
CANADA / JUDGMENT

R. v. Basi

2009 BCSC 1340

COURT

Supreme Court of British Columbia

DECIDED

14 September 2009

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2009 BCSC 1340 R. v. Basi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Basi,

2009 BCSC 1340

Date: 20090914

Docket: 23299

Registry: Vancouver

Regina

v.

Udhe Singh (Dave) Basi, Bobby Singh Virk

& Aneal Basi

Before: The Honourable Madam Justice Bennett

Oral Reasons for Judgment in the Application to

Cross-examine Patrick Kinsella

In Chambers

September 14, 2009

Counsel for the Crown

J. Winteringham, Q.C.

Counsel for the Accused, Dave Basi

M. Bolton, Q.C.

& C. Hatcher

Counsel for the Accused, Bobby Virk

K.G. McCullough

& T.J. Russell

Counsel for the Accused, Aneal Basi

J. Doyle

& E. Dance

Counsel for Patrick Kinsella:

J.M. Sullivan

& S. Knowles

Place of Hearing:

Vancouver, B.C.

- [1] THE COURT: These are the reasons relating to my dismissal of two motions on August 31, 2009. The accused are charged with corruption, fraud and money laundering arising from the sale of the Freight Division of BC Rail to CN Rail in 2003/2004. Mr. Dave Basi was the Executive Legislative Assistant to the then Minister of Finance, Gary Collins, and Mr. Virk was the Executive Legislative Assistant to the then Minister of Transportation, Judith Reid. Mr. Aneal Basi is charged with money laundering on behalf of the other two in connection with the alleged acceptance of benefits.
- [2] The defence position is that from the outset, the sale of BC Rail to CN Rail was preordained and that the Request for Proposals ("RFP") and the bidding process that ensued was merely a sham to make the sale more palatable to the public. The accused take the position that their actions were taken to make the bidding process appear to be viable and done at the instruction of the government.
- [3] In November 2003, both CP Rail and Burlington Northern & Santa Fe Railway Company wrote to those involved in the sale of BC Rail expressing their dissatisfaction with the bidding process and the apparent favouring of one of the proponents, CN Rail. Thus, there is some support for the defence contention. Whether this in fact is true remains to be seen.
- [4] The defence have brought an application seeking an order for production of records held by Mr. Kinsella, a third party to these proceedings. The first ruling in relation to documents relating to Mr. Kinsella was delivered on July 24, 2009 (see R. v. Basi, 2009 BCSC 1033). This application was in relation to documents, which were held by BC Rail. Mr. Kinsella had a privacy interest in some of these documents and made submissions in relation to them. The

documents were reviewed by me and those that were relevant were ordered released and the defence had them in their possession when they brought a further application as part of the third party application. Mr. Kinsella waived privacy interests in the documents which were found to be likely relevant.

- [5] As a result of the submissions on the application for the production of the BC Rail/Kinsella documents, I concluded that it would be relevant if Mr. Kinsella worked for both BC Rail and CN Rail at the same time leading up to the sale of BC Rail as that could relate directly to the question of whether the sale of the BC Rail Freight Division to CN Rail was predetermined. One of the comments I made in the July 24 ruling was that the defence had not met the low threshold required in *R. v. O'Connor*, [1995] 4 S.C.R. 411, to show that Mr. Kinsella worked for CN Rail at the same time he worked for BC Rail. Mr. Kinsella worked for BC Rail as a consultant between 2001 and 2005. During this time, BC Rail was sold to CN Rail.
- [6] As a result of that ruling, the defence brought an application to require Mr. Kinsella to testify on the third party record application and to issue a subpoena duces tecum to him.
- [7] I will address the issue of the subpoena first. In the ordinary course of a third party record application, the defence must issue a subpoena duces tecum to the record holder (see *R. v. O'Connor* at para. 20). Earlier in these proceedings I addressed an application for third party records which were held by the Speaker and Clerk of the House. When the application was brought, I indicated that there was no need for a subpoena to issue as it was unknown if any of the documents which were emails were recoverable. It did not seem appropriate in those circumstances to require the Clerk or Speaker to embark on an expensive and time-consuming search for documents unless and until a ruling was made on likely relevance.
- [8] When Mr. Kinsella was served with the application relating to his records, counsel did not serve a subpoena, apparently because they thought they were not required to because of my earlier ruling. This was discussed in court with Mr. Kinsella's counsel and it was agreed that a subpoena did not have to issue on the same footing as the MLA records. It was Mr. Kinsella's counsel at that point who was seeking the subpoena be issued.
- [9] The defence has now brought an application for a subpoena. Given that the procedure for the application was established some time ago, I see no need to change it now. There is no suggestion that Mr. Kinsella is destroying his documents. If Mr. Kinsella's records are found to be likely relevant, they will be ordered produced to the court.
- [10] The next issue is whether Mr. Kinsella should be required to testify on the third party record application. As noted above, I have dismissed this application.
- [11] As his counsel pointed out, Mr. Kinsella may well be obliged to testify at trial, but there is no basis shown to require him to testify on this application.

- [12] The defence tendered more evidence as part of this application in an effort to show a connection with Mr. Kinsella and CN Rail. However, I believe that the issue should be decided on legal principles rather than whether a factual basis has been established. The factual basis will be reviewed more extensively when the application for production of Mr. Kinsella's records has been completed.
- [13] To put this application into context, normally an accused does not have access to third party records when bringing such an application. The accused is generally hampered by a lack of information. That is not entirely the case here. The accused have had disclosure of tens of thousands of documents from BC Rail and other sources. Two of the accused were involved in the bidding process either as a government representative on committees or as a contact person for his respective Minister.
- [14] It is important to consider exactly what the accused are seeking in this application. They are seeking to question a person who may be a witness called by the defence. It is my understanding that the Crown has no intention of calling Mr. Kinsella as a witness. Thus, his evidence is not part of the case the defence needs to meet. The defence wishes to call him as part of their contention that the accused were acting in accordance with their employers' directions of trying to keep up an appearance that the bidding process was legitimate. If Mr. Kinsella was working for both BC Rail and CN Rail during the bidding process, that might raise concerns over the validity of the bidding process. I add that there are many witnesses who might fall into the same category as Mr. Kinsella in that they worked for BC Rail or CN Rail, or TD Securities or CIBC World Markets and so on. These individuals may have detailed information about the bidding process. I say "may" because at this point it is pure speculation whether the bidding process was rigged. Although the accused have put this argument forward, none of them have filed affidavits to add any substance to the defence position. The letters from CP and Burlington Northern are letters written well into the late fall of 2003. There are other perhaps oblique references to this in other material filed.
- [15] A third party has no obligation to assist an accused. He or she may have a moral obligation to ensure that the truth is uncovered, that the innocent are acquitted and the guilty convicted. However, this does not translate into a legal obligation.
- [16] The issue I am addressing is whether a reluctant third party can be required to testify on an application to produce his or her records. The trial is a long way from commencement. The application for third party records was commenced in order to utilize court time while waiting for a decision from the Supreme Court of Canada from an interlocutory ruling.
- [17] The defence submits in O'Connor, the court contemplated such evidence when it said at paragraph 19: "Viva voce evidence and a voir dire may, however, be required in situations in which the presiding judge cannot resolve the matter on the basis of the submissions of counsel."

[18] The defence position is essentially that they need Mr. Kinsella's evidence on the issue of whether he worked for CN Rail in order to establish likely relevance which is necessary before the court will order production of the records to the court.

[19] This submission, however, does not take into account the scheme which was established by O'Connor. Chief Justice Lamer and Justice Sopinka also said at paragraph 19:

When the defence seeks information in the hands of a third party (as compared to the state), the following considerations operate so as to require a shifting of the onus and a higher threshold of relevance:

- (1) the information is not part of the state's "case to meet" nor has the state been granted access to the information in preparing its case; and
 - (2) third parties have no obligation to assist the defence.
- [20] The O'Connor process permits the defence to access records of third parties in advance of the trial if the defence can establish that the documents are likely to be relevant. Likely relevance is found when the judge is satisfied that there is a reasonable possibility that the information is logically probative to an issue at trial, including evidence which may be probative to the material issues in the case, and also to the credibility of witnesses and to the reliability of other evidence. It also refers to the competence of a witness to testify, but that is not an issue here (para. 22).
- [21] O'Connor describes the likely relevance standard as a threshold that the accused needs to meet before records are produced. While a significant burden is on the accused, it is not an onerous burden. The threshold is low. However, it is a threshold and it is a threshold to prevent the defence from engaging in speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming requests for production (see para. 24).
- [22] Requiring a third party to testify to enable the accused to establish "likely relevance" flies in the face of the entire structure of the O'Connor application. While privacy rights are not weighed at Stage 1, the process was developed in order to ensure that third parties were not hauled into production requests which were speculative and so on, as noted above. The requirement of a likely relevance threshold allows the judge to assert his or her gatekeeper function and protect scarce judicial resources.
- [23] I am not saying that a third party would never have to testify at such an application. However, given the purpose of the O'Connor procedure, it would, in my view, be rare that the defence would be able to call the third party in order to establish the threshold for the production of documents.
- [24] The defence application for Mr. Kinsella's records will rise or fall on the material filed. The application is dismissed.

"E. Bennett J."

The Honourable Madam Justice Bennett

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/09/13/2009BCSC1340.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-basi-2009-bcsc-1340>

Prepared on 28 October 2026 · Esheria