
CANADA / JUDGMENT

R. v. Malenfant

2015 BCSC 1854

COURT

Supreme Court of British Columbia

DECIDED

30 June 2015

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2015 BCSC 1854 R. v. Malenfant

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Malenfant,

2015 BCSC 1854

Date: 20150825

Docket: 23534

Registry: Nelson

Between:

Regina

And

Mathieu Malenfant, Norman Gerald Stainer

and Deborah Achleitner

Before: The Honourable Madam Justice Humphries

Oral Ruling on Expert Reports

Counsel for the Crown:

Adrienne Switzer

Counsel for Malenfant:

Don Skogstad

Counsel for Stainer:

Blair Suffredine

Counsel for Achleitner:

Janet Connolly

Place and Date of Hearing:

Nelson, B.C.

June 29, 2015

Place and Date of Ruling:

Nelson, B.C.

June 30, 2015

[1] I read the substance of these reasons in court on June 29, 2015, and said I would file the full written reasons. These are those reasons.

[2] The accused are charged with:

Count 1 .on or about the 2nd day of March, 2012, at or near South Slocan, in the Province of British Columbia, did unlawfully produce a controlled substance, to wit: Cannabis (marihuana), contrary to Section 76(1) of the Controlled Drugs and Substances Act.

Count 2: on or about the 2nd day of March, 2012, at or near South Slocan, in the Province of British Columbia, did unlawfully possess a controlled substance, to wit: Cannabis (marihuana), for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drugs and Substances Act.

[3] None of the comments I make on the evidence for the purposes of this ruling are to be taken as findings of fact on the trial. Those will be made only at the conclusion of the evidence at trial, and following submissions.

[4] The charges arose as a result of a search of a residence which disclosed a large number of plants, over 5,000, in various rooms. The Crown's expert testified that the plants were worth \$25,800 to \$51,600 as clones. He said if the plants were brought to maturity, they would produce 439,000 grams of marihuana, worth \$1,900 per pound, for a total value of \$2 million, but it was his opinion that the operation was a clone factory.

[5] There appears to be evidence to tie ownership of the property to Mr. Malenfant and Ms. Achleitner, but not Mr. Stainer, who was present at the time the search warrant was executed.

[6] 23 samples of plants were taken for analysis. There appears to be no issue those plants were found to be marihuana. The rest of the plants were destroyed pursuant to an order of the Minister of Health.

- [7] The Crown's case was put in at the end of January, 2015, following rulings on disclosure in February of 2014 and on an application in June of 2014 for a stay under s. 7 of the Charter based on the destruction of evidence.
- [8] We have reconvened at the end of June 2015. The Crown has formally closed its case.
- [9] Counsel for Mr. Malenfant advised the court he had submissions to make under various categories but all directed to the same end, and all based on the same premise - the destruction of the plants has prevented his client from making full answer and defence on the "for the purpose of trafficking" count, and has also resulted in the Crown not having proved the case beyond a reasonable doubt. He applies for a directed verdict on Count 2, an order dismissing Count 2, and he renews his application for a stay of Count 2 pursuant to s. 7 of the Charter.
- [10] The only evidence Mr. Malenfant wishes to adduce is three expert reports by Mr. Taylor, Mr. Hartmann, and Professor Swartz. The Crown objects to their admissibility.
- [11] Ms. Achleitner joins Mr. Malenfant in wishing to adduce on the three expert reports. Mr. Suffredine on behalf of Mr. Stainer takes the position that he has no standing to make a Charter application as his client does not have title to the residence, but he adopts the submissions of Mr. Skogstad and Ms. Connolly on the issue of the experts and made brief submissions of his own. He advised that Mr. Stainer does not intend to call any evidence.
- [12] Presently before the court, then, is the issue of whether the three reports produced by Mr. Malenfant should be entered into evidence.
- [13] Section 657.3(1)(a) provides that a report may be given if "the court recognizes that person as an expert"; subsection (2) states that the court may require the person to appear for cross-examination.
- [14] Neither Mr. Taylor nor Mr. Hartmann is available for cross-examination. Professor Swartz is apparently out of the country and not available to be cross-examined by video until Friday of this week, that is the last day set aside for the completion of this trial. Whether any of the potential experts were subpoenaed is not before me.
- [15] The three reports are:
1. Brian Taylor, whom the defence wishes to tender as an expert in the cultivation and production of various strains of marihuana.
- [16] Mr. Taylor's Statement of Qualifications says he is familiar with cultivation of marihuana, is licensed to grow medical marihuana, is a co-founder and organizer of Canadian Cannabis Coalition, and has various other connections with growing marihuana, including making a movie, founding a magazine, designing grow units, and teaching small scale marihuana production. He says he was accepted as an expert in a case in provincial court.

- [17] Mr. Taylor opines that sophisticated testing is needed to tell a juvenile hemp plant from a juvenile marihuana plant, that the demand for hemp is growing, that hemp at .3% THC would be insufficient to have a "physco active" [sic] on an individual. He offers an opinion on what would or would not be an illegal substance. He says the photos are of immature plants, and without examining them, he cannot determine if they have roots.
2. Mr. Hartmann: his area of expertise is not encapsulated in his report, but he was asked to answer the question: Is it possible to identify plant cuttings and or whole leaf material as hemp, marihuana, or cannabis from direct visual observation?
- [18] Mr. Hartmann answered that it is not possible without magnification under a dissecting microscope to examine the reproductive structures, so it is not possible to identify hemp from marihuana based on visual observations alone.
- [19] According to his curriculum vitae, Mr. Hartmann was an Analyst and Research Scientist with Agriculture Canada from 1981 to 1986.
3. Professor Swartz: he has a doctorate in statistics. He was asked review "the sampling process" undertaken in connection with the search warrant, based on certain information.
- [20] Professor Swartz states only that he was told the sampling scheme "is unknown". It was acknowledged during argument that he was not provided with the transcript of evidence from the officer who took the samples until after his report had been filed, and even then was apparently given only part of the cross-examination. There is no evidence that I am currently aware of regarding any follow up opinion.
- [21] Professor Swartz said "typically, the selection is carried out by simply random sampling in this case the sampling mechanism is unknown, the tools of probability cannot be utilized it may be the case that the 7 selected plants are not representative of the population of 5163 plants."

Admissibility of Mr. Taylor's Report

- [22] The Crown questions the expertise of Mr. Taylor.
- [23] The defence says I implicitly accepted Mr. Taylor as an expert because I referred to his report in my earlier ruling on the stay application (2014 BCSC 1139).
- [24] The ruling on the stay was adjourned as premature, and I understood Mr. Skogstad to agree during the present argument that that application should be brought after all the evidence is in. Although I referred to the report and its contents in my ruling, I did not address myself to s. 657.3(1)(a).
- [25] I have difficulty with the Statement of Qualifications of Mr. Taylor and I would have to hear him cross-examined and have submissions on his qualifications before recognizing him as an expert. In any event, his report adds nothing to that of Mr. Hartmann.

[26] Based on the information before me, I do not recognize him as an expert. His report is inadmissible.

The Reports of Mr. Hartmann and Professor Swartz:

[27] The Crown does not take serious objection with the qualifications of Mr. Hartmann and Professor Swartz. Her objection to their reports is based on the principles in *R. v. Mohan* [1994] 2 S.C.R. 9. She submits the reports are not relevant or necessary because it does not matter whether the plants growing in the residence are marihuana or hemp. Both are illegal under the Controlled Drugs and Substances Act unless the accused proves an exception - for instance a licence to grow hemp.

[28] In addition, Professor Swartz's opinion is not necessary because it is simply common sense.

[29] Mr. Malenfant takes the position that although he does not intend to produce or prove a licence to grow hemp, he has been prevented from demonstrating that the plants were mainly hemp, and this is relevant regardless of a licence because he is charged with possession for the purpose of trafficking. He says he has arguments to make that he has been prevented from making because the evidence has all been destroyed. He contends this was an illegal destruction under s. 490.1 of the Code as it was done without judicial authorization.

[30] Ms. Connolly for Ms. Achleitner submits that the intent of the prohibition underlying Count 2 of the indictment is the criminalization of a mind altering substance, not hemp.

[31] Mr. Suffredine points to the Crown's expert report, which has as a fundamental point in its opinion on value, that this is marihuana with a particular strength.

[32] All of these arguments are still to be made on their merits, and in fuller form, but were adverted to on the issue of relevance and necessity.

[33] They are arguable points. That is all I can say about them at this time; but they do support the relevance of the opinions. Regardless of the burden of proof on the exception, the Crown must prove the element of "for the purpose of trafficking" beyond a reasonable doubt.

[34] The opinions are prima facie admissible.

[35] A difficulty is caused by the present unavailability of either expert to be cross-examined. Professor Swartz is apparently available on Friday but that leaves two days of unused court time, and then perhaps not enough time to finish the case, which is most unsatisfactory.

[36] Each witness makes a stark general statement - to boil them down, Professor Swartz says: "when the sampling scheme is unknown, the tools of probability cannot be utilized to assess it", and Mr. Hartmann says: "you cannot tell marihuana from hemp by visual observation; you need a microscope".

- [37] Professor Swartz's statement is, to a certain extent, common sense, although I suppose there is some worth in knowing that it is also a principle of statistical study. The use of his opinion, which is not specific to this case, depends entirely upon the information he is given, which can be the subject of argument based on the information presently before the court, and its weight adjusted accordingly. As it is, I see no real prejudice to the Crown if he is not available to be cross-examined on this very limited and uncontroversial statement because its weight, if any, will depend upon the findings made by the court.
- [38] Mr. Hartmann also makes a general statement that is clear, and thoroughly explained. Whether and to what extent it has applicability to this case can be a matter of argument and the lack of cross-examination can go to weight.
- [39] The court and opposing counsel are placed in a difficult position when the report of an expert witness is tendered, but the expert cannot or will not be made available for cross-examination.
- [40] Given the unusual circumstances here and the limited nature of the opinions, I will admit the evidence of Mr. Hartmann and Professor Swartz without requiring them to be cross-examined, but this case should not be considered a precedent for such an approach.
- [41] The opinions of Mr. Hartman and Professor Swartz are admissible.

"M.A. Humphries J."

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