

CANADA / JUDGMENT

R. v. Pickton

2006 BCSC 392

COURT

Supreme Court of British Columbia

DECIDED

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2006 BCSC 392 R. v. Pickton IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Pickton, 2006 BCSC 392 Date: 2006-03-09 Docket: X065319 Registry: New Westminster Between: REGINA And ROBERT WILLIAM PICKTON Publication Restriction Notice: Pursuant to s. 486.4, s. 486.5 and the inherent jurisdiction of the Court, information that may identify certain witnesses and undercover police officers may not be published, broadcast or transmitted in any manner. All other publication ban orders issued during this proceeding have expired. This version of the Reasons for Judgment complies with the existing publication bans. Before: The Honourable Mr. Justice Williams Ruling re: Section 37 of the Canada Evidence Act Counsel for the Attorney General of Canada J.L. Hayes Counsel for the Crown J.N. Ahern Counsel for the Accused P.C. Ritchie, QC Date and Place of Trial/Hearing: February 7, 2006 New Westminster, B.C.

- [1] Robert William Pickton seeks the disclosure of two RCMP files relating to Dwain Scott Chubb.
- [2] The RCMP initially provided partial disclosure of the source file to the provincial Crown (the "Crown"), which in turn disclosed that material to Mr. Pickton. After this application for disclosure was filed, the Attorney General of Canada (the "Attorney General"), on behalf of the RCMP, consented to the disclosure of the remainder of the source file to the Crown, which is currently in the process of vetting that material so that it may be disclosed to Mr. Pickton. Disclosure with respect to that file is therefore substantially resolved.
- [3] The second file has never been in the hands of the Crown. The Attorney General opposes its disclosure on the basis of public interest privilege, and invokes s. 37 of the Canada Evidence Act, R.S.C. 1985, Chap. C-5. Its claim of public interest is based on police practice/investigative technique.
- [4] There is no settled procedure with respect to the handling of a s. 37 inquiry. As an alternative to an in camera proceeding conducted in the absence of counsel for Mr. Pickton and the Crown, the Attorney General proposes to tender to the Court, under seal, a certificate and an affidavit attaching the privileged material so that I may examine it and assess the privilege claim. This was the procedure employed by Josephson J. in R. v. Raza, [1998] B.C.J. No. 3246 (S.C.). The Attorney General submits that a review of the material will demonstrate that nothing it contains could possibly affect the outcome of Mr. Pickton's trial

and that it ought not to be disclosed.

- [5] The Crown is in essential agreement with the Attorney General with respect to the proposed procedure. Mr. Pickton, however, is opposed. He submits that the preferable course would be for the Attorney General to disclose the material to the Crown, which could then review it to determine its relevance. Given the complexity and enormity of the proceedings against Mr. Pickton, he says that the Crown is better positioned than the Court to appreciate the potential relevance of the material at issue.
- [6] Authorities such as *R. v. Meuckon* (1990), 57 C.C.C. (3d) 193 (B.C.C.A) and *R. v. Pilotte* (2002), 163 C.C.C. (3d) 225 (Ont. C.A.), are clear that the court has wide discretion with respect to the procedure for reviewing privileged information when s. 37 of the Canada Evidence Act is invoked. This may include examining or hearing the information in the absence of the parties, their counsel, or the public. In my view, the procedure proposed by the Attorney General is sensible and, accordingly, we will proceed in that fashion.
- [7] The balancing process in which I must engage when considering the privilege claim is described at p. 200 of *R. v. Meuckon*, supra: if the privilege is claimed in a criminal trial, the trial judge must first decide whether the information might possibly affect the outcome of the trial. His decision on that question may well be influenced by whether the trial is being conducted by a judge alone or by a judge and jury. If a decision to uphold the claim of privilege and to prevent the disclosure of the information could not affect the outcome of the trial, then the privilege claim should generally be upheld. But if the decision to uphold the claim of privilege might affect the outcome of the trial, then the trial judge must consider whether the upholding of the claim of privilege would have the effect of preventing the accused from making full answer and defence. If the trial judge concludes that the claim of privilege would have that effect he should then consider giving the Crown the alternative of either withdrawing the claim of privilege or entering a stay of proceedings. If the Crown refuses to do either, then the trial judge may permit the introduction of the evidence though the trial judge may impose whatever safeguards seem appropriate.
- [8] Thus, I must first consider whether the outcome of the trial might be affected by non-disclosure. Only if I conclude that it might must I go on to consider whether upholding the claim would have the effect of preventing Mr. Pickton from making full answer and defence.
- [9] In *R. v. Raza*, supra, Josephson J. cited *R. v. Meukon*, supra, as well as *R. v. Richards* (1997), 115 C.C.C. (3d) 377 (Ont. C.A.), which he held equated the measure of "affecting the outcome of the trial" to one of relevance. Relevance, he observed, must be assessed in accordance with the definition set out in *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.).
- [10] In considering the relevance of the materials, I will be informed by the affidavit of Chris Karlsson sworn January 26, 2006, and Mr. Pickton's written submissions on this application. As I have already indicated to the parties, I will provide Mr. Pickton with the opportunity to make further submissions with respect to relevance once he has received the pending disclosure from the Crown, should he wish. Accordingly, once he has received and reviewed

that disclosure, I direct that he notify the Attorney General of his intentions so that the latter may attend and tender the sealed materials. "Williams J."

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