CITATION: Bruno-Manser-Fonds v. Royal Bank of Canada, 2018 ONSC 918
COURT FILE NO.: CV-17-578681-00CL
DATE: 20180207

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: BRUNO-MANSER-FONDS, ASSOCIATION FOR THE PEOPLES OF THE RAINFOREST AND MUTANG URUD, Applicants

AND:

ROYAL BANK OF CANADA, TORONTO-DOMINION BANK, MANULIFE FINANCIAL CORPORATION and DELOITTE & TOUCHE, Respondents

BEFORE: S.F. Dunphy J.

COUNSEL: *Lincoln Caylor, Maureen M. Ward and Nathan Shaheen*, for the Applicants

Marie-Andrée Vermette and Anastasija Sumakova, for the Satko Group Respondents

Junior Sirivar and Vladimira Ivanov, for Respondents Royal Bank of Canada and Toronto Dominion Bank

Andrew Gray and Stacey Danis, for Respondent Manulife Financial Corporation

Lara Jackson and Jed Blackburn for Respondent Deloitte & Touche

HEARD at Toronto: February 5, 2018

REASONS FOR DECISION

[1] It is not because the court can do something that it ought to do it. In my view, it would be inappropriate to extend the application of the court's inherent jurisdiction beyond existing precedent where doing so is not demonstrably necessary. As well, inherent jurisdiction ought not to be exercised in such a fashion as to undermine the careful balancing of interests already undertaken by Parliament in the *Criminal Code*. The order sought would confer greater powers upon individuals investigating a possible crime than those Parliament has conferred upon police and other public officials.

[2] I dismissed from the bench this application for a "*Norwich Pharmacal*" order. The order sought would have required the respondents to produce a broad range of confidential information to the applicants in order for the applicants to pursue their

investigation into a possible private prosecution of certain individuals or corporations in Canada. They concede they do not yet have sufficient evidence to pursue that prosecution without the further information they hope to glean from the documents sought. Upon dismissing the application, I undertook to deliver my reasons, these are those reasons.

Factual background

[3] The applicant Bruno-Manser-Fonds is a Swiss-based non-profit organization that advocates for rainforest conservation in Malaysia and combatting corruption in government there. The applicant, Mr. Urud, is a Canadian resident and citizen, but was originally from a village in Malaysia and is a descendent of the Kelabit people who are native to that Malaysian state on the island of Borneo.

[4] The applicants are of the view that Mr. Abdul Mahmud Taib has been guilty of systematic corruption for a number of years and has enriched himself very greatly as a result. Mr. Taib is a government official in the Malaysian state of Sarawak, itself located on the island of Borneo.

[5] The applicants have filed a large volume of information relating the allegations of corruption that they believe Mr. Taib is guilty of. Much of that information is of the hearsay variety, arising from media and similar accounts. None of it has yet been proven in court. However, the charges are serious ones.

[6] Of course allegations of corruption in Malaysia do not in and of themselves engage Canadian courts or Canadian law. There are at least two avenues in particular where Canadian law becomes engaged in such matters.

[7] Canadians doing business abroad are banned from engaging in corrupt practices themselves. We have ratified the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* and in consequence enacted the *Corruption of Foreign Public Officials Act* (S.C. 1998, c. 34).

[8] We have also enacted a variety of amendments to the *Criminal Code* in relation to possession of the proceeds of crime and money laundering that are of potential application. These apply when proceeds of activity that would be illegal if undertaken inside Canada are brought into this country. These provisions are set forth in s. 354 and in Part XII.2 of the *Criminal Code*. Where some of the proceeds of corrupt activity are brought into this country, Canada may, in some circumstances, find itself having to deal with the consequences of corruption abroad.

[9] The Canadian connection to this application arises from the fact that Mr. Taib's daughter went to school in Canada, married a Canadian and has settled here. Ms. Taib and her husband have founded and operated what has become a fairly large group of real estate companies that are referred to for convenience as the "Satko Group".

[10] The applicants allege that the Satko Group was founded with and has been significantly funded over the years by proceeds of the allegedly corrupt activities of

Mr. Taib in Malaysia. As such, they wish to investigate the prospect of charging some or all of the individuals and companies connected to the Satko Group with crimes including, potentially, knowing receipt of proceeds of crime and money laundering. The common elements of both offences are (i) that the proceeds in question are proceeds of an act or omission anywhere that, if it had occurred in Canada, would constitute a designated offence (this would include corruption-related offences in the *Criminal Code*); and (ii) that the proceeds in question were received and/or converted knowing or believing the property in question to be proceeds of such a crime.

[11] The applicants originally brought this application as an *ex parte* motion for a *Norwich Pharmacal* order. The matter came on before Myers J. on August 21, 2018. He declined to deal with the matter *ex parte* and directed notice be given. His reasons are now reported (*Bruno-Manser-Fonds v Royal Bank of Canada*, 2017 ONSC 5517 (CanLII)).

[12] The applicants re-constituted their application under a formal Notice of Application and, as directed, served the four financial institutions against whom relief was sought. The Satko Group and certain members of Mr. Taib's family alleged to be associated with it were also served. The Satko Group and each of the named financial institutions responded.

[13] These "Norwich Pharmacal" proceedings are not the only proceedings instituted by the applicants in Canada. They also filed a complaint/request for review in relation to the Satko Group with the "National Contact Point" for the OECD in Canada under the OECD Guidelines for Multinational Enterprises. This application was very hotly contested by the Satko Group and from this it would appear that the efforts of the applicants against Mr. Taib and persons and corporations associated with him has a very long and involved history.

[14] The Canadian National Contact Point issued a "Final Statement" dated July 11, 2017 declining to become further involved. The Final Statement made a number of comments regarding the conduct of the application by both sides, including breaches of confidentiality by the applicant BMF and observations about the "long standing and adversarial history of dispute between BMF and Satko".

[15] Each of the four named financial institutions have provided or are providing financial services to the Satko Group and are alleged to possess records that might enable the applicants to determine the sources of shareholder loans, down payments on properties and confirmation of legal and beneficial ownership of entities and properties. Evidence of these facts would be essential to make out the essential elements of the crimes being investigated.

[16] The material provided on this application was voluminous. Evidence and legal authorities presented at this hearing have filled two banker's boxes quite full. It can fairly be observed that no party left any stone un-turned in their zeal to present the issues fully and completely.

Issues to be decided

[17] The issue in this case is whether the inherent jurisdiction of this court ought to be exercised to permit the issuance and execution of what amounts to a civil search warrant in aid of a possible private criminal prosecution.

Analysis and discussion of issues

[18] The parties presented extensive written argument addressing the issues and evidence. The thoroughness of these presentations enabled me to focus on the one or two key questions that emerged and to conduct what had been originally scheduled as a two-day appearance in a half day. That is not intended as a reproach. I was able to focus my questions on key areas of dispute and to evaluate the position of the applicants on these. As it turned out, those issues were sufficient to enable me to dispose of the application more quickly than might otherwise have been the case. My reasoning process in arriving at that conclusion is summarized under each of the headings that follow.

(i) This case is novel

[19] Our Court of Appeal reviewed the history and application of *Norwich Pharmacal* orders in this province in the case of *GEA Group AG v. Flex-N-Gate Corporation*, 2009 ONCA 619 (CanLII). The origins and application of this remedy are quite decisively civil in nature. I have not been pointed to any Canadian cases where *Norwich Pharmacal* orders have been sought or granted in the connection with intended criminal proceedings.

[20] The applicants have referred me to a House of Lords decision that, they suggest, indicate an opening to use of this remedy in the context of criminal proceedings. An examination of *Ashworth Hospital Authority v. MGN Ltd.*, [2002] UKHL 29, [2002 All E.R. (D) 234 (Jun) reveals a much more nuanced conclusion. The *Norwich Pharmacal* order under consideration in that case was sought by the putative plaintiff in connection with a potential tort claim that might also become a criminal matter. I have been referred to no cases, whether in England or in Canada, where the *Norwich Pharmacal* jurisdiction has been applied in a purely criminal context.

[21] That is not at all surprising. Criminal law is overwhelmingly a matter of public investigation and enforcement.

[22] In the present case there is no civil proceeding contemplated or described. The applicants have no connection with the persons who might potentially be the object of the criminal proceedings they wish to investigate. That criminal proceeding, it is to be recalled, relates to the knowing receipt and conversion in Canada of proceeds of criminal activity abroad. This is of course derivative of the main focus of the applicants' attention being the corruption allegedly taking place in Sarawak and the alleged devastation of the traditional lands of the indigenous peoples there. If the criminal activity abroad was also a tort – which fact is by no means established – there is nothing before me to indicate that either applicant would have standing to advance the tort claim or that Ontario would be a potential forum for it. I raise the point only to dismiss it. The applicants have not

alleged a civil foundation to this application. They base it solely upon the prospect of an investigation of possible criminal charges.

[23] The relevance of novelty is this. Where I am being urged to take my inherent jurisdiction down paths where it has not yet gone, different considerations apply than when I am being urged down a well-worn path. I must be more alert to the public policy context and ramifications of the proposed relief.

(ii) Inherent jurisdiction

[24] There are perhaps two areas of the law where it can be observed that the categories are not yet closed. Negligence is one; inherent jurisdiction of superior courts is another.

[25] In *R. v. Caron*, [2011] 1 SCR 78, 2011 SCC 5 (CanLII), Binnie J. observed that a "categories" approach to inherent jurisdiction is not appropriate, but that the "very plenitude" of inherent jurisdiction "requires that it be exercised sparingly and with caution" where it is "essential to avoid an injustice".

[26] Following *Caron*, I would not hold that I should decline to entertain this application merely because no other court has exercised the jurisdiction to make the order sought. Whether this application neatly fits within the *Norwich Pharmacal* category or not, the underlying consideration is whether the relief sought is "essential to avoid an injustice". However, the *Caron* also commends caution in considering that question given the novelty of the relief sought.

(iii) Reasonable grounds to believe

[27] The applicants have filed seven volumes of evidence. This includes evidence from a wide variety of sources of varying degrees of reliability. The two criminal charges the applicants seek to investigate are knowing receipt of the proceeds of crime and knowing concealment or conversion of the proceeds of crime (the essential elements of each crime are of course more complex than my brief summary would suggest). For the time being at least, the applicants have suspicions but very little concrete evidence as to the amount, timing and criminal source of funds of the Satko Group. These are all matters that go to essential elements of the crimes the applicants wish to investigate.

[28] The applicants do not suggest that the evidence accumulated yet rises to the level of reasonable grounds to believe that an indictable offence under the *Criminal Code* has been committed. That would be the standard they would have to meet to lay an information under s. 504 of the *Criminal Code*.

[29] The applicants similarly do not presently have the reasonable grounds needed to obtain a search warrant under s. 487 were that avenue open to them as potential private prosecutors. Stated differently, even if the police were to have picked up this investigation, it has not progressed to the point where a search warrant analogous to what I am being asked to approve could be obtained by police. The links between the assets

of the Satko Group in Canada and the alleged corruption of Mr. Taib in Malaysia depend upon conjecture and suspicion more than evidence.

[30] The applicants are looking not only to determine who committed a particular crime and how, they are looking to find if any crime has been committed at all.

(iv) Necessity

[31] The necessity, if any, of the relief sought must therefore logically be examined from the perspective of the necessity to pursue an investigation that (i) has not proceeded to the point of producing sufficient information to justify a warrant if sought by police under s. 487 of the *Criminal Code* and (ii) has not produced sufficient evidence to sustain a private prosecution by way of information under s. 504 of the *Criminal Code*.

(v) Interests of justice

[32] In my view, the forgoing analysis leads logically to only one possible outcome and that is a dismissal of this application.

[33] Parliament has marked out a wide road for the applicants to follow if their investigation reaches the point where they have enough information to lay an information under s. 504 of the *Criminal Code*. Many things may happen in the context of such a private prosecution. The attorney-general may determine to issue a stay. The attorney-general may decide to intervene. Peace officers may determine to exercise their authority to seek a warrant to further the investigation of charges emerging from review by a justice. I express no view as to whether such a private search warrant would be available under the court's inherent jurisdiction to a private prosecutor whose evidence reaches that s. 504 *Criminal Code* threshold of reasonable grounds to believe.

[34] In this case, the applicants say that they have not yet got enough evidence to take the private prosecution path laid out by Parliament. They ask this court to carve out for them another road that Parliament has not seen fit to add to the *Criminal Code*. They ask this court to lend its inherent jurisdiction to advance a private *investigation* of alleged crimes before there is enough evidence to justify private *prosecution* of those crimes by the standards laid out in the *Criminal Code*. They further ask this court to sanction a mandatory search for evidence in circumstances where that investigation has not progressed to the point where police, were they running the investigation, could ask for such a warrant.

[35] The public policy case for *favouring* private criminal investigations over public investigations is not one that can be made.

[36] It seems to me to be self-evident that a civil search warrant in aid of a private criminal investigation ought to be a vanishingly rare occurrence where no criminal search warrant could be issued were the investigation publicly led.

[37] Tough cases can often make bad law. The applicants' story is a moving one that very naturally evokes sympathy. It is impossible to maintain indifference in the face of the possible destruction of the way of life of so many people and the loss of fragile, unique and invaluable ecosystems in the forests of Sarawak. These considerations quite naturally lead to a temptation to bend the rules "just this once".

[38] The power of precedent in our legal system, however, is such that rules seldom get bent just once. Today's novel order is tomorrow's routine.

[39] There are other perhaps less obvious, but no less important public policy issues that must also be considered before venturing out into the uncharted waters the applicants invite me to explore. These include considerations of the role of judicial discretion in relation to the rule of law and the balancing of interests in our criminal justice system to say nothing of the fundamental principles embodied in our *Charter of Rights and Freedoms*.

[40] Expanding the application of this court's inherent jurisdiction in the manner requested would put the court on what could easily turn out to be a very slippery slope. Favouring private prosecutions with lower standards than Parliament request be applied to public prosecutions would inexorably work to undermine the checks and balances built into the *Criminal Code*. The emergence of a cottage industry in private prosecutions to work around troublesome "obstacles" in the *Criminal Code* would be a very foreseeable and negative outcome of such a policy.

[41] Parliament has chosen to retain the institution of private prosecutions in the *Criminal Code* and Canadian courts have recognized this as a valuable safety valve in the case of official inertia, indifference or even ineptitude. However, the scope retained for private prosecutions is a constrained one and is a creature of statute. It would not be appropriate to disrupt the balance struck by the *Criminal Code* with ad hoc intrusions of inherent jurisdiction that may have significant unintended consequences.

Disposition

[42] I ruled at the hearing that the application must be dismissed. My reasons for so ruling are expanded upon above and I have so endorsed the application record.

[43] I have not yet made a decision regarding costs. Any decision I do make will have to consider and take into account, among other things, the novelty of the issues raised and the public interest in their airing and resolution. My reference to "public interest" is not limited to the interests advanced by *any* party as there were and are important public policy issues touching upon the positions of *all* of the parties.

[44] The parties are invited to discuss the matter among themselves. If they are not able to reach a resolution, I will receive their written submissions. These are to be limited to five pages per party, exclusive of authorities cited (citations alone are sufficient unless the cases are not available in the normal on-line data bases) and any outlines of costs or

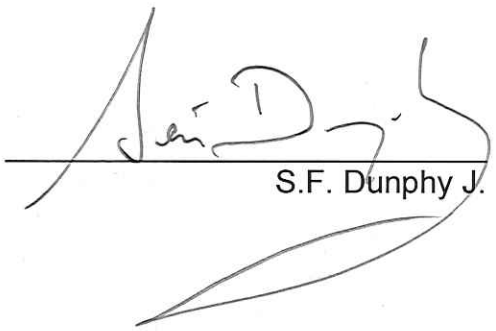
offers to settle. The timetable below may be modified by the parties without consulting me providing *all* are in agreement. I would ask one of the respondents to volunteer to collect *all* submissions and to submit them to me electronically all together via my assistant or the Commercial List office once all are collected and in place. In the absence of a volunteer, Royal Bank of Canada is nominated as first named respondent.

Respondent submissions: February 28, 2018

Applicant submissions: March 14, 2018

(Reply with leave only and not to be encouraged)

[45] I congratulate all of the parties on a very thorough and well-presented review of these novel and important issues.



S.F. Dunphy J.

Date: February 7, 2018