

CANADA / JUDGMENT

U.S.A. v. Cuppen

2023 BCSC 1094

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1094 U.S.A. v. Cuppen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

U.S.A. v. Cuppen,

2023 BCSC 1094

Date: 20230626

Docket: 30107

Registry: Vancouver

Between:

In the Matter of the Extradition Act,

S.C. 1999, c. 18 as amended

And

In the Matter of The Attorney General of Canada on behalf of

the United States of America

And

Matthew Aron Cuppen

Before: The Honourable Justice Schultes

Ruling on Disclosure re Communications between the Attorney General of Canada and the
Requesting State

Counsel for the Attorney General of Canada on behalf of the Requesting State:

A.S. Sanghera

Counsel for the Person Sought:

L.D. Myers, K.C.

H.M. Patey

Place and Date of Hearing:

Vancouver, B.C.

March 30, 2023

Place and Date of Judgment:

Vancouver, B.C.

June 26, 2023

Introduction

- [1] Mr. Cuppen is being sought for extradition by the United States for the equivalent of the Canadian offence of conspiracy to traffic in Schedule I controlled substances - cocaine and MDA.
- [2] His Charter application to exclude evidence of identification in the record of the case was adjourned because counsel for the Attorney General expected to receive additional evidence from the requesting state that would render the application moot. He had not advised Mr. Cuppen's counsel of the existence of this evidence until a few days before the hearing.
- [3] Mr. Cuppen now seeks disclosure of the dates on which the U.S. officials were advised of the Charter application, obtained the new evidence, and advised the Attorney General's office of its existence, as well as all correspondence between the Attorney General's office and the requesting state in relation to that evidence.

Background

- [4] Counsel agree that the facts set out in Mr. Cuppen's notice of application provide a sufficient basis on which to decide it.
- [5] The Charter application was scheduled to proceed on December 14-16, 2022. Those dates were set on August 10, 2022. A detailed Charter notice was filed in July. The original record of the case was certified in 2019.
- [6] The application sought to set aside orders that had been made on behalf of the requesting state. Those orders required the Insurance Corporation of British Columbia to provide evidence relating to Mr. Cuppen's BC drivers' licence, and permitted the evidence to be sent to the requesting state. This included his drivers' licence photograph. After the requesting state received the evidence, it formed part of the record of the case. Its purpose was to prove Mr. Cuppen's identity as the person who was being sought.

- [7] Before setting these application dates, Mr. Cuppen's counsel had gone to some lengths to obtain the Attorney General's position on the application, in order to assist in arriving at an accurate time estimate.
- [8] At that point, counsel for the Attorney General was not in a position to provide an application response or outline of his argument, but said he would make efforts to do so in the coming weeks. He was able to advise that he was opposed to the application. His initial suggestion was that it be set for three days. He later expressed that his view was that it could be completed in two days, but that he was prepared to set three if Mr. Cuppen's counsel believed they were needed.
- [9] Mr. Cuppen's counsel agreed to set three days because he was also involved in a lengthy murder case at that time, and he was concerned that if the application ended up requiring a continuation the murder case would take up all of his available dates. In furtherance of this concern, he wrote to counsel for the Attorney General, warning that if the Attorney General's position ended up causing a continuation, an adjournment, or the loss of more than a day of court time in the Charter application, he reserved the right to seek costs.
- [10] Counsel for the Attorney General filed his written submission on December 9. This was his first communication with Mr. Cuppen's counsel since the dates for the application were set.
- [11] On the same day, which was two business days before the application was scheduled to begin, he advised that he anticipated that the requesting state would be providing a supplementary record of the case that contained new identification evidence, at which point he would disavow reliance on the ICBC records that were the subject of the Charter application. He suggested that if the new evidence had not arrived by the start of the application, it would be prudent to adjourn the application to dates in March that had been reserved for the committal proceedings, because the issue would likely be resolved in the interim by its arrival.
- [12] Mr. Cuppen's counsel responded that while the suggestion seemed practical, it meant that little or no of the three days set for the application could be used. The cost of that unused time would then have to be borne either by Mr. Cuppen or by his counsel, neither of which his counsel regarded as acceptable. That left the option of pursuing the application for costs that his counsel had referred to in the previous letter. As a result, Mr. Cuppen's counsel were not prepared to agree to the adjournment unless the Attorney General agreed to bear those costs.
- [13] Counsel for the Attorney General did not agree to this condition for the adjournment. He expressed his intention to proceed with his adjournment application, and to respond to any application for costs as it arose.

- [14] On December 14, I granted the adjournment sought by the Attorney General. While I was sympathetic to the financial issues raised on Mr. Cuppen's behalf, I could see no value in devoting court time to resolving an issue that was likely to be rendered moot in the near future.
- [15] Shortly after the adjournment, Mr. Cuppen's counsel wrote to counsel for the Attorney general, requesting the disclosure that is the subject of the present application. Counsel for the Attorney General declined to do so, expressing the view that no legal basis for it had been provided.
- [16] The supplementary record of the case containing the new evidence was provided on January 27.

Mr. Cuppen's Position

- [17] Mr. Cuppen's counsel seek this disclosure to assess whether there was any misconduct or fault in the course of obtaining the new evidence, which could support an application for costs against the Attorney General and/or the requesting state.
- [18] His counsel submit that the last-minute nature of the Attorney General's disclosure, long after the Charter application dates had been set and in the face of an explicit warning about the consequences of a loss of those dates, gives an air of reality to the assertion that the conduct of the Attorney General, the requesting state, or both, was sufficiently unacceptable to support an order for costs. The requested disclosure will reveal what role each participant played in this delay. While counsel concede that an acceptable explanation for the delay may also emerge from the disclosure, they stress that no such explanation has been provided yet.
- [19] They say that the specific concerns that arise from this sequence of events distinguish this application from the speculation or "fishing expeditions" by the defence that have been found insufficient to support an order for disclosure in other cases.
- [20] In addition to pursuing the issue of costs, Mr. Cuppen's counsel intend to rely on the breach of his s. 8 rights in obtaining the now-disavowed ICBC information, to support a remedy pursuant to s. 24(1) of the Charter. They will also seek to exclude the new evidence as an abuse of process, because it amounts to a deliberate attempt to undermine the defence application to exclude the existing identification evidence, or at the very least to case-splitting by the Attorney General. They intend to link this conduct to the breach of s.8 that occurred with respect to the ICBC evidence, to lend further support to a s.24(1) remedy.
- [21] While they maintain that the disclosure is also justified in support of these abuse of process/ s.24(1) issues, they candidly concede that that particular application has not been fully fleshed out yet. At this stage I do not have to consider it, they explain, since the evidence in support of the costs application amply supports the ordering of the same disclosure.

The Attorney General's Position

- [22] Counsel for the Attorney general disputes the assertion that an air of reality to the allegations underlying a potential costs application has been established here. Specifically, the chronology of events preceding the adjournment does not support an inference that there has been the kind of serious prosecutorial misconduct that would be required to support a costs order.
- [23] More fundamentally, he questions whether the type of application that is envisioned by the defence here actually falls within the proper scope of an award of costs against the Crown.
- [24] Ordinarily, the "grievous financial burden of legal costs" must be borne by a person who is the subject of criminal proceedings: *R. v. Curragh, Inc.* [1997] 1 S.C.R. 537. at para. 13. And at least one court has rejected costs as a means of recovering expenditures for hiring counsel and an expert in criminal proceedings, finding that they are more appropriately dealt with in a civil action for malicious prosecution: *R. v. Derosé*, [2002] A.J. No. 1259 (Prov. Ct.) at para. 83.
- [25] Opening up costs applications on such a broad basis would also jeopardize the circumscribed role of judges in extradition cases under s.29(1) of the Extradition Act, it is argued, as well as the need to ensure that those cases proceed expeditiously.
- [26] Counsel questioned the validity of the s.24(1)/abuse of process application as well, and therefore of any disclosure in support of it, but as I have said, at this point the defence is content to rely on the relevance of the requested material to costs.

Principles to be Applied

- [27] In addition to the jurisdiction to order costs against the Crown in criminal matters pursuant to the Charter, which is not being relied on here, a superior court has always had the ability to do so pursuant to its inherent jurisdiction: *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, at para.80. The test is the same whether the basis is inherent jurisdiction, Charter or statute - what is required is a marked and unacceptable departure from the reasonable standards expected of the prosecution, one that goes beyond "mere negligence": *R. v. Melrose*, 2016 BCCA 292, at paras. 35, 71.
- [28] While they are "not without a compensatory element", in the context of problems with Crown disclosure costs awards are "integrally connected to the court's control of its trial process, and intended as a means of disciplining and discouraging flagrant and unjustified incidents of non-disclosure": *974649 Ontario Inc.* at para.81.
- [29] Crucially, "Crown counsel is not held to a standard of perfection, and costs awards will not flow from every failure to disclose in a timely fashion", only when the marked and unacceptable departure standard has been met: *974649 Ontario Inc.* at para.87. Inadvertent error is not sufficient: *R. v. Singh*, 2016 ONCA 108 at para. 38.

- [30] Although costs actions in extradition proceedings appear to be infrequently sought, and their availability has been endorsed only by implication (*USA v. Pakulski*, 2011 ONSC 3489 at para. 26), they have been found to be available in analogous proceedings under the Mutual Legal Assistance in Criminal Matters Act, which were characterized as "criminal in nature": *Canada (Attorney General) v. Pacific International Securities Inc.*, 2004 BCSC 1226 at para. 18, rev'd on other grounds 2006 BCCA 303.
- [31] There is also no authority directly supporting the liability for costs on the part of a requesting state in extradition proceedings. However, the Supreme Court of Canada has distinguished between the immunity of a requesting state from civil liability pursuant to the State Immunity Act, and that state's submission to the jurisdiction of the Canadian courts "in respect of the extradition proceeding itself": *Schreiber v. Canada (Attorney General)*, [2002] 3 S.C.R. 269, at para. 27. This implies that costs orders are available within the specific context of that proceeding.
- [32] Similarly, when dealing with threats by U.S. officials to seek a harsher penalty if the person sought fought their extradition from Canada, the Court in *U.S.A. v. Cobb*, [2001] 1 S.C.R. 587, at para. 35 held that the requesting state is a party to judicial proceedings before a Canadian court. Most importantly, that state is "subject to the application or rules and remedies that serve to control the conduct of parties who turn to the courts for assistance", which could potentially include costs.
- [33] Based on these authorities I am prepared to assume for the purposes of this application, without definitively deciding the issue, that a costs award is not precluded by the nature of this proceeding, or the parties to it.
- [34] The test for disclosure in extradition proceedings was set out in *R. v. Larosa* (2002), 166 C.C.C. (3d) 449 (Ont. C.A.), at para. 76: (1) the allegations must be capable of supporting the remedy sought; (2) there must be an air of reality to the allegations; and (3) it must be likely that the documents sought would be relevant to the allegations. Bare assertions are not sufficient, and the purpose of the test is to avoid "fishing expeditions" without the necessary basis having been met.
- [35] An air of reality means that there is "some realistic possibility that the allegations can be substantiated if the orders requested are made": *Larosa* at para. 78. That definition was accepted by our Court of Appeal in *Scarpitti v. United States of America*, 2007 BCCA 498 at paras. 25-27.
- [36] This "minimal but essential burden" must always be met before disclosure will be ordered. It is not sufficient for the defence to claim that they cannot meet the test until they have received the material in question: *United States of America v. Wong*, 2017 BCCA 109 at para. 27, leave to appeal ref'd [2017] S.C.C.A. No. 153. In other words, the fact that the defence is in a "Catch-22" situation - unable to support the need for further disclosure without first having it - is not a reason to order disclosure.

- [37] This focused test is in keeping with the limited role of a judge in an extradition proceeding, and stands in contrast to the broad rights of disclosure that are accorded to an accused in a criminal prosecution.

Discussion

- [38] As a preliminary point, I agree with counsel for the Attorney General that to the extent that the underlying costs application is intended primarily as a means to recover counsel's fees or to compensate Mr. Cuppen for having paid them, it is not supported by the authorities.
- [39] There is no equivalency between costs in criminal matters and in the civil regime. Costs in the latter are expressly designed to defray a portion of a litigant's actual costs of participating, including "costs thrown away" in the event of an adjournment.
- [40] While recovery of an accused's actual legal costs can certainly form part of the remedy in appropriate criminal cases, the focus is not on the accused's out-of-pocket expenses, but on the effect of the Crown's conduct on the integrity of the trial process.
- [41] The question in this case is whether the chronology gives rise to a realistic possibility that an allegation of delayed disclosure, amounting to the required marked departure from acceptable standard of prosecutorial conduct, can be substantiated if the requested disclosure order is made.
- [42] The operative period is between the filing of the Charter notice in July and the date on which the existence of the evidence was revealed to the defence. The lengthy period since the certification of the record of the case in 2019 is not relevant to the analysis, because until the Charter notice was filed counsel for the Attorney General would have had no basis to be concerned about the adequacy of the identification evidence in the record, or to seek to supplement it.
- [43] Counsel for the Attorney General's failure to provide a response to the Charter argument before the hearing dates were fixed, and the resulting warning letter from the defence about costs, are also not relevant to the analysis. The hearing dates were not lost because of any deficiency in the time estimate, but because of a development that did not figure at all in counsel's advance discussions. The fact that the information came at the last minute in relation to the hearing dates would not in itself provide a basis for ordering costs.
- [44] Considering what range of possible errors or misconduct can realistically be inferred from this chronology, the most likely possibility is that it took a significant portion of the time between notice of the Charter application and the hearing dates for the request for additional evidence to make its way from counsel for the Attorney General, through international channels, to the local prosecuting authorities in the U.S., and for their answer that the evidence was forthcoming to make its way back.

- [45] Realistic possibilities involving some degree of fault are that the requesting state advised counsel for the Attorney General early in that timeline that it would be providing new evidence, but counsel failed to pass that information on to the defence, or that counsel neglected to seek the new evidence from the requesting state until shortly before the application.
- [46] Possibilities at the other end of the chain are that the requesting state failed to respond in a timely way to indications from counsel for the Attorney General that the existing identification evidence was being challenged, or failed to advise counsel for the Attorney General of the existence of the new evidence within a reasonable time of having obtained it.
- [47] In each of these examples something beyond inadvertence or mere negligence would be required to support a costs order. Without condoning it if it occurred, it is difficult to see how inaction or delay of this kind could rise to the necessary level of misconduct. In particular, the relatively short time period involved weighs against any delay during it being found to be egregious enough to meet the test.
- [48] There is also nothing beyond speculation to support the possibility of deliberate action underlying the sequence of events. Indeed, it is difficult to imagine what benefit could flow to the Attorney General or the requesting state from deliberately failing to attend to the production of evidence that would insulate the record of the case from Charter attack, or to inform Mr. Cuppen's counsel that it was in the works. In fact, common sense weighs against such a possibility - the sooner they obtained the new evidence and disclosed its existence, the sooner they could avoid the Charter application.
- [49] Of course, the notion that either entity would delay disclosure in order to cause Mr. Cuppen to lose the hearing dates and incur further legal costs is, on the current evidence, unlikely to the point of absurdity.
- [50] This situation is in stark contrast to the circumstances that supported my previous disclosure order in this proceeding (2021 BCSC 1784). There, specific detailed affidavit evidence of aggressive conduct by the investigating officer towards witnesses provided an air of reality to the defence's request for his disciplinary records and other related material, since such misconduct had the clear potential to undermine the reliability of the record of the case.
- [51] Accordingly, I am not satisfied that threshold has been met for me to order the Attorney General to provide the evidence set out in Mr. Cuppen's notice of application. Specifically, I find that there is no air of reality to the request, in the sense of a realistic possibility that the evidence sought could support an application for costs. Even viewed in their worst light, the realistic possibilities that arise from the current evidence would not amount to marked and unacceptable departures from reasonable prosecutorial standards, and the kinds of scenarios that would rise to that level are not realistic possibilities in light of that evidence.
- [52] The disclosure application must therefore be dismissed.

"Schultes J."

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