Court of Queen's Bench of Alberta

Citation: Alberta (Justice and Solicitor General) v Bassett, 2020 ABQB 304

Date: 20200504
Docket: 1501 13768
Registry: Calgary

Between:

Jenna Larae Andrus

Applicant

- and -

Minister of Justice and Solicitor General for Alberta,
Dennis Clarence Bassett,
and the Chief of Police of the Calgary Police Service

Respondents

Reasons for Judgment
of the
Honourable Mr. Justice A.D. Macleod

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[1] During the week of November 4, 2019, I heard the viva voce application of Ms. Jenna Larae Andrus to revoke or vary a restraint order granted under the *Victims Restitution and Compensation Payment Act*, SA 2001, c V-3.5 [*VRCPA*] on the basis that the order was obtained in violation of Ms. Andrus' rights under the *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. Specifically, she wants her share of the cash that was seized returned.

[2] This application resulted from a decision (***Alberta (Justice and Solicitor General) v Bassett,*** 2019 ABQB 759) dated September 30, 2019, dismissing an application by the Minister to strike or stay the motion to revoke the *ex parte* restraining order brought by Mr. Bassett and Ms. Andrus. Justice Labrenz of this Court struck that part of the application brought by Mr. Bassett as an abuse of process but did not strike the one brought by Ms. Andrus. It was that application that I heard during the week of November 4, 2019.

[3] The background is set out by Justice Labrenz and I reproduce paragraphs 3-27 of that judgment:

> **The police investigation**
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> [3] The affidavit sworn by Constable Rafal Kwiecinski in support of the *ex parte* civil restraint order contains a comprehensive overview of the police investigation.
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> [4] On November 4, 2014, a Calgary Police Service investigation was commenced based upon a confidential tip that Mr. Bassett was using a medical marihuana licence to facilitate trafficking in marihuana. In response to the tip, amongst other investigative measures, the police contact ENMAX utilities to install a digital recording ammeter ["DRA"] to determine if the residence was probably being used to grow marihuana.
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> [5] The DRA exhibited the telltale pattern of electrical usage common for marihuana grow operations, and ENMAX provided the results of the relevant DRA information to the police. In addition, ENMAX wrote a letter to the police advising that the utility company was of the opinion that the residence occupied by Mr. Bassett and Ms. Andrus was involved in the diversion and consumption of electricity that was not being recorded for billing purposes. As a consequence of those communications from ENMAX, the Calgary Police Service commenced an investigation into the theft of electricity.
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> [6] As the DRA installation tended to demonstrate that theft of electricity was likely occurring within the residence, the police applied for and received a search warrant under s.487 of the *Criminal Code of Canada* ["*Criminal Code*"] to search the residence for an electrical bypass, and documents relating to ownership or occupancy.
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> [7] When the police executed the warrant on November 19, 2014, they located marihuana plants exceeding the number of plants permitted under Mr. Bassett's marihuana licence (164 suspected marihuana plants as opposed to the 73 plants permitted under the licence).
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> [8] A police officer who was involved in the execution of the warrant was of the opinion that the electrical meter on the outside of the residence was likely not displaying an accurate reading for the amount of electricity then being consumed, and ENMAX was contacted to assist in deciphering the electrical meter and locating the bypass.
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> [9] An ENMAX employee who attended to the residence being searched identified that the electrical meter was flipped outside down and explained that this was a method of bypassing the electrical meter in order to steal electricity.
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> [10] During the search, a safe containing the restrained cash was found in the living room. The safe also contained documents in Mr. Bassett's name, along with a small amount of psilocybin, sometimes colloquially know as "magic" mushrooms. Based upon these discoveries, the police obtained a further search warrant under the *Conditional Drugs and Substances Act* ["*CDSA"*]. In addition

to the 164 marihuana plants, the cash and 50.8 grams of psilocybin, the police under the authority of the *CDSA* warrant seized the following controlled drugs: 8,174 grams of marihuana, 2.4 grams of hash oil, 11.2 grams of hashish balls, 334.3 grams of hashish, and 2,610 grams of marihuana butter (six jars). The *CDSA* warrant was executed on November 20, 2014.

The *ex parte* civil restraint order and Mr. Bassett's and Ms. Andrus' application to revoke

[11] As I mentioned earlier, this court granted an *ex parte* application under the *VRCPA* restraining the money seized during the execution of the search warrant on December 2, 2015.

[12] On April 6, 2016, Mr. Bassett and Ms. Andrus filed an application to revoke the *ex parte* civil restraint order. The application filed by the respondents alleges that the affidavit of Constable Kwiecinski filed in support of the restraint order contained information that was obtained in breach of s. 8 of the *Canadian Charter of Rights and Freedoms* ["*Charter*"]. Specifically, the respondents claim that the DRA placed on their residence on November 10, 2014 breached s.8 of the *Charter* as it was not judicially authorized. Mr. Bassett and Ms. Andrus further argue that the release by ENMAX to the police of information gathered by the DRA under s.10(3)(f) of the *Code of Conduct Regulation,* Alta Reg 160/2003 as authorised by the *Electric Utilities Act,* SA 2013, c E-5.1, itself violates s.8 of the *Charter* and that the section of the *Code of Conduct Regulation* is therefore of no force and effect. At the time of police investigation, the *Code of Conduct Regulation* read as follows:

> s.10(3) Customer information may be disclosed without the customer's consent, to the following specific persons or for any of the following purposes:
>
> > (f) to a peace officer for the purpose of investigating an offence, if the disclosure is not contrary to the express request of the customer

[13] Mr. Bassett and Ms. Andrus allege violations of s.8 of the *Charter* occurred based upon their assertion that the information to obtain the initial search warrant did not disclose reasonable grounds to believe that evidence of electrical theft could be found in the residence, and they further allege that the affiant who swore the information to obtain the warrant did so without being entirely candid.

[14] In support of their joint application, Mr. Bassett and Ms. Andrus each swore an affidavit on April 5, 2016. Mr. Bassett stated that he and Ms. Andrus are the owners of the cash listed in the restraint order, and that he was arrested and charged with 5 counts contrary to the *Criminal Code* and the *CDSA,* consisting of the following: one count of possession of marihuana for the purpose of trafficking contrary to section 5(2) of the *CDSA*, one count of production of marihuana contrary to section 7(1) of the *CDSA*, one count of proceeds of crime contrary to s.354 of the *Criminal Code*, on count of theft contrary to s.334 of the *Criminal Code*, and one count of theft contrary to section 326 of the *Criminal Code*. Mr. Bassett indicated that the charges were set for trial from June 1-3, 2016.

[15] Beyond these initial assertions, Mr. Bassett advised that he had been informed by his present legal counsel that there are grounds to believe that the police unlawfully searched his residence on November 19-20, 2014, as the judicial authorization was not valid. Mr. Bassett further states that the Minister has used illegally obtained evidence as detailed in the affidavit of Constable Kwiecinski to obtain the restraint order.

[16] The affidavit sworn by Ms. Andrus on the same date essentially mirrors that of Mr. Andrus. Notably, neither affidavit claims that the money seized by the police was lawful (*sic*) in the sense that the cash did not derive from any criminality. Ms. Andrus asserts that she is an owner of the seized money, along with Mr. Bassett.

The criminal trial

[17] At his criminal trial Mr. Bassett argued that his s.8 *Charter* right to be free from an unreasonable search or seizure meant that the evidence seized by the police, including the money seized from the safe, should be excluded under s.24(2) of the *Charter*. The *voir dire* was heard by deWit J between May 23 to 26, 2017. For some unknown reason, Mr. Bassett chose not to make the same arguments in his criminal trial regarding alleged violations of his s.8 *Charter* rights as he now proposes to make in the upcoming civil forfeiture action under the *VRCPA.*

[18] Mr. Bassett argued at his criminal trial that his s.8 *Charter* rights were violated because the s.487 *Criminal Code* warrant should not have issued because it was "unnecessary, superfluous, deceptive and subterfuge" of the real investigation launched by the police. Secondly, Mr. Bassett argued at his criminal trial that the manner of search conducted by the police was unreasonable or not conducted in a reasonable manner.

[19] More particularly, Mr. Bassett's argument at his criminal trial focused on the suggestion that the s.487 warrant should not have issued because it was not required because the police already knew that electricity was being stolen, and that the search warrant was therefore not necessary. Mr. Bassett argued that the s.487 *Criminal Code* warrant was really a subterfuge utilized by the police for the unstated purpose of investigating the marihuana grow operation, and the potentiality that marihuana drug trafficking had been or was currently occurring. Justice deWit rejected all of these arguments.

[20] The unreasonable search argument that Mr. Bassett made at the criminal trial had four main parts. First, Mr. Bassett argued that it was unreasonable for certain officers to search for certain items in drawers when their initial duty was to ensure the safety of searchers. Second, he made an argument that police officers should not have remained in the residence after it was determined that a warrant pursuant to s.11 of the *CDSA* was required. Third, Mr. Bassett argued that it was unreasonable for the police not to allow Ms. Andrus into the residence to obtain her medication. Finally, Mr. Bassett argued that the manner of the search conducted by the police under both the *Criminal Code* and the *CDSA* warrants

were unreasonable because the police search efforts resulted in damage and disarray to the residence.

[21] In summary, deWit J found that there were ample grounds for issuing the warrants, and he concluded therefore that the police did not breach Mr. Bassett's s.8 *Charter* rights. The trial judge also found that the manner of search, while disruptive, was not so unreasonable as to breach Mr. Bassett's s.8 *Charter* rights.

[22] Ms. Andrus was the only witness called by the defence during the course of the criminal *voir dire*. At the time of the *voir dire*, at least, Ms. Andrus and Mr. Bassett were common law spouses, and they have a young child together. Ms. Andrus gave evidence as to feeling violated by the search, and took photographs of the open and empty safe. Ms. Andrus told the court that the safe had been moved during the execution of the search warrants from the home office into the living room. At the same time, Ms. Andrus made no mention of the money seized by the police from the safe. Ms. Andrus, in a manner consistent with her affidavit filed in the civil action, made no suggestion that the seized cash was from a legitimate and therefore non-criminal source.

[23] After deWit J concluded that no violations of Mr. Bassett's s.8 *Charter* protected rights had occurred, Mr. Bassett entered guilty pleas to two of the counts he faced at his trial. Mr. Bassett, with the assistance of legal counsel, entered guilty pleas to possession of marihuana for the purpose of trafficking under s.5(2) of the CDSA and possession of the proceeds of crime under s.354 of the Criminal Code. The latter count to which Mr. Bassett plead guilty reads as follows:

> On or about the 19th day of November, 2014, at or near Calgary, Alberta, did unlawfully have in his possession proceeds of property, to wit: money of a value exceeding $5,000.00 knowing that all of the property was derived directly or indirectly as a result of the commission in Canada of an offence under section 5(1) of the Controlled Drugs and Substances Act, contrary to section 354 of the Criminal Code of Canada [Emphasis Mine]

[24] At the time of the guilty plea the facts were read in by Crown Counsel, after Mr. Bassett's legal counsel acknowledged that the guilty pleas were made voluntarily pursuant to s. 606(1.1) of the *Criminal Code*, as follows:

> Sir, with respect to the facts supporting the two guilty pleas, you have heard evidence in the *voir dire* which has been applied to the trial proper. I understand, Sir, on November 19, 2014, ALERT CFSEU Green Team South executed a search warrant at a residence belonging to Mr. Bassett of [house residence address] here in Calgary, Alberta. Once inside that residence, Sir, officers located a marihuana grow operation consisting of 164 plants at various stages of growth. I understand that Mr. Bassett was allowed to legally possess 72 plants, so he was in excess of 92 plants. Sir, Crown is alleging for the purposes of this disposition, Sir, that the 92 plants that he was in excess of would produce

> marihuana under 3 kilograms and that it was possessed for the purpose of trafficking, Sir.
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> THE COURT: All right.
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> And further, as the officers executed the search warrant, officers located approximately $222,000.00 of cash in a safe located inside the residence, Sir.
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> THE COURT: All right. After hearing the facts as set forward by the Crown, I accept the guilty pleas to count number 2 and count number 3 on the Indictment.

[25] No objection was made to the facts as alleged by the Crown Prosecutor. The facts alleged were consistent with the evidence the Court heard during the *voir dire*. The facts that founded the guilty pleas were therefore uncontroverted as having been derived from the evidence the trial judge heard. The trial judge expressed no concern when deciding that he could accept the offered pleas.

[26] The federal Crown's pending application for forfeiture under the *Criminal Code* was not pursued because the money had previously been restrained under the civil forfeiture legislation by the Minister.

[27] At no time during his criminal trial did Mr. Bassett argue violations under s.8 of the *Charter* that mirror those he now seeks to advance in support of his application to revoke the *ex parte* civil restraint order, nor did Mr. Bassett pursue any application seeking to challenge s.10(3)(f) of the *Code of Conduct Regulation,* Alta Reg 160/2003 as being unconstitutional.

[4] Justice Labrenz refused to grant the Ministers application for Summary Judgment with respect to the claim of Ms. Andrus and he concluded as follows:

> [134] In consideration of the Minister's application for summary judgment, I conclude that it would not be fair to resolve Ms. Andrus's s.8 *Charter* application on a summary basis as I am of the view that Mr. Adrus' s.8 *Charter* argument, as supported by the constitutional challenge to the *Code of Conduct Regulation*, raises legitimate issues for consideration that must be resolved in the context of a proper hearing; most notably, after appropriate notice has been given under the *Judicature Act* to constitutionally challenge the regulation.

And finally he concluded at para 151:

> [151] I am not persuaded that summary judgment should issue against Ms. Andrus as the s.8 *Charter* arguments that she wishes to pursue cannot be said to be meritless. As previously stated, Mr. Bassett's application to revoke the *ex parte* civil restraint order is struck under Rule 3.68(1)(a) of the *Alberta Rules of Court* because his application is abusive of the court's process. I would also grant summary judgment against Mr. Bassett under Rule 7.2 of the *Alberta Rules of Court*, subject obviously, to the further resolution of Ms. Andrus's claim to the restrained money.

[5] I heard from only four witnesses, all called by the Minister. I heard from Constable Rafal Kwiecinski who swore the affidavit in support of the restraint order; Mr. Scott Sampson, a retired detective from the Calgary Police Service who now runs his own company, Calgary Fire Investigations CFRI Inc.; Mr. Jim Moore, a public health inspector with Alberta Health Services; and Bradley Lawrence, a retired manager from EnMax Power Corporation.

[6] Notably, I did not hear any evidence from Ms. Andrus. The issue before me is whether I ought to vary or revoke the Restraint Order with respect to Ms. Andrus' interest in the seized cash.

[7] I agree with Justice Labrenz as to the purpose of the *VRCPA*. It is to deter crime and to compensate victims. Forfeiture is intended to deny the alleged criminal or the proven criminal of the financial gains associated with unlawful acts or the means used to carry out the illegal acts: ***Alberta (Minister of Justice and Solicitor General) v Dhariwal,*** 2019 ABQB 228 at paras 12–14. Section 8 of the *VRCPA* sets out the nature of discretion which I have on review of a restraint order. That discretion is very broad. There have been cases in which our court has varied a restraint order based on a breach of the *Charter*.

[8] From the scant evidence before me I can only infer that Ms. Andrus' legal interest in the seized cash is of the same nature as that of Mr. Bassett. At the time of the seizure and at the time that the restraint order was granted, Ms. Andrus was living with Mr. Bassett and they had a child together. There is no evidence upon which I can infer that the cash seized was not related to the crimes admitted to by Mr. Bassett in the guilty pleas he entered before Justice de Wit. Accordingly, I would not order any change to the restraint order on that ground.

[9] The position of Ms. Andrus is that she is entitled to a review *de novo* on the issue of whether the original search and seizure was valid because *Charter* rights are about people and not about places. While it is true that the right to be free from unreasonable search or seizure protects individual privacy rights, this does not mean that valid search warrants and searches executed pursuant to those warrants are of no effect.

[10] For example, in ***R v Reeves***, 2018 SCC 56 [*Reeves*], a case relied upon by Ms. Andrus and Justice Labrenz, the property seized was a computer. It was seized pursuant to a release signed by a common-law spouse who occupied the home along with the owner. The Court found that under the circumstances the release did operate as against the owner's expectation of privacy. However, the majority made it clear that if a warrant had been obtained, the seizure of the device would have been justified: ***Reeves*** at para 57.

[11] Any expectation of privacy, in the face of a warrant which has been lawfully obtained, is unreasonable unless Ms. Andrus can show that she is legally in a different position from Mr. Bassett. There is no evidence that she is in any different position. The only basis upon which Ms. Andrus has any claim to the cash in question is that she swore an Affidavit that she has a joint property right in it with Mr. Bassett. Accordingly, in my view, her expectation of privacy and any expectation that she was free from search and seizure was negated by the original search warrants, which have been confirmed as valid by Justice deWit of this Court.

[12] The authorities had reasonable grounds upon which to believe that there was a grow operation being conducted at the address in question. They were looking for evidence of who occupied the address, whether it was being used in an illegal grow operation, and if so, what was

being produced and whether it was being sold. What they found fit the description of exactly what they were looking for in the various warrants that were issued. Had the evidence led to Ms. Andrus as well as Mr. Bassett, she no doubt would have been charged jointly with Mr. Bassett.

[13] It is true that Mr. Bassett did not raise the argument now advanced by Ms. Andrus that the *Code of Conduct Regulation,* Alta Reg 160/2003, enacted pursuant to the *Electric Utilities Act*, SA 2003, c E-5.1, is unconstitutional.

[14] It was primarily on this ground that Justice Labrenz refused to dismiss Ms. Andrus' claim at the earlier hearing. Accepting, without deciding, that Ms. Andrus is entitled to raise this argument at this time, I have reviewed the *Code of Conduct Regulation* in question together with the argument advanced on behalf of Ms. Andrus. The *Code of Conduct Regulation* provides direction to suppliers and consumers of electricity as to what information may or may not be passed on by the supplier of electricity to the law enforcement authorities. The *Code of Conduct Regulation* section 10(3)(f) does give the customer the right to change this default position and eliminate information which may be provided by the supplier to law enforcement authorities.

[15] The case of ***R v Gomboc***, 2010 SCC 55 [***Gomboc***] is, at first blush, the most significant barrier to the applicant in this case. There, the Supreme Court concluded that a consumer's expectation of privacy did not include the information which the subject matter of this application. However, Ms. Andrus argues that an analysis of the judgments in that case reveals that the majority, which ruled in favor of the Crown, did so on the basis of the regulation in question, which was not itself constitutionally challenged. This argument is reviewed in some detail by Justice Labrenz in his decision. It is argued on behalf of the applicant that if she is successful in attacking the constitutional validity of the regulation, the underpinning of the Supreme Court's decision in ***Gomboc*** falls and it is not the authority which the Crown urges upon this Court as a binding precedent.

[16] The applicant argues that the *Code of Conduct Regulation* cannot save what would otherwise be a warrantless search and cannot be justified under s. 1 of the *Charter*. But this argument, in my view, puts the cart before the horse.

[17] I agree with the Crown's argument that the Supreme Court has established a purposive approach to s. 8 of the *Charter* in which privacy became the dominant organizing principle: ***R v Spencer,*** 2014 SCC 43 at para 15. It has adopted a principled approach and stated that it is necessary to consider "the totality of the circumstances": ***Gomboc*** at para 18. Here, part of those circumstances is that there is a regulation setting out a default position wherein the information which was disclosed to law enforcement authorities could be disclosed. I repeat that it is open to the consumer to eliminate that possibility. This then becomes part of the circumstances, such that if the consumer does not choose to change the default position, it remains the default position. There is no suggestion that the subject matter of the regulation is beyond the authority of the parent legislation or the Province of Alberta. I see no merit to the argument that, simply because certain information may be disclosed without a warrant, the regulation is unconstitutional.

[18] Furthermore, on a review of all of the evidence and the argument before me, I would not exercise my discretion under s. 24(2) of the *Charter* to exclude any evidence which was before the original Justice who issued the Restraining Order. Nor am I persuaded to exercise my discretion to interfere in any way with the original Restraining Order. The application to vary is dismissed with costs.

Heard on the 4th day of November, 2019.
Dated at the City of Calgary, Alberta this 4th day of May, 2020.

A.D. Macleod
J.C.Q.B.A.

Appearances:

Cynthia R. Hykaway
Alberta Justice and Solicitor General
for the Respondent

Pawel Milczarek
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Jenna Larae Andrus

Patricia Yelle, Q.C.
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