

CANADA / JUDGMENT

R. v. Haevischer

2024 BCSC 1627

COURT

Supreme Court of British Columbia

DECIDED

29 August 2024

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2024 BCSC 1627 R. v. Haevischer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Haevischer,

2024 BCSC 1627

Date: 20240829

Docket: X072945-B

Registry: New Westminster

Rex

v.

Cody Rae Haevischer

Before: The Honourable Madam Justice Devlin

Oral Reasons for Judgment

Defence Adjournment Application

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N. Khan

Place and Date of Hearing:

Vancouver, B.C.

August 29, 2024

Place and Date of Judgment:

Vancouver, B.C.

August 29, 2024

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

Introduction

- [1] By way of a Notice of Application filed August 23, 2024, Cody Rae Haevischer applies to adjourn the hearing of his application for a judicial stay of proceedings for an abuse of process (the "Stay Application"). The Stay Application is presently scheduled to commence on October 7, 2024. Mr. Haevischer proposes to adjourn the hearing of the application to November 4, 2024.
- [2] The Crown does not oppose Mr. Haevischer's adjournment application on two conditions: (1) that there be no further adjournments; and (2) that counsel for Mr. Haevischer provide the Crown information the Crown seeks pertaining to the anticipated unfolding of the Stay Application.

Procedural History

- [3] Mr. Haevischer filed a revised Notice of Application for the Stay Application on August 21, 2023, which he further amended on May 29, 2024 (the "Abuse NOA"). In the Abuse NOA, Mr. Haevischer relies on both the trial fairness and residual categories of the abuse of process doctrine.

- [4] These proceedings relate to the execution-style killing of six people on October 19, 2007, in an apartment building in Surrey, BC. The incident is widely known as the "Surrey Six murders". On October 2, 2014, Justice Wedge found Mr. Haevischer and his co-accused Matthew Johnston guilty of six counts of first-degree murder and one count of conspiracy to commit murder in connection with the Surrey Six case: *R. v. Haevischer*, 2014 BCSC 1863.
- [5] Before their convictions were entered, Mr. Haevischer and Mr. Johnston initiated the Stay Application. Justice Wedge summarily dismissed the application at first instance, on November 19, 2014: *R. v. Haevischer*, 2014 BCSC 2172 [Vukelich Ruling]. On December 12, 2014, Wedge J. sentenced Mr. Haevischer to life imprisonment, with no parole eligibility for 25 years: *R. v. Haevischer*, 2014 BCSC 2533.
- [6] However, following appeals to our Court of Appeal and the Supreme Court of Canada, the Stay Application was remitted to this Court for an evidentiary hearing: see *R. v. Johnston*, 2021 BCCA 34, and *R. v. Haevischer*, 2023 SCC 11 [Haevischer SCC].
- [7] On May 25, 2023, the first case management conference ("CMC") after the judgment in Haevischer SCC was held before me. This CMC took place 3,109 days (or 8 years, 6 months, and 6 days) since Wedge J. had dismissed the Stay Application at first instance. During the CMC, Mr. Haevischer's counsel advised that they anticipated the hearing of the Stay Application would commence sometime in late 2024. Counsel cited concerns about the amount of time required to prepare for the hearing and about other commitments of defence counsel. Both the court and the Crown were available to deal with the application as soon as possible. I agreed with the Crown that there is a pressing public interest in having the Stay Application determined expeditiously.
- [8] Eventually, and with reluctance from the court, it was agreed that the hearing of the Stay Application would commence on October 7, 2024, and would be expected to end sometime in early 2025. I note that October 7, 2024, will be:
- 16 years, 11 months, and 18 days since the Surrey Six murders;
 - 9 years, 10 months, and 18 days since Wedge J.'s Vukelich Ruling; and
 - 1 year, 5 months, and 9 days since the decision in Haevischer SCC remitting the matter back to this Court for an evidentiary hearing.
- [9] Since the CMC in May 2023, this Court has dealt with several applications brought by both the Crown and Mr. Haevischer in anticipation of the Stay Application. These have resulted in:
- On December 1, 2023, a ruling dismissing the Crown's application for summary dismissal (*R. v. Haevischer*, 2023 BCSC 2111);

· On August 1, 2024, a ruling granting a defence application for production of third party records, and initiating a Stage 2 analysis pursuant to *R. v. O'Connor*, [1995] 4 S.C.R., 1995 CanLII 51, which remains ongoing (*R. v Haevischer*, 2024 BCSC 1409); and

· On August 15, 2024, an oral ruling permitting Mr. Haevischer to re-open an application for disclosure of witness protection materials (the "WPP Application").

[10] The WPP Application was heard over 13 days between April and August 2024, including some submissions in camera and ex parte, with the assistance of amici curiae. The court's determination of the WPP Application will be provided to the parties on September 4, 2024.

[11] Finally, the court is currently hearing a privilege application regarding information that Mr. Haevischer's counsel acquired in the course of witness interviews they had conducted in preparation for the Stay Application.

Mr. Haevischer's Adjournment Application

[12] Mr. Haevischer emphasizes the complexity of this litigation as the primary basis for the adjournment that he now seeks. In particular, he advises that the challenges he has encountered with witness interviews are more complicated than he had anticipated they would be. These challenges include difficulties in locating witnesses and in securing their cooperation. At the hearing of the adjournment application, counsel for Mr. Haevischer advised that they intend to call 52 witnesses at the evidentiary hearing, and that preparation in respect of these witnesses is ongoing.[1]

[13] Defence counsel also advise that they have encountered difficulties in obtaining information from one witness, which they say has impacted on the defence's ability to form a coherent plan and theory of the case. I gather that these difficulties relate to Steven Phillips. Defence counsel advise that they hired a private investigator to locate Mr. Phillips. I note that in an earlier appearance I was advised that the Crown had also located Mr. Phillips. As a result, I expect the difficulties relating to Mr. Phillips have now been resolved.

[14] In addition, Mr. Haevischer advises of difficulty with respect to the "million pages" of disclosure the defence has received in this matter. Of course, it must be remembered that this is an estimate of the total number of pages disclosed over the course of more than a decade of proceedings involving a complex investigation into the Surrey Six murders.

[15] In particular, Mr. Haevischer complains of difficulties in navigating records which have been produced to the defence from BC Corrections. Counsel for Mr. Haevischer says that these difficulties arise from the manner in which BC Corrections organized the materials that were produced, but he did not describe any efforts he has made to remedy the problem.

- [16] Finally, Mr. Haevischer complains that his ability to prepare for the hearing has been further impaired by the need to deal with "unforeseen pre-hearing issues", including the privilege application presently before the court. At the hearing of the adjournment application, counsel for Mr. Haevischer advised that preparation for this ongoing privilege issue took the defence team approximately three weeks of work--time they say they would have otherwise used to prepare for the evidentiary hearing.
- [17] In sum, Mr. Haevischer says that an adjournment of one month is necessary in order for him to be able to pursue his application.
- [18] The Crown submits that they too have concerns about proceeding on October 7, 2024, because the Crown says they have not received sufficient particulars from Mr. Haevischer as to which witnesses the defence expects to call to advance each specific allegation of abuse contained in the Abuse NOA. The Crown submitted that if the defence will be unprepared to argue the Stay Application at the presently scheduled date, the Crown expects it will be unprepared to appropriately respond.

Discussion

- [19] As I stated earlier in these Reasons, I reluctantly granted Mr. Haevischer's request to schedule the commencement of the Stay Application for October 7, 2024, with particular concern for the significant passage of time since the trial of this matter and the Surrey Six murders at the heart of this case. When setting the start of the hearing for October 7, 2024, this Court advised all counsel that a further adjournment of the Stay Application would not be favourably received. On several occasions over the past year, this Court has reminded all counsel of the pressing need to have Mr. Haevischer's allegations of abuse litigated.
- [20] Resolving this matter expeditiously is critical to afford Mr. Haevischer, the families and friends of the Surrey Six victims, and the community more broadly some measure of finality. It should be evident to all parties that the lengthy police investigation into the Surrey Six case, the complex trial of its perpetrators, the appeals to multiple levels of court, and the present Stay Application have rendered finality in this case long overdue.
- [21] In my view, there is no basis to adjourn the start of the hearing of the Stay Application for an entire month. Given the passage of time, it is not surprising that Mr. Haevischer has encountered some difficulties in locating and preparing the various witnesses the defence wishes to call at the evidentiary hearing. I see no reason to conclude that postponing the commencement of the evidentiary hearing would serve to remedy or ameliorate these concerns. Indeed, contrary to the defence's position, I find that further delay of these proceedings would risk exacerbating issues relating to the frailty of witnesses' memories or their willingness to attend court.
- [22] As well, while I accept that complications are likely to arise when preparing witnesses to testify about events that occurred almost two decades ago, I note that Mr. Haevischer has the benefit of a team of lawyers, some of whom have been involved in this matter since shortly

after his arrest more than 15 years ago. I cannot accept that a team of experienced counsel who have longstanding familiarity with this case are incapable of sufficiently preparing for the evidentiary hearing of the Stay Application over a period of 1 year, 5 months and 9 days. Nor am I prepared to accept that such preparations should be derailed or delayed because of the need to deal with pre-hearing applications. In my view, a key benefit of having a team of counsel on a particular matter is that the work can be divided amongst team members, reducing the demands on individual counsel.

- [23] The same comments apply equally to the Crown team who have been similarly involved in this matter, some for decades.
- [24] I also wish to emphasize that while there are various challenges associated with organizing an evidentiary hearing of this scope, it must be remembered that applications in which viva voce evidence is heard ultimately proceed with one witness at a time. This is simply the nature of litigation, and all counsel will be required to be flexible in order to deal with whatever unfolds in the courtroom. Going forward, if there arise unexpected developments, either before or during the hearing, it may be necessary to give counsel time to deal with the issue.
- [25] Having considered the submissions of all counsel, I am not persuaded that an adjournment of the hearing of the Stay Application to November 4, 2024, is justified. Instead, I am prepared to adjourn the commencement of the evidentiary hearing for a two week period.
- [26] Accordingly, the hearing of the Stay Application will commence on October 21, 2024. Mr. Haevischer's counsel is directed to provide the Crown with their plan for the hearing of the Stay Application by September 23, 2024. I reiterate that the hearing of this matter will unfold one witness at a time, and all counsel must work towards ensuring that the matter proceeds in an efficient manner.

"Devlin J."

- [1] While the court provided its oral ruling on this application, counsel for Mr. Haevischer rose to clarify a submission on this point. These edited Reasons reflect the submission as clarified by counsel.

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