NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Chehill, 2009 NSCA 85

Date: 20090814
Docket: CAC 307354
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Mandeep Singh Chehil

Respondent

Judge: The Honourable Justice Fichaud

Application Heard: August 13, 2009, in Chambers

Held: Extension and leave to intervene granted with conditions.

Counsel: Walter Thompson, Q.C. for the applicant and proposed intervenor, the Canadian Civil Liberties Association
Mark Cowan, for the appellant (respondent to the application), Her Majesty the Queen
Stanley MacDonald, Q.C. (not appearing), for the respondent, Mandeep Singh Chehil

Taking Evidence of Witnesses

Order restricting publication of evidence taken at preliminary inquiry

539. (1) Prior to the commencement of the taking of evidence at a preliminary inquiry, the justice holding the inquiry

(a) may, if application therefor is made by the prosecutor, and

(b) shall, if application therefor is made by any of the accused,
make an order directing that the evidence taken at the inquiry shall not be published in any document or broadcast or transmitted in any way before such time as, in respect of each of the accused,

(c) he or she is discharged, or

(d) if he or she is ordered to stand trial, the trial is ended.

Accused to be informed of right to apply for order

(2) Where an accused is not represented by counsel at a preliminary inquiry, the justice holding the inquiry shall, prior to the commencement of the taking of evidence at the inquiry, inform the accused of his right to make application under subsection (1).

Failure to comply with order

(3) Every one who fails to comply with an order made pursuant to subsection (1) is guilty of an offence punishable on summary conviction.

(4) [Repealed, 2005, c. 32, s. 18]
R.S., 1985, c. C-46, s. 539; R.S., 1985, c. 27 (1st Supp.), s. 97; 2005, c. 32, s. 18.

Decision:

[1] The Canadian Civil Liberties Association (CCLA) applies for an extension to apply for intervention and, if granted, for leave to intervene in this criminal appeal.

Background

[2] Operation Jetway is an RCMP program that monitors the travelling public at airports, bus and train stations, to identify then arrest persons carrying narcotics and other contraband. The officers use indicators to identify suspects.

[3] On November 16, 2005, Mr. Chehil travelled on a Westjet airplane from Vancouver to Halifax. RCMP officers obtained the passenger manifest from Westjet, and examined Mr. Chehil's ticketing information. The officers concluded that the information exhibited Jetway indicators. Then the officers used a police service dog to detect the odour of cocaine from Mr. Chehil's checked baggage at the Halifax airport. Mr. Chehil was arrested. The police searched his baggage and found 3 kilograms of cocaine. Mr. Chehil was charged with possession of cocaine for purposes of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, ch. 19.

[4] Mr. Chehil applied to the trial judge, Justice Simon MacDonald of the Supreme Court of Nova Scotia, for exclusion of evidence under s. 24(2) of the *Charter*. By a decision of December 19, 2008 (docket 277618), the judge ruled that, by obtaining from Westjet and using Mr. Chehil's information on the passenger manifest, the RCMP violated Mr. Chehil's right to be free from an unreasonable search and seizure under s. 8 of the *Charter*. The judge excluded the narcotics evidence under s. 24(2), and acquitted Mr. Chehil.

[5] By a notice of appeal dated February 12, 2009, the Crown appealed to the Court of Appeal. The principal issue on the appeal will be whether the judge erred in his ruling that s. 8 of the *Charter* was violated. The Crown and Mr. Chehil have filed factums, and the appeal will be heard on September 21, 2009.

[6] On August 6, 2009, the CCLA filed a notice of motion for leave to intervene in the appeal. The *Civil Procedure Rules* provide that a motion for intervention be filed within fifteen days from the notice of appeal, which here would mean by the

end of February, 2009. So the CCLA also moved for an extension. Mr. Chehil's counsel consented in writing to the extension and intervention, and did not appear at the hearing of the CCLA's motions. The Crown opposed the extension and intervention. I heard the motions on August 13, 2009.

Jurisdiction

[7] This is a criminal appeal, and is governed by the new *Rules* that came into force in January 2009. Criminal appeal *Rules* 91.02(2) and (3) incorporate the procedures in the civil appeal *Rule* 90, when not inconsistent with *Rule* 91. This incorporates *Rule* 90.19, governing intervention. Intervention is not inconsistent with the criminal *Rule,* and has been permitted under the former criminal *Rule* 65, that incorporated the former civil *Rule* 62. *R. v. R (KA)* (1992), 116 NSR (2d) 418, per Chipman, J.A.; *R. v. Murdock and Johnson* (1996), 148 NSR (2d) 183 at ¶ 7, per Bateman, J.A.; *R. v. Regan* (1999) 174 NSR (2d) 1, at ¶ 11, per Cromwell, J.A. In short, I will apply the principles of *Rule* 90.19.

Extension

[8] *Rule* 90.19(4) requires that a motion to intervene be filed within fifteen days of the filing of the notice of appeal. The CCLA's motion to intervene is over five months late. Rule 91.04 permits a judge to extend this time.

[9] In *Jollymore Estate v. Jollymore*, 2001 NSCA 116, 196 NSR (2d) 177, at ¶ 22, Justice Saunders summarized the tripartite test for extensions of time to file a notice of appeal: (1) the applicant must have had a *bona fide* intent to appeal when the right of appeal existed; (2) he must have a reasonable excuse for the delay; (3) there must be a compelling reason to warrant an extension, such as a strong case for error at trial. Flavoring this test is the broader question of "whether justice requires that the application be granted": *Tibbettts v. Tibbetts* (1992), 112 NSR (2d) 173, at ¶ 14, per Hallett, J.A.; *Jollymore,* ¶ 24. To the same effect: *McCarron v. Houghton*, 2003 NSCA 148, 220 NSR (2d) 22, per Oland, J.A., at ¶ 5; *R.K. v. Family and Children's Services of Cumberland County*, 2006 NSCA 19, ¶ 3, per Fichaud, J.A.

[10] The first *Jollymore* test, the intent to appeal within the time limit, cannot apply to an intervenor who was neither a party at trial nor notified of the trial decision's issuance. Instead, the key factors for a proposed intervenor are whether

there was a reasonable excuse for the delay and whether that delay would prejudice the other parties. The CCLA has filed an affidavit stating that (1) it became aware of the decision under appeal in June, 2009, (2) the CCLA was then undergoing a significant internal transition with the replacement of its general counsel and, (3) after the new general counsel's appointment, the CCLA moved expeditiously. I accept that there was a reasonable excuse for the delay. Neither would the CCLA's intervention, under the conditions I will discuss later, prejudice either the Crown or Mr. Chehil.

[11] The third *Jollymore* condition, compelling reasons such as a strong case for error at trial, is unsuited to a proposed intervention. The appeal is already underway, and the intervention will not change that. The critical factor for a proposed intervention is whether the intervenor would bring a submission or perspective on the parties' issues that reasonably may be expected to assist the court. But it is unnecessary to consider this critical factor on the proposed intervenor's motion for an extension. That is because this same factor inheres in the merits of the intervention application itself, as I will discuss shortly.

[12] The CCLA has reasonably explained its delay. Its intervention, under the appropriate conditions that I will discuss later, will not prejudice the parties. I grant the CCLA's motion for an extension to apply for leave to intervene.

Intervention

[13] *Rule* 90.19(5) says that the motion for leave to intervene must describe the intervenor, his interest in the appeal, his position to be taken on the appeal, his proposed submissions and their relevance, the reasons those submissions will be useful to the Court of Appeal and how those submissions will differ from those of the other parties. The CCLA has filed an affidavit that addresses those items.

[14] The authorities have described a flexible list of criteria to govern the judge's discretion whether to allow an intervention under what are now *Rules* 90.19(1) and (2): *R. v. Regan* (1999), 174 NSR (2d) 1, at ¶ 29-53, per Cromwell, J.A.; *R. v. Murdock* (1996) 148 NSR 2(d) 183, at ¶ 10, per Bateman, J.A.; *Arrow Construction Products Ltd. v. Nova Scotia (Attorney General)* (1996), 148 NSR (2d) 392, at ¶ 5, per Bateman, J.A. *Logan v. N.S. (Workers Compensation Appeals Tribunal)*, 2006 NSCA 11, ¶ 8, says:

> [8] ... Generally, an intervention should (1) target the parties' existing lis and (2) accommodate the process of the existing appeal while (3) augmenting and not just duplicating the parties' submissions or perspectives to assist the court's consideration of the parties' issues...In the circumstances of this application the key factor is whether the proposed intervention would bring a different or broader perspective that may assist the court to consider and determine the parties' issues on the appeal.

[15] The CCLA filed an affidavit of Mr. Graeme Norton, Director of the CCLA's Public Safety Project. The affidavit, under the heading "The Position to be Taken by the CCLA if Leave is Granted", said:

> 14. The CCLA respectfully submits that its unique and balanced approached will be of assistance to this Honourable Court. If granted leave to intervene, I believe the CCLA's submissions would be that:
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> - The information contained in an airline passenger manifest can reveal intimate details about the lifestyle and personal choices of the individual to whom it pertains (and potentially other individuals as well);
>
> - When individuals provide commercial air carriers with personal information required for the purpose of facilitating air travel they do not waive, release or abandon their legitimate expectation of privacy in that information. Such individuals rightly expect that this information will not be accessed or made available to police or other state agents without proper legal authorization.
>
> - The existence of legislation, such as *PIPEDA*, which creates specific privacy obligations for custodians of personal information, is a relevant factor to be considered when assessing an individual's reasonable expectation of privacy in personal information provided to a commercial airline;
>
> - Subsection 7(3) of *PIPEDA* does not create a new power for police to compel otherwise private information nor does it defeat a person's *Charter* protection against unreasonable search and seizure. Clauses (ii) and (iii) of subsection 7(3)(c.1) of *PIPEDA* require that police must demonstrate that they have reasonable and probable grounds to believe that an offence is being committed before they are given access to otherwise private personal information in the possession of a commercial airline. In the

> absence of exigent circumstances, police should be required to present a warrant before they are granted access to such information.
>
> • All members of the travelling public have a right to personal privacy protected under section 8 of the *Charter*. Warrantless accessing of airline passenger information by police constitutes a significant and impermissible encroachment of this right;

"*PIPEDA*"" is the *Personal Information Protection and Electronic Documents Act*, S.C. 2005, ch 5.

[16] The Crown submits that the CCLA would raise collateral matters that would distract from the issues between the Crown and Mr. Chehil.

[17] The Crown's memorandum for this application says (¶ 18) that, in the appeal, the Court will face the issue of "whether the Respondent Chehil had an expectation of privacy in Westjet computer records (s. 8 of the *Charter*), and whether the judge correctly interpreted and applied the law with respect to s. 24(2) of the *Charter*". The CCLA does not seek to participate in any debate over s. 24(2). The CCLA focuses on the expectation of privacy under s. 8.

[18] *PIPEDA*, according to its statement of purpose in s. 3, governs "the use and disclosure of personal information in a manner that recognizes the right of privacy of individuals". The decision under appeal referred to *PIPEDA*. in the course of the judge's s. 8 analysis under the *Charter*. Mr Chehil's factum to the Court of Appeal submits (¶ 39):

> The very existence of *PIPEDA* clearly supports the expectation of privacy in the information in the case at bar.

The Crown takes the opposite view, and submits that *PIPEDA* does not support any expectation of privacy for the purposes of s. 8.

[19] From my review of the factums filed by the Crown and Mr. Chehil for the appeal, it appears that there is a live issue whether *PIPEDA* affects the expectation of privacy that underlies the application of s. 8. Counsel for the CCLA said, on the hearing of this application, that the CCLA would not challenge the validity of *PIPEDA*, or any other legislation. Rather, the CCLA would address the

interpretation of *PIPEDA* and the reasonable expectation of privacy under s. 8. In my view, the CCLA's proposed position would be neither collateral nor distracting to the issues between the Crown and Mr. Chehil on the appeal.

[20] The Crown then says that intervention should be denied because the CCLA's position would substantially duplicate Mr. Chehil's position.

[21] The authorities I have cited earlier speak of the value to the court of an intervenor's different perspective on the parties' joined issues (e.g. *Logan*, ¶ 9-11). In my view, that point pertains to this case.

[22] Mr. Chehil aims to show that his own reasonable expectation of privacy engaged s. 8 of the *Charter*. The Crown's perspective includes the maintenance of the elements of the RCMP's national Jetway Program. The Crown's broader perspective encompasses the privacy that reasonably may be expected by travellers at airports generally. For instance, the Crown's factum on the appeal says:

> 34. Society's necessary interest in law enforcement and airline security readily outweighs any competing individual interest in the ticketing information. Indeed, the weight of considered authority is that travelers who enter Canadian airports and travel in the face of significant security restrictions do so with little, if any, expectation of privacy with respect to both their person and their checked baggage.
>
> . . .
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> 38. The evidence given by Dan Tanner and Cyril Cameron established that there is no real expectation of privacy for air travelers. Their evidence was uncontroverted. Air travelers are subjected to a high degree of security, both with respect to their person but also their belongings. This level of security is both open and notorious.

[23] The Crown asks the Court of Appeal to describe the reasonable expectation of privacy, under s. 8 of the *Charter*, pertaining to travellers generally at Canadian airports. Mr. Chehil may find it expedient to respond directly to the Crown's broad submissions regarding air travellers generally. Or he may not, choosing to focus more narrowly on his personal circumstances. The CCLA, however, will respond directly to the Crown's broad submission. In my view, this perspective may

reasonably be expected to assist the court on the issues that arise in this appeal. I disagree that the intervention would be duplicative.

[24] I grant leave that the CCLA may intervene.

Conclusion

[25] I extend the CCLA's time for this motion and grant leave to the CCLA's intervention. The following conditions will apply, both to minimize prejudice from the CCLA's late motion and to limit the intervention to the purposes that may be expected to assist the Court:

> (a) If the CCLA does not already possess the appeal book and factums with books of authorities from the Crown and Mr. Chehil, the appellant (the Crown) will serve those on counsel for the CCLA by August 20, 2009.
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> (b) The CCLA may file a factum of not longer than 20 pages, excluding appendices and authorities. The factum and authorities will be filed and served on counsel for the Crown and Mr. Chehil by August 31, 2009.
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> (c) The CCLA may not add evidence to the record.
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> (d) The CCLA will not add new issues to those raised by the Crown and Mr. Chehil and, in particular, the CCLA will not challenge the validity of legislation. The CCLA will not address s. 24(2) of the *Charter*. The CCLA may address (1) the interpretation of *PIPEDA*, (2) how *PIPEDA*, properly interpreted, may affect the expectation of privacy under s. 8 of the *Charter*, and (3) the expectation of privacy of air travellers under s. 8 of the *Charter* respecting the elements of the RCMP's Jetway Program.
>
> (e) The CCLA will not be entitled to make oral submissions at the hearing, unless requested by the panel. The CCLA will have counsel attend at the hearing to respond to requests or questions from members of the panel.

[26] There will be no costs award for these motions.