

CANADA / JUDGMENT

R. v. Saad

2021 BCSC 543

COURT

Supreme Court of British Columbia

DECIDED

26 March 2021

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2021 BCSC 543 R. v. Saad

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Saad,

2021 BCSC 543

Date: 20210326

Docket: 31146

Registry: Vancouver

Between:

Regina

v.

Susy Yasmine Saad

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Before: The Honourable Madam Justice Duncan

Ruling on Application #2 - Inadvertent

Crown Disclosure

Counsel for the Crown:

G. Comer

C. Smith

M. Myhre

Counsel for the Accused:

J. Narwal

Place and Date of Hearing:

Vancouver, B.C.

March 16, 2021

Place and Date of Ruling:

Vancouver, B.C.

March 26, 2021

Introduction

- [1] The accused, Susy Yasmine Saad, is charged with failure to provide the necessities of life and fraud. The Crown applies for an order requiring defence counsel to return and/or destroy unredacted copies of a document entitled "Report to Crown Counsel Disclosure", also referred to as the "Roadmap" and to destroy any work product incorporating privileged information inadvertently disclosed in the Roadmap.
- [2] Specifically, the Crown says the Roadmap contains eight sentences or sentence fragments ("the information at issue") which contain information covered by solicitor-client privilege between the Crown and the Vancouver Police Department (the "VPD"). The Crown maintains that the information at issue was inadvertently disclosed and privilege has not been waived, either explicitly or implicitly, by the inadvertent disclosure.
- [3] The defence position is that the information at issue is not privileged, either because the Crown has not met the burden of proving its claim of solicitor-client privilege or because the Crown has already disclosed the same information at issue in other disclosure and thus has waived privilege.

The Roadmap

- [4] The Roadmap is entitled "Report to Crown Counsel Disclosure" ("RTCC") and has a sub-heading "Update to Overview: August 13, 2020". In the first paragraph, there is reference to the RTCC submitted to Crown Counsel for charge approval in December 2017 and a reference to the initial RTCC having been submitted to Crown for the initial charge of criminal negligence. The Crown seeks to redact those sentences or sentence fragments.
- [5] The second paragraph states:

After consultation with Crown Counsel and a review of the evidence the threshold for Criminal Negligence had not been met. Charges of Fraud and Failure to provide Necessities were more applicable charges however additional investigative steps needed to be taken to meet the Charge approval standard.

[6] On page five, in the second full paragraph, the author states "A review of the evidence and after consultation with Crown Counsel" and then refers to Crystal Janes as someone who was familiar with the licensing of daycares. The Crown wants the sentence fragment before Ms. Janes' name redacted.

[7] The concluding paragraph reads:

The initial police report submitted to Crown Counsel in 2017 encompassed the police investigation up to December 2017. As a result of the review of the report submitted additional investigative steps were required between December 2017 to August 2020 to meet the charge approval standard for Fraud and Failure to Provide necessities. This report is to accompany the initial Report to Crown Counsel and will be included in the electronic disclosure to assist Crown and Defense as a roadmap for why the information was obtained and the result of that information.

The Crown wants to redact the underlined portion.

[8] In *R. v. McClure*, 2001 SCC 14, the Supreme Court of Canada cited, with approval, Professor Wigmore's explanation of the scope of solicitor-client privilege (at para. 36):

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

[9] The Crown relies on the affidavit of a legal assistant, Ms. Pervan, who deposes that she was advised by Sergeant Michael Rowe of the VPD Major Crime Homicide Unit, the sergeant responsible for the investigation, that it was not the intention of the VPD to waive the privilege attached to police/Crown communications by providing the Roadmap without vetting to the Crown.

[10] Mr. Narwal, counsel for Ms. Saad, maintains that this is hearsay and the Crown should have direct evidence from the VPD about the claim of privilege.

[11] While it would have been preferable for the Crown to have tendered an affidavit from the VPD, particularly an affidavit of the officer who prepared the report, to support the claim of privilege, in my view this is not fatal to the claim made by the Crown. Rather, the claim of privilege fails for other reasons.

[12] First, Ms. Pervan's affidavit states that it was not the intention of the VPD to waive the privilege attached to police/Crown communications by providing the Roadmap without vetting to the Crown. The difficulty with that assertion is that it does not set out the belief of

the VPD member that the communications were protected by solicitor-client privilege. Not all communications between the police and the Crown are protected and there is no explanation as to why the VPD believes this particular communication, or any part of it, attracts solicitor-client privilege.

- [13] Second, the author of the Roadmap stated specifically at the conclusion of the document that it was prepared to assist both Crown and defence with a roadmap for why the information was obtained and the result of that information. This appears to militate against the VPD officer's claim that there was no intention to waive privilege as the document was prepared for a wider audience than Crown counsel.
- [14] Third, I find that the references in the first paragraph to the submission of the RTCC in December 2017 and the initial charge of criminal negligence are not privileged because the defence has the original RTCC from December 2017 recommending the initial charge of criminal negligence. To the extent there was any privilege attached to those comments, it has been waived by earlier disclosure to the defence. The burden of proving waiver rests on the defence in this case and I am satisfied the burden has been met.
- [15] I find that waiver applies to the concluding paragraph of the Roadmap as well.
- [16] More problematic is the second full paragraph of the Roadmap. I am not persuaded that it falls within solicitor-client privilege, for the reasons expressed about the other parts of the Roadmap the Crown claimed privilege over, but I must go on to consider whether it is covered by prosecutorial discretion privilege.
- [17] The Crown's decision concerning what offences to charge, if any, and why, fall within the scope of prosecutorial discretion: *R. v. Anderson*, 2014 SCC 41 at paras. 44-45. The exercise of prosecutorial discretion is afforded considerable deference and is reviewable in very narrow circumstances when an abuse of process is alleged: *Anderson* at para. 48.
- [18] The Crown maintains that the second paragraph of the Roadmap falls within prosecutorial discretion. Mr. Narwal says it does not, as it is simply a statement about what had occurred in the course of the investigation.
- [19] While at first blush it would be simple to dismiss the Crown's assertions about prosecutorial discretion privilege on the basis that the second paragraph reveals nothing about the decision-making process, I am satisfied that the paragraph should be redacted.
- [20] In summary, the Crown's claims of solicitor-client privilege fail but the second paragraph of the Roadmap must be redacted. I order that any hard or electronic copy of the unredacted Roadmap be destroyed and any reference to the second paragraph of the Roadmap be redacted from any work product.
- [21] To the extent that this causes any difficulty to the defence, Mr. Narwal may seek directions from me.

"Duncan J."

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