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Canada (Attorney General) v. Sander

Between
The Attorney General of Canada, James D. Bissell, Q.C., and Eugene Kucher, Petitioners, and
Stephen Sander, Respondent

[1992] B.C.J. No. 2781

76 B.C.L.R. (2d) 53

79 C.C.C. (3d) 63

18 W.C.B. (2d) 238

Vancouver Registry No. CC920729

British Columbia Supreme Court
Vancouver, British Columbia

Collver J.

Heard: October 23, 1992
Filed: December 22, 1992

(14 pp.)

Counsel for the Petitioners: John R. Haig, Q.C.
Counsel for the Respondent: David J. Martin.

COLLVER J.:-- The Respondent, Stephen Sander, challenges the constitutional validity of Section 37 the Canada Evidence Act, which calls for determination by this court of an objection to disclosure of information ordered by a Judge of the Provincial Court of British Columbia.The basis of the challenge is that a court of criminal jurisdiction, constituted under the Criminal Code of

Canada, should not, during the course of a trial, be precluded from adjudicating upon public interest immunity objections raised by government agencies.

BACKGROUND OF THE APPLICATION

Before the commencement of his trial on tax evasion charges, Stephen Sander sought an order for disclosure of Revenue Canada audit and special investigation files, as well as disclosure of particulars of legal advice given by the Department of Justice to Revenue Canada. The requested disclosure was ordered by His Honour Judge Cronin, of the Provincial Court of British Columbia.

However, only the files were provided. Claiming that it is in the public interest to preserve privilege between solicitor and client, the Director of the Vancouver Regional Office of the Department of Justice, as a "person interested", objected to disclosure of particulars of legal advice given to the Department of National Revenue, and sought review of Judge Cronin's order. The Director's objection was made pursuant to Section 37(1) of the Canada Evidence Act, which gives this court the task of determining whether public interest in disclosure outweighs the interest which the Director seeks to protect.

I upheld the Director's objection, in reasons filed on September 18, 1992. However, it was agreed that since sufficient notice of Mr. Sander's intention to test the validity of the Canada Evidence Act provisions had not then been given, the constitutional issue could be addressed later. These reasons pertain to that issue.

THE IMPUGNED STATUTORY PROVISIONS

The applicable provisions of the Canada Evidence Act are as follows (my emphasis added):

> 37.(1) A minister of the Crown in right of Canada or other person interested may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.
>
> (2) Subject to sections 38 and 39, where an objection to the disclosure of information is made under subsection (1) before a superior court, that court may examine or hear the information and order its disclosure, subject to such restrictions or conditions as it deems appropriate, if it concludes that, in the circumstances of the case, the public interest in disclosure outweighs in importance the specified public interest.
>
> (3) Subject to sections 38 and 39, where an objection to the disclosure of information is made under subsection (1) before a court, person or body other than a superior court, the objection may be determined, on application, in accordance with

subsection (2) by

(a) the Federal Court-Trial Division, in the case of a person or body vested with power to compel production by or pursuant to an Act of Parliament if the person or body is not a court established under a law of a province; or
(b) the trial division or trial court of the superior court of the province within which the court, person or body exercises its jurisdiction, in any other case.

ISSUES RAISED IN THE PRESENT APPLICATION

Counsel for Mr. Sander submits that ordinary federal legislation (the Canada Evidence Act) cannot derogate from a criminal court's constitutional jurisdiction to grant relief pursuant to the Canadian Charter of Rights and Freedoms. Furthermore, he argues that the impugned Canada Evidence Act provisions are anomalous, in that they deprive Provincial Court judges, who conduct most of the criminal trials in Canada, of jurisdiction to make and enforce their own disclosure and evidentiary rulings. The following are listed as inconsistencies between Section 37(3) of the Canada Evidence Act and the provisions of the Charter:

(i) the provision deprives a provincial court of criminal jurisdiction of the power to make effective disclosure and evidentiary rulings in a criminal trial thus violating the Respondent's right to be tried according to law by an independent and impartial tribunal. [S. 11(d)]
(ii) the circumstances under which the provisions of the Canada Evidence Act, s. 37 may be invoked are unconstrained by limiting standards, rendering the legislation susceptible to prosecutorial abuse, thus violating the Respondent's right to a fair trial. [S. 11(d)]
(iii) the provision, derogating as it does from the constitutional jurisdiction of a provincial court of criminal jurisdiction, violates the Respondent's right to equality before the law, a fundamental principle of justice. [S. 15]

DISCUSSION

In my earlier reasons I referred to Revenue Canada's seizure (on June 21, 1990) of Mr. Sander's financial records at his home and his business and accounting offices - a seizure ostensibly effected pursuant to Section 231.3 of the Income Tax Act. But on November 28, 1990, in the Appeal Division of the Federal Court, Section 231.3 of the Income Tax Act was declared to be inconsistent with Sections 7 and 8 of the Charter of Rights and Freedoms and of no force and effect (Baron v. A.G. Canada [1991] 1 C.T.C. 125).

In Baron, the Court ordered that seized documents be returned forthwith. In the present case, notwithstanding demands by counsel for return of Mr. Sander's records, Revenue Canada kept the records, obtained another search warrant on March 21, 1991 (pursuant to Section 487 of the

Criminal Code) and simply re-seized them.

On June 14, 1991, Mr. Sander was charged with the present offences. The Crown elected to proceed by indictment, and Mr. Sander elected trial before a Provincial Court Judge, without a jury.

When his trial commenced, Mr. Sander applied for the mentioned disclosure, on the grounds that it was required in order to make full answer and defence.

In balancing Revenue Canada's argument for preservation of privilege against Mr. Sander's fair trial rights, Judge Cronin expressed concern for:

1. Mr. Sander's right to explore whether continued detention (of seized materials) was unconstitutional;
2. the considerations which the investigators brought to their decision to detain the seized business records;
3. the advice investigators received from the Department of Justice, and whether they followed it; and,
4. whether the advice was in conformity with the law.

However, I was not persuaded that advice given by the Department of Justice to the Department of Revenue with respect to either retention of items seized under the impugned provisions of the Income Tax Act or the availability of reseizure under the provisions of the Criminal Code raised the spectre of unlawfulness. Emphasizing the importance of protecting the privileged environment in which Attorneys General of Canada provide legal advice to departments of government and their officials, I held that the circumstances giving rise to Mr. Sander's request for disclosure were less than compelling, and that it would not be in the public interest to require the Crown to disclose to the defence particulars of or documents pertaining to such legal advice.

I have summarized my earlier conclusions to emphasize that in ruling as I did, I distinguished a recent decision of this court, The Queen v. Gray, [1992] B.C.J. No. 1363, CC910548, Vancouver Registry, February 18, 1992. Gray was an unusual drug conspiracy case in which disclosure of legal advice given by the Department of Justice to the R.C.M. Police was ordered by the Honourable Mr. Justice Oppal.

In deciding that the circumstances in this case, unlike those in Gray, did not justify ordering disclosure, I held that Judge Cronin need not have considered that there were directions in Gray which bound him. Nevertheless, implicit in the submission now made on Mr. Sander's behalf is the prospect that during the course of the disclosure application Judge Cronin should at least have been able to examine the information the Crown sought to protect (which was what Oppal J. did, in Gray) and thus determine whether the public interest in disclosure outweighed the specified public interest.

Mr. Sander's counsel argues that a judge of the Provincial Court, with unchallenged

jurisdiction to conduct an indictable tax evasion trial, should be able to determine all questions of fact and law, including Charter issues. The Crown's resort to the impugned Canada Evidence Act section is said to affect the ability of the trial judge to grant Charter relief, to allow the mounting of an interlocutory appeal, and to cause delay.

DECISION

I do not perceive the Crown's ability to interrupt the trial for the purpose of invoking the provisions of Section 37 of the Canada Evidence Act as being capable of undermining the independence of the trial judge. Although the process leading to adjudication is placed on hold while the review process takes place, the exercise of the court's function eventually resumes.

Nor am I satisfied that frustration arising from the Crown's alleged ability "to punt to another Court for a second play on evidentiary rulings" (to borrow counsel's earthy description) deprives an accused person of equal benefit of the law.

Although invocation of Section 37 of the Canada Evidence Act causes temporary removal of the case from the Provincial Court, which may introduce additional expense, inconvenience, and delay associated with seeking a ruling, the essential question to be answered is whether that produces unjust results or leads to abuse which would justify striking down the section. In this regard, it must be emphasized that Section 37(4) stipulates that:

> An application pursuant to subsection (3) shall be made within ten days after the objection is made or within such further or lesser time as the court having jurisdiction to hear the application considers appropriate in the circumstances.

The foregoing statutory imperative aside, counsel for the petitioners submits that in the total scheme of things, hearing the Director's objection adds little to the time it will eventually take to see Mr. Sander's prosecution through. However, counsel for Mr. Sander was not prepared to concede that either the necessity for, or the timing of, the review request were reasonable.

As to fairness, I question whether the second of the listed infringements - the absence of limiting standards, rendering the legislation susceptible to prosecutorial abuse - justifies criticism of the method which Parliament chose to allow objections to the disclosure of sensitive information.

Counsel for Mr. Sander relies upon Smith v. The Queen, (1987), 40 D.L.R.(4th) 435 (S.C.C.) to support his position that all he has to do is establish that legislation contains the potential for a Charter violation, and a declaration of invalidity should follow (subject to Section 1 justification). Confidence in reasonable behaviour by the Crown is not, obviously, enough in contemplating the prospect of abuse.

In Smith, Lamer J. rejected possible reliance upon the exercise of prosecutorial discretion, stating, at 481:

> To do so would be to disregard totally s. 52 of the Constitution Act, 1982 which provides that any law which is inconsistent with the Constitution is of no force or effect to the extent of the inconsistency and the courts are duty-bound to make that pronouncement, not to delegate the avoidance of a violation to the prosecution or anyone else for that matter. (my emphasis)

I concede that in Smith the constitutional validity of the minimum penalty (seven years) for importing drugs obviously constituted a dramatically different infringement of Charter rights. But the case is important here not only because of what it says about the issue of potential abuse, but also for the instruction it provides about the exercise I must embark upon in determining whether the legislation raises the prospect of a Charter infringement.

Lamer J. emphasized (at 475) that in measuring statutory content, the courts are to look to the purpose and the effect of the legislation. Here, it is important to at least briefly examine the history of the applicable Canada Evidence Act provisions.

Sections 37, 38, and 39 of the Canada Evidence Act have their origins in Section 41(2) of the Federal Court Act R.S.C. 1970, which provided that discovery and production of a document or its contents could be refused where a Minister of the Crown certified that production or discovery "would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen's Privy Council for Canada". Any examination of the document by the Court was prohibited.

The above provisions were repealed by S.C. 1980-81-82, Ch. 111, which introduced the Access to Information Act and the Privacy Act. Those enactments were, in turn, eventually replaced by the impugned Canada Evidence Act sections. The present legislation allows any public official, as a "person interested", to advance privilege claims, on uncircumscribed public interest grounds.

Objections to the disclosure of information which would be injurious to international relations or national defence or security are to be determined by the Federal Court, regardless of whether those objections arise in the course of proceedings in this court or in the Provincial Court.

In keeping with the spirit of the original legislation, objections to disclosure of information constituting a confidence of the Queen's Privy Council are still simply refused, without examination of the material.

During the course of trials in this court, if disclosure is ordered and an objection is made, the court can then proceed to weigh public interest factors, as Mr. Justice Oppal did, in Gray, supra. However, since the impugned legislation does not allow judges of the Provincial Court to conduct that kind of exercise, the question to be answered here is whether the means Parliament chose to have public interest issues determined deprives Mr. Sander of a fair trial. I reluctantly conclude that it does not.

Because they conduct trials of statutory offences on a daily basis, provincially appointed judges are in an obvious position to readily weigh and determine public interest issues. However, that does not mean that requiring an independent examination of public interest issues necessarily leads to unfairness.

It may be trite to suggest that restricting the domain of a court of comprehensive criminal jurisdiction is, in terms of affecting the free flow of proceedings, problematic. Citizens have the right to expect that their trials will proceed without unnecessary interruption, at the first reasonable opportunity.

Having said that, I must nevertheless observe that although counsel did not cite any jurisdictional parallels, I can think of two - the interception of private communications, and applications concerning the proceeds of crime. In those two areas, although superior court access or review often results in interruption of the trial process, issues to be examined invariably involve the rights of affected parties other than the accused. Independent review can generally be defended on that basis.

In balance, it seems to me that forum choice, where a Section 37 objection to disclosure is made, can also be justified with respect to the scope of the review necessary to examine government conduct in proceedings such as this Income Tax Act prosecution. In any event, by opting for an independent superior court examination of public interest issues, I am unable to say that Parliament has thus affected Mr. Sander's right to "a fair and public hearing by an independent and impartial tribunal" (Section 11(d), Canadian Charter of Rights and Freedoms).

To summarize, notwithstanding my bias against interlocutory steps which introduce additional expense, inconvenience, or delay into an already overtaxed justice system, I am not prepared to find that Section 37.(3) of the Canada Evidence Act violates Stephen Sander's right to a fair trial.

For the above reasons, Mr. Sander's challenge of the validity the legislation is dismissed.

COLLVER J.