IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Haevischer,*
2013 BCSC 2014

Date: 20131105
Docket: X072945-B
Registry: New Westminster

Regina

v.

Cody Rae Haevischer, Matthew James Johnston and Quang Vinh Thang Le

Before: The Honourable Madam Justice Wedge

Ruling re: Application No. 104
James Bacon's Application for a Publication Ban

Counsel for the Crown:	L.J. Kenworthy
Counsel for the Accused Haevischer:	D. Dlab
Counsel for the Accused Johnston:	B.A. Martland
Counsel for the Accused Le:	B.A. Martland
Counsel for Postmedia Network Inc. d.b.a. The Vancouver Sun, Canadian Broadcasting Corporation, Global Television Network Inc., and Postmedia Network Inc. d.b.a. The Province:	M.J. Wagner
Counsel for J. Bacon:	B.R. Anderson
Place and Date of Hearing:	Vancouver, B.C. September 26, 2013
Place and Date of Judgment:	Vancouver, B.C. November 5, 2013

I. INTRODUCTION AND BACKGROUND

[1] This is an application by James Bacon for an order prohibiting the publication of certain trial evidence in these proceedings.

[2] The accused are charged with conspiracy to murder and first degree murder in relation to the October 19, 2007 shooting deaths of the "Surrey Six". Their trial by judge alone commenced on September 30, 2013. Mr. Bacon faces the same charges in relation to the same conspiracy but on a separate indictment. A date for his trial by judge and jury has yet to be set. It is not disputed that the evidence to be heard at the two trials is intertwined.

[3] Part of the Crown's case on the *Haevischer* trial comprises a body of discreditable conduct evidence that was earlier ruled admissible. This evidence largely relates to the Red Scorpions gang, of which the Crown alleges the accused and Mr. Bacon were members, and the gang's drug trafficking activities. The Crown will lead this evidence for narrative and context, as well as to advance the Crown's theory of motive for the alleged offences.

[4] On this application, Mr. Bacon seeks to prohibit the publication of evidence regarding both (1) his ostensible involvement in the alleged conspiracy and murders, and (2) uncharged allegations of discreditable conduct tendered by the Crown, until final judgment is rendered on his indictment.

[5] The Media Respondents oppose the application. The Crown and the *Haevischer* accused take no position.

[6] As this application was heard only two days before the commencement of the *Haevischer* trial, I advised the parties that I was dismissing Mr. Bacon's application with full written reasons to follow. These are those reasons.

II. POSITIONS OF THE PARTIES

Mr. Bacon

[7] It is the position of Mr. Bacon that the publication ban he seeks is necessary to prevent a real and substantial risk to his constitutional right to a fair trial before an independent and impartial jury. These risks arise with respect to the integrity of both the jury pool and the testimony of the Crown's witnesses.

[8] Mr. Bacon says that the "Surrey Six" deaths, the subsequent police investigation and the eventual charges have been the subject of intense and sustained media interest, particularly in relation to him. As an example of both the level of media interest in the case and the focus of that interest on him, Mr. Bacon points to an August 2013 article from the *Globe and Mail* reporting on the decision to move the *Haevischer* trial from New Westminster to Vancouver, an event which would not normally be considered newsworthy. A photograph of Mr. Bacon accompanies the article even though he is not one of the accused. Moreover, the article can be retrieved by searching "Bacon trial" on the newspaper's website.

[9] Thus, Mr. Bacon argues, the risks that exist in this case arise not merely from the sheer volume of media coverage that can reasonably be anticipated, but the strong association that has been created between the *Haevischer* trial and him. Given that the trial is expected to take upwards to a year, there will be an ongoing stream of coverage over this period; this must be contrasted with the situation where there is a distinct piece of evidence that a juror can be told to disregard. Additionally, he says, much of the evidence will be prejudicial and, unlike the *Haevischer* accused, he will not have the ability to challenge it.

[10] Mr. Bacon submits that the mandatory publication ban imposed by s. 648 of the *Criminal Code* is an acknowledgement of the risk to an accused person's fair trial rights posed by pre-trial publicity. He says that publication of evidence arising in the *Haevischer* trial that relates to substantially the same allegations of fact against him would render the protections of s. 648 in his proceeding illusory.

[11] As noted, Mr. Bacon argues that publication of the evidence from the *Haevischer* trial will also create a real and substantial risk to the fairness of his trial by contaminating the testimony of the Crown's witnesses, many of whom are unsavoury *Vetrovec* witnesses. He says these are individuals who are highly motivated to give evidence for the Crown, yet as *Vetrovec* witnesses, they cannot reasonably be expected to comply with orders that they avoid media coverage of the *Haevischer* trial.

[12] According to Mr. Bacon, there are no reasonable alternatives that will protect against these dual risks. The logistical challenges of moving a trial of this size to another location are such that change of venue is not a viable option; moreover, the media attention is national in scope, in any event. As the *Haevischer* accused have been in pre-trial custody for 4.5 years, an adjournment is not a reasonable alternative either. Finally, challenges for cause or strong cautions to the jury will be insufficient to counteract the extensive adverse publicity. In this regard, Mr. Bacon relies on Chief Justice Lamer's caution in *R. v. Dagenais*, [1994] 3 S.C.R. 835 at 886, regarding the pernicious effects of sustained pre-trial publicity:

> More problematic is the situation in which there is a period of sustained pre-trial publicity concerning matters that will be the subject of the trial. In such circumstances, the effect of instructions is considerably lessened. Impressions may be created in the minds of the jury that cannot be consciously dispelled. The jury may at the end of the day be unable to separate the evidence in court from information that was implanted in a steady stream of publicity.

[13] Mr. Bacon says that the ban he seeks is measured and goes only as far as is necessary to protect his right to a fair trial by an impartial jury. The media will not be precluded from reporting on the evidence regarding either the alleged offences or the discreditable conduct as it relates to the *Haevischer* accused; nor will it be precluded from reporting on the many aspects of the case that do not involve him, such as the killings themselves and how they were allegedly committed. According to the Crown's theory, after all, Mr. Bacon was not present. Finally, he says the proposed ban is only a temporary deferral as opposed to permanent ban, and that

once final judgment is rendered in his proceeding, the media will be free to report upon all of the evidence that was covered by the ban.

The Media Respondents

[14] The Media Respondents counter that Mr. Bacon has failed to demonstrate the necessity of the proposed ban. They say that speculation about impressions which "may be created" (from the *Dagenais* quote above) in the minds of potential jurors does not amount to a sound basis, grounded in the evidence, upon which to find that a publication ban is necessary. A rigorous and thorough vetting of the prospective jurors in Mr. Bacon's trial, coupled with firm judicial instructions once a jury is selected, will address any concerns arising from media coverage of the *Haevischer* trial.

[15] The Media Respondents highlight the fact that no trial date has yet been set for Mr. Bacon's trial. Further, they say, Mr. Bacon plans to bring a compendious *Charter* application in advance of his trial which will likely take a considerable amount of time to be heard and decided. This temporal gap between the *Haevischer* trial and jury selection in Mr. Bacon's trial -- which the Media Respondents suggest could be between 18 months to two years -- substantially mitigates the effects of publicity regarding the former on the latter.

[16] The Media Respondents also submit that Mr. Bacon has provided no basis or authority for the proposition that exposure to trial publicity will contaminate the Crown's witnesses. In any event, they say, just as jurors can be challenged for cause and examined as to their exposure to pre-trial publicity, the Court or counsel for Mr. Bacon are similarly able to question the witnesses regarding what exposure they have had to any media coverage of the earlier trial.

[17] The Media Respondents additionally contend that the publication ban, if granted, would render it impossible for them to meaningfully cover this trial. What would effectively amount to a blanket ban of a major criminal trial for a period of years is not the measured and proportionate response that Mr. Bacon maintains.

III. DISCUSSION

[18] This is not Mr. Bacon's first application in these proceedings for a publication ban. Raising similar arguments regarding the need to ensure that the protections afforded him in his own trial by s. 648 are not illusory, he previously sought a ban prohibiting publication of any information or evidence heard in pre-trial applications. While I declined to grant the order as sought, I did conclude that some publication restrictions were necessary to give effect to the statutory ban, and that the restrictions were proportional (indexed as 2012 BCSC 1679). In the result, I ordered that there be no publication of the record that had been filed on the Crown's application regarding the admissibility of discreditable conduct evidence, as well as the related ruling. The primary basis for my conclusion was that that voluminous body of prejudicial material was untested and untried, and that a substantial portion of it would not be placed in evidence at trial. (The ban also applied to pre-trial conferences and pre-severance rulings covered by s. 648.)

[19] The circumstances here are different, as I alerted at para. 94 of the previous ruling:

> As the Applicant did not seek an order concerning the trial itself, I have not addressed that issue. These reasons do not preclude such an application. Nevertheless, the Applicant must be aware that if he seeks to "clear the courtroom" in the trial of the Accused in *R. v. Haevischer et al.,* the bar will be high: *J.R-S.; Kossyrine; Glowatski;* and, *Murrin.*

[20] The decisions therein cited -- *R. v. J.S-R.* (2008), 236 C.C.C. (3d) 519 (Ont. Sup. Ct.); *R. v. Kossyrine,* 2011 ONSC 6081; *R. v. Glowatski,* [1999] B.C.J. No. 3210 (S.C.); and, *R. v. Murrin,* [1997] B.C.J. No. 3182 (S.C.) -- arose in high-profile cases in which either multiple accused were being tried separately or there was the prospect of anticipated evidence in an earlier proceeding tainting the prospective jury pool for a subsequent one. In none of these cases did the Courts find it necessary to impose publication bans in the trials heard first to ensure trial fairness in those which were to follow. Rather, they expressed their faith that with appropriate jury safeguards, the accused would be able to receive a fair and impartial trial; hence, my reference to the bar being high.

[21] Mr. Bacon brings this application pursuant to the common law. The governing analytical framework is therefore that set out in *Dagenais* (at 878):

> A publication ban should only be ordered when:
>
> (a) Such an order is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.
>
> [Emphasis in original.]

[22] As explained in *Dagenais*, this test endeavours to ensure that an appropriate balance is struck between an accused person's constitutional right to a fair and impartial trial on the one hand, and the public's constitutional right to free expression on the other.

[23] The onus of satisfying this test rests with the proponent of the ban, in this case, Mr. Bacon.

[24] I observe that at the first stage of the analysis it is not sufficient that there be some risk to trial fairness; the risk must be real and substantial. It must also be a risk that cannot be ameliorated by reasonably available alternative measures.

[25] I accept the proposition that there will be extensive publicity surrounding the *Haevischer* trial. The trial will be the first public airing of evidence relating to the shootings of the Surrey Six victims, an event that galvanized public anger regarding escalating gang violence in the Lower Mainland. There has been a great deal of media attention and commentary regarding the deaths and the subsequent police investigation in the intervening six years; it is a virtual certainty that the evidence at trial will be widely reported. I take Mr. Bacon's point that such is the media's interest in this case that even a brief adjournment of the trial and a change in its location from one Lower Mainland courthouse to another were considered worth reporting.

[26] It is apparent, as well, that Mr. Bacon is very strongly associated to this trial both factually and in the public consciousness. Given that until last year he was charged on the same indictment as the *Haevischer* accused, this is not surprising.

They are alleged co-conspirators, and it is inevitable that Mr. Bacon will feature prominently in the evidence led by the Crown to prove the conspiracy.

[27] Nevertheless, the question remains whether sustained publicity of the trial, including evidence which may implicate Mr. Bacon in the offences and acts of discreditable conduct, will create a real and substantial risk to Mr. Bacon's right to a fair trial that cannot be addressed by alternative measures.

[28] It is difficult to know what impact media coverage of a court case has on those who read and hear it. In *J.S-R* (which concerned the notorious "Boxing Day shooting" in Toronto), Justice Nordheimer drew a distinction between the impact of information on jurors and on those who hear it in a pre-trial context (at para. 40):

> First and foremost, there is a very different effect, it seems to me, in twelve persons, having been selected as jurors and knowing that they are tasked with deciding the issue of the guilt of the accused, learning of problematic material in the midst of trial contrasted with the effect on persons learning of such material when they have no idea that they will be a juror in the case to which the material relates. In the former situation there is not only the immediacy of the impact of such material on the jurors given their role, there are compelling reasons for the jurors to remember the information in the trial context that do not exist in the pre-trial context.

[29] Justice Oppal commented in *Murrin* how public recollection of information of this nature can be fleeting (at para. 20):

> Common sense tells us that public knowledge is at times fleeting in matters of this nature. We live in an era that is often marked by high degrees of pretrial publicity which often features revelations of prejudicial pretrial evidence. In fact, it can be safely said that sometimes media coverage can be described as frenzied. However, I do not think that the justice system is so fragile that appropriate corrective measures cannot be taken in certain cases so as to ensure that an accused's right to a fair trial is not jeopardized.

[30] In *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at para. 130, Cory J. commented that the alleged partiality of jurors arising from adverse pre-trial publicity "can only be measured in the context of the highly developed system of safeguards which have evolved to in order to prevent such a problem". It is only when these safeguards are inadequate to guarantee impartiality that there will be a breach of s. 11(d) of the *Charter*.

[31] Justice Cory emphasized that with today's methods of communication, the goal of finding twelve jurors who know nothing about a highly-publicized case is not realistic. He went on to say that an impartial juror is not one who is necessarily ignorant of the facts of a case but, rather, one who is able to discard previously held opinions and approach his or her task with an open mind. The goal of finding twelve such jurors, said Justice Cory, is a readily attainable one:

> [132] The objective of finding 12 jurors who know nothing of the facts of a highly-publicized case is, today, patently unrealistic. Just as clearly, impartiality cannot be equated with ignorance of all the facts of the case. A definition of an impartial juror today must take into account not only all our present methods of communication and news reporting techniques, but also the heightened protection of individual rights which has existed in this country since the introduction of the Charter in 1982. It comes down to this: in order to hold a fair trial it must be possible to find jurors who, although familiar with the case, are able to discard any previously formed opinions and to embark upon their duties armed with both an assumption that the accused is innocent until proven otherwise, and a willingness to determine liability based solely on the evidence presented at trial.
>
> [133] I am of the view that this objective is readily attainable in the vast majority of criminal trials even in the face of a great deal of publicity. The jury system is a cornerstone of our democratic society. The presence of a jury has for centuries been the hallmark of a fair trial. I cannot accept the contention that increasing mass media attention to a particular case has made this vital institution either obsolete or unworkable. There is no doubt that extensive publicity can prompt discussion, speculation, and the formation of preliminary opinions in the minds of potential jurors. However, the strength of the jury has always been the faith accorded to the good will and good sense of the individual jurors in any given case.

[32] The jurisprudence is replete with similar affirmations of faith and confidence in the jury system. *Dagenais* itself is one such example (at 884-5).

[33] Justice Cory went on in *Phillips* to observe that "the solemnity of the juror's oath, the existence of procedures such as change of venue and challenge for cause, and the careful attention which jurors pay to the instructions of a judge all help to ensure that jurors will carry out their duties impartially" (at para. 134).

[34] For the reasons advanced by Mr. Bacon, I accept that a change of venue and an adjournment of the *Haevischer* trial are not viable alternatives. I would observe, however, that a date for Mr. Bacon's trial has yet to be set, and that he intends to

bring a compendious *Charter* application in advance of trial. To the extent the concern is that pre-trial publicity will taint the prospective jury pool, this temporal gap will in all likelihood alleviate some of the impact.

[35] In *Glowatski*, the period between the two trials in question (relating to the death of Reena Virk) was in the range of seven months. Justice Macaulay accepted that this temporal gap "may be insufficient to clear all vestigial memories of the coverage of the Glowatski trial that all prospective jurors may have" (at para. 20). Nevertheless, he recognized that it was more likely, as time went on, that a greater number of prospective jurors would have little or no recollection of the media coverage.

[36] Similarly in *Murrin*, the two proceedings in question were also at least six or seven months apart. Justice Oppal made the comment about the fleeting nature of public recollection cited earlier, and declined to order a publication ban.

[37] On the other hand, there was less than two months separating judgment in one trial and jury selection in a related proceeding in *R. v. Giles*, 2008 BCSC 1900, a decision cited by Mr. Bacon. That circumstance was pivotal to the conclusion of MacKenzie J. (as she then was) that a limited ban regarding certain information was warranted.

[38] I do not know when Mr. Bacon's compendious *Charter* application will be set down or how long it will take to be heard and decided. Accordingly, I do not know whether the Media Respondents' assessment that Mr. Bacon is 18 to 24 months away from trial is accurate. Nevertheless, the notion of "compendious" suggests that the application will not be a brief matter, and that Mr. Bacon's trial is still some distance away. It is significant, in my view, that a date for the commencement of his trial has not yet been set.

[39] While this alone is not a complete answer to Mr. Bacon's concerns, I am satisfied that together with rigorous challenges for cause and firm judicial instructions to the jury to decide the case solely on the evidence before them, these

measures are capable of addressing any risks to his right to a fair trial. The vehicle of challenge for cause will identify those jurors who have formed firm opinions and are unable to approach the case with an open mind. As the authorities make clear, Mr. Bacon is entitled to an impartial jury, not an uninformed one. Moreover, instructions to those jurors who survive the challenge process of the need to decide the case solely on the evidence heard in the courtroom and not on extraneous information will further minimize any residual risks.

[40] As I noted earlier, it is Mr. Bacon's position that challenges for cause and judicial instructions will not be sufficient to counter the extensive and sustained pre-trial publicity, and he relies on Chief Justice Lamer's caution in *Dagenais* in support. The applicants in *J.S-R* raised the same concerns and the same passage from *Dagenais*. Justice Nordheimer dismissed the argument. As I share his view of the matter, I have taken the liberty of quoting from his reasons at some length (paras. 49-51):

> [49] In terms of challenges for cause, the applicants contend that such a remedy is ineffective in this case because the effect of the publicity will be sustained and lead to deeply ingrained perceptions that would not be revealed through the challenge procedure. They offer the same contention in response to the fifth alternative of strong judicial instruction, saying that no judicial instruction can overcome the effects of extensive pre-trial publicity. On this latter point, the applicants rely heavily on the following statement of Chief Justice Lamer in *Dagenais*, at para. 88:
>
> > More problematic is the situation in which there is a period of sustained pre-trial publicity concerning matters that will be the subject of the trial. In such circumstances, the effect of instructions is considerably lessened. Impressions may be created in the minds of the jury that cannot be consciously dispelled. The jury may at the end of the day be unable to separate the evidence in court from information that was implanted by a steady stream of publicity.
>
> [50] This is the observation by the Chief Justice to which I made reference above and regarding which I would offer a couple of comments. First, there is nothing in this one paragraph, or elsewhere in the decision in *Dagenais*, that suggests that the Supreme Court of Canada was intending to say that in cases where there is "sustained pre-trial publicity" a publication ban should automatically follow. Second, this observation was made in the context of a discussion of the effectiveness of judicial instructions. I do not read the Chief Justice's observation, viewed against the decision as a whole, as suggesting a conclusion that the concerns expressed could not be addressed through

> other remedies, notably, the challenge for cause process. The implications of such a suggestion would again be sweeping.
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> [51] I should also note that the applicants did not place any evidence before me that would sustain their assertion that the challenge for cause process will fail to reveal those persons who have had indelible impressions created in their minds as a consequence of the publicity that may surround the trial of J.S-R.

[41] Mr. Bacon raises as a second risk the contamination of the testimony of the Crown's witnesses by the extensive publicity. In my view, should a witness' testimony alter from this trial to the next, the matter can be fully explored in cross-examination.

[42] Accordingly, I am not satisfied in the circumstances that the proposed ban is necessary to prevent a real and substantial risk to the fairness of Mr. Bacon's trial.

[43] While not strictly necessary, I will go on to balance the salutary effects of the proposed ban against its deleterious effects on the free expression of those affected by it.

[44] The salutary effect of the proposed ban would be that the risks to trial fairness that Mr. Bacon identifies would be somewhat reduced. The deleterious effects of the ban on the media's ability to publish the evidence at trial, however, would be substantial. The proposed ban would prohibit publication of evidence regarding Mr. Bacon's involvement in the alleged conspiracy and murders, and in uncharged allegations of discreditable conduct.

[45] Although Mr. Bacon characterizes the ban as tailored, I do not agree that is the case.

[46] The discreditable conduct evidence that the Crown will elicit at trial is principally for the purpose of establishing motive on the part of the alleged co-conspirators -- the *Haevischer* accused and Mr. Bacon alike -- to commit the alleged murders. It is also advanced to prove that Mr. Bacon was one of the leaders of the Red Scorpions whose influence was such that his co-conspirators would commit murder at his behest. Mr. Bacon's role in the conspiracy, as alleged by the Crown, is

central to the proof of the motivation of the *Haevischer* accused and, thus, to the proof of their participation in the alleged murders. As I observed in the earlier publication ban ruling, it is simply not possible to unravel or isolate the evidence implicating Mr. Bacon from that implicating the *Haevischer* accused. As a result, were the ban to be ordered, the media would not be able to sensibly report the evidence without including the references to Mr. Bacon. The ban would also be of indeterminate duration, as a trial date has yet to be set for Mr. Bacon's trial.

[47] In my view, the effect of the proposed ban on the public right to free expression would be substantial, and outweighs its salutary effects.

IV. CONCLUSION

[48] Mr. Bacon has failed to establish that the publication ban he seeks is necessary. Accordingly, his application is dismissed.

The Honourable Madam Justice C.A. Wedge