

CANADA / JUDGMENT

R. v. Bird

2025 BCSC 143

COURT

Supreme Court of British Columbia

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2025 BCSC 143 R. v. Bird

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bird,

2025 BCSC 143

Date: 20250130

Docket: 183260

Registry: Victoria

Rex

v.

Roland Henry Bird

Before: The Honourable Associate Chief Justice H. Holmes

Reasons for Judgment re

Request for Access to the Court Record

Counsel for the Crown:

L.A. Ruzicka, K.C.

Appearing on his own behalf:

R.H. Bird

Place and Date of Hearing:

Victoria, B.C.

September 3, 2024

Place and Date of Judgment:

Victoria, B.C.

January 30, 2025

INTRODUCTION

- [1] The applicant Roland Henry Bird is serving a life sentence for second degree murder for the shooting death of his common law partner in September 1974. The sentence was imposed in January 1975.
- [2] In February 2022, Mr. Bird began a process of applying for access to materials in the court file relating to his conviction in order to support an appeal.
- [3] As I will explain, Mr. Bird has been given all of the material to be found in the court file that he wishes to receive, except a list of the names of the twelve jurors who served in his trial. The Crown has also given Mr. Bird additional material that is no longer or was never in the court file. The Crown opposes the release of the juror names to Mr. Bird.
- [4] These are my reasons for concluding that Mr. Bird should not have access to the juror names.
- [5] I will begin by giving some additional detail about the background to Mr. Bird's request.

BACKGROUND TO THE CURRENT REQUEST

- [6] Mr. Bird was convicted on January 30, 1975 after a trial at which he was represented by counsel. He was sentenced that day to life in prison with no possibility of parole for ten years.
- [7] Mr. Bird did not appeal his conviction at the time or in the decades that followed. He continues to serve his sentence at Dorchester Penitentiary in New Brunswick. He appeared by video for the hearing of this application to have access to the list of juror names.
- [8] Mr. Bird submitted his first request for access to the court record on September 28, 2019. He applied in writing, but supplemented his request by telephoning court registry staff. Essentially, Mr. Bird asked for whatever was available from the court file, including, specifically, the names of the jury members. Mr. Bird told registry staff that he believes a juror was in a conflict of interest because he was connected socially with a police officer involved with his case. At that time, Mr. Bird appeared to want to support a "faint hope" application for early release under s. 745.6 of the Criminal Code.

- [9] Over the course of two years, Mr. Bird corresponded with the Court to further or clarify his requests. The Court's legal counsel responded by letters dated June 24, 2020, October 28, 2020, February 18, 2021, and January 26, 2022. The Court provided Mr. Bird with copies of every document in the court file that was of interest to him except the following:
1. the list of juror names, and
 2. some police photographs of the crime scene.
- [10] Mr. Bird was advised by the Court's legal counsel that he would need to apply for a court order, on notice to the Crown, if he wished to pursue his request for access to those two items.
- [11] In about May 2024, Mr. Bird was also given copies of the police photographs of the crime scene that were in the court file. Mr. Bird had also asked for a transcript of the voir dire evidence of Dr. James Donald, but neither the Court nor the Crown was able to locate transcripts, recordings, or shorthand notes, making that request impossible to fulfill.
- [12] Mr. Bird's outstanding request is therefore for the names of the jurors in his trial. The court file contains a handwritten list that includes those names, as I will discuss below.
- [13] In February 2022, Mr. Bird attempted to appeal his conviction, but he filed his application in this Court, not the Court of Appeal, and it was dismissed for that reason.
- [14] It is clear from the voluminous materials Mr. Bird has filed in this Court that he hopes to apply to the Court of Appeal for an extension of time to appeal his 1975 conviction, and that among the grounds on which he wishes to appeal is "jury tampering" in his trial. His submissions indicated that a lack of juror impartiality or a reasonable apprehension of bias are also of concern to him.
- [15] I turn then to consider whether Mr. Bird should have access to the list of juror names.

ANALYSIS

The Framework for Analysis

- [16] I agree with the Crown that Mr. Bird's request for access to the names of the jurors in his trial is properly considered on the basis of the Court's Policy on Access to the Court Record, read in light of the "open court principle" expressed by the Supreme Court of Canada in *Sherman Estate v. Donovan*, 2021 SCC 25 and subsequent jurisprudence. The Court's Policy on Access to the Court Record recognizes that access to the court record is an important aspect of the Court being open to the public.

The Open Court Principle - Sherman Estate

- [17] In *Sherman Estate*, the Supreme Court of Canada made clear that, to justify a discretionary limit on the open court principle, it must be shown that (1) court openness poses a serious risk to an important public interest; (2) the limit sought is necessary to prevent this serious risk because reasonably alternative measures will not do so; and (3) as a matter of proportionality, the benefits of the limit outweigh its negative effects: para. 38.
- [18] Any limits on public access introduced to protect an important competing interest must therefore be crafted to "[minimize], as much as possible, any impairment of the open court principle": *Canadian Broadcasting Corp. v. Named Person*, 2024 SCC 21 at para. 5. The court must "apply the maximum degree of openness as is compatible with the task at hand", meaning that there must be no reasonable alternatives available to address the risk to competing interests: *R. v. Bacon*, 2019 BCCA 458 at para. 1; *Sherman Estate* at para. 105.

The Court's Policy on Access to the Court Record

- [19] The Access Policy reflects the open court principle by providing for access to most parts of the court record, and denying or restricting access only when necessary to protect social values of superordinate importance. Some of those social values are expressed by federal or provincial statute. Others depend for protection on the Court in the exercise of its supervisory role over the record and its related responsibility to protect individual and societal rights and interests.
- [20] The Access Policy provides that the court record includes "documents in the court file, as well as information about the court proceedings stored by the court": section 1.3. Nonetheless, not every document found in a court file is a "court record" within the meaning of the Access Policy. Sometimes, judges' copies of documents find their way into the court file even though those documents, especially if annotated by the judge, are part of the adjudicative process, not the court record.
- [21] Under the Access Policy, an accused person may inspect the records in their criminal court file, unless the file is sealed: section 2.3. Mr. Bird's file is not sealed. (I note also in passing that there is no record of any ongoing publication ban or reason to believe that such a ban may apply.) Nor is there any specific provision in the Access Policy restricting access to juror names.
- [22] Generally, a person entitled under the policy to inspect a record without a court order is also entitled to a copy, subject to payment of the applicable fee: Access Policy, section 2.10.

Mr. Bird's Application and the Access Policy

- [23] In the court file relating to Mr. Bird's trial, the juror names are found in a one-page document that also includes the name of the presiding judge, the date of trial, the charge, and the names of counsel. It seems likely that the list was made by a court official at the time

of the trial, although it is also possible that the presiding judge made the list for their own purposes while conducting the trial - as I will explain later, lists of juror names are not routinely kept in criminal court files. In this application, I will assume that a court official made and kept the list, and that the list was a court record at the time it was made, in 1975.

- [24] On that basis, and on a literal reading of the Access Policy, Mr. Bird would appear entitled to access to the list of juror names. However, in my view a more nuanced approach is necessary, given the Court's ongoing supervisory and protective responsibilities in relation to its records, and the lack of any specific provision in the Access Policy relating to records containing information about criminal trial jurors.

The Evolved Approach to Juror Privacy and Security

- [25] It is no surprise that the Access Policy does not specifically address access to these records, given the legislative history I will outline, with its marked evolution in the approach to juror privacy and security.
- [26] As the Court's legal counsel noted in one of the letters to Mr. Bird, it is unusual in the present context for a court file to include a list of juror names. No information is available in this application about the Court's practice at the time of Mr. Bird's trial in 1975, but for decades it has not been the Court's practice to record juror names in criminal trial files. I know from personal experience that when the first iteration of the Access Policy was drafted in 2011, it was not routine for juror names to be recorded in the court file, or to be presumptively available for access after the fact.
- [27] On the assumption that Mr. Bird's file was not the only criminal file at the time in which juror names were recorded, and therefore that the Court's practice has changed since that time, it is necessary to consider whether the change reflects an important public interest that requires that juror names not be provided at this point.
- [28] In short, I conclude that it does. Stricter protections for juror privacy and security have been legislated since the time of Mr. Bird's trial, and greater recognition has been given to those interests in the governing jurisprudence.
- [29] At the time of Mr. Bird's trial in 1975, juror names were read aloud in the courtroom during the jury selection process. The clerk of the court was required to draw cards and call out the names and numbers of a sufficient number of jurors to allow for a full jury to be empanelled, allowing for the challenges and directions to stand by that would then remove some jurors from the selection: s. 560 of the Criminal Code, R.S.C. 1970, c. C-34 (which became s. 631).

- [30] In 2001, this provision was amended to protect the privacy and safety of jury members in cases where the proper administration of justice so required. Courts were given a new authority to order that only juror numbers, not names, be called out in the jury selection process where the court is satisfied that it is in the best interest of the administration of justice to do so, including in order to protect the privacy or safety of the members of the jury (s. 631(3.1), added by way of Bill C-24, December 18, 2001, s. 38): S.C. 2001, c. 32, s. 38.
- [31] A further amendment in 2011 provided even greater protection of jurors' identities by essentially reversing the default position. Instead of juror names being called (absent a court order that only juror numbers be called, as permitted by the 2001 amendment), only juror numbers are now called unless the court is satisfied that calling out names is necessary for the proper administration of justice and so orders: 41st Parl., 1st Sess., Legislative Summary of Bill C-2: Fair and Efficient Criminal Trials Act, S.C. 2011, c. 16, s. 7.
- [32] Accompanying the 2011 amendment described above was an amended s. 631(6), which reinforced the existing authority of the court to ban the publication of information identifying jury members, and also gave a new authority to "[limit] access to or the use of that information".
- [33] It is clear from this sequence of amendments that the concern to protect juror privacy and security has increased since the time of Mr. Bird's trial. In 1975, juror names were read in open court; this is no longer permitted, absent a court order. Also, a court may now make an order expressly limiting access to juror names, or limiting the ways in which a person who has information about juror identities may use that information.
- [34] It is worth noting that the various legislative protections of juror privacy and security apply to jury panelists (or members of the jury "array") who are called for the jury selection process, as well as to jurors who serve on the jury during the trial. The Criminal Code uses the term "juror" as including members of the jury array who may or may not be selected to serve on the jury for the trial. This is clearly because members of the public who are called to attend for a jury selection must be confident that they can do so without fear of harassment or intimidation, whether or not they are ultimately selected to serve on the trial jury.

The Accused Person's Fair Trial Rights - Review of Jury Panel Lists

- [35] To be balanced against jurors' privacy and security interests are the accused person's fair trial rights. Courts recognize that an accused person's fair trial rights include some ability to review the list of jurors summonsed to the jury selection to constitute the jury panel or array, so long as the review respects the privacy interests of potential jurors: *R. v. Davey*, 2012 SCC 75 at para. 33.

- [36] In practice, the defence is generally given some advance notice and a controlled review of the list for the purpose of taking lawful steps during the jury selection process to ensure an impartial jury. This form of access to juror lists (for the panel or array) is usually subject to limitations in time and scope.

Applying the Sherman Estate Test to Mr. Bird's Application

- [37] In this application for the names of the jurors in the trial, the Sherman Estate test must, as always, be applied taking account of the context in which the issue arises.
- [38] To recap, to restrict access it must be shown that: (1) court openness poses a serious risk to an important public interest; (2) the limit sought is necessary to prevent this serious risk because reasonably alternative measures will not do so; and (3) as a matter of proportionality, the benefits of the limit outweigh its negative effects.
- [39] For convenience, I will reverse the order in which I address the second and third branches of the test.

An Important Public Interest Would Be at Serious Risk

- [40] Juror privacy is an important public interest that weighs heavily in the application of the Sherman Estate test.
- [41] This is clear from the evolved approach to juror privacy, as reflected in the sequence of Criminal Code amendments I have outlined, successively designed to increase the protection of juror privacy and security.
- [42] It is also clear from the recognition in the jurisprudence that an accused person's constitutionally protected right to a jury trial depends on a system that ensures the privacy and security of jurors, both during the jury selection process and through the trial: *Davey; R. v. Pan*, 2001 SCC 42.
- [43] The privacy of the jurors who served in Mr. Bird's trial almost 50 years ago would be violated by the disclosure of their names to Mr. Bird - or to anyone else.
- [44] Further intrusions into their privacy would result from the questioning Mr. Bird would need to conduct to determine whether they have information useful to him. Since Mr. Bird represents himself, there would be an additional risk, in that process, of causing a breach of the prohibition in s. 649 on jurors discussing the subject matter of their deliberations.

The Benefits of Restricting Access Outweigh the Negative Effects

- [45] The context of the application also includes the purpose for which Mr. Bird seeks access to juror names, namely to support his application for an extension of time to appeal from his conviction on the ground of jury tampering or a reasonable apprehension of bias. Flowing from this, Mr. Bird's position is that not having access to the juror names will have the negative effect of reducing the chances that he will succeed in his application. However, as I

will explain, I am unable to give this purpose any meaningful weight in the Sherman Estate analysis, because I agree with the Crown that Mr. Bird's application discloses no real possibility that having the names of the jurors in his trial would assist him in his application to the Court of Appeal.

- [46] Mr. Bird advises that one of the two sheriffs, who were transporting or keeping custody of him during the trial, told him that a member of the jury, who the sheriff did not identify, "did not belong" on the jury, and was a "redneck Christian". The sheriff also told Mr. Bird that the juror was a member of the Victoria Shamrocks, a lacrosse team. Six months later, it dawned on Mr. Bird that Norm Baker, a member of the Saanich Police Department which had conducted the investigation in his case, had also played for the Victoria Shamrocks. Mr. Bird became concerned that Norm Baker may have interfered with or influenced the deliberations of the jury member who played on the same team.
- [47] Mr. Bird advised in his submissions that his concerns arise both from the information that one juror was a "redneck Christian" and from the information that that same juror played on the same team as a member of the investigating police department.
- [48] Considering first the possible role of Norm Baker, there was no evidence indicating that he was involved in any way with Mr. Bird's criminal case. The Crown advises that the Saanich Police Department's disclosure package included no mention of him being involved in the investigation, nor was he a witness at trial.
- [49] Further, there is no information in the application about when Mr. Baker worked for the Saanich Police Department, or about when he played for the Victoria Shamrocks. One can therefore only speculate about whether he held those roles at or around the same time, and also at or around the time of the investigation into Mr. Bird's case or his trial.
- [50] More fundamentally, to infer possible jury tampering, influence, or bias on the bases Mr. Bird puts forward would mean overlooking a series of protections in the criminal justice process that are designed to prevent exactly those results.
- [51] In the jury selection process, jurors are customarily instructed to identify any basis on which they may be unable to serve impartially in the trial. Jurors unable to serve impartially will be excused and not selected. When, in the selection process, a juror identifies a connection with a person associated with the investigation or the trial, the judge will assess whether the juror will nonetheless be able to serve impartially and determine the case solely on the basis of the evidence, submissions, and instructions from the judge. The juror will be excused if it is unclear that they will be able to do so. If a basis for bias arises during the trial, the juror who cannot serve impartially will be discharged.

- [52] At various points during a trial, including in the judge's final charge to the jury, jurors are instructed by the judge to determine the case solely on the basis of the evidence, submissions, and judge's instructions, and to disregard all outside information and influences. Our system of criminal justice would be unable to function if it could not rely on jurors to carry out this duty.
- [53] Finally, Mr. Bird raised his concerns with his counsel when the concerns first arose. Mr. Bird advises that six months after the trial, when he realized the potential lacrosse team connection between Officer Baker and a jury member, he immediately contacted counsel who had represented him in the trial. One of his counsel met with him the next day, and took a full account. However, nothing resulted, as far as Mr. Bird is aware. The reasonable inference from the information Mr. Bird has given is that counsel concluded that Mr. Bird's concerns either were not well-founded, or that they would not support a remedy. Since Mr. Bird's counsel was well-familiar with the case and the trial, his apparent failure at the time to take further steps, despite having responded quickly to Mr. Bird's request that he address the concerns, weighs against a remedy now. The basis on which Mr. Bird suggests concerns about jury interference or bias is, simply, far too weak to support the intrusions into juror privacy that access for Mr. Bird would entail.

Reasonably Alternative Measures Are Not Available

- [54] Mr. Bird makes clear that he seeks access to the juror names simply to make inquiries about his concerns, in order to determine whether they are well-founded and, if they are, to support his application for an extension of time to appeal on the basis that the jury verdict resulted from interference, or reasonably appears to have been tainted by bias. Mr. Bird assures the Court that if his inquiries do not bear fruit for his appeal he will drop them. He also assures the Court that he has no intention of publishing juror names.
- [55] I accept Mr. Bird's assurances, but cannot agree that he should have access to the list of juror names.
- [56] Juror names were released to the defence in *R. v. Levin*, 2014 ABQB 113. However, in that case, unlike this one, the accused person was facing an outstanding charge (of attempting to obstruct justice), and the juror names were needed to assist her defence. Mr. Bird's trial is long over, and he had an opportunity to pursue the concerns he now raises a matter of months (rather than half a century) after it concluded. I note also that in *Levin*, the Court was able to craft conditions of access, in reliance on defence counsel's professional ethical obligations; similar conditions would not have the same effect in this case, with Mr. Bird representing himself.
- [57] In making this last comment, I acknowledge that *amicus curiae* may be effective in helping the Court and an accused person navigate some situations where the accused person is not represented by counsel. However, the basis for Mr. Bird's application for juror names is far too weak to justify such an appointment.

CONCLUSION

- [58] For Mr. Bird to have access to the names of the jurors in his trial would violate their privacy, an important public interest.
- [59] Reasonably alternative measures to provide access while protecting the important public interest are not available in the circumstances.
- [60] The negative effects of denying access are minimal because there is no real possibility that the names of the jurors would assist Mr. Bird in his stated purpose for seeking them, namely to support his application for an extension of time to appeal his conviction. Those effects are far outweighed by the benefits of restricting access in order to uphold the privacy of the jurors.

ORDER

- [61] Mr. Bird's application for access to the list of juror names in the court file is denied.
- [62] I wish to thank Crown counsel for her helpful submissions and the assistance she has given Mr. Bird over the course of his extended communications with the Court and the Crown.

"The Honourable Associate Chief Justice H. Holmes"

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