

CANADA / JUDGMENT

R. v. Lowry

2023 BCCA 423

COURT

British Columbia Court of Appeal

DECIDED

21 November 2023

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2023 BCCA 423 R. v. Lowry

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Lowry,

2023 BCCA 423

Date: 20231121

Docket: CA47682

Between:

Rex

Respondent

And

Robert Lowry

Appellant

File Sealed In Part

Before:

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Grauer

The Honourable Justice Skolrood

Supplementary Reasons to R. v. Lowry, 2023 BCCA 399,

Vancouver Docket CA47682.

Counsel for the Appellant:

R.J.A. Gregory

Counsel for the Respondent:

J.R.W. Caldwell

Counsel for the Respondent on the Application, Attorney General of Canada:

J.I. Katz

Written Submission Received on behalf of the Appellant:

November 14, 2023

Written Submissions Received on behalf of the Respondent:

October 24 and November 14, 2023

Written Submission Received on behalf of the Respondent on the Application,
Attorney General of Canada:

November 9, 2023

Date of Supplementary Reasons:

November 21, 2023

Supplementary Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Mr. Justice Grauer

The Honourable Justice Skolrood

Summary:

The appellant is at the second stage of his application for the production of video footage from a third-party record holder, Correctional Service of Canada ("CSC"). The video footage relates to a post-sentence assault committed upon the appellant by fellow inmates. The appellant seeks production of the video footage in support of his application for the introduction of fresh evidence on his appeal from sentence. Held: Application granted. The video footage, redacted to protect the privacy interests of third parties, is to be provided to counsel for the appellant on the terms and conditions set out herein.

Supplementary Reasons for Judgment of the Honourable Mr. Justice Fitch:

- [1] The appellant applies for an order producing to him certain portions of CCTV video footage held by a third-party record holder, Correctional Service of Canada ("CSC"). The video footage depicts a post-sentence assault perpetrated upon the appellant by a group of other inmates. If the appellant is successful on this application, it is his intention to apply to have the video footage admitted as fresh evidence on his upcoming appeal from sentence.
- [2] Where, as here, a privilege claim has not been asserted, an application for the production of a record from a third party engages a two-stage process.
- [3] At the first stage, the applicant must demonstrate that the records sought are "likely relevant" in the context of the use that is proposed to be made of them in the underlying proceeding: *R. v. O'Connor*, [1995] 4 S.C.R. 411, 1995 CanLII 51 at para. 19; *R. v. Johnston*, 2019 BCCA 107 at paras. 60-61. If the applicant meets the likely relevance threshold, the documents will be produced to the Court.
- [4] At the second stage, the Court must weigh the salutary and deleterious effects of a production order to determine whether, and to what extent, the records should be produced to the applicant. This will involve consideration of the extent to which production of the record is necessary, the probative value of the record, and countervailing interests, including third-party privacy interests that could be implicated by an order disclosing the record to the applicant: *O'Connor* at paras. 30-31. At the second stage, it will often be helpful for courts to assess first the true or actual relevance of the targeted record, which will frequently be determinative of the application: *R. v. McNeil*, 2009 SCC 3 at para. 39; *R. v. Gubbins*, 2018 SCC 44 at para. 27.
- [5] In reasons indexed as 2023 BCCA 399, this Court addressed the first stage of the test for production and concluded, with the agreement of the Crown, that the appellant had established the records sought are "likely relevant" to the appeal.
- [6] As noted in *McNeil* at para. 41, the existence of a privacy interest in a third-party record may well warrant redactions or the imposition of conditions to ensure that no unnecessary invasion of privacy flows from production of the record to the applicant.
- [7] Consistent with *McNeil*, the Court directed CSC to produce to the Court redacted and unredacted copies of the four videos in question that depict commission of the assault. Counsel for the record holder was directed to follow this process:
- [24] Before producing these records to the Court, counsel for the record holder shall review and vet the records to identify any deletions, redactions or video pixelations that may be required based on safety or security concerns, third-party privacy interests, privilege and/or any statutory provision prohibiting disclosure.
- [25] Counsel for the record holder shall produce to the Court a vetted copy (containing any proposed deletions, redactions or video pixelations) and an un-vetted copy of the CSC records in question. At the same time, counsel for the record holder shall provide a brief written submission, not to exceed three pages, setting out the basis for the deletions,

redactions or video pixelations in the form of a sealed memorandum to the Court, amplified by such further in camera and ex parte submissions and evidence as the record holder considers necessary and the Court permits.

- [27] If the Court concludes at the second stage that the vetted video records in question should be disclosed to counsel for the appellant and the Crown, the Court will confirm this in brief supplementary reasons for judgment.
- [8] In the event an order was made providing to the appellant redacted copies of the video clips in question, the Court invited submissions from counsel about whether any conditions should attach to the order.
- [9] Since the delivery of judgment on the first stage of the application, CSC has filed with the Court redacted and unredacted versions of the video clips depicting the assault, memoranda explaining the redactions, and an application for a sealing order over both versions of the video clips and the memoranda prepared by CSC's counsel.
- [10] These reasons address the analysis that must be undertaken at the second stage of the application.
- [11] I have reviewed the redacted and unredacted versions of the video clips filed with the Court. The redacted versions pixelate the facial images of inmates (other than that of the appellant) who are depicted in the videos to protect their privacy interests. To be clear, the appellant has, from the outset, accepted that the video clips would have to be redacted to protect the privacy interests of third parties before being produced to him.
- [12] Counsel acting for CSC submits that, having attended to the task of pixelating the facial images of inmates to protect their privacy interests, there are no countervailing considerations to be balanced at this stage of the application. In particular, we are advised that there are no other common law privileges or statutory provisions prohibiting disclosure of the redacted video clips, and that the production of these clips to the appellant would not give rise to individual or institutional safety or security concerns.
- [13] For its part, the Crown submits that, "[t]he salutary effects of permitting the appellant to present the fullest probative picture possible to the Division hearing his [sentence] appeal serve to tip the balance in favour of disclosure." In particular, the Crown concedes that the video clips are a "necessary element" of the appellant's fresh evidence application, and that third-party privacy concerns can be addressed by pixelating or editing the videos to anonymize the clips. This, of course, has now been done.
- [14] Against this background, I would order that the four video clips in question be provided to the appellant in redacted form. As noted in our reasons for judgment delivered on the first stage of the application, the appellant already has in his possession detailed written reports prepared by CSC staff describing what the videos depict. In these circumstances, an argument could conceivably have been advanced at this stage of the application that production of the video clips to the appellant is not necessary. Given the position advanced

by counsel for the Crown on this application--which I consider to be a fair-minded one--I do not think it advisable to raise a concern not raised by counsel that touches on an issue that appears to have received scant attention in the jurisprudence.

- [15] I do, however, consider it to be appropriate and necessary to add conditions to this order. I do so to guard against the mischief that might otherwise flow from unregulated access to and improper use of the video clips, even in redacted form.
- [16] Of particular relevance to this issue are the following considerations. While the facial images of inmates have been pixelated, other identifying information such as their clothing, body shape and size, and gait can be discerned from the redacted versions of the videos. The identity of the actual perpetrators of this assault, and any aiders, abettors or supporters of it, is irrelevant to the disposition of this appeal. It would, in my view, be contrary to the interests of justice, including the promotion of safety and security in federal correctional institutions, to have these video clips in general circulation, even in redacted form. In addition, this application should not be the means through which civil counsel acting for the appellant obtains access to the video footage of the assault. Civil counsel's request for access was denied under the Access to Information Act, R.S.C. 1985, c. A-1. The refusal is the subject of an outstanding appeal to the Office of the Information Commissioner. Access to the video clips should be resolved in that context and not indirectly through the order I propose making. I should hasten to add that I am not suggesting that this application is driven by ulterior motives. I was assured by the appellant's counsel in a previous case management appearance that it was not, and I unreservedly accept that submission.
- [17] In these circumstances, I would attach several conditions to the order producing to the appellant redacted copies of the video clips he seeks. The conditions proposed below are consistent with the joint position advanced by counsel on this stage of the application:
1. Redacted versions of the video clips are provided to the appellant for the sole purpose of making use of them on his appeal from sentence;
 2. The redacted video clips, or copies thereof, shall not be shown or provided, directly or indirectly, to anyone other than counsel of record on this appeal and co-counsel or administrative support staff working under their direction and supervision;
 3. The redacted video clips in the possession of counsel of record, and any copies thereof, are to be returned to counsel for the record holder at the conclusion of all possible proceedings that may be taken in connection with this appeal; and
 4. The videos clips, or copies thereof, shall not be electronically transmitted to the appellant or left in his possession.

- [18] Counsel for CSC moves for a sealing order over the redacted and unredacted versions of the video clips filed in connection with this application and associated memoranda prepared and filed on the record holder's behalf setting out the basis for the video redactions. Counsel for the appellant and Crown consent to the granting of such an order and have approved and signed off on a Consent Sealing Order.
- [19] Applications for the production of third-party records engaging privacy or confidentiality concerns are generally heard in camera. Public access to records from a closed proceeding is not granted as of right. An application is required for an order permitting access: Court of Appeal for British Columbia, Record and Courtroom Access Policy, s. 1.4 (March 2023). In this case, the application was unopposed and proceeded on a less formal footing than would often be the case.
- [20] While it might be said that the imposition of a sealing order would simply reflect the existing practice of the Court in these circumstances, I am nonetheless satisfied, having considered the test in *Sherman Estate v. Donovan*, 2021 SCC 25, that a sealing order should be imposed at this stage subject to further order of the Court. The effect of the order is to limit public access only to the vetted and un-vetted versions of the videos and related memoranda prepared on behalf of CSC and filed on this application. I would approve the form of the Consent Sealing Order submitted by counsel.
- [21] For the foregoing reasons, I would order that the redacted video clips be provided to counsel for the appellant on the terms and conditions set out herein.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Justice Skolrood"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/23/04/2023BCCA0423.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-lowry-2023>

Prepared on 26 October 2026 · Esheria