
CANADA / JUDGMENT

R. v. Pelletier

2018 BCSC 351

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Pelletier,

2018 BCSC 351

Date: 20180308

Docket: X079494

Registry: New Westminster

Regina

v.

Leonard Allan Joseph Pelletier

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for the Crown:

M. Loda

M. Wiancko

Counsel for the Accused:

D. Butcher, Q.C.

Place and Date of Hearing:

New Westminster, B.C.

February 19, 2018

Place and Date of Judgment:

New Westminster, B.C.

March 8, 2018

I. Introduction

- [1] On February 19, 2018, the accused, Leonard Pelletier, brought a mid-trial disclosure application. For reasons that I will elaborate upon shortly, at the hearing of that application both Crown and defence supported an order directing that this disclosure application be heard by another judge of this court. The issue was whether I had the jurisdiction to make that order.
- [2] Following a review of authorities, I ruled that I had the inherent jurisdiction to refer the disclosure application to another judge of this court and that, in the particular circumstances of this case, it was in the interests of justice to do so. I indicated that reasons for that ruling would be given later. These are those reasons.

II. Background

- [3] The indictment in this case charges Mr. Pelletier with a number of drug offences, plus the offence of wilfully obstructing a peace officer, all of which are alleged to have occurred on July 22, 2014. The indictment names both Mr. Pelletier and Jason Wallace, but Mr. Wallace entered a guilty plea on the first day of trial.
- [4] The trial commenced on May 29, 2017 by way of a voir dire. A ruling on that voir dire was given on June 16, 2017. The trial proper commenced on June 19, 2017. The Crown's case completed on June 21, 2017. For reasons not important to explain here, the defence was not at that point in a position to call its case. Continuation dates were set for November 2017.
- [5] On November 20, 2017, the date set for a continuation of the trial, defence counsel informed the court that matters between himself and his client were such that he was required to withdraw. Mr. Pelletier subsequently engaged other counsel and four days were secured in February 2018 for the completion of the trial.
- [6] On February 6, 2018, the Crown delivered to defence counsel a notice of its intention to introduce into evidence 11 telephone calls derived from wiretaps, in the event that the accused called evidence. About a week later the Crown added an additional eight telephone calls to that list, bringing the total to 19.
- [7] The Crown explained that the intercepts in question had been obtained as part of an operation by the Combined Forces Special Enforcement Unit. The focus of that operation was not on Mr. Pelletier but instead was on other persons and activities. During the time from April 20, 2017 to November 20, 2017, there were many thousands of wiretap intercepts,

some of which involved Mr. Pelletier. The Crown said that in 19 of those telephone calls Mr. Pelletier is heard discussing the trial in this case, which was taking place during the period in question.

- [8] The Crown explained that because: (1) Mr. Pelletier discussed the trial of this matter in those 19 intercepts; and (2) the Crown intended to introduce those intercepts into evidence in the event the defence called evidence, the Crown was required to give notice to the accused pursuant to s. 189 of the Criminal Code.
- [9] Upon receipt of the notice from the Crown, the accused delivered a notice of application, which has since been amended, seeking disclosure of the wiretap authorizations, the authorization packets, the affidavits in support and other related reports, memoranda, notes and emails, etc.
- [10] Defence counsel informed the court that until the disclosure application is decided he is unable to make decisions concerning the defence case to be presented at trial, if any.
- [11] Defence counsel expressed concerns about the prejudicial contents of the intercepts. He said that, for the purposes of the accused's disclosure application, it was not necessary that I hear the contents of the intercepts, and he emphasized that it was undesirable that I do so. Crown counsel was equally adamant that the Court had to hear the contents of the intercepts in order to gauge the relevance (or, in the Crown's submission, irrelevance) of the documents in question.
- [12] I indicated to counsel that one solution to this impasse might be to refer the application to another judge. Both counsel agreed with this suggestion.
- [13] As noted earlier, following a review of authorities I concluded that I had the jurisdiction to refer the disclosure application to another judge.

III. Discussion

A. The Issue

- [14] The issue here arises out of the accused's concern that the prejudicial contents of the intercepts, which may never form any part of the evidence in the case, will be aired before me as the trial judge. The underlying concern is that I may be influenced by the contents of these intercepted calls.
- [15] I will say at the outset that I have every confidence that I am able to disabuse myself of any prejudicial information that does not form part of the evidence in this case. Trial judges who sit as triers of fact routinely deal with applications involving potentially prejudicial evidence. However, if there is a solution that eliminates any element of concern on the part of the accused, and both Crown and defence agree with it, then it seems to me that this solution should be adopted if possible. As I have noted, in this case both Crown and defence supported a referral order.

- [16] In this case, referring the disclosure application to another judge may also mean a more efficient hearing, as it was apparent that Crown and defence had firmly opposite views as to whether it was necessary to know the contents of the intercepts in order to decide the disclosure issue. Referring the disclosure application to another judge, I expect, will eliminate, or largely eliminate, the need for an extended debate of that issue.
- [17] The general question, then, is whether a trial judge who has commenced a trial may refer an issue to another judge in circumstances where a case management judge has not already been appointed.

B. Analysis

Criminal Code

- [18] Section 551.6 of the Criminal Code allows a trial judge, during the course of a trial, to refer "any issue" to a case management judge. However, s. 551.1 requires that a case management judge be appointed before jury selection (in the case of a jury trial) or before any evidence is presented (in the case of a judge-alone trial). Thus there is a statutory process in place that allows a trial judge to refer an issue to another judge, but only where a case management judge has already been appointed. There is no equivalent statutory process where no case management judge has been appointed.

Case Authorities

- [19] Several case authorities have concluded that, on the basis of inherent jurisdiction, a superior court judge may refer at least certain types of matters to another superior court judge. I will discuss them in chronological order.
- [20] In *R. v. Trang*, 2002 ABQB 1036, leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 64 [Trang], a trial judge referred a recusal motion to another judge because he felt the motion ought to be resolved in that manner. The accused, who was the applicant on the motion, argued that the referral judge had no jurisdiction to entertain the motion. Watson J. concluded that he did. He noted that Parliament had not ousted or displaced the inherent jurisdiction of a superior court to control its process, which can only be done through express and clear language. Inherent jurisdiction included the power to adopt measures to address "the increasing needs of the administration of justice" (at para. 105). He said:
- [107] In my view, where it is possible to discern a reasonable and restrained method - which method is within the long-acknowledged sphere of competence of a superior court of criminal jurisdiction - to address a procedural problem and to preserve the reputation of the administration of justice as well as to advance its timeliness and manageability, the superior court should not be dismissive of such a method on a ground merely that Parliament has not yet enacted it expressly. In other words, even if s. 669.2 of the Criminal Code could not quite reach what Binder J. [the referring judge] did, and what it is proposed that I do, in this case, I would think it desirable that the superior court in relation to its

procedural powers move towards "keeping up" with the demands on the justice system.

- [112] The common law is not, it seems to me, rendered oblique by recognizing a procedural jurisdiction which would give the authority of a superior court of criminal jurisdiction the sustenance of greater public confidence and respect.
- [21] Watson J. concluded as follows:
- [126] In the result, I am persuaded that the common law jurisdiction of superior courts includes the ability of a Trial Judge to seek, if so minded, the assistance of another superior court judge to deal with a question of recusal, and that it also includes the ability of that other superior court judge to provide that assistance. There are various public policy justifications for so doing - the repute of justice being a main one, but curial efficiency being another.
- [22] In *R. v. Leduc* (2003), 176 C.C.C. (3d) 321 (Ont. C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 64 [Leduc], the accused brought an application for a stay of proceedings on the ground of wilful non-disclosure of certain materials by the police. The trial judge recused himself from the hearing of the application due to possible apprehension of bias, as he had acted for the police force in question while a member of the bar and had at one time been involved in a discipline process against the police officer in question. He referred the application to another judge. The referral judge granted a stay. The Crown appealed. One of the questions on appeal was whether the trial judge had the jurisdiction to refer the stay application to another judge.
- [23] The Ontario Court of Appeal concluded that the trial judge did have that jurisdiction, finding jurisdiction based on both s. 24(1) of the Charter and on s. 669.2(1) of the Criminal Code. Jurisdiction under the Charter rested on the principle of "the constant, complete and concurrent jurisdiction" of a superior court to grant relief under s. 24(1) of the Charter: *Leduc*, at para. 62. Jurisdiction under s. 669.2(1) of the Criminal Code existed by virtue of the trial judge being "for any reason unable to continue", as provided for in that section, and the trial judge's disqualification for bias was a "reason" within that section of the Criminal Code: *Leduc*, at para. 66.
- [24] The grounds for jurisdiction in *Leduc* are not applicable here. The defence disclosure application in this case is not Charter-based, and no reasonable argument can be made that I am "unable to continue". However, *Leduc* does illustrate other situations where referrals may be made.
- [25] In *R. v. Cormier*, 2005 ABQB 801 [Cormier], Binder J., who had been the trial judge in *Trang*, noted the other referrals that he had made in *Trang* and summarized a later ruling he made in that case (a ruling he referred to as *Trang* #2):

[10] In *R. v. Trang* (2003), 344 A.R. 258, 2003 ABQB 774 at paras. 17 to 31 (Trang #2), an application was brought before me as the trial judge in a drug conspiracy prosecution to refer a Garofoli application to the judge who had granted the wiretap authorization. I noted at para. 19 that I had already declined to hear three other interlocutory applications in the matter and referred them to other judges, including:

- (a) an application for a stay by one of the accused based on cruel and unusual treatment in the Edmonton Remand Centre, as delay of the trial proper to hear the application would prejudice the other accused;
- (b) an application for a publication ban, as a relative of mine was employed by a law firm representing one of the media parties, which might lead to an apprehension of bias; and
- (c) a recusal application, for reasons of timeliness, manageability of the trial process, and the appearance and repute of justice.

[11] As I indicated in Trang #2 at para. 29, the judge who heard the recusal application held (Trang #1) that he had jurisdiction to do so given that:

- (i) the recusal motion was not a collateral attack on any ruling the trial judge made and the doctrine of collateral attack did not prevent the trial judge requesting assistance;
- (ii) the referral did not convict anyone or deny anyone a full and fair hearing;
- (iii) the trial judge had the common law jurisdiction to control the proceedings before him, and the Criminal Code could be interpreted to allow for this procedure;
- (iv) apprehension of bias could have raised an inability for the trial judge to continue with the trial;
- (v) the Court of Appeal could, in the course of dealing with an appeal from the outcome of the trial, consider the merits of any of the trial rulings, including those of a judge other than the trial judge;
- (vi) this procedure did not involve any real fragmentation of the trial, because it did not involve issues of evidence or findings of fact vital to the case;
- (vii) to allow another judge to hear the recusal motion would not change the fact that the trial judge remained seized with the trial;
- (viii) the absence of knowledge of what the trial judge was thinking would in fact be advantageous to Watson J. in accurately assessing whether there was an appearance of bias;
- (ix) the proposed procedure made it possible to address a procedural problem while preserving the repute of administration of justice as well as advance its timeliness and manageability; and
- (x) the trial judge fashioned an appropriate remedy suitable to his particular problem.

[12] I commented in Trang #2 at para. 23 that:

Just as the courts have adopted the principled approach (necessity and reliability) with respect to hearsay evidence, in my view trial fairness (non-prejudice to the accused), efficiency and appearance of the administration of justice are the components of a principled approach to determining loss or lack of jurisdiction in such situations.

- [13] After reviewing Leduc and other examples of the principled approach to issues of jurisdiction *R. v. Chan* (2002), 169 C.C.C. (3d) 419 (Alta. Q.B.); *R. v. Wu* (2002), 170 C.C.C. (3d) 225 (Ont. C.A.), I concluded in *Trang #2* at para. 31 that this jurisprudence:
- (1) supports referrals on a principled basis of certain trial matters which do not impact upon the determination of the guilt or innocence of an accused (in that they involve neither findings of fact nor admissibility of evidence), by a superior court trial judge to another superior court judge for determination or advice, without loss of jurisdiction by the referring judge;
 - (2) does not support referrals which impact upon the determination of the guilt or innocence of an accused such as findings of fact and admissibility of evidence ...
- [26] In *R. v. Greer*, 2007 BCSC 1531 [Greer], the Crown sought clarification about what applications might be heard by a judge other than the assigned trial judge. The case was unusual in that there was no application before the court and it was due to the complexities of that case (including the fact that the trial was to be a bilingual trial) that the Crown sought guidance on the issue. Powers J., who was not the assigned trial judge, noted that while it was not usual to issue a ruling where there was no formal application before the court, he was prepared to comment on the issue, following submissions from the parties, in order to provide guidance to the Crown and accuseds in that case.
- [27] Powers J. concluded that a judge of the Supreme Court of British Columbia, who is not the trial judge on a particular case, has the inherent jurisdiction to hear applications in the nature of pre-trial applications, though not any applications affecting the nature of the trial (for example, severance) or that go the outcome of the trial (for example, the admissibility of evidence). He said that jurisdiction had to be exercised carefully and judicially: Greer, at paras. 6 and 10.
- [28] In *R. v. Tingley*, 2015 NBCA 51, the New Brunswick Court of Appeal sounded a cautionary note about referring recusal motions, describing the referring of the recusal motion in *Trang* as an "unorthodox approach" (para. 31). The court held that the trial judge in *Tingley* correctly dismissed the accused's application, which was opposed by the Crown in that case, to have a recusal motion heard by another judge. There was, however, no discussion of the jurisdiction point.
- [29] My own inquiries reveal that there are two further cases in British Columbia where mid-trial applications were heard by judges other than the trial judges. Both cases are unreported and in at least one of those cases (but probably in both) the reasons for the ruling are sealed by court order. Both cases involved informer issues and applications by the Crown to appear ex

parte before the trial judge to address potentially prejudicial evidence and issues of privilege associated with that evidence. The concerns in those cases centred on both the potential prejudice to the accused and on the ex parte nature of the proposed hearing before the trial judge. In each of those cases, the judges in question relied on Trang and Greer in finding that they had the inherent jurisdiction to hear the ex parte applications in order to protect the fair trial rights of the accused even though they were not case management judges appointed pursuant to s. 551.1 of the Criminal Code.

The Nature and Extent of Inherent Jurisdiction

- [30] In *R. v. Raczkowski*, 2013 BCSC 2528 [Raczkowski], Schultes J. canvassed a number of authorities on the nature of the inherent jurisdiction of a superior court. Raczkowski involved an issue different from the one that arises here, but the authorities cited in that case are very helpful. I discuss those authorities in the paragraphs that follow.
- [31] In *R. v. Caron*, 2011 SCC 5 [Caron], Binnie J., writing for the majority, described the nature, extent and purpose of inherent jurisdiction:
- [24] The inherent jurisdiction of the provincial superior courts, is broadly defined as "a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so": I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, at p. 51. These powers are derived "not from any statute or rule of law, but from the very nature of the court as a superior court of law" (Jacob, at p. 27) to enable "the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner" (p. 28). In equally broad language Lamer C.J., citing the Jacob analysis with approval (*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at paras. 29-30), referred to "those powers which are essential to the administration of justice and the maintenance of the rule of law", at para. 38. See also *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 18, per Rothstein J., relying on the Jacob analysis, and *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, at paras. 29-32.
- [32] Later in *Caron* (at para. 32), Binnie J. addressed an argument that the inherent jurisdiction at issue in that case had been implicitly ousted by certain enactments. He rejected that argument, and in doing so quoted with approval the following additional comment by I.H. Jacob, in "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23 at p. 24:
- ... the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute ... so long as it can do so without contravening any statutory provision.
- [Emphasis added by Binnie J.]

- [33] Similarly, the courts have held that the inherent jurisdiction of a superior court may only be ousted by clear and unambiguous language: *R. v. Cooper*, 2002 ABCA 156, leave to appeal to S.C.C. ref'd, [2002] S.C.C.A. No. 286 [Cooper]. Some powers, for example the power to punish for contempt, cannot be ousted at all: *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725.
- [34] Caron and Cooper answer any argument that the Criminal Code, by having a provision for referrals to a case management judge (but only where a case management judge has been appointed prior to the commencement of trial), has implicitly ousted the inherent jurisdiction to refer an issue to another superior court judge in other types of situations.
- [35] In *R. v. W.V.*, 2007 ONCA 546, a case involving jury selection procedure, the court said:
- [21] It is also the case that trial judges must be afforded some latitude or discretion where the Criminal Code does not specifically address the issue.
- [22] On the other hand, trial judges have no inherent authority to modify [a] codified procedure [in that case, for jury selection] even where it may seem expeditious to do so.
- [36] In *Raczkowski*, Schultes J. added two further examples of the exercise of inherent jurisdiction in a Criminal Code or analogous context:
- [18] As examples of the application of this jurisdiction to supplement legislation, Watt J. in *Church of Scientology [Re Church of Scientology of Toronto and the Queen (No.6) (1986)]*, 27 C.C.C. (3d) 193 (Ont. H.C.J.) relied on it to impose publication bans in circumstances concerning which the Criminal Code was silent. The re-election of the accused for which there was no applicable Criminal Code provision was permitted on this basis in *R. v. Niemi* (2008), 254 C.C.C. (3d) 311 (Ont. S.C.J.).

Summary

- [37] From these authorities I draw the following conclusions:
- The inherent jurisdiction of a superior court judge allows a trial judge to refer some types of mid-trial applications to another judge for determination even where no case management judge has been appointed pursuant to s. 551.1 of the Criminal Code;
 - The power to do so derives from the inherent jurisdiction of a superior court, which allows the court to employ reasonable methods to manage mid-trial issues in order to achieve the timely, orderly and fair administration of justice;
 - The types of mid-trial matters that may be referred are limited in scope. A trial judge may not refer any matter that touches upon the nature of the trial itself, the admissibility of evidence at trial or, generally, the determination of the guilt or innocence of the accused;
 - Generally, however, mid-trial applications ought to be heard by the trial judge. A judge may depart from that general rule if satisfied that the referral is appropriate and it will advance an objective relating to the timely, orderly and fair administration of justice.

IV. Application of Principles

[38] In the present case, I relied on the following factors in making the decision to refer the disclosure application to another judge:

- a) the disclosure application involved intercepted communications that were said to have contents prejudicial (and perhaps highly prejudicial) to the accused;
- b) the accused was concerned that this prejudicial content might influence me as the trial judge. While I did not share this concern, I concluded that if there was a solution that eliminated any element of concern on the part of the accused then that solution ought to be adopted, if possible;
- c) Crown and defence were at an impasse as to whether the contents of the intercepts had to be before the Court in order to determine the relevance of the documents sought. I concluded that referring this matter to another judge might well eliminate the need for a debate on the contents issue, and this would make the hearing of the application more efficient;
- d) there was referral judge immediately available for the hearing of this application, so there would be no time lost by making the referral; and
- e) perhaps most importantly, both Crown and defence agreed that referring the disclosure application to another judge was a good idea.

[39] For those reasons, I ruled that I had the inherent jurisdiction to refer the disclosure application to another judge and that, in the particular circumstances of this case, it was in the interests of justice to do so.

"Blok J."

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