
CANADA / JUDGMENT

R. v. Valliere

2004 BCSC 1457

COURT

Supreme Court of British Columbia

DECIDED

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Citation:

R. v. Valliere

Date: 20041018

2004 BCSC 1457

Docket: 31615-3

Registry: Penticton

IN THE SUPREME COURT OF BRITISH COLUMBIA

Ruling on Ban on Publication

of Names of Undercover Operators

The Honourable Mr. Justice Barrow

October 18, 2004

REGINA

Against

NIEL RICHARD VALLIERE

Counsel for the Crown:

B.V. Bagnall

Counsel for the Accused:

C.J. Sadlemyer

Counsel for the Attorney General of Canada appearing by telephone:

J.L. Hayes

Place and Date of Hearing:

Kelowna, B.C.

October 18, 2004

BAN ON PUBLICATION - SECTION 539(1) C.C.C.

- [1] THE COURT: The Attorney General of Canada applies for an indefinite ban on the publication in print or by broadcast of any information tending to identify undercover police officers involved in the investigation of the accused, Mr. Valliere.
- [2] On Friday I granted, on an interim basis, a ban on the publication or broadcast of that information. I reserved until this morning my decision as to whether the ban would be granted on a permanent basis and, if so, whether it would be of an indefinite or fixed duration.
- [3] The accused is charged with manslaughter in connection with the December 30, 2001 death of Helene Boivin at Penticton, British Columbia. He was the subject of an undercover operation during the months leading up to his arrest in April 2003. That investigation involved the now familiar ruse of the police pretending to be members of a criminal organization interested in recruiting the accused as a member.
- [4] The police fashioned a variety of scenarios in which the accused was asked to participate, culminating in a meeting with a pretend crime boss during which the event under investigation was discussed.
- [5] The investigation now before the court is not, I am told, atypical. It began in January 2002 and involved the police playing out some 32 scenarios with the accused. The investigation culminated with a "crime boss" scenario in early April 2003, shortly after which the accused was arrested.
- [6] The Attorney General's application was served or delivered to a variety of media outlets and/or their counsel. Mr. Hayes, counsel for the Attorney General of Canada who appears on all applications of this nature in the province, explained that there is in place an informal, but recognized, mechanism by which media outlets are advised of the Attorney General's intention to make such an application. In particular, notice of the application is sent directly, either by fax or e-mail, to as many local media outlets as possible. In addition, the application is e-mailed to counsel who appear regularly on behalf of several major media companies, such as Canwest Global, Bell Global and Pacific Press. Notwithstanding these efforts, no one appeared to oppose this application. I note further that the accused does not oppose this application.
- [7] In *R. v. Mentuck*, [2001] 3 S.C.R. 442, Iacobucci J. on behalf of the entire court said this at para. 38:

In some cases, however, most notably when there is no party or intervener present to argue the interests of the press and the public to free expression, the trial judge must take account of these interests without the benefit of argument. The consideration of unrepresented interests must not be taken lightly, especially where Charter-protected rights such as freedom of expression are at stake.

- [8] The Attorney General's application in this matter is supported by the affidavit of Sergeant Mann, the N.C.O. in charge of undercover co-ordination for the R.C.M.P. in British Columbia. He deposes that there are two categories of undercover operators: full-time operators and pool operators.
- [9] Full-time operators are just that, members who are assigned to the undercover unit in Vancouver on a full-time basis. Once so assigned, they typically spend the entirety of their service working in an undercover capacity. Pool operators are police officers who have regular duties, either in a detachment or otherwise, but are called upon from time to time to assist in undercover operations as needed.
- [10] There were seven undercover operators involved in the investigation of the matter before the court. Audio and video tapes of several of their meetings with Mr. Valliere are expected to be tendered in evidence during the trial. In addition, all seven members are expected to testify.
- [11] Sergeant Mann deposes that if any information tending to reveal the identity of these police officers were to be published or broadcast, it may compromise their safety and the effectiveness of their current or future operations.
- [12] In support of this conclusion, he cites a number of instances in the past in which those dangers have materialized. On several occasions, police have learned, through the coincidental interception of private communications, that the targets of ongoing undercover investigations have discovered, or at least become suspicious, that they are being targeted. These discoveries or suspicions have arisen when there has been widespread media coverage of criminal trials on which similar undercover techniques have been employed.
- [13] Of particular significance to the issue before me is Sergeant Mann's assertion that in December 2003, the police learned through the interception of private communications that a target of an ongoing undercover operation was conducting, through the internet, a search of R.C.M.P. news releases in an effort to associate the first names of operators to known R.C.M.P. officers identified in those news releases.
- [14] The governing legal principles that may be distilled from *Mentuck* and the companion decision in *R. v. O.N.E.*, [2001] 3 S.C.R. 478 include the following:
 - (a) There is a strong and highly valued presumption that courts should be open and their proceedings open for public reporting.

- (b) The burden of displacing that presumption is on the applicant. To discharge the burden, the applicant must put before the court a convincing evidentiary basis for issuing a ban.
 - (c) A publication ban should only be ordered when it is necessary in order to prevent a serious risk to the proper administration of justice for which there is no reasonably available alternative, and only when the salutary effects of the publication ban must outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the rights to free expression, the right of the accused to a fair and public trial and the efficacy of the administration of justice. (See generally para. 32 of *Mentuck*)
 - (d) As to the "serious risk" referred to above, it must be a risk, the reality of which is well grounded in the evidence. It must also be a risk that poses a serious threat to the proper administration of justice. The point of the exercise is to avoid a serious risk, not necessarily to confer a benefit on or advantage to the administration of justice.
 - (e) Any ban imposed must be cast as narrowly as possible. The court must have regard to any reasonably available alternatives when fashioning the ban so that its scope is as narrow as the circumstances will permit.
- [15] In *Mentuck*, the Attorney General sought a ban on both the identity of undercover operators and the operational methods they employed. The court granted the former but declined the latter. It appears that the bulk of the evidence and argument was directed towards the requested ban on operational methods.
- [16] The evidence before me is more extensive on the issue of the deleterious effect of publishing information about the identity of undercover operators than was the case in *Mentuck*. At trial in *Mentuck*, *Menzies J.* noted only the following in relation to the evidence before him:

The Crown relies upon evidence that the techniques used in this case have taken years to develop and refine for use in undercover operations. The RCMP express concern that if the evidence in this case is made public, these techniques may become ineffective or less effective in the pursuit of criminals. As well, the R.C.M.P. express concern that [if] the techniques are made known, the identity of the officers in the field using these techniques is in jeopardy of being discovered. With respect to the officers involved in this particular operation, it is sworn as evidence before me that they continue to be involved in current covert operations. The evidence before me is to the effect that if they are identified in the media either through name, photo or general description, their safety and well being will almost certainly be jeopardized. (See para. 8 of the decision of *Menzies, J.* in *R. v. Mentuck*, [2000] M.J. No. 69)

- [17] In *Mentuck*, the Supreme Court of Canada gave consideration to whether undercover operators should use pseudonyms when playing out their undercover roles. If they were to do that, then the reach of the ban could be narrowed, although not eliminated. It would remain necessary to ban the publication of any likenesses of the officers or information about their physical appearance, but not their names.

[18] On the facts in *Mentuck*, Iacobucci J. found that the necessity component of the test had been met, and in doing so he said this about the use of pseudonyms at paras. 46 and 47:

Given that the officers involved appear to go by their real names in the course of this undercover work, publishing their names could very easily alert targets that their apparent criminal associates are in fact police officers. Furthermore, since the operations in question have already been commenced, it would obviously be unreasonable for officers to adopt pseudonyms now. The targets already know their real names. Accordingly, I agree with Menzies J. that a ban on the publication of officers' names is necessary and that there is no reasonable alternative.

I also agree that the ban should be restricted to a period of one year. After ongoing operations have been completed, reasonable alternative measures such as the regular use of pseudonyms, the use of different officers, and the use of different scenarios will become available to the police. Should the circumstances of a particular case change, of course, the ban may need to be shortened or extended. For that reason it will be prudent for such orders of publication bans to be made subject to further order of the court.

[19] On the proportionality aspect of the analysis, Iacobucci J. held that the salutary effects of the ban were significant and the deleterious effects were not substantial. He refused, however, to impose a ban of longer than one year writing at paras. 58 and 59 as follows:

I disagree, however, with the appellant's request that the ban be made indefinite. As a general matter, it is not desirable for this, or any, Court to enter the business of permanently concealing information in the absence of a compelling reason to do so. The appellant suggests that the officers would be in physical danger if their identities were ever revealed. This is not a substantial enough risk to justify permanent concealment. All police officers are subject to the possibility of retributive violence from criminals they have apprehended and other persons who bear them grudges or ill-will. In rare cases this may result in tragic events, and while all efforts must be deployed to prevent such consequences, a free and democratic society does not react by creating a force of anonymous and unaccountable police. I do not find that these officers are at a substantially greater risk than other police officers. Given a showing on the record of a future case that a specific group of officers indeed suffers a grave and long-term risk to life and limb, a permanent or extended ban would be considered.

I do not, however, wish to be taken as creating a bright-line rule restricting publication bans to a year. Different cases will involve different considerations, and there may well be times when the danger to officers or to the importance of the administration of justice of police operations rises to a level of seriousness sufficient to justify the deleterious effects inherent in publication bans of a longer duration. Furthermore, these different considerations may authorize a different approach in some cases to the process of tailoring. There may be cases where a longer ban might be tailored to reduce its impact by prohibiting only the publication of the likeness or photograph of an officer, not his name. Should the police choose to adopt the practice of using pseudonyms in undercover operations, this would clearly be a sensible option that would mitigate some of the dangers of long-term secrecy.

[20] As was the case in Mentuck, the officers involved in the matter at bar used their real first names, and sometimes a nickname, in their dealings with the accused. They did so, according to Sergeant Mann, for a variety of reasons. Why they did so and why, in his opinion, it is unsafe and impracticable to change is set out in his affidavit. He deposed as follows:

- a. Using one's given name is easy and foolproof in that it is the name that one has answered to all of one's life. When in a stressful situation it is second nature to respond to one's given name.
- b. Concurrent undercover operations will often overlap in time and involve multiple targets. It would be difficult to remember multiple pseudonyms when dealing with multiple targets and operations.
- c. Undercover operators generally use a single pager and cellular telephone number. In the course of undercover operations they give those numbers to multiple targets for contact purposes. Carrying several pagers and cellular telephones for different investigations is impractical and dangerous. An undercover operator would not necessarily know the identity of the caller and would be faced with trying to respond and answer using one of several pseudonyms.
- d. Undercover operators regularly receive calls from and place calls to targets of one operation when in the presence of a target from a different operation. It would accordingly not be possible to use a different pseudonym in the presence of a target.
- e. Certain undercover scenarios are arranged such that small groups (three or four operators) or, less frequently, a dozen or more undercover operators, are in each other's presence and the presence of a target or multiple targets. It would be very difficult for each one of these operators, who are usually portraying that they know each other quite well, to memorize different "operation specific" pseudonyms of the other operators.
- f. In that undercover operators often participate in more than one undercover operation at a time, it is neither safe nor practical to use different pseudonyms. No matter how well trained, undercover operators cannot risk reacting to more than one pseudonym in the highly stressful situations that arise in undercover operations.

[21] It is not clear to me whether, in commenting on the use of pseudonyms, Iacobucci J. had in mind undercover operators using different pseudonyms for each operation in which they participated. On the basis of the evidence before me, I accept that a practice of using different pseudonyms in different operations by the same officer is dangerous and would be practically very difficult, if not impossible, to adopt.

- [22] I note, however, that the concerns expressed in paragraphs (b), (c), (d) and (f) of Sergeant Mann's affidavit only arise if different pseudonyms are used by the same operator for different investigations. If an operator used the same pseudonym throughout his or her career, many of the concerns expressed would disappear entirely and those that remain would have diminished significance.
- [23] Given the overlapping nature of undercover operations in which full-time operators are involved, I recognize that it would be difficult to adopt a pseudonym mid-career as it were. The same challenges, however, are not faced by pool operators who, it seems to me, could adopt the use of pseudonyms without compromising ongoing investigations. Were they to do that, there would be no need to ban the publication of their real identity, rather only the publication of the fictitious identity.
- [24] I recognize that the Supreme Court has not created a bright line rule in which bans are restricted to one year in duration. The court did, however, make it clear that limiting the reach of the ban as far as reasonably possible is necessary having regard to the principles at stake. I do not think that adopting pseudonyms is a reasonable alternative for existing full-time undercover operators. I am satisfied that, short of weaning operators from undercover operations to the point where they have no active operations, it would not be possible for them to adopt the use of a pseudonym without giving rise to unacceptable risks. I am also satisfied that pulling them out of service, in effect, for the period that would be necessary to accomplish this without courting those risks is not reasonable.
- [25] I am therefore ordering an indefinite ban as it relates to the three full-time operators involved in this matter. As I pointed out above, the same considerations do not apply in relation to pool operators. I am ordering a ban in the terms sought in relation to the pool operators for a period of three years. It may be renewed on application by the Attorney General at the end of that period.
- [26] In fixing that period, I have attempted to permit ongoing operations in which pool operators may be involved to run their course. Once a pool operator is not involved in any operations, he or she would be able to adopt the use of a pseudonym without significantly compromising the other interests at play, thereby allowing for a more restricted ban should that be necessary in the context of future cases.
- [27] I am ordering a permanent ban in the terms sought in relation to "Y", "J" and "L" who, I understand, are the full-time operators. The ban will remain in place until further order of the court.
- [28] Any interested party may apply to set aside the ban so created on three days' notice to the Attorney General of Canada.

[29] The ban in relation to "F", "C", "Jo" and "T", the so-called "pool operators", will remain in place for three years unless, prior to the expiration of that period, any interested party applies, again on three days' notice, to the Attorney General of Canada and the court hearing the application decides to terminate or change the ban. The ban may, of course, be extended beyond three years on the application of the Attorney General of Canada.

"G.M. Barrow, J."

The Honourable Mr. Justice G.M. Barrow

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