PROVINCIAL COURT OF NEWFOUNDLAND & LABRADOR
Citation: R. v. Brake, [2019] NLPC

Date: 2019-12-17
Docket: 1719PA000262
Registry: Happy Valley-Goose Bay

Between:

Her Majesty the Queen
v.
Justin Brake

Judge:	The Honourable Judge Harris
Heard:	November 6, 2019 in Happy Valley-Goose Bay, Newfoundland and Labrador
Decision	December 17, 2019
Charge:	Charter Application
Counsel:	Geoff Budden, for the Applicant, Justin Brake Stephen Anstey for the Respondent, Her Majesty the Queen

By the Court:

Factual Background

[1] The allegation of mischief against Mr. Brake arose in October of 2016. At that time, there were consistent protests at the Muskrat Falls site which is close to Happy Valley-Goose Bay, NL. As a result of blockades at the site, Nalcor sought, and was granted an ex parte injunction order from the Supreme Court in Happy Valley-Goose Bay on October 16, 2016.

[2] The injunction order's effect was to prevent persons who were named in it or who had notice of it from engaging in certain activities. The operative part of the that order stated:

> IT IS HEREBY ORDERED THAT until further Order of this Court the Respondents and any other person acting under their instruction and anyone having notice of this Order, be strictly enjoined and restrained, until the final disposition of this action or further Order of this Court from:
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> a. With respect to any person or persons seeking lawful entrance to or exit from the Muskrat Falls construction site, whether such person or persons is or are on foot or in a vehicle of any type, hindering, delaying, stopping, obstructing or in any other manner interfering with such person or persons, at any time or for any length of time, including by presence, temporary or otherwise, of one or more objects on any portion of any highway, driveway or laneway which is intended or ordinarily used for vehicular access to Muskrat Falls construction site or to any portion of such premises;
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> b. Stationing person on or otherwise trespassing on the Muskrat Falls construction site;

> c. Ordering, aiding, abetting, counseling, or encouraging in any manner whatsoever, either directly or indirectly, any person to commit the acts enjoined or any of them.

[3] Law enforcement officials were ordered to enforce the terms of the injunction order and to terminate any activity that contravened the injunction order. After the injunction order was granted, the protests continued including blockades of traffic. On October 22, 2016, a protestor cut the lock on the gate to the work site and approximately 50 people, including Mr. Brake, entered onto the site. Some of these persons continued within the site to an accommodations complex where they remained for some time. Others remained at the gate area and continued to block access to the site.

[4] Persons identified to have taken part in these activities were served a civil contempt Notice to Appear including Mr. Brake. Mr. Brake was also charged criminally pursuant to sections 127 and 430 of the Criminal Code. The Crown, following the Court of Appeal decision, has withdrawn the section 127 Criminal Code charge but is proceeding on the section 430 mischief charge.

[5] Mr. Brake first appeared on the Criminal Code charges on April 11, 2017. On July 21, 2017, Mr. Brake made application for a stay of proceedings of the section 127 charge alleging a violation of his rights under section 7 of the

Charter. That application was dismissed by Judge Trahey of the Provincial Court on March 12, 2018.

[6] The criminal matters then stalled for a lengthy period of time as Mr. Brake wished to await the outcome of an appeal in the ***Re Brake, 2019 NLCA 17, 433 D.L.R. (4th) 122*** decision as he believed that it would materially affect the prosecution of the criminal matters. The Court of Appeal released its decision on March 28, 2019.

[7] Mr. Brake argued at the Supreme Court that Nalcor did not, in either its application for the injunction order or the application for the contempt appearance notice, advise the court that he was a working journalist actively covering the protest. It was his position that that the fact he was a journalist actively engaged in covering a significant story was a material fact of such importance that Nalcor had a duty to disclose it to the court at the time of their application for the injunction order and the contempt appearance notice. The Supreme Court applications Judge did not find the occupation of Mr. Brake to be a material fact and dismissed his application.

[8] Mr. Brake brought the matter to the Court of Appeal. At paragraph 22 of its decision in ***Re Brake***, supra, the Court of Appeal states the issues as follows:

> The issues directly engaged in this appeal are whether the applications judge erred in concluding that Mr. Brake's position as a working journalist was not a material fact that should have been disclosed by the respondents to the Court on the ex parte application for the issuance of the contempt appearance notice. If the judge did err in not concluding that Mr. Brake's journalistic status was a material fact, a second issue must also be addressed: whether the applications judge, having been apprised of this fact, should have exercised his discretion to vacate the impugned order?

[9] Ultimately, the Court of Appeal found that this was a material fact that should have been considered by the applications judge. At paragraphs 92 and 93 of the same decision, the Court of Appeal states:

> 92. I regard the material non-disclosure of Mr. Brake's role in the protest events as being very significant. It is a factor that, in my view, could have had a decisive impact on whether the injunction should have been applied to Mr. Brake at all, and certainly on whether he should have been enmeshed in the contempt process without careful consideration of the differences between his circumstances and those of the protestors.
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> 93. in my view, the non-disclosure here, both at the time of the application for the injunction and especially at the subsequent application for leave to proceed with the contempt process brings the integrity of the whole process as it applies to Mr. Brake into question. It justifies setting aside the orders as they apply to him. I make no comment on what effect, if any, non-disclosure relative to Mr. Brake might have on the effectiveness of the orders relative to others potentially affected by them. Because the orders are not under attack in this appeal by anybody other than Mr. Brake, the proper disposition is to leave them in place and to issue a declaration that Mr. Brake is not bound by the ex parte injunction issued on October 16, 2016 nor by the contempt appearance notice issued on October 24, 2016.

[10] The Court of Appeal distinguishes the journalist from the protestors and concludes that the Applications Judge erred by not considering the occupation of Mr. Brake as a journalist to be a material fact. For that reason, the Court of

Appeal decided that the injunction order and contempt appearance notice should not apply to Mr. Brake.

[11] This decision by the Court of Appeal led the Respondent to discontinue the prosecution of the section 127 Criminal Code offence. Mr. Brake entered a not guilty plea to the mischief charge on July 29, 2019. This application was filed by Mr. Brake on September 4, 2019 alleging violations of sections 2(b) and 7 of the Charter. More particularly, Mr. Brake alleges that the continuation of the prosecution of the mischief charge is an abuse of process in light of the Court of Appeal decision. It appears to be the position of the Applicant that the Court of Appeal has made factual findings which this court should consider to determine that the facts found by the Court of Appeal would not support a mischief conviction.

[12] Alternatively, if this court does not reach that conclusion, Mr. Brake suggests that the findings of the Court of Appeal support a defence under section 430(7). Finally, Mr. Brake contends that the continuation of the section 430 mischief prosecution is an abuse of process as the Crown has failed to properly exercise its prosecutorial discretion to discontinue the prosecution.

ISSUES

[13] Mr. Brake phrases the issues for this court to determine as follows:

> Issue 1: Are the findings of the Court of Appeal in Re: Brake incompatible with a finding of guilt on the criminal charge of mischief and does the continued prosecution of same therefore amount to an abuse of process?
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> Issue 2: In the alternative, are the findings of the Court of Appeal in Re: Brake incompatible with a finding of guilt on the criminal charge of mischief by operation of s. 430(7) of the Criminal Code, and does the continued prosecution of same therefore amount to an abuse of process?
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> Issue 3: Does the Respondent's use of discretion to continue to prosecute this matter amount to an abuse of process which can only appropriately be remedied by a stay of proceedings?

[14] The Respondent phrases the issues as follows:

> Does the continued prosecution of the Applicant violate his rights under ss. 2(b) and 7 of the Charter in light of the Court of Appeal's decision in Re: Brake?
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> If the Applicant's rights are violated by the continued prosecution, what is the appropriate remedy pursuant to s.24(1) of the Charter?

ANALYSIS

[15] I have reviewed the decision of the Court of Appeal in ***Re Brake*** and note that the decision was in relation to the validity of the injunction and contempt notice order as it related to Mr. Brake given the non-disclosure of his status as a journalist in the court process. These were civil proceedings.

[16] It is clear that the Court of Appeal did not consider the criminal offence of mischief in its decision. In fact, the Court of Appeal did not consider criminality at all. There was one narrow issue before the Court of Appeal and it related to the civil matters surrounding the protest at the Nalcor site.

[17] The elements of the offence of mischief may, in part, be included in the actions considered by the Court of Appeal. However, there is a different standard of proof; it is a general intent criminal offence; and the elements of the offence that must be proven are broader than the factors considered in the context of the civil proceedings.

[18] The Court of Appeal appeared to acknowledge that Mr. Brake was possibly engaged in trespass on the Nalcor property and that he could have been prohibited from same although not by the application of the injunction order which, they stated, had a different purpose than to prohibit trespass *contra mundum*. For the purposes of this Application, counsel for Mr. Brake has conceded that Mr. Brake was trespassing on the property of Nalcor.

[19] Justice Green, as he then was, in ***R. v. Dooling (1994), 124 Nfld. & P.E.I.R. 149, 94 C.C.C. (3d) 1 (NL SC)*** discusses mere trespass as it relates to the charge of mischief as follows at paragraph 32:

> 32. In my view, the fact that an accused is trespassing and may be guilty of the provincial offence of petty trespass or may be subject to liability in tort for trespass is only relevant to the offence of mischief if it can be said that the acts constituting the trespass have the effect of obstructing, interrupting or interfering with the use or enjoyment of the property in question. Mere presence on the property, depending on its character and location, may or may not constitute an obstruction, interruption or interference with its use or enjoyment. It is the acts constituting the trespass, not the fact of the commission of the trespass itself that is relevant for the purpose of the offence of mischief.

[20] So while it is clear that mere trespass will not, on its own, necessarily constitute mischief, it may form the basis of a mischief charge in that trespass puts a person in a position where they may then interfere with the use and enjoyment of the property upon which they are trespassing.

[21] The Court of Appeal acknowledged that Mr. Brake was present on the site and followed them (the protestors) "as they trespassed on the construction site and occupied the buildings" (para. 62 of ***Re Brake***, supra). There is information in the decision which suggests more than mere "grass bruising" as some of the persons on the site entered into and occupied buildings. Mr. Brake may have been part of that group.

[22] This court has not heard **any** evidence in this matter. While it has been provided with the documentary evidence provided to the Court of Appeal, there has been no viva voce evidence. None of the documentary evidence referred to has come from the Respondent. It has been generated as a result of, and in

response to, civil proceedings. The Respondent was not party to the civil matters and did not participate in those proceedings.

[23] Consequently, it cannot be said that the issue of the mischief charge has been determined by the findings of the Court of Appeal. Certainly, some of the information provided in the civil proceedings might be relevant to the criminal proceedings. If, as Mr. Brake's counsel asserts, the evidence is the same as that provided to the Court of Appeal, the criminal trial could be shortened by virtue of agreement between the Applicant and the Respondent on some or all of the facts.

[24] Mr. Brake also asserts that section 430(7) offers a defence to any claim of mischief and that this is made out based upon the findings of the Court of Appeal. Section 430(7) is considered in the ***R. v. Dooling*** decision quoted by counsel. I note that particular case was a picketing case during a strike and it that one of the general purposes of a picket line can be to provide information. Mr. Brake appears to have been reporting on activities as they occurred – his was not a mere repetition of information for the benefit of persons attending the property nor was this his "cause" as he was not part of the protest. He was actively engaged in seeking out news.

[25] The argument that journalistic reporting falls under section 430(7) is a novel argument and neither counsel were able to provide any case law which was analogous to the situation in this case. If mischief can be made out against Mr. Brake, it is certainly open to him to argue that this section provides a defence. However, it is not altogether clear, without consideration of all of the facts and circumstances, whether this defence applies. This issue, like the mischief charge, has not been specifically addressed by the Court of Appeal. Nor does it appear to have been considered by any other court in the country.

[26] At paragraphs 22 through 24 of ***R. v. Dooling***, supra, Justice Green, as he then was, stated the following with regard to the charge of mischief in the context of picketing:

> 22. As a matter of provincial labour relations law, it is permissible to attempt, through peaceful picketing during a strike that is otherwise lawful to interfere with an employer's business by persuading people not to enter the employer's place of business or to do business with the employer. Indeed, the very nature and purpose of picketing is, through the medium of the presence of the picketers and the information conveyed on their signs, to interfere with or interrupt the employer's business activities. In Retail, Wholesale & Department Store Union, Local 580, Peterson and Alexander v. Dolphin Delivery Limited et al, [1978] 1 W.W.R. 577 (SCC), McIntyre, J. described the purpose of picketing thus at p. 589:
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> > It is equally evident that, if successful, the picketing would have done serious injury to the respondent. There is nothing remarkable about this, however, because all picketing is designed to bring economic pressure on the person picketed and to cause economic loss for so long as the object of the picketing remains unfulfilled.

> 23. Unless, therefore, certain types of picketing activity with the admitted object of interfering with an employer's business operated from property in which the employer has an interest is held not to constitute an obstruction, interruption or interference for the purposes of the offence of mischief, labour relations activity which is provincially countenanced will become stultified. In my view, therefore, an interpretation of subsection 430(1)(d) of the Criminal Code which leads to such a result ought not to be applied unless the language of the subsection, in its context leads necessarily to that conclusion.
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> 24. In order to constitute the external circumstances of the offence, there must be some physical act on the part of the accused which operates as, or has the effect of causing, some sort of obstruction, interruption or interference with the use or enjoyment or possible use or enjoyment, of the property in question that goes beyond the mere communication of information through picketing. In R. v. Mammolita (1983), 9 C.C.C. (3d) 85 (Ont. C.A.), where a large group of picketers interfered with police who were attempting to escort personnel into a workplace, the obstruction or interference was found in the "human barricade" that was created. It was "more than mere presence and passive acquiescence" (p.88). In R. v. March (K.J.) et al (1993), 111 Nfld. & P.E.I.R. 116 (NFSC) where picketers of a struck store in a shopping mall were milling about in a circular motion "completely blocking off the front entrance" (p.120) to the store in an intimidating atmosphere, the obstruction or interference was found in the creation of difficulty of access to and egress from the store which went "well beyond an information picket line". [Both of these decisions were decided under subsection 430(1)(c) rather than 430(1)(d); however neither counsel asserted in argument that the meaning of "obstruct, interrupt or interfere" under one subsection should be different from its meaning in the other subsection].

[27] The cases cited deal with the communication of information through **lawful** picketing that does not result in obstruction or interference with the property. At paragraphs 34 and 35 of ***R.v. Dooling***, the Supreme Court of Newfoundland and Labrador discussed the applicability of section 430(7) as follows:

> 34. I turn now to the applicability of subsection 430(7) to this case. It provides that no person commits mischief with the meaning of s.430 by reason only that he or she attends at or near a place "for the purpose only of obtaining or communicating information." Whether this is to be interpreted as an exception to the general charging provision or is to be regarded as an aid in the interpretation of it, the end result is the same: acts which might otherwise be technically

> regarded as resulting in an obstruction, interruption or interference will not be so regarded for the purpose of the offence of mischief if the nature of the act is such that it amounts to mere presence ("attendance") at a place and is incidental to a purpose of communicating information. It relates not only to the mental element of the offence but also to its external circumstances inasmuch as certain obstructions, interruptions or interferences so regarded in common parlance, will not be considered to be such for the purpose of subsection 430(1). Subsection 430(7) thus helps in defining the parameters of the offence of mischief under subsection 430(1)(d).
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> 35. If the acts of the accused involve more than mere attending at or near a place for the purpose of communicating information, subsection 430(7) will, of course, not apply. Thus, if the acts complained of constitute something more than mere presence at a place in a manner that is **reasonably necessary** to communicate information or if the communication is in fact a mask or subterfuge for a different purpose (and thus the attendance at the place is not necessary to accomplish the purpose of the communication, the accused will not be able to take advantage of subsection 430(7). [emphasis added]

[28] The Court of Appeal also did not determine this issue in the context of the mischief charge. While the Court of Appeal distinguished the actions of Mr. Brake from those of the protestors by stating that he was not present for the same purpose as the protestors in that he was not a member of that group, it is clear that he was present with the protestors on the Nalcor property. Whether this is sufficient in the circumstances to potentially absolve him of possible criminal activity has not been determined.

[29] If the mischief matter proceeds to trial, it is open to Mr. Brake to raise section 430(7). As the matter of the mischief has not been adjudicated, this court cannot speculate on the possible success of this section. As discussed above, neither counsel was able to provide any case law supporting the

applicability of the section to journalistic reporting. Whether this would be covered would be a question for the trial judge to determine given the particular circumstances.

[30] Mr. Brake has not demonstrated that his Charter rights are being violated as a result of the continued prosecution by the Respondent of the section 430 mischief charge. This court cannot make a decision on a criminal matter in the absence of any evidence from the Respondent. The Court of Appeal decision arises in the context of civil proceedings that are not so similar to the section 430 Criminal Code offence as to be determinative of the outcome of a criminal trial.

[31] Nor has Mr. Brake demonstrated an abuse of process. It is difficult, as acknowledged by both counsel, to interfere with prosecutorial discretion. While it is true that the Crown has an obligation to assess, continuously, the viability of prosecutions, there is nothing to indicate that this has not happened. It is clear that the Crown has discontinued the section 127 Criminal Code prosecution as a result of the Court of Appeal decision. Clearly, this involved some consideration of the circumstances and viability of that charge after the Court of Appeal decision.

[32] It would be difficult to conceive that the Crown would only have considered the decision with respect to one of the two outstanding criminal charges. This court does not have at its disposal all of the information that was available to the Crown in making that decision. While Mr. Brake asserts that all of the relevant evidence was before the Court of Appeal, this is not an assertion that this court can accept for the reasons stated above.

[33] The nature of conduct which may give rise to an abuse of process was discussed in ***R. v. Andersen [2014] 2 S.C.R. 167, 2014 SCC 41*** at paragraphs 49 and 50 as follows:

> In Nixon, the Court held that the abuse of process doctrine is available where there is evidence that the Crown's decision "undermines the integrity of the judicial process' or 'results in trial unfairness'. The Court also referred to 'improper motive[s]' and 'bad faith' in its discussion.
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> Regardless of the precise language used, the key point is this: abuse of process refers to Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system.

[34] Mr. Brake as the Applicant bears the burden of proving an abuse of process on a balance of probabilities. ***R. v. Andersen***, supra, notes that this can be difficult as the Crown typically is the only party who will know why a prosecution is to be continued. In this instance, Mr. Brake has not met the threshold.

[35] The Guide Book for Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador provides that there must be a "reasonable likelihood of conviction". It does not have to be a certainty. This is consistent with the direction of the Supreme Court of Canada in ***Nelles v. Ontario, [1989] 2 S.C.R. 170***. The Crown must be satisfied that the evidence is sufficient to justify the institution or continuation of the proceedings and that the public interest requires that a prosecution should be pursued.

[36] The Crown, by its continued pursuit of the prosecution of the section 430 mischief charge, is demonstrating that it believes there is a reasonable likelihood of conviction and that it is in the public interest to proceed. It has had the benefit of the review of the ***Re Brake*** decision and has taken some action as a result of same.

Conclusion

[37] The Court of Appeal decision in ***Re Brake*** does not have the effect of determining the outcome of a criminal trial for mischief or the possible applicability of section 430(7) to the facts. The actions of the Crown do not meet the standard of egregious and it does not seriously compromise trial fairness and or the integrity of the justice system. Counsel have, in fact,

demonstrated that there are triable issues particularly as it relates to the possible application of section 430(7).

Phyllis A. Harris, PCJ