

CANADA / JUDGMENT

Merritt v. Canada (Attorney General)

2020 BCSC 2112

COURT

Supreme Court of British Columbia

DECIDED

15 December 2020

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2020 BCSC 2112 Merritt v. Canada (Attorney General)

01N THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Merritt v. Canada (Attorney General),

2020 BCSC 2112

Date: 20201215

Docket: S123809

Registry: Vancouver

Between:

Sherri Merritt

Plaintiff

And

Attorney General of Canada, The Minister of Justice of the

Province of British Columbia, Claude Wilcott, Jennifer Hyland,

John Doe and Jane Doe

Defendants

Before: The Honourable Mr. Justice Walker

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

G.A. Krueger

Counsel for the Defendants Attorney General of Canada, Minister of Justice of the Province of British Columbia, Claude Wilcott and Jennifer Hyland:

C.N. Landsiedel

A. Eyer

K.L. Lakusta

Place and Date of Hearing:

Vancouver, B.C.

December 15, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 15, 2020

- [1] THE COURT: These reasons concern an application by the defendants to strike the expert report of Mr. Les Rose dated August 26, 2020.
- [2] The background facts concerning Ms. Merritt's claim are set out in my prior reasons for judgment respecting the defendants' application for a sealing order, which are indexed at 2020 BCSC 1887.
- [3] In his report, Mr. Rose states that his opinion concerns two matters:
1. This letter is in response to your correspondence dated August 13, 2020, with respect to the Sherri Merritt matter requesting my expert opinion in regard to:
 - 1) the expectations and standards of the competent RCMP officers operating in B.C. ("E' Div.") on the investigation of a potential criminal charge which was comparable to the charge being investigated against Ms. Merritt; and
 - 2) the appropriate protocol of the RCMP when the investigation does not meet the required expectation and standards.
 - [4] Throughout the material time, Mr. Rose was employed by the Department of Justice working in the RCMP Legal Advisory Section between 1999 and 2015. Mr. Rose's experience relevant for this application is described in his report at paras. 7-11 and 13 -15:
 7. In 1997, I accepted an opportunity to relocate to Whitehorse for the purposes of promoting a more constructive working relationship between the RCMP and the Whitehorse Regional Office Prosecution's Group.

8. During my service in Whitehorse embedded within the Whitehorse RCMP Detachment[,] I approved for prosecution every significant criminal investigation for the purposes of quality-control.
9. The approval process included a review of the investigation reports (RTCC) to be forwarded to Crown Counsel on the basis of sufficiency of evidence; and as well sufficiency of public interest for prosecution.
10. In 1999, I relocated to Criminal Operations E Div, Victoria (and in 2002 subsequently relocated again with the same section in Vancouver E Div HQ) working within the RCMP Legal Advisory Section for the purposes of providing real-time operational legal advice to a broad spectrum of investigative units.
11. I also assisted with operational policy development, and in conjunction with rolling out policy I provided educational and training experiences to senior and mid-level management.
13. On frequent occasions, I was consulted by senior management to provide advice with respect to high impact anti-corruption investigations, both internal to the RCMP and external investigations of persons working in other public/governmental bodies and agencies.
14. In the course of my career I have delivered legal education with respect to the maintenance of high-quality Charter and ethically-compliant investigations.
15. Such presentations most always include a component that provides guidance as to how to avoid wrongful convictions. The venues for these presentations and learning experiences include various RCMP regional headquarters and detachments across Canada.
- [5] Moreover, Mr. Rose was involved with Cpl. Allchin in reviewing the facts of Ms. Merritt's case, and at a minimum, formed a view of Ms. Merritt's conduct and of the course of action being taken by members of the RCMP Coquitlam detachment. Cpl. Allchin is a material witness and is listed as a witness to be called in Ms. Merritt's case.
- [6] Mr. Rose, along with Cpl. Allchin, analyzed the Criminal Code and formed a view of the merits of some or all of the case, which he, along with Cpl. Allchin, decided to communicate to their superiors. I do not need to decide whether or not Mr. Rose in fact gave legal advice to Superintendent Wilcott about the matters concerning Ms. Merritt as the latter says in his evidence occurred. My findings in this respect of Mr. Rose's involvement in the matter, including forming an opinion, are supported by the following evidence.
- [7] I will begin with Mr. Rose's own affidavit evidence. In his affidavit sworn October 17, 2020, Mr. Rose deposed at para. 13:

I do recall discussing with Cpl. Allchin, as a friend and colleague, that given the circumstances of the matter, he had an obligation to disclose to the management of the Coquitlam Detachment that Cpl. Allchin had a conversation with the Plaintiff in which he assured the Plaintiff that her actions protecting the integrity of her personal "correspondence macros" were reasonable and not problematic.

[Emphasis added]

[8] Next, I turn to Cpl. Allchin's statement dated November 8, 2011, to one of the defendants, Sgt. Hyland, during the material time. I have extracted what Cpl. Allchin said to Sgt. Hyland that is relevant to the instant application:

H [Sgt. Hyland] Uh uhm.

A [Cpl. Allchin] I can't remember exactly but I went in there to talk to Les [Mr. Rose] to say um you know I give you the facts just same facts we just discussed for the last couple hours how long we've been here and I said Les, this is..what do you think that they're looking at for mischief and he looked at it and he said on the basis of the facts that, same facts that I've given you now

H Uh uhm.

A He said this is ridiculous it can't be that.

H Uh uhm.

A Um and then Doug was walking by, I said Doug get in here. You know you need to know about this whether you know you might have to do the statutory on me if you believe that I you know something under the Code of Conduct you need to hear this.

H Uh uhm.

A I just wanted I said look these are the facts. I'm not hiding anything.

H Uh uhm.

A This is what I've done.

H Uh uhm.

A And uh Les said well this is nothing, your biggest fear is um exploding into something else and you're gonna give yourself sleepless nights if you do that.

H Uh uhm.

A I don't see any, there's nothing here and Les said well to Doug well why don't you try and nip this in the bud.

H Uh-huh.

A call Coquitlam Detachment.

[Emphasis added]

[9] The third document is either an email or memorandum sent by Cpl. Allchin to Sgt. Hyland on November 7, 2011, the day before Cpl. Allchin gave his statement to Sgt. Hyland. It is copied to Mr. Rose, showing his ongoing involvement in the matter:

Good morning, Sgt. Hyland.

Please find attached a preamble statement to our interview tomorrow.

I want to be the most effective witness that I can be, and I want to ensure that you hear the full facts as I know them. I don't think I can do ensure either without providing you with this statement.

I am not working today, but I will see you tomorrow at 12:30 at R/M Detachment.

[10] From this evidence, I am satisfied that Mr. Rose's relationship with the RCMP working in its Legal Advisory Section, coupled with his review of Ms. Merritt's case and his discussion with Cpl. Allchin, puts him in a conflict of interest sufficient to disqualify him as an expert: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] 2 S.C.R. 182 at paras. 10 and 35. It cannot be said in this case that Mr. Rose's evidence will satisfy the obligation of an expert as set out by the Supreme Court of Canada and in the Supreme Court Civil Rules (Rule 11-2 Duty of Expert), to provide impartial, independent, and unbiased evidence.

[11] The defendants have discharged the burden on them as set out in *White Burgess* in para. 48. In this case it is the lack of Mr. Rose's independence and impartiality which goes to the admissibility of his report as opposed to weight: *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.*, 2019 BCSC 275 at paras. 107-113:

The duties of an expert: Independence and Impartiality

[107] In *White Burgess*, Cromwell J, wrote at paras. 26 and 27:

[26] There is little controversy about the broad outlines of the expert witness's duty to the court. As Anderson writes, "[t]he duty to provide independent assistance to the Court by way of objective unbiased opinion has been stated many times by common law courts around the world": p. 227. I would add that a similar duty exists in the civil law of Quebec: J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at para. 468; D. Béchar, with the collaboration of J. Béchar, *L'expert* (2011), c. 9; An Act to establish the new Code of Civil Procedure, S.Q. 2014, c. 1, art. 22 (not yet in force); L. Chamberland, *Le nouveau Code de procédure civile commenté* (2014), at pp. 14 and 121.

[27] One influential statement of the elements of this duty are found in the English case *National Justice Compania Naviera S.A. v. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68 (Q.B.). Following an 87-day trial, Cresswell J. believed that a misunderstanding of the duties and responsibilities of expert witnesses contributed to the length of the trial. He listed in obiter dictum duties and responsibilities of experts, the first two of which have particularly influenced the development of Canadian law:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation
2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his [or her] expertise An expert witness in the High Court should never assume the role of an advocate. [Emphasis added; citation omitted; p. 81.]

(These duties were endorsed on appeal: [1995] 1 Lloyd's Rep. 455 (C.A.), at p. 496.)

[Emphasis in original.]

[108] At paras. 28 to 31 Cromwell J. discussed various formulations in the civil Rules of Court in various Canadian jurisdiction that "provide a convenient summary of a broadly shared sense of the duties of an expert witness to the court".

[109] At para. 32 he wrote:

[32] Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her: P. Michell and R. Mandhane, "The Uncertain Duty of the Expert Witness" (2005), 42 Alta. L. Rev. 635, at pp. 638-39. These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias. [My emphasis.]

[110] In British Columbia Rule 11-2 provides:

Duty of expert witness

- (1) In giving an opinion to the court, an expert appointed under this Part by one or more parties or by the court has a duty to assist the court and is not to be an advocate for any party.

Advice and certification

- (2) If an expert is appointed under this Part by one or more parties or by the court, the expert must, in any report he or she prepares under this Part, certify that he or she
- (a) Is aware of the duty referred to in subrule (1),
 - (b) has made the report in conformity with that duty, and
 - (c) will, if called on to give oral or written testimony, give that testimony in conformity with that duty.

[111] If a proposed witness certifies awareness of the duties under Rule 11-2 (1) (as Mr. Isnor has done in this case) the burden shifts to a party opposing admission of the witness' evidence to establish a realistic concern that the expert is unwilling or unable to discharge that duty. If such a realistic concern is established the burden shifts back to the party proffering the evidence to establish on a balance of probabilities that the opinion is not tainted by bias. If lack of taint is not established the opinion evidence, or those parts of it that are tainted by a lack of independence or partiality should be excluded. These same burdens apply at common law. See: White Burgess at paras. 47 and 48.

[112] In White Burgess at para. 49 Cromwell J. went on to observe that it will be quite rare that expert evidence will be excluded at the threshold stage and should occur only in those very clear cases in which an expert is unwilling or unable to provide objective or non-partisan evidence. Anything less than clear unwillingness or inability to provide such objective or non-partisan evidence should not lead to exclusion but should be taken into account at the gatekeeping stage.

[113] Justice Cromwell explained the task of the trial judge with respect to issues of partiality at the gatekeeping stage as follows at para. 54:

[54] Finding that expert evidence meets the basic threshold does not end the inquiry. Consistent with the structure of the analysis developed following Mohan which I have discussed earlier, the judge must still take concerns about the expert's independence and impartiality into account in weighing the evidence at the gatekeeping stage. At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.

[Bold and underline emphasis in original]

[12] I agree with the defendants' submission that Mr. Rose did not approach the task as an expert as a "blank canvass".

- [13] Mr. Rose's role as an expert also offends the prohibition against lawyers acting against their former clients: *McDonald Estate v. Martin*, [1990] 3 SCR 1235 at 1245-1246.
- [14] I therefore do not need to consider the other grounds raised by the defendants on this application, i.e., the Mohan factors of relevancy and necessity (*R. v. Mohan*, [1994] 2 SCR 9) or whether Mr. Rose is qualified to provide the opinions he expresses in his report.
- [15] I order the relief sought by the defendants to strike Mr. Rose's report. In doing so, I wish to make these two additional comments. The first one is my decision is not intended to and should not impact upon Mr. Rose's potential role as a fact witness. Second, my decision does not and should not reflect on his integrity and his expertise.
- [16] Now, is there anything arising?
- [17] MS. LANDSIEDEL: It's Ms. Landsiedel.
- [18] THE COURT: I am sorry, you cut out. You said Ms. Landsiedel and then you cut out. I am sorry.
- [19] MS. LANDSIEDEL: Oh, I am sorry. I am just pointing out just the issue of costs remains.
- [SUBMISSIONS RE COSTS]
- [20] THE COURT: Thank you. I agree with Ms. Merritt's submission that the defendants' application to strike Mr. Rose's report is rolled up with trial preparation and that Ms. Merritt's opposition to the application was bona fide. That said, the basis upon which the defendants succeeded in striking the report was due to Mr. Rose's clear prior involvement in the matter.
- [21] Mr. Rose discussed the matter of Ms. Merritt's action with Cpl. Allchin, who is a material witness, and provided him with his views on at least some of the issues. Mr. Rose formed an opinion about the matter that he believed should be conveyed to Cpl. Allchin's superiors. It was the nature of Mr. Rose's involvement in the matter that clearly and decidedly made the issue one of admissibility and not weight. In this respect the defendants should be entitled to their costs to bring the application, which I commend them for doing so quickly, well before the deadline for service of expert reports, to allow Ms. Merritt the opportunity to secure another expert if she considers it necessary.
- [22] I therefore conclude that costs should be paid by Ms. Merritt to the defendants in any event of the cause, but I do not order them payable forthwith in light of the defendants' outstanding application to strike the claim. If the defendants are successful in that application, then they will recoup these costs as the action will be dismissed; if they are not successful and if, for example, Ms. Merritt succeeds and obtains an order for costs, there could be an offset.
- [23] So to conclude, I order costs paid by Ms. Merritt in any event of the cause but not forthwith.

[24] Is there anything arising?

[25] MS. LANDSIEDEL: Nothing from the defendants, My Lord.

[26] THE COURT: Mr. Krueger?

[27] MR. KRUEGER: No, My Lord. Thank you.

[28] THE COURT: I want to thank counsel for excellent work in bringing the issues to the fore in a very clear and concise manner. So if there is nothing else, we will adjourn.

"Walker J."

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