

CANADA / JUDGMENT

Nuttall v. Canada (Attorney General)

2023 BCSC 601

COURT

Supreme Court of British Columbia

DECIDED

17 April 2023

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2023 BCSC 601 Nuttall v. Canada (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nuttall v. Canada (Attorney General),

2023 BCSC 601

Date: 20230417

Docket: S213568

Registry: Vancouver

Between:

John Stuart Nuttall and Amanda Marie Korody

Plaintiffs

AndCanada (Attorney General), Ministry of Public Safety and Solicitor General (British Columbia),
Officer A, Officer C, Officer D, Stephen Matheson, Bill Kalkat, Stephen Corcoran, Daniel Bond,
Peter Eccles, Sharon Steele,

and John Doe

Defendants

Before: Master Bilawich

Reasons for Judgment

Counsel for the Plaintiffs:

N.J. Muirhead

J.F. Gray

Counsel for the Defendants Attorney General of Canada and Minister of Public Safety and Solicitor General (British Columbia):

D. Kwan

J. DeWiel

No other appearances

Place and Date of Hearing:

Vancouver, B.C.

March 23, 2023

Place and Date of Judgment:

Vancouver, B.C.

April 17, 2023

Introduction

- [1] This action arises out of a police investigation and criminal prosecution of the plaintiffs. The criminal proceedings were ultimately stayed based on a finding of abuse of process and entrapment. The reasons are indexed as *R. v. Nuttall*, 2016 BCSC 1404 and *R. v. Nuttall*, 2018 BCCA 479.
- [2] In this action, the plaintiffs claim for damages against prosecutors, police officers and the provincial and federal governments arising from the investigation and prosecution. Among the defendants are three identified as Officers A, C and D. They are undercover police officers who were involved in the investigation. They testified at the criminal trial. Publication bans were ordered in both the BC Supreme Court and Court of Appeal proceedings which restrict publication, broadcasting or transmission of evidence that could identify any undercover police officers. Sealing orders were also made which restrict access to the court files to counsel of record and court personnel. The bans and sealing orders remain in effect indefinitely.
- [3] Plaintiffs' counsel does not yet know the names of Officers A, C and D and has not yet been able to arrange to have them served with the notice of civil claim. Counsel asked whether the Attorney General of Canada or Ministry of Public Safety and Solicitor General (British Columbia) (collectively, the "Crown Defendants") would accept service on their behalf, which was declined. They also proposed that the officers voluntarily accept service through their counsel of choice, which has not been taken up.

- [4] In this application, the plaintiffs seek leave to serve interrogatories on the Crown Defendants seeking disclosure of Officer A. C and D's names and their most recent residential and business addresses. The Crown Defendants oppose the relief sought.
- [5] The plaintiffs also apply for an order renewing the amended notice of civil claim for a further six months. That application is not opposed.

Background

- [6] Starting in February 2013, the plaintiffs became the subjects of an undercover police operation code-named "Project Souvenir". It took place between February 23, 2013 and July 1, 2013. On July 1, 2013, criminal proceedings were initiated against the plaintiffs on four terrorism-related charges.
- [7] On February 2, 2015, a trial by jury began in BC Supreme Court. The plaintiffs were acquitted on one count and a conditional stay of proceedings was granted on a second. The jury convicted the plaintiffs on two counts. The plaintiffs then applied for a stay of proceedings based on entrapment and abuse of process. On July 29, 2016, Justice Bruce granted their application. The Crown appealed the stay. On December 19, 2018, the appeal was dismissed.
- [8] On March 25, 2021, the plaintiffs started this action. On March 25, 2022, I granted an order renewing the notice of civil claim for a period of six months.
- [9] On August 29, 2022, the plaintiffs filed an amended notice of civil claim. On August 30, 2022, the plaintiffs served it on the Crown Defendants. On August 31, 2022, the federal Department of Justice ("DOJ"), representing both Crown Defendants, asked the plaintiffs to delay efforts to personally serve the individual defendants so it could determine whether it would also be acting for some or all of them as well.
- [10] On September 23, 2022, Master Nielsen made an order renewing the amended notice of civil claim for a further six months.
- [11] On January 6, 2023, DOJ informed plaintiffs' counsel it would not be representing the individual defendants. Between January 2023 and March 2023, the plaintiffs were informed that four of the individual defendants had retained counsel. Two counsel accepted service on their client's behalf. Two other individual defendants were served personally. Efforts to serve the remaining two are pending.
- [12] On February 28, 2023, the Crown Defendants filed a joint response to civil claim. No other responses had been filed prior to the hearing of this application.
- [13] With respect to Officers A, C and D, on March 6, 2023, the plaintiffs sent the proposed interrogatories to DOJ. On March 9, 2023, DOJ advised that the Crown Defendants would not consent to the interrogatories being served.

[14] The BC Supreme Court's formal sealing order and publication ban was not included in the application material before me. There is a warning included in Justice Bruce's reasons, as follows:

Restriction on Publication: Pursuant to ss. 486.5(1) and 486.5(9) of the Criminal Code there shall be no publication, broadcast or transmission in any way of any information that could identify any undercover police officers including any pseudonyms used by the undercover police officers involved in the investigation of the Accused. This publication ban applies until further order of the Court.

[15] The Court of Appeal's formal sealing order and publication ban is as follows:

THIS COURT ORDERS that any information contained in the transcript and appeal book filed herein that could identify any undercover police officer, including any pseudonyms used by any undercover police officer, shall not be published in any document or broadcast, or transmitted in any way.

THIS COURT FURTHER ORDERS that the documents contained in the appeal book filed herein and identified as [various exhibit numbers] shall be sealed and not be disclosed to any person, save and except counsel for the parties and court personnel.

AND THIS COURT FURTHER ORDERS that the transcript filed herein shall be sealed and shall not be disclosed to any person, save and except counsel for the parties and court personnel, except by order of the Court on application with two clear days notice to the parties, and upon such conditions as set by the Court.

Applicable Law

[16] Discovery by interrogatories is governed by R. 7-3 of the Supreme Court Civil Rules. Sub-rule (1) provides that they may only be served on another party of record if (a) that party consents or (b) the court grants leave.

[17] The principles considered when deciding whether to grant leave were summarized by Justice Riley in *The Insurance Corporation of British Columbia v. Teck Metals Ltd.*, 2020 BCSC 1617 at paras. 86-92:

- "[T]he court must be satisfied that the proposed interrogatories are relevant to an issue raised in the pleadings" (para. 87);
- Considering the purposes served by interrogatories, and the overall object of the Rules, "the court must be satisfied that the interrogatories are being effectively employed in the context of the discovery process, and not merely being used as a parallel means of obtaining information that could easily be obtained on discovery" (para. 87);

- "[T]he court should undertake a practical cost-benefit analysis, involving a consideration of the types of information sought and whether interrogatories are a suitable means of obtaining that kind of information" (para. 89);
- Interrogatories are "well suited for information that might have to be assembled or compiled from a variety of different sources" (para. 90);
- "[I]nterrogatories should not be in the nature of cross-examination, should not include a demand for discovery of documents, should not be used to obtain the names of witnesses, and should not be duplicative of demands for particulars" (para. 91); and
- Where interrogatories are presented to a corporate party, "they should be directed to a particular person or persons" (para. 92).

[Citations omitted.]

Plaintiffs' Position

- [18] The plaintiffs say the information sought in the interrogatories is relevant to issues raised in the amended notice of civil claim. The plaintiffs are entitled to know the names of Officers A, C and D. Their addresses are necessary to help effect service on them. Interrogatories are the most practical and cost-effective way to obtain this information.
- [19] The information sought is clerical in nature and representatives of the Crown Defendants can verify it through personal knowledge or reasonable inquiry. Inquiries will not be complicated or costly. Finally, the information sought is critically important and cannot be deferred until other discovery processes have been completed.

Crown Defendants' Position

- [20] The Crown Defendants argue that leave to serve the interrogatories should be denied because:
- a) The plaintiffs are trying to use interrogatories to obtain the names of witnesses, which is not permitted;
 - b) The Crown Defendants cannot disclose the information sought without violating the publication bans. If interrogatories are ordered, they will be obliged to object to them on this basis;
 - c) The plaintiffs and counsel who represented them in the criminal proceedings know or can refresh their memory regarding the names of Officers A, C and D. The plaintiffs or their former counsel can access the sealed portions of the court files if necessary;
 - d) The appropriate next step is for the plaintiffs to apply to vary the publication bans and sealing orders to allow all counsel in this action to access and use the sealed portions of the court files.

Analysis

- [21] The Crown Defendants argue the plaintiffs know or can obtain the names of Officers A, C and D through the counsel who acted for them in the criminal proceedings or the court files. The concern appears to be that the publication ban appears sufficiently broad to prevent the plaintiffs or their former counsel from sharing those names with counsel in this civil action.
- [22] Another argument advanced is that interrogatories cannot be used to seek the names and addresses of witnesses. Plaintiffs' counsel's response is that the interrogatories seek material facts, not witness names. While this may be arguable with respect to the Officer's names, the same cannot be said regarding their last known addresses.
- [23] The practical answer is that while the publication bans remain in effect, the Crown Defendants will object to answering the interrogatories on that basis. The plaintiffs will be obliged to make a second application to try to compel answers to the interrogatories, which will also be opposed. The plaintiffs will inevitably find it necessary to address variation of the publication bans and sealing orders. The contents of the court files are likely relevant to issues in dispute in this action.
- [24] Until the publication bans and sealing order issues are addressed, simply granting leave to serve interrogatories is unlikely to achieve the result that the plaintiffs desire. To the extent that allowing service of interrogatories could also circumvent or conflict with the terms of the publication bans, it appears doubtful that a Master can or should make such an order in the circumstances. The publication bans and sealing orders should be addressed first.
- [25] A journalist has previously unsuccessfully applied to set aside the publication ban: see *R. v. Nuttall*, 2021 BCSC 1924. In her reasons, Justice Watchuk reviews authorities addressing variation of publication bans, including cases involving undercover police officers. At paras. 50-51, she notes that the court has an ongoing supervisory authority over the court record. She also addresses onus and evidentiary burden on these applications:
- [50] The Supreme Court of Canada has recently confirmed that courts retain supervisory authority over the court record with respect to ancillary matters even after the decision on the merits has been entered: *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 at para. 36 [CBC]. Courts may exercise jurisdiction to vary or set aside a publication ban or sealing order where the circumstances relating to the making of the order have materially changed: CBC at para. 53. While CBC clarifies the state of the law, Abella J. (writing in dissent, but not on this point), citing *R. v. Adams*, [1995] 4 S.C.R. 707 at para. 30 and *Henry* at para. 11, notes that the proposition that a court can vary a publication ban when there has been a material change in circumstances is not a new one: at para. 113.
- [51] Regarding the allocation of onus and the evidentiary burden on the party seeking to vary a publication ban, Kasirer J. said the following at para. 55:

... I do agree that a first question for the court will be whether there has been a material change in circumstances since the making of the initial order ([Adams] para. 30). The burden of establishing this change falls to the party seeking a variation in the order (see, by analogy, *L.M.P. v. L.S.*, 2011 SCC 64, [2011] 3 S.C.R. 775, at para. 31). That party must establish both that a change of circumstances has occurred and that the change, if known at the time of the initial order, would likely have resulted in an order on different terms (*L.M.P.*, at para. 32; *Droit de la famille -- 132380*, 2013 QCCA 1504, 37 R.F.L. (7th) 1, at paras. 75-76; *R. v. Baltovitch* (2000), 47 O.R. (3d) 761 (C.A.), at para. 6). The correctness of the initial order is presumed and is not relevant to the existence of a material change of circumstances (*L.M.P.*, at para. 33; *Droit de la famille -- 132380*, at para. 78).

- [26] The safety of Officers A, C and D and their families continues to be a matter of public interest. In Justice Watchuk's reasons, at paras. 56-59:
- [56] There is clearly an important public interest in maintaining the safety and security of undercover operators and their families. As noted above, the Supreme Court of Canada has determined physical safety to be an important public interest: *Sherman Estate* at para. 96. Establishing a serious risk to an important interest does not necessarily require direct evidence. The court may infer "objectively discernable harm" on the basis of "logical inferences" and "objective circumstantial facts": *Sherman Estate* at para. 97.
- [57] The Dodds affidavit sets out the numerous ways in which identifying the undercover operators can place them at risk of serious harm. This is particularly so for the member currently engaged in ongoing investigations, but identification is also a risk to the other pool operators. I accept and rely on the evidence set out in the Dodds affidavit.
- [58] This risk of serious harm is amplified across both internal and international borders when one takes into account, "the information technology context, which has increased the ease with which information can be communicated and cross-referenced... In this context, it may well be difficult for courts to be sure that information will not be broadly disseminated in the absence of an order": *Sherman Estate* at para. 80.
- [59] Further, there is also a compelling public interest in maintaining the operational integrity of the existing investigations, as well as that of future operations that may require the deployment of any or all of the other three members who remain pool operators.
- [27] I conclude that it would not be appropriate for the plaintiffs to serve the proposed interrogatories. Consideration first needs to be given to how to preserve the safety and security of Officers A, C and D and their families within this action. That may well involve extending the existing publication bans and sealing orders to include this action. Those issues will have to be addressed before a judge of the court.

Conclusion

- [28] The plaintiffs' application for leave to serve the proposed interrogatories is dismissed.

[29] The application to renew the amended notice of civil claim for a period of six months from today is granted.

[30] The Crown Defendants are entitled to costs of this application from the plaintiffs.

"Master Bilawich"

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