

CANADA / JUDGMENT

R. v. MacKay

2019 BCCA 101

COURT

British Columbia Court of Appeal

DECIDED

21 March 2019

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2019 BCCA 101 R. v. MacKay COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. MacKay, 2019 BCCA 101 Date: 20190321 Docket: CA44514 Between: Regina Respondent And Kurk Joshua MacKay Appellant Restriction on publication: A publication ban has been mandatorily imposed under

- s. 486.4(2) of the Criminal Code in cases involving sexual offences to ban the publication, broadcasting or transmission in any way of evidence that could identify a complainant or any witness under the age of 18. This publication ban applies indefinitely unless otherwise ordered. Section 16(4) of the Sex Offender Information and Registration Act: This section provides that no person shall disclose any information that is collected pursuant to an order under SOIRA or the fact that information relating to a person is collected under SOIRA. Before: The Honourable Madam Justice Stromberg-Stein The Honourable Madam Justice Fisher The Honourable Mr. Justice Butler On appeal from: An order of the Supreme Court of British Columbia, dated March 9, 2017 (R. v. MacKay, Victoria Docket 165264). Oral Reasons for Judgment Counsel for the Appellant (via teleconference): T.J. Russell Counsel for the Respondent: M.A. Street Place and Date of Hearing: Vancouver, British Columbia March 21, 2019 Place and Date of Judgment: Vancouver, British Columbia March 21, 2019 Summary: The appellant brings a notice of motion seeking the release of audio and other records relating to an in camera proceeding at trial with respect to third party records so he can prepare a transcript for his appeal. The motion is uncontested. Held: the motion is granted. A single justice in chambers cannot make the order under s. 683(1)(a) of the Criminal Code. If the order is uncontested, the parties could proceed by desk order.
- [1] STROMBERG-STEIN J.A.: The appellant has appealed his convictions for two counts of sexual assault and two counts of sexual interference relating to two foster children in his care. He has brought a notice of motion before this Division seeking the release of audio and other records relating to an in camera proceeding at trial with respect to third party records so he can have a transcript prepared for his appeal. The matter came before Madam Justice Dickson in chambers, and in oral reasons given on February 22, 2019, she referred this application to a division of this Court. She did so because she was not confident that a single justice in chambers could make the order. It was her view that this Court's jurisdiction to make the order sought is derived from s. 683(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46,

and cannot be expanded by s. 10(2) of the Court of Appeal Act, R.S.B.C. 1996, c. 77.

- [2] Section 10(2)(a) of the Court of Appeal Act permits a justice to make an order "incidental to the appeal". Section 683(1)(a) of the Criminal Code provides that a court of appeal may, where it considers it in the interests of justice, "order the production of any writing, exhibit or other thing connected with the proceedings".
- [3] The Crown submits, as does Mr. Russell, that the order sought does not fall under s. 683(1)(a) because the transcript sought is not "connected with" the proceedings but is the proceedings.
- [4] I am not inclined to interpret s. 683(1)(a) as suggested by the Crown and Mr. Russell. I agree with the reasons of Madam Justice Dickson. As she noted, a similar order was granted by the Ontario Court of Appeal under s. 683(1)(a) in *R. v. Budimirovic*, 2017 ONCA 908. The problem arises from the wording of s. 683(1)(a), which refers only to "the court of appeal". An amendment to the Criminal Code to add wording to the effect of "or a judge of that court" would solve the problem.
- [5] I would make the order, which is by consent, in the terms suggested by the parties.
- [6] I would note that in the future, if there is consent, the parties can proceed by desk order, thus eliminating the expense of time and resources necessitated by an appearance before a division.
- [7] FISHER J.A.: I agree.
- [8] BUTLER J.A.: I agree.
- [9] STROMBERG-STEIN J.A.: The order is made in the terms sought by the parties. "The Honourable Madam Justice Stromberg-Stein"

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