QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2012 SKQB 288**

Date: **2012 07 18**
Docket: QB CR 900 of 2011
Judicial Centre: Estevan

BETWEEN:

SLAWOMIR BIELAWSKI

APPLICANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

Counsel:

Steven P. Dribnenki — for the Crown (respondent)
Nicholas P. Robinson — for the accused (applicant)

JUDGMENT
July 18, 2012

SCHWANN J.

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[1] This is a pre-trial motion by the accused for a *Stinchcombe* order (*R. v. Stinchcombe*, [1995] 1 S.C.R. 754) requiring the Crown to disclose:

> "all material that may be relevant to the within matter in the possession and/or control of Her Majesty the Queen including all radio and/or electronic transmissions, or transcripts thereof, in relation to the individuals enumerated in the Search Warrant and Sealing Order dated August 23rd, 2010 including, but not limited to Sebastiano D'Amato and Corey Johnson.

[2] The accused, Slawomir Bielawski, alleges to have been detained without warrant based on a random police search of a GMC vehicle. It was only after these events transpired that Estevan Police Service obtained a search warrant in relation to a package found within the vehicle in the course of their warrantless search. The search warrant was granted by a justice of the peace on August 23, 2010 based on the information of Cst. Tyler McMillen. It authorized the following search to be undertaken:

> "... in respect of which one or more offences have been committed contrary to the following sections of the *Controlled Drugs and Substances Act* and *Criminal Code*, namely:
>
> Corey Johnson, DOB: 1989-04-20, Sebastiano D'Amato, DOB: John Johnson, DOB Unknown, Corey Keptfer and Carly Selk 91-04-19 of Estevan, Saskatchewan on or about 23rd day of August, 2010 at or near Estevan Saskatchewan did:
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> 1) Possession for the purpose of trafficking in a substance included in Schedule 1 to wit: cocaine contrary to Section 5(1) of the Controlled Drugs and Substances Act;
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> 2) Possession for the purpose of trafficking in a substance included in Schedule II to wit: cannabis marijuana contrary to Section 5(1) of the Controlled Drugs and Substances Act;
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> in or are in a place, namely:
>
> Sk Plate 106HNG, a GMC truck, which is carrying a priority mail package and in it will turn up cocaine and crack cocaine in it.
>
> AND IT IS FURTHER ORDERED that access to and disclosure of any information relating to this warrant is hereby prohibited until otherwise ordered by a court of competent jurisdiction. The Information of Constable Tyler McMillen and anything exhibited or appended thereto shall be placed in a sealed packet in accordance with the provisions of Section 487.3 of the Criminal Code. The packet may be opened and the contents examined by any Justice in the Province of Saskatchewan for the purposes of hearing and considering an application for a detention order pursuant to Section 490 of the Criminal Code or an ex parte application for a management order pursuant to Sections 6 and 7 of the Seized Property Management Act provided that upon conclusion of any such application the contents shall be

> returned to the sealed packet. Except as may be permitted by this order, the packet shall remain sealed and the contents shall not be disclosed to the public or any interested party until otherwise ordered by a court of competent jurisdiction. This warrant is not required to be placed in the sealed packet, but it shall not in any event be disclosed to the public or any interested party until otherwise ordered by a court of competent jurisdiction. Nothing in this order shall be construed so as to prohibit disclosure of all or any portion of the contents of the said Information to Obtain or the contents of this warrant by or with the consent of Constable Tyler McMillen.
>
> > (a) to a peace officer or prosecutor in Canada or to a person or authority with responsibility in a foreign state for the investigation or prosecution of offences where such disclosure is intended to be in the interests of the administration of justice in Canada or elsewhere,
> >
> > (b) to a peace officer or prosecutor in Canada for the purposes of disclosure to a person charged with an offence or for the purposes of disclosure to any other interested party, or
> >
> > (c) as may be necessary for the purposes of execution and reporting as required by law. ...

[3] The accused contends the police had no evidence to support the initial traffic stop, subsequent search of the vehicle, nor to detain and arrest the accused. The accused further contends that the search warrant was obtained without reasonable and probable grounds on the part of the police. An application under ss. 8 and 24 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ("*Charter*"), along with s. 487 of the *Criminal Code,* has been filed and will be heard at the commencement of the accused's trial in October, 2012 in the course of a *voir dire*.

[4] With that backdrop in mind, I turn to the within *Stinchcombe* application. The accused makes no secret of the purpose underlying his application. At paras. 23-25 of his brief of law he states:

> 23. The Applicant has filed an application seeking exclusion of evidence on the basis that the Police had little more than a suspicion before they arrested the Applicant and conducted their search. Disclosure of evidence collected in relation to the investigation of Corey Johnson, Sebastiano D'Amato, John Johnson, Corey Keptfer and Carly Selk is both relevant and is therefore required for the Crown to meet their disclosure obligations.
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> 24. If the Crown wants to rely on the Search Warrant and any evidence yielded from the search then the Crown must disclose its case against the other accuseds involved. The Crown cannot rely on evidence produced as a result of the Search Warrant and then refuse to tell defence about its case against the individuals identified in the warrant.
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> 25. The Applicant takes the position that there was no basis beyond suspicion for the warrant and believes that the Crown does not want to make full disclosure as this will weaken the Crown's case against the Applicant and potentially lead to success on one or both Charter Applications.

[5] The Crown's position is simple. It says full disclosure has been made as required by law as it pertains to the accused and that the within application is simply an open-ended fishing expedition on his part. In making this point, the Crown relies upon the decision of Popescul J. (as he was then) in *R. v. Anderson* 2011 SKQB 464, 387 Sask. R. 305 where he states at para. 59 thereof:

> [59] However, the defence also has an obligation to act responsibly during the disclosure process. In *R. v. Girimonte* (1997), 121 C.C.C. (3rd) 33 (Ont. C.A.), Doherty J.A. said:

> 12 Disclosure demands which are no more than "fishing expeditions", seeking everything short of the proverbial kitchen sink undermine the good faith and candour which should govern the conduct of counsel. ...

The disclosure demands made in *Girimonte* were described by the Ontario Court of Appeal as "frivolous and abusive" and concluded:

> 12 ... It would be obvious to anyone that the prosecution would resist compliance with such a far-fetched demand. Disclosure demands like some of those made in this case seem calculated to create needless controversy and waste valuable resources rather than to assist the accused in making full answer and defence.

Those comments have application to many of the defence's requests made in this case.

[6] Both parties agree this application is governed by the principles established in the Supreme Court of Canada decision *R. v. Chaplin*, [1995] 1 S.C.R. 727. This case addresses the approach to be taken where the Crown alleges it has discharged its obligation to disclose in circumstances where either (i) the existence of the material is established, or (ii) where the existence of the material is disputed. The Saskatchewan Court of Appeal in *R. v. Fitch* 2006 SKCA 80, 279 Sask. R. 310 summarized the *Chaplin* approach at paras. 17 and 18 thereof:

> 17 The Supreme Court confirmed that the Crown is under a general duty to disclose all information whether inculpatory or exculpatory except evidence that is beyond the control of the prosecution. However, where the Crown asserts that it has discharged its disclosure obligations, and the material sought does not relate to the specific charge or specific investigation and was not information the Crown relied upon in preparing its case, the defence is required to establish a basis upon which the presiding judge can consider whether the disclosure sought is potentially relevant. The purpose of this requirement is to preclude requests based upon speculation or conjecture.
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> 18 A number of other cases have also held that where disclosure is sought with respect to other investigations an accused must establish a basis for and the relevancy of the items sought. A mere allegation of state

> misconduct or systematic misconduct on the part of the investigating police officer is not sufficient to trigger a disclosure obligation. ...
>
> [Emphasis Added]

[7] The Crown is firmly of the view all disclosure has been made with respect to *this accused* relating to *this specific offence*. The Crown does not suggest the material sought does not exist; rather the Crown takes the position that the within application is nothing more than a 'fishing expedition' in an attempt to obtain disclosure pertaining to other individuals. Put simply, the material sought does not appear to relate to this particular accused, and in any event, the request is overly broad as it lacks parameters with respect to dates, periods of time and specific items.

[8] Upon consideration of all material filed, I am satisfied that certain information in the possession of the police respecting the search warrant of August 23, 2010 is relevant to the accused, and directly linked to his ability to make full answer and defence. While the pending *Charter* application is not part of the substantive defence at trial, I fail to see how documents and material used to obtain the search warrant do not directly bear on the ability of this accused to answer the charge against him. From my perspective, the two are related such that if the search warrant is found to be invalid, it goes directly to the accused's right to make full answer and defence to these charges.

[9] That said, the scope of the consent order of May 30, 2012 must be considered. Pursuant to this order the packet containing the Information to Obtain along with supporting affidavits of informants in relation to the search warrant was directed to be unsealed and provided to the Crown for purposes of editing under s. 487.3(4) of the *Criminal Code*. The order further directed that the edited copy be disclosed to the

accused. There is no suggestion the Crown has failed to abide by the terms of this order. Nevertheless, there may be additional information or material not captured by the previous order which is relevant and ought to be disclosed. Accordingly, an order will issue directing the Crown to make timely disclosure of all information which the police have in their possession pertaining to obtaining the search warrant of August 23, 2010 including officer's notes, statements, documents, CD's, radio or other electronic transmissions relied upon by Cst. McMillen. The May 30, 2012 order shall be amended only to the extent provided for herein. In all other respects the consent order shall remain in full force and effect unless otherwise determined by this Court.

[10] This leaves the balance of the within motion which essentially seeks disclosure of material related to the investigation of Sebastiano D'Amato, Corey Johnson, Carly Selk, John Johnson and Corey Keptfer. Carly Selk is a co-accused and the other individuals are charged with related offences. The Crown indicated in argument that disclosure for Selk constitutes the same disclosure as that for the accused, and to that extent it has been provided.

[11] Apart from the generalized contention that evidence collected in relation to Johnson, D'Amato, Johnson and Keptfer is relevant and probative to his charge, the accused is unable to substantiate any tangible basis upon which the court can determine what precisely is sought or whether it is at all relevant. Simply characterizing it to be so is insufficient and merely speculative. (See *Fitch*) The accused is entitled to disclosure of anything in the possession of the Crown, be it exculpatory or inculpatory, which relates to the specific offence with which he stands charged. He is not entitled to disclosure with respect to the other accused persons absent a tangible basis to support its relevancy to the

charge he faces. As no basis had been established, the application is dismissed save for the order made above.

J.
L. M. SCHWANN