

CANADA / JUDGMENT

R. v. J.J.

2020 BCSC 349

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 349 R. v. J.J.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. J.J.,

2020 BCSC 349

Date: 20200311

Docket: X081421

Registry: New Westminster

Regina

v.

J.J.

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Before: The Honourable Madam Justice Duncan

Reasons for Judgment

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Written Submissions received:

January 24, 2020

February 4, 2020

Place and Date of Judgment:

New Westminster, B.C.

March 11, 2020

Introduction

- [1] On February 18, 2020, I advised counsel that the Crown's application under s. 1 was dismissed, with reasons to follow. These are my reasons.
- [2] In *R. v. J.J.*, 2020 BCSC 29, I found that the seven days' notice requirement in s. 278.93(4) of the Criminal Code for a hearing concerning the admissibility of records, in the possession of the defence, that may meet the definition of a record in s. 278.1 constituted a violation of the accused's fair trial rights under s. 7 of the Charter. At paragraph 90 of those reasons, I described the seven days' notice requirement as compelled disclosure of defence evidence which unduly truncates the right to make full answer and defence by providing the complainant and the Crown with an advance preview of defence evidence and tactics before the complainant's examination-in-chief has completed and a case to meet has been established.
- [3] The notice requirement applies to all evidence in the defence's possession which could meet the definition of record in s. 278.1, whether that evidence engages the complainant's sexual activity on other occasions such that it would fall under s. 276 or whether it is a record of matters unrelated to sexual activity.
- [4] The Crown seeks to justify the violation under s. 1 of the Charter and, if unsuccessful, address the remedy for the violation.

The Law

- [5] Section 1 of the Canadian Charter of Rights and Freedoms guarantees "the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

- [6] In *R. v. Simard*, 2019 BCSC 531 Thompson J. summarized the nature of a s. 1 inquiry and commented on the interplay between s. 7 and s. 1:
- [57] The Crown bears the burden of establishing, on the balance of probabilities, that the Charter violation is justified, taking into consideration the "specific factual and social context" within which the law is applied: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at 270. Although the law's impact on the claimant is a significant factor, the "broader societal context in which the law operates must inform the s. 1 justification analysis": *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 69.
- [58] The test for whether a Charter violation is justified was set out in *R. v. Oakes*, [1986] 1 S.C.R. 103. First, the purpose of the law must address a pressing and substantial objective; and second, the legislative means by which the objective is furthered must be proportionate. The proportionality branch of the *Oakes* test has three components: the means must be rationally connected to the objective; they must be minimally impairing; and there must be proportionality between the effects of the law and the objective.
- [59] It is "difficult, but not impossible" to justify a s. 7 violation under s. 1: *R. v. Safarzadeh-Markhali*, 2016 SCC 14 at para. 57. The Court in *Carter* postulated that "in some situations the state may be able to show that the public good -- a matter not considered under s. 7, which looks only at the impacts on the rights claimants -- justifies depriving an individual of life, liberty or security of the person under s. 1 of the Charter". However, this justification will be difficult to establish, as it is "hard to justify a law that runs afoul of the principles of fundamental justice and is thus inherently flawed": *Carter*, at para. 95.
- [7] The Crown maintains that the new regime encapsulated in ss. 278.2 through 278.93(4) is a complex legal response aimed at addressing the competing rights and interests of parties involved in sexual assault cases, and is precisely the type of case the Supreme Court of Canada envisaged as one where s. 1 ought to be considered as a justification for a s. 7 violation.

The Oakes Test

- (1) A pressing and substantial objective
- [8] The Crown's position is that the objectives of the legislation - protection of the complainants' rights to privacy, improved confidence in the justice system and protection of the integrity of the trial process - are pressing and substantial.
- [9] I agree that protecting a sexual assault complainant's right to privacy, improving confidence in the justice system and protecting the integrity of the trial process are pressing and substantial legislative objectives. The first stage of the *Oakes* test is satisfied.
- (2) Proportionality
- a) Rational Connection

- [10] The Crown maintains that the seven day notice period facilitates efficient trial management and has the effect of avoiding delay - and hence a violation of the accused's s. 11(b) Charter rights - in sexual assault trials. The notice period is also connected to the objective of facilitating complainant participation, balancing the objective of trial efficiency with a threshold screening tool. The complainants' privacy, dignity, security and equality rights are protected, as is the accused's right to a fair and expedient trial.
- [11] I find that the notice period lends itself to efficient trial management and complainant participation and therefore find that it is rationally connected to the goal of the legislation. It is also precisely what prejudices the accused, which I will address under the other parts of the proportionality test.
- b) Minimal impairment
- [12] The Crown says that the seven day notice provision is a minimal impairment and strikes a "perfect balance" between the competing and complicated interests that are unique to sexual assault trials: the interests of the complainant, the accused and the administration of justice. It mirrors the s. 276 regime, which has withstood Charter scrutiny; it includes judicial discretion, which permits flexibility. Additionally, the notice provision requires the defence to be proactive, which is consistent with the modern approach to trial management and which avoids s. 11(b) violations. The Crown further argues that eliminating the seven day requirement could result in bifurcated trials, the challenges of which may be compounded by the logistical issues of providing complainants with meaningful access to counsel and increase stress, which in turn may create a barrier to reporting and thus undermine the objective of the provision.
- [13] Parliament has cast its net wider than s. 276 to catch evidence which has nothing to do with prior sexual conduct and everything to do with core trial issues of credibility and reliability. In requiring notice of an application, with detailed particulars, seven days in advance, Parliament has compromised the accused's s. 7 rights by compelling disclosure of such a broad category of defence evidence.
- [14] While Rothery J. in *R. v. Anderson*, 2019 SKQB 304 struck down a broader part of the legislation than I did, I agree with the observations he made in the context of his s. 1 ruling, reported at 2020 SKQB 11:
- [10] The second component of the proportionality test is that the law impairs as little as possible the right or freedom in question. It is this component of the proportionality test that fails. The definition of "record" in s. 278.1 of the Criminal Code, combined with the pre-screening requirements of ss. 278.91(1), 278.92(2)(b) and 278.94(2), defeats the purpose of cross-examination of the complainant by the accused's counsel. While Parliament may have intended to enact legislation that addressed the problem of a complainant's private records as dealt with in *Shearing*, the combination of the definition of "record" and these impugned sections squarely infringes the accused's s. 7 and 11(d) Charter rights. This legislation tramples on the truth-seeking objective of cross-examination.

[emphasis added]

[15] I therefore conclude that this provision does not minimally impair the accused's right to make full answer and defence.

c) Proportionality

[16] While the notice requirement advances the goal of trial efficiency and fairness to the complainant, it does so at the expense of the right to make full answer and defence and not in a manner that I find strikes the right balance. There are alternative, less harmful means of achieving Parliament's objective.

[17] I conclude that the s. 7 violation is not saved by s. 1.

The Remedy

[18] The Crown argues that the remedy to the violation should be crafted precisely to address only the narrow defect, while still respecting as much as possible, Parliament's intent and the integrity of the provision. To this end, Crown submits that since s. 278.93(4) applies to both ss. 276 and 278.92, the appropriate remedy is to read down the provision only as it applies to s. 278.92. This, Crown argues, will balance the three competing interests at play and preserve the integrity of the s. 276 framework, which has withstood constitutional scrutiny.

[19] The remedy of reading down or reading in as a remedy for a constitutional defect has been upheld by the Supreme Court of Canada in a number of cases where legislation was found to violate s. 7 of the Charter by being overly broad: *R. v. Sharpe*, [2001] 1 S.C.R. 45; *Carter v. Canada (Attorney General)*, 2015 SCC 5; and *R. v. Appulonappa*, 2015 SCC 59. I am persuaded that it is the appropriate remedy for the violation of s. 7 in this case, because striking down the seven day notice requirement in s. 278.93(4) in its entirety would have the unintended consequence of upending the s. 276 application regime.

[20] The Crown suggests that s. 278.93(4) should be read, insofar as it applies to s. 278.92 applications, to require that the application be given to the prosecutor and the clerk of the court "on such reasonable notice as the judge, provincial court judge or justice determines is required in the interests of justice but no later than the conclusion of the prosecution's direct examination of the complainant." This would ensure that the accused's right to full answer and defence is respected, prevent complainants from being ambushed and ensure that trial judges retain discretion to determine the timing of applications.

[21] While the Crown's formulation is helpful, I find that the fairest way to read down the legislation is to add that applications pursuant to s. 278.92 should be made "at the conclusion of the complainant's examination in chief, or as otherwise required by the judge, provincial court judge or justice in the interests of justice".

[22] This formulation does not preclude trial judges, in the exercise of their trial management powers, from inquiring of defence counsel at a pre-trial conference or at the commencement of a trial whether such an application might be made. Such an inquiry would have the benefit of putting the Crown and the complainant on notice that counsel might be required to assist the complainant and reduce mid-trial delay if such an application proceeds without requiring the defence to disclose any particulars.

"Duncan J."

The Honourable Madam Justice Duncan

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