
CANADA / JUDGMENT

R. v. Haevischer

2013 BCSC 1225

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 1225 R. v. Haevischer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Haevischer,

2013 BCSC 1225

Date: 20130710

Docket: X072945-B

Registry: New Westminster

Regina

v.

Cody Rae Haevischer, Matthew James Johnston

and Quang Vinh Thang Le

This ruling has been edited to comply with applicable publication bans.

Corrected Judgment:

The text of the judgment was corrected on pages 1 and 2 on July 11, 2013.

Before: The Honourable Madam Justice Wedge

Ruling re Application No. 78 -- Stay of Publication Ban Order

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Place and Date of Hearing:

New Westminster, B.C.

June 26, 2013

Place and Date of Judgment:

New Westminster, B.C.

July 10, 2013

I. NATURE OF THE APPLICATION

- [1] The Crown earlier applied for an order pursuant to s. 486.5 of the Criminal Code prohibiting publication of any information that could identify two anticipated witnesses in the Surrey Six prosecution as witnesses or justice system participants. In a ruling indexed as 2013 BCSC 1085 (the "Ruling"), I declined to order the publication ban sought by the Crown, and instead ordered a narrower ban with respect to photographs and depictions of the two witnesses, and information concerning measures taken to protect their personal safety. The order also required that the witnesses be referred to by their initials only.

- [2] The order has yet to be approved and entered.
- [3] The Crown now seeks what is in essence a stay of that order until September 15, 2013 so that measures can be taken to arrange the transfer of one of the two witnesses to whom the Ruling applies (the "Witness") to a new custodial facility.
- [4] In support of its application, the Crown relies on two affidavits of RCMP Supt. John Robin, who attests to his belief that the Witness faces a real and substantial risk of harm if he is not transferred to the new facility before the Ruling is published.
- [5] The Crown's application is supported by the Attorney General of Canada and both witnesses to whom the Ruling applies.
- [6] The Media Respondents, as well as the accused Cody Haevischer and Matthew Johnston, oppose the Crown's application. They also oppose the reception of the affidavit evidence of Supt. Robin.
- [7] The accused Michael Le takes no position on the application.

II. THE EVIDENCE OF SUPT. ROBIN

- [8] The Crown wishes to rely on two affidavits sworn by Supt. Robin. The first of these speaks to the current circumstances of the Witness. Supt. Robin deposes (among other things) to the following:
 - a) The Witness was first incarcerated in April 2009 under his former name;
 - b) In June 2012, Supt. Robin arranged a name change for the Witness just before he was transferred to a new institution. However, upon transfer, the Witness was identified by his former name and continues to be known in the inmate population by that name;
 - c) To date, the Witness has not been confirmed as a cooperating witness within the inmate population;
 - d) Supt. Robin has been advised by Correctional Service of Canada ("CSC") officials that there are no CSC institutions in which the Witness can be safely housed unless he is placed in segregation;
 - e) Over the past two years, the RCMP have been arranging for a facility in the Lower Mainland suitable for housing the Witness while required as a witness at trial (the "Temporary Custodial Facility"); and
 - f) Since receiving the Ruling, the RCMP have accelerated their efforts to make this facility available, but there remain significant logistical difficulties associated with the arrangements and the transfer of the Witness to it. The earliest the transfer can be made is late August 2013.

- [9] The second of Supt. Robin's affidavits is very heavily redacted on the basis of witness protection concerns. The Crown has requested that the unredacted version be filed under seal. According to the Crown, Supt. Robin refers in the affidavit to the location of the Temporary Custodial Facility and explains why it will not be ready until late August 2013. He also describes certain security issues with respect to the facility.

III. POSITIONS OF THE PARTIES

Position of the Crown

- [10] The Crown emphasizes that it does not seek to vary the order resulting from the Ruling in any substantive way. Rather, it says, the temporary relief it seeks is well within the spirit of the Ruling and will ensure that the Court's intention is given its correct expression. The essence of the Ruling is that the two witnesses are not at risk of real and substantial harm because there are reasonable alternative measures to address that risk, one of which is a transfer to a new institution should their status as cooperating witnesses become known. The Crown says that measure must now be implemented with respect to the Witness because his identity is known by fellow inmates and publication of the Ruling will reveal his status as a cooperating witness.
- [11] The Crown says that the affidavit evidence of Supt. Robin is not advanced to contradict or undermine the findings of fact underlying the Ruling, but only to: (i) demonstrate that upon publication of the Ruling, fellow inmates will identify the Witness as a cooperating witnesses and that, as a result, he will be at risk of real and substantial harm unless he is first transferred; and (ii) explain why the Witness cannot be transferred to a new facility before late August 2013. (The Crown seeks a stay until September 15 to provide some extra leeway, as the trial of the accused does not commence until September 16, 2013.)
- [12] The Crown submits that the Court has authority to issue the order it seeks pursuant to its inherent jurisdiction to control its own proceedings and process: *R. v. Caron*, 2011 SCC 5; *R. v. Gibson*, 2011 BCSC 324; and, I.H. Jacob, *The Inherent Jurisdiction of the Court* (1970), 23 *Current Legal Problems* 23. The Crown also cites the Court's inherent jurisdiction as the authority upon which it ought to receive and consider Supt. Robin's two affidavits.
- [13] In summary, says the Crown, delaying the effect of the Ruling and its publication will protect the Witness from the risk of real and substantial harm while at the same time permitting the Media Respondents to report on the trial as contemplated by the Ruling.
- [14] The Crown additionally requests that the initials by which the two witnesses will be referred be something other than their own, such as "A.A." and "B.B." or "X" and "Y".
- [15] The Attorney General of Canada supports the Crown's application, submitting that CSC requires time to work with the RCMP to facilitate the appropriate and safe placement of the Witness. The Attorney General also supports the use of non-identifying initials in relation to the two witnesses.

- [16] The Witness supports the position of the Crown with respect to both the stay and the use of non-identifying initials. He advises that he is considering an appeal of the order but has not yet finalized his decision in this regard. Counsel for the other witness to whom the Ruling applies had not been able to receive instructions from his client by the time of this application, and thus, in the interests of prudence, supports the Crown's application. He similarly seeks the use of non-identifying initials in relation to his client.

Position of the Respondents

- [17] The Media Respondents submit that the Crown is attempting to vary this Court's order under the guise of an application for a stay. Further, they say, the Crown has failed to meet the requisite test for a stay, whether the three-pronged test outlined in *RJR--MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, or that set out in s. 65.1(2) of the Supreme Court Act, R.S.C., 1985, c. S-26. This latter provision requires that the Court be "satisfied that the party seeking the stay intends to apply for leave to appeal and that delay would result in a miscarriage of justice". The Media Respondents maintain that the Court's inherent jurisdiction is to be used sparingly as a "gap filling" measure, and they say that no such gap exists in the present circumstances in light of the existing jurisprudence and statutory provisions.
- [18] The Media Respondents say that the Crown has had the benefit of a broad interim publication ban for many months, and its application for a permanent ban on the same terms has now been considered and rejected; there is no proper basis upon which to extend that ban.
- [19] The Media Respondents object to the admission of Supt. Robin's two affidavits on the basis that it is fresh evidence that does not meet the test mandated by *R. v. Palmer*, [1980] 1 S.C.R. 759. They argue that the evidence contained in those affidavits is essentially an attempt to "end run" this Court's Ruling by replacing the evidentiary foundation of the earlier application to better suit the Crown's purposes. Not only does the affidavit evidence contradict the findings of fact already made by the Court, but it also cannot be tested or challenged in its current form.
- [20] The Respondent Mr. Johnston argues that an application to stay a publication ban order outside the context of an appeal is exceptional and novel, and he questions the appropriateness of issuing a stay for the administrative convenience of CSC in order that it may provide the most amenable treatment to the Witness. He identifies several alternatives to a stay, including temporary placement of the Witness in segregation until the new custodial facility is ready to receive him or else having the RCMP take him into their custody and house him in their cells or other facilities. Mr. Johnston submits that given that the Witness continues to be safe despite the fact that fellow inmates know of his true identity, the risk of harm resulting from the publication of the Ruling is unlikely to be significant, in any event.

- [21] Mr. Johnston strongly objects to the admission of the affidavits of Supt. Robin on several bases. First, the evidence they contain is far more detailed and presents a different picture than the Crown painted at the initial hearing. He argues that it is wholly unfair for the Crown to tactically withhold relevant evidence and then subsequently seek to rely on it when it suits its purposes. Second, the affidavits are replete with hearsay, as well as vague and ambiguous language. They do not provide the Court with a full and unambiguous picture of the Witness's circumstances. Should the Court decide to admit the evidence, Mr. Johnston asks to be provided with further disclosure and the opportunity to cross-examine Supt. Robin. In the further alternative, he submits that the affidavits ought to be accorded little weight.
- [22] Mr. Haevischer adopts the submissions of the Media Respondents and Mr. Johnston. As they do, he emphasizes that the Crown is now seeking to advance evidence which was available to it at the time of its application for the publication ban, and which contradicts findings in the Ruling: for example, that the Witness has been successfully and safely integrated into the general inmate population under his new name despite his notoriety as an admitted participant in the Surrey Six murders.

IV. DISCUSSION

- [23] In Caron (at para. 24), the Supreme Court of Canada endorsed the analysis of I. H. Jacob, cited earlier, with respect to the breadth of the inherent jurisdiction of the superior courts of justice, of which this Court is one. As Sir Jacob states at p. 32, a part of this inherent jurisdiction is the power of the court to control and regulate its process. Of particular relevance to the present application is the observation of the learned author at p. 39:
- under its inherent jurisdiction, the court can at any stage of the proceedings, even after judgment, vary, modify or extend its own order so as to express correctly its intention and meaning and thereby to ensure that the purposes of justice are not defeated.
- [24] Thus, for example, in Gibson, Williamson J. held that the Court could rely on its inherent jurisdiction to stay an order requiring an accused, following conviction, to submit to the taking of a DNA sample pursuant to s. 487.015 of the Criminal Code pending an appeal against conviction. Justice Williamson, after weighing the injustice of enforcing an order that may be based on an incorrect decision in law against the impact of delay on the ability of the authorities to compare the DNA sample provided to that contained in the DNA data bank, concluded that the competing factors favoured the request for a stay.
- [25] The Crown did not suggest in its submissions that it intends to appeal the Ruling. Accordingly, the law governing stays pending appeal has no application.
- [26] I am satisfied that the Court has authority under its inherent jurisdiction to make the order sought by the Crown in this instance.

- [27] The order setting out the terms of the publication ban is described in para. 144 of the Ruling. As earlier noted, the order has not yet been approved or entered.
- [28] To date, the Witness has been safely integrated into the general inmate population at his institution. However, once the Ruling is published, the Witness's fellow inmates may well become aware that he is a cooperating witness in the Surrey Six prosecution. There can be little doubt that publication of the Ruling will identify the Witness as a cooperating witness to anyone who is familiar with his former name. The Ruling describes in detail the role he played in the Surrey Six murders.
- [29] I concluded in the Ruling that the Witness is not at risk of real and substantial harm so long as certain protective measures are in place. I further concluded that in the event the Witness is identified as a cooperating witness, an available protective measure is his transfer to a new facility.
- [30] I accept the submissions of the Respondents that the evidence of Supt. Robin cannot be advanced for the purpose of contradicting the findings of fact contained in the Ruling. The Crown has emphasized, and I accept, that the only purpose in advancing his evidence is to advise the Court that the Witness's former name is known by his fellow inmates and to explain why CSC and the RCMP require time to effect the transfer of the Witness to a suitable facility.
- [31] I did not find it necessary to review the sealed affidavit of Supt. Robin which, according to the Crown, describes the location of the facility to which the Witness will be transferred and the security issues requiring some time to resolve. I do not require that level of detail to determine the issues arising on this application.
- [32] I am not prepared to grant the request of Mr. Johnston for disclosure or cross-examination of Supt. Robin.
- [33] The only findings I make from the facts to which Supt. Robin deposes are that he has been advised by CSC that the Witness is known in his current institution to at least some of the inmate population by his former identity, and that he must be transferred to a new facility that will not be available until late August 2013. That being the case, publication of the Ruling will place him at real and substantial risk of harm.
- [34] The Witness must therefore be removed from his current institution, or at least removed from the inmate population, before the Ruling is published. It is my view that a transfer in these circumstances falls well within my intention expressed specifically at para. 128 of the Ruling. As I made clear in the Ruling, I do not accept that segregation is a reasonable means of protecting a cooperating inmate witness from risk of harm.

- [35] The Respondents have not established any prejudice to them resulting from a delay in the effect and publication of the Ruling. The Media Respondents are entitled to the full benefit of the Ruling, which is the ability to report on the trial with only minimal restrictions when it commences on September 16, 2013. Mr. Johnston and Mr. Haevischer will also have the full benefit of the Ruling, which from their perspective is an open and public trial.
- [36] I conclude that the risk of real and substantial harm to the Witness that could result from publication of the Ruling before his transfer significantly outweighs any effect of the delay of its effect and publication on the Respondents. Accordingly, I will grant the order sought by the Crown, which is a stay of the order set out at para. 144 of the Ruling until September 15, 2013.
- [37] I also grant the Crown's request, supported by the Attorney General of Canada and the witnesses, that the witnesses be referred to as "X" and "Y", rather than by their initials. My intention, as expressed at para. 126 of the Ruling, was to assist in concealing the fact that both witnesses are living under new names. This minor change, which was not opposed by the Respondents, remains within the scope of the order prohibiting the publication of the witnesses' new names as a reasonable measure to protect them from harm.
- [38] The parties have provided the Court with their submissions on the redactions that ought to be made to the Ruling before it is published. I will consider those submissions and provide my ruling on the matter well in advance of September 15, 2013.

"The Honourable Madam Justice C.A. Wedge"

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