

# Court of Queen's Bench of Alberta

**Citation: R. v. B. P., 2010 ABQB 204**

**Date:** 20100330  
**Docket:** 080469810S101001  
**Registry:** Calgary

Between:

**Her Majesty the Queen**

Respondent

- and -

**B. P.**

Appellant

**Restriction on Publication:** No one may publish any information that may identify a person as having been dealt with under the *Youth Criminal Justice Act*. See the *Youth Criminal Justice Act*, s. 110(1).

No one may publish any information that may identify a child or young person as being a victim or witness in connection with an offence alleged to have been committed by a young person. See the *Youth Criminal Justice Act*, s. 111(1).

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**Reasons for Judgment  
of the  
Honourable Madam Justice J. Streckf**

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Appeal from the Conviction by  
The Honourable Judge S.E. Lipton  
Convicted on the 11<sup>th</sup> day of February, 200  
( Docket: 080469810Y101001)

[1] This is an application by Christopher McAviney for intervenor status in a summary conviction appeal brought by his former client, B. P.

[2] Mr. P. was charged with carrying, using or threatening to use a weapon in committing an assault upon M. L. on April 15, 2008, contrary to section 267(a) of the *Criminal Code*. Mr. McAviney was Mr. P.'s trial counsel. On February 11, 2009, Mr. P. entered a guilty plea to possession of a weapon for a dangerous purpose, contrary to section 88(1) of the *Criminal Code*. The original charge was withdrawn and the plea was accepted by the Provincial Court Judge, who sentenced Mr. P. to a nine month term of probation.

[3] On March 10, 2009, Mr. P. filed a Notice of Appeal in which the primary ground advanced is that the guilty plea entered by Mr. McAviney on behalf of the Appellant is invalid and that a miscarriage of justice resulted from Mr. McAviney's ineffective representation. Mr. Priija agreed to waive solicitor-client privilege with respect to Mr. McAviney.

[4] Mr. McAviney seeks intervenor status in the appeal, with leave for his counsel to ask him some supplemental questions after his evidence would be led by the Crown, to cross-examine Mr. P. after Crown counsel with respect to his interactions with Mr. McAviney, and to make submissions on matters pertaining to Mr. McAviney's representation of Mr. P. in the case.

[5] The granting of intervenor status is a matter for the exercise of the Court's discretion. The test generally applied in Alberta, which does not have rules specifically addressing the granting of intervenor status, is whether the party seeking to intervene will be directly affected by the ultimate decision of the case and/or whether its presence is necessary for the Court to properly decide the matter, having regard to considerations of expeditiousness and fairness: *R. v. De Trang*, 2002 ABQB 185, 4 Alta. L.R. (4<sup>th</sup>) 161, at paragraphs 9 - 10.

[6] Our Court of Appeal has recognized that intervention is unusual in criminal proceeding as stated in *R. v. Neve* (1996), 108 C.C.C. (3d) 126 (Alta. C.A.) per Irving J.A. at page 131:

Any granting of intervenor status is discretionary, and ought to be exercised sparingly. Interventions have been permitted in criminal proceedings although normally such interventions are intended to offer a broader perspective beyond the merits of a particular prosecution. Canadian criminal proceedings, procedurally and in their purpose, must remain a simple *lis* between the accused person and the accusing Crown. We were shown no case where an intervention was permitted when its stated purpose was to argue the merits of the appeal itself. Where intervention is sought on a point of law, that should be defined with particularity, rather than in vague and elusive terms.

[7] Similarly, in *R. v. J.L.M.A.*, 2009 ABCA 324, 464 A.R. 310, Watson, J.A. held at paragraph 2:

Intervention by a third party in a criminal case is generally shunned by the courts for a variety of policy and prudential reasons. Without discussing all those reasons, it can be said that all necessary voices with proper standing will necessarily be heard through the traditional binary process. There is a risk that the hearing of other voices can distort an appeal. That risk of distortion is of acute concern where the intervention might be directly or indirectly adverse to the defendant in the case. Where the defendant already faces the voice of the state, the courts must necessarily be concerned about introduction of any other voice that could hurt the defendant.

[8] While Mr. McAviney acknowledges that intervention in a criminal case is unusual, he requests that the Court exercise its discretion to allow it in this case. He claims to have a direct interest in the outcome of the case as the appeal is based upon his alleged incompetence, inadvertence or unethical practices. He argues that the real *lis* or issue in the case is between Mr. McAviney and Mr. P. because it is that relationship that will be the central element of the appeal. It is also argued that Mr. McAviney's position as an officer of the court distinguishes him from other witnesses. Mr. McAviney takes no position on the merits of the appeal itself.

[9] The Crown and Mr. P. oppose the application. The Crown disputes the suggestion that Mr. McAviney has a direct interest in the appeal and takes the position that he is simply a witness and that Mr. P. is the only one with a direct interest in the outcome of the appeal. The Crown takes issue with the characterization that the *lis* in this case is, or should be viewed as being, between anyone other than the Crown and the accused, who is the only person subject to state action in this proceeding. While the Crown acknowledges that Mr. McAviney's professional reputation may be called into question, it is submitted that if the potential effect on a witness's reputation was considered a sufficient reason to grant intervenor status that would open the floodgates, for example, police officers accused of using excessive force or sexual assault victims may also feel their reputation has been called into question in a criminal proceeding. The Crown's position is that Mr. McAviney's conduct in the case was appropriate and that his interests are being protected. The Crown rejected Mr. McAviney's submission that being a lawyer or an officer of the court should give him any special status, as compared to any other witness, when seeking intervenor status.

[10] Mr. P. opposes the application on the grounds that the appeal is not about Mr. McAviney, but rather about his right to a fair trial, and that granting Mr. McAviney intervenor status could shift the focus of the appeal. He also opposes being subjected to being cross-examined twice.

[11] The Crown referred the Court to two decisions in which intervenor status was granted to a party's previous legal counsel, both of which they argue are not binding and are distinguishable. The first case involved circumstances that are analogous to those before the Court on this application. In *R. v. West*, 2009 NSCA 63, 279 N.S.R. (2<sup>nd</sup>) 241, one of the grounds advanced by the accused on an appeal of his convictions and sentences for several *Criminal Code* offences

was legal incompetence and ineffective representation by the accused's previous counsel. In permitting counsel to intervene, Saunders J. stated at paragraph 31:

It seems obvious to me that Mr. Jeffcock has a direct interest in these proceedings with respect to the ground of appeal alleging incompetence. A finding of incompetence would have an impact on him personally, and might give rise to civil or regulatory proceedings. Mr. Jeffcock's conduct and professional competence as a lawyer are under attack by Mr. West. In my view he would be denied an effective way of answering those charges (which may ultimately have a significant bearing on the outcome of the appeal) without being added as an intervenor.

[12] He went on to state at paragraphs 34 - 38:

34 There will be no delay occasioned by the addition of Mr. Jeffcock as an intervenor. This case is being case managed and the fresh evidence application and the appeal on the merits are already scheduled for fixed dates in November.

35 As acknowledged by Mr. Scott for the Crown at the hearing, Mr. Jeffcock's participation may assist the Court in clarifying or streamlining some of the issues. Mr. Jeffcock is represented by experienced counsel who assured me that they will comply with any deadlines or directives imposed in completing these proceedings.

36 There can be no prejudice to Mr. West in permitting Mr. Jeffcock to intervene. The appellant has made serious allegations about an officer of the court; fairness dictates that such allegations be answered by Mr. Jeffcock directly, particularly where they form part of the basis for overturning the conviction under appeal.

37 Mr. Jeffcock's participation would not result in Mr. West facing two prosecutors. His submissions will be limited to his interactions and communications with Mr. West. Since Mr. Jeffcock's competence and advice have been raised squarely in the appeal on the fresh evidence application, it is necessary for this Court to have the opportunity for full examination of that advice before deciding whether it in any way caused or contributed to Mr. West's conviction.

38 Having regard to these unique circumstances, and the factors considered in earlier decisions of this Court in such cases as K.A.R., and Regan, I am satisfied that fairness, justice and the public interest justify Mr. Jeffcock being granted formal standing as an Intervenor in these proceedings. I will grant an order accordingly.

[13] In *Butty v. Butty*, 2009 ONCA 852, where the trial judge had made highly critical comments about one of the lawyers in a matrimonial trial, the lawyer in question was identified in the case report on appeal as an intervenor represented by counsel, without any discussion of the lawyer applying for intervenor status or the basis on which that was granted.

[14] Neither of these cases are binding upon me. The circumstances in *Butty*, which was a civil case, are distinguishable and there is no indication in the decision whether there was any opposition to previous legal counsel being given intervenor status. I am not persuaded that the reasoning adopted in *West* should be applied in this case.

[15] As with any professional when his or her conduct is called into question, it is not surprising that Mr. McAviney takes issue with some of the allegations in relation to him advanced in Mr. P.'s appeal. However, as our Court of Appeal recognized in the passages referred to above, the *lis* in any criminal proceeding is between the accused person and the Crown only. Permitting other participants to have a role beyond that of a witness can distort that process, which is of particular concern where, as in this case, the intervention sought may be adverse to the interests of the accused. I am not persuaded that Mr. McAviney should be afforded any special status because it is his conduct as an officer of the Court that is at issue. Courts must exercise caution and restraint whenever any special status or privileges are sought to be afforded to participants in the legal process beyond that available to members of the public in general. I see no reason to do so in the circumstances of this case.

[16] Mr. McAviney's application for intervenor status is dismissed.

Heard on the 17<sup>th</sup> day of March, 2010.

**Dated** at the City of Calgary, Alberta this 29 day of March, 2010.

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**J. Strekaf**  
**J.C.Q.B.A.**

**Appearances:**

Kyra Kondro  
Crown Prosecutor's Office  
for the Respondent

Danusia Bourdon  
Ruttan Bates  
for the Appellant

Perry Mack, Q.C.  
Machida Mack Shewchuk Meagher LLP  
for the Applicant