

CANADA / JUDGMENT

Harms v. British Columbia (Attorney General)

2015 BCSC 1309

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Supreme Court of British Columbia

DECIDED

3 July 2015

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2015 BCSC 1309 Harms v. British Columbia (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Harms v. British Columbia (Attorney General),

2015 BCSC 1309

Date: 20150703

Docket: 23894-1

Registry: Smithers

Between:

Janet Harms (Informant) and Andrew Fidler

Applicants

And

Attorney General of British Columbia

Respondent

Restriction on publication: Ban on identity of police officers

Before: The Honourable Mr. Justice Silverman

Oral Reasons for Judgment

The Applicants:

Appeared on their own behalf

Counsel for the Respondent:

L.A. Ruzicka

Place and Date of Hearing:

Smithers, B.C.

July 2 and 3, 2015

Place and Date of Judgment:

Smithers, B.C.

July 3, 2015

- [1] THE COURT: These are oral reasons. If a transcript is ordered, I reserve the right to edit, although that process will not involve a change in the decision or in the reasoning.
- [2] This hearing has been an application for an extraordinary remedy or remedies seeking a ruling concerning a Provincial Court decision of Judge Birnie on August 27, 2014, which declined to approve the issuance of process on some, but not all counts, on three private informations. The applicants are Mr. Fidler, the victim of a number of alleged criminal acts on the part of three police officers, and Ms. Harms, the informant and a witness to much of the alleged criminal activity. They were self-represented on this application and with respect to all of the materials filed by them in support of this application. While Ms. Harms sat at counsel table with him, Mr. Fidler argued on behalf of the application.
- [3] Not surprisingly, because of their status as self-represented litigants, they had some procedural difficulties along the way in getting this matter to court, and while the Crown opposes this application on the merits, they assisted the applicants with those procedural difficulties so that the merits could be properly dealt with.
- [4] Similarly, these applicants, given their status, could not possibly be expected to know or to articulate with specificity what type of extraordinary remedy or remedies might be applicable or the provisions of Part XXVI of the Criminal Code. The Crown does not argue that as a reason to dismiss this matter. Rather, it agrees that if any of the traditional remedies are called for on the merits, the application should succeed. I think that is the correct position for the Crown to take, and I thank Ms. Ruzicka for it.
- [5] The incident which forms the basis for the informant's proposed charges occurred on April 22, 2014, near Burns Lake, a small community near the centre of British Columbia. On June 9, 2014, Ms. Harms swore three private informations against three specific RCMP officers. The three Informations consisted of a total of 63 proposed counts. On July 29 and 30, 2014, a process hearing which comprised most of two days was held in Provincial Court in Burns Lake following the procedure set out in the Criminal Code and particularly s. 507.1. That was conducted by Her Honour Judge Birnie.

- [6] During the course of the process hearing, a number of proposed counts on each information, were withdrawn. A number were amended. Judge Birnie gave oral reasons for not issuing process on a number of counts and reserved with respect to several others.
- [7] On August 27, 2014, Judge Birnie issued written reasons in which she declined to issue process on all but four counts, which consist of two assaults and two kidnapping charges against two of the three police officers. On September 9, 2014, she endorsed those informations pursuant to the procedure set out in the Code. She declined to issue process with respect to the others, and it is those decisions where process was not approved which are before me on this application.
- [8] On March 3, 2015, the originating process on this matter was filed in this court which has resulted, after a number of procedural detours, in the hearing before me. The four approved charges are not before me for review. Of those four approved charges, there is an appearance date for the two officers set in Provincial Court in Burns Lake on July 28 next. I am advised that the Attorney General is in the process of conducting an investigation with respect to whether or not those charges will proceed and will advise before July 28 as to what extent she may intervene.
- [9] At the process hearing, Judge Birnie heard oral evidence from three witnesses: Mr. Fidler, Ms. Harms, and a third person who was present for most of the relevant events. There seems to be no dispute about the procedures she followed, although that statement is perhaps tempered by what I heard in reply this morning, and I will deal with that separately. I am satisfied, in any event, that she followed the correct basic procedure when conducting the hearing.
- [10] In her decision, she discussed, in detail, the evidence that she heard from each of the three witnesses. For this application, it is not necessary for me to refer to that evidence in great detail because of the limited nature of the review that an application of this sort allows. It is sufficient to note briefly that the evidence heard by Judge Birnie indicates that Mr. Fidler, on the date in question, was driving a truck without licence plates. He was confronted by an RCMP officer about it. He responded that he was not required to have licence plates because his truck was not a "commercial vehicle," and he proceeded to attempt to instruct the RCMP officer on the proper law and the officer's poor training and proper duties. The officer indicated that he would impound the vehicle. Mr. Fidler considered that an attempt to steal his vehicle. A window was broken by the officer's baton. It is not clear if it was intentional or occurred incidentally in the course of the events. Mr. Fidler drove the vehicle to an uncle's where Ms. Harms and the third witness I mentioned were present. Two other officers arrived at those premises. There was violence. Mr. Fidler attempted to arrest one of the officers. The officers eventually restrained Mr. Fidler, arrested him, and transported him to the police station. There was a good deal more detail given to Judge Birnie about what occurred, and particularly about the violence that occurred.

- [11] I understand that Mr. Fidler was charged with one or more assault-related counts arising out of the incident in question but that the Crown subsequently stayed that charge or those charges.
- [12] The two approved assault charges against the two RCMP officers arise from the violence at those premises. The kidnapping charges relate to the officers confining and transporting Mr. Fidler in the police car against his will to the police station on the theory that there were no grounds, proper grounds, for the arrest.
- [13] The foregoing is a brief summary of the evidence that was before Judge Birnie.
- [14] The charges proposed against the officers which were not approved consist of the following, and I will simply refer to them briefly by their short-form titles and sometimes a Criminal Code number. With respect to one of the officers: escaping lawful custody, criminal negligence causing bodily harm, overcoming resistance by choking or strangling pursuant to s. 246(a) of the Criminal Code, aggravated assault, unlawfully causing bodily harm, torture pursuant to s. 269.1 of the Code, criminal breach of contract, intimidation, and a denial of a right to make a telephone call pursuant to s. 7(2) of the Offence Act. With respect to a second of the officers, almost the same charges with some minor differences: assisting in escape from lawful custody, criminal negligence causing bodily harm, aggravated assault, torture, criminal breach of contract, intimidation, and again the denial of the right to access the telephone. With respect to the third officer against whom no charges were approved: obstructing or violence to or arrest of an officiating clergyman, uttering threats, falsifying valuable security with intent to defraud pursuant to s. 397(1), which apparently, it was argued to Judge Birnie, referred to something to do with a ticket under the Motor Vehicle Act, intimidating a justice system participant, threatening to commit an internationally protected person, wilfully causing an event to occur under s. 429(1) of the Code, mischief, attack on transport of an internationally protected person; in addition, crimes against humanity.
- [15] I should indicate that the charges which many of us in the criminal justice business have never seen laid before involving an officiating clergyman, an internationally protected person, and crimes against humanity, refer to Mr. Fidler's self-proclaimed status as a clergyman and as an ambassador to the Commonwealth of Israel. Those charges seem not to have been approved without reasons and summarily.
- [16] It is the refusal to issue process for most of those charges which is the subject of this review. I am satisfied that Judge Birnie correctly instructed herself with respect to the correct test for issuing process, that is, was there some evidence on each of the essential elements of the offence, in directing herself as to which counts to approve and which not. She did apply that test and a consideration of the evidence with respect to the proposed charges.
- [17] A few comments about general principles that govern this hearing before me.

- [18] First, it is not disputed that a decision not to issue process on a private information is reviewable under the extraordinary remedies part of the Criminal Code.
- [19] Second, it is clear that such a remedy is available only to challenge decisions by an inferior court that have been made either in excess of or by way of failure to exercise jurisdiction.
- [20] Third, it is clear that a review is not available with respect to errors of fact, and it will only be available with respect to errors of law or errors of mixed fact and law if those errors are the type of error or the magnitude of error which goes to the Provincial Court judge's jurisdiction.
- [21] At the commencement of this hearing, I confirmed that Mr. Fidler understood the foregoing limitations of this hearing and that, even if he convinced me that Judge Birnie's decision or decisions with respect to individual counts were wrong in the sense that I disagreed with her, that would not be enough to result in him winning this application because of the limitations I previously mentioned. He indicated that he did understand that and also that he had received and read the Crown's written submissions which had been provided to him in advance, as it had to me, and which explains the foregoing limitations in clear and understandable English.
- [22] I had advised the parties in advance of the commencement of this matter yesterday that their oral submissions would be limited to two hours each, and I thank them both for honouring that. In addition to their oral submissions, I have the Crown's written submission of 33 pages in length, double-spaced. That includes a nine-page chart detailing each proposed count and how it was dealt with. I have from Mr. Fidler the essence of his written argument in a document entitled "second asseveration." It is 99 pages in length, single-spaced. There is a good deal of other written materials from Mr. Fidler, but this second asseveration has the heart of his factual and legal arguments, as he told me yesterday.
- [23] Mr. Fidler made two arguments yesterday during his oral submissions and expanded that today in his reply. I will deal with them now. The first argument yesterday was that Judge Birnie made an error or errors in law that go to her jurisdiction and that bear on each of the counts for which process was not approved. The second argument he made yesterday is that she made an error in law related to two specific counts – the denial of access to telephone counts. There are two of them because the same charge is proposed to be laid against two of the officers. I will deal with the first of those arguments now, that Judge Birnie committed an error or errors in law that go to her jurisdiction and that if successful would bear on all of the counts that are at stake here.
- [24] Mr. Fidler, summing up the argument as I understand it, says this. Judge Birnie was wrong in rejecting his argument that he was lawfully entitled to operate his truck on a public roadway without licence plates or insurance, and if she had made that decision correctly and acknowledged that he did have the right to be driving without licence or insurance, then it would follow that everything the officers did would have been without authority and unlawful, and therefore, everything the officers did would have been illegal, and what would

flow from that, logically, would be that all of the other proposed charges against the officers should have been approved. That is how I understand the skeleton of his argument.

[25] He says that she was wrong about this for two reasons:

1. on the merits of whether or not he indeed has such a right to drive, and
2. because she considered his arguments in light of the Alberta case of *Meads v. Meads*, 2012 ABQB 571, and the reliance on that indicates she was biased against him.

I will deal with those in reverse order.

[26] Mr. Fidler, it was clear yesterday during his oral submissions, takes great exception to being lumped into the same category as the litigants described by Associate Chief Justice Rooke in the *Meads* case. Judge Birnie, after going through the merits of the argument about the right to drive, said this at para. 60 of her decision:

I have considered these arguments in light of the very thorough and thoughtful decision of Justice Rooke of the Alberta Court of Queen's Bench in *Meads v. Meads*, 2012 ABQB 571. For the reasons set out in that decision I find that there is no merit to Ms. Harms argument that Mr. Fidler was lawfully entitled to use, enjoy or operate his truck on a public roadway without license plates or insurance.

[27] Judge Birnie then goes on to quote roughly 15 paragraphs, not all consecutive, from *Meads*. In my view, all of those paragraphs were directly relevant to the various arguments raised by Mr. Fidler. While it may not be helpful to categorize him as a particular type of litigant, it is clear that he displays many of the characteristics of many of those litigants referred to in *Meads* and in other similar decisions. Those characteristics which are shared by Mr. Fidler include the following:

1. the belief and claim that governments, and particularly, in this case, the governments of Canada and British Columbia, are corporations with corporate rights;
2. laws do not apply to him unless he has agreed to them and perhaps even entered into a contract with respect to them, in this case, traffic laws;
3. written arguments that are, if we were to make it double-spaced, several hundred pages in length and contain, for the most part, some combination of irrelevancies and nonsense;
4. the rights of the people are constantly under attack and have been perhaps for centuries from conspiring dark forces that, according to Mr. Fidler, include government, Jesuits, communists, the Rothschild banking cartel, and treasonous traitors of the judiciary.

[28] He not only uttered these phrases numerous times, but they form an important part of his submission. I gather that the significance of the conspiracy submission in this case is that it is these dark forces which have conspired and continue to conspire to unlawfully take away an individual's rights such as his inalienable right to drive.

- [29] I should say this at this point. Mr. Fidler's tone and manner of speaking belies much of what he said that I have just referred to. He is always polite and articulate and speaks well, and I have no criticism of him with respect to that. Having said that, he lapsed into impermissible criticism and personal insults towards members of the judiciary, particularly Judge Birnie and Associate Chief Justice Rooke, when he lumped them in with the various conspirators I have referred to, either as members or as working for the same goals as the conspiracy.
- [30] Sir, because a judge does not agree with you does not make them treasonous or traitors. You are entitled to criticize their decisions. You should be careful about personal attacks. It is not the proper way to proceed in court, just as personal insults about you would not be appropriate, whereas disagreeing with your decisions might be, or with your views of what is right or wrong with the world.
- [31] In my view, it was apt for Judge Birnie to refer to Meads in the manner that she did. That said, none of that means that Mr. Fidler's argument on the merits does not deserve proper consideration. Clearly, it does, and I will deal with it now. I can deal with it in a sentence. The argument is without merit. Judge Birnie gave her reasons for rejecting it in paras. 57 to 59, on the merits, of her reasons, then followed up with what I have already indicated about Meads. I will not grace the argument on the merits by repeating it here. I endorse what Judge Birnie said, and I am satisfied that she was correct in law in what she said about it.
- [32] In addition, I would add this. While there may well be a common law right to access and use of the highways, that does not include a right to drive. Being allowed to drive is not a right, although I understand you think it is and I am not going to change your mind. It has never been a right. It is a privilege and always has been, a privilege to which everyone is entitled so long as they comply with the reasonable rules and guidelines that exist for everyone's safety and the maintenance of the roads. You do not get to decide what those reasonable guidelines are. The government gets to decide with the oversight and scrutiny of the courts. I would also add that this particular issue, the one that you have raised, is not novel. It has been argued and decided in our courts many times. In fact, it is a common argument raised by many of the litigants of the sort referred to in *Meads v. Meads*. Just a few of those cases where it has been referred to can be found by reference to another well-known case of the same sort, *Fearn v. Canada Customs*, 2014 ABQB 114, where, at para. 245, the Court says this:
- OPCA gurus often argue a very commonplace but misguided belief that legal operation of a motor vehicle does not require a driver's licence or motor vehicle insurance: for example, *R. v. Furqan*, 2013 NSCA 55; *R. v. Westover*, 2013 ONCJ 472 ; *R. v. Valliere*, 2013 ONCJ 158.
- [33] I reject the argument with respect to the right to drive on the basis of both grounds, that is, the Meads aspect of it and the merits aspect of it.

[34] None of the foregoing, nor anything else for that matter, suggests or is intended to suggest that Mr. Fidler and Ms. Harms should not be entitled to pursue this private information process. I would think that the fact that Judge Birnie approved process with respect to four Criminal Code charges would make that clear. Secondly, it is not suggested or intended to be suggested by me that on April 22, 2014, the police officers had any right to do anything to Mr. Fidler which would be criminal conduct.

[35] I turn to the second argument relating to Judge Birnie's refusal to issue process. This is with respect to the right to make a telephone call, and as I have indicated, that was not approved with respect to the two officers against whom other charges were approved. Judge Birnie declined to issue process on these counts for two reasons:

1. Mr. Fidler was told that he could use a telephone to call a lawyer but could not use the telephone to call a family member; and
2. s. 7 of the Offence Act did not apply because Mr. Fidler has been arrested in relation to a Criminal Code offence, that is, the assault offences, and the Offence Act only applies to proceedings brought in relation to provincial legislation.

[36] Section 7 of the Offence Act, R.S.B.C. 1996, c. 338 says this:

7 (1) Every person who is taken into custody by a peace officer is entitled, on request to the person responsible for his or her custody, to have access to, and the private use of, a telephone as soon as possible at least once during the first 12 hours of his or her custody.

- (2) A person who, without reasonable excuse, hinders or prevents a person in custody from exercising the right granted by subsection (1), commits an offence.

[37] In my view, her first reason for declining to issue process was likely wrong in law, and she made an error. Often, being permitted to use a telephone to call a family member is permissible, and Judge Birnie seems not to acknowledge that possibility when the call to a family member is a means by which there is an attempt to get through to a lawyer. If that were the only reason why she declined to issue process, I would come to a different conclusion. However, the second independent reason that she gave, that the Act is inapplicable to Criminal Code offences, was a correct decision in law by her and was a sufficient reason on its own to deny application for process.

[38] Judge Birnie did not refer to and may have been unaware of an existing British Columbia Court of Appeal decision where, in obiter dicta, the court made comments on this very point. The case is *R. v. Patterson*, 2006 BCCA 24, where, at para. 52, the Court said this:

This argument is without merit. First, there was no breach of s. 7(1), as the appellant was offered the use of a telephone within the first 12 hours of his custody. Second, if there was a breach, s. 7(2) provides the remedy - the person in breach has committed an offence under the Act. Third, it is doubtful that the Act applies to criminal proceedings under the Criminal Code: see *Scowby et al. v. Glendinning* (1986), 29 C.C.C. (3d) 1. where the majority of the Supreme Court of Canada

held that provincial human rights legislation was "constitutionally inapplicable to arrest or detention under the provisions of the criminal law."

The paragraph goes on with a different topic.

- [39] The decision is obiter, but it is from our Court of Appeal and is apparently the only judicial commentary available on this topic. In all the circumstances, it is persuasive and convincing.
- [40] Having said that, Judge Birnie apparently did not refer to it, and I assume was unaware of it, but came to that same decision on her own. In my view, she did not err in law in doing so.
- [41] Having said that, if it was an error in law, it was not one which went to her jurisdiction and therefore cannot result in this Court providing one of the traditional extraordinary remedies which is available on an application of this sort.
- [42] But even if I am wrong about that, an extraordinary remedy is ultimately within the discretion of the judge hearing it. This is a case where I would not exercise my discretion to employ such a remedy with respect to those charges. In exercising that discretion, I consider, among other things, this. There are already four serious criminal charges approved for process. If those proceed to trial, the evidence about the phone call will likely emerge as part of all of the circumstances heard by the judge. The courts have to use their time wisely and efficiently. I have to weigh all of that and the other demands on the court by other litigants who need time in court as well against the fact that there, potentially, is already going to be a trial. There is nothing to be gained and no merit at all in overcharging with far less serious charges than those that have already been approved.
- [43] Therefore, Mr. Fidler's second argument fails as well.
- [44] While bias was argued yesterday as part of the right-to-drive argument, it also appears in the written materials as an independent argument and arises independently because of Judge Birnie's references to Meads. In that regard, I note that Mr. Fidler said this in one of his written materials: that Judge Birnie "has been extremely biased in making her decision and has failed to do the job that she has sworn to do by failing and refusing to issue process when she should have done so and by unnecessarily attacking Andrew Fidler without cause or reason." That last phrase, "by unnecessarily attacking", refers to Judge Birnie's reference to Meads.
- [45] The record clearly shows that Judge Birnie treated Mr. Fidler throughout with utmost courtesy, gave him time to talk and argue, complimented him on his intelligence and ability to speak well, was attentive to all his arguments, asking him questions for explanations, and in my view showed remarkable restraint in the face of the wording of some of his arguments. In my view, she addressed everything in a fair manner with an open mind. There is no indication she was predisposed to any particular result, and again, I would think the fact that four charges were approved would be strong evidence of that. I am satisfied there is no bias whatsoever shown on the record.

[46] Further, a reasonable person fully informed of the circumstances would not, in my view, have any reasonable apprehension of bias on the part of Judge Birnie. Mr. Fidler's argument ultimately is this: She disagrees with my arguments, even after I have given her all the necessary authorities that would enable her to come to the right decision, and therefore, she either has not read them, did not understand them, or was biased. Mr. Fidler is simply wrong, and that argument is rejected.

[47] After both parties made oral submissions yesterday, we adjourned overnight with the understanding that Mr. Fidler would have 30 minutes to reply this morning. He did so and provided me a nine-page written submission to go with that. There are several comments to make about his reply. First, it is much more temperate in its comments and in its tone than what Mr. Fidler said yesterday, and I infer that that reflects an understanding on his part from some of my remarks made yesterday that his comments about conspiracy theories and personal insults were not very useful. Second, while not withdrawing those comments of yesterday, he did say this, for which I thank you, Mr. Fidler. I am reading from the written reply:

The applicant apologizes if he offended any individual during his presentation, and hopes that there are no hard feelings. It is not his intention to offend, but rather, to expose.

[48] Third, a different error of law was argued, an additional error of law, perhaps better described as a series of errors, ones which I suspect a lawyer would have focused on exclusively if he had been representing Mr. Fidler, and in that regard, I will simply read a paragraph which I think summarizes it from his written reply. The second last paragraph says this:

In Mrs. Birnie's written decision related to her failure to issue process she considered extraneous matters, non-relevant or inappropriate issues, refused to issue process implying that the informant would not be successful at trial, failed to consider and apply the evidence before her, acted bias against the informant and the victim of the violent criminal acts alleged against the accused in that her mind was already made up, for example, in relation to the Count regarding section 423 of the Criminal Code, and she refused to issue process where there was "some evidence" on each essential element of the offence to support issuing process. Mrs. Birnie failed to exercise her discretion in a judicial manner, and all of these grounds go to the issue of jurisdiction.

[49] I disagree with Mr. Fidler concerning each of the foregoing. A detailed reading of Judge Birnie's reasons indicates that she considered and decided each of the issues that Mr. Fidler raises, and she did so correctly. However, if I am wrong about that and she did commit one or more errors in law, I am satisfied that they are not such errors as go to her jurisdiction and therefore do not attract the type of remedy that this application seeks. Finally, if I am wrong about that, I would not use my discretion to allow an extraordinary remedy in this case for the same reasons that I noted earlier that I would not use my discretion when talking about the refusal to provide access to the telephone charges.

[50] I conclude, therefore, as follows. The application for an extraordinary remedy or remedies is dismissed. This decision has no bearing on the four charges where Judge Birnie approved the issuance of process. That matter will proceed in the usual course.

[51] That is the decision.

"Silverman J."

The Honourable Mr. Justice Silverman

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Prepared on 27 October 2026 · Esheria