

CANADA / JUDGMENT

Burke v. Red Barn at Mattick's Ltd.

2024 BCSC 965

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 965 Burke v. Red Barn at Mattick's Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Burke v. Red Barn at Mattick's Ltd.,

2024 BCSC 965

Date: 20240403

Docket: 180545

Registry: Victoria

Between:

Jennifer Burke and Mallory Colter

Plaintiffs

And:

Red Barn at Mattick's Ltd. and Matthew Schwabe

Defendants

Brought under the Class Proceedings Act, R.S.B.C. 1996, c. 50

Before: The Honourable Madam Justice V. Jackson

Oral Reasons for Judgment

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Place and Date of Hearing:

Victoria, B.C.

March 25, 2024

Place and Date of Judgment:

Victoria, B.C.

April 3, 2024

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NOTE TO READER: These oral reasons were delivered in court. The reasons have since been edited for publication without changing the substance.

BACKGROUND

- [1] This certified class action involves allegations that a class of people were surreptitiously and unlawfully video recorded while using a washroom or a staff room at the Red Barn at Mattick's Ltd. ("Mattick's Red Barn") grocery store located at 5325 Cordova Bay Road, in Saanich (the "Mattick's washroom and staff room").
- [2] This class action was judicially case managed by Justice MacKenzie until his retirement from this Court. Subsequent to his retirement, I was assigned as the case management judge.
- [3] The individual defendant, Matthew Schwabe, was the subject of an investigation by the Saanich Police Department (the "SPD") in and around June 28, 2016. During that investigation the police identified a number of individuals who had been surreptitiously recorded in the Mattick's washroom and staff room. The SPD has advised that there are seven individuals who were recorded in the Mattick's washroom and staff room who they have not identified (the "Unidentified Individuals").
- [4] On January 29, 2018, a proposed class action was filed in relation to the surreptitious recordings. At that time, no criminal charges had been laid. The police investigation was ongoing.
- [5] On January 22, 2019, after hearing submissions from counsel for the plaintiffs, Mr. Schwabe, and Mattick's Red Barn, with no one appearing on behalf of the SPD although it had been duly served, and noting the SPD took no position apart from requesting 60 days to comply with any order, MacKenzie J. made an order under Supreme Court Civil Rules, R. 7-1(18) [documents not in possession of a party] requiring the SPD to produce documents (the "2019 Production Order"): *Burke v. Red Barn at Mattick's Ltd.*, 2019 BCSC 69 [2019 Production RFJ] at para. 54. Not surprisingly, given it had taken no position on the application, the SPD did not appeal the 2019 Production Order.
- [6] The 2019 Production Order was based on the form of order outlined in *Wong v. Antunes*, 2009 BCCA 278, commonly referred to as an "Antunes Order". Like this action, *Antunes* also involved a civil action and a parallel criminal prosecution. The Court of Appeal in *Antunes* noted the Attorney General's aim in that case was to "build on the practice developed some years ago whereby documents relevant to a civil action that are in the possession of the police may by consent be ordered to be produced by desk order", as recognized by a Practice Direction dated 17 October 1990, and to "[encourage] the profession to expand the use of desk orders [w]hen there are no parallel or on-going criminal investigations or prosecutions" because "the desk order is an efficient and cost effective means of obtaining relevant police documents": at para. 17.
- [7] In *Antunes*, the Court of Appeal observed the situation was complicated "first, by the accused/defendant's 'refusal to even list the [there, Vancouver Police Department] documents as being in his possession' and further, by 'the Crown's concern that some of the documents or information may jeopardize the on-going criminal proceedings': at para. 18.

- [8] As MacKenzie J. noted in his 2019 Production RFJ at para. 55, an Antunes order "balances the plaintiffs' interests and the interests of the Saanich Police, and leaves space for "full debate" on privilege-related issues". Justice MacKenzie also found that the documents sought by the plaintiffs in this action related to "a specific class of documents held by the Saanich Police, namely documents "relating to the surreptitious recording of people while they used the washroom at [Red Barn]" that were documents "undoubtedly relevant to the plaintiffs' action": at para. 60. I make this point to emphasize that the sufficiency of the relevance of the documents for disclosure purposes has already been determined by this Court.
- [9] Relevant to this application, the 2019 Production Order included the following terms:
2. the Chief Constable of the Saanich Police Department, or his delegate ("the police") be authorized and directed to, within 60 days of receipt of a copy of this Order, find all documents as defined in the Supreme Court Rules, including all handwritten notes of all investigating officers, in the possession or control of the Police relating to the surreptitious recording of people while they used the washroom at the Mattick's Farm store located at 5325 Cordova Bay Road near Victoria (the "Incidents") and in particular Saanich Police file number 2016-2288;
 3. the Police shall examine the said documents when found, and determine which documents or portions of documents may not be produced because they are:
 - (a) correspondence or communications between the Police and Crown Counsel, or between the Police and solicitors advising them, for the purpose of giving or receiving legal advice;
 - (b) documents which it would be contrary to the public interest to produce, and in particular documents which if disclosed:
 - (i) could reveal correspondence or communications between the Police and Crown Counsel other than those referred to in subparagraph (a);
 - (ii) could prejudice the conduct of a criminal prosecution which is anticipated or has been commenced but not finally concluded, where the dominant purpose for the creation of the documents is that prosecution (not including reports, photographs, videotapes or other records of or relating to the Incidents created by or for the Police on their attendance at the scene of the Incidents or as a contemporaneous record of such attendance);
 - (iii) could harm an ongoing statutory investigation or ongoing internal Police investigation;
 - (iv) could reveal the identity of a confidential human source or compromise the safety or security of a source;
 - (v) could reveal sensitive police investigation techniques; or
 - (vi) could harm international relations, national defence or security or federal provincial relations;

- (c) protected for production by the Youth Criminal Justice Act (Canada) or by any other applicable statute;
- [10] I will refer to this category of documents listed at para. 3 in the 2019 Production Order as the "Excepted Documents". The 2019 Production Order then described additional terms relevant to the disclosure of the documents:
4. the Police shall copy the documents which satisfy the criteria for production referred to in paragraph 2 or such portions of the documents as satisfy the criteria for production referred to in paragraph 2;
 5. the Police shall make the copies available to the solicitor for the plaintiffs for inspection or collection at the Saanich Police Department at 760 Vernon Ave, Victoria, BC;
 9. any party, the police and the Attorney General of British Columbia, shall have liberty to apply to the Court to determine which, if any, documents are required to be produced pursuant to this order.
- [11] The effect of the terms of the 2019 Production Order, working together, was that all of the documents sought were ordered to be produced to the plaintiffs' counsel, other than the Excepted Documents. Implicit in the Antunes order, was that if the SPD formed the opinion any of the relevant documents were Excepted Documents, they were to advise the parties accordingly and, if there was a dispute over whether particular documents were Excepted Documents, any party, the SPD, or the Attorney General of British Columbia, could apply to the Court to determine the issue.
- [12] At the time of the 2019 Production Order, no charges had yet been laid in the investigation.
- [13] On June 26, 2019, Justin Hodgkinson, the information and privacy coordinator for the SPD, wrote to counsel for the plaintiffs advising they were enclosing "a copy of all file material and records associated to Saanich Police Department file 16-2288" but that "[a]t this time only a very limited number of severed records can be disclosed". Mr. Hodgkinson went on to advise "[t]he rest of the records have been severed in their entirety because disclosure of them could prejudice the conduct of the criminal prosecution, which is anticipated or has been commenced but not finally concluded, where the dominant purpose for the creation of the documents is that prosecution and/or could reveal correspondence or communications between the Police and Crown Counsel". No other basis for not disclosing the documents was cited by the SPD. The document provided by the SPD revealed the relevant documents include civilian notes and statements, Mr. Schwabe's employment history, interviews of Mr. Schwabe, and a Mobile Report Voyeurism (Affidavit #5 of Jason Fisher).
- [14] Charges were laid against Mr. Schwabe in September 2019.

- [15] In November 2019 the plaintiffs sought guidance from the Court with respect to the SPD's obligation to comply with the 2019 Production Order. On November 22, 2019, after hearing from counsel for the parties and counsel for the SPD, MacKenzie J. made an order (the "Second 2019 Order") which contained the following terms:
1. Within 14 days of this order, the Chief Constable of the Saanich Police Department, or his delegate (the "Police") will produce to the parties to this litigation and to Attorney General of British Columbia, a list of all documents as defined in the Supreme Court Rules (the "List"), including all handwritten notes of all investigating officers, in the possession and control of the Police relating to the surreptitious recording of people while they used the washroom at the Mattick's Farm store located at 5325 Cordova Bay Road near Victoria and in particular Saanich Police file number 2016-2288;
 2. The List shall include dates and descriptions of the documents sufficient to allow a consideration by the parties and the Court as to whether the documents were properly withheld pursuant to paragraph 3 [the Excepted Documents] of this Court's January 22, 2019 order made in this proceeding;
 3. The List will include redactions to the document descriptions made by the Attorney General of British Columbia as it considers necessary to protect the criminal proceedings involving Mr. Schwabe, along with an explanation as to why each redaction was made;
 4. Upon providing the List to the parties, the Police will advise the parties which of the documents on the List the Police are willing to produce, absent any objection from Matthew Schwabe that is accepted by this Court; and
 5. The parties, the Police and the Attorney General of British Columbia have liberty to apply for further directions or orders from this Court relating to the production of the documents listed on the List.
- [16] No list of documents was provided within the time period specified in the Second 2019 Order.
- [17] On December 16, 2019, the SPD provided a redacted index to the SPD report to Crown counsel, with minimal descriptions, and which does not contain the information required by the Supreme Court Civil Rules and the prescribed Form 22.
- [18] As an aside, I observe the index of the report to Crown counsel appears to be very organized and would facilitate a highly efficient and timely document production process. However, it does not constitute compliance with the Second 2019 Order requiring the SPD to provide a list of documents. A list of documents is a prescribed form, specifically Form 22 of the Supreme Court Civil Rules, and requires documents to be organized with the date of the document to be set out, a description of the document to be provided, and for the individual person or organization producing the document to indicate whether the document is or is not any longer in the listing party's possession or control, and, most importantly perhaps in relation to the issues in this application, to set out at Part 4 documents for which privilege

from production is claimed, which must include the grounds on which the privilege is claimed. This is the column which would have facilitated the SPD to claim and communicate the specific "excepted" basis for not disclosing relevant documents to plaintiff's counsel under the January 2019 Order.

- [19] In November 2020, I am advised counsel for the plaintiffs learned Mr. Schwabe's criminal charges would likely be resolved by way of guilty plea, anticipated to occur in early 2021. The plaintiffs elected to await resolution of the criminal charges before taking further formal steps to obtain production of the documents MacKenzie J. had ordered produced in the 2019 Production Order and the Second 2019 Order. Guilty pleas were not entered until September 2022 and sentencing took place in November of that year, with the appeal period expiring in December 2022.
- [20] Following some discussions early in 2022, on March 14, 2022, the plaintiffs' counsel wrote to counsel for the SPD to once again request production of relevant documents the SPD had not yet produced. The request included "copies of images taken from the recordings of the unidentified victims in the Red Barn Washroom that show their faces or are the most revealing of their identity, but preferably with genitals and breasts censored by the addition of opaque black bars or boxes". Also in March 2022, the plaintiffs requested the SPD provide evidence collected regarding the allegations that Mr. Schwabe exposed his genitals to someone on April 2, 2014 and to another person under 16 years old on October 20, 2014 (I infer these relate to Counts 29 and 30 of the Information or Indictment), and advised that the victims' names could be redacted if they were unrelated to the surreptitious videotaping incidents at Mattick's Red Barn. Those documents are relevant to direct and vicarious liability of Mattick's Red Barn. Those documents contain information about what Mattick's Red Barn knew about Mr. Schwabe's actions at Mattick's Red Barn, when it knew it, and what, if anything, it did in response.
- [21] On March 23, 2022, and citing s. 22(1) of the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165 [FOIPPA], counsel for the SPD advised it would not produce the video images because "disclosure of such information would be a substantial and unjustified invasion of the privacy of the unidentified victims and amount to further re-victimization of them". The SPD went on to advise that the "SPD must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy". Counsel for the SPD also noted the "doctrine of public interest privilege" would likely bar the SPD from producing the images, since "there is clearly no public interest in the release of intimate and potentially identifying images" of the victims and "every public interest in maintaining the privacy" of those individuals.
- [22] The SPD advised it would "not oppose an order for production of the balance of the materials sought", but on certain "conditions", namely it would not organize the documents but would simply provide what it estimated were between 13,000 and 20,000 pages of materials en masse, production would need to be made pursuant to a court order, and someone from the SPD's FOI department would "charge their normal hourly rate for

production", which the SPD quoted as being \$93 per hour. The SPD further advised that it could not provide an estimate of how long the process would take, or the expense involved, but explained that "given the voluminous nature of the records involved [the SPD would] require at least six months to get this done from the date the court order is entered and served".

- [23] Communications between counsel for the plaintiffs and the SPD continued, without success. The plaintiffs filed the within application on April 21, 2022, however, owing to the pending certification application in this action and the SPD's agreement to provide information needed for that application (via an affidavit setting out the number of Unidentified Individuals), the plaintiffs' application was not immediately scheduled for hearing.
- [24] The plaintiffs' application to certify their action as a class proceeding was heard over several days between October 24 and 27, 2022.
- [25] On March 13, 2023, MacKenzie J. issued reasons for judgment certifying the action as a class proceeding: *Burke v. Red Barn at Mattick's Ltd.*, 2023 BCSC 367 [Certification RFJ]. The plaintiff's revised litigation plan formed part of MacKenzie J.'s certification order.
- [26] To date, no list of documents has been provided. The relevant documents, including those the SPD does not object to producing, have not yet been provided to the plaintiffs' counsel.

ANALYSIS

- [27] The plaintiffs apply for an order directing the SPD to comply with the 2019 Production Order, and in particular to produce to plaintiffs' counsel numerous documents. Mattick's Red Barn consents to the relief sought. Mr. Schwabe did not participate in the application. The SPD opposes the relief with respect to video images. At the hearing, the SPD advised it consented to production of the other relevant documents, but on certain conditions.

Res judicata

- [28] The plaintiffs say the production issue has been determined by way of the 2019 Production Order, which was not appealed, and that the SPD's objections to production are res judicata, and rely on *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at paras. 25-26, 33, 62. In the alternative, the plaintiffs argue a (further) production order should be made.
- [29] The issue of whether the documents collected by the SPD regarding the allegations that Mr. Schwabe exposed his genitals to someone on April 2, 2014 and to another person under 16 on October 20, 2014, which the plaintiffs requested in March 2022, is not res judicata. Those documents do not appear to be ones the plaintiff initially applied to have produced. As a result, the 2019 Production Order did not determine whether they ought to be produced. Those documents are relevant to the action herein. The SPD does not object to producing them, albeit on the conditions to which I have already outlined. Those documents shall be produced to the plaintiffs.

- [30] However, the issue of whether the SPD is to produce the other relevant documents addressed in the 2019 Production Order--being "all documents as defined in the Supreme Court Rules, including all handwritten notes of all investigating officers, in the possession or control of the Police relating to the surreptitious recording of people while they use the washroom at the Mattick's Farm store located at 5325 Cordova Bay Road near Victoria (the "Incidents") and in particular Saanich Police file number 2016-2288"--is res judicata. The questions of whether those documents are relevant, and whether they are properly producible by the SPD, have already been determined by this Court on a final basis in a forum that involved all of the same participants. It is only disputed about what documents properly constitutes Excepted Documents that remain undetermined. In my view it is appropriate for me to exercise my discretion to apply issue estoppel with respect to whether those broad category of documents are relevant and producible by the SPD.
- [31] It is apparent the SDP's objection to producing the video images, and only the video images, is based on its position that they are Excepted Documents. The issue of whether the video images are Excepted Documents is not res judicata.

The SPD's objections to producing the video images

- [32] The 2019 Production Order did not include any requirement for the SPD to prepare a list of documents, even one limited to setting out what relevant documents the SPD claimed were Excepted Documents and the basis for any such claims. As the need for an application which led to the Second 2019 Order reflects, the absence of a proper list of documents hampered the efficient resolution of disputes regarding what documents were properly Excepted Documents which should not be produced. Unfortunately, the failure of the SPD to provide a list of documents even after the Second 2019 Order has continued to impede production of documents and resolution of disputes about what documents, if any, are Excepted Documents. In my view, requiring the recordholder to prepare a list of documents, even one limited to setting out the particular documents the recordholder claims are not producible and the basis for that claim, would likely be of significant assistance to the parties, the recordholder, and the Court in future Antunes orders. A complete list of documents, however, would likely be of the greatest utility. Such a list of documents would not only track what has been produced, but it would also provide the parties to the civil litigation information about the nature of the document and its source.

Would production of the video images violate the unidentified members of the class' right to seclusion?

- [33] The SPD argues the Unidentified Individuals enjoy a right to seclusion--in other words a right to be left alone--and that production of the video images would violate that right. I disagree. The governing jurisprudence has affirmed that, to date, no such common law cause of action has been recognized in British Columbia: *Ladas v. Apple Inc.*, 2014 BCSC 1821 at para. 76; *Ari v. Insurance Corporation of British Columbia*, 2015 BCCA 468 at para. 9; *Tucci v. Peoples Trust Company*, 2020 BCCA 246 at para. 11. I was taken to no case authority

or legislation suggesting the contrary.

Are the video images Excepted Documents?

[34] The SPD argues the video images are not producible because they are Excepted Documents. It advances several reasons for its position.

Would production of the video images be contrary to the "public interest"?

[35] As I have already outlined, para. 3(b) of the 2019 Production Order contemplated certain documents--the Excepted Documents--may not be produced because they were "documents which it would be contrary to the public interest to produce" and set out a list of exceptions "in particular" [emphasis added].

[36] Relying on *Smerchanski v. Asta Securities Corporation Limited*, 31 O.R. (2d) 705, 1981 CanLII 1695 (C.A.), the SPD argues production of the video images would be contrary to "the public interest". The SPD argues "the courts have recognized a type of privilege over documents in the possession of the police if it would be contrary to the public interest for them to be produced". I accept that premise. Indeed, several situations where production may be contrary to the public interest were specifically referenced in the 2019 Production Order. However, the SPD does not rely on any of the express exceptions set out in the 2019 Production Order.

[37] Nonetheless, the SPD also argues the words "and in particular", which follow the words "documents which it would be contrary to the public interest to produce" in term 3(b) of the 2019 Production Order, are to be interpreted in a manner analogous to the word "include", and that they do not circumscribe or limit the "public interest" circumstances where relevant documents would not be produced: *Helme v. Claus*, 2008 BCSC 1523 at para. 24. I need not determine whether the words "and in particular" are to be given the same interpretation as the word "including", which introduces an inclusive but not exhaustive list of examples, because, as noted by Justice Blair in *Smerchanski*, this type of privilege applies where disclosure "will be harmful to the fabric of the state". The SPD was unable to articulate any such harm that would flow from production of the video images to counsel for the plaintiffs.

Does FOIPPA preclude production of the video images?

[38] Para. 3(c) of the 2019 Production Order contemplated certain documents may not be produced because they are "protected from production by any other applicable statute". The SPD argues FOIPPA is an applicable statute and that, as a public body, it is subject to FOIPPA and has a duty to uphold the privacy rights of individuals. Within this rubric the SPD advances two arguments.

- [39] First, citing s. 33(2)(l) of FOIPPA, the SPD argues it can only disclose the documents which constitute personal information, such as the video images, within the meaning of FOIPPA, in order to comply with a court order. It further argues that the 2019 Production Order is not a court order which authorizes disclosure of the records, but rather is an order that permits the Court to make a later order about what documents should be disclosed.
- [40] The SPD's arguments have several frailties. First, while personal privacy is an important societal interest which can be considered by the courts when they are called on to make document production orders against non-parties, the Court is not bound by FOIPPA: *Vlastic v. Fleming*, 2019 BCSC 1735 at para. 48. FOIPPA does not supersede this Court's procedures for accessing information in the course of civil actions: FOIPPA, ss. 2(2), s. 33(2)(e) and (l). Federal privacy legislation (Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 [PIPEDA]) has a similar carve-out: *Royal Bank of Canada v. Trang*, 2016 SCC 50 at paras. 24-25; PIPEDA, s. 7(3)(c).
- [41] Second, the SPD argues that s. 22(4)(a) of FOIPPA requires it, as a public body, to have the written consent of an individual before releasing information that would otherwise amount to an unreasonable invasion of that person's privacy. Again, I disagree. First, in my view the SPD's argument mischaracterizes s. 22(4)(a) of FOIPPA, which simply provides that disclosure of personal information is not an unreasonable invasion of someone's personal privacy if that person has consented to the disclosure in writing. More importantly, s. 22(4)(a) of FOIPPA refers to the personal privacy of third parties. Vis-à-vis this application, at least since certification, the Unidentified Individuals are not third parties: Schedule 1 to FOIPPA, definition of "third party". This is not a case that is analogous to *Lepard v. Greenwood*, 2023 BCSC 1594, relied on by the SPD. In *Lepard*, the concern was about the privacy interests of individuals who were not parties to the action (casino staff and patrons). The Unidentified Individuals are members of the class; they are not third parties whose interests are not represented in this proceeding.
- [42] The SPD also relies on *University of British Columbia (Re)*, 2014 BCIPC 12 [Re U.B.C.] in support of its position. First, I observe *Re U.B.C.* involved a request under FOIPPA for documents and parts of documents. The documents were not sought under the Supreme Court Civil Rules and its procedures governing production of documents. Second, like in *Lepard*, the concern of the Office of the Information and Privacy Commissioner's delegate in *Re U.B.C.* was that the documents sought identified people other than the applicant, i.e. third parties, including the subject of the applicant's complaint, as well as others: see para. 8.
- [43] Further, since certification there has been "a lawyer client relationship between class counsel and the class members": *Brazeau v. Canada (Attorney General)*, 2021 ONSC 8158 at para. 27, cited by MacKenzie J. in the Certification RFJ at para. 97. As a result of the certification order and accompanying litigation plan, the plaintiffs' counsel represent the entire class, which includes the Unidentified Individuals. The class counsel therefore have duties to the entire class including the Unidentified Individuals. The privacy interest at issue belongs to the Unidentified Individuals, and the request is being made by their legal

counsel. This application is being advanced by the Unidentified Individuals who are class members by class counsel acting on their behalf: Certification RFJ at para. 97.

- [44] The SPD argues the authority to represent the Unidentified Individuals who are members of the class does not equate to a consent to view the intimate images of those individuals, relying on *R v. Ewanchuk*, [1999] 1 SCR 330, 1999 CanLII 711 at paras. 1, 31. That authority, which considers the legal principles surrounding "consent" in the context of the criminal offence of sexual assault, is not apposite to the issues on this application and does not support the SPD's argument.
- [45] Further, the nature of the disclosure sought (copies of images taken from the recordings that show the Unidentified Individuals' faces or are most revealing of their identity, but with genitals, breasts and buttocks censored by the addition of opaque black bars or boxes) has been tailored to preserve the Unidentified Individuals' privacy to the greatest extent possible, while still providing an opportunity for their identification and their representation by class counsel. One of the representative plaintiffs has affirmed she and her co-plaintiff will instruct class counsel to handle the documents "with utmost care" (Affidavit #3 of Mallory Fulmore née Colter at para. 5).
- [46] Third, I reject the SPD's argument that the 2019 Production Order is not a court order which authorizes disclosure of the records but is instead an order permitting the Court to make a later order for the disclosure of documents. The 2019 Production Order is a court order requiring production of documents. Paragraph 4 of the 2019 Production Order requires the SPD to make copies of the documents that "satisfy the criteria for production" in para. 2 of the 2019 Production Order, and para. 5 of the 2019 Production Order requires the SPD to provide those copies to counsel for the plaintiffs. The only exception is for what I have described as Excepted Documents, which are excepted from the initial production requirement. The 2019 Production Order permits disputes about whether any particular document is properly an Excepted Document to be deferred and resolved later, either by agreement or court intervention. Were it otherwise, I fail to see what utility an Antunes order would serve.
- [47] All documents not claimed by the SPD as being Excepted Documents were to have been provided to the plaintiffs' counsel. An Antunes order "balances the plaintiff's need to obtain information in the police file with the Crown's need to preserve the integrity of the criminal prosecution" and "permits, in the appropriate case, full debate on the various privilege issues that may arise": Antunes at para. 26.

Is an alternative to production of the video images a preferable order?

- [48] Although the SPD argued FOIPPA "does not provide the court with the discretion to engage in a balancing process" (in the course of its argument that FOIPPA applies to preclude production), it nonetheless argues I should craft an order that balances the interests of the plaintiffs with the "public interest".

- [49] First, and as I have already noted, the SPD has not identified any "public interest" for me to balance beyond those set out in the 2019 Production Order, on which it does not rely. Second, with respect, the terms of an Antunes order are intended to, and did via the 2019 Production Order, balance the interests of the plaintiffs with the public interest: 2019 Production RFJ at para. 55.
- [50] The SPD argues that instead of ordering production of the video images, I should leave it to the SPD to "facilitate" the identification of the unidentified plaintiffs. The SPD argues if individuals who want to know whether they were filmed, they can simply contact the SPD.
- [51] First, and without intending to cast any aspersions, I point out the obvious fact that the process the SPD proposes be followed has not yet proven to be an effective means of identifying individuals who have remained unidentified since 2016.
- [52] Second, upon inquiry, at least one individual was given inconsistent information by the SPD about whether they were or were not thought to be one of the Unidentified Individuals.
- [53] Third, the litigation plan approved by MacKenzie J. in his certification decision outlines a detailed plan to identify the Unidentified Individuals. Of particular relevance in this application are the following aspects of the litigation plan:

...

The Saanich Police Department ("SPD") are in possession of the images of the seven unidentified but potentially identifiable victims, as a result of seizing those images from the defendants Matthew Schwabe. It is unknown what steps they took, if any, to identify those victims.

The plaintiffs brought a pre-certification application to have the SPD disclose (among other records) censored versions of those images to the plaintiffs so that the plaintiffs could see if they recognized the unidentified individuals. If the plaintiffs were unable to identify the victims, the known members of the class could be asked if they recognized the images of the unidentified victims, and Mr. Schwabe and a representative of [Mattick's Red Barn] could be asked in examinations for discovery who the victims were.

The SPD opposed that application, taking the position that it would be "embarrassing" for those individuals to be identified and notified, and that if people wanted to know if they were in the class, they could ask the SPD, and a police officer would make that determination.

Whether it is appropriate for the SPD to retain possession of the images of the unidentified victims, to dictate the process by which those victims are identified, and serve as the final decision maker in that regard, are matters that will affect the quality of any notice program approved by this court. The court should hear and decide that application for disclosure from the SPD at an early date.

Notification

Notification is proposed to proceed in three stages:

1. The plaintiffs will bring an application for disclosure from the SPD of censored images of each of the unidentified victims.
 2. If the court orders disclosure of those images by the SPD, the plaintiffs will attempt to identify the unidentified victims by
 - (a) reviewing the images themselves and showing the images to the other known victims to see if the unidentified individual(s) can be identified; then, if necessary
 - (b) conducting a discovery of Matthew Schwabe; and then, if necessary
 - (c) conducting a discovery of a representative of [Mattick's Red Barn];
 3. If one or more unidentified victims are identified pursuant to any stage of step 2, above, then the plaintiffs will contact the unidentified victim(s) to confirm their identity (if necessary after obtaining an order for last known contact information from [Mattick's Red Barn]);
 4. If any victim remains unidentified following step 2 above, then notice will be provided to anyone who was employed by [Mattick's Red Barn] during the relevant time period for a 120 day period (or some other period as the court considers appropriate) in a form and publication approved by the court;
 5. If any victim remains unidentified following step 4 above, the notice will be provided to the public at large within a period as specified by the court, in a form and publication approved by the court.
- [54] The litigation plan ordered by MacKenzie J. went on to provide that "[i]f the plaintiffs are not successful in their disclosure application from the SPD at stage 1 above, they will pursue the process above beginning at step 2(b)" and "[a]ny individuals identified pursuant to the process will have a 60 day period in which to opt out of the class proceeding".
- [55] Finally, there is no evidence or even suggestion production of the video images would interfere with the SPD's ongoing investigation or its own efforts to identify the Unidentified Individuals, if any.
- [56] For all these reasons I have concluded the video images are not Excepted Documents. The SPD is ordered to produce those documents to plaintiffs' counsel.

The SPD's conditions for production

- [57] The SPD says it will turn over the other documents ordered to be produced (i.e. "all documents as defined in the Supreme Court Rules, including all handwritten notes of all investigating officers, in the possession or control of the Police relating to the surreptitious recording of people while they use the washroom at the Mattick's Red Barn located at 5325 Cordova Bay Road near Victoria (the "Incidents") and in particular Saanich Police file number 2016-2288") on the condition that the SPD be paid for its efforts in producing them. It argues that although the plaintiffs have sought production of the documents they have not

undertaken to pay the costs of the production.

- [58] An undertaking from the plaintiffs is not required. The 2019 Production Order already includes, at para. 7, the following order: "any reasonable costs incurred by the Police for the retrieval, production, inspection, copying and delivery of the said documents shall be paid forthwith by the solicitor for the plaintiffs".
- [59] If there is a dispute as to what constitutes the "reasonable costs", I order the SPD shall bear the full costs of production and the issue of who should ultimately bear the burden of those expenses referred to the common issues trial judge, as was done in *British Columbia/Yukon Association of Drug War Survivors v. Abbotsford (City)*, 2015 BCCA 142 at para. 31.
- [60] Given the extensive period of time that has already passed without the SPD producing the documents, I wish to make clear and emphasize that any dispute about the reasonable costs of producing the documents is not to result in a further failure, or delay, by the SPD to produce the documents.

CONCLUSION AND SUMMARY OF ORDER MADE

- [61] The orders sought by the plaintiffs in Part 1, paras. 1(a) through (i) inclusive, of the notice of application filed December 14, 2023, are granted.
- [62] The plaintiffs were successful in their application. I order that the SPD shall pay the plaintiffs' costs of this application, in an amount to be agreed upon by the plaintiffs and the SPD, such agreement being encouraged, or failing agreement, to be assessed by the Registrar.

"The Honourable Madam Justice V. Jackson"

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