
CANADA / JUDGMENT

R. v. Sipes

2008 BCSC 1257

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 1257 R. v. Sipes

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sipes,

2008 BCSC 1257

Date: 20080917

Docket: 66431

Registry: Kelowna

Regina

v.

Dale Gordon Sipes, Leslie Podolski,

Sheldon Richard O'Donnell, Peter Manolakos

and Douglas Corey Brownell

Before: The Honourable Mr. Justice Smart

Ruling on Notice of Applications

September 17, 2008

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For the Accused Brownell

B. Hickford

C. Purves

Date and Place of Hearing:

August 28, 2008

Vancouver, B.C.

I. INTRODUCTION

- [1] I have commenced hearing a number of pre-trial applications involving issues such as severance, disclosure, and the admissibility of evidence. Some of the applications concern alleged violations of the accused's rights under the Canadian Charter of Rights and Freedoms ("Charter").
- [2] At the commencement of these applications, I requested that each applicant provide the Court and the respondent written notice and particulars of each application two weeks prior to the hearing of the application. This was to be provided together with an outline of argument, a list of witnesses it intended to call and any other evidence it intended to enter.
- [3] I also requested that the respondent file a written response to the application together with a list of witnesses it intended to call and any other evidence it intended to enter, at least one week prior to the hearing of the application.

[4] My purpose in making these requests was threefold:

- One, to assist counsel for the respondent to clearly understand the applications; to prepare for any evidence to be called; to determine what evidence, if any, they wished to call; and to prepare considered and informed submissions;
- Two, to permit counsel for the applicant to know the respondent's position in advance of making their application and hopefully narrow the issues between the parties; and
- Three, to ensure that I clearly understood each application and could better assess the relevance of any evidence tendered.

[5] In hindsight, I believe that I was less clear than I should have been in communicating to counsel what I intended and why.

[6] For reasons that are not the fault of counsel, the applicants have so far been unable, generally, to meet my requests. I have consequently granted adjournments to the Crown to respond to the applications. The process has been unsatisfactory for all counsel and the Court. It has made the scheduling of applications uncertain and has resulted in a less effective process.

[7] Numerous applications remain to be heard and decided prior to January 12, 2009, when the trial is scheduled to commence with a jury. It is important that the applications proceed efficiently and expeditiously.

[8] During a recent pre-trial application some defence counsel submitted that what I had requested was unfair, placed too much of a burden on the defence and was not necessary as a matter of law. Counsel referred me to *R. v. Kutynec* (1992), 70 C.C.C. (3d) 289, 70 O.R. (3d) 277 (Ont. C.A.).

[9] I invited counsel to make further submissions to me on this issue at a later date. I have now heard those submissions. These are my reasons. I hope that by providing written reasons it will be clear what my directions are concerning notice, why I believe they are necessary and within my jurisdiction to make.

[10] Having heard the submissions of counsel, I do not believe there is any real disagreement concerning my jurisdiction to give these directions. The real issue is whether my requirements are fair and reasonable in the circumstances of this trial.

II. SUBMISSIONS OF THE PARTIES

[11] The Crown argues in support of the position that reasonable notice should be provided by all applicants. At para. 5 of its written argument the Crown submits:

Criminal trials involve serious issues concerning the admissibility of evidence or the application of legal principles to specific facts. The way in which those issues are prepared and argued has a significant impact on the proper administration of justice. Although the same might be said for

every case, there are few cases such as the case at bar, in which multiple accused are charged with criminal organization offences in addition to multiple, separate murders. More than fifteen lawyers are involved. The case may take a year with a jury. If convicted of these offences, the accused will serve life sentences. Whether the trial ends with convictions or acquittals, this Court's rulings on the issues will, in all likelihood, be scrutinized by both the Crown and the defence for the purpose [of] appeal. As such, the Crown submits it is in the best interests of all that the Crown, the defence and the Court are able to carefully, and fully, consider each step that is taken in this trial so that justice may properly be done.

[12] The Crown accepts that reasonable notice does not mean that the notice must be lengthy and detailed for every application and always provided at least 14 days in advance. The Crown submits at paras. 11 and 12 of its written argument:

The Crown does not ask that the defence be required to provide fourteen days notice of every point the defence ultimately makes. Dealing with the mutually unexpected is part of the trial process, and experienced counsel, both Crown and defence, should be able to do that. If every time an unexpected issue arose, the parties needed to adjourn so that they could contemplate what to argue, and notify the other side of what arguments they intended to make, the process would clearly bog down.

The Crown does not even suggest that either the Crown or defence should be foreclosed from making arguments that occur to them late in the day. That is the nature of the trial process. However, if a party is aware of an argument they intend to make, they should be required to notify the opposing party two weeks prior to the date set down for the argument so that the opposing side will have at least one week to write a written argument in reply. In those circumstances where a filing deadline has passed and the applicant thinks of a new argument to make in support of its position, at the very least the other side should be given a "heads-up." The "heads-up" should be as detailed as possible in order to be fair. It should be more than a notification that a new issue is intended to be argued. It should be a notification which provides sufficient detail for the other side to adequately prepare.

[13] The Crown has provided me with suggested guidelines:

Suggested Guidelines for Pre-trial Motions

A. All pre-trial motions should be set down by way of Notice of Motion;

B. At the time the hearing of a motion is scheduled, counsel will confirm that not later than 14 days prior to the date scheduled for hearing of the motion, the applicant will provide the respondent and the Court with copies of:

- a) written argument setting out with sufficient detail the points counsel intends to make;
- b) all documents, police notes or other materials the applicant intends to rely on during the course of submissions; and

c) a book of all the authorities intended to be relied on.

C. The respondent will provide the applicant and the Court with copies of the items listed in (B) above not later than 7 days prior to the date set for hearing of the motion.

D. If, after filing a written argument:

- a) counsel decides to raise a new argument; or
- b) viva voce evidence is called during the course of the motion; or
- c) counsel decides to make revisions to the argument;

counsel may file an amended written argument prior to the date set for the hearing of oral argument with agreement of opposing counsel, or with leave of the Court. Counsel who require additional time to consider arguments raised for the first time in an amended written argument may apply for an adjournment to consider the issue and respond.

[14] Mr. Brooks, on behalf of the defence, argues that providing full written submissions 14 days in advance of each application places an unreasonable burden on the defence. He submits beginning at para. 18 of his written argument:

The Court has the advantage of experienced counsel. Counsel should be expected to appreciate issues as they emerge. Counsel should be expected and encouraged to deal with some of the applications on the basis of oral argument. A requirement that each application must proceed according to a formal timetable promotes rigidity and increases delay.

Only those applications identified in advance as being particularly complex should have a timetable attached to it.

The method of proceeding by way of 14 day exchange of all written arguments, all authorities and all documentary materials with a reply 7 days later does not meet the requirements of this case.

[15] Mr. Brooks notes that the progress of these applications is uncertain and the result of one may impact on another and on the issues to be argued. He argues at para. 21:

The requirements of this case, in addition to those facts mentioned at the commencement of this submission, include that applications move ahead on a continuous basis with a minimum of interruption. There is no reason to think that the complexity of the applications to come will cause them to proceed according to a pre-determined course. The applications have many aspects to them. Some of those aspects are bound to arise at the last minute. The sheer number of applications means that any approach must foster moving through each application expeditiously and from one application to the next expeditiously. New applications will be identified as the case moves closer to its trial date.

[16] He submits at para. 25 that seven days notice is sufficient:

It is submitted that the way to deal with the concerns outlined above is that the applicant should, in applications that require any materials, provide their materials (as defined below) 7 days before the commencement of the application and the respondent should provide their materials 3 days before the commencement of the application. These time periods are not too short given the experience of the counsel, particularly Crown counsel, involved in this case.

[17] Mr. Brooks summarizes his position at paras. 32 to 34:

32. A timetable for the exchange of materials should only occur for those applications deemed sufficiently complex.
33. If a timetable is directed it should be for the delivery of the applicant's materials 7 days before argument and delivery of the respondent's materials 3 days before argument.
34. The materials of the applicant should include a detailed Notice of Application and an index of authorities for the applicant. The materials for respondent should include a concession of any issues which are admitted and an index of authorities.

III. ANALYSIS

- [18] A criminal trial in Canada today is very different from what it was 30 years ago. The Charter has fundamentally changed criminal law and criminal trials. Disclosure, the admissibility of evidence, the fair trial rights of the accused and a fair process for all participants in the justice system are now common issues raised during a criminal trial. Judges have the jurisdiction to exclude evidence pursuant to the Charter. In addition, the rules of evidence have changed dramatically through both statutory amendments and decisions from the Supreme Court of Canada regarding the common law. Judges have much more discretion to determine the admissibility of evidence on a case-by-case basis.
- [19] Trials have grown substantially longer and more complex due to the expansion of issues that arise. Much has been written and said on this subject. The concerns expressed have been directed, in particular, at what is sometimes described as the "mega-trial". See for example: Michael Code, "Law Reform Initiatives Relating to the Mega Trial Phenomenon", (2008) 53 Crim. L.Q. 421.
- [20] The law regarding a trial judge's responsibility and authority to manage a criminal trial has evolved since Kutynec. The law is clear that judges have the authority to ensure not only a fair trial but also an efficient process.
- [21] In *R. v. Felderhof* (2003), 235 D.L.R. (4th) 131, 180 C.C.C. (3d) 498 (Ont. C.A.) Rosenberg J.A., on behalf of the Court, addressed directly the responsibilities of the trial judge to properly manage a criminal trial. At para. 40 he stated:

Whatever may have been the case in the past, it is no longer possible to view the trial judge as little more than a referee who must sit passively while counsel call the case in any fashion they please. Until relatively recently a long trial lasted for one week, possibly two. Now, it is not

unusual for trials to last for many months, if not years. Early in the trial or in the course of a trial, counsel may make decisions that unduly lengthen the trial or lead to a proceeding that is almost unmanageable. It would undermine the administration of justice if a trial judge had no power to intervene at an appropriate time and, like this trial judge, after hearing submissions, make directions necessary to ensure that the trial proceeds in an orderly manner. I do not see this power as a limited one resting solely on the court's power to intervene to prevent an abuse of its process. Rather, the power is founded on the court's inherent jurisdiction to control its own process.

[22] At para. 57 he added the following observations:

I think something should be said about the trial management power. It is neither necessary nor possible to exhaustively define its content or its limits. But it at least includes the power to place reasonable limits on oral submissions, to direct that submissions be made in writing, to require an offer of proof before embarking on a lengthy voir dire, to defer rulings, to direct the manner in which a voir dire is conducted, especially whether to do so on the basis of testimony or in some other form, and exceptionally to direct the order in which evidence is called.

[23] Felderhof was followed in *R. v. Snow* (2004), 190 C.C.C. (3d) 317, 73 O.R. (3d) 40 (Ont. C.A.). At para. 24, the Court said:

On the other hand, a trial judge is certainly entitled to control the proceedings and to intervene when counsel fail to follow the rules or abide by rulings. A trial judge is not a mere observer who must sit by passively allowing counsel to conduct the proceedings in any manner they choose. It is well recognized that a trial judge is entitled to manage the trial and control the procedure to ensure that the trial is effective, efficient and fair to both sides.

[24] The Supreme Court of Canada expressed a similar view in *R. v. Pires*; *R. v. Lising*, [2005] 3 S.C.R. 343 at para. 35, where Charron J., on behalf of the Court, said:

The concern over the constructive use of judicial resources is as equally, if not more, applicable today as it was 15 years ago when *Garofoli* was decided. For our justice system to operate, trial judges must have some ability to control the course of proceedings before them.

[25] Recently, Rosenberg J.A. in *R. v. Horan*, 2008 ONCA 589, on behalf of the Court, reiterated what he had said in *Felderhof*. At para. 33 he wrote:

In *R. v. Felderhof* this court recognized a broad trial management power to promote the efficient use of court time and ensure that all parties are treated fairly.

[26] Many applications heard during the course of a criminal trial concern the admissibility of evidence and alleged Charter violations. They are often made by the accused. When they are, the onus of proof is on the accused and the burden is on a balance of probabilities. This is in contrast to the usual onus of proof, which is on the Crown to prove each essential element of the offence beyond a reasonable doubt.

- [27] It is important therefore not to confuse the onus placed on the Crown to prove the offence with the onus placed on an accused who is applying for a specific order or remedy such as severance of counts, disclosure or Charter relief such as the exclusion of evidence.
- [28] In my view, requiring an accused's counsel to provide adequate notice and particulars of pre-trial applications does not compromise his or her right to silence. This requirement flows from the fact that the applicant bears the onus of proof and that notice is necessary to ensure a fair and efficient process.
- [29] The nature and timing of the notice and particulars that should be provided depends on the nature and complexity of the issues on the application and the circumstances under which it arises.
- [30] A trial judge's management power can include requiring reasonable notice and particulars of a pre-trial application from the defence, including a synopsis of the evidence to be adduced and the issues and the law to be argued. As stated in *Horan*, a judge owes a duty to the parties and to the public to promote the efficient use of court time and to ensure that all parties are treated fairly.
- [31] It is important that each party to an application clearly knows in advance of the application what is at issue, what evidence will be led, what arguments will be made and what case law will be presented.

What is required?

- [32] What I originally requested was based on the procedure that was followed in *R. v. Malik*, 2002 BCSC 484 and in *R. v. Pickton*.
- [33] However, I believe counsel for those accused had more time and more resources to prepare their pre-trial applications. The Crown in those cases had also been able to provide disclosure in a more timely way. The circumstances here have not permitted the Crown to do this.
- [34] I am satisfied that all counsel are working hard to absorb the material provided, to prepare for these pre-trial applications and to prepare for the actual trial. I accept that there are limitations on the resources available to counsel. These limitations apply to both the Crown and the defence.
- [35] If the defence had unlimited resources they could do as the Crown has suggested: provide full written submissions and case books for all applications at least two weeks in advance of each application. I accept that this is expecting too much in the circumstances of this case.

- [36] However, I also accept that the defence must provide adequate notice of each application they intend to make. Inadequate notice places an additional workload on the Crown, makes it more difficult for the Crown to properly fulfil its responsibilities, and undermines the orderly and efficient hearing of the applications. A criminal trial is an adversarial process. Fair tactics are part of the process; unfair surprise is not.
- [37] If the defence are unable to provide adequate notice of an application, they should request an adjournment of the application until they are able to do so.
- [38] While I have referred to the defence as the applicant and the Crown as the respondent, applications may arise where the roles are reversed. There may also be applications where one or more of the accused oppose an application brought by another accused and are therefore respondents to that application. The same notice requirements will apply, whoever the applicant and the respondent are.
- [39] In my view, the notice required will depend on the particular application. It must be sufficient to enable the respondent to clearly understand the application and to properly prepare for and respond to it. When the applicant intends to tender evidence, the application should provide an outline of what that evidence will be, including any potential witnesses, so that the respondent is in a position to prepare for the evidence and determine whether it also wishes to tender evidence.
- [40] The notice must state with sufficient particularity the issues to be argued, so that the respondent is in a position to know what evidence to tender and what arguments to advance to meet those issues.
- [41] To assist I will provide an example of what occurred on an application concerning the lawfulness of a search conducted by the police. The defence advised the Crown that one of the issues on the application was the manner of the search. This was not, in itself, adequate notice. The respondent must not be required to guess at what will be argued.
- [42] The notice should have provided further details. It should have stated, as was ultimately argued, that the police officer who applied for and was named in the warrant by the authorising judge, did not execute the warrant and that this rendered the search unreasonable. The notice should also have provided the cases and citations that the applicant would be relying on to support this argument.
- [43] As I have said, experienced and capable counsel represent each of the parties at this trial. They understand that the applicant has the burden of proof on these applications. They also understand what adequate notice is.
- [44] I am not requiring that an applicant provide full written argument when filing their notice of application. Written submissions, together with oral argument highlighting and supplementing those submissions, are often an effective method of presenting argument. I have found this process to be of real assistance on the applications I have heard to date. I appreciate, however, that where written submissions are provided, counsel are not always

able to do so in advance of the application. Further, when witnesses are to be called, it would usually be premature for counsel to provide written submissions before the evidence is heard.

- [45] Let me emphasize that while I am not directing that full written argument be filed with each application, I am directing that the notice provide sufficient detail to address the issues I have identified. I will not be more specific with respect to what is sufficient. I will leave it to counsel to determine, in the circumstances of the individual application, what is necessary in light of the requirements I have stated.
- [46] If it becomes necessary, I will hear submissions on an application-by-application basis concerning what should be provided. I am confident this should not be necessary given the counsel involved in this trial.
- [47] With respect to case books, I am not directing that an applicant provide a case book to the respondent with their notice of application. A list of the cases to be relied on with their citations is adequate. I appreciate the Crown's submissions with respect to the benefits of the more onerous requirement but I will leave this to the discretion of counsel for the present.
- [48] With respect to the timing of the notice, I believe that what is reasonable for most applications is that the notice be filed and served at least 10 working days before the application is to be heard. The respondent should provide a reply no later than three working days before the application is to be heard. The content of the respondent's material should enable the applicant to clearly understand the respondent's argument opposing the application, if that is the position, and should include a list of any additional cases they will rely on and the case citations. This will permit the applicant to prepare and present more focused oral submissions.
- [49] If, as a result of the respondent's material, an issue arises that the applicant did not anticipate, the applicant may apply for additional time to respond to that issue.
- [50] These directions concerning timing are not intended to be without exception. They are intended to be fair to all parties. Counsel can apply to vary these directions where necessary or they may agree amongst themselves to adopt a different process for a particular application.
- [51] Counsel may apply concerning the adequacy of the notice provided for any application. The procedure I am directing is intended to be a flexible one. I will entertain an application to vary it when requested to do so.
- [52] I trust that these directions will support a reasonable and fair process while at the same time promoting the effective and efficient use of resources.

"SMART J."

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