

CANADA / JUDGMENT

R. v. Teixeira

2023 BCSC 203

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 203 R. v. Teixeira

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Teixeira,

2023 BCSC 203

Date: 20230208

Docket: X082939

Registry: New Westminster

Regina

v.

Brandon Nathan Teixeira

Restriction on publication: There are restrictions on publication of these reasons pursuant to s. 486.5(1), s. 486.5(9) and s. 684 of the Criminal Code of Canada and the Inherent Jurisdiction of this Court. The restrictions remain in place until further order of the Court.

Before: The Honourable Justice Duncan

Oral Reasons for Judgment

Re: Case Management Directions

Counsel for the Crown:

D. Wiedemann

V. Toselli

A. Smith

H. James

M. Barrenger

Counsel for the Accused:

R. Thirkell

V. Williams

R. Mansoori-Dara

Place and Date of Trial/Hearing:

New Westminster, B.C.

February 2 and 3, 2023

Place and Date of Judgment:

New Westminster, B.C.

February 8, 2023

Introduction

- [1] THE COURT: On February 2, I presided over a case management conference ("CMC") in this matter. I advised all counsel well in advance that the purpose of this CMC was to set hearing dates for existing and anticipated defence applications. The anticipated applications were related to application 14, which is in progress. They have now been numbered 67 and 68.
- [2] I also told counsel well in advance of February 2 that my focus was on concluding all of the applications dealing with search and seizure issues, with a view to scheduling a hearing to determine whether evidence will be excluded under s. 24(2) of the Charter. I suggested that the s. 24(2) hearing should take place before the end of June. I specifically directed that application 64, a broad-ranging abuse of process application that involves alleged Charter breaches against individuals other than Mr. Teixeira and was not filed until November 28, 2022, would not be heard before the s. 24(2) application.
- [3] Finally, I advised counsel before the winter break of dates when I was not available in February, March and April as well as the date of the judge's conference in May. I did that to facilitate discussion over future hearing dates.
- [4] The February 2 CMC was an abject waste of court time. While I was grateful to Ms. Williams for handing up a draft schedule of suggested dates, it was clear to me that the Crown and defence had not discussed anything to do with scheduling prior to coming to court. For example, Mr. Barrenger, who joined the Crown team in court on January 31, advised during the CMC that he had scheduled vacation in March during some of the dates proposed by the defence concerning an application of which he now has conduct.

- [5] I am in no way criticizing Mr. Barrenger for having pre-planned vacation time, just as I am in no way criticizing the defence attempt at drafting a coherent schedule. What concerns me is that counsel came to the CMC without having exchanged proposals or ideas about how to move this matter to trial.
- [6] This is a recurring pattern in this case. I accept that we have been engaged more or less full-time on pre-trial applications since the middle of November 2021. The Crown has had to shift focus from the applications and trial preparation to deal with some significant disclosure rulings. The defence team, in addition to vigorously pursuing Mr. Teixeira's right to full answer and defence and leaving no stone unturned, have practices to run. Everyone is busy but the failure to communicate thwarts progress. For want of a better description I feel like a dentist rather than a case management judge when I try to discuss setting hearing dates.
- [7] The Supreme Court of Canada in *Jordan* and *Cody* excoriated the criminal justice system for having fallen into a culture of complacency. The conduct of this case is drifting in that direction. Everyone has a role to play in ensuring the efficient progress of files, particularly lengthy and complex ones like this. Counsel simply have to do more discussing and coordinating outside of court to make efficient use of case management time.
- [8] We accomplished virtually nothing on February 2, despite the fact that three hours of court time were available. By contrast, on February 3, a realistic set of hearing dates was presented to me. They resulted from Mr. Barrenger's suggestion that the Crown and defence meet on the afternoon of February 2 and actually talk about the outstanding applications.
- [9] Within about 30 minutes of court time on February 3 I heard counsels' rationale for the order of applications, even those which I thought should be deferred because they had been filed so late. I advised counsel that I would request scheduling to put the dates into the system and then I would take some time to review them to ensure they are workable from my perspective, in that counsel require some rulings before moving on to subsequent applications.
- [10] While the proposed timing is tight I expect to be able to provide rulings, or at least the result with reasons to follow, in order to keep to the schedule. But I remind counsel that for at least part of the time when I am not presiding over applications in this matter, I am obliged to hear and decide other matters, which may slow my progress. I also remind counsel that written submissions must not exceed thirty pages and I appreciate any effort to minimize the number of loose papers filed as exhibits and extra authorities handed up during argument that are not in a casebook or hyperlinked in the electronic copy of submissions.
- [11] Additionally, there is one date, April 20th, which conflicts with my schedule. Counsel will need to find another date or shorten the length of the application.

Proposed Schedule for Outstanding Applications

Application 67: February 28 for one day

- [12] this is one of the applications that was split off from Application 14, the Langley search. It involves the failure to file a s. 490(2) application for exhibits seized. If the Crown intends to make concessions, they will be provided to the defence team and the court by February 21.

Application 64: March 8 and 9

- [13] This is the late-filed omnibus abuse of process application. I advised counsel on at least two occasions that I would not hear this application until all of the earlier filed s. 8 applications and any s. 24(2) issues are determined. Mr. Mansoori-Dara suggested that he file a separate application dealing only with alleged breaches of Mr. Teixeira's Charter rights and have the evidentiary part of that application heard in advance of the s. 24(2) hearing. I will agree to set it on that basis, but I will require some further clarification from counsel once the application is filed concerning the remedy sought.

Application 68: March 17 all day in Vancouver and March 22-24 in New Westminster

- [14] This is the re-seizure or locker warrant application. The defence seeks to cross-examine Corporal Biles, the affiant. I observe that this request appears to have been made very late in the progress of this matter. The only date that works for this part of the application is March 17. That is during the court's reading week but I have agreed to hear it, with the balance of the application including any cross-examination, if permitted, to be heard the following week.

Application number to be decided: March 20, a half day, for an application conference to arrange dates for further hearings

- [15] The defence plans on filing an application for third party records, specifically records from Person X's iCloud and iPhone. This application will be filed by February 10. The timing of this application is of some concern to me. I am aware that counsel have been discussing X's phone records and that in the absence of consent there must be an application. Mr. Thirkell advises it may involve serving notice on Apple and the record holders require a date certain for a return to court to start the process.
- [16] I told counsel that despite my direction that all substantive applications must be completed before trial, this application may not complete in that timeframe but it will not hold up the start of the trial because of its relatively late filing date.

Application 38: April 3, one day

- [17] I screened out application 38, which involves the discovery of DNA in a Jeep rented by Mr. Teixeira's roommate which was later matched to Mr. Teixeira, on January 13. The defence intends to apply to re-open the application. I advised counsel that this application should be deferred until after existing applications which had not yet been determined are heard. Defence counsel seeks to use available court time on April 3 or 4. I will hear the application on April 3.

Application 59: April 4, a half-day

- [18] On January 13, I issued a memo to counsel advising I was satisfied that X's jail communications from May 3, 2019 until he was released from federal custody should be produced to the court for review. Mr. Katz for the Attorney General of Canada has conduct of that application. Counsel advises that Mr. Katz is available on a variety of dates, including April 4. I am grateful to Mr. Katz for having provided a range of dates and if April 4 turns out to be inconvenient to him, another date can be arranged. I have not yet provided reasons for this ruling and will endeavour to do so in due course.

Applications 16-18: April 24 through 27

- [19] These applications concern electronic devices seized during the Langley search. Counsel require my decision on applications 67 and 68 to proceed with these applications. I will endeavour to at least provide a result on those applications as soon as I can. Counsel have estimated five days and want to start on April 20. Unfortunately, I am not available that day. I am available April 21. If that is not workable, I request that counsel find another day or shorten the application by use of an agreed statement of facts.

Applications 19 and 20: May 4 and 5

- [20] These are applications concerning production orders for exhibits 123 (the 7440 phone) and 129 (a Samsung S5). Counsel require my ruling on applications 16-18 before proceeding with this application.

Application 42: May 8 and 9

- [21] This application concerns the Encrochat phone seized during the Langley search. I will require some further particulars about the nature of this application because it is my understanding that nothing was obtained from it.
- [22] The gap between applications 42 and 54 is explained in part by the judges' conference which takes place May 24 through 26. I offered to sit through this week in order to move through the applications but counsel did not view that as necessary.

Application 54: May 29 through 31

[23] The silver iPhone search warrant. A three day time estimate seems excessive for this subject matter. I will set the dates requested but require counsel to examine ways to save court time.

Applications 35-37: June 5 through 7

[24] These are applications concerning production orders for a phone as well as for ICBC and Corrections records. Since there are three applications, I accept that a three day time estimate is likely fair.

[25] The gap between applications 35-37 and application 22 was at my request.

Application 22: the DNA warrant: June 26 and 27

Section 24(2) hearing: July 11-21, nine days in total

[26] The length of this hearing is difficult to predict as many of the alleged breaches of Mr. Teixeira's Charter rights have not been determined. Counsel have suggested a longer time estimate, erring on the side of caution. I agree with that approach.

[27] All other outstanding applications, including the abuse of process argument that does not relate to Mr. Teixeira's Charter rights and the various stages of the application concerning X's phone and iCloud records, the Crown's application for the admissibility of probation records and for further clarification of the discreditable conduct ruling, will be scheduled after the s. 24(2) hearing.

[28] I have not been asked to set dates for exchanges of written submissions. This is something that counsel must turn their minds to and discuss.

[29] I strongly encourage counsel to attempt to place agreed statements of fact before me instead of calling witnesses, wherever that is possible. I am particularly concerned with the number of days set for applications 16 through 18. If any old ground is to be dug up on any of the applications I will intervene to move things along. Counsel will be strictly held to the time estimates provided to me on February 3.

[30] Counsel must also turn their minds to whether exhibits from previous applications will be required. Exhibits on concluded applications are not kept in the courtroom for two obvious reasons: a lack of space and the fact that until we start the trial, or until Mr. Teixeira appears in person, we will continue to be moved around to different courtrooms. Court staff need more than ten minutes notice before court starts that an exhibit is required.

[31] A last note concerning scheduling: I have no idea if witnesses will be required for any of these applications, apart from Cpl. Biles if I determine that she can be cross-examined in relation to the locker warrant. I am assuming that where witnesses are required, their schedules have been taken into consideration.

Other Matters

- [32] First, I direct that counsel must exchange proposals on hearing dates or other subjects at least one full business day before a CMC. If a CMC is on a Monday, proposals should be exchanged no later than 9:00 a.m. Friday. If a CMC is on a Tuesday, proposals should be exchanged no later than 9:00 a.m. Monday, and so on.
- [33] Once proposals are exchanged, any difficulties with availability are to be noted and conveyed to opposing counsel, then brought to my attention at the CMC so I have a template to work from.
- [34] This may seem overly formalistic, but it is the only way I envision making any progress at CMCs. Frankly it is a system I should not have to impose on a group of counsel who have carriage of a CPD-3 designated prosecution, but we have reached the point where I must require it.
- [35] Second, Mr. Teixeira has been appearing by MS Teams from the remand facility where he is housed since the beginning of this matter. He filed, through counsel, an omnibus consent to appear remotely, even when witnesses were giving evidence on pre-trial applications. From time to time I have asked for confirmation on the record that this method of appearance is still Mr. Teixeira's preference, and have been advised that this is the case.
- [36] I asked counsel in early January to ensure that this method of appearing is consistent with recent amendments to the Criminal Code, R.S.C. 1985, c. C-36, in particular s. 715.23. I have not had a response and I direct counsel to turn their minds to the section and be prepared to address it before the next application where viva voce evidence is called. In particular, I require an update on whether or not remand facilities continue to put individuals in isolation due to Covid concerns if they have been outside the facility. I recall that was the original rationale for Mr. Teixeira to appear remotely for the pre-trial applications.
- [37] Third, I want counsels' input on the expected length of trial. I have the Crown's fourth case plan with a time estimate of 16.5 weeks without admissions and defence evidence. I require defence counsel to turn their minds to an estimate based on a scenario where the evidence challenged under s. 8 is excluded and a scenario where it is not excluded. This will provide a high and low estimate to work from.
- [38] I expect the Sheriffs will require more than eight weeks to issue the number of summons that will be required to empanel a jury of 14 for a trial that at the current best estimate will last over four months.
- [39] I have asked defence counsel if there will be a challenge for cause requiring triers to be chosen from the jury panel. I have been advised that there will not be a challenge and the Sheriffs will issue sufficient summons for a jury of 14 based on the process of choosing jurors in the ordinary course.

- [40] There will be a lengthy CMC in due course to deal with jury selection and the trial process. I am developing an agenda of issues to canvas. Above all I want to avoid gaps in court days, to the best of the Crown's ability to do so. This will require communication between the Crown and defence about the anticipated length of cross-examination.
- [41] Fourth, Ms. Smith provided an update on the Crown's compliance with my order following on application 48. This involves IHIT and CFSEU reviewing all emails and submitting them to the Crown to be uploaded into "Email Island", which the Crown then vets and discloses to defence counsel. It is anticipated that there will be approximately 16,000 emails.
- [42] Ms. Smith is cautiously optimistic that this process will complete by mid-June. The Crown's intention is to include periodic editions of this disclosure to the defence with updated disclosure sets. Mr. Thirkell for the defence team advises that it is preferable for the emails to be received separate from disclosure updates. I have not been asked to adjudicate on this and it is something for counsel to sort out.
- [43] While there is a great deal of labour involved with this process, I am directing the Crown to have it substantially completed by the middle of May. By substantial completion I mean 85% of the emails should be uploaded and disclosed to defence counsel by then. I will require updates every two weeks on how the process is going, starting on February 28.
- [44] Fifth, I distributed my reasons on application 58 to the Crown, amicus and counsel for the Attorney General of Canada with a request to get back to me concerning my proposed redacted version to give to defence counsel. I expect we can deal with this in camera for some time today, tomorrow or Friday. I do not require Ms. Elden or Mr. Katz to be present at this stage. I simply require an update from the Crown as to whether the redactions I made are or may be acceptable.
- [45] I will have these reasons transcribed and distributed to counsel but I reiterate that all counsel involved must step up and demonstrate leadership and problem-solving skills. Both have been in scarce supply of late.

"Duncan J."

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