IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Banfield, 2007 NSPC 76

Date: 20071218
Docket: 1580134 - 1580139
1580143/1580145
Registry: Amherst

Between:

Her Majesty the Queen

v.

David Alex Banfield
and
John Alfred Hardy

Judge:	The Honourable Judge Carole A. Beaton
Decision delivered:	18 December 2007 in Amherst, Nova Scotia
Decision released:	14 January 2008
Counsel:	Mr. Douglas Shatford, for the crown (federal) Mr. Bruce Baxter, for the crown (provincial) Mr. Mark Knox (not present), for the defence (David Banfield) Mr. Jim O'Neil, for the defence (John Hardy)

By the Court (orally):

[1] The applicants are charged with various offences contrary to the *Controlled Drugs and Substances Act* and the *Criminal Code*. Preliminary inquiry was held in this court on November 8th, 2006 and both accused were committed for trial. Following re-election back to this court, counsel for Mr. Hardy and Mr. Banfield brought this application, seeking disclosure of certain information. Specifically, both defendants seek to have the crown produce the Police Information Retrieval System (hereinafter referred to as PIRS) records pertaining to each of them from July 30th, 2002 to October 4th, 2005.

[2] This issue had its genesis in an exchange that occurred at preliminary inquiry when crown witness Corporal James Duggan was cross examined by Mr. O'Neil, counsel for Mr. Hardy. The following series of questions, and the responses to those questions are pertinent to understanding the nature of the defendants' request to this court:

(Beginning at page 29, line 19 of the preliminary inquiry transcript)

> Q. Okay, now would there be information on the PIRS system concerning this case that would not have been disclosed to the crown for whatever reason?
>
> A. There should not have been. I did not actually do the Police Information Retrieval System checks on the individuals involved.
>
> Q. I'm going to ask you to do something and to provide it to the federal crown, I'm going to ask you to check the PIRS system or cause it to be checked, whatever you do, whether you do it personally or not, have it checked and please provide the federal crown with a confirmation for me whether there's additional information on PIRS and if there is we want the other information. So, in other words, if there's no information, you could indicate but if there's additional information, we would like you to provide it to the federal crown and we'll deal with the crown on that.

Later (at page 30, line 15 of the preliminary inquiry transcript) Mr. O'Neil, on behalf of Mr. Hardy, again described the disclosure being sought:

> Q. The two accused, pertaining to the two accused here and this matter. In other words, pertaining to the two accused and to the investigation of this matter. Now in terms of investigation we rely on you when it appears that it started June 24th but it may have started in April, I don't know when information started floating around but anything concerning this case that you may have on PIRS that has not been disclosed to the crown already and I say that and I'm leading you when I say this because I know that's a much bigger database and may contain information the crown doesn't have.

And later still (at page 31, beginning at line 1 of the preliminary inquiry transcript) the witness, Corporal Duggan, obtained further clarification from Mr. O'Neil concerning the request:

> A. If I understand what you're asking, then for the court's purpose, I can enter Mr. Hardy's name and I can also enter Mr. Banfield's name on PIRS and retrieve information for the court's purposes pertaining to the, is there a start date or end date, is there a...
>
> Q. Why don't we start, let's say three years before the charge is laid, it's their information, they won't mind getting irrelevant information if there's any there because it concerns them.
>
> A. That's possible to do that, yes.
>
> Q. Let's say three years before, you'll undertake to give that to the crown?
>
> A. I can, yes.

[3] In the ensuing months, as a result of exchanges between the crown and defence counsel, it was ultimately determined by the crown that the requested records would not be released on the basis that:

> ...For each of David Banfield and John Hardy there are some records in the PIRS database, however not a single one is relevant to this file, not a single one was relied upon by the investigators in this file, and for those reasons none of the PIRS records are subject to disclosure by the accuseds.

(As per correspondence of crown counsel David W. Schermbrucker, of July 30th, 2007.)

[4] On behalf of the defendant David Banfield, Mr. Knox argues that of the five limitations enunciated in *R. v. Stinchcombe* [1991] 3 S.C.R. 326 concerning the crown's obligation to disclose, the crown appears to be relying on the so-called "third" limitation that the crown need not produce that which is clearly irrelevant and the "fifth" limitation that the crown need not produce that which is sought through insincere and meritless requests.

[5] Counsel for Mr. Banfield further argues that the crown in this matter is in no different position than was the crown in *R. v. Lalo* [2002] N.S.J. No. 96. In *Lalo* (supra), Robertson, J. reviewed the law surrounding the crown's exercise of discretion and the burden on the crown when the crown refuses to disclose. At paragraph 5 of her decision, quoting from paragraph 11 of Sopinka, J.'s decision in *Stinchcombe* (supra), Robertson, J. noted, in part:

> ...While the crown must err on the side of inclusion, it need not produce what is clearly irrelevant. The experience to be gained from the civil side of the practice is that counsel, as officers of the court and acting responsibly, can be relied upon not to withhold pertinent information. Transgressions with respect to this duty constitute a very serious breach of legal ethics. The initial obligation to separate "the wheat from the chaff" must therefore rest with crown counsel...

> The discretion of crown counsel is, however, reviewable by the trial judge. Counsel for the defence can initiate a review when an issue arises with respect to the exercise of the crown's discretion. On a review the crown must justify its refusal to disclose. Inasmuch as disclosure of all relevant information is the general rule, the crown must bring itself within an exception to that rule. (Emphasis added)

And continuing at paragraph 6 of her decision, Justice Robertson noted:

> Reasons for non-disclosure include an existing privilege if it constitutes a reasonable limit on the constitutional right to make full answer and defence, relevance and the necessity of delaying disclosure for the purpose of completing an investigation or the protection of a witness. However, it is clear that the crown is under a general duty to disclose all relevant material. (Emphasis added)

[6] Clearly the crown's general duty to disclose is at a low threshold. If the information sought presents a reasonable possibility that it could be useful to the accused in making full answer and defence, then the crown must disclose it. This places an onus on the crown to consider and anticipate potential defences and uses for the information and how that information might affect the conduct of the defence: *R. v. Dickson* (1998), 122 C.C.C. (3d) 1 (S.C.C.); *R. v. Egger* [1993] 2 S.C.R. 451; *Stinchcombe* (supra); *Lalo* (supra). Having said that, I note that it should be recognized that there may be those occasions when the crown, short of becoming an active participant in providing advice to a defendant, might never be in a position, because of its adversarial role vis-a-vis the accused, to be able to contemplate the value or utility of certain information in the same way that would be recognizable by the defendant and/or their counsel.

[7] In this case, both defendants assert that the relevance of the record sought is easily recognized as the information in the PIRS record may well impact on issues of credibility and bad character and therefore it is reasonably possible that such information will be helpful to advancing full answer and defence. Specifically, it is argued that the PIRS record may go to the character or credibility of either

accused or someone else, and if it is that the police know something about the character or credibility of either or both defendants then either or both defendants need to know that before making decisions such as, for example, whether to take the stand in their own defence. The defendants assert that the crown's position that the defence has to explain a direct impact that the records might have before they are entitled to them is in error. The defence asserts that the crown must employ a liberal interpretation and err on the side of caution in assessing relevance and providing disclosure; if the worst case scenario were to be that the material is ultimately not relevant or useful to the defence, then it is for the crown to err on the side of disclosing the material. The defence asserts that the very fact of the crown's acknowledgment that the names of both defendants appear in the PIRS system makes the argument for relevance of the PIRS information in and of itself; that is to say that the issue is not whether the police relied on that information but rather that it exists and the defence is entitled to explore it.

[8] Further, Mr. O'Neil on behalf of Mr. Hardy asserts that the "discovery" nature of the preliminary inquiry process permitted the question to be posed as to the existence of PIRS records, and it was that proper question which prompted the crown to search for the records. The defence argues that even if PIRS was not consulted by the investigators, nonetheless one aspect of the defence to these charges concerns <u>when</u> the defendants came under suspicion and/or investigation. The defence asserts that the relevance is not limited to merely relying on records; for example, the police often interview individuals but do not rely on that information, even though the fact that they interviewed people would be of interest to the defence. The defence relies on the decision in *R. v. James and Smith*, 2006 NSCA 57 in support of the notion that the areas of disclosable materials are constantly expanding and if production of the material is not violating any security concerns or third party privilege, then it is not appropriate for the defence to have to demonstrate how the information could be used to advance its position.

[9] The crown relies on exhibit number 1, the "can say" statement of Marjorie Dodds as to the use and purpose of the PIRS system, in support of its assertion that it has met its disclosure obligations under *Lalo* and *Stinchcombe*. The crown argues that the defence has been advised that the PIRS records were looked into, as per the defence request made at the preliminary inquiry, and the crown has confirmed that PIRS records do exist for each defendant. Having conducted the analysis of that material, and considering whether it has any relevance to the charges before this court in assisting the defence in making full answer and

defence, the crown, in recognizing that its discretion should be exercised in favour of disclosure, nonetheless maintains that it has met its obligation and the PIRS record need not be disclosed as it has no relevance to the matters before this court. Further, the crown takes the position that because the defence asked the crown to look for something following preliminary inquiry, the indication from the crown that the information was not used by the investigators in relation to these charges and was not even accessed until after the defence requested it, supports that the information cannot now be essential to the accuseds' ability to make full answer and defence. Simply put, the crown asserts that the defence is "on a fishing expedition". The crown maintains that because the PIRS system was never involved in the investigation of the allegations each accused faces, and because the PIRS information never influenced the officers in the course of the investigation, therefore any records in the PIRS database are not relevant, were never relied upon, and are not now subject to disclosure. The crown asserts it has met its obligation in considering the question as to whether there is any reasonable possibility that the defence could use the information contained in the PIRS database and has concluded that the answer to that question is no.

[10] Exhibit 1 before the court, entered by consent of crown and defence, is in the nature of a "can say" statement summarizing the evidence of Marjorie Dodds, who did not testify in this application. Counsel agreed at the outset of the hearing of this application that exhibit 1 as put before the court constituted the evidence of Ms. Dodds. Exhibit 1 identifies that PIRS is "an automated occurrence reporting and information management system" which is "used to store, update and retrieve information" and allows "the means to electronically index personal information such as names, dates of birth, addresses, phone numbers, physical descriptors, vehicles, etc. collected for operational reasons". The law clearly establishes a low threshold for disclosure, a principle upon which both crown and defence in this matter are agreed. Crown and defence also agree that the obligation on the crown is to err on the side of caution in disclosing materials, however there is no absolute duty on the crown to disclose that which is clearly irrelevant: as per *Stinchcombe* (supra). Mr. Shermbrucker, as an officer of the court, has notified defence counsel for both accused that the database which defence counsel specifically requested be examined did indeed contain records for each accused which are unrelated to the matters before the court.

[11] First, I note that I find it difficult to make the connection in this case between the mere existence of the PIRS record and any potential utility it could

have for the defendants. Crown and defence agree as to the nature of the PIRS record and the kinds of information it generally contains, as per the contents of exhibit 1. I am at a loss to appreciate how this type or kind of record could assist the defendants in making full answer and defence. It appears the PIRS record stores data - for example, names, addresses, physical descriptions, etc. It begs the question as to how that kind of information could, with any reasonable possibility, go to, for example, matters of credibility?

[12] Secondly, while it may be trite to note that there are undoubtedly a myriad of scenarios which would make information in the hands of the crown irrelevant to the crown but relevant to the conduct of the case for a defendant, it is difficult in this matter to make the connection the defence suggests can be made between material that was never consulted or accessed in any way during the course of an investigation which resulted in charges against the accused, and how the contents of that database would be relevant when the investigators were asked to go back and review and acquire that material after charges had already been laid. It would, by way of illustration, be materially different from the situation where a defendant learned of the existence of evidence or a witness that would constitute an alibi for the defendant and the defendant then asked investigators to go back and retrieve and disclose that information. It is not of any assistance whatsoever for the defendants to assert that the mere existence of entries on the PIRS database pertaining to them can automatically constitute relevancy.

[13] While I don't disagree with the defence's observation that the police often take certain actions during the course of an investigation upon which they ultimately do not rely, which might be of interest to the defence, nonetheless that is much different than suggesting, as the defendants do here, that there <u>might</u> be something in the PIRS records and that the defendants <u>might</u> rely on that information. The defendants are entitled to know and indeed it is relevant to making full answer and defence to know what the police did during an investigation, even if the doing of it had no ultimate significance. In my view however, that entitlement is distinct from the assertion that a PIRS record which the defendants could not have accessed prior to charges being laid becomes automatically accessible, in the name of relevancy, after a charge has been laid. There is a sharp distinction between the mere existence of a certain kind of information on PIRS and any potential for its relevancy that theoretically might exist but cannot be identified. Further, in this case, not only was the PIRS information not consulted prior to the defendants being placed injeopardy, but now

that it has been consulted, at the request of the defendants, I am satisfied that the crown has properly exercised its lawful discretion to maintain that particular record has nothing to do with the charges which place the defendant in jeopardy.

[14] All counsel agreed that during the course of the investigation of this matter a search warrant was sought and counsel advise this court that the Information to Obtain contains references to Corporal Ryan having consulted the PIRS system on August 2nd, 2005 regarding one Mark Alan Ferguson. Clearly any source of information or any database consulted by the investigators in that context is relevant. That is to be sharply contrasted with no consultation or reliance on a database regarding the two accused until after the two accused requested that the database be consulted. Further, had the request made by the accused, or either of them, regardless of the timing of it, generated information related to the matters now before the court, then the relevancy of that information would be obvious. However, I am not persuaded that the apparent fact that both accused are referenced in the PIRS system must therefore mean that such entries are automatically relevant to the matters before the court. If that were to be so, then the logical extension of the defendants' argument would be that all information concerning the defendants contained in the PIRS database, regardless of the nature of that information, the age of it or the date when the information was inputted into the PIRS system, would be relevant to the defence in this case. Not only is that proposition, broadly speaking, without merit, but clearly that cannot be the situation here as the defence asked only for information for a very narrow time period, spanning just over three years. In that sense, if the information were relevant, then the PIRS record in its entirety would be relevant for purposes such as credibility, character evidence, or the like. There would be no parsing out of a particular time frame for fear that there might be something in another time frame that was logically connected to this matter.

[15] Had the defendants requested the entirety of the PIRS record and not just a portion of it, in my view the same difficulty as to an absence of relevancy applies. That the defence asserts something may be relevant does not in and of itself make it so. In the same vein, that the crown in this case chose to exercise its discretion in refusing to disclose does not mean the discretion is absolute and not able to be reviewed. However, the crown's exercise of discretion must be permitted to be meaningful, otherwise it is pointless and the floodgates could open to permit any defendants to make any nature and frequency of demands upon the crown on the grounds of relevance and the need to make full answer and defence. While the

areas of disclosable materials might be observed to be expanding, common sense would dictate there are still parameters beyond which entitlement to disclosure cannot extend. I find it very difficult to make the connection between the mere existence of a PIRS record and its automatic relevance to these accused concerning these charges. While not shifting any burden to the defendants that is not theirs, in this case neither defendant can articulate the relevance of the PIRS record other than to say the record exists and so it must be presumed to be relevant. Such a presumption cannot stand in the face of the permissive exceptions to absolute disclosure as articulated in *Stinchcombe*.

[16] I am not persuaded that the crown has to date failed to disclose that which it has an obligation to produce. I am also not persuaded that the applicants have established any basis upon which the materials sought are relevant, nor am I persuaded that there is any basis upon which the court should override the discretion that has been exercised by the crown to date in declining to produce the PIRS records related to the defendants for the period from July 30th, 2002 to and including October 4th, 2005. I am left unpersuaded that the crown has improperly relied on the notion of relevance, or the lack thereof, in refusing to disclose the PIRS record. With respect, it is difficult not to see the defence request for disclosure, which the crown has characterized as a "fishing expedition", as anything but a request without merit under all of the circumstances. The crown's refusal to disclose is justified both on that basis and on the basis that the material the defence seeks to have disclosed is not relevant to the matters before the court and the defendants' ability to make full answer and defence. The defendants' application is therefore dismissed.

PCJ