

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Farler*, 2012 NSCA 74

Date: 20120706

Docket: CAC 379999

Registry: Halifax

Between:

Timothy Charles Farler

Appellant

v.

Her Majesty The Queen

Respondent

Restriction on publication: Pursuant to s. 486.4 of the *Criminal Code of Canada*

Judge: The Honourable Justice Linda Lee Oland

Motion Heard: July 5, 2012, in Halifax, Nova Scotia, in Chambers

Held: Motion by the appellant for a stay of the *SOIRA* order is dismissed.

Counsel: Timothy Charles Farler, appellant in person
Jennifer MacLellan, for the respondent

Order restricting publication – sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Decision:

[1] On May 12, 2011, Justice Arthur LeBlanc found the appellant guilty of two charges of sexual assault, contrary to s. 246.1(1)(a) and s. 271(1)(a) respectively of the *Criminal Code*. On February 9, 2012 the appellant was sentenced to a total of 30 months incarceration less credit for remand time. The judge adjourned decision as to whether or not to grant an order under the *Sex Offender Information Registration Act*, S.C. 2004, c. 10. The *SOIRA* order is dated June 6, 2012. The decisions of Justice LeBlanc regarding conviction and sentencing, including the *SOIRA* order, are as yet unreported.

[2] The appellant's appeal from conviction and sentence are to be heard on November 19, 2012. The Crown consented to his motion for bail pending the outcome of his appeal.

[3] The appellant has brought a motion to stay the *SOIRA* order until his appeal is determined. His affidavit in support of his motion explains how, in his view, the judge erred in several respects and his belief that there is a very strong possibility his appeal will succeed. The appellant's affidavit continues:

11. The harm of having to register on the SIORA is mostly physiological. There is a stigma that is attached to being put on such a registry. There is also the belief that once on the registry, even with a successful outcome to the appeal, it would be nearly impossible to get my name off the registry.
12. There would be no harm done if a further 6 months passes without me registering as I am on conditions now that allow me to be monitored. Also I have been under a court undertaking for the past 10 plus years, in relation to this case, without a breach.
13. I am no danger to society.
14. Money cannot compensate for the humiliation of being known as a registered sex offender.
15. The harm of having one's Charter Rights violated because of a conviction that was not according to due process, or the fundamental principles of law can never be healed and no amount of money can return one's faith in the justice system when one is forced to fulfill a requirement of the law of which was wrongly imposed.

[4] I must determine if a Chambers judge of this court has the jurisdiction to stay a *SOIRA* order. Section 683(5) of the *Criminal Code* gives this court, or a judge of this court, the power to suspend certain court orders. It reads:

683. (5) If an appeal or an application for leave to appeal has been filed in the court of appeal, that court, or a judge of that court, may, when the court, or the judge, considers it to be in the interests of justice, order that any of the following be suspended until the appeal has been determined:

- (a) an obligation to pay a fine;
- (b) an order of forfeiture or disposition of forfeited property;
- (c) an order to make restitution under section 738 or 739;
- (d) an obligation to pay a victim surcharge under section 737;
- (e) a probation order under section 731; and
- (f) a conditional sentence order under section 742.1.

A *SOIRA* order is not contained in that listing.

[5] The appellant argues that s. 686(8) of the *Criminal Code* provides the necessary authority because it allows any order “that justice requires”. It reads:

686. (8) Where a court of appeal exercises any of the powers conferred by subsection (2), (4), (6) or (7), it may make any order, in addition, that justice requires.

However, that provision refers to the “court of appeal”, and not a judge of that court. In addition, the enumerated subsections pertain to situations before the court of appeal which are not applicable here.

[6] The appellant was convicted of two offences which come within the definition of “designated offence” in s. 490.011(1) of the *Criminal Code*. Section 246.1(a) is a designated offence under s. 490.011(1)(c)(v), and s. 271(a) a designated offence under s. 490.11(1)(a)(xvi). Section 490.012(1) provides:

490.012 (1) When a court imposes a sentence on a person for an offence referred to in paragraph (a), (c), (c.1), (d) or (e) of the definition “designated offence” in subsection 490.011(1) or renders a verdict of not criminally responsible on account of mental disorder for such an offence, it shall make an order in Form 52 requiring the person to comply with the *Sex Offender Information Registration Act* for the applicable period specified in section 490.013. [Emphasis added]

This provision came into force before both the decisions on conviction and sentence were issued. As a result, the *SOIRA* order in this case was mandatory. Once he found the appellant guilty of these offences, the judge could not refuse to grant the order. See also *R. v. J.M.W.*, 2012 NSCA 9 at ¶ 4.

[7] There are no provisions in *SOIRA* which pertain to a stay of a *SOIRA* order.

[8] The Court of Appeal is a statutory court. I am not persuaded that, as a single judge of that Court sitting in Chambers, I have the authority to stay a *SOIRA* order. Jurisdiction to suspend a *SOIRA* order cannot be found in the *Criminal Code* or in *SOIRA* itself.

[9] According to the Crown, the *SOIRA* order as issued is imperfect. The Crown submits that while it is stated to apply for only ten years, it should apply for life: see ss. 490.013(2)(c) and (2.1) of the *Criminal Code*.

[10] The appellant submits that the error in the duration of the *SOIRA* order means that it is a nullity. He refers to two decisions of the New Brunswick Court of Appeal, namely *R. v. Mullins*, 2005 NBCA 111 and *R. v. McDonald*, 2006 NBCA 20, together with the decision of the Ontario Court of Justice in *R. v. Jayswal*, 2011 ONCJ 33. The appellant’s motion is for a stay, not a decision as to the validity of the *SOIRA* order. I make no comment as to the Crown’s suggestion that the *SOIRA* order is imperfect or the appellant’s argument that it is a nullity, other than to observe that the Crown may have grounds to appeal its duration and the appellant may have grounds to attack the validity of the order. The appellant understands that the *Civil Procedure Rules* provide for amendment of the Notice of Appeal.

[11] I would dismiss the motion for a stay of the *SOIRA* order.

Oland, J.A.