

CANADA / JUDGMENT

R. v. Schirmer

2022 BCCA 378

COURT

British Columbia Court of Appeal

DECIDED

10 November 2022

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2022 BCCA 378 R. v. Schirmer COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Schirmer, 2022 BCCA 378 Date: 20221110 Docket: CA46511 Between: Rex Respondent And Horst Francisco Schirmer Applicant Sealed in Part Before: The Honourable Madam Justice DeWitt-Van Oosten The Honourable Mr. Justice Grauer The Honourable Justice Marchand On appeal from: An order of the Supreme Court of British Columbia, dated February 1, 2019 (R. v. Schirmer, 2019 BCSC 297, Victoria Docket 170268). Counsel for the Applicant: B.R. Anderson N. Chizik, Articled Student Counsel for the Respondent, Public Prosecution Service of Canada: J.N. Walker Counsel for the Respondent on the Application, Attorney General of Canada: D.J. Strachan, Q.C. M. Zemojtel Counsel for the Respondent on the Application, Police Complaint Commissioner: G. DelBigio, Q.C. Place and Date of Hearing: Vancouver, British Columbia May 3, 2022 Place and Date of Judgment: Vancouver, British Columbia June 16, 2022 Place and Date of Supplementary Reasons: Vancouver, British Columbia November 10, 2022 Written Reasons of the Court: Summary: The applicant seeks access to records involving allegations made against a police officer who testified at his criminal trial. The records have been ordered produced to the Court for review. These reasons address next steps in the production application; specifically, whether the material thus far provided to the Court in response to its order provides a sufficient foundation for the second stage of the application. Supplementary Reasons for Judgment of the Court:

- [1] On June 16, 2022, we made an order in this appeal for the production of records under s. 683(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46. The reasons for the order are indexed as R. v. Schirmer, 2022 BCCA 214. We were satisfied that the appellant, Mr. Schirmer, had met his onus of showing "likely relevance" at the first stage of the application process, warranting production of the sought-after records to this Court for review. Mr. Schirmer seeks the records in support of a fresh evidence application in his outstanding appeal from conviction for drug offences.

- [2] After we ordered production, the parties appeared in Court of Appeal chambers for the purpose of case management and to address the logistics of the second stage of the production application. At the second stage, the Court will determine whether the records should be further produced to Mr. Schirmer. Making that determination requires the Court to assess the records for actual relevance and to address any relevant competing interests, including issues involving privilege and assertions of statutory confidentiality.
- [3] During case management, it became apparent that the records we ordered to be produced are voluminous. They include material that is subject to multiple sealing orders and audio/video recordings that we understand have not yet been transcribed. The Court was told that to compile the entirety of the records captured by our order would take considerable time and police and legal counsel resources. Moreover, it would likely result in thousands of pages of documents coming to the Court for review.
- [4] In light of those practical realities and the fact that Mr. Schirmer's appeal from conviction has been outstanding since November 2019, the Court asked the parties to consider an alternative and more efficient way of giving meaningful effect to the terms of the Court's production order. In particular, the parties were asked to consider whether investigative reports or other synopses of the records might be available that would describe or explain the records and suffice for the purposes of the second stage.
- [5] Counsel for the Attorney General of Canada and the Office of the Police Complaint Commissioner subsequently advised that reports or synopses were indeed available. With the consent of all parties involved in the first stage of the production application, it was agreed that unredacted copies of that material would be provided to the Court. The Court would then review the material and assess whether, from its perspective, it is sufficient for adjudication at the second stage, or whether additional material is required.
- [6] The reports and synopses have been produced and we have reviewed them. We have determined that this material is sufficient for addressing the second stage of the production application. The reports and synopses describe the police investigations undertaken in respect of Cst. Ferris; the methodologies employed; the fruits of those investigations; the nature and substance of his alleged misconduct; their evidentiary foundation; and the relevant timeframes. We are satisfied that on the basis of this material, the Court has an adequate foundation from which to determine actual relevance and to address relevant competing interests.
- [7] Accordingly, we direct that the appeal be returned to case management for a consideration of next steps in moving to the second stage, including ensuring proper notice to all parties with standing to address the issue of production, the procedure to be followed given the assertion of privilege and statutory confidentiality claims, and a possible application by Mr. Schirmer for the appointment of an amicus. Once those matters have been addressed, the second stage can be set for hearing. Counsel are encouraged to arrange for case management at their earliest convenience. "The Honourable Madam Justice DeWitt-Van

Oosten" "The Honourable Mr. Justice Grauer" "The Honourable Justice Marchand"

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