
CANADA / JUDGMENT

Iser v. Canada (Attorney General)

2016 BCSC 2325

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 2325 Iser v. Canada (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Iser v. Canada (Attorney General),

2016 BCSC 2325

Date: 20161212

Docket: S140297

Registry: Vancouver

Between:

Christopher Henry Iser,

By His Committee Jessica Nicole Iser

Plaintiff

And

The Attorney General of Canada, Vince LeBlanc,

Scott Verwold, and John Does #1-8

Defendants

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

In Chambers

Counsel for Plaintiff:

B.E. Webster-Evans

Y. Wong

Counsel for Defendants:

B. Sokhansanj

M. McEachern

Place and Date of Hearing:

Vancouver, B.C.

November 4 & 7, 2016

Place and Date of Judgment:

Vancouver, B.C.

December 12, 2016

INTRODUCTION

- [1] This ruling concerns an application filed by Christopher Henry Iser, the plaintiff in a civil action against the Attorney General of Canada. Mr. Iser submits that the defendants' appeal from a Master's decision, heard before me, should be reopened for rehearing and reconsideration. Additionally, the plaintiff seeks the following orders:
1. to tender further evidence and make further submissions regarding the nature of the claims of privilege over redacted documents before the court;
 2. to unseal those portions of Ms. Janeen England's sealed affidavit that was before me (the 2nd affidavit) that do not address the issue of Confidential Informant Privilege;
 3. to order the defendants produce for the court an unredacted copy of Ms. Janeen England's affidavit of March 15, 2016 (the 1st affidavit) and that they provide to only Mr. Iser's counsel an affidavit unredacted except for areas engaged by Confidential Informant Privilege; and
 4. to cross-examine Ms. England about her affidavits.
- [2] The defendants have provided this Court with an unredacted copy of the 1st affidavit so that portion of the third order listed above is no longer necessary. Otherwise, the defendants oppose all applications made by the plaintiff.

BACKGROUND

- [3] Mr. Iser, the plaintiff, has brought a civil action against the defendants for damages for personal injuries he suffered while he was a federal inmate at Matsqui Institution. Upon arriving at Matsqui, Mr. Iser was attacked by fellow inmates, suffering serious injuries which have left him with a brain injury. He claims that the defendants failed to protect him from this attack. As Voith J. summarized in a hearing on an application for discovery for this matter, the plaintiff alleges:

that at the time the plaintiff was placed in Matsqui, it was known to the defendants, or it ought to have been known to them, that Matsqui already housed a significant number of inmates who were known to be, or suspected of being, associates or affiliates or members of gangs who posed a threat to the safety of the plaintiff.

See *Iser v. Canada (Attorney General)*, 2016 BCSC 1627 at para. 8.

- [4] This claim, regarding the identity of the attackers and the defendants' knowledge of their identity and gang affiliation, is central to the plaintiff's case. As such, they have sought disclosure from the defendants regarding who was involved in the alleged attack, in addition to information and documents about what officials at Matsqui knew about the gang affiliation of inmates. I did not understand the defendants to disagree that the information sought by the plaintiff is relevant to his claim. The Master ordered disclosure of those documents, upon which the defendants claimed privilege, although he did restrict access through a confidentiality order. The defendants' position before the Master was that those documents could not be disclosed even under terms of strict confidentiality.
- [5] The defendants appealed the Master's order. During that appeal, I found that the defendants' claims for privilege - both Public Interest Immunity and Confidential Informant Privilege - were valid and therefore I ruled that any information covered under either privilege be redacted.
- [6] After the conclusion of the appeal heard before me in May 2016 and delivery of my reasons, but before the Order was entered, the parties sought leave to appear before me again to address what the plaintiff says is a new issue: the defendants presented a different affidavit at that appeal than had been proffered before the Master at the original Chambers hearing. The Master did not admit the 1st affidavit into evidence and it was never filed. The defendants said this was one of the errors the Master committed.
- [7] The defendants submit the issue is not new because it was, or ought to have been, clear that the 2nd affidavit was different from the 1st for three reasons. First, the affidavit admitted by me was sworn after the hearing before the Master and that date was mentioned in the defendants' original notice of appeal. The defendants also say that during submissions on the appeal their counsel explained that the 1st affidavit had been "vetted" in order to ensure the claims for privilege were robust and there were a small number of inadvertent errors that were identified and rectified. Finally, the defendants submit that part of the plaintiff's

submissions implicitly acknowledged the affidavit was different. Primarily, the defendants emphasize they did not mislead and did not intend to mislead the court. I agree that neither the defendants nor their counsel's conduct was blameworthy.

- [8] However, I also find the plaintiff's position that it was unclear that the affidavit before me was not the same one proffered to the Master to be reasonable. It is important to remember that plaintiff's counsel has never seen either the affidavit, or the redactions of the documents attached to both. I add that it was not clear to me in issuing my reasons that the affidavits were different. This was a genuine misunderstanding. I place no fault on either party or their counsel for the misunderstanding.
- [9] Thus, there is one issue on this application: does the undisputed fact that Ms. England's affidavit accepted by me was not the same one proffered to, but not admitted by, the Master justify reopening or reconsidering the appeal?

Principles Applicable to Reopening a Trial Decision

- [10] As both parties note, my order has not yet been entered and as such it is within my discretion to reopen this judgment. I have been referred to the case of *Hodgkinson v. Hodgkinson*, 2006 BCCA 158, an appeal of a decision by Dillon J. where the law regarding when a trial should be opened to review fresh evidence was reviewed (*S.R.P.H. v. R.L.H.*, 2004 BCSC 1630 at para. 2). This review was discussed and helpfully summarized in a latter case, *Zhu v. Li*, 2007 BCSC 1467. In *Zhu*, Justice Ehrcke set out the principles which apply in an application to reopen a trial to adduce new evidence at para. 20:
1. Prior to the entry of the formal order, a trial judge has a wide discretion to re-open the trial to hear new evidence.
 2. This discretion should be exercised sparingly and with the greatest care so as to prevent fraud and abuse of the court's process.
 3. The onus is on the applicant to show first that a miscarriage of justice would probably occur if the trial is not re-opened and second that the new evidence would probably change the result.
 4. The credibility of the proposed fresh evidence is a relevant consideration in deciding whether its admission would probably change the result.
 5. Although the question of whether the evidence could have been presented at trial by the exercise of due diligence is not necessarily determinative, it may be an important consideration in deciding whether a miscarriage of justice would probably occur if the trial is not re-opened.
- [11] I emphasize that the standard identified in steps 3, 4 and 5 requires "that a miscarriage of justice would probably occur if the trial is not re-opened".

- [12] The existence of fresh or new evidence is merely one reason to reopen a trial, but is not a necessary condition. This proposition is discussed in *Cheema v. Cheema*, 2001 BCSC 298 where Bennett J. references the case of *Sykes v. Sykes*, [1995] B.C.W.L.D. 1275 (BCCA). In *Sykes*, Wood J.A. stated:
- [10] In my view, new evidence is not an essential prerequisite to a trial judge's exercise of the discretion to re-open. In some cases, it may be the only circumstance which would justify a re-opening. But, a discretion to re-open may also properly be exercised where the trial judge is satisfied, either because of the argument of one of the parties, or on the basis of his own reconsideration of the record, that the original judgment was in error because it overlooked or misconstrued material evidence, or misapplied the law.
- [13] In other words, the Court of Appeal identifies that even where no fresh evidence exists, the court has discretion to re-open a hearing before entry of the order if satisfied, upon review of the record, that it fell into error. In my view that represents a higher standard to meet (result is changed because of error) that must be shown on a fresh evidence application (would probably have changed the result).
- [14] The application before me is not only about the introduction of new evidence, but, according to the plaintiff, also the consideration of evidence that was misconstrued at trial, namely the changed affidavit of Ms. England.
- [15] In my view, the fresh evidence analysis does not neatly fit the situation before me. I have found there was a genuine misunderstanding by the court and plaintiff's counsel about the affidavits the defendants proffered before the Master and in the appeal. But the Master did not examine, consider or accept into evidence the 1st affidavit and it was never filed; it formed no part of the appeal record. In that way, the defendants' position is because the 1st affidavit was not filed, it is as if it does not exist. They say there is no "fresh" evidence.
- [16] The defendants also submit there was nothing untoward in their bringing a different affidavit to the appeal (and their primary position is that it was clear it was not the same affidavit). They alleged the Master erred in not admitting the 1st affidavit, erred in permitting disclosure under a confidentiality order and erred in the application of principles about Confidential Informant Privilege and Public Interest Immunity. The defendants sought to uphold their claims of privilege on appeal, which meant they were obliged to present evidence about the basis upon which privilege was claimed. It was the failure to consider evidence explaining the basis of the privilege claims which they say led the Master into error.
- [17] In light of that, the defendants' position was that I cannot consider the content of the 1st affidavit not only because it is not "evidence" of any kind, but also because it is irrelevant because it was never considered by the Master.

- [18] I find the defendants' position sound; but the existence of fresh evidence is not a necessary condition to re-open a hearing to correct an error. There remains a possibility that the genuine misunderstanding I describe above may have led to my misconstruing the 2nd affidavit in some way.
- [19] Re-opening a hearing is a discretionary exercise designed ultimately to prevent a miscarriage of justice. I lay no blame on any counsel for the misunderstanding, but in this type of case where plaintiff's counsel has not and will not see the sealed affidavits, I think the interest of fairness and justice justify my examining the 1st affidavit.
- [20] I understood the defendants to agree to my review of the 1st affidavit solely for the purpose of this application and on a narrow issue to determine if any differences between the two affidavits are significant. They maintain the primary position that it is not evidence and ought not to be admitted or reviewed. They preserve their right to argue I ought not to have looked at the 1st affidavit in any appeal.

ANALYSIS

- [21] Central to the test for introducing new evidence and the test for reconsidering original evidence is the requirement that failing to do so would result in an error in judgment, whether it be a definite error (as is necessary in the test for reconsidering original evidence), or a probable error (as is the case in the test for introducing new evidence).
- [22] The possibility of error in how the 2nd affidavit was considered in the appeal is more likely in assessing the claim of Public Interest Immunity. I will not repeat here the legal principles that underlie the privileges except to reiterate that Public Interest Immunity is not absolute. It is not a blanket privilege. Instead, unlike Confidential Informant Privilege, Public Interest Immunity requires a document by document review of any information claimed to be protected from disclosure balanced against the public interest in disclosure. Quoting from a source that was referenced in my earlier reasons of *Iser v. Canada (Attorney General)*, 2016 BCSC 985, in order to invoke Public Interest Immunity the question must be answered as to "whether the public interest in secrecy outweighs the public interest in ensuring that courts have access to all relevant information: see Robert W. Hubbard, Susan Magotiaux & Suzanne M. Duncan, *The Law of Privilege in Canada*, vol. 1 loose-leaf (Toronto: Thomson Reuters Canada Limited, 2013) at 3-4 - 3-4.1. There must be a balancing of those two interests, and supporting affidavit material is important to properly conduct that exercise.

The Differences between the Affidavits

- [23] I reviewed the 1st affidavit of Ms. England and compared it to the 2nd affidavit entered at the appeal. The differences are described below.

- [24] One new paragraph in the 2nd affidavit confirms Ms. England has been designed as a peace officer pursuant to the Commissioner Directive #3 (which is attached) and the Criminal Code. I did not understand that fact to have been controversial and plaintiff's counsel addressed the significance of that fact in the appeal hearing. Clearly, that paragraph would not and could not have changed the result or resulted in a miscarriage of justice.
- [25] The main difference between the two affidavits is that the 2nd affidavit is more detailed and specific with regard to explaining the specific redactions. In the 1st affidavit, Ms. England refers to documents by tab number and groups documents together. For each group she describes what harms she says would flow from the disclosure. Some tabbed numbers appear in more than one group because some documents have more than one basis upon which privilege is claimed.
- [26] In the body of the 2nd affidavit, there are paragraphs which describe the status of a person or persons identified (whether directly or not) in the redactions, and what harm Ms. England believes would result in disclosure of that information. There is also a chart that lists every document over which Confidential Informant Privilege or Public Interest Immunity is claimed, accompanied by Ms. England's reasoning of the harm that would result from each document: 111 documents are so described.
- [27] I found no inconsistency between the two affidavits with regard to the categories and/or specific harms that Ms. England identified may result from disclosure of any of the redacted information. The wording she used to describe the harms is virtually identical. No new harms are identified in the 2nd affidavit.
- [28] There are nine other paragraphs in the 2nd affidavit that do not appear in the 1st affidavit. They similarly give more detail about some of the information contained in the 1st affidavit. Six of those paragraphs contain information that helps understand the nature of some of Ms. England's duties and some of the documents, including references to Commissioner's Directive 596-9, "Management of Human Sources" and Directive 586-2, "Recording and Sharing of Security Information. I understand those directives to be publically available. The paragraphs in Ms. England's 2nd affidavit put portions of those directives into the context of how she performs some of her duties.
- [29] With regard to documents on which only Public Interest Immunity is claimed (that is, to which Confidential Informant Privilege does not attach to any of the redactions on the document), the basis of that privilege claim in both affidavits includes one or more of the following: (i) information in redacted portions that reveal the identity of an individual who provided information, but who is not specifically a confidential informant but, in Ms. England's view, if it was known that person provided information that person's safety would be at risk; (ii) information that would reveal investigative techniques, and; (iii) information that would jeopardize institutional safety.

- [30] It was suggested that the plaintiff ought to be given more information about the redacted information for the Public Interest Immunity claims, or that those portions of the affidavit could be unsealed but restricted to being viewed only by plaintiff's counsel. I disagree.
- [31] The balancing exercise required to assess claims of Public Interest Immunity is very delicate and necessarily specific to each document examined. Given the type of harm identified in the sealed evidence before me, I am satisfied there is a risk of harm in the disclosure of information contained in the affidavits and the redactions, even though the information may seem innocuous. This is not a frailty in the defendants' case, or a deficiency in how they prepared the affidavit. It is inherent in the type of information contained in documents and the unique circumstances of an institution like Matsqui. The apparent anomaly of "innocent" information causing harm is well recognized in the case law.
- [32] I am satisfied that there is nothing in the content of the 1st affidavit that could or did change the reasoning or result of my consideration and application of the legal principles governing privilege to the redactions. I also find no miscarriage of justice occurred because of the misunderstanding about the 1st affidavit.

CONCLUSION

- [33] The plaintiff's application is dismissed.

Sharma J.

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