

CANADA / JUDGMENT

## R. v. Haevischer

2023 BCSC 2111

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2023 BCSC 2111 R. v. Haevischer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Haevischer,

2023 BCSC 2111

Date: 20231201

Docket: X072945-B

Registry: New Westminster

Rex

v.

Cody Rae Haevischer

Before: The Honourable Madam Justice Devlin

Oral Reasons for Judgment re: Summary Dismissal Application

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Place and Dates of Hearing:

Vancouver, B.C.

October 16, 2023

Vancouver, B.C.

November 24, 2023 (In Camera)

Place and Date of Judgment:

Vancouver, B.C.

December 1, 2023

THE COURT: This decision was delivered in the form of Oral Reasons. The Reasons have since been edited for publication.

## Introduction

- [1] In *R. v. Haevischer*, 2023 SCC 11 [Haevischer SCC] the Supreme Court of Canada remitted Mr. Haevischer's stay of proceedings application, which alleged abuse of process, back to this Court for hearing at a voir dire. Justice Martin, writing for a unanimous Court, explained that an application in a criminal trial should only be summarily dismissed if it is manifestly frivolous.
- [2] On August 21, 2023, Mr. Haevischer filed a revised Notice of Application ("NOA") in which he relies on both the trial fairness and residual categories of abuse of process. In addition to the various types of misconduct by state actors referred to in his original abuse of process application, the revised NOA includes allegations related to the non-disclosure of information about Person Y, a Crown witness.
- [3] On this application, relying on the framework established in *Haevischer SCC*, the Crown seeks summary dismissal of Mr. Haevischer's abuse of process allegations in relation to the Crown's non-disclosure of information about Person Y.
- [4] The Crown makes two principal arguments in support of summary dismissal. First, by virtue of the principle of vertical stare decisis, this Court is bound by the findings of the Court of Appeal in *R. v. Johnston*, 2019 BCCA 107 [Johnston 2019] and *R. v. Haevischer*, 2021 BCCA 34 [Haevischer 2021], which determined that the non-disclosure of the Person Y

information did not adversely affect trial fairness. Therefore, relying on paragraph 85 of *Haevischer SCC*, they argue the issue of whether the non-disclosure had an impact on trial fairness is a legal argument that has already been rejected. Hence, as the Crown submits, the application is manifestly frivolous and should be dismissed. Secondly, relying on paragraph 96 of *Haevischer SCC* they argue the NOA is deficient as it does not identify any evidence that would support a finding of Crown misconduct.

- [5] Mr. Haevischer submits the Crown has failed to demonstrate that his application is manifestly frivolous. In particular, he emphasizes that even if the Court of Appeal rulings preclude a finding by this Court of abuse of process under the trial fairness category, the rulings have no impact on his claim under the residual category as it was never considered at the appellate level. His position is that the factual record pertaining to the non-disclosure of the Person Y material overlaps both categories, and following the evidentiary hearing, the factual record before this Court may differ from that before the Court of Appeal. Accordingly, Mr. Haevischer submits, it would be premature to dismiss the claim for relief under the trial fairness category.
- [6] I also heard submissions from the Amicus Curiae in an ex-parte, in camera hearing. Those submissions focused on why the application for abuse of process on the residual ground is not manifestly frivolous. While I have had the benefit of hearing those submissions, I will not detail them in this ruling as I have focussed my determinations on Mr. Haevischer's submissions.

## Procedural History

- [7] For ease of reference, I will briefly summarize the procedural history of this matter. Mr. Haevischer was originally charged together with Mr. Johnston. They made joint submissions before both the Court of Appeal and Supreme Court of Canada. However, Mr. Johnston passed away after the appeal was argued before the Supreme Court of Canada.
- [8] On October 2, 2014, following a lengthy trial before Justice Wedge, Mr. Haevischer and Mr. Johnston were convicted on six counts of first-degree murder and one count of conspiracy to murder (*R. v. Haevischer*, 2014 BCSC 1863). On June 9, 2014, before the end of the trial, both filed an application for a stay of proceedings due to abuse of process. On November 19, 2014, after conducting a hearing pursuant to the procedure established in *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.), 1996 CanLII 1005, leave to appeal to SCC ref'd, [1996] S.C.C.A. No. 461 [Vukelich], Wedge J. granted the Crown's application for summary dismissal of the stay application (*R. v. Haevischer*, 2014 BCSC 2172).
- [9] On January 8, 2015, Mr. Haevischer filed a notice of appeal against conviction which was later amended on May 8, 2015. After filing his notice of appeal, counsel for Mr. Haevischer received some disclosure from the Crown which revealed that Person Y was admitted into the federal Witness Protection Program ("WPP") after he testified at trial. Prior to the hearing of his conviction appeal, Mr. Haevischer sought further disclosure to support

potential applications to adduce fresh evidence at the hearing of his appeal. Initially, the Crown declined to provide further disclosure on the basis that it was irrelevant and privileged, but did provide some material prior to the appeal being heard.

- [10] In Johnston 2019, counsel for Mr. Haevischer and Mr. Johnston brought an application for further disclosure regarding Person Y and the WPP to support potential applications to adduce fresh and new evidence at the hearing of the appeals. Justice Griffin, writing for the Court, accepted the appellants' submission that the test from *R. v. Dixon*, [1998] 1 SCR 244, 1998 CanLII 805 (SCC) [Dixon] would be applied to their proposed fresh evidence application. However, Griffin J.A. rejected the argument that there was a reasonable possibility the WPP records pertaining to Person Y would assist the appellants in a fresh evidence application on appeal. Justice Griffin concluded there was no reasonable possibility that the Person Y materials would assist the appellants in arguing that non-disclosure affected the trial verdict or trial fairness. At para. 123 Griffin J.A. characterized the material as "minor and tangential".
- [11] In Haevischer 2021, the Court of Appeal affirmed the verdicts of guilt, but vacated the convictions and remitted the stay application to the trial court for an evidentiary hearing on the abuse of process allegations. As mentioned earlier, although the Crown disputed the relevance of the documents sought pertaining to Person Y seeking and being afforded entry into the WPP, they disclosed the information in their possession, redacted for privilege. The Crown accepted that disclosure of this material came within the scope of the Crown disclosure obligations under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 1991 CanLII 45 [Stinchcombe]: Haevischer 2021 at para. 337.
- [12] The relevant issue on appeal was whether the breach of the appellants' right to disclosure also breached their s. 7 right to make full answer and defence. The Court agreed with the Crown that the reasons of Griffin J.A. for dismissing the appellant's disclosure application in Johnston 2019 informed the non-disclosure issues raised on appeal. Considering the test set out in Dixon, the Court concluded there was no reasonable possibility the undisclosed WPP information could have affected the trial verdict (at paras. 343-348) and there was no reasonable possibility the failure to disclose the WPP information could have affected overall trial fairness (at paras. 349-354). The Court also agreed with the finding in Johnston 2019 at para. 123 that the information was "at best minor and tangential to Person Y's credibility".
- [13] In Haevischer SCC, the Supreme Court of Canada dismissed the Crown's appeal of the decision in Haevischer 2021 to order a hearing on the stay of proceedings application. Justice Martin, writing for a unanimous Court, set out the framework to be applied on summary dismissal applications in criminal proceedings.

## The Governing Legal Framework

- [14] In *Haevischer SCC*, the Supreme Court of Canada determined that the threshold test for the summary dismissal of applications made in the criminal law context is whether the underlying application is manifestly frivolous.
- [15] Justice Martin outlined the two core values relevant to a summary dismissal application: trial efficiency and trial fairness. In terms of efficiency, the main concern is the avoidance of disproportionate or undue delay: at para. 51. Trial fairness, a constitutional imperative, arises because summary dismissal runs counter to the notion that parties should have the opportunity to present their cases and to have their evidence, claims and allegations adjudicated on their merits. Thus, trial fairness requires a low threshold for holding a *voir dire*: at paras. 55-59.
- [16] At paras. 67-69 the Court described the meaning of both "manifestly" and "frivolous". Importantly, the frivolous nature of the application must be obvious on the face of the record. Otherwise, the application should be heard: at para. 69.
- [17] The Court provided guidance on how to apply the "manifestly frivolous" threshold, which I summarize as follows:
- 1) The judge must assume the facts alleged by the applicant to be true and must take the applicant's arguments at their highest: at para. 83.
  - 2) The judge ought to accept the inferences suggested by the applicant, unless there is no reasoning path toward the inference: at para. 84.
  - 3) Determine if there is a fundamental flaw in the application's legal pathway such that the remedy is unattainable. For instance, the application may have put forward a legal argument that has already been rejected. Applications that "depend on legal propositions that are clearly at odds with settled and unchallenged law are manifestly frivolous": at para. 85.
  - 4) Determine if the application creates a situation where the remedy sought could never issue on the facts of the particular application: at para. 86.
  - 5) Determine if there are key portions or factual allegations missing from the application. The fundamental flaws must be manifest, i.e. apparent on the face of the record; if not, the underlying application must be allowed to proceed: at paras. 87-88.
  - 6) The power to summarily dismiss is an ongoing power: at para. 89.
  - 7) The burden is on the party seeking summary dismissal to establish that the application is manifestly frivolous: at paras. 90-92.

## Abuse of Process

- [18] Before I apply the Haevischer SCC framework to this application, I will briefly canvass the law of abuse of process as there is some dispute between the parties as to how the doctrine of abuse of process applies to Crown non-disclosure.
- [19] Stated generally, an abuse of process captured by s. 7 of the Charter may arise from state conduct that either: (a) compromises trial fairness (i.e., the "main" category); or (b) does not threaten trial fairness but risks undermining the integrity of the judicial process (i.e., the "residual" category): *R. v. Babos*, 2014 SCC 16 at para. 31 [Babos], citing *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 73, 1995 CanLII 51 [O'Connor]. The residual category, put differently, captures conduct that is so vexatious or unfair that it "contravenes fundamental notions of justice and thus undermines the integrity of the judicial process": *R. v. Nixon*, 2011 SCC 34 [Nixon] at para. 36, describing O'Connor at para. 73.
- [20] The general governing test is whether compelling the accused to stand trial "would violate those fundamental principles of justice which underlie the community's sense of fair play and decency", or whether the proceedings are "oppressive or vexatious": *Nixon* at para. 40, citing *R. v. Keyowski*, [1988] 1 S.C.R. 657 at 658-659, 1988 CanLII 74, and *R. v. Jewitt*, [1985] 2 S.C.R. 128 at 136-137, 1985 CanLII 47.
- [21] As set out in para. 74 of O'Connor, abuse of process due to non-disclosure by the Crown normally falls under the trial fairness category caught by s. 7 of the Charter. Therefore, a challenge based on non-disclosure will generally require a showing of actual prejudice to the accused's ability to make full answer and defence.
- [22] However, O'Connor, at para. 83, recognizes that under the residual category, the non-disclosure may also impact the integrity of the justice system. In *R. v. Bjelland*, 2009 SCC 38, the Supreme Court expanded on the comments at para. 83 of O'Connor, recognizing that while in most cases the focus of the disclosure issue will be on whether there was prejudice to the accused, the "safeguarding of the integrity of the justice system will also be a relevant concern": at para. 26.
- [23] In *Babos*, Justice Moldaver laid out the test for determining whether a stay of proceedings is warranted for an abuse of process. In doing so, Moldaver J. described the residual category of abuse of process, and its relation to the trial fairness category, as follows:
- [33] The test is the same for both categories because concerns regarding trial fairness and the integrity of the justice system are often linked and regularly arise in the same case. Having one test for both categories creates a coherent framework that avoids "schizophrenia" in the law (O'Connor, at para. 71). But while the framework is the same for both categories, the test may -- and often will -- play out differently depending on whether the "main" or "residual" category is invoked.

- [35] By contrast, when the residual category is invoked, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial -- even a fair one -- will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency. This harms the integrity of the justice system.
- [24] As this brief canvass of the case law establishes, abuse of process allegations regarding disclosure issues may ground valid claims under both categories of abuse of process -- trial fairness and the residual category, which considers the impact on the integrity of the justice system. Further, it is not necessary to establish that the alleged abusive conduct invokes both categories in order to make out a successful abuse of process claim. For instance, there is nothing to prohibit a consideration under the residual category even if the impact on trial fairness is not established.

#### Analysis -- Application of the Haevischer SCC Framework

- [25] For ease of reference, I have set out the components of Mr. Haevischer's application the Crown submits should be summarily dismissed.

#### PART I - Abuse of Process by the RCMP and Other Police Agencies

##### II. Trial Fairness:

44. The police failed to provide a full accounting of benefits provided to the witnesses who testified at trial. This included, inter alia:
- a. Failing to disclose their offer of witness protection to a key witness at trial, Person Y;
  - b. Failing to disclose the details of a special custodial arrangement for Person Y post-trial; and
  - c. Failing to disclose the untruthful evidence of Person Y regarding his expected conditions of confinement.

#### PART III - Abuse of Process by the Crown

##### I. Residual Category

59. Crown counsel deliberately withheld information regarding Person Y's entry into the Witness Protection Program from defence counsel at trial in violation of their Stinchcombe obligations.

60. In order to bolster Person Y's credibility and secure a conviction against the Applicant and his co-accused, Crown counsel intentionally or recklessly permitted Person Y to mislead the court regarding his anticipated conditions of confinement post-trial. In his closing submissions at trial, Crown counsel expressly referred to the inaccurate evidence of Person Y regarding his anticipated life in solitary confinement and deprivation where he would "sit in the hole for the rest of [his] life".

## II. Trial Fairness:

61. Crown counsel deliberately withheld information regarding Person Y's entry into the Witness Protection Program from defence counsel at trial in violation of their Stinchcombe obligations.
62. In order to bolster Person Y's credibility and secure a conviction against the Applicant and his co-accused, Crown counsel intentionally or recklessly permitted Person Y to mislead the court regarding his anticipated conditions of confinement post-trial. In his closing submissions at trial, Crown counsel expressly referred to the inaccurate evidence of Person Y regarding his anticipated life in solitary confinement and deprivation where he would "sit in the hole for the rest of [his] life".
63. The accused were unfairly denied a meaningful opportunity to properly and fully cross-examine Person Y on his misleading testimony.
- [26] It is evident that the allegations pertaining to Crown conduct under the residual category mirror two of the three allegations made under the trial fairness category. In addition, both Part I and Part III relate to the impact of the non-disclosure of the Person Y material and his status with the WPP at the time of testifying at trial.
- [27] As stated earlier, the Crown submits that the section of Mr. Haevischer's abuse of process application set out above is fundamentally flawed because it is based on the same legal argument that has already been rejected by the Court of Appeal. They rely on the findings by the Court of Appeal in Haevischer 2021, which adopts the analysis by Griffin J.A. in Johnston 2019. Therefore, in accordance with paragraph 85 of Haevischer SCC they submit this Court should summarily dismiss the application.
- [28] I turn first to the allegations under the residual category. Although they focussed their submissions on the trial fairness category, the Crown also takes the position that there is nothing in the NOA to establish that the non-disclosure caused prejudice to the integrity of the justice system, particularly because there has been no prejudice to Mr. Haevischer's trial fairness rights. During oral submissions, the Crown clarified that they are not submitting Mr. Haevischer must establish an impact on trial fairness under the residual category. Rather, given the Court of Appeal did not find prejudice to Mr. Haevischer's fair trial rights, he has not indicated any other pathway that could also demonstrate prejudice to the integrity of the justice system.

- [29] Mr. Haevischer does not challenge the findings of the Court of Appeal that the non-disclosure did not impact his fair trial rights. However, he submits those findings do not render his reliance on the residual category manifestly frivolous. I agree.
- [30] It is important to consider what the Court of Appeal decided regarding the non-disclosure of the Person Y information. On appeal, the issue was whether the appellants and Amici had established that breach of the appellants' right to disclosure of the Person Y material also breached their s. 7 right to make full answer and defence. The Court considered this issue under the second part of the Dixon test, which asks whether there was a reasonable possibility the non-disclosure affected the trial verdict or overall trial fairness.
- [31] In dismissing this ground of appeal, the Court in Haevischer 2021 concluded "there was no reasonable possibility the undisclosed information could have affected the trial verdict": at para. 343. Among other considerations, the Court, at paras. 344-357, noted that the undisclosed WPP information did not contradict Person Y's evidence at trial. Further, Person Y's evidence that he would be serving his sentence "in a hole" or placed in solitary confinement or "super-duper protective custody" was consistent with his experience at the time. Another consideration was the fact that at the time of his testimony, his application to the WPP was not complete. The Court also agreed with Griffin J.A.'s finding at para. 123 of Johnston 2019 that the material was "at best minor and tangential".
- [32] I agree with the Crown that the allegations contained in the paragraphs of the NOA cited above are similar to the issues dealt with in Haevischer 2021. As I have said, the findings in Haevischer 2021 are binding on this Court when considering the impact of the non-disclosure on trial fairness. However, the Court of Appeal was not dealing with an application under the abuse of process doctrine and certainly made no findings under the residual category of abuse of process. In other words, I accept I am bound by the findings of the Court of Appeal regarding trial fairness, and those findings must inform my consideration of the abuse of process application; however, I do not consider those findings to be determinative of the issue on abuse of process, particularly with respect to the claim under the residual category.
- [33] Further, Mr. Haevischer submits that the very act of Crown non-disclosure, regardless of whether it impacted trial fairness, supports an evidentiary basis for his claim under the residual category. Relying on the non-disclosure, he invites this Court to infer improper motive on the part of the Crown. As the Amicus explained, the issue on the abuse of process application is not whether there was an explanation for the lack of disclosure, but rather the propriety of withholding the information. As instructed by the Supreme Court of Canada, on a summary dismissal application I am to assume the facts as alleged by the applicant, take the arguments at their highest and refrain from weighing evidence.
- [34] Accordingly, I am not satisfied the Crown has demonstrated that Mr. Haevischer's abuse of process claim under the residual category is manifestly frivolous.

- [35] Turning to the remaining allegations, I am also not prepared to dismiss Mr. Haevischer's claim under the trial fairness category of abuse of process. At this stage of the process, given the evidentiary overlap between the two categories and the expectation that the evidentiary record on this application will differ from that before the Court of Appeal, I agree with Mr. Haevischer that it would be premature to summarily dismiss his claim under the trial fairness category. Although I reiterate that I am bound by the findings of the Court of Appeal regarding trial fairness, and those findings will govern my analysis of the abuse of process claim, I am also cognizant of the low threshold identified in Haevischer SCC for holding a voir dire: at para. 59.
- [36] Finally, I agree with the Crown that there are some deficiencies in both Mr. Haevischer's NOA and the Trial Plan he has filed, but I do not view these deficiencies as a basis to summarily dismiss the application. Rather, these are issues this Court can address through the utilization of broad case management powers which, as discussed in Haevischer SCC, include the ability of a court to revisit prior evidentiary determinations, allow new applications if in the interests of justice and to determine how the voir dire will be conducted.

## Conclusion

- [37] I find that the Crown has failed to establish that portions of Mr. Haevischer's abuse of process application is manifestly frivolous. Therefore, the Crown's application is dismissed. However, as the matter proceeds during the case management phase, and as the evidence unfolds at the hearing it may be necessary to revisit some of this ruling.

"Devlin J."

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