

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Hilchey*, 2015 NSPC 46

DATE: July 27, 2015

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REGISTRY: Halifax

BETWEEN:

Her Majesty the Queen

v.

Michael David Hilchey

DECISION ON THE CROWN'S *VUKELICH* APPLICATION

JUDGE: The Honourable Judge Anne S. Derrick

HEARD: July 17, 2015

WRITTEN SUBMISSIONS: July 16 (Crown) and July 25 (Defence)

DECISION: July 27, 2015

CHARGES: 5(2) x 2 *Controlled Drugs and Substances Act*

COUNSEL: Timothy McLaughlin, for the Crown

Wayne Bacchus, for Michael David Hilchey

By the Court:*Introduction*

[1] Mr. Hilchey and his wife, Jocelyn Hilchey, are charged with possession of marijuana and cocaine for the purpose of trafficking, contrary to section 5(2) of the *Controlled Drugs and Substances Act* (“CDSA”). Original trial dates were displaced to accommodate a *Charter* application brought by Mr. Hilchey alone. Ms. Campbell has maintained on Jocelyn Hilchey’s behalf a “watching brief” only in relation to the *Charter* application.

[2] Mr. Hilchey was arrested and his residence searched on February 7, 2014. His original *Charter* notice, dated September 29, 2014, alleged infringements of section 7 and 8 rights due to (a) the use of excessive force in effecting Mr. Hilchey’s arrest; and (b) the search of Mr. Hilchey’s residence exceeding the scope of the warrant. (“original grounds”) This latter ground relates to the photographing of a “dildo” in the course of the search.

[3] Mr. Hilchey’s *Charter* application went part-heard on June 16 and 17, 2015. On June 17, Mr. Bacchus was granted an adjournment to amend his original *Charter* Notice to include additional grounds (“additional grounds”). The direct examination of D/Cst. Winnell Jackson, the exhibit officer on the execution of the search warrant at the Hilchey residence, was adjourned to permit Mr. Bacchus to amend the Notice. Mr. McLaughlin indicated the Crown might bring a *Vukelich* application.

[4] Mr. Bacchus filed his amended Notice of *Charter* application on June 29, 2015. In a letter dated July 7, 2015, Mr. McLaughlin indicated the Crown would be making a *Vukelich* application. A hard copy of the Crown’s brief and cases on the *Vukelich* application was filed on July 16. I granted Mr. Bacchus an adjournment on July 17 to file a Defence response to the Crown’s *Vukelich* application. Mr. Bacchus’ brief in response was filed electronically on July 25.

[5] After hearing submissions on July 17 I also ruled that I would not entertain a *Vukelich* application on the original grounds of Mr. Hilchey’s *Charter* motion. The

voir dire on the original grounds has not concluded and Mr. Bacchus indicated his intention to continue the cross-examination of D/Cst. Jackson in relation to the original grounds and call an additional witness, that being Jocelyn Hilchey.

[6] The *Vukelich* application is therefore confined to the additional grounds, that is, the grounds in Mr. Hilchey's amended *Charter* Notice.

[7] At a pre-trial hearing on July 17, the Crown and Mr. Hilchey indicated it was understood that:

- if the *Vukelich* application was denied, the *voir dire* will be expanded and additional evidence may be called or elicited in relation to the additional grounds in Mr. Hilchey's amended *Charter* Notice.
- if the *Vukelich* application was allowed, Mr. Hilchey's *Charter voir dire* will be confined to the "original grounds."

Mr. Hilchey's Amended Charter Notice – the Additional Grounds

[8] Mr. Hilchey's original *Charter* application dealt with two alleged violations of his *Charter* rights: (1) the use by police of excessive force in arresting him – a section 7 violation; and (2) the taking of an irrelevant photograph by police of a "dildo" during the search-under-warrant of Mr. Hilchey's residence – a section 8 violation. In Mr. Hilchey's submission, he was injured by the excessive force used and humiliated by the photograph of a police officer smiling while posing with the "dildo".

[9] The newly alleged *Charter* violations that have been advanced by Mr. Hilchey - the additional grounds in his amended *Charter* Notice - are:

- 1) The failure to disclose a photo log (of the photographs taken by police during the search) in a timely manner;
- 2) The failure to itemize the "dildo" photograph in the photo log;
- 3) The conclusion by police that three bags seized in the search contained cocaine;

- 4) Including in one sample, for lab testing, sampled contents from the three separate bags, resulting (it is alleged) in cross-contamination;
- 5) Disclosing two Certificates of Analysis #C0289171 “which are not reflected in the Evidence Processing Sheet or related to any Exhibit in the Exhibit Log”;
- 6) “Possible misappropriation” of money seized from Mr. Hilchey’s residence during the search.

[10] In Mr. Hilchey’s amended *Charter* Notice, Schedule “B”, the particulars of the section 7 *Charter* breach, he alleges there has been a violation of his right to make full answer and defence as a result of: the police having “mixed substance (sic) from three separate bags into one lab sample” and providing “only one Certificate of Analysis #C0289131 for three different substances”; the cross-contamination of all three bags “when obtaining lab samples for one Certificate of Analysis #C0289131”; and the loss or misplacement by police of the “Exhibit related to two Certificate of Analysis #C0289171.”

[11] It is Mr. Hilchey’s submission that the “misappropriation” of his money constitutes a section 8 violation as it relates to the requirement that the search of his residence be conducted in a reasonable manner.

[12] Mr. Hilchey submits that the *Charter* breaches in this case, due to their cumulative effect, justify a stay of proceedings pursuant to section 24(1) of the *Charter*, or, in the alternative, the exclusion of evidence seized from Mr. Hilchey’s residence on February 7, 2014.

What is a Vukelich Hearing?

[13] A *Vukelich* application obtains its name from *R. v. Vukelich*, [1996] B.C.J. No. 1535, a decision of the British Columbia Court of Appeal. A *Vukelich* hearing allows the trial court to determine if a *Charter* application should proceed to be heard. *Charter* motions that do not have any possibility of success or where the remedy being sought could not possibly be granted can be dismissed, avoiding the expenditure of valuable and limited judicial and court resources.

[14] As stated in the often-cited case of *R. v. Kutynec*, [1990] O.J. No. 1077,

...It would seem that a requirement that a defendant must make a substantial preliminary showing that he or she was the subject of the infringement or denial of a Charter right as a condition of granting an evidentiary Charter hearing would be an appropriate response to any concern that might exist relative to the time and cost of permitting Charter hearings as of right on the mere claim of constitutional violation which in turn results in time-consuming hearings to identify non-meritorious claims. It may be appropriate for the court to be able to dismiss a motion for a s. 24 remedy without the necessity for an evidentiary hearing where the defence has failed to demonstrate by its notice of motion and offer of proof a high likelihood that if a hearing were held the defendant would succeed on the merits. (*paragraph 28*)

[15] *Vukelich* hearings are expected to be focused and efficient. They rely on the submissions of counsel and supporting documentation. Oral evidence may be called. (*Vukelich, paragraph 17*)

[16] The British Columbia Supreme Court in *R. v. McDonald*, [2013] B.C.J. No. 2966 discussed *Vukelich* hearings in the following terms:

The rigour with which *Vukelich* is applied and the way in which a trial judge exercises his or her discretion in relation to such an application is case-specific and highly contextual. Among the factors that will shape the exercise of that discretion are: the extent to which the facts or anticipated evidence underlying the alleged *Charter* breach are in legitimate dispute; the state and clarity of the law on the issue sought to be litigated; and the infinite variety of pragmatic considerations that will arise in a given case and suggest resolution of the application in one way or another. *What underlies the inquiry is the need to balance an accused's fair trial interests with the public interest in the management of criminal proceedings by foreclosing lengthy and unnecessary pre-trial applications in circumstances where the remedy sought could not reasonably be granted.* (*paragraph 21*) (*emphasis added*)

[17] The *Vukelich* hearing addresses and dispenses with *Charter* applications that lack merit or where no possible remedy is available.

[18] The Supreme Court of Canada in *R. v. Pires*, [2005] S.C.J. No. 67 makes the point that is central to the rationale for *Vukelich* hearings:

... For our justice system to operate, trial judges must have some ability to control the course of proceedings before them. One such mechanism is the power to decline to embark upon an evidentiary hearing at the request of one of the parties when that party is unable to show a reasonable likelihood that the hearing can assist in determining the issues before the court. (*paragraph 35*)

[19] *Vukelich* makes a similar point:

...it does not follow that an accused is always entitled as of right to a voir dire in the course of a criminal trial in order to challenge the constitutionality of a search. The trial judge must control the course of the proceedings, and he or she need not embark upon an enquiry that will not assist the proper trial of the real issues...(*paragraph 26*)

[20] In a *Vukelich* hearing, the accused gets the benefit of the Court presuming the allegations to be true, subject to the evidence, and of the Court proceeding on the basis of submissions and documentation alone.

The Issues

[21] The issues to be determined in this *Vukelich* application are:

- Has Mr. Hilchey demonstrated there is a reasonable basis upon which the Court can find a breach of his *Charter* rights?
- Is there a reasonable likelihood that the expanded voir dire can assist in determining the issues before the Court? (*Pires*, *paragraph 35*)
- If there is a *Charter* violation, will it result in the remedy being sought?

Analysis of Mr. Hilchey's Amended Charter Notice

[22] As I have noted, Mr. Hilchey has made additional allegations of *Charter* violations. He alleges the police concluded that three seized bags contained

cocaine; that sampling from these three bags resulted in cross-contamination; and that exhibits that produced two Certificates of Analysis have been lost. He also seeks *Charter* relief in relation to the disclosure of the police photo log from the search, the failure to document the “dildo” photograph in that log, and the disappearance of a significant sum of money from his residence.

The Sampling/Lost Evidence Allegations

[23] In response to the Crown saying that the allegations relating to what is purported to be cocaine do not engage the *Charter* and are merely potential shortcomings in the processing of the evidence going to admissibility and weight at trial, Mr. Hilchey makes the following arguments:

- 1) As the allegations are being raised in a voir dire and not the trial proper, they “are issues at this time and need to be fully canvassed.”
- 2) The potential shortcomings in the processing of the evidence go to the abuse of process claim and constitute a violation of the right to make full answer and defence. Mr. Hilchey analogizes possible contamination of evidence with loss or destruction of evidence and references *R. v. La*, [1997] S.C.J. No. 30.
- 3) The potential shortcomings in the evidence has the effect of leaving Mr. Hilchey in the position of not knowing “the full case against him as there is no clear information on how much illegal substance he allegedly had”, violating his right to make full answer and defence.

[24] I will address each of Mr. Hilchey’s points in turn:

- 1) Three bags of a white substance were located by police at Mr. Hilchey’s residence in a coffee can with a false bottom. The bags were photographed and they are itemized in the police exhibit log as Exhibit 21. The Evidence Processing Sheet indicates each bag was weighed and samples taken (Exhibit 21a.). A Certificate of Analysis #C0289131 is noted as relating to these samples.

The issues of potentially contaminated evidence and/or a failure to properly analyze seized substances are issues for trial. They are issues that relate to the question of whether the Crown is able to prove the case against Mr. Hilchey beyond a reasonable doubt. Mr. Hilchey is charged with possession of cocaine for the purpose of trafficking. If the Crown fails to prove, through

direct or circumstantial evidence, that the substances seized were cocaine, the prosecution will fail. If the Crown proves that only some of the substances seized were cocaine then the prosecution for possession for the purpose of trafficking may be in jeopardy. The Crown has the burden of proof throughout the case and Mr. Hilchey is entitled to the presumption of innocence and the application of the principle of reasonable doubt.

- 2) The possible contamination of sampling and/or the failure to prove beyond a reasonable doubt that the three bags contained cocaine are issues of admissibility and weight to be assessed at trial. There is nothing that elevates these alleged problems with the evidence to the level of an abuse of process. Abuse of process arises where state conduct violates the fundamental principles underlying the community's sense of decency and fair play. Mr. Hilchey's right to full answer and defence has not been prejudiced. I reiterate my comments about the Crown's burden, the presumption of innocence and reasonable doubt.

The circumstances in Mr. Hilchey's case are not analogous to the lost evidence in *R. v. La*. Problems with the Crown's evidence, such as sampling contamination, can only advantage Mr. Hilchey, not prejudice him. Not only is Mr. Hilchey's complaint not comparable to a situation where investigators have lost a statement taken from a Crown witness, in *La*, where that happened there was a finding that the accused's right to make full answer and defence had not been impaired. (*La*, paragraph 32)

Although Mr. Hilchey's brief does not speak to this and focuses on the contamination issue, Schedule "B" of his amended notice, the particulars of his section 7 *Charter* claim, alleges that two bags containing a substance have been lost or misplaced. As I understand what is being alleged, there is a Certificate of Analysis #C0289171 in relation to the two seized but lost bags.

Mr. Hilchey has not explained how this has prejudiced his right to make full answer and defence. He does not indicate, for example, that he was intending to have the contents of the bags independently analyzed. He will be able to make submissions at trial that the Certificate of Analysis should be accorded little weight in the absence of the bags that it purports to relate to.

- 3) As I have already said, problems with the Crown's real evidence in this case can only benefit Mr. Hilchey, not prejudice him. To secure a conviction for possession for the purpose of trafficking in cocaine, the Crown will have to prove beyond a reasonable doubt that Mr. Hilchey had possession of cocaine and that it was possession for the purpose of trafficking. If it can be proven that the substance seized was cocaine, the quantity of cocaine is usually relevant to the issue of the purpose of the possession.

[25] I find Mr. Hilchey's complaints about the seized substances to constitute allegations about the evidence processing in this case. They may reveal deficiencies in how the evidence seized from Mr. Hilchey's residence was handled and prepared for analysis. If, in the course of the trial, it is established that there are deficiencies in the evidence relied on to prosecute Mr. Hilchey, this will go to admissibility and weight. These possible deficiencies are not *Charter* violations. Consequently there can be no remedy obtainable under the *Charter*.

The Exhibit Log and the "Dildo" Photograph, and the Missing Money

[26] Mr. Hilchey's additional grounds relate to the failure to disclose the photo log in a timely manner; the failure to itemize the "dildo" photograph in the photo log; and the possible theft of Mr. Hilchey's money. Late disclosure and police misconduct are issues that can engage the *Charter*. However, for reasons I will explain, I find an evidentiary hearing in this case is not warranted.

The Photo Log Issue

[27] Mr. Hilchey has raised a late-disclosure issue relating to the photo log prepared by D/Cst. Jackson. The photo log made its appearance in the course of D/Cst. Jackson's direct examination on the *Charter* voir dire. Mr. Hilchey has not shown how this has prejudiced him in any way or how this amounts to a violation of his *Charter* rights. What the disclosure of the photo log does do is reveal that the photograph of the "dildo" was not included in the listing of the photographs taken during the search. It seems to me this is a piece of evidence for Mr. Hilchey to use in his argument at the end of the voir dire that the "dildo" photograph was taken for no evidentiary purpose as it apparently did not merit being itemized with all the other photographs taken during the search.

[28] Late disclosure can constitute a *Charter* violation. (*R. v. Bjelland*, [2009] S.C.J. No. 38) However a *Charter* remedy will likely be rare and any prejudice to

the right to make full answer and defence will be addressed through an adjournment and disclosure order. (*Bjelland, paragraph 3*)

[29] As I have said, I find there has been no prejudice to Mr. Hilchey's fair trial rights caused by the photo log not being disclosed sooner. The absence of the "dildo" photograph in the inventory of photographs on the log may say something about the evidentiary value of the photograph but it does not constitute a violation of Mr. Hilchey's *Charter* rights.

The Allegation of Stolen Money

[30] Mr. Hilchey testified at the *Charter* voir dire to having \$22,350 in cash at his home in addition to the money seized and inventoried in the Halifax Regional Police/RCMP Integrated Drug Unit Evidence Processing Sheet of approximately \$7,300. It was Mr. Hilchey's evidence that he had the money stashed in various locations at his home.

[31] According to Mr. Hilchey he had: at least \$3000 in a pair of pants; approximately \$5000 in a blue and red jacket - made up of \$1000 in an elastic band and \$4000 in a ziplock bag; approximately \$2700 in the top left-hand dresser drawer; \$8000 in a white and grey jacket, divided in equal amounts of \$4000 in two ziplock bags; \$1550 on top of the dresser; approximately \$2000 in a nightstand - \$1700 of which was in an elastic band; and a \$100 bill in his wallet which was located on his barber station. I understood Mr. Hilchey's evidence to indicate that the contents of his wallet were still there, although scattered around, when he returned home after being released from custody.

[32] Mr. Hilchey explained that he kept so much money in his house because he does "everything in cash". He doesn't use banks because he owes back-taxes and fines and is concerned that his money will be "seized." He described a variety of cash-based enterprises that represent how he makes his livelihood: barbering, running a garage, repossessing homes; building commercial display cabinets; and buying and selling "a lot" of vehicles. Mr. Hilchey has worked as a tow-truck dispatcher although that was not mentioned in the context of what he does as a cash-based entrepreneur.

[33] Mr. Hilchey acknowledged that he has not made a police report about the money he claims he is missing or asked for an investigation to be commenced. He testified he has not mentioned the missing money in court before.

[34] Mr. Hilchey filed a civil suit against the police on August 6, 2014. His statement of claim alleges that the Halifax Regional Police and named police officers are liable in negligence. He is seeking damages for the use of excessive force in his arrest and *Charter* violations relating to the “dildo” photograph and the execution of the search warrant. Mr. Hilchey makes no mention in his statement of claim of any missing money.

[35] In seeking to expand his *Charter* claims to include a claim that money was stolen during the search of his home, Mr. Hilchey has provided no supporting documentation relating to the source of the cash. He testified that he had money from the sale of a motor vehicle and to pay two brothers who had done work for him. However, Mr. Hilchey has supplied nothing, not a bill of sale or payroll statements, to corroborate his testimony.

[36] Mr. Hilchey states in written submissions that “there are several pictures in the file showing bills with denominations of 5, 10 and 20 dollars which were not reflected in the Evidence Processing Sheet.” However, an examination of the Evidence Processing Sheet reveals references to small denominations – Exhibit 18 is described as “money – uncounted \$5.00 & \$10.00”. Exhibits 6, 7 and 8 show \$5, \$10 and \$20 bills were itemized.

[37] The Crown also notes that Mr. Hilchey was in custody for several days after his arrest on February 7 while other persons were in his house. The police were not in the Hilchey residence after February 7.

[38] The assessment of Mr. Hilchey’s evidence and lack thereof concerning the money he purports was stolen by police is important in assessing whether an evidentiary hearing will be of assistance in determining if Mr. Hilchey is entitled to a judicial stay. Whether a stay would be likely granted is a relevant consideration.

[39] As I noted earlier, for the purposes of a *Vukelich* application, I am to accept as true the facts alleged by Mr. Hilchey. Therefore I am to accept as true that money he had stashed in his home was missing when he returned there after being released from police custody.

[40] In *R. v. Haevisher*, [2014] B.C.J. No. 2821 (S.C.) the accused sought a judicial stay of proceedings for abuse of process arising from multiple instances of extremely serious police misconduct that included the well-documented mishandling by police officers of funds related to key witnesses. After a careful examination in a *Vukelich* hearing of the law and the egregious facts in the case,

the British Columbia Supreme Court determined that the grounds advanced by the accused could not support a judicial stay of proceedings. The Court held that consequently an evidentiary hearing was unnecessary.

[41] In *R. v. Babos*, [2014] S.C.J. 16, Moldaver, J. observed that, a stay of proceedings “is the most drastic remedy a criminal court can order.” A stay of proceedings terminates the prosecution of an accused, with the result that “the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits.” (*Babos*, paragraph 30) It is only in the “clearest of cases” “when a stay of proceedings for abuse of process will be warranted.” (*Babos*, paragraph 31)

[42] Mr. Hilchey’s application for a judicial stay of proceedings on the grounds of the missing money does not fall into the main category for such applications, the category of cases where trial fairness has been compromised by state conduct. It falls in the “residual category” where trial fairness is not implicated but state conduct “risks undermining the integrity of the judicial process.” (*Babos*, paragraph 31)

[43] I am amply satisfied that, in relation to the allegation of police thieving, Mr. Hilchey has not established the state has

...engaged in conduct that is offensive to societal notions of fair play and decency [such that]...proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. (*Babos*, paragraph 35)

[44] All that has been established, under the procedure for *Vukelich* hearings, which requires that I accept as true the facts alleged by Mr. Hilchey, is that Mr. Hilchey had approximately \$30,000 in cash in his home at the time the search warrant was executed on February 7; that the police seized approximately \$7300; and that when Mr. Hilchey returned home from police custody several days later, the balance of the cash he would have expected to find was missing. This does not establish that the police stole the money. It is a serious allegation supported by speculation only. It is an allegation that Mr. Hilchey has never done anything about in any context until now. I conclude that Mr. Hilchey’s allegation of stolen money does not disclose a *Charter* violation because all that can be accepted as true is that money went missing. There is simply nothing more than speculation that the police took it and evidence of opportunity for someone else to have done so while Mr.

Hilchey was in custody. In any event, this allegation would not support a stay of proceedings. Therefore an evidentiary hearing is unnecessary.

[45] As for the alternative remedy of an exclusion of the evidence from the search pursuant to section 24(2), the stolen money allegation is not an appropriate basis for such a remedy, which would amount to an effective stay of proceedings anyway. If there was an evidentiary basis establishing that the police stole money from Mr. Hilchey's residence during the execution of a search warrant, the appropriate remedy to be pursued would be a judicial stay. As I have already discussed, that is not to say a stay would be granted.

Conclusion

[46] The Crown's *Vukelich* application is granted. Mr. Hilchey's *Charter* voir dire will proceed on the basis of the original grounds only and none of the grounds in the amended *Charter* notice.