

Citation: *R. v. Molloy*, 2007 YKTC 2

Date: 20061110  
Docket: T.C. 04-00406B  
Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**

Before: His Honour Judge Barnable

**REGINA**

v.

**THOMAS MOLLOY**

Appearances:  
Jennifer Grandy  
Andre Roothman

Counsel for the Crown  
Counsel for the Defence

**REASONS FOR JUDGMENT**

[1] BARNABLE T.C.J. (Oral): What I want to do is outline the charge as per the Information and I wish to point out that there is a presumption that all this was done right; it is not a re-trying of the section 810 matter, and there is a presumption that there is nothing to say otherwise, that this individual satisfied the judge that there were reasonable grounds for his fears regarding the nine-year-old and that when the recognizance was put to Mr. Molloy, the bottom portion of it told him that there was such a thing as a breach, about the breach and the consequences of a breach. All this is presumed to have been done correctly.

[2] The bare facts of the case are that the defendant on the day referenced in the charge, did have contact with Ross McBee. He drove Ross from the airport to downtown, and later picked up Ross and was in the vehicle with Ross until he disembarked at his own home, whatever time that took. I heard eight to ten minutes downtown and then from downtown, we will say double that, back to his own home. He was picking up Ross' mother, Donna, at the time, and that was at her request, from a phone call made to him two days before.

[3] The main prosecution witness was Lisa Patterson. Lisa Patterson witnessed the contact, both downtown and departing the airport, the rides in the vehicle. The first thing I think I will do is put -- Lisa Patterson saw (indiscernible) put her best foot forward as if I believe everything she said. That is not my finding of facts in the matter, and I will get on to Ms. McBee's evidence in a minute and explain it.

[4] In the cases that I was given, as Mr. Justice Cromwell said in the Court of Appeal in Nova Scotia in the *R. v. Regan* case, [2002] 1 S.C.R. 97, the first thing you have to do is get a set of facts that are reasonable from the evidence and will stand up to scrutiny. That turned out to be the problem in *Regan*, that the facts and the inferences did not stand up to scrutiny. So it is very important, and I think both counsel recognize that, to get a reasonable set of facts, and that is the first thing and that is what I spent a lot of time at.

[5] Now, putting Lisa's best foot forward, this is what I gather from her evidence, if I accept all of it. On the 26th of July, she did not know that Donna was returning on Air Canada at 1:15, that she did not know that Donna wished to be relieved of Ross, her

son, before 3:00 p.m., that she did not think it was legal for Donna and Tom McBee to informally agree to relinquish Ross, or, on the other side, to assume physical custody of Ross at times other than that set out by the judge. She came to the conclusion that it was not proper because she felt that the court had made the order at the time. Being off to lunch between one and two, she thought that perhaps Donna and Ross will be on the 1:15 plane and she thought that she might witness something that would "protect her back" - I am not sure what that expression meant for her - in the custody and access battle over Ross. She said she did not expect Tom Molloy to come along and breach a condition of his bond or recognizance. In fact, she did not even know if Tom Molloy was in Whitehorse at all. She did not know how Donna and Ross were to get in from the airport to wherever they were going next. She said when she saw Tom pick up Ross and Donna she did not intervene because she said Tom Molloy intimidates her. But she followed them to town for the sake of Ross' security, and because that was the normal procedure for her, was to observe. She then gave some explanation, a brief one, because any incident, minor or otherwise, usually ended up in the Supreme Court. Then for some reason she took notes and typed her notes and did "legwork" for the police, trying to find out if she could acquire a video as to what happened inside the terminal. Now that is putting her best foot forward.

[6] Donna McBee told me that she did not know when on the 26th -- she knew what date she was supposed to turn over Ross back to her estranged husband, but she did not know when on the 26th she had been told to return Ross to Tom. This is because she left without getting the actual order, but knowing that she would be arriving on the 1:15 Air Canada flight, she phoned Tom McBee and she left on his answering machine

the day before, that information of her wish to return Ross to him as soon as she disembarked. I listened to the tape because I wanted to see what else was the alleged content of that call, and the only other bit of content was that she did not have transportation from the airport. That is the only other bit of content. There was no reference to Thomas Molloy is going to pick me up later, or anything like that; no reference to Thomas Molloy that I can find.

[7] Tom McBee did not call her back, and she was not surprised. They were not on good terms, but despite that she still had faith that he would comply with her wish, so much so that she felt Tom Molloy could come out about 2:00 and that Ross would be gone by that time. When she found that Tom McBee was not there and Thomas Molloy was finally there, she weighed the breach more lightly than her nausea - she mentioned being pregnant and nauseous at the time - and her need to get to the court to file some papers as per her pledge, and she talked about fearing she would be in contempt if she did not.

[8] Before 3:00, or 3:00, she had Molloy's car and she was back at the airport, where she now expected to meet Tom McBee. They did and the exchange took place in silence and they went from each other.

[9] The worst case scenario, I would have thought, before I heard the last of the submission this morning, would have been this, and it was interesting that phrase, "worst case scenario", because it came up in *International Forest Products Ltd. v. Kern*, 2004 BCCA 349 case and I really agree with Mr. Roothman, that that is the most pertinent case of all. The worst case scenario would be that Donna made the call to

Tom McBee the day before, that it was received - and I think this is the worse now, although Mr. Roothman wishes to excuse Mr. McBee entirely and accept his testimony that he did not know anything about it. But the worst case scenario would be, in my mind, if Tom McBee and Lisa decided to do two things, that Tom not show up until three o'clock and Lisa would stake out the airport at 1:15, when the Air Canada plane arrives, in the hope of catching Tom Molloy picking up Donna and Ross. As it turns out, her hopes then were realized and she typed up her account for the police and she tried to gather even more evidence regarding the video recordings and she completed her legwork. That is the worst scenario.

[10] Now, Mr. Roothman is not even willing to go that far. He thought that Mr. McBee was truthful in not knowing, before he went to the airport at 3:00, anything about this phone call.

[11] Lisa Patterson's explanation for her being at the airport does not sound really credible to me, but Donna McBee's assertion that she expected Tom McBee to be there early to take Ross off her hands does not sound very credible either. Especially when I consider the bad blood that existed between the two, and when I consider Ms. McBee's comment in evidence that she did not expect -- she expected him to comply but she did not even expect him to call back, which is surprising, because he would never do something like that, she said.

[12] Now, when I say her evidence is not very credible, then I do not find in her evidence that she was surprised -- that Molloy was so surprised when he found Ross still there, later, at 2:00 or whenever he came. On balance, I believe that Ms. McBee

knew when she was to relinquish Ross and the point where she was to relinquish Ross, because she went back there at three o'clock. The two times she was talking about were 3:00 or 5:00, nothing at all about the 1:15. That was all from that call. And I believe that Ms. McBee, even after listening to her, would still have plenty of time to file her court documents that day, considering how far away downtown was and the courthouse was from the airport.

[13] But I do believe her when she told her cross-examiner that she was not upset when the no contact order was breached.

[14] After listening to Donna McBee and Lisa Patterson, I have come to the conclusion that the two of them seem much more skilled in legal proceedings than the average lay witnesses. When I weigh their evidence, one against the other and even singly, I cannot say who was more truthful about those items. I looked at Lisa's affidavit of August the 8th, and her statement, which she says she typed for the police in support of the charges. After hearing her testimony and comparing the two exhibits, that is, her statement to the police and her affidavit, I do not find too much to say, but I noted one difference. In the affidavit she asserted a belief in paragraph 6 that Ross was in the back seat of Molloy's vehicle, as it was driven away from the courthouse area and away from that hotel, the Westmark. In her typed notes she said that she saw Donna turn to the rear of the jeep, looking at something or talking to someone, which is not as specific. Otherwise, I considered that the lawyer prepared the affidavit and she, herself, prepared her police statement and I really see no other differences worthy of comment between the two.

[15] Of all the cases I had to read, I found the case that was the most analogous was *International Forest Products Ltd. v. Kern, supra*. In that case, the accuseds were being prosecuted by the Crown for disobeying a court order, and they agreed that they had disobeyed, but they claimed that their prosecution was an abuse of process because the beneficiaries of the original injunction had behaved badly themselves. At paragraph 11, it says:

Parrett J. framed the stay of proceedings issue before him with a quotation from the written submission of counsel for the appellants and the other accused:

The accused say that to allow these proceedings to go forward in view of Interfor's history of violence, reliance on violence in this proceedings, mass attack on the same protestors who Interfor sought the court's assistance to restrain on September 15, and subsequent conspiracy to destroy evidence and mislead this court, would shock the conscience of the community. Furthermore, the accused say that there is a strong public policy interest in clearly rebuking Interfor's conduct by declining to allow this prosecution to proceed further.

[16] This is most akin to what is going on here. In that case, the worst scenario was accepted and a stay was still not granted. Here, I have been asked to totally disbelieve Lisa Patterson on her awareness of the call and to conclude that she destroyed the call so that Tom McBee could not have opportunity to hear it, and I have to totally disbelieve her reason for being at the airport, which was never very clear, to watch her own back, to gather evidence, to be an observer. I agree with Mr. Roothman, it was not that clear. But I notice that her evidence of what she saw at the airport was not challenged in any regard.

[17] The focus here has been on entrapment. I do not believe that Lisa Patterson entrapped Tom Molloy by her stakeout at the airport. I do not believe she necessarily needed to have heard a voice message saying, "I'm coming on Air Canada at 1:15. I don't have means of transport. I would like Ross picked up at this time and at the airport." From the order that was obtained for this holiday, and considering Lisa's relationship with Tom McBee, I would think that Lisa knew when, at least a time and a date, because I do not see a place cited, when Ross was to be transferred over to Tom McBee from Donna. It was not established, and I mentioned this to the Crown, it was not established how much air traffic comes into Whitehorse daily from Vancouver, but it seems possible that Lisa, knowing that much, the date and where she is coming from, could deduce that Ross and Donna were coming at 1:15 without ever hearing a voice mail. It is not absolutely necessary that she heard and destroyed a voice mail. Of course, she testified to that effect in this Court, that she heard no voice mail.

[18] Both she and Tom McBee swore that there was no -- or testified; I am not sure now if somebody affirmed, but swore that there was no recorded call heard. As I said earlier, the defence counsel has credited Tom McBee with being truthful, but not Lisa. Presumably, the trip to the airport and the collecting of the information and the seeking the other information is what made the difference between the two in his mind.

[19] One of the problems I have not been able to resolve is this call. Nobody has ever produced anything to assist, either from the British Columbia end of the call or the Yukon end. Nobody produced anything to assist me and make it easier to decide if there ever was a call. One thing that Ms. McBee said was that she was supporting her recollection of making the call by remembering Tom's long and annoying, she did not



use the word annoying but that was the suggestion, that he had a long voice message that you would hear when he was not home or something, and she had to endure it, that was the feeling I got, and that helped her remember the fact of making a call. As I have already said earlier, there was nothing in the content of the message, as related by Ms. McBee, to say that Molloy was coming to the airport to get her.

[20] I listened to Tom Molloy's account of how he came to know he was to get Donna at the airport, and that did not assist at all in the credibility of Ms. McBee and trying to balance the probabilities that Donna did call Tom McBee's household because Mr. Thomas Molloy testified that it was two days before the 26th that Donna had called him to pick her up, and he said, "I asked her to phone Tom and Donna told me she had phoned Tom." So that has not assisted me either.

[21] Given that state of facts, the defendant has asked the court to extend the concept of entrapment to persons other than the prosecutorial authorities. Then, to apply entrapment to proceedings collateral to the one, whoever did the entrapping, intended to be abused. Because the defence position is that the aim of this stakeout out at the airport was to frustrate or abuse the Supreme Court proceeding, the custody matter there.

[22] If the defence theory was right, that that is what the effort was aimed at, and then if she put it in an affidavit, that she did put it in, I am told, I would expect the Supreme Court would be well able to look out for itself too in making sure that its processes are not abused. Also, in considering this; that this is a lay person supposed to be doing the thing or things - it seems it would have to be two of them at least - they could not just

have gone to the airport, she would have to merely have wiped out the phone call. That is the only causative she could have done, heard the phone call, wiped it out, not told Tom, and then gone to the airport. So I do not think just going to the airport would have been enough at all. I looked at who she was. She was not the one looking for custody of Ross. She calls him her stepson but she is off to the side a bit however close she feels to it. It was Tom McBee who was looking for custody.

[23] Now, keeping in mind what the defence is saying, I had to ask myself, is there any infection of the police here? Because that is the only way I can see Ms. Patterson's behaviour having any impact at all, that she would have to infect the police somehow. Anybody should be able to see that, and then go even one step up, because, I say, there is less expected of the laity than there is of the professional police in investigating crime. There is less expected of the police than there is of the professional Crown prosecuting people.

[24] So the only way I could see that it ever could connect all the way up to where we got a proceeding that should be stopped, is if everybody else got infected, and I do not see that. All the police did was took the statement from Lisa Patterson, and I do not know if they proceeded on that alone. Normally, if somebody alleges that somebody committed a crime, the police will at least put it to the person. There was no confessions or admissions brought in this case, but I did hear Ms. McBee and Thomas Molloy acknowledge the main ingredients of it, that there was contact, and the Crown has proceeded. I do not see any of that infection in this case.

[25] So those are the two big extensions, or more than two, if I count that she is not even the main character who is the beneficiary. She was the girlfriend of.

[26] A stay of proceedings is said to be a drastic measure reserved only for the “clearest of cases”. That is the phrase. Another requirement is that it has to be the only remedy available to counter the effect of the abuse. “Clearest of cases” creates a very high threshold, and that is where it was vitally important for the judge to get the facts right and to draw the correct inferences. As far as that phone call is concerned, that alleged phone call, I think there has got to be somewhere between not believing it happened at all and saying on a balance of probabilities that it did happen, and I do not know where to stop, whether it is equally balanced or less likely but possibly so or what, but I do not wish to say that on a balance of probabilities that call was ever made.

[27] Now, “clearest of cases” applies to the two prongs of analyses, that is, first of all, to see if the trial process is being interfered with, and even if it is not, to go to that residual ground that we spoke of. I think it is the residual ground that Mr. Roothman was urging me towards throughout, rather than the process of the trial itself. I can see Thomas Molloy and Donna McBee being pretty annoyed, and I can see him imagining that yes, they got the phone call, and yes, they just laid in wait for us as a result, but I do not see the public being particularly shocked about behaviour like this from lay people only off to the side, interested and involved, but not being the centre of it; I do not see the public being shocked, and I do not think a stay is appropriate. I do not think there was entrapment. I found no case that would satisfy me in the cases presented that this is a case of entrapment. I am not satisfied there was abuse of process. The case of *R. v. Unterschute*, 2004 YKSC 7, from this jurisdiction, the police in that case, the facts

were that the policeman, without suspicion or without any proof of suspicion, invited a citizen to commit a crime, that is, provide him with boot-legged liquor and the citizen did, and that was entrapment. But I do not think that Lisa Patterson invited Thomas Molloy to come out and to get in contact with Ross. As I said at the beginning and I come back to that, I presume, I am sure, that everything was done right when Thomas Molloy was ordered to enter into this recognizance. The motion for a stay of proceedings is denied.

[28] Do you want a few minutes or anything? All the evidence in this trial is heard. I did not hear submissions on the facts, but I thought you were pretty well agreed that those were the facts.

[29] MR. ROOTHMAN: Yes, Your Honour, from the defence's side there is no issue about the facts and as such the facts in itself technically sets out the basis for a conviction.

[30] THE COURT: Well, they are set out, technically, they are set out.

[31] MR. ROOTHMAN: Yes.

[32] THE COURT: Can I enter a conviction at this time, or is there anything else to be said?

[33] MR. ROOTHMAN: There is nothing to be said from --

[34] THE COURT: I find you guilty as charged, Mr. Molloy.

