

CANADA / JUDGMENT

R. v. Haevischer

2013 BCSC 2311

COURT

Supreme Court of British Columbia

DECIDED

16 December 2013

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2013 BCSC 2311 R. v. Haevischer IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Haevischer, 2013 BCSC 2311 Date: 20131216 Docket: X072945-B Registry: New Westminster Regina v. Cody Rae Haevischer, Matthew James Johnston and Quang Vinh Thang Le Before: The Honourable Madam Justice Wedge Ruling re: Application No. 100 Application for Production of Immunity Agreement Documents Counsel for the Crown: L.J. Kenworthy A.W. Henderson Counsel for the Accused Haevischer: D. Dlab Counsel for the Accused Johnston: B.A. Martland Counsel for the Accused Le: C.S. Johnson P.M. Ferguson Counsel for Postmedia Network Inc. d.b.a. The Vancouver Sun, Canadian Broadcasting Corporation, Global Television Network Inc., and Postmedia Network Inc. d.b.a. The Province: M.J. Wagner Counsel for Person X: O.A. Snowdon Counsel for Person Y: J.M. Doyle T. Etmanski Counsel for the Attorney General of Canada: K.J. Elvin-Jensen Place and Date of Hearing: Vancouver, B.C. September 24, 2013 Place and Date of Judgment: Vancouver, B.C. December 16, 2013 I. OVERVIEW

- [1] The Media Respondents apply for production of a copy of an immunity agreement entered into by the individual identified as Person X, as well as any other documents in the possession or control of the Crown, Person X or Person X's counsel which relate to the immunity agreement.
- [2] Person X was the subject of a previous application by the Crown for a ban on publication of his identity, as well as that of a second individual known as Person Y (Application No. 78). Both were federal inmates who were anticipated to be witnesses for the Crown at trial, and the risk to their personal safety were they to become known within their institutions as cooperating witnesses was the basis for the ban the Crown was seeking.
- [3] The Media Respondents sought, and were granted, standing to participate in Application 78 by consent. They fully participated in the hearing of the application.
- [4] Prior to the hearing of Application 78, the Crown had provided the Media Respondents with an immunity agreement relating to Person Y on the basis that Person Y had referred to it in his affidavit filed in support of the publication ban. However, it declined to provide similar materials with respect to Person X citing lack of relevance to the application.

- [5] At the outset of the hearing, the Media Respondents applied for production of copies of all documents in the possession of the Crown and/or the two witnesses and their counsel "which provide evidence of the contractual or quasi-contractual obligations undertaken by the [Attorney General], Corrections, or other agents of the state which do, or could, bear on the issues on this application including but not limited to the terms and conditions of imprisonment" of Persons X and Y. The Media Respondents argued that the contents of the agreements might bear on issues arising in the Crown's application.
- [6] Neither the Crown nor Person X filed the immunity agreement or sought to rely on any of its provisions. I ruled that the only information contained in the arrangements between the two individuals and the authorities that could be possibly relevant to the Crown's publication ban application would be any promises made concerning the seeking of a publication ban or arrangements made with a view to ensuring the safety of the two individuals during their incarceration.
- [7] At my request, counsel for Person X provided a copy of the immunity agreement to the Court. I reviewed the document and determined that only one provision could be relevant to the issues engaged by the Crown's application. That provision of the agreement was disclosed to counsel for the Media Respondents.
- [8] Subsequently, in the course of an unrelated application heard *ex parte* and *in camera*, I ruled for reasons relating to the fair trial rights of the three accused that the Crown could not call Person X as a witness in the *R. v. Haevischer et al.* trial. That ruling is under seal, but an abbreviated ruling is indexed as 2013 BCSC 1526.
- [9] The Media Respondents now seek disclosure of the immunity agreement and any related documents on the basis that the public has an interest in knowing of the benefits Person X received under the immunity agreement and any related agreements or arrangements, particularly as that individual is no longer required to testify at trial.
- [10] The Crown argues, as a preliminary matter, that the Media Respondents are not parties to the *R. v. Haevischer et al.* prosecution and, accordingly, lack the requisite standing to seek disclosure of the documents in question. The Attorney General of Canada and Person X share the Crown's position.
- [11] The three accused and Person Y take no position on the application. II. DECISION
- [12] As is frequently the case when representatives of the media are granted standing to participate in publication ban applications, the precise scope of the Media Respondents' participation in Application 78 was not expressly articulated at the time standing was granted. In keeping with the usual approach to these matters, it was my understanding that the Media Respondents would participate in the application to advance arguments on the impact of the proposed ban on the right to free expression, including the potential impairment of the open court principle and the application of the relevant statutory and common law tests to the specific circumstances before the Court. Those were, in fact, the

issues addressed by the Media Respondents during the hearing of the application.

- [13] The Media Respondents have advanced no legal authority in support of their position that they are entitled, as non-parties to the prosecution, to bring an independent application for disclosure by the Crown of documents that I ruled were not relevant to any live issue in the proceedings in which they were granted standing.
- [14] The Media Respondents rely on the comments of the Supreme Court in *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 101, to argue that the Crown has a duty, in the public interest, to disclose information in its possession to the public at large. With respect, that is not an accurate reading of the decision. Justice L'Heureux-Dubé, writing for the majority at para. 101, stated that the Crown's unique obligation to protect the fair trial rights of an accused, which is a duty owed to both the accused and the public, require it to disclose to the defence all information that is not clearly irrelevant. However, she made equally clear that this duty does not extend to third parties, nor does it extend to information that is not within its possession or control.
- [15] The Media Respondents rely as well on the following authorities: *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41; *CTV Television Inc. v. Ontario Superior Court of Justice* (2002), 163 C.C.C. (3d) 321 (Ont. C.A.); *R. v. Global News, a Division of Shaw Television Limited Partnership*, 2011 ONCJ 381; and *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.
- [16] In the first three of these decisions -- *Toronto Star*, *CTV Television* and *Global News* -- the applicants sought access to exhibits or warrants filed with the court and which formed part of the court record as material relevant to the issues arising in the application in question. The fourth decision, *Criminal Lawyers' Association*, concerned an appeal of a decision made under the Ontario Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F. 31.
- [17] In my respectful view, none of these authorities supports the argument of the Media Respondents on the issue of their standing to seek disclosure from the Crown of documents which were neither filed by the Crown nor relied upon by any party participating in the proceedings.
- [18] The immunity agreement was not relevant to any issue arising in the publication ban application with respect to which the Media Respondents were granted standing. The Media Respondents are not parties to the prosecution and, unlike the accused, have no right to compel disclosure by the Crown of information that does not form part of the public court record. Accordingly, they do not have standing to seek an order compelling disclosure of the immunity agreement by the Crown.
- [19] The application is dismissed. The Honourable Madam Justice C.A. Wedge

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