IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Wiens,*
2013 BCSC 1538

Date: 20130627
Docket: 40090-K
Registry: Penticton

Regina

v.

Keith Gregory Wiens

Before: The Honourable Mr. Justice Barrow

Oral Reasons for Judgment

Chambers

Counsel for Crown:	C. Forsyth
Counsel for the Accused:	C. Evans
Place and Date of Trial/Hearing:	Penticton, B.C. June 19, 2013
Place and Date of Judgment:	Penticton, B.C. June 27, 2013

[1] **THE COURT:** Marshall Jones, the editor of Penticton Info Tel news website, has applied for a copy of an exhibit in this trial. To put the matter into context, the accused, Keith Wiens, is on trial for second degree murder in relation to the death of his common law spouse, Lynn Kalmring. Ms. Kalmring was shot on August 16, 2011, in the bedroom of a condominium she shared with Mr. Wiens in Penticton.

[2] The trial began before a jury on May 30, 2013. The exhibit in question was entered on June 4th by an exhibit officer, who said that he found it on the top of a roll-top desk in the kitchen of the residence. It is a three-page, handwritten document which, while not formally dated, appears to have been written at 12:40 a.m. on January 1, 2011. It is addressed to “Lynn”. Assuming it was written by Mr. Wiens, and that appears to be the case, it deals with an argument they had had not long before the letter was written. The bulk of the letter is about the parties’ financial affairs. In it, Mr. Wiens wrote that he was unable to support a condominium they owned in Arizona and suggested that they sell it. Failing that, he wanted Ms. Kalmring to pay half of the expenses.

[3] On the last page of the letter, Mr. Wiens wrote (as read in):

> Starting January 2011, it will be a two-way street regarding financial matters.

He explained that they would be sharing expenses starting that day. He signed it, "Love you, K." The letter has a number of interlineations and some words have been crossed out. The word "Love" appears twice in the body of the letter and has been crossed out. Mr. Wiens wrote (as read in):

> You want to stay together, get married, et cetera.

The word "married" is crossed out and under it is written (as read in):

> Not anymore.

[4] When the letter was entered into evidence, the Crown asked that the officer read it into the record. I refused permission to do that for two reasons. First, the letter can be read by the jurors themselves, and reading it into the record would not

assist them. Second, because of the interlineations and the fact that words have been crossed out, reading the letter without reference to those features would distort its potential significance, and attempting to include those features would almost inevitably give rise to editorializing by the witness, which may also distort the contents and potentially result in the officer giving opinions about matters which are for the jury to decide. In short, the exercise held the promise of raising more dangers or problems than the limited value reading it into the record might have. The result of the foregoing is that the letter was referred to, and there were brief submissions about whether it should be read into the record. It was shortly after that, that a member of the media informally indicated that he wanted a copy of the exhibit. I explained that it would be necessary to make a formal application with notice to those whose interests might be affected. That has now been done and the issue has been spoken to.

[5] Mr. Jones, who argued the application on his own behalf, says that the *Dagenais/Mentuck* analysis applies to this question, and as a result, the media is entitled to a copy of the exhibit, unless the parties seeking to limit that access proves that the limitation is necessary to prevent a serious risk to the interest of justice. Further, that such a risk must be one well-grounded in the evidence.

[6] A reporter with Mr. Jones' publication has been covering the trial and reporting on it from the outset. Info Tel Penticton operates a website on which it posts reportage from the South Okanagan on a daily and sometimes more frequent basis. If the exhibit is released, Mr. Jones plans to have it scanned and published on the website, complete with the interlineations and showing the words that have been crossed out. He argues that to the extent that is done, there is no risk of misrepresentation of the document. And while a reporter may offer speculation about who wrote it, or what it means, he or she would be able to do that, were they allowed to simply inspect the document without copying it. I note that the Crown does not oppose the latter alternative.

[7] The Crown argues that the authorship of the letter and the meaning of its contents are matters that the jury may eventually have to decide. It is now an exhibit, largely without context, and thus its distribution or publication may give rise to distortion. They argue that Mr. Jones' organization and other interested media should be allowed to inspect the exhibit, but not copy it; once a verdict has been rendered, they would be entitled to a copy of it, but not before.

[8] Counsel for Mr. Wiens opposes the application. He argues that to provide a copy now would or might compromise his client's right to a fair trial. He argues that while the media has a right to access court records, broadly understood, that does not mean they have a right to receive copies of those records in mid-trial. He notes that he opposed the reading of the exhibit by the witness when it was tendered because of the almost inevitable consequence that doing so would involve interpretive editorializing by the witness. To have the exhibit distributed to the media would result in the same thing; thus, in effect, courting the risk that my ruling was intended to avoid.

[9] As I understand his position, he opposes any access to the document now, whether by way of copying or simply examining it.

[10] The analytical framework, within which this application falls to be decided, was first articulated in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835. It was refined in *R. v. Mentuck*, [2001] 3 S.C.R. 442 and then summarized in *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 where, at para. 26, Fish J., writing for the court, held:

> [26] …that case that discretionary action to limit freedom of expression in relation to judicial proceedings encompasses a broad variety of interests and that a publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free

> expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

He then reiterated Justice Iacobucci's caution, expressed in *Mentuck*, that:

> [27] …the "risk" in the first prong of the analysis must be *real, substantial*, and *well grounded in the evidence*…

[11] While the principles expressed in *Dagenais* and *Mentuck* are principles of general application, the context to which they are applied will affect the analysis. In *Dagenais*, the issue arose as a result of an application to prevent the broadcast of a television documentary dealing with circumstances that paralleled a trial that was about to be commenced. In *Mentuck*, the issue arose when the Crown sought to ban the publication of evidence relating to investigative techniques used by undercover police officers.

[12] Madam Justice Holmes reviewed these cases and other authorities in the context of an application for the release of copies of exhibits when the release is sought mid-trial in *R. v. Panghali*, 2011 BCSC 422. In doing so, she made reference to Sharpe J.A.'s decision on behalf of the Ontario Court of Appeal in *R. v. Canadian Broadcasting Corp*., 2010 ONCA 726. In that case, the C.B.C. had applied for the release of a copy of an exhibit for the specific purpose of preparing an investigative documentary. There was no suggestion that the exhibit would be displayed to what Derrick P.C.J. referred to as the "infinity of the Internet", in *Hyde (Re),* 2009 NSPC 34. Holmes J. did not read *R. v. Canadian Broadcasting Corp.* as authorizing or mandating the unrestricted release of copies of exhibits to the media, either mid-trial or at the conclusion of a trial. I agree with her analysis of that case.

[13] She also adopted a practical approach to the requirement that the risk that release of a copy of an exhibit might give rise to, need be supported by “convincing evidence” to use the language of Sharpe J.A., or to be "well-grounded in the evidence" to use the language of Iacobucci J. in *Mentuck*.

[14] Her approach reflects the fact that copying exhibits will usually give rise to the need to consider other interests and will necessarily engage the court's supervisory

responsibility over material entrusted to its care. She found the criteria identified by Stevenson J. in *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671 instructive. Those criteria or factors are:

> 1) The nature of exhibits as part of the court "record".
>
> 2) The right of the court to inquire into the use to be made of access, and to regulate it.
>
> 3) The fact that the exhibits were produced at trial and open to public scrutiny and discussion so that the open justice requirement had been met.
>
> 4) That those subjected to judicial proceedings must undergo public scrutiny of what is said at trial or on appeal and contemporaneous discussion is protected, but different considerations may govern when the process is at an end and the discussion removed from the hearing context.

[15] The exhibits to which the media sought access in *Panghali* were, with one exception, video recordings either of the accused or of someone that might have been the accused. The copies were sought mid-trial, but after all the evidence and arguments had been made and the case was on reserve.

[16] Mr. Panghali was on trial for murder and interfering with human remains. One of the issues at trial was identity. Holmes J. refused to release copies of the exhibit when the application was brought, concluding that no copies would be provided at least until she had rendered her decision. She deferred the eventual determination of that question until after the conclusion of the trial and judgment had been rendered. She did, however, permit the media to examine the exhibits, including, in the case of the video exhibits, by viewing them under the supervision of the court registry staff. She held, on the question of whether to release copies of the exhibits, while the case was on reserve, was not warranted upon an application of *Dagenais/Mentuck* analysis, largely because:

> [44] To have released those exhibits during the trial or the deliberation process for wide dissemination would, in my assessment, have run a high risk of precipitating a parallel process of trial and judgment in the news and social media, based on only a portion of the evidence in the trial.

She reached that conclusion notwithstanding that the case was not being heard by a jury. She said that:

> [46] Mr. Panghali was entitled to a trial -- including during the period of the judge's deliberations -- unencumbered by the distractions and pressures of a parallel, extra-judicial process over the "infinity of the internet".

This comment was made in the context that the exhibits, about which she was concerned, were exhibits that were yet to be interpreted by the court or whose evidentiary significance was yet to be assessed.

[17] There are several distinctions between the matter at hand and the situation in *Panghali*. First, release of a copy of the exhibit is unlikely to give rise to a parallel process of trial and judgement on the issues in this trial. At least it will not do that to any significant extent and not much more than might have happened had the exhibit simply been examined or read into the record. Second, unlike *Panghali*, where the videotape exhibits were played in court and were reported on, during the trial, the exhibit in this case has not been read into the record for the reasons noted above. Third, this is a jury trial, and while the law has confidence in the ability of jurors to follow their oath and the instructions given to them on the law, instructions which include a direction that they decide the case based solely on the evidence and ignore anything they may see or read in the media, the fact that it is a jury trial remains a significant, contextual factor.

[18] One of the difficulties I face at this juncture is that I do not yet know how or to what extent this exhibit will feature in the eventual analysis of the issues. It may play very little role. On the other hand, it may assume a significance that is not yet apparent to me. The fact that it appears relatively innocuous, on its face, is not a firm measure against which to make that assessment. The accused, of course, is not obliged to disclose his defence at this trial. The fact that an application for production of an exhibit has been made does not displace that right.

[19] This imponderable was not in play in *Panghali* because the issue was not addressed until all the evidence and the arguments had been completed.

[20] The only competing interest at play at this juncture, it seems to me, is the fair trial interest of the accused. The media and, by extension, the public's right to access to court records is important. However, what is at issue at this juncture is not prohibiting access to the material, but merely delaying it, at least until the case is in the jury's hands. While I have great confidence in the ability of jurors to follow instructions that they receive during the trial, it is unnecessary and, in my view, unwise to test that ability at this juncture. It is important that Mr. Wiens have confidence that the process has been fair. He may be constrained at this juncture from disclosing the implications of this document for the reasons I have just noted.

[21] On balance, I think it appropriate that the media be given access to the exhibit under the supervision of the court; that is, they can view it, take notes about its contents and otherwise consider it. I am not persuaded that releasing a copy is either required by the law or prudent at this stage, and I decline to permit copies to be made of it. If Mr. Jones wishes a copy at the conclusion of the trial, he is at liberty to reset his application and I will deal with it at that time.

[22] I acknowledge the argument that making the exhibit available to the media may give rise to speculation about who wrote which parts of it. I do not regard that as determinative of the matter or inconsistent with my earlier ruling. The media and public more generally are permitted and likely do speculate about the importance of evidence given during the course of a trial on a day-to-day basis. It does not matter if the speculation is based on a document or oral testimony, the implications are the same.

[23] The mischief that my earlier ruling sought to avoid was not to avoid speculation or editorializing by the public or by the media, but rather to avoid speculation or editorializing by a witness in the proceeding during the course of giving evidence. Allowing the media access to this exhibit, for their examination at this stage, does not court that concern.

[24] That is my ruling, Mr. Jones. You are welcome then to examine the exhibit, take notes about it as you see fit. You can arrange to do that with the assistance of the court staff in the registry where a clerk can probably assist you in that regard.

[25] If you want a copy after the trial is over, or indeed once it is in the hands of the jury, I am happy to hear from you and I will simply address that at that juncture. Thank you. Any questions from your point of view, Mr. Evans?

[26] MR. EVANS: No, sir. Thank you.

[27] THE COURT: Thank you. Mr. Forsyth?

[28] MR. FORSYTH: No. Thank you.

[29] THE COURT: Thank you. Mr. Clerk, I will just leave it in your capable hands to see how that can be mechanically carried out.

[30] MR. JONES: If I may, sir, is it possible to get a copy of this decision?

[31] THE COURT: Yes. I will order that a transcript be prepared, and it will be prepared in due course. Thank you.

"G.M. Barrow, J."
Barrow J.