

CANADA / JUDGMENT

R. v. Park

2018 BCSC 1830

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 1830 R. v. Park IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Park, 2018 BCSC 1830 Date: 20181023 Docket: 27172 Registry: Vancouver Regina v. James Travis Park Before: The Honourable Madam Justice Watchuk Ruling on Section 7 of Canada Evidence Act Counsel for the Crown: Michelle J. Booker Counsel for the Accused: Karin Anne Blok Place and Dates of Hearing: Vancouver, B.C. April 6, 2018 Place and Date of Oral Reasons: Vancouver, B.C. May 4, 2018 Place and Date of Written Reasons: Vancouver, B.C. October 23, 2018

- [1] This is an application by the Crown for leave to call more than five expert witnesses in a criminal trial pursuant to s. 7 of the Canada Evidence Act, R.S.C., 1985, c. C-5 (the "CEA"). That provision states: Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called on either side without the leave of the court or judge or person presiding.
- [2] The accused is charged with the second degree murder of his infant daughter, A.P. The jury trial is scheduled to commence on May 28, 2018.
- [3] In advance of the trial I provided counsel the ruling granting the application. There are the reasons for that ruling. Overview of the Law
- [4] Section 7 of the CEA is not often discussed in reported criminal law decisions. In R. v. Noyes, [1991] B.C.J. No. 3091, the Court of Appeal found the trial judge did not err in admitting the expert evidence of eight psychiatrists. The history of the provision was set out at page 11: The history of s. 7 of the Canada Evidence Act confirms it to be purely pragmatic. It appeared in substantially its present form in 1902, 2 Edw. 7, c. 9 and s. 2 was added in 1906, c. 145. It was first commented on briefly in R. v. Dodge (1906), 38 S.C.R. 149, at p. 152, when Idington, J., simply noted that its application could have minimized the reduction of much irrelevant evidence. The plea for the need for a general power of restriction of evidence was perhaps most eloquently put by Tomlin, J., as a trial judge in Graigola Merthyr Co. v. Swansea Corporation, [1928] Ch. 31, in a civil case where he said counsel owed the court a positive duty to reduce to a minimum the experts required. Wigmore (Chadbourn Ed.) vol. 6, s. 1907 et seq., makes extensive reference to the history in various jurisdictions and it is

plain that the legislation was directed to curbing expense or abuse.

- [5] *Altana Pharma Inc. et al v. Novopharm Ltd.*, 2007 FC 1095, a Federal Court decision made prior to that court's adoption of Rule 52.4, clarifies the application of s. 7 of the CEA. Justice Phelan held the purpose of s. 7 was, at least in part, to prevent abuse, trouble, expense, and delay caused by the excessive use of expert evidence: para. 55. Another Federal Court decision confirmed that the purpose of the provision is to limit the number of experts to a number that is reasonable, beyond which prior leave must be obtained: *Eli Lilly and Co. v. Apotex Inc.*, 2007 FC 1041 at para. 29.
- [6] In *Sam v. British Columbia*, 2016 BCSC 86, Bracken J. dealt with an application for leave pursuant to s. 7 of the CEA in the context of a civil claim relating to Aboriginal treaty rights. The Province was opposed to the application that sought leave to call twelve experts at the trial because of duplication. Justice Bracken noted the following:
- [4] The limitation to five experts has been interpreted as a restriction of the number of experts that may be called per issue and the number of experts that may be called per party. There seems to be greater consensus that the Act restricts the number of experts to five per party. Overall, the authorities have taken the more conservative interpretation, in part because provisions such as s. 7 of the Act allow for leave to apply for experts in excess of the stated number. That is, where a provision allows for leave, the limit is considered to apply per party, and can be increased with leave of the court.
- [7] Justice Bracken reviewed several civil cases and Federal Court Rule 52.4, which suggest a court, when deciding to grant such an application, can consider a number of factors:
- (a) the number of experts each side proposes to produce;
 - (b) whether the opposing party will be disadvantaged if leave is granted;
 - (c) whether the additional experts are necessary;
 - (d) whether there is duplication in the proposed evidence;
 - (e) whether the additional experts will require time or cost disproportionate to the issues that must be decided at trial;
 - (f) whether the litigation has public significance or requires legal clarification; and
 - (g) the complexity or nature of the issues in dispute. While not every factor will apply in all cases, these considerations can assist a court in deciding whether to grant leave pursuant to s. 7 of the CEA.
- [8] In *Sam*, Bracken J. held the evidence would be complex and cover many areas of science, law, and culture. The plaintiffs acknowledged there would be some overlap, but argued that the experts would provide different perspectives and, in any event, the duplication would not amount to an abuse. Justice Bracken allowed the plaintiffs to call twelve experts, stating:

- [26] As the nature of the litigation is unusual, it cannot be said that the number is disproportionate to the number of experts called in similar cases. In this case, one of the central issues is to determine whether there was a breach of a treaty and, if so, how much land the Lekwungen or Chekonein peoples utilized before the alleged treaty was made. A considerable body of expert opinion will be required in determining that issue.
- [9] Expert evidence can also be limited through the criteria laid out in *R v. Mohan*, [1994] 2 S.C.R. 9. There is some overlap in the issues to be considered under s. 7 of the CEA and what the court may be asked to address at a later date pursuant to the Mohan criteria. Both are born out of concern with the "proliferation of experts" discussed in *R. v. D.D.*, 2000 SCC 43. A common thread in both granting leave under s. 7 of the CEA and applying the Mohan criteria is that the expert evidence must assist the jury rather than confuse or overwhelm them with the "mystic infallibility" of expert evidence referred to in Mohan.
- [10] The Mohan test does not render s. 7 of the CEA moot in the criminal context. Section 7 is a threshold requirement that also applies in criminal cases. Section 7 applies, as worded in *Noyes*, to put a positive duty on counsel to keep expert evidence to a minimum. Remaining issues regarding expert evidence can then be addressed by applying the Mohan criteria.
- Application to this Case
- [11] In this case, the allegation is that Mr. Park inflicted an injury to the head of his seven-week old daughter resulting in her death.
- [12] The Crown seeks to call ten medical experts to address several issues. I would summarize the areas of expertise as follows: the victim's injuries (acute and pre-existing), the cause of death, child protection concerns, and the symptoms of withdrawal from substance abuse.
- [13] The Crown's proposed list of expert witnesses is as follows: 1. Dr. Cogswell Intensive Care Medicine 2. Dr. Colbourne Paediatric emergency medicine and the causes of injury and illnesses in children, child protection unit 3. Dr. Culham Paediatric Radiology, metaphyseal injuries 4. Dr. Holmes Medical biochemist, lab medicine and vitamin D deficiency 5. Dr. Ng Anatomical Pathology with particular expertise in bone and soft tissue pathology, metaphyseal injuries 6. Mr. Orde Forensic Pathology, including the causes and contributing factors of injury 7. Dr. Sabhaney Paediatric Emergency Medicine and injuries and illnesses in children 8. Dr. Sargent Paediatric Radiology, Paediatric neuroradiology, and head injuries in children 9. Dr. Dunham Neuropathologist 10. Dr. Wood Symptoms, diagnosis and treatment of substance abuse disorders, and withdrawal
- [14] All of the experts are scheduled for less than a day each, with the exception of Dr. Sabhaney, who is scheduled for one day, and Dr. Colbourne and Dr. Orde, who are scheduled for three days each.

- [15] There is some overlap in the proposed evidence from the experts on this list. For example, there are three doctors addressing the causes and contributing factors of injury (Dr. Colbourne, Dr. Orde, and Dr. Dunham) and there are two experts addressing the issue of metaphyseal or leg injuries (Dr. Ng and Dr. Culham). However, the use and extent of this evidence in the trial proper depends on voir dire rulings.
- [16] Dr. Orde's report regarding the causes and contributing factors of injury and death relies on the reports of Doctors Culham, Holmes, Ng and Dunham. If all of these experts testify, there will be overlap. The Crown says it may be helpful or necessary for the trier of fact to hear the evidence directly from those doctors on whom Dr. Orde relied. The Crown also indicates that the authors of the underlying reports may not ultimately be needed at trial.
- [17] Furthermore, there are complicated medical issues in this case and the charges are serious. Limiting the Crown's expert list to five experts could result in gaps in the medical evidence regarding the victim's care and autopsy. At least five proposed experts on the list (Dr. Sabhaney, Dr. Cogswell, Dr. Sargent, Dr. Colbourne, and Dr. Orde) were involved in the victim's care from when she arrived to the hospital until she was taken off life support. This information is relevant to both the Crown and defence. I also note that some of this expected evidence may be factual evidence as opposed to opinion evidence: *R v. Akumu*, 2017 BCSC 383 at paras. 16-20.
- [18] The additional issues primarily relevant to the Crown's case, namely the metaphyseal injuries and the evidence on substance abuse, involve a further four experts (Dr. Culham, Dr. Holmes, Dr. Ng, and Dr. Wood). The admissibility of this evidence is to be decided during the voir dire.
- [19] After considering the issues raised by counsel in the framework of the Sam factors set out above, in this case it is appropriate to grant leave to allow the Crown to call more than five expert witnesses. The complexity of the issues persuades me that the expert witnesses proposed are necessary.
- [20] The issue of duplication can be addressed by the defence challenge of witnesses with full argument on the Mohan criteria. The limitation of particular evidence, for example opinion evidence on the use of force, can also be addressed at trial with consideration of the probative value and prejudicial effect of the evidence.
- [21] Currently there is sufficient trial time set aside for all the witnesses to testify. The time required for the Crown to call more than five expert witnesses is not disproportionate to the issues that the trier of fact must decide.
- [22] Section 7 of the CEA does not require me to specify an upper limit on the number of expert witnesses the Crown is permitted to call. It is also not appropriate for the court to make an order specifying which experts can testify or on what topic. To do so would be both beyond the scope of s. 7 and not reflective of the reality that the list of intended experts in this case may change as the trial proper approaches.

[23] I would, however, suggest that the Crown continue to consider what expert evidence is relevant and necessary to the case so that objections regarding the admissibility of the expert evidence on the basis of the Mohan criteria are focused and can be dealt with in a timely fashion so as to minimise interruptions to the evidence before the jury.

[24] The application is therefore granted. "The Honourable Madam Justice Watchuk"

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