PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. MacKenzie, 2011 NSPC 58

Date: 20110708
Docket: 1667088, 1667089
1667090, 1667091

Between:

Her Majesty the Queen

- and –

Gerald J. MacKenzie

DECISION

Judge: The Honourable Judge Jean M. Whalen, J.P.C.

Heard: January 12, 2011

Charges(s): Section 238(1) x 4, *Income Tax Act*

Counsel: David Iannetti, for the Crown
Ralph Ripley, for the Defence

Introduction

FACTS

[1.] Mr. MacKenzie is charged on or about December 7, 2005 he failed to file income tax returns for the years2001, 2002, 2003, 2004. The Information was sworn on July 10, 2006. The informant is Connie Delaney of the Canada Revenue Agency.

[2.] Mr. MacKenzie first appeared on August 14, 2006 and the matter was adjourned at defence request to August 28, 2006 for plea.

[3.] On August 28, 2006 the defendant did not appear and defence counsel requested an adjournment to September 5, 2006 (for plea).

[4.] On September 6, 2006 counsel sent a letter requesting disclosure to Mr. Iannetti. On September 7, 2006 the Crown sent Mr. Ripley a letter which indicated disclosure was enclosed. [There is no dispute as to the contents of the letter or what was received]. It is noted that the "Diary Notes" referred to by Ms. Delaney were not part of the original disclosure package.

[5.] On September 13, 2006 Mr. Ripley sent a second letter to the Crown requesting Mr. Iannetti confirm, in writing, that what was sent was "full and complete disclosure". No further disclosure was received by Mr. Ripley.

[6.] On October 3, 2006 Mr. Ripley entered a plea of not guilty and the matter was set for trial on April 26, 2007. On April 26, 2007 the trial was adjourned to May 25, 2008 for status because defence counsel required surgery. On May 21, 2008 there was a joint request by counsel to adjourn for status to June 20, 2008. On June 20, 2008 the trial was rescheduled to April 1, 2009.

[7.] On April 1, 2009 Crown had personal matters to attend to, defence agreed to an adjournment request to April 8, 2009 to set trial date.

[8.] On April 8, 2009 the defendant was not present, Mr. Ripley appeared on his behalf. Ms. O'Leary appeared for Mr. Iannetti and requested the matter be adjourned to April 15, 2009. Mr. Ripley consented. April 15, 2009 counsel scheduled the trial for November 10, 2009. On November 10, 2009 all parties appeared for trial.

REVIEW OF EVIDENCE

[9.] The Crown called one witness, Ms. Connie Delaney, a field officer with Canada Revenue Agency, employed for 33 years. She stated her duties are:

> "To go after anybody that's a nonfiler of income tax...whether it be an individual or a corporation."

[10.] She is assigned files by a supervisor and:

1) reviews history of file;

2) checks notices of assessment, last returns, and information slips.

[11.] Gerald MacKenzie and his returns came to her attention. After a review she concluded there were four (4) returns outstanding between 2001 – 2004.

[12.] Ms. Delaney then prepared requirement letter to be served on Mr. MacKenzie. Those were entered as exhibits #1 through #4.

- Exhibit 1(a) – letter servd personally on November 2, 2005 (signed) at Mr. MacKenzie's office – KPMG, Charlotte Street;
- He was required to file 2001 within 30 days;
- sets out penalty, etc.;

Exhibit 1(b) – affidavit of personal service
- date November 2, <u>2006</u> (typed) sworn to May 17, 2006
Exhibit 1(c) – affidavit of failure to comply within 30 days (Ms. Delaney had checked system).

Exhibit 2(a) – letter personal service (2002), November 2, 2005 (signed) 45 days to comply (2002)
- Affidavit of personal service [typed November 2, 2006], sworn May 17, 2006
- Affidavit failure to comply sworn May 17, 2006.

Exhibit 3(a) – all the same (2003)

Exhibit 3(b) – affidavit personal service says November 2, 2006

Exhibit 3(c) – Sworn May 17, 2006

Exhibit 4(a) – all the same (2004)

Exhibit 4(b) – affidavit personal service says November 2, 2006

Exhibit 4(c) – Sworn May 17, 2006.

[13.] At page 14 of the transcript Ms. Delaney was asked:

Q. Are you familiar with Mr. MacKenzie?

A. I just know he works for an accounting firm.

Ms. Delaney identifies the gentleman she served that day as being seated in the court room.

[14.] (At page 16) Ms. Delaney waited 75 days (waits for final letter to expire). If returns are not received, she then does a request for prosecution.

[15.] The fact that there is a balance outstanding or credit due has no bearing on whether or not charges are laid. Ms. Delaney's job "is to get the returns in based on what the income of the individual is."

[16.] On cross examination, Ms. Delaney is referred to Exhibit 1(b). It was prepared by her. Her attention was drawn to the date of November 2, 2006 and she acknowledged that the date was not correct and only realized when pointed out to her by defence counsel.

[17.] Exhibit 2(b), 3(b), and 4(b) contain the same mistake.

[18.] Exhibit 1(a) does not contain a SIN for Mr. Gerald MacKenzie because they are not allowed to have a SIN on them.

[19.] Exhibit 1(c) outlines the steps Ms. Delaney took to make sure “a personal income tax return was not received per the system”.

[20.] [At page 22] when asked if she had no other notes with respect to what she did, “personal notes”, she indicated she has “notes in my diary, [page 23] notes that when I checked it to say that it wasn’t received”.

> Q. You would agree with me in there that you don’t indicate that you had access to or used the SIN of Mr. MacKenzie when you checked out whether returns were filed?
> A. No not in this letter.
>
> Exhibit 2 – does not indicate she had access to or used the SIN of Mr. MacKenzie.

[21.] [At line 13] she agrees that the social insurance number [SIN] would be a tool that one would have or be able to use in terms of checking out information on the system.

[22.] Exhibit 3 and 4 – same as above.

[23.] [At page 24] Ms. Delaney met personally with Mr. MacKenzie. She testified she has “a diary note in my system at work where I went to his business and served him personally”.

[24.] [At page 25] she agreed she has nothing [in court] that indicates that at the time she met with Mr. MacKenzie she received his social insurance number.

[25.] She also agreed there is nothing in the notes provided or documents that indicates she took steps to go to any data base to obtain the social insurance number for Mr. MacKenzie.

NOTE: The affidavit of Failure to Comply states: "The officer...who has charge of the appropriate records...after careful examination and search of appropriate records..."

[26.] [At page 25] Ms. Delaney said when she checked the data base, she typed in Mr. MacKenzie's social insurance number. But she did not have it in her possession while testifying in court.

[27.] She got the social insurance number when the account was assigned to her. She said she checked the number [page 27] but she did not check the database to see that it was an accurate number assigned to this accused, Gerald MacKenzie (i.e. the man identified in court).

[28.] The fact that Mr. MacKenzie was owed money was not relevant to her job. She is responsible to get "returns in". "What the end result is has no bearing on the fact that the return is outstanding and has to be filed."

[29.] [At page 30] when she put in the social insurance number in assigned account, the defendant's name and address came up.

[30.] Ms. Delaney was the only Crown witness. Mr. Ripley did not call any evidence. I requested written submissions from counsel to assist me in my deliberations. As part of Mr. Ripley's submissions he indicated that it was his intention to make an application for a judicial stay pursuant to s. 24(1) of the Charter alleging a breach of the defendant's ability to make full answer and defence.

[31.] Mr. Iannetti argued that Mr. Ripley should be estopped from making such an argument. I heard oral submissions on January 15, 2010.

[32.] On February 19, 2010 I decided that the defendant was not estopped from making the Charter motion and the court would hear the argument. It was adjourned to March 15, 2010 to set a date for hearing.

[33.] On March 15, 2010 there was another joint request to adjourn to have transcripts prepared by counsel and the matter was adjourned to June 1, 2010. On June 1, 2010 counsel appeared, offered November 29, 2010 and matter was set.

[34.] Defence counsel argues that irreparable harm has been done because:

(i) The potential documents that would have been relevant to the trial only came to light during cross examination of the Crown's sole witness.

(ii) Three years have passed since the charge was laid.

(iii) The Crown had stated they made "full disclosure" and thus this failure to disclose cannot be remedied.

[35.] Crown counsel argues that:

(i) The diary notes are not prejudicial to the defendant's right to make full answer and defence and are not relevant.

(ii) The notes came to light during cross examination before closing of Crown's case; with no request by the defendant to adjourn and request disclosure.

[36.] It is trite to say the premier case on disclosure is **R. v. Stinchcombe**. Justice Sopinka set out the law to be followed: [HEAD NOTE]

> "1) The fruits of a police investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction, but the property of the public to be used to ensure justice is done.
>
> 2) There is a general duty on the part of the Crown to disclose all material it proposes to use at trial on a charge of an indictable offence and especially all evidence which may assist the accused even if the Crown does not propose to adduce it.

> 3) The Crown has a discretion to withhold information which may be subject to privilege and may delay disclosure so as not to impede an investigation.
>
> 4) The Crown need not produce what is clearly irrelevant.
>
> 5) The discretion of Crown counsel is reviewable by the trial judge.
>
> 6) Counsel for defence can initiate a review when an issue arises with respect to the exercise of the Crown's discretion.
>
> 7) The general principle is that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege."

[37.] There is no issue that this rule of law extends to regulatory offences and/or the *Income Tax Act*.

[38.] As the jurisprudence progressed the courts also decided that defence counsel has an obligation to be diligent in its request / pursuit of disclosure.

[39.] In **R. v. Dixon** stated: [122 C.C.C. (3d) 1] the Supreme Court of Canada at p. 12:

> "A finding that an accused's right to disclosure has been violated does not end the analysis ... An appellate court must be careful not to "confuse the obligation to establish a breach of the right [to full answer and defence] with the burden vesting in the appellant in seeking a stay" Similarly the initial test which must be met in order to establish a breach of the right to disclosure is analytically distinct

from the burden to be discharged to merit the remedy of a new trial. It follows that the Crown may fail to disclose information which meets the **Stinchcombe** threshold, but which could not possibly affect the reliability of the result reached or the overall fairness of the trial process. In those circumstances there would be no basis for granting the remedy a new trial under s. 24(1) of the *Charter*, since no harm has been suffered by the defendant."

[40.] At para 31:

"The right to disclosure is but one component of the right to make full answer and defence. Although the right to disclosure may be violated, the right to make full answer and defence may not be impaired as a result of that violation. Indeed different principles and standards apply in determining whether disclosure should be made before conviction and in determining the effect of a failure to disclose after conviction."

[41.] And further at para 55:

It must be remembered that defence counsel is not entitled to assume at any point that all relevant information has been disclosed to the defence ... [counsel's .. obligation is ongoing ... to be diligent in pursuing disclosure" (also stated in **Branwell**).]

[42.] Defence counsel sited several cases to support his application and in particular:

R v. Chaplin 96 C.C.C. (3d) 225 This case can be distinguished as there is no withholding of evidence. Diary notes were a surprise to Crown counsel, once he became aware he disclosed given to defendant.

R v. Egger (1993), Can Lii 1998 (S.C.C.) involved non-disclosure of a breath sample. The defendant could not exercise his right to obtain a sample

to test. It can be distinguished. Here notes still exist and now are in the defendant's possession.

R. v. O'Connor (1995) Can Lii 51 (S.C.C.)
1) Holds that a stay be granted only where the defendant's right to fair answer and defence F.A. & D cannot be remedied
2) Or where irreparable prejudice would be caused.

The circumstances here are:

1) notes came to light during cross-examination;
2) three years after the charges were laid; and
3) the Crown said there was full disclosure.

Is this a case equal to irreparable harm?

[43.] **R. v. Smith**, 2004 SKPC 108: Defence counsel argues his trial preparation was based on the disclosure he received. The question here, would trial preparation be different?

[44.] **R. v. Oickle** 1994 Can Lii 4234 (N.S.S.C.) is distinguished in that there the Crown knew of records; whereas here the Crown did not.

ANALYSIS

Has the defendant's right to disclosure been violated?

[45.] Diary notes were referred to by Mrs. Delaney when she was asked about meeting with Mr. MacKenzie and service of documents.

[46.] At page 24, line 18 [of the trial transcript]:

> A. "Well I have a diary note in my system at work where I went to his business and I served him personally."

[47.] Defence counsel did not have these notes; as well the Crown counsel did not have them and did not know they existed.

[48.] Mr. Ripley did not request a copy of these "diary notes" nor request the court order Crown to disclose same. However, I understand the Crown has since supplied a copy to defence counsel.

[49.] Mr. Iannetti says they are not relevant. Mr. Ripley says witness' notes are not irrelevant given what she said in her testimony i.e. running notes tell her what she did.

[50.] Without having seen a copy of these "diary notes" the court cannot say with any certainty whether they are or are not relevant.

[51.] However, given the context in which they arose, I am prepared to find that there is a "reasonable possibility" that the previously undisclosed information is relevant and could be used to meet the case for the Crown, and thus the defendant's right to disclosure has been violated.

[52.] What is the appropriate remedy? Is this a case where a stay of proceedings should be entered? Would the defendant's trial strategy be any different?

[53.] The defendant is not on any conditions. There is no election. This is a summary conviction matter. This is not a jury trial or a matter where there are numerous witnesses whose testimony may have been different based on lack of disclosure. Here there is only one Crown witness.

[54.] There is no improper motive in the Crown's failure to disclose, i.e., it is not like **R. v. Chapin** *supra* where the Crown knew of the information and failed to disclose because of privilege or negligence.

[55.] Mr. Ripley says the Crown and agent are one and these notes should have been disclosed.

[56.] The Crown was not aware of these "diary notes". Is this something the Crown should have been aware of, the same way for example, Crown counsel is aware of Crown sheets, occurrence reports, etc.?

[57.] I have heard no evidence on this application to suggest these diary notes are made routinely during investigations. So I cannot find one way or the other. But certainly once Crown counsel became aware, he disclosed a copy to defence counsel.

[58.] The defendant's counsel argues that too much time has passed since laying of the Information and actual trial, and the fact notes only came to light now, adds to the irreparable harm faced by the defendant.

[59.] The witness would have time to reflect on what was said and modify her testimony.

[60.] There is no evidence before me that the Crown witness would do this. No witnesses were called on the application and that is mere speculation by defence counsel.

[61.] A large part of the delay in the trial can be attributed to the defendant. The first 20.2 months. The next 10.5 months was a joint request, and the last 6.5 months were by the Crown's request with defence consent.

[62.] There is a due diligence requirement on the defendant to request disclosure from the Crown on an ongoing basis. Defence counsel is not entitled to assume, at any point, that all relevant information has been disclosed.

[63.] In defence counsel letter dated September 13, 2006 he wrote:

> "Given my correspondence to you of September 6, 2006, requesting <u>full</u> disclosure and given your letter of September 7, 2006 (received at my office on September 11, 2006) and given the duty on the Crown to make <u>full</u> disclosure prior to arraignment, can you confirm in writing

> that what you have forwarded to my office is in fact full and complete disclosure with respect to Crown's case."
>
> "To answer the last inquiry in your letter, if this is full and complete disclosure, then it does meet with my satisfaction. If it is not full and complete disclosure, could you indicate when same would be received?"

[64.] Mr. Ripley states in his memo that no further disclosure was received from the Crown.

[65.] I would note there is no indication that when he did not receive a response to his last request he continued to follow up and confirm with the Crown.

[66.] But also, more importantly, when these "diary notes" came to light during cross-examination, he did not request the court order production and disclosure of same and adjourn the trial to allow him to review same and seek instructions from Mr. MacKenzie.

[67.] He ended his cross-examination and offered to call no evidence. Later as part of his written submissions on the merits, Mr. Ripley advised the court and Crown he would be making a *Charter* motion for a stay of proceedings.

[68.] Counsel made a decision not to ask for the notes. Mr. Ripley says it's not like **R. v. Dixon** [1998], 1 S.C.R. 244 where counsel asked, but did not follow up. Here the defendant asked but did not received.

[69.] Whether you classify counsel's decision as tactical or not, the question to be answered is, "Is this one of those clearest of cases" where a stay of proceedings is appropriate after considering all of the factors including defence counsel due diligence or lack thereof?

[70.] The court considered:

i) The nature of the information withheld, the diary notes of the field agent. I don't know the exact content but the witness refers to them in the contest of answering questions about social insurance numbers, the person name and Gerald MacKenzie.

ii) Whether it might affect the outcome. The court cannot say definitively without seeing all the notes. The Crown says they are irrelevant; the defendant says it does not matter because he prepared for trial based on fact no notes. However, I note his questions were still around matching SIN numbers on her file, with database information and the Gerald MacKenzie she served at KPMG office on Charlotte Street.

[71.] I'm not convinced the outcome may have been different and even if I did I am not convinced that based on all of the above this is one of those clearest of cases where a stay of proceedings should be entered.

[72.] The defendant's *Charter* motion is denied. There will be no stay of proceedings. However, I do order:

i) Production of the "diary notes".

ii) Re-opening of the trial; the defendant may cross examine Ms. Delaney.

iii) At close of Crown's case, the defendant can decide if he will call evidence.