
CANADA / JUDGMENT

Iser v. Canada (Attorney General)

2016 BCSC 2594

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 2594 Iser v. Canada (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Iser v. Canada (Attorney General),

2016 BCSC 2594

Date: 20160317

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: Master Baker

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

B.E. Webster-Evans

A.C. Price-Stephens

Counsel for the Defendants:

C. De Los Reyes

S.D. Norris

Place and Date of Hearing:

Vancouver, B.C.

February 18 & 23, 2016

March 16 & 17, 2016

Place and Date of Judgment:

Vancouver, B.C.

March 17, 2016

- [1] THE COURT: This is an application brought on behalf of Mr. Iser, plaintiff in these proceedings, for a variety of relief, all by way of discovery or disclosure.
- [2] There is a cross-application brought by Her Majesty for two heads of relief: firstly, for an order that the defendants LeBlanc and Verwold cease to be parties and be struck from the style of cause, or in the alternative striking pleadings as against those defendants. The second application by the defendants is for leave under Rule 7-3 to serve interrogatories to Jessica Nicole Iser. I will explain her role in a few seconds.
- [3] The applications by the plaintiff -- well, before I go there, all of this arises as the result of unfortunate -- perhaps tragic is a better word -- circumstances that occurred in August of 2012 at the Matsqui medium security institution, a federal institution operated by the Correction Services. Mr. Iser at the time was 31 years of age. As I understand the facts, on his first day at Matsqui, he was by some means taken to a blind spot, if you can call it that, in the day yard at roughly 5:00 p.m., dinner time, in any event, and was attacked by seven, as we understand it, seven assailants, all of course fellow inmates.
- [4] The theory of the plaintiffs is that these were members of rival gangs. Mr. Iser is a member, or was a member, of the United Nations, the UN gang, so called. The antagonistic gangs in the institution apparently included members of the Red Scorpions, the Independent Soldiers, and Hells Angels, all of whom I gather were, as I say, antagonistic to UN gang members.

- [5] He was assaulted. He was severely injured, as I understand it. He suffered traumatic brain injury, to the extent that he is now a patient under the Patient Property Act, and his mother, Jessica Nicole Iser, is his committee. He now resides with his mother and thus the interrogatories I referred to that the defence seeks are to -- they want to address them to Ms. Iser as his committee.
- [6] This matter was heard by the court on February 18, February 23, March 16, and today, March 17, the latter two days being full days. My recollection is that most of the 18th was taken and only the afternoon of the 23rd. The point in saying that is there has been considerable opportunity and a long time for argument.
- [7] Notwithstanding that, we were not able to get to the defendants' applications, so they are adjourned accordingly. I am not seized with them. I have heard a very great deal of the background of this, but I am not sure that that makes too much of a difference. As a consequence of the way this matter has proceeded, comments I have made during submissions, and my reasons that are following, the defence may well wish someone else to hear this and I would understand that.
- [8] Taking the plaintiff's application, it is first, number 1, and I refer, Madam Registrar, to the paragraphs in their paragraph numbering that is in their application. Number 1, that the defendants provide to the plaintiff within seven days of this order, an amended list of documents listing all the documents that relate to any and all matters in question in the action on the expanded basis of Rule 7-1(11). In other words, what is loosely called the Tier 2 documents.
- [9] Secondly, that the documents, list the documents over which grounds of privilege are claimed as P6, 7, and P in the defendants' list of documents dated August 31, 2015.
- [10] Third, counsel for the Attorney General swear an affidavit verifying the list of documents.
- [11] Fourth, the Abbotsford Police Department provide unredacted copies of their file. I gather that has been done. Certainly they are not here and they have not taken a position.
- [12] MS. PRICE-STEPHENS: The documents from Abbotsford Police Department were forwarded to the defence counsel, and we have received those documents. Some, I believe, still are redacted.
- [13] THE COURT: Oh I see, thank you, okay.
- [14] MS. PRICE-STEPHENS: By -- I apologize, by my -- by defence, as opposed to --
- [15] THE COURT: Yes.
- [16] MS. PRICE-STEPHENS: -- by the APD.
- [17] THE COURT: I understood that, yes.

- [18] Five, Abbotsford Police Department provide unredacted copies of the following documents, referred to as the attachments in the APD file.
- [19] Six, that the defendants provide to the plaintiff within seven days of pronouncement of this order, the following documents. There are then listed various categories of documents, some specific, some by category, subparagraphs (a) through (v). That is the disclosure of documents.
- [20] Paragraph 7, that Mr. LeBlanc attend for a continuation of his examination for discovery. Eight, that Mr. Verwold also attend for a continuation of his discovery. Each say prior to March 15th, an impossibility, of course, now.
- [21] Number 9, that the defendant shall produce a suitably-prepared and knowledgeable representative for examination for discovery.
- [22] Number 10, that the defendants provide responsive answers to the discovery questions listed in Schedule A.
- [23] Number 11, the plaintiff is at liberty to conduct further examinations for discovery of the defendants for a further seven hours, or any defendant, and costs in the cause.
- [24] Dealing first, and a little out of order with paragraphs 4 and 5 in relation to the Abbotsford Police Department: the files will go as requested. The police department has taken no position whatsoever and no one has attended on their behalf, and I understand that any investigations they have been engaged in are complete. My understanding then is that you probably do not even need an order on the terms of Antunes, but that is, I suppose, for the police department to possibly discuss with you. In any event, those paragraphs will go.
- [25] Paragraphs 2 and 6 will be addressed as follows. There has been considerable discussion of the basis for redaction or non-production of documents. To be clear, the schedules to the amended or multiply-amended list of documents of the defence have claimed at one point, by my count, 350 documents as subject to, I will say, various provisions restricting their disclosure. I say various provisions, because taking any particular document, it was not unusual to see, in the spreadsheet schedule, reference to resistance to production as being not relevant, but also subject to "P categories".
- [26] To explain, the defence relies almost entirely on public interest privilege as restricting the disclosure of, I will say, a multitude of documents, as I have said, some 350, most of which are resisted based on some level of, or some basis or aspect of, public interest privilege. The defence has sub-categorized its interpretation of public interest privilege into nine separate categories and then, in respect of various -- all the documents have said P1, P7, P9, whatever. One could then refer back to their code, if you will, and see that P9, for example, might say something like, "Presents risk to a named individual", that if that name is disclosed, that person may suffer risk of physical harm. I use that as an example.

- [27] Subsequent to the earlier hearings, at the urging of the court, there was a re-examination of the documents. Ms. England, who filed or swore an affidavit on the 22nd of February, as I believe she is a security intelligence officer and is pretty closely associated with this case and with the process by which information is restricted or disclosed, reviewed the documents, and I am told was prepared or that the defence was prepared to release a less-redacted or enlarged degree of disclosure. They did so in two categories. They said one category of binders, two binders, I think, was ones that had been redacted for relevance. I have said several times, I will say it again in my reasons here, that it sounds to me like a self-chosen Halliday order. That they have simply gone through documents, have redacted various aspects for which they say it is just not relevant.
- [28] Now, usually, for what it is worth, when we hear that argument, it is usually in the context of personal injury cases, but obviously it is not restricted to that, and usually we are given some specifics. Usually we are hearing, "well, there are real privacy issues here or there is a real confidentiality issue here". Relevance is an awfully broad term in this area, and I was not told why documents are irrelevant, but in any event, that was the approach.
- [29] The second category of what they said was greater disclosure, less redaction, was those documents which they said related to the public interest privilege.
- [30] That, by Ms. De Los Reyes' calculation, left something like 110 documents still in the original category by which the privilege was claimed and which were listed, as I said, as amongst those 350 documents.
- [31] I pause to say that the very limited opportunity that the plaintiff's counsel has had to look at these newly-released documents, if I can call them that, in the last day or so, because they were presented yesterday at the start of the hearing, they are not satisfied that enough redactions, if you will, have been removed. They still feel that there has been an unreasonable degree of restriction on the documents.
- [32] A full answer to that, in my respectful view, is the form of order granted by Mr. Justice Affleck, acknowledging that it was by consent, in *Margison v. Cardinal*, that is Vancouver Registry No. S145650. I have that exhibited before me in Ms. Grace's affidavit. In my respectful view, it addresses the obvious need and compelling purposes for confidentiality in respect of claims arising in a secure institution such as Matsqui.
- [33] Again, in my respectful view, this is so obviously, to me, the appropriate approach to take that it is unfortunate that so much work and so much time has gone into trying to get documents which I will say are, beyond any doubt in my mind, fundamental and essential to the plaintiff's case.
- [34] The various redacted documents or documents which are simply held back in the privileged documents, I will call them that, very many of them, in my respectful view, seem obviously Tier 1 or Rule 7-1(1) documents that will assist in proving or disproving material facts in the claim. An example, after this event: naturally there were inquiries made. I am sure there

were inquiries at very many levels, and I am sure, being the institution it is, lots of documents were generated. But I am amazed; a board of inquiry was structured, it conducted its business and came up with conclusions. I am told that that is not a hearing inquiry, as we would know it. It was a paper inquiry, to the extent it examined various, I guess, statements, reports, that sort of thing and came up with conclusions; in other words, "what went wrong?" I am told that that document, its conclusions, is redacted. That is just so obviously a fundamental document to the plaintiff's case that I take it as indicative of the level of restriction that has been applied here.

- [35] I do not think the plaintiff should have to tease out of lists of documents the documents they have in their application, paragraph 6. It is normally not the plaintiff's or any party's job to anticipate what the other might have in their documents and then ask for it, but in a large list, yes. Mr. Justice Davies said in *Kaladjian* that the first round, Tier 1 documents, 7-1(1) documents, are defined -- the production, their categories, whatever -- are defined by the pleadings. The other or greater disclosure under Rule 7-1(11) is defined by evidence, like "show us the evidence". I understand that.
- [36] In this case, it would be very hard to get that evidence because it is a circular argument. It is hard to establish a particular document's importance, relevance, materiality, when there is such a restrictive approach taken to production on the other side. It puts a party in a very circular circumstance, in my view.
- [37] This order will go on the terms of Mr. Justice Affleck's order in *Margison*. I expect a refocused effort on the part of the defence, a redoubled effort, if you will, to get to it.
- [38] I will address the concerns, as I understand them. Over and over and over again I was told release of this information is so sensitive that it can result in physical harm to parties named, parties involved. I find the irony of this overwhelming when I am told that some of the redactions included Mr. Iser. For example, the defence does not want to release where he is living. He is living with his mother. Retaliation against whom? Against the parties that beat up Mr. Iser? I am not saying there should be retaliation, obviously there should not, but I find it an ironic situation for Her Majesty to refuse to disclose names or the identities of assailants, for example, on that basis.
- [39] Nobody is acting for these people. I mean, they are John Doe 1 through 8 or whatever. The plaintiffs have learned now who these people are. They have learned that from the Abbotsford Police Department's investigation.
- [40] It is my view, in conclusion, that the response has been overly restrictive, that it speaks to more of an institutional approach, almost a bureaucratic approach. While it may be grounded in a genuine and sincere concern for the safety of other people, be they the assailants or anyone else, it may also be grounded in a reflexive concern for further liability against Her Majesty if there should be further repercussions. I do not know, and I cannot decide that based on what I have been told for the last four days of applications.

- [41] But it is absolutely clear to me that it is not possible for Mr. Iser to pursue his claim in a reasonable and fair way without much greater disclosure.
- [42] Now, I started to discuss the basis for the claim of public interest privilege. It is, generally speaking: (1) a fear of further harm to inmates; (2) I guess, a fear of possible harm to staff; (3) possible compromise of the security of the institution, in other words the release of schematics, drawings, that could aid in someone's escape or something like that. I understand that and I do not think those are unreasonable precautions whatsoever; certainly not unreasonable concerns.
- [43] I think this order provides for that, because the people who will have access to this information under the terms of the order are so restricted. It starts with Mr. Iser's counsel. They are officers of the court. They understand their responsibilities. They will retain and instruct experts who will also understand their responsibilities and whose understanding of their restrictions is required by endorsement under the terms of the order. Finally, there is the potential for release of information to Ms. Iser. I assume that that will be done in an extremely careful and confidential way, because broadcast, release of the information to her would obviously trigger the same concerns that I have been talking about.
- [44] But I am not convinced at all that that is a risk. I am not convinced it will be necessary for her to carry away documents, schematics, statements, names, whatever. I am more than convinced and satisfied that the proper prosecution of Mr. Iser's claims can proceed without that risk.
- [45] I should say that, without getting into too much of the detail, there was considerable argument today about informant privilege. I do not consider any of that argument persuasive. I do not consider the precedents applying to this particular case.
- [46] Every case I was referred to, save two, was in the criminal context. Her Majesty represents us, the people, in that context. She is the prosecutor. The protection of informants who assist the prosecution is so clear, so important, and so structured that there is a federal statute protecting them. This is not that. This is the civil process wherein disclosure favours the process. I am trying to recall Madam Justice Kirkpatrick's words in *Antunes*, it is something like the presumption favours disclosure.
- [47] These people are not informants under the terms of that legislation or those cases. They are witnesses, witnesses to the event, or they are defendants. It is more irony to say that these people are somehow protected by informant privilege. I, with the greatest of respect, consider that a complete misunderstanding of what those cases stand for. I said during submissions, and it is my view, that the protection of informants in that circumstance protects a process, a necessary process by which information is gathered for important and necessary prosecution of crimes. Again, this is not that.

- [48] Two of those cases, however, were not criminal cases, per se. They related to inmates' circumstances, applications for either habeas corpus in one case or in another a process by which an institutional decision had been made to raise an individual, as I understood it, from a lesser, lower security to a higher security institution and Judge Romilly in that case said, "Look, we understand that this means a greater restriction on the inmate's circumstances," and then proceeded to consider whether or not a summary of information that had been provided by institutional informants was sufficient or whether greater information was required. Again, I do not consider those compelling circumstances.
- [49] I asked for a better description of who Her Majesty considered to be informants. I was told that cannot be answered, because that would compromise their safety. I asked, "could you speak generically and tell me Inmate A, Inmate B, Inmate C, are there 15 or are they 12 people?" That answer was not forthcoming. I was simply told they are not staff.
- [50] I am not persuaded that Her Majesty has exercised the necessary diligence and responsibility under the Rules of Court and the law as I understand it to carefully and assiduously examine the documents they have regarding the rights that Mr. Iser has to disclosure and to govern their disclosure accordingly. It is my view that there has been a more reflexive response, almost a wall thrown up, and that is wrong.
- [51] We have Ms. Grace's affidavit indicating that she has had numerous cases, up to 30, I think she said:

I have been counsel in numerous (over 30) prison assault cases and other claims filed against provincial and federal prison authorities . . .

- [52] Her evidence is that other cases of serious injury done to people like Mr. Iser while incarcerated have been dealt with by a confidentiality order similar to what I have been discussing, given by, in that case, Mr. Justice Affleck. The plaintiffs offered on two separate occasions confidentiality agreements, and for the life of me I do not understand why that was not acceptable. That was not seriously entertained but it offers a solution. It gives Her Majesty the security respecting the confidential information and it respects the professionalism of the parties involved.
- [53] Of course, in respect of this process of documentary disclosure, the plaintiffs have liberty to apply further if necessary. I suppose I should hear that if it happens, that the process is further, in their view, unreasonably restricted.
- [54] I am a little concerned that, notwithstanding what I have ordered, the cases do, and Judge Affleck's reasons in the case indicate, well, redact for relevance. I am a little concerned about what I have heard about Her Majesty's view of what is relevant and what is not. I am very concerned about that and, frankly, I am pessimistic.

- [55] So going back to the application -- I said that, in my respectful view, deals with paragraph 2. I am not going to order Her Majesty to swear the affidavit, that is adjourned, that is number 3. So numbers 2 and 6, in my view, are dealt with by this requirement they do this.
- [56] Paragraph number 1, 21 days. Twenty-one days for them to do their list of documents. They have got to get to it. They have got to spend some serious time going through these documents and restructuring their list of documents. I do not think they can do that in seven days. We have got Easter coming, too. So that is 1, 2, 3, 4, 5, 6.
- [57] Paragraph 7, Mr. LeBlanc will reattend for a full day.
- [58] Paragraph 8, Mr. Verwold will reattend for up to two days. I do understand he has important responsibilities. I do understand that he is now the warden of Matsqui, but I do not want to repeat my view of the significance of the claims here. It would seem to me that two days may not be necessary, but it would also seem to me that that is very much up to the defence.
- [59] Number 9 is adjourned. I am persuaded that Mr. Verwold did not necessarily turn his mind to his responsibilities as the representative of Her Majesty after he was specifically put up as Her Majesty's representative which put him in a difficult situation for a layperson to try and understand: "what am I? Am I the representative or am I the defendant?" He was both, but that is the choice of the defence. Maybe they will rethink that; that is up to them, but that is adjourned.
- [60] If Mr. Verwold does not give reasonably informed responses, if he has not reasonably informed himself, given a second chance, frankly, then it is entirely possible that Her Majesty will have to put up another witness, but that is, I say it again, up to them.
- [61] Paragraph 10 is adjourned, as well. I should address this. I heard a great deal about this. That Mr. LeBlanc was first examined for something like a day, a little under. Anyway, he was asked a lot of questions. Questions were left outstanding. It happens. The next day with Mr. Verwold, it was asked of the defence, could the outstanding questions now apply to Mr. Verwold, since the view seems to be taken that those were questions more appropriately addressed to Her Majesty's representative rather than to Mr. LeBlanc in his personal capacity. That is, as I understand it, at least partially the problem.
- [62] On that day, Mr. Workun, who was conducting the examinations for the defence, said, "Well, you know, many of those questions were overly broad." He did not give a clear answer to the request that those outstanding questions simply be taken as applying to Mr. Verwold and have Mr. Verwold go and get the answers. But instead, the plaintiffs were told, well, those questions were overly broad. Some of them for sure. I said this at great length during the submissions; that it seemed unfair to me and, having heard more, I am convinced it is unfair to allow a witness to be asked questions, to have those questions outstanding, have that witness discharged for the day, come back the next day, and then say, "Well, those questions were overly broad, so we are not going to deal with them."

- [63] It deprives the examining counsel of the opportunity to readdress the issue, to narrow the question down, to restate it in a satisfactory fashion. It is a perfectly reasonable and benign, frankly, objection to make to say, "Well, it is overly broad. You are asking two or three questions there. Can you narrow it down?" It is done all the time, but to do it the next day when a witness is gone and at the same time say, "We are not going to commit to applying those questions to this new witness."
- [64] Anyway, I say that by way of background and explaining I think this can be addressed now that Mr. Verwold is going to have to come back and be examined, and those "overly broad questions" can be directly given to him. If they are still overly broad in the view of counsel, that can be addressed when he is there and you can deal with it.
- [65] Number 11, that is liberty to conduct further examinations on any of the defendants. Oh, well, I think I have already answered that.
- [66] Is that it?
- [67] MS. WEBSTER-EVANS: Time limit for those discoveries. My friends will have 21 days to get the new documents listed and disclosed.
- [68] THE COURT: It would be much shorter than that. Honestly, I have said, and I will say this again as part of my reasons, I am very concerned that the trial date be preserved. I cannot see a good reason why you should not be given the opportunity to be properly prepared for your trial in September. It is not easy to get five weeks, and normally I would put a shorter fuse on that, but I have committed them to some serious review of their documents, and I think that they may need the 21 days.
- [69] MS. WEBSTER-EVANS: So it will take us to the middle of April, Your Honour.
- [70] THE COURT: Yes.
- [71] MS. WEBSTER-EVANS: To get those documents.
- [72] THE COURT: Yes.
- [73] MS. WEBSTER-EVANS: Then we will -- perhaps my friends will provide some earlier, but 21 days, then we will need to do those discoveries, that will take us --
- [74] THE COURT: And you have got experts out there.
- [75] MS. WEBSTER-EVANS: Pardon me?
- [76] THE COURT: And you have got experts out there.
- [77] MS. WEBSTER-EVANS: And I have got experts, so I am hoping we will be able to do those discoveries by the end of April, because that will only give our poor experts one month. We are --
- [78] THE COURT: I am not saying you cannot --

- [79] MS. WEBSTER-EVANS: -- very limited.
- [80] THE COURT: I have not said you cannot schedule your discoveries. You can take steps to schedule your discovery whenever you want, but you are going to have to -- if your friends do not get those documents to you or a recast list in the 21 days, then, well, I do not know what is going to happen then.
- [81] I think I have addressed the issues. I have adjourned your friends' application. They can reset that whenever they want. They may well try and -- well, they may well proceed to set it down in advance of discoveries on the principle that they should not be discovered because they will not be parties, that is up to them.
- [82] MS. PRICE-STEPHENS: Your Honour, I would like to speak briefly to the matter of costs.
- [83] THE COURT: Oh yes, we have not got there yet. I just want to be absolutely clear that we have covered off the issues. Everybody is nodding on the plaintiff's side. Okay, costs.
- [84] MS. PRICE-STEPHENS: Very simply --
- [85] THE COURT: You are entitled to your costs so far.
- [86] MS. PRICE-STEPHENS: Yes.
- [87] THE COURT: I need to hear from Ms. De Los Reyes, but you have succeeded. The rules, as far as I am concerned, say that, but I do need to hear from her. Why would they not get their costs?
- [88] MS. DE LOS REYES: Our position is that the parties should bear their own costs in this application, considering how the application has proceeded. We maintain that we did not get adequate -- first, we did not get a demand for documents, and second, we did not have adequate notice with respect to the privilege claims that were in issue.
- [89] THE COURT: Okay, thank you. You are entitled to your costs on Scale B, three-and-a-half days. This has consumed, in one form or another, three-and-a-half days.
- [90] I am just going to assemble all your documents and give them back to you. Give these back to Ms. De Los Reyes. Give these two green books back to her.
- [91] MS. PRICE-STEPHENS: Your Honour, may I clarify? All costs in any event of the cause?
- [92] THE COURT: Yes, that is right.

"Master Baker"

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