

CANADA / JUDGMENT

R. v. McKay

2016 BCCA 126

COURT

British Columbia Court of Appeal

DECIDED

11 March 2016

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

2016 BCCA 126 R. v. McKay COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. McKay, 2016 BCCA 126 Date: 20160311 Docket: CA43232 Between: Regina Appellant And Cameron Tyler Lewis McKay Respondent Before: The Honourable Madam Justice Stromberg-Stein (In Chambers) On appeal from: An order of the Supreme Court of British Columbia, dated October 27, 2015 (R. v. McKay, Victoria Registry 160966). Oral Reasons for Judgment Counsel for the Appellant: W.P. Riley, Q.C. Applicant for Intervenor Status: M. Levitz Counsel for the Respondent: B. Hickford Place and Date of Hearing: Vancouver, British Columbia March 11, 2016 Place and Date of Judgment: Vancouver, British Columbia March 11, 2016 Summary: The Attorney General of British Columbia applies for intervenor status in an appeal by the Federal Crown from a judicial stay of proceedings. The appeal concerns the disclosure of raw intelligence provided by police informers. Held: Application allowed. The Attorney General has a direct interest in the appeal and can provide a useful and different perspective on the issues before the Court. The intervention will not be unfair or create an appearance of unfairness to the accused.

- [1] STROMBERG-STEIN J.A.: The Attorney General of British Columbia applies for intervenor status in the Federal Crown's appeal from a judicial stay of proceedings. The issue raised in the appeal is whether and in what circumstances an accused person is entitled to access raw intelligence provided by police informers.
- [2] Neither the Federal Crown nor Mr. Hickford on behalf of the accused, Cameron McKay, have filed written materials. They have appeared today and essentially are taking no position on this application.

Background

- [3] Mr. McKay was charged with possession of cocaine for the purpose of trafficking. This charge arose from the seizure of approximately one kilogram of cocaine and other drug paraphernalia from his residence. The only live issue at trial was the sufficiency of the grounds to support the search warrant for the residence. Mr. McKay sought disclosure of intelligence provided by two police informers in the form of source handler notes and source debriefing reports. The Crown disclosed a single source debriefing report, but asserted that the remaining source debriefing reports and source handler notes were not

relevant and were protected by informer privilege.

- [4] The trial judge held that the Crown was obliged under its "first party" disclosure obligations to search for, review and disclose all source handler notes and source debriefing reports containing intelligence from the two informers, except those that could be classified as "clearly irrelevant" and subject to editing to protect informer privilege. The Crown declined to comply with the disclosure and the judge ordered a stay of proceedings.
- [5] The Federal Crown's appeal raises the following grounds:
- i. the judge erred in requiring disclosure of source handler notes and source debriefing reports in the absence of a finding that they were likely relevant; and, ii. the judge erred in holding that presumptive disclosure of source handler notes and source debriefing reports, subject to redaction of specific details, is consistent with the informer privilege rule.
- [6] In its factum, the Federal Crown argues that source handler notes and source debriefing reports that are not created or maintained as part of the investigative file, or as fruits of the investigation regarding a particular matter, should only be subject to disclosure where the accused can meet a threshold of likely relevance. Further, the Federal Crown argues that where the accused has shown a basis for the relevance of a particular document, the Crown can then review the document and disclose any likely relevant, non-privileged information.
- [7] The Attorney General says that it has prosecuted a number of "mega-cases" involving murders and murder conspiracies arising out of rivalries between criminal gangs. A significant issue in these cases has been the disclosure of information relating to confidential informers. If granted intervenor status, the Attorney General's argument will go further than that of the Federal Crown. It will argue that all information provided by a confidential informer in whatever form is presumptively privileged and must not be disclosed absent a finding of innocence at stake. It will argue that attempting to edit a privileged document involves an incalculable risk of identifying the informer. Thus, it will submit that upon a claim of privilege there should be no disclosure of information relating to the informer to anyone absent a court order. Legal Principles
- [8] Interventions in criminal law are only granted in exceptional circumstances. The reason for this is that granting intervenor standing may result in unfairness, or at least create the appearance of unfairness to the accused: *R. v. Mayers*, 2011 BCCA 268 (in Chambers) at paras. 5-6.
- [9] The decision whether or not to allow an intervention is discretionary and may be made on any terms and conditions the justice considers appropriate: *Carter v. Canada (Attorney General)*, 2012 BCCA 502 (in Chambers) at para. 11.

- [10] Generally, intervention is allowed in two situations. The first is where the proposed intervenor has a direct interest in the litigation: Carter at para. 12. The second is where the appeal raises public law issues that legitimately engage the applicant's interests, and the applicant brings a different and useful perspective to those issues that will be of assistance to the Court: Carter at para. 13.

Disposition

- [11] Recognizing that interventions in criminal matters are only granted in exceptional circumstances, in my view, the Attorney General's application should be granted. This appeal concerns the scope of disclosure of confidential informer information and whether an accused person is entitled to see raw intelligence provided by police informers. 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.
- [12] In my view, the Attorney General is directly affected by this litigation in the sense that the outcome will impact how Crown counsel balance the duties of disclosure and the protection of informer privilege, having regard to the Crown's high duty to guard the confidentiality of an informer's identity as expressed by the Supreme Court of Canada in *Named Person v. Vancouver Sun*, 2007 SCC 43 at para. 26. The Attorney General, from its experience in prosecuting so called "mega-cases", can offer a unique and different perspective from that of the Federal Crown and Mr. McKay on the risks of disclosure of informer information. This perspective will provide this Court with an opportunity to consider the impact of its decision outside of the context of drug cases by highlighting additional risks from the disclosure of this type of information not only to the safety of the informer, but also to the viability of the prosecution.
- [13] I would allow the Attorney General's intervenor application. The Attorney General is permitted to file a factum of no more than 20 pages by April 8, 2016.
- [14] It is left to the Division hearing the appeal to decide whether the Attorney General will be permitted to make oral submissions. [discussion with counsel]
- [15] The parties agree the appeal should be adjourned to June 22, 2016. The Attorney General's factum is due April 8, 2016. The respondent's factum is due May 11, 2016. The respondent will be given an additional six pages in his factum. No costs will be awarded for or against the Attorney General of British Columbia. "The Honourable Madam Justice Stromberg-Stein"

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/16/01/2016BCCA0126.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-mckay-2016>

Prepared on 29 October 2026 · Esheria