

CANADA / JUDGMENT

R. v. Hamdan

2017 BCSC 562

COURT

Supreme Court of British Columbia

DECIDED

4 April 2017

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2017 BCSC 562 R. v. Hamdan IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Hamdan, 2017 BCSC 562 Date: 20170404 Docket: 27088 Registry: Vancouver Regina v. Othman Ayed Hamdan Restriction on Publication: Pursuant to ss. 486.5(1) and 486.5(9) of the Criminal Code there shall be no publication, broadcast or transmission in any way of any information that could identify the undercover police officer including any pseudonyms used by the undercover police officer involved in the investigation of the Accused. This publication ban applies until further order of the Court. These reasons for judgment comply with this publication ban. Before: The Honourable Mr. Justice Butler Ruling on Vukelich Application Counsel for the Crown: Lesley Ann Kilgore Sharon K. Steele Anita Chan Counsel for the Accused: Bryan E. Fitzpatrick Place and Date of Trial/Hearing: Vancouver, B.C. March 9, 2017 Place and Date of Judgment: Vancouver, B.C. April 4, 2017

- [1] On February 7, 2017, the defence delivered two Notices of Intention to Seek Constitutional Remedies; one based on s. 7 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 (the "Charter") and one based on s. 8. On March 9, 2017, I conducted a Vukelich hearing to determine whether to enter into a voir dire to consider the defence applications. The Crown denies any breach of Mr. Hamdan's s. 7 rights and so does not oppose a voir dire to consider if his rights were breached, and if so, whether any remedy should be ordered. However, the Crown takes the position that even if Mr. Hamdan's s. 8 rights were breached, there is no need for a voir dire because there is no real prospect the Court would grant a remedy.
- [2] In January of this year, prior to receiving the defence Notices, I heard a defence application seeking a remedy for alleged breaches of Mr. Hamdan's s. 10 Charter rights. In reasons indexed as R. v. Hamdan, 2017 BCSC 467, I concluded that Mr. Hamdan's s. 10(a) right to be informed promptly of the reasons for his arrest and of his right to retain counsel was not breached, but that the implementation component of his s. 10(b) right to retain and instruct counsel without delay was breached. At para. 12 of those reasons, I declined to determine what, if any, remedy should flow from the breach until I had heard the s. 7 and s. 8 voir dires:

- [12] Both parties advanced arguments on the application of s. 24(2). However, I decline to rule on the issues raised by the s. 10(b) breach at this time. This is because Mr. Hamdan has alleged additional Charter breaches. He says his s. 7 and s. 8 Charter rights were violated by police searches of his computer and of his email accounts. In a separate Vukelich application, Mr. Hamdan has asked the Court to embark on a voir dire to consider those breaches. I have concluded that I should conduct a voir dire to consider whether Mr. Hamdan can establish additional Charter breaches. Following my ruling on that voir dire, I will consider s. 24(2) and determine whether any evidence should be excluded.
- [3] I indicated to the parties that I would provide a more formal ruling on this Vukelich application. This is my ruling.
- [4] The defence alleges that Mr. Hamdan's s. 7 rights were breached because evidence was lost or destroyed when police captured Mr. Hamdan's Facebook posts without using forensic-grade software. He says that the means used to capture the posts destroyed data that might have been used in his defence. The Crown says there was no s. 7 breach, and denies that the means used to capture the Facebook posts resulted in the loss or destruction of relevant evidence. It is evident that a voir dire must be held to consider this alleged breach.
- [5] The defence alleges that Mr. Hamdan's s. 8 rights were breached when Civilian Member Sara Spearman accessed a number of his email accounts without judicial authorization. The Crown concedes this, but argues that there is no possibility the Court will grant a remedy under s. 24(2) because there is not a sufficient nexus between the breach and the evidence the defence wishes to exclude. The Crown does not intend to lead any evidence from the email accounts. Further, it says the evidence it will seek to tender at trial was gathered prior to August 4, 2015, the date when CM Spearman accessed the email accounts.
- [6] The threshold for embarking on an evidentiary hearing into an alleged Charter breach is low: *R. v. Malik*, 2002 BCSC 484. The applicant need only demonstrate a reasonable basis upon which the court could find a breach. The test for entering into a voir dire is set out in *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.) at para. 26: it does not follow that an accused is always entitled as of right to a voir dire in the course of a criminal trial in order to challenge the constitutionality of a search. The trial judge must control the course of the proceedings, and he or she need not embark upon an enquiry that will not assist the proper trial of the real issues.
- [7] In *R. v. Mehan*, 2017 BCCA 21 at paras. 44-47, the court reconsidered and re-affirmed the test for entering into a voir dire. A trial judge should enter an evidentiary hearing when the hearing "would assist", "will assist" or "can assist" in a determination of the real issues at trial. It matters not which expression of the test is used, the bar is a low one.

- [8] Here, I have found that the actions of the police breached Mr. Hamdan's s. 10 Charter rights. The Crown has conceded that state actions also resulted in a breach of his s. 8 rights. It is possible that the defence will be able to establish a third Charter breach in how the Facebook posts were captured.
- [9] In order to embark upon a s. 24(2) analysis and determine whether the admission of the evidence would bring the administration of justice into disrepute, the Court must be cognizant of the totality of the breaches, especially given the nature of the charges in this case. Accordingly, a voir dire to consider the s. 8 breach could assist in consideration of the real issues at trial, as it may be relevant to the remedy which might flow from other Charter breaches.
- [10] In summary, this Court will embark upon evidentiary hearings to determine the existence and nature of any s. 7 and s. 8 Charter breaches, following which the parties can advance full argument on what, if any, remedy is available under s. 24(2). "Butler J."

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