
CANADA / JUDGMENT

R. v. Haevischer

2014 BCSC 691

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Supreme Court of British Columbia

DECIDED

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2014 BCSC 691 R. v. Haevischer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Haevischer,

2014 BCSC 691

Date: 20140407

Docket: X072945-B

Registry: New Westminster

Regina

v.

Cody Rae Haevischer and Matthew James Johnston

Restrictions on publication in accordance with

the terms at para. 47 of this ruling

Before: The Honourable Madam Justice Wedge

Oral Ruling on Application 126

Publication Ban re Michael Le

Counsel for the Crown:

M.K. Levitz, Q.C.

L.J. Kenworthy

A.W. Henderson

Counsel for the Accused Haevischer:

D. Dlab

Counsel for the Accused Johnston:

B.A. Martland

Counsel for M. Le:

J. Winteringham, Q.C.

C.S. Johnson

Appearing for The Vancouver Sun:

K. Bolan

Place and Date of Hearing:

Vancouver, B.C.

April 2, 2014

Place and Date of Judgment:

Vancouver, B.C.

April 7, 2014

- [1] THE COURT: The Crown applies pursuant to s. 486.5 of the Criminal Code, the common law, and the inherent jurisdiction of the Court for the following orders: first, an order prohibiting publication of the name, photographs, depictions, and descriptions of Michael Le; second and following on the first, an order that those conditions remain in place until the conclusion of Mr. Le's sentence; third, for an order banning publication of the names of any persons connected to the Triads who may be mentioned during Mr. Le's testimony with the exception of Sophon Sek; and fourth, an order prohibiting publication of information concerning measures taken to protect Mr. Le's personal safety. The Crown also requests an order prohibiting publication of the materials filed in support of this application.
- [2] Mr. Le supports the Crown's application. Mr. Haevischer and Mr. Johnston oppose the application with the exception of the proposed ban on publication of measures taken to protect Mr. Le's safety. The Vancouver Sun opposes any ban on publication of Mr. Le's name and on publication of the names of Triad members mentioned in Mr. Le's testimony, but supports a ban on publication of any likeness of Mr. Le and measures taken for his safety.
- [3] Briefly, by way of background, Mr. Le was an accused on the indictment along with Mr. Haevischer and Mr. Johnston from mid-2009 until November 28, 2013, when he entered a plea on one count of conspiracy to commit first degree murder before Associate Chief Justice Cullen. His plea came nearly three months into the trial which began on September

30, 2013. Shortly before he entered his plea, Mr. Le signed a plea and immunity agreement in which he agreed to testify for the Crown against his former co-accused, and, in addition, with respect to another former co-accused, James Bacon, who is to be tried separately at a later date.

- [4] On December 17, 2013, the Crown and Mr. Le's counsel appeared before Cullen A.C.J. and made a joint submission on sentencing, following which Mr. Le received an effective remaining sentence of three years and one month taking into account time served prior to trial. At the time of sentencing, the Crown sought and obtained an order prohibiting publication of Mr. Le's likeness, his role as a cooperating witness for the Crown, and measures taken to secure his safety. At the same time, the Associate Chief Justice stipulated that the order was subject to further submissions before this Court in relation to Mr. Le's testimony in these proceedings, and that the order may be varied or set aside at that time.
- [5] Mr. Le's alleged role in the Surrey Six murders, as well as his guilty plea and sentencing some months into the trial, have been entirely in the public domain and the subject of widespread media coverage throughout the trial.
- [6] I will turn first to the grounds advanced by the Crown for the publication ban.
- [7] The Crown submits that in light of the effective three-year custodial sentence received by Mr. Le last December, he will likely serve a considerable portion of his sentence on conditional release in the community. The Parole Board will determine the nature and extent of the conditions imposed on Mr. Le while he is on conditional release. Such conditions may require Mr. Le to reside in a halfway house and/or attend group programming with other offenders who are on conditional release. The Crown submits that if such other offenders recognized Mr. Le as the former leader of the Red Scorpion gang who is now cooperating with the justice system, it is likely they will disseminate this information to others in the criminal world. For that reason, those who wish to do Mr. Le harm will be able to easily locate him, which will place him at real and significant risk of harm. The Crown says that if the media are permitted to identify Mr. Le by name and publish his likeness, the pool of persons who know Mr. Le to be the former Red Scorpion leader and now cooperating witness will be significantly increased, thereby again creating a real and substantial risk of harm.
- [8] The Crown advises that Mr. Le will be in the Lower Mainland to prepare for and testify in the current proceeding, and that his attendance will also be required in the R. v. Bacon proceeding, which has not yet been set for trial. Further, submits the Crown, while Mr. Le is in the community on conditional release, attempts to harm or kill him will place the community as a whole at risk.

- [9] With respect to the order sought concerning publication of Triad members who may be identified by Mr. Le in the course of his evidence, the Crown says Mr. Le fears retaliation against him and his family. Even if he cannot be identified by name, should he be required to identify Triad members by name in the course of his testimony, those members will immediately identify him as the person giving evidence.
- [10] Finally, the Crown says there are no reasonably available alternative measures to prevent the risks it has outlined.
- [11] Mr. Le has sworn an affidavit in support of the Crown's application. In it, he describes the harm he believes he will suffer if it is known that he cooperated with the police and Crown. His belief is based on his personal experience with gangs and the prison system. He also believes there will be a serious risk to family members as a result of his testimony.
- [12] The Crown filed the affidavit of Justin Chow who is a parole officer supervisor. Mr. Chow deposed to the process undertaken with respect to offenders on conditional release. Application must be made by the offender to the Parole Board of Canada which reviews and considers the recommendations of community parole officers, but is not bound to implement them. Offenders are usually granted day parole before being granted full parole and, on day parole, offenders are directed to reside at a halfway house. According to Mr. Chow, gang-affiliated offenders face a substantial risk of physical harm while on conditional release. Such offenders who are also justice system collaborators face the added substantial risk of retaliation by other gang members. Residency and programming conditions are routinely imposed on offenders on conditional release, which entail significant and regular interaction with other offenders; that, in turn, increases the risk of harm.
- [13] In cases where the risk to the offender is high in a specific location, an available option for dealing with the risk in the community is to work with other regions to effect a transfer. Nevertheless, Mr. Chow expressed the view that transfer to another region is considered a last resort because it is usually beneficial to reintegrate the offender back into his home community where he has the advantage of his support systems.
- [14] Mr. Le submits that the evidence of Mr. Chow identifies three significant challenges. First, it is very difficult to fulfill Corrections' obligations to protect gang-affiliated cooperators in the community setting because placement options are limited and the cooperator must both interact with other individuals on conditional release at halfway houses and in programs, and must coexist daily within the community at large. Second, given residency and programming conditions frequently imposed on offenders on conditional release which require interaction with other offenders, staff, and the community, there are very limited means of protecting either the offender or the community. The third challenge, says Mr. Le, relates to the widening of the pool of potential retaliators. It is not uncommon for offenders to provide information to or do favours for gang members in an effort to obtain status or credibility in the criminal world. As such, Correctional Service Canada tries to limit the number of persons who are told that a parolee is a cooperator, but it cannot control external

sources such as the media.

- [15] Mr. Haevischer and Mr. Johnston assert their constitutional right to a public trial. They are most concerned that the ban sought will frustrate the right of the public to understand the narrative of this trial -- that is, the true narrative of the events and the need for a clear understanding of what is occurring in the courtroom. They argue that the ban sought in this application attempts to conceal from the public what has now become a central aspect of the narrative, which is that Mr. Le, who on the Crown's theory was a directing mind of a conspiracy which left six people dead, is now testifying to the role of his former co-accused in the murders. That concealment, say the accused, will eviscerate the public's ability to understand what is actually happening in the courtroom.
- [16] Secondly, the accused argue that unlike Witnesses X and Y who were the subject of an earlier publication ban order, Mr. Le is not serving a life sentence. He is serving a determinate and relatively short federal sentence. The public has a right to scrutinize the plea agreement which resulted in an actual period of incarceration of approximately six-and-a-half years. The public should know the reasons underlying that plea agreement, including Mr. Le's agreement to testify in this proceeding and the Bacon trial.
- [17] Thirdly, the accused argue that Mr. Le's connection with this case is both close and recent. Only last week there was extensive evidence about Mr. Le's involvement in the conspiracy to commit the murders. It is simply a fiction to suggest that anyone with any knowledge of this case will not know who the unnamed witness is and, as such, the ban will have no efficacy whatsoever.
- [18] Fourthly, the accused argue that the Crown, who bears the onus on this application, has failed to establish the first prong of the Dagenais/Mentuck test, which is necessity. While Mr. Le may be at substantial risk of harm, there remains unproven the second prong of the necessity test: that is, the Crown has failed to establish there are no reasonably available alternative measures to address the risk.
- [19] Finally, the accused argue that even if necessity has been established, the proportionality aspect of the test must be considered. Whether a ban is proportional involves a balancing of the positive and negative effects of the ban on the rights and interests of the parties and the public in the specific circumstances of the case. Here, say the accused, the negative effects clearly outweigh any positive effect the ban on Mr. Le's name could have. They argue that the ban will be meaningless because anyone even marginally knowledgeable about the case will know who Mr. Le is. They contrast the circumstances of Witnesses X and Y, who are governed by a previous ban of this Court; their identities were protected from the outset of the trial, while Mr. Le's involvement has been known and widely published for the duration of this trial. How, the accused ask, does one explain the disappearance of Mr. Le and the appearance of an unnamed witness?

- [20] With respect to the proposed ban regarding the names of Triad members, the accused argue there is no basis in law or the evidence to support such an order. They say that given Mr. Le's former association with the Triads and, in particular, the Triad member by the name of Sophon Sek, who has been charged separately for his alleged role in the Surrey Six murders, it is inconceivable that Triad members will not know Mr. Le is the former accused now testifying pursuant to a plea and immunity agreement.
- [21] While the accused take the position that neither Mr. Le's name nor depictions of him should be the subject of a publication ban, they argue in the alternative that his depiction may be the subject of a ban without significantly impairing the open-court principle.
- [22] The Vancouver Sun opposes only the ban on Mr. Le's name and the names of the Triad members who may be mentioned in his evidence. Ms. Bolan on behalf of the Vancouver Sun advised the Court that the Vancouver Sun supports the ban of publication of photographs or other likenesses of Mr. Le, as well as the measures that may be taken to ensure his safety. The difficulty with respect to the proposed ban on publication of Mr. Le's name, Ms. Bolan emphasized, is that it adds to the difficulty reporting on the narrative of the case already posed by current bans on witnesses' names. Prohibiting publication of Mr. Le's name will significantly impair the ability of the media generally to properly cover this trial given the centrality of Mr. Le's involvement in the trial's narrative. She also expressed concern about the prospect of shielding the names of individuals who are active members of gangs such as the Triads and the public perception that the Court is protecting the identities of these individuals.
- [23] I canvassed the legal framework governing publication ban applications such as this in my earlier ruling on Witnesses X and Y, (which is indexed as 2013 BCSC 1085), and I will not cover that ground again to any extent.
- [24] It is sufficient to say that in my earlier ruling, I concluded at para. 107 that the proper approach on an application pursuant to s. 486.5 of the Criminal Code is to consider and apply the factors enumerated in s. 486.5(7) within the framework established by the Supreme Court of Canada in the Dagenais/Mentuck decisions, always bearing in mind the relevant rights and interests engaged and the purposes and effects of the particular ban in question.
- [25] As noted in my earlier ruling, the Dagenais/Mentuck framework involves the two-stage inquiry described by Justice Iacobucci at para. 32 of *R. v. Mentuck*, [2001] 3 S.C.R. 442, where he stated as follows:

A publication ban should only be ordered when:

- (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and

- (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.
- [26] The first prong of the test involves a determination of the necessity of the ban. The second involves the proportionality considerations, that is, the purpose and effects of the ban.
- [27] Turning first to necessity, two questions must be answered. First, is there a real and substantial risk, the reality of which is well grounded in the evidence advanced on the application? Second, if so, has the proponent of the ban established that lesser alternative measures will not address that risk? This stage of the inquiry also encompasses the factors described in ss. 486.5(7)(b), (c) and (e). Subsections (b) and (c) address the risk of harm should Mr. Le's identity be disclosed and his consequent need for protection from retaliation. Subsection (e) requires consideration of the effect of alternatives to protect his identity other than a ban on his name.
- [28] Mr. Le argues that there is no evidence to suggest that lesser alternative measures than a ban on his name could reduce the risk of harm to him. The difficulty with this submission is that the proponent of the ban cannot simply rely on the absence of such evidence. To do so is to misapprehend the onus on the applicant. If common sense suggests there are obvious alternative measures to banning publication of Mr. Le's name -- such as a name change, for example -- then it is up to the proponent of the ban to establish that a name change will not adequately address the risk. Neither the Crown nor Mr. Le provided any evidence or argument to that effect.
- [29] The efficacy of concealing Mr. Le's name at this stage of the trial, particularly in light of the evidence that has been the subject of widespread media reporting for the past six months, is not at all self-evident. Mr. Le will be readily identifiable as the individual who was until recently one of the accused on the indictment. There can be no doubt that a focus of the cross-examination will be Mr. Le's involvement in the conspiracy to murder and his recent cooperation under a plea and immunity agreement. Persons with any motivation to harm Mr. Le will undoubtedly know that he is the witness in question.
- [30] That begs the question why Correctional Service Canada has not already taken steps to assist Mr. Le in obtaining a name or identity change for purposes of keeping him safe both for the remaining months of his incarceration and once he is in the community on conditional release. The Crown has had abundant warning that it must address the obvious lesser alternative measure of a name or identity change, not only as a result of my earlier ruling concerning Witnesses X and Y, but as a result of the comments of Cullen A.C.J. in his December 17, 2013 ruling on the Crown's application for a publication ban at paras. 51-52:

- [51] I agree with Mr. Anderson that the lack of evidence of what alternative measures either have been or will be put in place to some extent confounds my ability to judge the necessity of the order sought, but I accept that the timeframe within which this proceeding has developed to the point it has is relatively compressed and any process of integration with a new name and/or identity may take time to be realistically comparable to what Madam Justice Wedge was faced with in relation to X and Y.
- [52] I do think, however, that there is an ongoing obligation on the police, corrections, and Crown to make their best efforts to put effective and reasonable measures in place to buttress the protection of the accused.

At para. 56, he states:

- [56] On the other hand, this is not a situation where there will never be the ability for public understanding and scrutiny. It seems likely that this issue can and will again be raised at the time of the accused Le's testimony in several months at the Haevischer trial, and it may be that in the interim more will have been done to shield the accused from the effects of publicity about the nature of his involvement to enable full or fuller disclosure.

At para. 58, he says:

- [58] I will thus make the order, but it will be subject to further submissions or order of the Court which may be made in connection with the testimony of the accused in the case of R. v. Haevischer.
- [31] In the absence of evidence to the contrary, it is difficult to conclude that a name change would be a less effective means of reducing the risk of harm to Mr. Le than banning publication of his name six months into the trial. A name change would address most of the challenges posited by Mr. Chow in his affidavit, particularly if the Court accedes to the Crown's request for a ban on the publication of photographs and other likenesses of Mr. Le. The media supports that measure and the accused do not strenuously oppose it.
- [32] In the circumstances of this case, I am satisfied that a ban prohibiting publication of photographs of Mr. Le coupled with a name change would significantly reduce the risk of harm to him. That is because, on the evidence filed in this application, there are very few photos of Mr. Le currently in circulation. The only photograph in the materials is one of Mr. Le taken several years ago which bears little resemblance to Mr. Le's appearance at present. As such, a ban on publication of his likeness will, in my view, substantially reduce the risk of harm to him. Accordingly, there will be an order to that effect.
- [33] The Crown relied on Mr. Chow's evidence concerning the risk of placing Mr. Le on conditional release in the community where he is known. However, the Crown does not say why Mr. Le could not be placed in a different community. While Mr. Chow deposed that it is preferable to place released offenders in the community where they have support systems, there is no evidence to suggest that Mr. Le has any such support system in the Lower Mainland. At the time of his extradition to Canada in 2009, Mr. Le had been living outside of

Canada for well over a year. In any event, if his safety is at stake, surely the preferable measure is to release him to a community some distance from the Lower Mainland, where Mr. Le was previously engaged in gang activities and where he is more likely to be located by criminal elements wishing to do him harm.

- [34] Accordingly, I conclude that the publication ban sought by the Crown with respect to Mr. Le's name is not necessary in light of the reasonably available alternative measures.
- [35] As observed by Mr. Justice Iacobucci in *Mentuck*, however, it is useful to support the conclusion regarding necessity by conducting the proportionality analysis. The rights and interests engaged at the proportionality stage are contained in ss. 486.5(7)(a), (d), (f) and (g). Subsection (a) refers to the right of the accused to a fair and public hearing, a right also guaranteed by s. 11(d) of the Charter; s-s (d) protects society's interest in encouraging the reporting of crime and participation in the criminal justice process; s-s (g) refers to freedom of expression also guaranteed by s. 2(d) of the Charter; and s-s (f) reminds the Court to weigh the salutary effects of the proposed order against its deleterious effects.
- [36] As noted earlier, a ban on Mr. Le's name would be significantly intrusive of the open court principle in two respects. First, Mr. Le's decision to cooperate and testify against his co-accused is now central to the narrative of the case. Second, Mr. Le's plea and immunity agreement was obtained in part by his agreement to testify against his co-accused. There is a significant public interest engaged here. The public has a right to understand, in the context of this ongoing trial, the link between the sentence imposed on Mr. Le for his role in the homicides and his agreement to cooperate in the prosecution of his former co-accused. The public is also entitled to understand the caution with which Mr. Le's evidence must be approached by this Court.
- [37] I acknowledge that society's interest in encouraging the reporting of offences and cooperation of persons such as Mr. Le in the prosecution of crime, may have been advanced by a ban on the publication of his name. However, in this case, that is not a significant consideration in light of my conclusion that the risk of harm to Mr. Le's safety would not be reduced by that measure. In the result, I am satisfied that the salutary effects of the proposed ban do not outweigh the deleterious effects on the other rights and interests engaged in this trial.
- [38] However, a ban on the publication of Mr. Le's likeness, coupled with a change of name or identity, will provide a realistic means of significantly reducing the risk of personal harm to Mr. Le.
- [39] In light of my conclusions, it is not necessary to address the issue of whether the ban on publication of the names of any individuals identified by Mr. Le as Triad members is necessary. In any event, I would not accede to that aspect of the application for two reasons. First, any Triad gang members would immediately recognize that the person testifying is the former accused who has now entered a guilty plea. Mr. Le is expected to testify that he paid a Triad member, Sophon Sek, to assist the accused to gain access to the Balmoral on the day

of the murders. Mr. Sek has been charged with manslaughter on a separate indictment for his alleged role in the murders. His legal counsel has been monitoring these proceedings. It is highly unlikely that any Triad members will not be aware of Mr. Le's identity. Secondly, at least one unintended consequence of such a ban would be to shroud the operations or activities of the Triads, a consequence members of the public would likely find very difficult to countenance.

[40] In summary, the Crown has not established the necessity of the ban it seeks with respect to Mr. Le's name. However, it has established the necessity of a ban on publication of photos, depictions and descriptions of Mr. Le.

[41] In order to assist counsel, I have provided the terms of the order in writing. Madam Registrar, if you would pass them out and I will review them orally with counsel. Thank you. I have a couple of extra copies here if you need them.

[42] MS. KENWORTHY: My Lady, I wonder if I could clarify one point? You may have addressed it at the beginning --

[43] THE COURT: Yes.

[44] MS. KENWORTHY: -- of your reasons. Is there to be a publication ban on any protective measures?

[45] THE COURT: Yes.

[46] MS. KENWORTHY: Oh, thank you.

[47] THE COURT: Yes, that is included in the order. Thank you.

1. The order of the Associate Chief Justice dated 17 December 2013 is set aside;
2. There shall be no publication, broadcast, or transmission of:
 - (a) photographs, depictions, or physical descriptions of Michael Le;
 - (b) information concerning measures taken to protect Mr. Le's safety; and
 - (c) written materials filed in support of this application;
3. This order shall remain in place until the end of Mr. Le's sentence including any period of conditional release into the community; and
4. This order may be varied or set aside by further order of this Court.

[48] MS. DLAB: My Lady, I was wondering if I could just address the Court on something the media has asked me to request. As you know, they are not represented by legal counsel.

[49] THE COURT: Yes.

[50] MS. DLAB: And in light of Your Ladyship's ruling, they were wondering whether they are free to report on this proceeding, application 126?

- [51] THE COURT: Yes, they are. They are free to report on the fact of the application and they are free to report on the reasons that I have given.
- [52] MS. DLAB: Thank you.
- [53] THE COURT: All right.
- [54] MS. KENWORTHY: My Lady, just one additional -- with respect to the wording of the order, while the publication ban application was heard on December 16, 2013, I believe Associate Chief Justice Cullen provided his decision on the 17th.
- [55] THE COURT: I thought so, but I was confused by the fact that the currently circulating draft order refers to the 16th of December.
- [56] MS. KENWORTHY: It is, and I was present for that so I am --
- [57] THE COURT: Yes, yes.
- [58] MS. KENWORTHY: -- quite clear about that.
- [59] THE COURT: And I see that the transcript of his remarks is dated the 17th of December. The order will be amended accordingly.

The Honourable Madam Justice C.A. Wedge

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