PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Mercer*, 2016 NSPC 48

Date: August 22, 2016
Docket: 2906851
Registry: Sydney

HER MAJESTY THE QUEEN

v.

JOHN RUSSELL MERCER

DECISION ON CHARTER APPLICATION - VOIR DIRE

HEARD BEFORE: The Honourable Judge Brian Williston
PLACE HEARD: Sydney, Nova Scotia
DATE OF DECISION: August 22, 2016
CHARGE: That he on or about the 26th day of August, 2015, at or near Cape Breton Regional Municipality, Nova Scotia, did communicate with Constable Ashley MacDonald for the purpose of obtaining, for consideration, the sexual services of Constable Ashley MacDonald, contrary to s. 286.1(1) of the Criminal Code of Canada

COUNSEL: Andre Arseneau, Crown Counsel
T.J. McKeough, Defence Counsel
Nash Brogan, Defence Counsel

[1] The accused is charged in an information sworn on the 8th of September, 2015, that he did:

On or about the 26th day of August, 2015, at or near Cape Breton Regional Municipality, Nova Scotia, communicate with Constable Ashley MacDonald for the purpose of obtaining, for consideration, the sexual services of Constable Ashley MacDonald, contrary to s. 286.1(1) of the Criminal Code of Canada.

CHARTER ISSUE:

[2] The accused has applied to this Court for a determination that the actions of the Cape Breton Regional Police Service, in using a police officer to pose as a prostitute to enforce section 286.1(1) of the Criminal Code and in holding a press conference announcing the names, ages and places of residence of those charged, constitutes an abuse of the criminal justice process which infringed his rights under s. 7 of the Charter of Rights and Freedoms.

[3] Furthermore, the accused asks, if it is determined that there was an infringement of his rights under s. 7 of the Charter, that the proceedings against him be stayed pursuant to s. 24(1) of the Charter.

LEGISLATION:

[4] The applicable sections of the Charter and the Criminal Code are the following:

Canadian Charter of Rights and Freedoms:

> *7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*
>
> *24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.*

Criminal Code of Canada

> *286.1(1) Everyone who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person is guilty of*
>
> *(b) an offence punishable on summary conviction and liable to imprisonment for a term of not more than 18 months and a minimum punishment of,*
>
> *(ii) in any other case,*
>
> *(A) for a first offence, a fine of $500, and*
>
> *(B) for each subsequent offence, a fine of $1,000.*

FACTUAL BACKGROUND:

[5] In the spring of 2014, the Cape Breton Regional Police Service received complaints from the Downtown Business Association that customers and tourists were being approached by sex trade workers and "johns" who thought they were sex trade workers. The police responded by putting more uniformed officers on those streets along with plain clothes officers to try to move the activity to other locations away from the downtown core.

[6] Sgt. Jodie Wilson, officer in charge of the Community Safety Enforcement Unit continued to monitor and gather information regarding prostitution in downtown Sydney. It was determined that the scope of the problem was more serious than originally thought. Over time there were upwards of thirty-seven sex trade workers and over fifty johns visiting the downtown area. The police came to learn that many of the workers were being subjected to violence from some of the johns as well as from boyfriends who were "pimping" them out.

[7] When Bill C-36 became law, it changed the approach of the police who, with the realization of the potential violence from johns and pimps now treated the sex trade workers as "victims". The police had not realized the extent of the violence the street workers had been subjected to until they looked at their situation over time. The police felt that they had to do something before someone was seriously injured or killed.

[8] The police began "Operation John Be Gone" to deter and abolish the sex trade from the downtown area. The officers received training regarding human trafficking as well as methods to help the workers exit from the sex trade. Many of those workers were seen by the police as not being in that line of work by choice but by circumstances such as socio-economic conditions, childhood abuse and addictions to alcohol and drugs.

[9] The police began to focus more on helping the workers find an exit strategy through making them aware of what was available in the local area regarding addiction and mental health treatment. Many of those workers were aboriginal. The Cape Breton Regional Police partnered with the Royal Canadian Mounted Police in the community of Eskasoni to identify support groups and "elders" in that location who could help those suffering with addiction and mental health issues. Some of the elders even accompanied the police officers when they met with aboriginal sex trade workers in the downtown area of Sydney to encourage them to get help and support for their addictions and health issues.

[10] During that time period police surveillance identified vehicles and licence plate numbers of johns who had a history of violence. With this information the police began to stop vehicles driven by these individuals to try to disrupt their transactions with the sex trade workers. During that time, the police also laid charges under the Motor Vehicle Act against those individuals and other johns.

[11] The police also began to give the sex trade workers as much information as they could about these potentially violent johns and did safety checks on the workers. The police enlisted reformed former sex trade workers to come on patrols with them to talk to the workers. They offered peer counseling and

introductions to the methadone treatment program to wean them from their addictions, enabling them to leave prostitution if they wished to do so.

[12] Sgt. Jodie Wilson testified that the police were supplied with one thousand lipstick tubes from Mary K Cosmetics which they filled with notes containing the contact information of agencies which could help the workers deal with their addictions and mental health. As the police distributed these containers and began to meet with the workers, they saw a trust begin to build between them. Sgt. Wilson and her colleagues began to receive text messages and telephone calls from the workers who now were reporting violent johns. These workers, who earlier had a distrust of the police, were coming to realize that these officers were there for their support and assistance in treating them as victims and trying to keep them safe. However, despite this new relationship with the police, the workers would not agree to testify against the johns, expressing fear of retaliation.

[13] Sgt. Wilson testified that the police came to the realization that something had to be done before someone was killed or injured. As a result, Operation John Be Gone was established to deter and abolish the ongoing activity in the downtown area. During the eighteen months leading up to Operation John Be Gone, the police had given the johns warnings and second chances but it was to no avail. In the opinion of the police officers who witnessed the increasing demand on the sex

trade, it was felt they could no longer use a "band-aid" approach and the decision was made to begin the use of undercover police officers and the laying of charges as the best form of action to enforce Bill C-36.

[14] The accused, John Russell Mercer, is one of twenty-seven accused charged as a result of that police action. On September 8, 2015 at a press conference the police announced the results of Operation John Be Gone along with the names, ages and places of residence of those individuals charged ranging in ages from 26 to 81. The accused has characterized this conference as a "public shaming" by the police and contends that this was an abuse of process. The accused, age 73, in his testimony on the Voir Dire, stated he had never used a prostitute before. He testified that as far as he was concerned it was entrapment. He told the Court that his wife and friends found out by "word of mouth" of his being charged by the police when it appeared in the local newspaper.

ABUSE OF PROCESS

[15] Section 7 of the Charter protects against two categories of abuse of process:
(1) where prosecutorial conduct compromises the fairness of a trial (the main category) and

(2) where prosecutorial conduct "contravenes fundamental notions of justice and thus undermines the integrity of the judicial process" (the "residual" category): *R.*

v. Nixon, 2001, S.C.C. 34 at para. 36, citing R. v. O'Connor, [1995] 4 S.C.R. 411, at para. 73.

[16] The first category of abuse of process focuses on the effect the conduct has on the fairness of an accused's trial. Evidence of prejudice to the fair trial of an accused is key to meeting that test. The prejudice needs to be carried forward through the conduct of the trial, resulting in ongoing unfairness to the accused: *R. v. Babos 2014, S.C.C. 16, at para. 34.*

[17] Under the second category referred to as the "residual category", prejudice to the fair trial for the accused is not required: *Nixon (supra) at para. 41*.

[18] The key question to be decided under this category is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. *R. v. Babos (supra) at para. 35.*

[19] It is well established that police conduct may, under a subsequent criminal prosecution, be an abuse of process. This may occur where the conduct renders the trial itself unfair or if it is so offensive to community notions of fairness and decency that it compels the Court to refuse to lend its processes to a prosecution resulting from such conduct. *R. v. Regan (2002), 161 C.C.C. (3d) 97 at 120-122; R. v. O'Connor, supra.*

[20] In this present case, the accused has not argued that the police conduct affected his ability to get a fair trial. However, he has strenuously argued that the police conduct was so contrary to community notions of fairness and decency to render any trial an abuse of the Court's process.

[21] In *R. v. O'Connor, supra, at para. 73*, L. Heureaux-Dube J., held that such claims are properly considered under s. 7 of the Charter:

> *...In addition, there is a residual category of conduct caught by s. 7 of the Charter. This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the Charter, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process [Emphasis added].*

[22] The ultimate question is whether the police conduct was so egregious that it would shock the conscience of the community and demand that the Court not lend its process to a prosecution flowing from such conduct.

[23] In *R. v. Regan, supra*, Lebel J, speaking for the majority referred to the unanimous decision of the Supreme Court of Canada in R. v. O'Connor, supra, and stated at para. 50:

> *....“L’Heureux-Dube J. thus held that now, when the courts are asked to consider whether the judicial process has been abused, the analysis under the common law and the Charter will dovetail (See O’Connor, at para. 71). In this manner, while it acknowledged that the focus of the Charter had traditionally been the protection of individual right, the O’Connor decision reflected and accommodated the earlier concepts of abuse of process, described at common law as proceedings “unfair to the point that they are contrary to the interest of justice” (R. v. Power, [1994] 1 S.C.R. 601 (S.C.C.), at p. 616), and as “oppressive treatment” (R. v. Conway, [1989] 1 S.C.R. 1659 (S.C.C.), at p. 1667). In an earlier judgment, McLachlin J. (As she then was) expressed it this way:*
>
> > *...abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community’s sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice. I add that I would read these criteria cumulatively.*
> > *(R. v. Scott, [1990] 3 S.C.R. 979 (S.C.C.) at p. 1007)*

ARGUMENT

[24] The accused’s argument that the police conduct in this case is an abuse of process centers on two actions:

(1) **The use of undercover police officers to enforce s. 286.1 of the Criminal Code.**

The accused contends that this was a misuse of the criminal law in an attempt to correct a small social problem that the police had failed to address head

on when trying to get the sex trade workers help through the addiction and mental health agencies.

(2) **The press conference held by the police at the end of the operation.**

The accused submits that it amounted to a public shaming by naming the twenty-seven individuals charged along with their ages and places of residence.

LEGISLATIVE FRAMEWORK

[25] In *Bedford v. Canada (Attorney General)* 2013, S.C.C. 72, three sex trade workers sought a declaration that three provisions of the Criminal Code were unconstitutional pursuant to sections 7 and 2(b) of the Charter. Those Criminal code provisions prohibited a person from keeping a bawdy-house, from living on the avails of prostitution of another, and from communicating for the purpose of engaging in prostitution. On December 20, 2013, the Criminal Code provisions were found to have infringed section 7 of the Charter and were held to be not justified under section 1 of the Charter.

[26] Chief Justice Beverley McLachlin, writing for the Court, stated at para. 58 - 60:

> *58 Section 7 provides that the state cannot deny a person's right to life, liberty or security of the person, except in accordance with the principles of fundamental justice. At this stage, the question is whether the impugned laws negatively impact or limit the applicants' security of the person, thus bringing them within the ambit of, or engaging, s. 7 of the Charter.*

> *59 Here, the applicants argue that the prohibitions on bawdy-houses, living on the avails of prostitution, and communicating in public for the purposes of prostitution, heighten the risks they face in prostitution—itself a legal activity. The application judge found that the evidence supported this proposition and the Court of Appeal agreed.*
>
> *60 For reasons set out below, I am of the same view. The prohibitions at issue do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing dangerous conditions on prostitution; they prevent people engaged in a risky–but legal– activity from taking steps to protect themselves from the risks.*

[27] The Supreme Court of Canada suspended the declaration of invalidity for one year and Chief Justice McLachlin stated at para. 165-169:

> *165 I have concluded that each of the challenged provisions, considered independently, suffers from constitutional infirmities that violate the Charter. That does not mean that Parliament is precluded from imposing limits on where and how prostitution may be conducted. Prohibitions on keeping a bawdy-house, living on the avails of prostitution and communication related to prostitution are intertwined. They impact on each other. Greater latitude in one measure–for example, forbidding the nuisances associated with keeping a bawdy-house. The regulation of prostitution is a complex and delicate matter. It will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime.*
>
> *166 This raises the question of whether the declaration of invalidity should be suspended and if so, for how long.*

> *167 On the one hand, immediate invalidity would leave prostitution totally unregulated while Parliament grapples with the complex and sensitive problem of how to deal with it. How prostitution is regulated is a matter of great public concern, and few countries leave it entirely unregulated. Whether immediate invalidity would pose a danger to the public or imperil the rule of law (the factors for suspension referred to in Schachter v. Canada, [1992] 2 S.C.R. 679 (S.C.C.) may be subject to debate. However, it is clear that moving abruptly from a situation where prostitution is regulated to a situation where it is entirely unregulated would be a matter of great concern to many Canadians.*
>
> *168 On the other hand, leaving the prohibitions against bawdy-houses, living on the avails of prostitution and public communication for purposes of prostitution in place in their present form leaves prostitutes at increased risk for the time of the suspension–risks which violate their constitutional right to security of the person.*
>
> *169 The choice between suspending the declaration of invalidity and allowing it to take immediate effect is not an easy one. Neither alternative is without difficulty. However, considering all the interests at stake, I conclude that the declaration of invalidity should be suspended for one year.*

[28] Parliament enacted new Criminal Code offences in Bill C-36 which are now contained in sections 286.1 - 286.5. Counsel for the Crown and Defence have jointly filed for the consideration of the Court as Exhibit 1, the Technical Paper: Bill C-36, Protection of Communities and Exploited Persons Act, published by the Department of Justice. The Technical Paper speaks of the purpose in creating the new provisions and goes into the background of research and consultation leading to these new Criminal Code provisions.

[29] The centerpiece of Bill C-36 is a shift in legislative policy away from the old approach which treated prostitution as a public nuisance to a recognition that prostitution is inherently exploitive to sex trade workers with great potential for violence from johns and pimps. Under the previous legislation, the sex trade workers were themselves subject to prosecution and reporting violence at the hands of a john or pimp could have also exposed them to criminal penalties for engaging in prostitution. In addition, the previous law which criminalized the sex trade workers often fostered a distrust of the police who were seen as not being there to protect them.

[30] The objectives of the new legislation are clearly set out in the Technical Paper:

> ***(a) Objectives of the Legislation***
>
> *Bill C-36 reflects a significant paradigm shift away from the treatment of prostitution as "nuisance", as found by the Supreme Court of Canada in Bedford, toward treatment of prostitution as a form of sexual exploitation that disproportionately and negatively impacts on women and girls. Bill C-36 signals this transformational shift both through its statement of purpose, as reflected in its preamble, and its placement of most prostitution offences in Part VIII of the Criminal Code, Offences Against the Person.*
>
> *Bill C-36's objectives are based on the following conclusions drawn from the research that informed its development:*

- *The majority of those who sell their own sexual services are women and girls, Marginalized groups, such as Aboriginal women and girls, are disproportionately represented.*
- *Entry into prostitution and remaining in it are both influenced by a variety of socio-economic factors, such as poverty, youth, lack of education, child sexual abuse and other forms of child abuse, and drug addiction.*
- *Prostitution is an extremely dangerous activity that poses a risk of violence and psychological harm to those subjected to it, regardless of the venue or legal framework in which it takes place, both from purchasers of sexual services and prostitution.*
- *Prostitution reinforces gender inequalities in society at large by normalizing the treatment of primarily women's bodies as commodities as to be bought and sold. In this regard, prostitution harms everyone in society by sending the message that sexual acts can be bought by those with money and power. Prostitution allows men, who are primarily the purchasers of sexual services, paid access to female bodies, thereby demeaning and degrading the human dignity of all women and girls by entrenching a clearly gendered practice in Canadian society.*
- *Prostitution also negatively impacts the communities in which it takes place through a number of factors, including: related criminality, such as human trafficking and drug-related crime; exposure of children to the sale of sex as commodity and the risk of being drawn into a life of exploitation; harassment of residents; noise, impeding traffic, unsanitary acts, including leaving behind dangerous refuse such as used condoms or drug paraphernalia; and, unwelcome solicitation of children by purchasers.*
- *The purchase of sexual services creates the demand for prostitution, which maintains and furthers pre-existing power imbalances, and ensures that vulnerable persons remain subjected to it.*

- *Third parties promote and capitalize on this demand by facilitating the prostitution of others for their own gain. Such persons may initially pose as benevolent helpers, providers of assistance and protection to those who "work" for them. But the development of economic interests in the prostitution of others creates an incentive for exploitative conduct in order to maximize profits. Commercial enterprises in which prostitution takes place also raise these concerns and create opportunities for human trafficking for sexual exploitations to flourish.*

Consequently, Bill-36 recognizes that prostitution's victims are manifold; individuals who sell their own sexual services are prostitution's primary victims, but communities, in particular children who are exposed to prostitution, are also victims, as well as society itself. Bill C-36 also recognizes that those who create the demand for prostitution, i.e., purchasers of sexual services, and those who capitalize on that demand, i.e., third parties who economically benefit from the sale of those services, both cause and perpetuate prostitution's harms.

Consequently, Bill C-36 seeks to denounce and prohibit the demand for prostitution and to continue to denounce and prohibit the exploitation of the prostitution of others by third parties, the development of economic interests in the exploitation of the prostitution of others and the institutionalization of prostitution through commercial enterprises, such as strip clubs, massage parlours and escort agencies in which prostitution takes place. It also seeks to encourage those who sell their own sexual services to report incidents of violence and leave prostitution. Bill C-36 maintains that the best way to avoid prostitution's harms is to bring an end to its practice.

IMMUNITIES: SELLERS

Bill C-36 criminalizes the purchase but not the sale of sexual services. However, Bill C-36 in no way condones the sale of sexual

> *services; rather, it treats those who sell their own sexual services as victims who need support and assistance rather than blame and punishment. Research shows that individuals frequently engage in prostitution as a result of seriously constrained choices and/or because they have been coerced by unscrupulous individuals to do so. [47] This asymmetrical approach is also intended to encourage those who sell their own sexual services to report incidents of violence and exploitation committed against them, rather than seeking to avoid detection by law enforcement.*
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> *Accordingly, Bill C-36 expressly immunizes from prosecution individuals who receive a material benefit from their own sexual services or who advertise those services. It also immunizes those who sell their own sexual services for any part they may play in the purchasing, material benefit, procuring or advertising offences in relation to the sale of their own sexual services. Such prosecutions would otherwise normally be available by operation of general provisions of the criminal law that impose criminal liability on persons for various forms of participation in offences committed by other persons (i.e., liability for aiding, abetting or counseling another to commit an offence, conspiring with another person to commit an offence or being an accessory after the fact to an offence). These immunities mean that individuals cannot be prosecuted for selling their own sexual services, whether independently or cooperatively, from fixed indoor or other locations, as long as the only benefit received is derived from the sale of their own sexual services.*

THE POLICE UNDERCOVER OPERATION:

[31] The initial response by the Cape Breton Regional Police to complaints about prostitution in the downtown Sydney area was to generally treat it as a nuisance problem and try to move it away from the complaint area. As the police talked to

the sex trade workers they became increasingly aware of the hardships, stigma and violence to which they were exposed. The Police Community Safety Unit, headed by Sgt. Jodie Wilson, came to see first-hand how these workers, who were largely aboriginal, were often disadvantaged and vulnerable along race, economic and gender lines. The police sought and received specialized training on the new prostitution offences, on human trafficking and on undercover operations. The police then employed improved policing techniques by offering the women strategies and information regarding community treatment programs for addictions, mental health and abuse suffered by them. The police also offered supportive relationships with them to promote future contacts and safety planning including information about potentially violent johns. The new legislation, for the most part, decriminalizes prostitutes in recognition of their marginalized and vulnerable positions and criminalizes the johns who buy, or attempt to buy, and the pimps and human traffickers who exploit, and profit from, coercing women into the sex trade.

[32] As the police learned more about the dangers to which these women were exposed, they came to the conclusion that they could no longer use a “band-aid” approach to the problem. The new law had shifted the focus away from the women who were seen as victims to the johns and pimps on the demand and exploitative side.

[33] Operation John Be Gone was initiated using undercover police officers posing as sex trade workers. The police were not able to use the actual sex trade workers themselves since they were reluctant to participate in prosecutions for fear of reprisals from the johns or pimps.

[34] The police utilized trained police officers to minimize any risk of harm to the street workers.

[35] The Defence has not advanced an entrapment argument. Entrapment can only be argued after an accused has been found guilty of an offence charged and not before.

[36] It would be an error in law to consider entrapment before a trial begins. A determination of entrapment is to be made, if at all, after a finding of guilt as held by the Supreme Court of Canada in *R. v. Mack* [1988] 2 S.C.R. 903.

[37] The Ontario Court of Appeal in *R. v. Imoro* [2010] O.J. No. 586 set aside the accused's acquittals and substituted guilty verdicts where the trial judge sitting without a jury had at the beginning of the trial held that the undercover officer's conduct amounted to entrapment. Laskin, J.A. stated at para 21 - 24:

> *21 The trial judge held that as she was sitting without a jury, she could consider whether the undercover officer's conduct amounted to entrapment at the outset of the trial before determining whether Mr. Imoro was guilty. This holding, respectfully, is contrary to Mack and*

to the Supreme Court of Canada's later decision in R. V. Pearson, [1998] 3 S.C.R. 620.

22 *In Mack, Lamer J. stated at p. 972: "Before a judge considers whether a stay of proceedings lies because of entrapment, it must be absolutely clear that the Crown had discharged its burden of proving beyond a reasonable doubt that the accused had committed all the essential elements of the offence."*

23 *Although in Mack the accused was tried by a jury, I do not read Lamer J.'s statement as being limited to jury trials. In the very next sentence on p. 972 he added, "if this is not clear and there is a jury, the guilt or innocence of the accused must be determined apart from evidence which is relevant only to the issue of entrapment." Why should guilt or innocence be determined before a judge considers entrapment? Lamer J. provides the answer: "This protects the rights of an accused to an acquittal where the circumstances so warrant."*

24 *In Pearson, Lamer C.J. and Major J. writing for the majority noted that entrapment is not a conventional defence. It puts in issue not the accused's culpability but the conduct of the state. Thus, as the majority notes at para. 15, "It arises after a fair trial has found the accused guilty." Accordingly, a claim of entrapment leads to a "two-stage trial". At the first stage, the trier of fact determines whether the accused is guilty. If the accused is found guilty, the trial moves to the second stage where the judge considers the claim of entrapment. In setting out these two stages, the Supreme Court did not distinguish between jury and non-jury trials. Whatever the mode of trial, the judge ought to consider entrapment only after a finding of guilt.*

[38] In Operation John Be Gone, the police utilized trained undercover police officers in an observable setting with minimized risk to those officers.

[39] The British Columbia Supreme Court analyzed the use of undercover police officers in *R. v. Riley* [2001] B.C.J. No. 2398. Romily J. stated at para 15 - 16*:*

> *15 In analyzing the actions of undercover officers specifically, the courts have provided many guidelines. A common theme is their recognition for the need of police to have some latitude in performing their duties. Lamer J. (As he then was), at p. 697 in R. v. Rothman, supra, states:*
>
> > *The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community.*
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> *16 In R. v Unger (1993), 83 C.C.C. (3d) 228 (Man. C.A.), another leading authority for the proposition that courts should not be setting public policy on the parameters of undercover operations, the court used the test of the "reasonable dispassionate person, aware of the difficulties in the investigation of the case". This person would consider an abuse of process argument only if the actions of the officers were "unfair or so unacceptable, indecent, and outrageous, that the evidence that was derived from that operation, if admitted as evidence in the trial of the accused, could bring the administration of justice into disrepute." (Hewak C.J.Q.B., at p. 253 of the trial decision).*

[40] The accused has submitted that the police action in Operation John Be Gone was an abuse of process as an economic-based approach with an aim to solving an isolated and small social problem. The accused argues that if prostitution was really such a problem, they could have simply conducted surveillance like any other police operation instead of resorting to the use of undercover police officers. I do not agree with that premise. The police could not use conventional surveillance alone without involving the sex trader workers who were reluctant to testify. Instead, the police put trained undercover female police officers on the street to reduce the risk of harm.

[41] The police actions were a legitimate response to a need to protect society's most marginalized and vulnerable members in focusing their attention on the men driving demand. As well, the effort by the police in disseminating information to the sex trade workers on safety issues, social services, drug and alcohol rehabilitation and treatment programs related to abuse, is encouraging.

[42] I find that there was no abuse of process in the techniques used by the police in Operation John Be Gone.

THE PRESS CONFERENCE:

[43] The applicant argues that the press conference at the end of Operation John Be Gone amounted to a public shaming and that it was the modern day equivalent of locking someone in the stocks. The accused submits that he was a mere pawn used by the police so they could show the public, after eighteen to twenty-four months of making no progress on dealing with the situation, that they had actually done something.

[44] At the press conference, the police released the names, ages and places of residence of the twenty-seven individuals charged. The accused submits that while it is common for the names of individuals charged to be released to the public, this is usually as a result of the local media doing their own research through the Courts.

[45] There is no suggestion that the trial court has been compromised by any pre-trial statements made by the police which would prejudice the accused's fair trial interests. The application by the accused is based on the second branch of the abuse of process doctrine, i.e. the residual power of a court to protect the integrity of the judicial process and to maintain confidence in the administration of justice.

[46] In *Regan, supra*, the police revealed that Mr. Regan was under investigation eighteen months before any charges were laid. The Supreme Court of Canada agreed with the finding of the trial judge that the police error in releasing the

accused's name as a suspect well in advance of charges being laid, contrary to public policy, did not rise to the level of egregious abuse warranting a stay of proceedings. LeBel, J. held at para 92-95:

> *92 The trial judge found that the police were "clearly wrong" (para. 86) when they released Regan's name as a suspect, well in advance of any charges. This was in contravention of the express policy of law enforcement agencies that the identity of suspects may be released only after charges have been laid. However, Macdonald J. added that this lapse was not done in bad faith, and the judge himself further indicated that this police error influenced his finding of abuse of process "to a lesser extent" (para 132).*
>
> *93 This policy was adopted, no doubt, to protect the privacy and other interests of individuals who are merely questioned about a crime, with nothing more. There is no question that such a policy is laudable, and a breach of it should not be condoned. However, other evidence on the record indicates that after this one misstep, the police exercised greater caution in preventing further information leaks until the process was truly public. For example, when the police delivered their investigation report to DPP Pearson, the letter included a control sheet asking that all persons who have control or access to please sign and date, to establish continuity. Throughout this investigation, the media has been diligent and persistent in obtaining information and for this reason security must remain a priority. I have implemented controls within the R.C.M. Police to limit access. I have not allowed any R.C.M. Police documents, pertaining to this investigation, to be disseminated outside this Headquarters, Halifax Subdivision and the Task Force investigators. Therefore, I am now asking that the same restriction occur within your office and this information be carefully protected. (Letter from chief Superintendent Falkingham to DPP Pearson, May 19, 1994)*

> *In addition, the police acceded to Regan's request to hold the arraignment outside Halifax, to try to avoid a media frenzy. In my view, this supports the finding of no bad faith.*
>
> *94 I would add that following the dictum in Blencoe, the prejudice experienced by the appellant as a result of this early leak - humiliation and stress - cannot be attributed to this police error alone. This impact on Regan was a certainty no matter when his name was finally released in connection with these charges, and there is no question that there was sufficient evidence and subjective belief for the police to ultimately lay at least some of the charges. Furthermore, there is no evidence to suggest that the premature announcement had any effect on the separate question of whether the Crown properly proceeded with the charges. While the media may have been clamouring for information, it does not follow that this put pressure on the authorities to lay any particular number of charges at all, for that matter.*
>
> *95 For these reasons, I think the trial judge was correct in his finding that this police error either alone or in combination with the Crown conduct discussed above does not rise to the level of egregious abuse. The serious remedy of a stay of proceedings is not an appropriate method to denounce or punish past police conduct of this nature.*

[47] The Cape Breton Post reported five days before the police press conference that a number of "sources" had told the newspaper that more than twenty-five individuals were to be charged relating to the solicitation of sex. (Exhibit 3). On September 8, 2015, Cape Breton Regional Police Chief, Peter MacIsaac, announced the charges at a press conference following what was referred to as "a

seven day sting operation" between August 26th to September 4th involving undercover female police officers. With the formal laying of the charges before the Courts, the police released the names of the twenty-seven accused, along with their ages and places of residence. The Cape Breton Post reported on its website on September 8, 2015, that Chief Peter MacIsaac said "that could serve as a deterrent for others". (Exhibit 4).

[48] Police Chief MacIsaac credited the community safety enforcement unit, vehicle and foot patrols and the management team for the work put into the sting and added that "the investigation is not completed". He also referred to the police service working with community partners including mental health and addiction services since beginning its investigation. He added that a number of the women who had been involved in prostitution had gone into treatment for opioid addiction which had been a major contributing factor to the increased prostitution activity. (Exhibit 4).

[49] In describing the new laws shifting criminal enforcement toward the buyers of sex and targeting the demand side, the police highlighted the new approach to law enforcement encouraging prostitutes to exit while holding johns criminally responsible.

[50] The police do have a discretion to release information to the media subject to an over-riding limitation to not give details which could jeopardize a fair trial for an accused. The personal information released at the press conference was limited to what was already accessible to the media and the public in the informations before the Court. The information released by the police at the press conference does not constitute an abuse of process.

CONCLUSION:

[51] In considering whether the Crown (as represented by the police) has engaged in action that is so offensive to fundamental notions of fair play and decency that proceeding with the trial would undermine the integrity of the judicial process, I conclude that there is no evidence of conduct before me which would objectively warrant a finding of abuse of process.

[52] Accordingly, on the evidence before me, I find that the accused has failed to establish an abuse of process under s. 7 of the Charter. Even if I were incorrect in this finding, the accused has not met the criteria required for a judicial stay of proceedings as the circumstances presented thus far in this hearing do not amount to the "clearest of cases" warranting such a remedy.

JUDGE BRIAN WILLISTON