

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lepard v. Greenwood*,
2023 BCSC 1594

Date: 20230912
Docket: S131626
Registry: Kelowna

Between:

Gayla Lepard

Plaintiff

And

**David Barry Greenwood, Antonio Jose Carvalho Vieira,
Brandon Marco Vieira and Michael Anthony Vieira**

Defendants

And

**Great Canadian Gaming Corporation
and David Barry Greenwood**

Third Parties

Before: Master Hughes

Reasons for Judgment

Counsel for Plaintiff:

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C. R. Cordick

Counsel for Michael Anthony Vieira

M. Magaril

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B. T. Duong and E. Main, articulated
student

Place and Date of Hearing:

Kelowna, B.C.
August 30, 2023

Place and Date of Judgment:

Kelowna, B.C.
September 12, 2023

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Background

[1] On September 13, 2019, the plaintiff was a patron at the Hard Rock Casino in Coquitlam, BC, which is operated by Great Canadian Gaming Corporation. She was sitting on a stool and playing a slot machine when a fight broke out nearby between the defendants, who were also patrons at the casino. During the course of that fight, the plaintiff was knocked off her stool and onto the floor by one of the defendants. The fight was captured by surveillance cameras, and casino staff investigated and prepared incident reports.

[2] Pursuant to operational service agreements between the British Columbia Lottery Corporation (“BCLC”) and Great Canadian Gaming Corporation, the surveillance footage and incident reports (the “Surveillance Materials”) belong to BCLC. The application before the court is for production of the Surveillance Materials from BCLC, a non-party, pursuant to *Supreme Court Civil Rules*, B.C. Reg. 168/2009 (“Rules”), Rule 7-1(18). All parties agree that the Surveillance Materials are relevant to the issues in this action, are in the possession and control of BCLC and ought to be produced.

[3] BCLC is not opposed to production of the Surveillance Materials, provided that adequate protections are put in place to prevent inadvertent disclosure and to ensure that the Surveillance Materials do not form part of a public court record without adequate notice to BCLC. The proposed terms impose limitations on who may access the Surveillance Materials, how they are to be stored and used, and for their return to BCLC at the conclusion of this litigation. A notice period prior to any party tendering the Surveillance Materials as evidence would allow BCLC to apply for a sealing order, should it wish to do so.

[4] At issue is the terms and conditions that BCLC seeks as part of the order for production. None of the parties oppose the conditions sought by BCLC with the exception of defendant Michael Vieira. He is opposed to any conditions being imposed, and also raised a preliminary issue as to the jurisdiction of a master to hear this application.

Jurisdiction

[5] Section 11.3(2) of the *Supreme Court Act*, RSBC 1996, c 443 provides:

(2) Subject to the limitations of section 96 of the *Constitution Act, 1867*, a master has the same jurisdiction under any enactment or the Rules of Court as a judge in chambers unless, in respect of any matter, the Chief Justice has given a direction that a master is not to exercise that jurisdiction.

This is not one of those matters in which the Chief Justice has directed that a master is not to exercise jurisdiction (PD-50, Part A, para. 3).

[6] The defendant Michael Vieira submits that BCLC is relying on the inherent jurisdiction of the court to support its request for confidentiality conditions, and that this application must be heard by a judge as masters do not have inherent jurisdiction.

[7] However, Rule 7-1(17) provides:

(17) The court may order the production of a document for inspection and copying by any party or by the court at a time and place and in the manner it considers appropriate. (emphasis added)

[8] Reading Rules 7-1(17) and (18) together, I am satisfied that the court has the authority under the Rules to impose conditions on the production of documents in the possession of a non-party, and need not rely on inherent jurisdiction. Accordingly, this application and the imposition of the conditions sought by BCLC are within the jurisdiction of a master.

BCLC's position

[9] BCLC is an agent of the provincial government, and is responsible under the *Gaming Control Act*, SBC 2002, c 14, to conduct and manage gaming on behalf of the province. As part of its statutory obligation, BCLC undertakes information and intelligence gathering with respect to activity in its casinos. Surveillance is carried out to support BCLC's obligations under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 (the "*Proceeds of Crime Act*") and the *Gaming Control Act*, including BCLC's obligations to identify and report certain

transactions to the Financial Transactions and Reports Analysis Centre of Canada (“FINTRAC”) under s. 7 of the *Proceeds of Crime Act* and certain conduct, activities and incidents to the BC Gaming Policy and Enforcement Branch (“GPEB”) pursuant to section 86(2) of the *Gaming Control Act*, respectively.

[10] BCLC also collaborates with the RCMP to assist law enforcement and to obtain information relevant to preventing undesirable individuals from attending the premises of a gaming facility. As part of this collaboration, BCLC provides surveillance information relating to suspected illegal activity to the RCMP.

[11] BCLC’s information and intelligence gathering includes video surveillance in casinos and the reporting and recording of specific incidents in BCLC’s Casino Reporting System (“CRS”). Due to its sensitive nature, this information is highly confidential, and access to CRS is restricted even among casino employees.

[12] The operational service agreements between BCLC and Great Canadian Gaming Corporation related to the operation of the Hard Rock Casino provides that certain information, data or materials relating to the surveillance of the facility, including personal information of patrons and information related to the surveillance and operation of the facility and games in the facility, is the sole and exclusive property of BCLC and that the use of the data is subject to BCLC’s control.

[13] BCLC argues that publicly releasing the video footage could potentially compromise or undermine the effectiveness of surveillance techniques and monitoring capabilities by revealing the location of cameras, camera angles, blind spots and other limitations of the surveillance systems. Similarly, public release of the incident reports could reveal surveillance and security practices, along with the identity of the security and surveillance staff involved. Disclosure of the names and GPEB identification numbers of the staff members, which are included in the incident reports, could expose those individuals to heightened risk to their personal safety.

[14] Another concern is that the Surveillance Materials contain the personal information, including images, of casino staff and patrons who are not parties to this

action. BCLC is subject to the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165 (“*FIPPA*”). Section 30 of *FIPPA* requires that:

30 A public body must protect personal information in its custody or under its control by making reasonable security arrangements against such risks as unauthorized collection, use, disclosure or disposal.

[15] “Personal information” means recorded information about an identifiable individual other than contact information (*FIPPA*, Schedule 1). Video footage and audio footage of an individual’s image is their personal information : *School District 57 (Prince George) (Re)*, 2015 BCIPC 45 at para. 26; *Surrey Creep Catcher (Re)*, 2020 BCIPC 33 at para. 11.

[16] Section 32 of *FIPPA* provides:

32 A public body may use personal information in its custody or under its control only

(a) for the purpose for which the information was obtained or compiled, or for a use consistent with that purpose,

(b) if the individual the information is about has identified the information and has consented, in the prescribed manner, to the use, or

(c) for a purpose for which the information may be disclosed to the public body under section 33.

[17] The only purpose under s. 33 which is relevant to this action is s. 33(2)(l): to comply with a subpoena, warrant or order issued or made by a court or person in Canada with jurisdiction to compel the production of information in Canada. Accordingly, BCLC cannot release personal information in a civil proceeding unless the release is pursuant to a court order. It is still required to take steps to comply with s. 30 in protecting that personal information.

Michael Vieira’s position

[18] Michael Vieira’s position is that the conditions sought by BCLC are onerous and unnecessary. He submits that the implied undertaking (*Juman v. Doucette*, 2008 SCC 8) is sufficient to prevent unauthorized disclosure of the Surveillance Materials.

[19] In *Larkin v. Johnson*, 2019 BCSC 164, Justice Milman said at paras. 27-28:

[27] The implied undertaking usually suffices to protect the confidentiality of information produced to opposing parties by way of discovery. The cases in which additional protection is required must be shown to be exceptional: *Knight v. Imperial Tobacco Canada*, 2009 BCSC 339, at para. 5.

[28] In *Araya v. Newsun Resources Ltd.*, 2015 BCSC 1209, Abrioux J. summarised the principles that have found to be pertinent in determining whether a case is sufficiently exceptional for this purpose, at para. 20:

[20] The principles pertaining to confidentiality provisions are summarized in *Eisses v. CPL Systems Canada Inc.*, [2008] O.J. No. 239 at para. 5, 2008 CanLII 1946 (S.C.J.) and *Altec Design Group Ltd v. Motion Works Inc.*, [1993] 46 C.P.R. (3d) 61 at 71-72 (B.C.S.C.):

- i. a confidentially order is exceptional in nature: *Homelife Realty Services Inc. v. Homelife Properties Inc.*, [2002] O.J. No. 1482 at para. 3 (S.C.J.);
- ii. the presumption is that parties ought to have access to the other side's productions. In general, the necessity for complete disclosure supersedes the fact that a party may lose a competitive advantage when disclosure is made: *Forestral Automation Ltd. v. R.M.S. Industrial Controls Inc.*, (1977), 4 B.C.L.R. 219 (S.C.);
- iii. the burden of demonstrating that the court ought to deviate from this presumption rests on the party who would deny the access to or use of the documents. The denying party must show that the risk of harm is real and substantial. Speculation is not sufficient. An adequate factual basis must be provided: *Dodd v. Cossar*, [1998] O.J. No. 335 at paras. 2-4 (Gen. Div.); *Allerex Laboratory Ltd. v. Dey Laboratories L.P.*, [2002] O.J. No. 3168 at para. 15 (S.C.J.); *Homelife* at para. 22; *Deprenyl Research Ltd. v. Canguard Health Technologies Inc.* (1992), 41 C.P.R. (3d) 228 (Fed. T.D.);
- iv. however, the court has inherent discretion to grant an order restricting the production of documents in circumstances where unlimited production will prejudice a party: *BASF Canada Inc. v. Max Auto Supply (1986) Inc.*, [1999] O.J. No. 515 at para. 15 (S.C.J.); *Supreme Court Civil Rules*, Rule 7-1(1);
- v. an order may be made where the access or use of the information would risk serious financial harm if the information was available to a competitor or would allow a competitor to improve its competitive position: *BASF* at para. 16; *Zellers Inc. v. Venta Investments Ltd.*, [1998] O.J. No. 2118 (Gen. Div.);
- vi. if the court is satisfied that (a) the information is confidential, (b) it is commercially sensitive, and (c) a competitor could obtain an unfair advantage through its

release, the party seeking the order is *prima facie* entitled to a protective order unless the responding party would be unduly prejudiced by such an order: *BASF* at para. 17;

vii. in instances where the probative value of the documents is not sufficiently great to outweigh the real and considerable adverse effect of disclosing a trade secret, disclosure ought not to be ordered: *G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada Ltd.* (1992), 70 B.C.L.R. (2d) 180 (S.C.);

viii. the making of such an order is designed to strike a balance between the disclosure necessary for the conduct of an action and a party's *bona fide* right to the protection of confidential and sensitive information: *BASF* at para. 16. In maintaining a balance between disclosure and confidentiality, the governing principle is to lean in favour of openness and disclosure: *Devron-Hercules Inc. v. Gill* (1988), 27 B.C.L.R. (2d) 394 (C.A.);

ix. the party whose documents are being disclosed to be examined by an expert is entitled to have a representative present during the examination: *GEAC* [full citation below];

x. in matters not requiring technical expertise, the parties may be required to produce the documents to a third party for examination and report to the court: *Webster v. Mastercraft Development Corp.* (1991), 55 B.C.L.R. (2d) 121;

xi. an order preventing counsel from showing relevant documents to his or her client should only be granted in exceptional circumstances: *Deprenyl Research*;

xii. where the information that is at issue is such that it would allow a competitor to improve its competitive position, the deemed undertaking rule offers insufficient protection. This is because the deemed undertaking rule would not prevent the use of the information by a competitor so long as it does not use the information to commence a new lawsuit: *Zellers* at para. 16. It also does not apply to evidence filed in court or referred to in a hearing and it applies only to parties, their counsel, and experts, not to third parties: *BASF* at para. 20; *Juman v. Doucette*, at para.; and

xiii. the party viewing the confidential materials shall give an undertaking to the court and the opposite party, the terms of which may vary from case to case: *GEAC Canada Ltd. v. Prologic Computer Corp.* (1989), 24 C.P.R. (3d) 566 (B.C.S.C.).

[Emphasis added]

[20] Mr. Vieira relies on another decision of Milman J., *Reehal v. Reehal*, 2019 BCSC 1563, a family law case in which the claimant sought production of various

records related to the respondent's businesses. In *Reehal*, the court held that the exceptional circumstances required for confidentiality provisions to be imposed on document production between the parties had not been met on the evidence provided by Mr. Reehal. It is important to note that *Reehal* addresses the considerations where an application is made with respect to production of documents or records by a party to a proceeding.

[21] The restrictions sought by BCLC would require Mr. Vieira's counsel to ensure that the Surveillance Materials are appropriately labelled, remain securely in counsel's possession and control, and are not further disclosed except as authorized and then only to persons who provide written confirmation that they will abide by the confidentiality order. Counsel submits that these conditions introduce unnecessary expense and exposes him to potential contempt liability for an inadvertent breach of the order.

Analysis

[22] In granting an order under Rule 7-1(18), the court is to ensure protection of the independent interests of non-parties whose records are sought: *Kaladjian v. Jose*, 2012 BCSC 357 at para. 53.

[23] BCLC seeks to protect both its own interests and those of the public at large in ensuring the integrity of its surveillance systems and security practices. In addition, as noted previously, it has a statutory obligation to protect the personal information of individuals, including casino patrons and staff. These are both compelling reasons to impose protective conditions on the disclosure of the Surveillance Materials. While the conditions may be considered onerous, they are necessary and appropriate. I do not view the conditions as being unduly prejudicial to Mr. Vieira, and the conditions sought strike a balance between the disclosure necessary for this litigation and protection of the public interest and the interests of the individuals whose personal information is contained in the Surveillance Materials.

[24] I am satisfied that this is one of those exceptional cases where additional confidentiality protections, beyond the implied undertaking, are appropriate. Accordingly, the order sought by the plaintiff is granted on the terms set out in the draft order attached as Schedule A to the application response filed by BCLC.

Costs

[25] The plaintiff and BCLC seek costs against anyone who opposed the application. Only Michael Vieira was opposed.

[26] As BCLC is a non-party with no interest in the outcome of this litigation, it is entitled to its costs from Michael Vieira in any event of the cause and payable forthwith. The plaintiff shall have her costs in the cause.

“Master Hughes”