

CANADA / JUDGMENT

R. v. Moazami

2020 BCCA 61

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British Columbia Court of Appeal

DECIDED

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2020 BCCA 61 R. v. Moazami COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Moazami, 2020 BCCA 61 Date: 20200219 Docket: CA43308; CA43857 Between: Regina Respondent And Reza Moazami Appellant Restriction on Publication: A publication ban has been mandatorily imposed under s. 486.4(1), s. 486.4(2) and s. 486.5 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant, witness or victim (or any witness under the age of 18), referred to in this judgment by the initials H.W., Z.C., and F.A. This publication ban applies indefinitely unless otherwise ordered. Pursuant to s. 16(4) of the Sex Offender Information and Registration Act, 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. SEALED (IN PART) Corrected Judgment: The text of the judgment was corrected at paragraph 38 on February 20, 2020, and on the front page on February 21, 2020. Before: The Honourable Mr. Justice Frankel (In Chambers) On appeal from: orders of the Supreme Court of British Columbia, dated September 15, 2014 and February 11, 2016 (R. v. Moazami, 2014 BCSC 1727, Vancouver Docket 26108; R. v. Moazami, 2016 BCSC 99, Vancouver Docket 26423). Counsel for the Appellant: T.M. Arbogast A. Grewal Counsel for the Respondent: L.A. Ruzicka M.G. Scott Counsel for the Attorney General of British Columbia: J.D. Hughes Counsel for the Applicants, The Vancouver Sun and the Canadian Broadcasting Corporation: S.A. Dawson J. Trueman Counsel for the Proposed Intervenor, F.A.: J.B. Gratl Counsel for the Proposed Intervenor, K. Mohsenipour: J. Narwal Counsel for the Proposed Intervenors, Canadian Media Lawyers' Association, CTV, Global News, and The Globe & Mail: D.W. Burnett, Q.C. Place and Date of Hearing: Vancouver, British Columbia January 28, 2020 Place and Date of Judgment: Vancouver, British Columbia February 19, 2020 Summary: Application to intervene in a constitutional challenge brought by The Vancouver Sun and the C.B.C. to this Court's disclosure policy with respect to criminal files. Held: Two applications dismissed; one allowed. The applications of F.A. and K.M. for intervenor status based on a direct interest in the challenge are dismissed. Their respective interests are indirect and relate to the precedential effect of the outcome of the challenge. For the same reason, a group of media-related organizations does not have a direct interest. However, those organizations joint application is allowed because their arguments will be of assistance to the division hearing the challenge. Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

- [1] This matter involves three applications for leave to intervene on a constitutional challenge to the sections of this Court's Record and Courtroom Access Policy applicable to criminal files. The Vancouver Sun and the Canadian Broadcasting Corporation (the "media challengers") have brought that challenge. Those seeking to intervene are: (a) F.A.; (b) Kasra Mohsenipour; and (c) the Canadian Media Lawyers' Association, CTV, Global News, and The Globe & Mail (the "media applicants").
- [2] The media challengers' position is that the access policy as it relates to criminal files offends the open court principle. The proposed intervenors support that position. The Crown--represented by the British Columbia Prosecution Service as distinct from the Attorney General of British Columbia--opposes the interventions.
- [3] What lies behind the constitutional challenge is an application for access to material Reza Moazami has filed on two conviction appeals he currently has before this Court. Those appeals related to Mr. Moazami's convictions on prostitution-related charges (CA43308) and obstruction of justice and breach of a court order (CA43857). I have been case managing those appeals for some time.
- [4] For the reasons that follow, the applications of F.A. and Mr. Mohsenipour are dismissed and the application of the media applicants is allowed.

Background

- [5] I do not see the need to rehearse the facts relating to Mr. Moazami's conviction appeals. They are set out in my reasons dismissing his application for bail pending the determination of those appeals: *R. v. Moazami*, 2019 BCCA 226 at paras. 6-10 (Chambers).
- [6] In both the prostitution and obstruction appeals, Mr. Moazami asserts abuse of process based on the alleged misconduct of James Fisher, a former member of the Counter-Exploitation Unit of the Vancouver Police Department ("VPD"). Mr. Fisher was involved in investigating the prostitution and obstruction matters and testified for the Crown at both trials. Following those trials, the VPD conducted an investigation into misconduct by Mr. Fisher with respect to his relationships with a number of complainants and witnesses with whom he had contact (the "Fisher Investigation"). That investigation resulted in Mr. Fisher being charged with a number of offences. Eventually, he pleaded guilty to two counts of breach of trust, one in relation to Z.C., and the other in relation to H.W. He also pleaded guilty to a charge of sexual exploitation in relation to Z.C. Z.C. had been a potential Crown witness with respect to prostitution-related charges brought against another person that were resolved by a plea. Mr. Fisher received an aggregate sentence of 20 months' imprisonment plus two years' probation, which this Court upheld: *R. v. Fisher*, 2019 BCCA 33.

- [7] H.W and F.A. testified for the Crown at Mr. Moazami's prostitution trial; in the trial judgment F.A. is referred to by different initials.
- [8] In connection with the prostitution and obstruction appeals, the Crown has provided Mr. Moazami with disclosure from the Fisher Investigation ("Fisher Disclosure"). In the context of those appeals, Mr. Moazami applied pursuant to s. 683(1)(a) of the Criminal Code, for an order compelling the Crown to produce a complete inventory of all materials relating to the Fisher Investigation. He did so as he seeks to have his convictions set aside on the ground that Mr. Fisher's misconduct with complainants and witnesses has given rise to a miscarriage of justice. A division of this Court recently dismissed that application: *R. v. Moazami*, 2020 BCCA 3.
- [9] Mr. Moazami filed approximately 3,500 pages of Fisher Disclosure on the thumb drive in support of his bail application. I heard that application on May 6, 2019, and dismissed it on June 20, 2019.
- [10] On May 7, 2019, a C.B.C. reporter sought access to the Moazami conviction appeal files by filing the form required by the access policy. That reporter also sought access to a third file involving a summary conviction appeal brought by Mr. Moazami with respect to his conviction on a charge of assault with a weapon (CA45510). On May 27, 2019, a Vancouver Sun reporter sought access to the same three files. It is convenient to note here that on January 21, 2020, I dismissed Mr. Moazami's application for an extension of time to file his notice of application for leave to appeal in CA45510: *R. v. Moazami*, 2020 BCCA 20 (Chambers).
- [11] After the access requests were filed, the reporters' counsel communicated with Mr. Moazami's counsel, Crown counsel on the appeals, and this Court's Registrar. Mr. Moazami's counsel and Crown counsel took the position that the reporters should not have complete access to this Court's files. In particular, Crown counsel objected to the reporters being given access to the Fisher Disclosure Mr. Moazami filed on his bail application.
- [12] In June of 2019, Chief Justice Bauman referred the access issue to me. On July 7, 2019, I held the first case-management conference concerning that issue.
- [13] On July 8, 2019, the media challengers filed a notice of motion in the three Moazami appeal files returnable before me, seeking an order:
1. vacating, or, in the alternative, varying each and every order made in this appeal prior to this motion being heard, if any, that:
 - a. is in the nature of a sealing order;
 - b. is in the nature of a publication ban; or
 - c. limits the openness of these proceedings, including by limiting access to material filed with the registry;

2. requiring notice to the [media challengers] of any future application in this appeal for an order that:
 - a. is in the nature of a sealing order;
 - b. is in the nature of a publication ban; or
 - c. limits the openness of these proceedings, including by limiting access to material filed in the registry. The notice of motion goes on to state: For clarity and notwithstanding the breadth of the relief described above, the [media challengers]:
 - do not seek to displace any order that protects the identity of any victim of the appellant or minor witnesses; and
 - respectfully say that access to material filed with or supplied to this honourable court should be prima facie available to the public, including the media, without application, as the onus is on those who would restrict access to apply for that relief. [Emphasis in original.]
- [14] On September 9, 2019, Mr. Mohsenipour filed a notice of motion seeking access to the material filed in support of Mr. Moazami's bail application. Mr. Mohsenipour is currently appealing his conviction on prostitution-related charges arising out of an investigation in which Mr. Fisher was involved (CA45957). His co-accused, Tamim Albashir, also is appealing his conviction (CA45961). The Crown has provided Mr. Mohsenipour and Mr. Albashir with post-conviction Fisher Disclosure and the possibility of additional disclosure is outstanding.
- [15] On September 13, 2019, the media challengers filed a notice of motion pursuant to s. 8(2) of the Constitutional Question Act, R.S.B.C. 1996, c. 68, challenging this Court's access policy with respect to criminal files on the basis it infringes ss. 2(b) (freedom of the press and other media of communication) and 11(d) (the right of an accused to a fair and public hearing) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
- [16] On October 22, 2019, F.A. filed a request for access to the Moazami prostitution-related and obstruction of justice conviction appeal files. The Crown objected to the disclosure of certain material from those files. On November 18, 2019, F.A. filed a notice of motion seeking access to all three Moazami files. She has commenced a civil action against Mr. Fisher, the City of Vancouver, John Doe, Jane Doe, Her Majesty the Queen in Right of the Province of British Columbia, and the Minister of Public Safety and Solicitor General. F.A. alleges Mr. Fisher sexually and psychologically abused her. An order dealing with document discovery has been made in that action that addresses document production by the VPD.
- [17] At a case-management hearing on November 20, 2019, counsel for F.A., Mr. Mohsenipour, and the media applicants appeared and indicated their respective clients were seeking intervenor status on the constitutional challenge to the access policy. The Attorney General of British Columbia appeared as a party to that challenge by virtue of s. 8(6) of the Constitutional Question Act, and his counsel indicated she would be participating as a quasi-amicus curiae. Thereafter, arrangements were made for the intervention application to be heard on January 28, 2020.

- [18] Three of the media applicants, CTV, Global News, and The Globe & Mail, are national media organizations. The Canadian Media Lawyers' Association is a national organization whose aim is to promote improved laws and policies for freedom of expression and openness of courts.
- [19] Chief Justice Bauman has directed that a division of the Court hear the constitutional challenge to the policy. Summary of the Parties' Positions
- [20] The Crown opposes all of the intervention applications. Mr. Moazami supports the applications of the media intervenors and of Mr. Mohsenipour, but takes no position with respect to F.A.'s application. The Attorney General takes no position on any of the applications.
- [21] The media challengers support all the applications. They do, however, submit that one of F.A.'s proposed submissions--concerning what the access policy should be--is an expansion of the issues they are raising. The media challengers say the arguments the media applicants intend to advance (discussed below), are different from the ones they will be advancing; as counsel for the media challengers put it, "my plate is full".

Analysis

- [22] I will first discuss the legal framework that applies to intervention applications and then address separately the applications before me.

Legal Framework

- [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. F.A.'s Application

- [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.
- [27] I do not find it necessary to rehearse the arguments F.A. seeks to make, because 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. If the challenge fails, then access requests will be determined in accordance with the current policy. If the challenge succeeds, then I expect the Court will develop a new policy. While the outcome of the challenge will have precedential value, it will not directly affect either F.A.'s privacy rights or access rights. Those will be determined later.
- [28] Suffice it to say, I do not accept the media challengers' submission that anyone who might wish to make an access request with respect to one of this Court's criminal files has a direct interest in the challenge they have brought.
- [29] I would not grant F.A. intervenor status. Mr. Mohsenipour's Application
- [30] Mr. Mohsenipour also seeks intervenor status on a direct interest basis. He says the constitutional challenge will affect his right to advance his conviction appeal to the fullest extent possible. Like Mr. Moazami, Mr. Mohsenipour seeks to raise miscarriage of justice based on Mr. Fisher's misconduct as a ground of appeal.
- [31] I do not need to rehearse the arguments Mr. Mohsenipour seeks to make, because, like F.A., I consider his interest in the constitutional challenge to be indirect. Accordingly, for the reasons stated above with respect to F.A., I would not grant him intervenor status. The Media Applicants' Application
- [32] The media applicants seek intervenor status on both a direct interest and public interest basis. If allowed to intervene, then they will address the following three areas:
- (a) the access policies and rules in place at all levels of court in Canada;
 - (b) the genuine and practical barriers to access created by the existing policy; and
 - (c) existing and alternate means of protecting the administration of justice.
- [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.

- [34] With respect to public interest status, the media applicants point to the fact that the Supreme Court of Canada has permitted them to intervene in a number of cases. I note that has generally been as part of a joint intervention: see *R. v. Barton*, 2019 SCC 33; *Denis v. Côté*, 2019 SCC 44; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306.
- [35] The Crown submits that the media applicants should not be permitted to participate because they do not have a perspective different from that of the media challengers. The Crown further says the media challengers could address the three areas the media applicants propose to address. The Crown's understanding is that the Attorney General intends to deal with the policies and rules in place across Canada.
- [36] The Crown cites *Trans Mountain Pipeline ULC v. Mivasair*, 2020 BCCA 8 at paras. 3, 15, 17 (Chambers), and *Squamish Nation v. British Columbia (Minister of the Environment)*, 2019 BCCA 65 at paras. 23, 25, 28 (Chambers), 22 B.C.L.R. (6th) 155 (Chambers), as authority for the proposition that intervention will be refused when the arguments of a proposed intervenor could be made by one of the parties. In my view, those decisions do no stand for such an absolute bar. In *Trans Mountain Pipeline*, the arguments the proposed intervenor wished to make would have expanded the scope of the appeal and not assisted the Court on the narrow ground raised by the appellant: at paras. 14, 17. In *Squamish Nation*, the arguments the proposed intervenor wished to make either were addressed by one of the parties or would have expanded the scope of the appeal: at paras. 24-28.
- [37] While I agree the media challengers and media applicants share the same perspective that, in and of itself, does not preclude the latter's participation. In the absence of a direct interest, what should be considered in addition to the representative scope of a proposed intervenor and its legitimate interest in the issues, is "whether the applicant can make a valuable contribution or bring a different perspective to a consideration of the issues that differs from those of the parties" (emphasis added): *EGALE Canada Inc. v. Canada (Attorney General)*, 2002 BCCA 396 at para. 7 (Chambers) (per Rowles J.A.), 170 B.C.A.C. 204, quoted with approval in *British Columbia Teachers' Federation* at para. 8. In other words, even in the absence of a different perspective, an intervenor may be able to assist the Court in reaching a fully informed decision with respect to the issues raised by the parties.
- [38] In my view, the media applicants, because of their knowledge, experience, and expertise, are in a position to make a valuable contribution to the resolution of the constitutional challenge. I am confident their submissions will assist the division that hears the challenge. With respect to the policies and rules of other courts, I am equally confident that counsel for the media applicants and the Attorney General will work together to avoid duplication.
- [39] I will defer the question of the length of the media intervenors' factum to another day. Following release of these reasons, counsel should consult with the registry to arrange a case-management hearing.

Disposition

[40] The applications of F.A. and Mr. Mohsenipour are dismissed. The joint application of the Canadian Media Lawyers' Association, CTV, Global News, and The Globe & Mail is allowed. "The Honourable Mr. Justice Frankel"

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