

CANADA / JUDGMENT

R. v. MacKay

2020 BCCA 258

COURT

British Columbia Court of Appeal

DECIDED

27 August 2020

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

2020 BCCA 258 R. v. MacKay

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. MacKay,

2020 BCCA 258

Date: 20200827

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.

FILE SEALED IN PART

Before:

The Honourable Mr. Justice Willcock

(In Chambers)

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

(via teleconference):

M.G. Scott

Counsel for the Proposed Intervenor, Ministry of Children and Family Development

(via teleconference):

L. Hawes

Place and Date of Hearing:

Vancouver, British Columbia

August 24, 2020

Place and Date of Judgment:

Vancouver, British Columbia

August 27, 2020

Summary:

The Ministry of Children and Family Development applies for an order pursuant to Rule 36(1) of the Court of Appeal Rules, for a direction to appear and make submissions at the hearing of this appeal or, in the alternative, for leave to intervene in this conviction appeal. It argues that it is implicit in s. 278.4(2) of the Criminal Code (which provides that one who has possession of records sought on application in relation to sexual offences may appear and make submissions at

the trial) can appear and make submissions on an appeal where the making or refusal of a production order is challenged. In any event, it says it has a direct interest in the appeal and should be granted leave to intervene. Held: Application to intervene allowed. The Ministry does not have standing to appear and make submissions without leave, but it does have a direct interest in the issue it is specifically authorized by the Criminal Code to address at trial. That interest is legitimately engaged on this appeal.

WILLCOCK J.A.:

Introduction

- [1] The Ministry of Children and Family Development seeks an order pursuant to Rule 36(1) of the Court of Appeal Rules, B.C. Reg. 297/2001 for a "[d]irection to appear and make submissions in the appeal" or, in the alternative, for leave to intervene in this conviction appeal.
- [2] Although Rule 36 (the rule with respect to intervenors), is the only rule relied upon by the Ministry, it says it has a right to appear and make submissions, without leave, and in some capacity other than as an appellant, respondent or intervenor in this appeal. It says that right is implicit in the provisions in Part VIII of the Criminal Code, R.S.C. 1985, c. C-46, that address the production of records relating to complainants or witnesses in specified sex-offence cases.
- [3] The procedure set out in ss. 278.3 to 278.91 calls for an in camera hearing to determine whether to order the person who has possession or control of the record to produce it to the court for review by the judge. Section 278.4(2) provides:
 - (2) The person who has possession or control of the record, the complainant or witness, as the case may be, and any other person to whom the record relates may appear and make submissions at the hearing, but they are not compellable as witnesses at the hearing.

[Emphasis added.]

- [4] Because the neither Part VIII (Offences Against the Person and Reputation) of the Criminal Code, nor the provisions of Part XXI (Appeals), make any provision for participation in an appeal by the witnesses or complainants referred to in s. 278.2; and because there is no provision in the Court of Appeal Rules for an appearance or submission by anyone other than appellants, respondents and intervenors, I am of the view that the only basis upon which the applicant may appear and make submissions is as an intervenor, with leave. I address the application on that basis.
- [5] Before I do so, I note that the respondent Crown supports the application, but says it should not be heard without notice to the complainants whose records were sought at trial. Curiously, the applicant Ministry supports the Crown in that regard.

- [6] The Ministry's position is curious because the Ministry might have alerted the complainants to its application and invited them to participate, but did not do so. No one has identified a legal impediment to the complainants being alerted to the issues on this appeal (although the appellant's counsel says the participation of witnesses in the appeal per se might in some way prejudice the appellant's interests on a retrial). No one has sought an order for directions from the Court with respect to notice to the complainants, and it is only an "abundance of caution" on the part of the Crown that has precluded the Crown from advising the complainants of this motion.
- [7] The complainants are not parties to the appeal. I see no reason, nor has any been identified, why I should not rule on the Ministry's application without hearing submissions from a non-party who may wish to bring a similar application and whose position is similar to, but not the same, as the applicant's.

Background

- [8] On March 2, 2017, Mr. MacKay was convicted by a jury of two counts each of sexual interference and sexual assault, contrary to ss. 151 and 271(1) of the Code, respectively, against two children who were in his foster care. He was sentenced to 12 years' imprisonment. The conviction appeal is scheduled to be heard before a division of this Court on October 30, 2020.
- [9] Mr. MacKay raises several grounds of appeal, one of which is described at para. 14 of his factum as follows:
14. Did the trial judge err in dismissing the application for production and disclosure of the third party records in the possession of the Ministry?
- [10] This issue stems from Mr. MacKay's pre-trial application for records held by the Ministry, brought under s. 278.3 of the Code. The judge ordered production of some of the records, but dismissed the application with respect to most of the records for reasons indexed as R. v. MacKay, 2015 BCSC 1704.
- [11] Mr. MacKay says the judge erred by not ordering disclosure of the remainder of the records, this error prejudiced his defence, and he is entitled to a new trial. Mr. MacKay provided notice of his appeal to the Ministry, and notice that he intends to challenge the judge's ruling regarding disclosure of the Ministry's records.

Positions of the Parties

- [12] The Ministry contends it should be given leave to intervene in order to address its direct interest in the question whether the judge erred in dismissing the application for production and disclosure of the third party records in its possession. It does not claim to have an interest in the conviction; it says it will address a discrete issue, and has an interest distinct from that of the prosecutor.

- [13] The Ministry says the application for disclosure of records required the trial judge to engage in a two-stage process: first, consideration of whether the records should be disclosed to the judge; and, if so, second, determining which, if any, of those records should be disclosed to the applicant, and providing reasons for doing so.
- [14] In the case at bar, the trial judge found most of the records sought from the Ministry were unlikely to be relevant, and determined it was not necessary for them to be produced for his review.
- [15] The Ministry says a decision by this Court that the trial judge ought not to have accepted the argument it advanced in this regard may preclude certain arguments in the event a new trial is ordered and the application is renewed. It says such an application is almost a certainty if a new trial is ordered on this ground. On the other hand, dismissal of this ground of appeal will affirm that it has no obligation to produce the records sought.
- [16] The appellant's counsel says this Court will not finally determine whether the Ministry is legally obliged to produce any documents, and the Ministry is only concerned with the precedential effect of the judgment in this case, an interest that is indirect.

Applicable Law

- [17] The relevant Rule provides as follows:

36 (1) Any person interested in an appeal may apply to a justice for leave to intervene on any terms and conditions that the justice may determine.

- (2) A party seeking leave under subrule (1) to intervene in an appeal must, within 14 days after the filing of the appellant's factum,
- (a) prepare
 - (i) a notice of motion in Form 6, and
 - (ii) a memorandum of argument in Form 18,
 - (b) file 2 copies of that notice of motion and memorandum of argument for use by the court plus such additional copies of those documents as are required for the purposes of paragraph (c), and
 - (c) serve one filed copy of the notice of motion and memorandum of argument on each of the other parties.
- (3) In any order granting leave to intervene, the justice
- (a) is to specify the date by which the factum of the intervenor must be filed, and
 - (b) may make provisions as to additional disbursements incurred by the appellant or any respondent as a result of the intervention.

- (4) An intervenor must file a factum in Form 10 on or before the date referred to in subrule (3) (a).
- (5) Unless a justice otherwise orders, an intervenor
- (a) must not file a factum that exceeds 20 pages,
- (b) must include in the factum only those submissions that pertain to the facts and issues included in the factums of the parties, and
- (c) is not to present oral argument.
- [18] The appropriate approach to applications to intervene in criminal cases was described by Sopinka J. in *R. v. Osolin*, [1993] 2 S.C.R. 313 at 314: "The discretion to allow interventions in criminal appeals has been exercised sparingly by this Court."
- [19] In *R. v. Alfred*, [1994] 3 C.N.L.R. 88 at 96 (B.C.S.C.), Ryan J. (as she then was) explored the underlying policy concerns in applications for intervention in criminal law matters. She noted that it is unacceptable in our system of justice to determine whether a conviction should be imposed on the basis of arguments not raised by the Crown. For that reason, the Court is particularly wary of intervenors who seek to support the result: see *R. v. Bornyk*, 2014 BCCA 450; *Re Regina and Morgentaler, Smoling and Scott* (1985), 19 C.C.C. (3d) 573 (Ont. C.A.).
- [20] This Court in *Duncan v. Canada* (1995), 130 D.L.R. (4th) 99, 57 B.C.A.C. 185, leave to appeal ref'd [1995] S.C.C.A. No. 252, said:
- [30] [T]here is authority for the proposition that intervenors should only be granted standing in criminal cases in exceptional circumstances since to grant such standing may result in unfairness to the accused, or, at least, may create the appearance of unfairness: see, for example, *R. v. Seaboyer and Gayme* (1986), 50 C.R. (3d) 395 (Ont. C.A. in Chambers) and *R. v. Finta* (1990), 1 O.R. (3d) 183 (C.A. in Chambers).
- [21] In *R. v. Mayers*, 2011 BCCA 268 (Saunders J.A. in Chambers), this Court did not allow the Director of Public Prosecutions to intervene in an appeal concerning the proper interpretation of the Truth in Sentencing Act, S.C. 2009, c. 29 despite the fact the applicant assured the Court its submissions would not be concerned with the outcome of the case before the Court. She held:
- [7] The material filed on this appeal raises an issue of interpretation. The constitutionality of the legislative provisions appears not to be in issue. There is no reason to expect that provincial Crown counsel will not advance all submissions that are proper and necessary for this court to give a considered opinion on any interpretation issue that may be raised on this appeal; it is the stuff of counsel's duties. Nor, I will say, is any view of the Act expressed in *Johnson* of more than general interest given that it is not binding upon this court. Accordingly, intervention of a second prosecuting authority, in my respectful view, is unlikely to bring something to the appeal the parties will not bring, and is not necessary for

a fully considered determination of the issues raised on this appeal.

- [8] The caution against unnecessary intervention expressed in the cases referred to above addresses not just the efficient use of resources but also the appearance of fairness. It is my view the proposed intervention raises the appearance of unfairness by "piling on", with little or no prospect of additional illumination such as would justify an order, and accordingly, and respectfully, the administration of justice would not be well served by the order proposed by the applicant.
- [22] In *R. v. McKay*, 2016 BCCA 126 (Chambers), Stromberg-Stein J.A. noted that intervenor status may more readily be granted to address a question that will not directly impact the guilt or innocence of the accused. At issue was the scope of disclosure of confidential informer information, and whether an accused was entitled to see raw intelligence provided by police informers. In granting the Attorney General of British Columbia's application, Stromberg-Stein J.A. stated at para. 11:
- [11] This appeal is different from the usual criminal appeal in which findings of this Court directly impact the determination of the guilt or innocence of an accused person. While the outcome of this appeal may have an impact on an important right of the accused person, it will not determine his guilt or innocence, or even the admission of an important piece of evidence. Thus, I do not think it would be unfair to the accused, or create an appearance of unfairness, to allow the intervention in this case.
- [23] With that caveat, this Court generally looks to the same criteria in criminal and civil cases on an application to intervene: see *R. v. O'Connor* (1993), 105 D.L.R. (4th) 110, 82 C.C.C. (3d) 495 (B.C.C.A.); *R. v. Kapp*, 2005 BCCA 247; *R. v. Moazami*, 2020 BCCA 61; and *R. v. Smyth*, 2020 BCCA 141.
- [24] In *O'Connor*, this Court held:
- [21] The principles normally applied in deciding whether an applicant should be permitted to intervene in an appeal in this court are reasonably well settled. The important questions in the present context are whether the applicant has an appropriate "interest" in an issue raised in the appeal and, if so, would the applicant bring to the resolution of that issue a useful "perspective" which would not otherwise be presented on the appeal. In view of the position taken before us for the Crown it is apparent that certain issues of general public importance may have to be dealt with on this appeal in respect of which there would be no one to speak for an important interest, that is to say, for the "privacy interest" of those against whom sexual assaults are alleged to have occurred.
- [22] The interest mentioned ought, of course, to be spoken for should the court be obliged, or should it decide in any event to deal with general questions concerning orders or rulings requiring disclosure of confidential information with respect to such witnesses, or with the procedure which ought to be followed in obtaining or carrying out of such orders or rulings.

- [23] It is, however, of great importance in this case that it be borne in mind that this is a criminal proceeding. Should the appeal be allowed, the trial will proceed and there will be many witnesses to be heard. It is essential that nothing be said in these proceedings which might cause public prejudice against the respondent or prejudice any prospective witness, whether for Crown or defence. The right to intervene should not be granted if the result might be to compromise the right of the respondent to a fair trial in the event the appeal should succeed, that is to say a trial held in an atmosphere free from prior prejudicial comment.
- [24] The applications for intervenor status must be decided with these considerations in mind.
- [28] It must be regarded as undesirable that persons who are alleged to be the victims of a crime which is alleged against an accused person, and who will be the principal Crown witnesses against that person at a criminal trial, should be heard as intervenors in the criminal proceedings. The personal "interest" which they must have in establishing the truth of their allegations involves them so closely in the merits of the case as to make it impossible to expect that they will be able to deal with the matter before the court in a detached manner. Their [witnesses] "interest" is very real, but it is not of the sort which is suited to intervention in this appeal, and particularly so, of course, where as here they have instituted their own civil proceedings against the respondent.

[Emphasis added.]

- [25] The parties agree that the test on this application to intervene is that described by Frankel J.A. in *Moazami*. In that case, two individuals and a number of media organizations applied to intervene in a conviction appeal. One issue on appeal involved disclosure orders in relation to investigations carried out by the police. The individual applicants were accused in other proceedings arising out of the investigation in question.

[26] Frankel J.A. noted:

[23] There are two routes to intervenor status:

- (1) where the applicant can show a direct interest in the proceedings; or
- (2) where, on a public law issue, the applicant can make a useful contribution or bring a different perspective concerning the issues.

See: *West Moberly First Nations v. McLeod Lake Indian Band*, 2014 BCCA 283 at para. 13, 62 B.C.L.R. (5th) 303; *British Columbia Teachers' Federation v. British Columbia*, 2014 BCCA 365 at para. 8, 361 B.C.A.C. 191; *Ahousaht Indian Band v. Canada (Attorney General)*, 2012 BCCA 404 at para. 12, 38 B.C.L.R. (5th) 256; *Ward v. Clark*, 2001 BCCA 264 at para. 6.

- [24] "To establish a direct interest, a proposed intervenor must show the proceeding will directly and adversely affect its legal rights or interests, or impose additional legal obligations on it. A concern that the prospective decision will have precedential effect is insufficient": *West Moberly First Nations* at para. 13 (per Neilson J.A.). See also: *Susan Heyes Inc. v. South Coast B.C. Transportation Society*, 2010 BCCA 113 at para. 12, 286 B.C.A.C. 16.
- [25] When a proposed intervenor does not have a direct interest it must show it represents a public interest in a public law issue: *British Columbia Teachers' Federation* at para. 9; *Ahousaht Indian Band* at para. 12.
- [27] Frankel J.A. described the application of one of the individuals before him as follows:
- [26] F.A. submits she should be granted intervenor status on a direct interest basis. She says the constitutional challenge will affect her privacy rights because the Moazami files contain personal information about her. She further says her access rights will be affected because she is seeking information from those files in connection with her civil action against Mr. Fisher and others.
- [28] The prospective intervenor was in a position not dissimilar to that of the Ministry here: she claimed to be affected by the outcome of a disclosure order in a criminal case, because disclosure in that case would help her to establish police misconduct. Frankel J.A. held, at para. 27:
- [27] I do not consider her to have a direct interest in the issue raised by the media challengers. Her interest [is] more aptly described as indirect. This is because the outcome of the constitutional challenge will not result in disclosure of any information from the Moazami files, nor will it determine who is entitled to access, or the extent of such access.
- [Emphasis added.]
- [29] Similarly, the interests of the prospective media intervenors in the records sought was considered to be indirect. Frankel J.A. wrote:
- [33] The media applicants say they have a direct interest because the existing policy affects their ability to access and gather court documents, i.e., they are "burdened" by the policy. For reasons already expressed, I consider their interest to be indirect and, therefore, insufficient to warrant intervenor status. In fact, their claim is more attenuated than those of F.A. and Mr. Mohsenipour, as it is not tethered to any access request.
- [30] The majority of the cases to which I have been referred involve applications to intervene to address public law issues. It is difficult to find cases where intervenors can establish a direct interest in a criminal case. That is, of course, because the statutory power of the Court of Appeal on a conviction appeal is limited by s. 686, and ordinarily no one other than the Crown and the accused have a direct interest in such an appeal. There are, however, a limited number of cases where an intervenor has successfully established a direct interest. In *R. v. Watson and Spratt*, 2006 BCCA 234, Newbury J.A. considered a number of

applications to intervene (in that case primarily in support of the arguments being advanced by the accused) in the appeals of individuals convicted for breaching ss. 2(1)(a) and 2(1)(b) of the Access to Abortion Services Act, R.S.B.C. 1996, c. 1, the "bubble zone" legislation. She described the law in relation to interventions as follows:

- [3] I believe all the parties are agreed on the applicable law, which in this province has been expounded in cases such as *MacMillan Bloedel Ltd. v. Mullen* (1985), 66 B.C.L.R. 207, *Canada (Attorney General) v. Aluminium Co. of Canada Ltd.* (1987), 35 D.L.R. (4th) 495, and *Ward v. Clark*, 2001 BCCA 264, all decisions of this court. (See also the helpful summary of the applicable principles provided by Pitfield J. in *International Forest Products Ltd. v. Kern*, 2000 BCSC1087 at para. 20.) From these it is clear that where the applicant does not have a "direct" interest in the litigation, the court must consider the nature of the issue before the court (particularly whether it is a 'public' law issue); whether the case has a dimension that legitimately engages the interests of the would-be intervenor; the representativeness of the applicant of a particular point of view or "perspective" that may be of assistance to the court; and whether that viewpoint will assist the court in the resolution of the issues or whether, as noted in *Ward v. Clark*, the proposed intervenor is likely to "take the litigation away from those directly affected by it". (Para. 6.) Thus in *Ward v. Clark*, it was held that the application of the Civil Liberties Association for intervenor status had been properly dismissed, given its proposal to "change the focus" of the argument to something different than that proposed by the parties themselves.
- [31] Newbury J.A. granted leave, apparently on the basis of direct interest, to organizations that spoke for persons directly affected and purportedly protected by the Access to Abortion Services Act.
- [32] The judgment in *Watson and Spratt* was relied upon by Bowden J. in granting leave to the Police Complaints Commissioner to intervene in a summary conviction appeal in *R. v. Plummer*, 2017 BCSC 1579:
- [10] Having considered the nature of the issues in the proceedings I am satisfied that the interests of the PCC are legitimately engaged. In my view the PCC has a direct interest in the outcome of the appeal. He is not an outsider to the litigation but was actively involved in relation to the subpoena issue when that was dealt with at the trial court. The PCC also stands to be affected by the determination of issues involving the interpretation of the Police Act.
- [33] While this analysis to a certain extent confuses the public interest and direct private interest tests by merging them, Bowden J.'s conclusion that the Police Complaints Commissioner had a direct interest in the outcome of the appeal, as a party who had directly participated in addressing the critical issue in the court below, has some merit.
- [34] From these and other cases it can be seen that an order granting leave to intervene is discretionary. The discretion should be exercised sparingly in conviction appeals, and generally not in favour of a party with an interest in the ultimate outcome. The order should

not be made if the intervenor's involvement in the appeal may prejudice a retrial if one is sought. It should only be granted on the basis of direct interest if the interests of the intervenors are legitimately engaged and not if the proposed intervenor is only affected by the outcome as a precedent.

[35] Finally, a direct interest was described in *West Moberly First Nations v. McLeod Lake Indian Band*, 2014 BCCA 283 at para. 13 as follows:

[13] To establish a direct interest, a proposed intervenor must show the proceeding will directly and adversely affect its legal rights or interests, or impose additional legal obligations on it. A concern that the prospective decision will have precedential effect is insufficient: [Citations omitted].

Discussion

[36] I am satisfied that the Ministry has no interest in the outcome of the conviction appeal. Its involvement will not prejudice a retrial if one is ordered.

[37] The Ministry has a direct interest in the issue it is specifically authorized by the Criminal Code to address at trial. That interest is legitimately engaged, and it is not only affected by the outcome as a precedent. The appellant's counsel correctly says this Court will not finally determine whether the records in question will have to be produced and if the issue is revisited, it will be heard by another tribunal on a different record. On this appeal, however, he contends the trial judge erred in holding the "likely relevance" test was not met. If that argument is accepted, it will reopen an issue the Ministry now considers to be closed, and again involve the Ministry in the proceedings at trial. It will to some extent constrain the arguments open to the parties on a reapplication, and the Ministry will not be an outsider to those proceedings.

[38] There is, of course, on the application, one overriding concern, to ensure the interests of justice are served and, in particular, to protect the appellant's right to a fair trial and due process.

[39] The Ministry says Mr. MacKay would suffer no prejudice from its participation in the appeal on the issue of production of records alone. The Ministry's participation and submissions will be distinct and usefully assist the Court in determining an issue in the appeal. In support, it has provided many of the proposed submissions it intends to make.

[40] The appellant's counsel says Mr. MacKay will suffer prejudice from the intervention because the Ministry and the Crown both take instructions from the Attorney General, and the Ministry's intervention is a form of "double teaming".

[41] The Crown points out that the prosecutor has a role that is clearly distinct from other agents of the Crown, and that the Crown ought not to be regarded as unitary for the purpose of this application. He refers us to the judgment of Charron J., for the Court, in *R. v. McNeil*, 2009 SCC 3. In that case the Court states, in particular with respect to production of documents,

that: " the suggestion that all state authorities constitute a single entity is untenable and unworkable" (at para. 48) and, at para. 49, that "[t]he Crown is not an ordinary litigant" and the prosecution has an "undivided loyalty to the proper administration of justice". That is reflected, in my view, in the provision of the Criminal Code that permits the holder of the records in question, in this case a Minister of the Crown, a right to appear and make submissions at a criminal trial.

[42] In my view, the Ministry's interest and proposed submissions on the appeal are sufficiently distinct from the Crown's that the granting the order sought will not result in duplicative arguments or unfairness in the process. I am of the view the Ministry's submissions may be of assistance to the Court.

Conclusion

[43] The Ministry of Children and Family Development is granted leave to intervene for the limited purpose of addressing the appellant's challenge to the order of August 28, 2015. The factum will be limited to ten pages. The extent of the intervenor's oral submissions will be determined by the division hearing the appeal.

"The Honourable Mr. Justice Willcock"

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/20/02/2020BCCA0258.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-mackay-2020>

Prepared on 29 October 2026 · Esheria