

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

RITCHIE SINCLAIR

P R O C E E D I N G S

BEFORE THE HONOURABLE JUSTICE S.F. CLEMENTS

On March 9, 2012, at TORONTO, Ontario

Courtroom 502

APPEARANCES

Counsel for the Crown

M. Callaghan, Mr.

Counsel for the Accused

M. Strathman, Mr.

FRIDAY MARCH 9, 2012

5
MR. CALLAGHAN: Your Honour, I can indicate - there is some additional information, and I see that - just so it's clear for the record - I don't necessarily need him to come forward. If Your Honour wants him to, that's fine. Mr. Sinclair.

THE COURT: He can remain seated.

10
MR. CALLAGHAN: Your Honour, I did receive some additional information from the officer in charge. The officer in charge just finished six days on. He called me this morning at about 10:30 from Oakville. Given what I'm going to convey to you, I indicated to him I'm not requiring him to come down to give the evidence. It'll become clear why I would say that to him when I tell you what the update is. Detective Eustace was in conversation with Mr. McLeod and his daughter. What I understand is the following - then I'll get to the caveat. He does require open heart surgery. It was confirmed by a Dr. Morgan, a heart specialist at Sunnybrook, on Monday March the 5th. It will be performed within 15
20
25
30
the next three to four weeks. He has to undergo a series of four pre-surgery tests, the first of which is now scheduled for Monday March the 12th. That's the day of the trial. He's been told by doctors he'll be in hospital for approximately five to seven days following the surgery, assuming there's no

5 complications, followed by a period of
convalescence at a home for approximately a
month. That puts him in a position of being
able to attend court sometime around late May,
early June 2012, if everything goes well and
he recovers as planned. Obviously he's 81
years old, so there's a possibility of
10 complications, as there is with anybody, but
they do increase with age. All this
information - what Detective Eustace was
hoping to get was to get a doctor's note or a
letter from them. But what I understand was
that he was not able to obtain anything in
writing that could be forwarded to the court
15 by this morning. He's currently resting with
friends, not in the city, and attends the
hospital on Monday. I'm provided with the two
phone numbers where he could be reached. What
Detective Eustace's sort of caveat was that
20 obviously the information is provided from Mr.
McLeod, because I asked him, "What other
confirmation is there? Can you find out
something?" I understand from the phone call
this morning that he called Sunnybrook,
25 they're not willing to give any information
out, personal information about another party,
without having a written consent form. So I
think Detective Eustace's position was that's
the information that he was able to gather.
30 The Crown and the police have no reason to
believe it to be untrue, and that's the

information that would be conveyed in support of an adjournment.

THE COURT: Mr. Strathman.

5
10
MR. STRATHMAN: Well, on Monday when my client called me and told me that the motion was occurring, I called Detective Eustace and left a message for him, asking about a doctor's letter. When I spoke to him personally on Tuesday or Wednesday I asked him about a doctor's letter, and I expressed our belief that Mr. McLeod is committing a fraud upon the courts, upon the police, and that we can't be relying on what Mr. McLeod says. And so I...

THE COURT: On what basis?

15
MR. STRATHMAN: Well I can take you through the material that I filed yesterday, and it clearly shows that he misled the police by - and...

THE COURT: With respect to another issue.

20
MR. STRATHMAN: No, with respect to this very issue.

THE COURT: His health.

MR. STRATHMAN: With respect to the allegation in this matter.

25
30
THE COURT: No, no, I'm talking about his health. Let's assume you're right. Let's assume he's misled the police. Let's assume he's an unreliable witness. Let's assume he has absolutely no credibility, for the sake of this issue before me today. Are you suggesting to me that he's lying about his

medical condition?

MR. STRATHMAN: I have no information, and that's why we wanted information from a doctor. I'll just hand up - and I just provided my friend with a copy. There was an email sent to Mr. Sinclair from a counsel in Toronto, Mr. Jonathan J. Sommer, S-O-M-M-E-R. That's the bottom email.

THE COURT: Yes.

MR. STRATHMAN: There was an ongoing civil case, February 23rd of this year, and Mr. McLeod was scheduled to be a witness in that case. And Mr. Sommer spoke to counsel for the other side, Mr. Schiller (ph), and was told that Mr. McLeod was available on thirty minutes' notice to attend. And he rhetorically asked, "When does McLeod claim his health problems began?" So as of the end of February we had this - he was apparently well and fit to attend court. It's interesting to note that Mr. McLeod's appointment was on this past March 5th, the day the motion was filed, and so it was sometime within a week of the 23rd that this issue arose. Now I looked up Mr. Sommer on the Law Society of Upper Canada website. He is a practicing lawyer. I just wanted to confirm that. We have had a couple of emails, but he indicates that as of that date Mr. McLeod was well. So...

THE COURT: Yes, but that's on February 23rd.

MR. STRATHMAN: Absolutely. And it's certainly possible that his health has declined since then.

THE COURT: Well, at 81 just about anything could happen.

MR. STRATHMAN Absolutely.

THE COURT: What's your position here? You're opposed to an adjournment?

MR. STRATHMAN: We are opposed to an adjournment. And the - not just because in my submission there's hearsay evidence, not substantiated in the way that the court should have it substantiated. I spoke to the trial coordinator's office. They're apparently setting dates in January, but because this matter didn't proceed the trial coordinator's office advised me we'd likely be looking at a date in September or October. So we're at eleven months since the judicial pre-trial in this matter now. April 13th was the judicial pre-trial, so we're eleven months - fourteen months approximately since the arrest. And we're going to be now a further six months - seventeen, eighteen months down the road between when the date was set and when the trial is proceeding. In my submission, on the face of the allegation - and I have a DVD here, because my client taped the service on December 17th of the subpoena - and in my submission it's helpful to review to see - because of the view of the complainant in this

case that Ms. Kersti, K-E-R-S-T-I, McLeod, found it to be a scary situation, she laughs and smiles...

5
THE COURT: Okay. That doesn't help on the issue of whether or not an adjournment should be granted, quite frankly. I don't know how that could possibly help me.

10
MR. STRATHMAN: Sorry if I'm not assisting Your Honour. I'll simply indicate that the bona fides are...

15
THE COURT: Well your position is that you think that Mr. McLeod's misleading. I've got Mr. Callaghan telling me the police officer, to the extent that he can confirm, or can't confirm independently whether or not Mr. McLeod has the conditions that he's described to the police officer, and I'm left in this kind of untenable situation, where I think somebody's going to have to call some evidence.

20
MR. CALLAGHAN: What I would say, Your Honour, is had this been on the day of trial, and a witness had influenza, we're not going to have a doctor's note before the court to say they have influenza. Generally speaking...

25
THE COURT: No, no, I appreciate that, but given what Mr. Strathman is saying, that he has some reason to suspect the authenticity of what Mr. McLeod is telling the police officer, based upon not the greatest or most reliable -
30
I mean I've got an email saying, you know, in

5
10
February he seems to be fine. And he may have said that in February, which doesn't mean that Mr. McLeod is in fact knowingly - or that he's not reliable or anything. But it does raise the prospect, I suppose, that - and given I guess what Mr. Strathman would say is other stuff that's going on, that relates to his reliability, which is really a trial issue, and not really relevant on the adjournment application in my view - it may very well be that some effort has to be made to confirm what Mr. McLeod is saying.

MR. CALLAGHAN: I can indicate why there's not more done for today is that...

THE COURT: Well he didn't have time.

MR. CALLAGHAN: There wasn't the time, and in fact it was yesterday by speaking with Mr. McLeod's daughter they found out where he was, north of the city, staying with friends. And that's where, after he received that information, he was able to yesterday have a more fulsome discussion with Mr. McLeod. But that didn't leave him an ability to get a letter from the doctor, or a written consent from...

THE COURT: He has an appointment on Monday.

MR. CALLAGHAN: He does.

THE COURT: At what time?

MR. GORDA: The appointment is in the morning. I don't know the time, other than...

THE COURT: It should be pretty easy to

confirm, he's at the hospital for an appointment on Monday. Wouldn't you agree, or are you going to question that too?

5
MR. STRATHMAN: Of course, I understand - I agree with Your Honour. I just - you know, Mr. Sinclair has no record, and has had this matter hanging over his head for a long time.

10
MR. CALLAGHAN: I mean if there's a specific bail term that's causing him extreme unction I'm happy to look at it.

THE COURT: No, I think what I'm going to do is put this back into court on Monday, and the trial judge is going to deal with it on Monday.

15
MR. CALLAGHAN: What I can ask is...

THE COURT: And on Monday, if the officer in charge arrives and says he's at Sunnybrook Hospital, he has an appointment with Dr. So and So, I mean we can confirm that he has an appointment with Dr. So and So, and he's present with the cardiologist.

20
MR. STRATHMAN: Well I'm in Your Honour's hands.

25
THE COURT: And then it seems to me - well the only other option is for me to grant the adjournment, quite frankly, at this stage. I don't know how that assists you very much.

MR. STRATHMAN: Well, if I could just get instructions from Mr. Sinclair.

30
THE COURT: Right.

MR. STRATHMAN: Thank you. It would be

helpful if it could be confirmed on Monday, not just that he had a doctor's appointment but that he is scheduled to have surgery in three to four weeks.

5 **THE COURT:** I think you'd have to leave that in the hands of the trial judge. I'm not going to usurp the function of whoever is going to be assigned to conduct this trial.

MR. CALLAGHAN: And I can indicate...

10 **THE COURT:** The only reason it's here, as I've learned, is because one of my colleagues felt some concern on March the 5th that Mr. Sinclair apparently was called by his partner to say the police were at his place with some sort of a document requiring him to be in court. And he cancelled his employment for that day, arrives here and seems to be the only one that knows that there's an adjournment application. And I think quite rightly my colleague's saying, "Well wait a minute. The police don't get to do this, and not tell anybody about this" and kind of pull him off the street, as it were. You know, it's presumptuous on their part, and pretty high-handed in my view, without telling somebody, and so I'm just trying to accommodate people. I appreciate, Mr. Strathman, what you're saying, but on the other hand the information that the officer has received seems relatively detailed. It doesn't fly in the face of common sense. It's

15

20

25

30

5
10
not information which you could look at and say, "Oh come on, you know, doctors don't behave in that way" or "Doctors don't schedule appointments for this kind of thing in that way." I mean on its face it seems it could be true. You on the other hand seem to think that he's an untrustworthy, unreliable person, who is capable of making this all up. And I'm left in a position with no evidence either way.

MR. CALLAGHAN: I mean from the Crown's perspective, I'm - if he's confirmed - look, it's the trial judge's decision at the end of the day, but...

15
THE COURT: Yes, and it's your decision as to what you want to call...

MR. CALLAGHAN: Right.

20
THE COURT: I mean I can't - I'm not going to suggest to you that you should do such and such.

MR. CALLAGHAN: I won't be subpoenaing his medical records for an adjournment application.

25
THE COURT: But I can understand why Mr. Sinclair, given what Mr. Strathman has said to me, may want to hear, or have further information about Mr. McLeod's availability on Monday if he's not available, or why he's not available.

30
MR. CALLAGHAN: And I'm prepared - I will be in touch with Detective Eustace, and what I

would like him to do is to go down to Sunnybrook on Monday morning, and to personally confirm that he's got an appointment with the cardiologist there.

5
THE COURT: I mean if Mr. Strathman's worst fears are correct, then obviously the Crown's got a significant problem on their hands.

MR. CALLAGHAN: I agree.

10
THE COURT: If this is a legitimate health problem, notwithstanding that he might otherwise be totally unreliable and untrustworthy as a witness, it still entitles the Crown, I think, to have an adjournment, if you understand what I'm saying. Because I'm not here, on an adjournment application, to assess credibility or reliability, but I get the point. And I think the fairest thing for me to do is to duck this one, and let the trial judge hear it, because I don't - my inclination would be, if you were to force my hand on this, is to grant the adjournment at this stage, on the information we have.

15
MR. CALLAGHAN: Okay. I will...

20
THE COURT: So I'm going to put this matter over to...

25
MR. STRATHMAN: I did finally smile, Your Honour. Thank you.

30
THE COURT: No, I understand the issue here, and I can understand your client's concern, and at the same time I've got an 81-year-old witness who has been told he's got to have

5
open heart surgery, and it seems to me that
you both could be right. You could have a
situation where you're correct about previous
conduct, but that he could nonetheless still
have a serious health problem. Does that make
any sense?

MR. CALLAGHAN: I would agree. There's a
number of possibilities.

10
THE COURT: I just think that it would be
useful from everybody's perspective that on
Monday - the jurist who is going to be seized
with this may not be very happy, but that's
neither here nor there. I mean...

15
MR. STRATHMAN: They'll be assisting other
courts in any event, as well.

THE COURT: Yes.

MR. CALLAGHAN: I'm here Monday, and I'm happy
to go in and address the trial judge on it,
with some concrete information, touch wood.

20
THE COURT: Thank you. Thank you both for
your representations.

MR. STRATHMAN: Thanks, Your Honour. Have a
nice weekend.

25
THE COURT: Thank you, Mr. Strathman.

30