Case Name:

Purdy v. Canada (Attorney General)

Between
John K. Purdy, respondent (petitioner), and
The Attorney General of Canada, appellant (respondent)

[2003] B.C.J. No. 1881

2003 BCCA 447

230 D.L.R. (4th) 361

188 B.C.A.C. 195

177 C.C.C. (3d) 438

15 C.R. (6th) 211

109 C.R.R. (2d) 160

124 A.C.W.S. (3d) 481

58 W.C.B. (2d) 553

Vancouver Registry No. CA030851

British Columbia Court of Appeal
Vancouver, British Columbia

Lambert, Donald and Thackray JJ.A.

Heard: June 17, 2003.
Judgment: August 13, 2003.

(27 paras.)

Civil rights -- Right to make full answer and defence -- Canadian Charter of Rights and Freedoms -- Application -- In foreign proceedings -- Evidence -- Disclosure of investigative materials.

Appeal by the federal Crown from an order that it was obliged to disclose material relating to the investigation of Purdy, who was currently held on money laundering charges in the United States. Purdy was a Canadian citizen resident in Vancouver. The Royal Canadian Mounted Police and the Federal Bureau of Investigation investigated him as part of a cross-border money laundering group. With a promise of money, an RCMP agent lured Purdy to the United States, where he was arrested. Charges were pending in Florida, but the judge below found that the investigation occurred primarily in Canada and concerned a Canadian national whose liberty and security were at risk. The Crown argued that US law provided avenues for Purdy to make full answer and defence to the charges. It argued that the matter was now a US concern and there was no breach of the Charter, and in any event, the Charter could not have extra-territorial effect.

HELD: Appeal dismissed. The investigation in Canada and the means taken to effect the arrest provided a sufficient peg on which to hang this petition. Nothing in the applicable Charter provisions limited the relief sought to matters arising in judicial proceedings in Canada. The deprivation of the right to make full answer and defence was in Canada, against a Canadian. Therefore a justiciable issue on disclosure might arise relating to foreign proceedings where Canadian authorities gathered some of the evidence. Disclosure did no more than put Purdy in the position where he was able to offer evidence. It did not take over the US discovery process.

Statutes, Regulations and Rules Cited:

Canada Evidence Act.
Canadian Charter of Rights and Freedoms, 1982, ss. 7, 24(1), 32(1).
Federal Rules of Criminal Procedure, Rule 16(2).
Privacy Act, R.S.C., s. 46.

Counsel:

J.A. Van Iperen, Q.C. and J.G. Johnston, for the appellant.
R.C. Peck, Q.C., D.J. Martin, N. Harris and K. Eldred, for the respondent.

The judgment of the Court was delivered by

1 DONALD J.A.:-- This appeal explores the reach of s. 7 of the Canadian Charter of Rights and Freedoms and poses the question: does a Canadian citizen, investigated by the R.C.M.P. in Canada, lured by the R.C.M.P. to the United States to effect his arrest, and facing charges there primarily on evidence gathered in Canada, entitled to disclosure as a Charter remedy in order to defend those charges?

2 On the petition of the respondent, Madam Justice Satanove answered the question in the affirmative: [2003] B.C.J. No. 1087, 2003 BCSC 725, and made the following order:

> THIS COURT ORDERS that
>
> 1. The Officer of the Royal Canadian Mounted Police (the "R.C.M.P.") in charge of the participation of the R.C.M.P. in Operation Bermuda Short or his or her delegate (the "Officer in Charge") shall find and retrieve, from Archival Storage if necessary, any records, documents, files - electronic or hardcopy, notes, papers, writings, maps, photographs, audiotapes or videotapes in the power, custody or control of the R.C.M.P. relating to the investigation of the Applicant in respect of Operation Bermuda Short.
> 2. The Officer in Charge shall examine the above-noted records to determine whether any portion of them:
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> a) could harm an on-going statutory R.C.M.P. investigation;
> b) reveals the identity of a confidential human source or compromises the safety or security of a source;
> c) reveals privileged solicitor-client communications;
> d) could harm international relations or national defence or security; or
> e) reveals information protected from disclosure by the Young Offenders Act, R.S.C. 1985, c. Y-1 and/or the Youth Criminal Justice Act, S.C. 2002, c. 1.
>
> The Officer in Charge may then redact those portions of the records in such a way that it will be apparent to counsel for the petitioner that redactions have been made.
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> 3. The Officer in Charge make the copies of the records available to counsel for the petitioner for pick-up at a mutually convenient location within thirty (30) days of the making of this Order.
> 4. The solicitor for the petitioner pay any reasonable costs incurred by the R.C.M.P. for the retrieval, production, inspection and delivery of the records within thirty (30) days of the receipt of an invoice.

3 The Crown appealed from that order.

4 As we were satisfied that the learned Chambers judge came to the correct result, we dismissed the appeal at the conclusion of the hearing with reasons to follow.

5 I am in respectful agreement with the reasons of the learned Chambers judge. The following remarks are supplementary to her analysis.

6 The respondent, a Canadian citizen living in Vancouver, became the target of an undercover sting operation jointly conducted by the R.C.M.P. and the Federal Bureau of Investigation investigating cross border money laundering. The two agencies operated under an agreement providing that charges arising from the investigation would be prosecuted in the U.S.

7 The learned Chambers judge found that the investigation occurred primarily in Canada. On appeal, the Crown contests that finding; but it is, in my view, amply supported by the evidence of the respondent's Florida defence attorney who deposed in an affidavit sworn in support of the petition:

> 7. Based upon our review of pre-trial discovery provided pursuant to the Federal Rules of Criminal Procedure, including written notes as well as more than 150 undercover audio and video tapes, it is apparent that the very first undercover contact with Mr. Purdy was made in March, 1999 by Corporal Bill Majcher, an investigator assigned to the Vancouver Proceeds of Crime Section of the RCMP. Moreover, Corporal Majcher played a constant, leading, and essential role throughout the investigation from March 1999 until the arrest of Mr. Purdy on August 15, 2002.

8 After about two years the authorities were ready to lay charges. The R.C.M.P. undercover agent asked the respondent to travel to New York where they could meet with Ricardo, an F.B.I. agent posing as a Colombian drug figure. The agent overcame the respondent's reluctance by promising $1 million financing for improvements to the respondent's hotel. The respondent was arrested on landing at John F. Kennedy International Airport in New York. This expedient avoided extradition.

9 The respondent was charged with two indictments in the District Court of the United States, Southern District of Florida. He was tried on the first indictment and acquitted of all charges on 28 February 2003. The trial of the second indictment is set for 14 July 2003.

10 The respondent brought the petition in order to advance the defences of innocent intent and entrapment at his second trial in Miami. He argues that he has a right to disclosure from the R.C.M.P. and that their refusal to disclose was a breach of his s. 7 right to make full answer and defence in proceedings with which the R.C.M.P. were closely connected.

11 The Crown both here and below challenged the court's jurisdiction to entertain a s. 7 claim in the absence of any criminal process in Canada. The learned chambers judge took jurisdiction on the basis of the respondent's nationality and Canada's involvement in the matter. On this, she said the following at [paragraphs] 12, 22, and 25:

> [12] The nationality of the person subject to the domestic law is a valid basis of jurisdictional authority. Canadian nationals have a right to expect protection from interference with their rights by our government or its agents regardless of where that interference took place (R. v. Harrer, [1995] 3 S.C.R. 562).
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> ...
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> [22] The petitioner is a Canadian national whose life and liberty has been put in jeopardy because of an investigation which took place in Canada and in which Canadian authorities played a major part. In a joint investigation, such as this one, the ultimate forum in which the accused is tried should not deprive the accused from the observance by Canadian authorities of Charter rights to which the accused would otherwise have been entitled.
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> ...
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> [25] I agree with this submission, but I am not relying on any general empowerment of the Charter to order disclosure. I am ordering disclosure as a remedy for the infringement of Mr. Purdy's constitutional rights. I have found that Mr. Purdy is entitled to the protection of his right to make full answer and defence, because he is a Canadian whose freedom has been placed in jeopardy by the actions of Canadian legal authorities conducting a joint investigation with U.S. agencies, in Canada.

12 The learned Chambers judge found at [paragraph] 28 that the only "practical remedy" was an order framed in the usual form of a Stinchcombe order, referring to the leading case on disclosure, R. v. Stinchcombe, [1991] 3 S.C.R. 326.

13 The Crown alleges that the learned Chambers judge erred in this finding because the rules of the District Court provide a mechanism for disclosure. However, evidence filed by the respondent without objection at the hearing before us buttresses the contested finding. Mr. Sonnett, the respondent's attorney, deposed at [paragraphs] 4 and 5 in an affidavit sworn 17 June 2003:

> 4. I understand it has been suggested that I could make application under Rule 16 of the Federal Rules of Criminal Procedure for an order that the FBI request disclosure from the RCMP in accordance with the Letter of Agreement. Such a suggestion is impracticable and has little or no chance of success, as Rule 16(2) specifically excludes the "discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case."

> 5. Indeed, during the course of the first trial, I was unsuccessful in making application for disclosure of a far less extensive nature than that being sought in this application. After FBI undercover agent Ricardo Pagan incorrectly testified that the FBI had an open file on Mr. Purdy before it became aware of the RCMP investigation and began the joint FBI/RCMP investigation, I requested that the Court order the prosecution to provide me with discovery of the date upon which Mr. Purdy became a subject of the FBI investigation, the date on which the FBI opened its file, and the source of the information, in order to demonstrate that the FBI file was opened based solely upon information provided by the RCMP. The Court denied this application. . .

14 The principal arguments of the Crown on appeal are:

> 1. An order for disclosure as a s. 24(1) remedy must be found on a breach of s. 7, in this case infringement of the respondent's right to make full answer and defence. The respondent has no charges in Canada to answer to, nor is he subject to any proceedings in Canada relating to charges elsewhere, such as extradition. Therefore, s. 7 is not engaged and accordingly the court has no jurisdiction to entertain a petition for a s. 24(1) remedy.
> 2. If the court has jurisdiction to embark on the inquiry, it has no jurisdiction to grant the remedy sought because to do so would give the Charter extraterritorial effect in that it would interfere with a U.S. trial and usurp the role of the U.S. court in dealing with disclosure issues.

15 I cannot accept either argument. Dealing first with the threshold issue of jurisdiction, I am persuaded that the investigation in Canada and the means taken to effect the respondent's arrest in the U.S., both actions of an arm of the Canadian government, provided a sufficient peg on which to hang the petition. The Charter addresses the relationship between the individual and the state. If government action infringes or denies a right of an individual guaranteed by the Charter, s. 24(1) affords a remedy. Section 32(1) of the Charter provides:

> 32.(1) This Charter applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

16 Section 24(1)of the Charter provides:

> 24.(1) 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.

17 Nothing in the language of ss. 7, 24(1) or 32(1) limits relief to matters arising in judicial proceedings in Canada. In my opinion, s. 7 can be invoked if Canada's participation is causally connected to the deprivation of a liberty interest in a foreign state. In R. v. Cook, [1998] 2 S.C.R. 597, Mr. Justice Cory and Mr. Justice Iacobucci, who wrote the majority judgment of the court, said the following at [paragraph] 44:

> 44 In our view, Harrer and Terry, [1996] 2 S.C.R. 207, do not stand as authorities for the proposition that the Charter is absolutely restricted in its application to Canadian territory. Rather, the guiding principles to be gleaned from these cases are that: (1) the Charter cannot apply to actions which fall beyond the purview of s. 32(1); and (2) the Charter cannot be applied extraterritorially to govern the conduct of criminal proceedings by foreign authorities in another state since to do so would violate the principle of state sovereignty.

At [paragraph] 46 they continued:

> 46 In our view, the reasoning adopted in both Harrer and Terry can accommodate a finding that on the jurisdictional basis of nationality, the Charter applies to the actions of Canadian law enforcement authorities on foreign territory (which satisfies s. 32(1)), provided that the application of Charter standards would not interfere with the sovereign authority of the foreign state. The Chief Justice acknowledged that this was so in Schreiber, [1998] 1 S.C.R. 841 at para. 16:
>
> > [Canadian] officials are clearly subject to Canadian law, including the Charter, within Canada, and in most cases, outside it. They fall squarely within the purview of s. 32 of the Charter, as an arm of the executive branch, or the "government of Canada". Moreover, because they are Canadian, there is no reason to be concerned with comity. They can be expected to have knowledge of Canadian law, including the Constitution, and it is not unreasonable to require that they follow it. [Emphasis added in original.]

18 The majority in Cook, supra, therefore concluded that the Charter may apply in circumstances

where (1) the impugned act falls within s. 32(1) of the Charter and (2) the application of the Charter would not interfere with the sovereign authority of the foreign state and thereby generate an extraterritorial effect.

19 The judgment of the court in Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, is also helpful on this question. There the court granted a new deportation hearing to Suresh who claimed refugee status on the ground that he faced torture if deported to Sri Lanka. The question arose whether s. 7 was implicated since the infringement in the form of torture would occur in a foreign state. The court reasoned as follows:

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> We may thus conclude that Canadians reject government-sanctioned torture in the domestic context. However, this appeal focuses on the prospect of Canada expelling a person to face torture in another country. This raises the question whether s. 7 is implicated at all. On one theory, our inquiry need be concerned only with the Minister's act of deporting and not with the possible consequences that the expelled refugee may face upon arriving in the destination country. If our s. 7 analysis is confined to what occurs on Canadian soil as a necessary and immediate result of the Minister's decision, torture does not enter the picture. If, on the other hand, our analysis must take into account what may happen to the refugee in the destination country, we surely cannot ignore the possibility of grievous consequences such as torture and death, if a risk of those consequences is established.

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> We discussed this issue at some length in Burns, [2001] 1 S.C.R. 283. In that case, the United States sought the extradition of two Canadian citizens to face aggravated first degree murder charges in the state of Washington. The respondents Burns and Rafay contested the extradition on the grounds that the Minister had not sought assurances that the death penalty would not be imposed. We rejected the respondents' argument that extradition in such circumstances would violate their s. 12 right not to be subjected to cruel and unusual treatment or punishment, finding that the nexus between the extradition order and the mere possibility of capital punishment was too remote to engage s. 12. We agreed, however, with the respondents' argument under s. 7, writing that "[s]ection 7 is concerned not only with the act of extraditing, but also the potential consequences of the act of extradition" (para. 60 (emphasis in original)). We cited, in particular, Canada v. Schmidt, [1987] 1 S.C.R. 500 at p. 522, in which La Forest J. recognized that "in some circumstances the manner in which the foreign state will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country, may be such that it would violate the principles of fundamental justice to surrender an accused under those circumstances". In that case, La Forest J. referred specifically to the possibility that a country seeking extradition might torture the accused on return.

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> While the instant case arises in the context of deportation and not extradi-

> tion, we see no reason that the principle enunciated in Burns should not apply with equal force here. In Burns, nothing in our s. 7 analysis turned on the fact that the case arose in the context of extradition rather than refoulement. Rather, the governing principle was a general one -- namely, that the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government's participation and the deprivation ultimately effected. We reaffirm that principle here. At least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand.
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> 55 We therefore disagree with the Court of Appeal's suggestion that, in expelling a refugee to a risk of torture, Canada acts only as an "involuntary intermediary" (para. 120). Without Canada's action, there would be no risk of torture. Accordingly, we cannot pretend that Canada is merely a passive participant. That is not to say, of course, that any action by Canada that results in a person being tortured or put to death would violate s. 7. There is always the question, as there is in this case, of whether there is a sufficient connection between Canada's action and the deprivation of life, liberty, or security.
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> [Emphasis added]

20 In the present case, the deprivation of the right to full answer and defence is here in Canada by the R.C.M.P.'s refusal to make disclosure, although the effect of the deprivation will be felt in Florida. The respondent faces charges in the U.S. because of an investigation in Canada and because of the ruse employed by the police to by-pass extradition. The causal connection is, in my opinion, direct and obvious. And, as stated in Cook, supra, the respondent's Canadian nationality is a key consideration.

21 In an extradition case, U.S.A. v. Kwok, [2001] 1 S.C.R. 532, the fugitive sought disclosure from the requesting state. The following remarks of Madam Justice Arbour, who gave the judgment of the court, relating to the significance of Canadian involvement in the U.S. case, are apposite:

> 106 Only where a justiciable Charter issue can arise from the potential involvement of the Canadian authorities in the gathering of evidence is it necessary to consider the degree of disclosure that might be required of the Requested State: Dynar, [1997] 2 S.C.R. 462. In Dynar, the fugitive was not entitled to further disclosure from the Canadian authorities because no justiciable Charter issue arose. Canadian authorities had not provided any assistance to the Americans in gathering evidence and, in any event, the latter were not relying on anything

> but their own evidence. Considering the breadth of the prosecutorial discretion involved in extradition cases, and absent any air of reality to any suggestion of impropriety or bias on the part of prosecutorial authorities, the disclosure requests made by the appellant to the Minister did not bear on issues sufficiently relevant to the surrender decision, or to the constitutional rights of the appellant in that process, to require compulsory disclosure.

22 Thus, a justiciable issue on disclosure may arise in relation to foreign proceedings where Canadian authorities gathered some of the evidence.

23 I return to the two part formulation in Cook, supra, the first of which is whether the matter falls within the purview of s. 32(1). For the above reasons, I have concluded that it does. The second principle relates to the doctrine of state sovereignty and prohibits an extraterritorial application of the Charter.

24 The simple answer to the Crown's contention that the order under appeal violates the second principle is this: disclosure does no more than put the respondent in the position where he can offer the evidence obtained by disclosure to the U.S. court; it does not decide for the court whether to admit the evidence or determine how it should be used. Disclosure is sought to enable the respondent to present the defences of innocent intent and entrapment. Whether the defences are accepted is for the U.S. court to determine, and nothing in the order impinges on that authority.

25 The Crown says that the order takes over the discovery process in the U.S. court. The furthest that proposition can be taken is that the order made it unnecessary to apply for the R.C.M.P. file in the U.S., but as I have discussed earlier, it would appear because of the restriction in Rule 16(2) of the Federal Rules of Criminal Procedure, such an application would be futile. Rule 16(2) provides as follows:

> Rule 16.(2)Information Not Subject to disclosure. Except as provided in paragraphs (A),(B),(D) and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. Sec. 3500.

26 In any event, as I see it, the right to disclosure is essentially an issue between a Canadian and his government who took action against him and put him into the hands of the U.S. authorities. Furthermore, he is no different position than if he obtained the information through the means of the Access to Information Act, the Privacy Act, or s. 46 of the Canada Evidence Act, avenues the Crown argues he ought to have pursued. One way or another, he would have obtained disclosure in Canada and not by a motion in the U.S. This patent inconsistency demonstrates the frailty of the

Crown's argument.

27 These are my reasons, taken together with the learned Chambers judge's reasons, for dismissing the appeal.

DONALD J.A.
LAMBERT J.A.:-- I agree.
THACKRAY J.A.:-- I agree.

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