PROVINCIAL COURT OF NOVA SCOTIA

Citation: R v. Budge, 2012 NSPC 69

Date: 20120615
Docket: 2155316
Registry: Sydney, N.S.

Between:

Her Majesty the Queen

v.

Sandra Budge

DECISION
(Charter Motion)

Judge: The Honourable Judge Jean M. Whalen

Heard: February 29, 2012, in Sydney, Nova Scotia

Oral decision: June 15, 2012

Written decision: August 8, 2012

Charge: Section 266(b) of the *Criminal Code*

Counsel: Kathy Pentz, for the Crown
Alan Nicholson, for the Defence

By the Court:

[1] FACTS

[2] The applicant, Sandra Budge, is charged that she did, on or about February 20, 2010, commit an assault on Joanne Wilson contrary to s. 266(b) of the *Criminal Code of Canada*.

[3] On April 21, 2010, Ms. Budge entered a plea of "not guilty" to the offence and a trial date was set for February 10, 2011. On that date, Ms. Budge had not retained a lawyer. The Crown was prepared to proceed but the Court agreed to an adjournment. The Crown Attorney on the file was Steve Drake. The new trial date was set for June 3, 2011.

[4] On June 3, 2011, the trial matter was joined with information #604393 R. v. Melinda Gaigneur, represented by Tony Mozvik. Allan F. Nicholson appeared with the defendant, Sandra Budge. The Crown was represented by Steve Drake. The matter was adjourned to June 6, 2011 to set a trial date.

[5] On June 6, 2011, Crown Attorney Steve Drake and Defence Counsel Patricia Fricker-Bates, for Allan Nicholson, appeared before the Provincial Court. The matter was set for trial on December 7, 2011.

[6] On October 26, 2011, Crown Attorney Kathryn Pentz and Defence Counsel Allan Nicholson appeared before the Court to confirm the trial date of December 7, 2011.

[7] On December 7, 2011, the trial commenced before Judge Jean Whalen with Allan Nicholson for the Defence and Kathryn Pentz for the Crown. Mr. Kenneth Gaigneur testified on behalf of the Crown. The matter was adjourned until February 3, 2012 to allow the Crown to call Joanne Wilson as she was not present.

[8] On February 2, 2012 at 3:55 p.m., Ms. Pentz faxed Mr. Nicholson to notify him of the following results of her meeting with the complainant, Joanne Wilson:

> "I met with Joanne Wilson. She reviewed her statement and when I asked her if it was accurate she said the part about them sitting on the couch was not. She said they were in the bedroom but she was too embarrassed to admit that.
>
> In relation to the participation of each Joanne said that Melinda kicked and pulled her hair and was screaming at her. She then went over to attack Kenny at which point Sandra began to assault her - she said Sandra punched her multiple times as hard as she could. She didn't recall Sandra either kicking her or pulling her hair."

[9] On February 3, 2012 Mr. Nicholson during cross examination of Joanne Wilson confirmed that she spoke with Mr. Drake beginning at page 93, line 2:

<u>CROSS EXAMINATION</u>

MR. NICHOLSON: Thank you, Your Honour. Ms. Wilson when did you finally come and tell the police the truth about where you were when the ladies came in?

A. I didn't actually have an opportunity to speak to the police afterwards. I told the first prosecutor that was dealing with my case, Stephen Drake, when I met with him and the police.

Q. And when was that?

A. I'm not sure of the date. It was one of the dates that we were, we were brought here for court, but it got postponed...

Q. Right.

A. ...so I don't remember the exact day.

Q. Okay. So you say you didn't have an opportunity to correct the lies that you told the police in your first statement? You don't have a phone, you don't have any way to communicate with them?

A. With the police officers?

Q. Yes?

A. I, I didn't know what I should have spoken to them again...

Q. You lied to them, you should've straightened it out?

[10] THE LAW

[11] The burden of proof in charter application rests on the applicant. In *R. v. Collins*, [1997] 1 SCR 265, the Supreme Court of Canada stated as follows at paragraph 21:

> The appellant, in my view, bears the burden of persuading the court that her Charter rights or freedoms have been infringed or denied. That appears from the wording of s. 24(1) and (2), and most courts which have considered the issue have come to that conclusion (see R. v. Lundrigan (1985), 19 C.C.C. (3d) 499 (Man. C.A.), and the cases cited therein and Gibson, The Law of the Charter: General Principles (1986), p. 278). The appellant also bears the initial burden of presenting evidence. The standard of persuasion required is only the civil standard of the balance of probabilities and, because of this, the allocation of the burden of persuasion means only that, in a case where the evidence does not establish whether or not the appellant's rights were infringed, the court must conclude that they were not.

[12] Provincial Court J. Ross in *R. v. MacLellan,* 2012 NSPC 46, sets out very succinctly the governing legal principles:

> Whether characterized as late-disclosure or non-disclosure the principles are the same. Some of the cases deal with lost evidence, which is not amendable to the same range of remedies as a case of late disclosure. I must bear in mind the obvious difference between a case where trial has concluded and a situation, like this, where the trial is in progress. At the same time, there are cases where the s.7 beach is so egregious that the remedy of a stay has been ordered even before a trial has begun.

In *R. v. Greganti* [2000] O.J. No. 34 in the Ontario Supreme Court, per Stayshyn J.:

> 147 In *R. v. O'Connor*, the Supreme Court of Canada held that the common law doctrine of abuse of process has been subsumed under section 7 of the Charter. L'Heureux-Dube J. recognized that while traditionally the common law doctrine of abuse of process focussed on the protection of the integrity of the court process, and the Charter focussed more on the protection of individual rights, the two have merged. Furthermore, L'Heureux-Dube J. emphasized that the protection of individual rights and the preservation of the reputation of the administration of justice should not necessarily be viewed as distinct purposes:
>
>> ...Unfair trials will almost inevitably cause the administration of justice to fall into disrepute. What is significant for our purposes, however, is the fact that one often cannot separate the public interests in the integrity of the system from the private interests of the individual accused.
>>
>> [63] In fact, it may be wholly unrealistic to treat the latter as wholly distinct from the former. This court has repeatedly recognized that human dignity is at the heart of the Charter. While respect for human dignity and autonomy may not necessarily, itself, be a principle of fundamental justice. It seems to me that conducting a prosecution in a manner that contravenes the community's basic sense of decency and fair play and thereby calls into question the integrity of the system is also an affront of constitutional magnitude to the rights of the individual accused. It would violate

> the principles of fundamental justice to be deprived of one's liberty under circumstances which amount to an abuse of process and, in view, the individual who is the subject of such treatment is entitled to present arguments under the Charter and to request a just and appropriate remedy from a court of competent jurisdiction.

R. v. O'Connor (1995), 103 C.C.C. (3d) 1 (S.C.C.) at 35

148 L'Heureux-Dube J. held in *R. v. O'Connor* that, although the doctrine of abuse of process is subsumed under section 7 of the Charter, there is no one particular "right against abuse of process". Different Charter guarantees will be engaged in different circumstances. For example, pre-trial delay may be best addressed by reference to section 11(b) of the Charter. Alternatively, the circumstances may indicate an infringement of accused's right to a fair trial embodied in sections 7 and 11(d) of the Charter. L'Heureux-Dube J. noted that in both of these instances, concern for individual rights of the accused may be accompanied by concerns about the integrity of the judicial system. In

addition to those circumstances where trial fairness or particular enumerated Charter rights are engaged, there is a "residual category" under section 7 of the Charter:

In addition, there is a residual category of conduct caught by section 7 of the Charter. This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the Charter, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

R. v. O'Connor, supra at 39-40

149 It would appear therefore that the doctrine of abuse of process is available to address virtually every kind of situation within the criminal justice system where:

> (I) The fairness of an accused's trial is affected or other procedural rights enumerated in the Charter are impaired, or;
>
> (ii) The administration of justice is brought into disrepute.

R. v. O'Connor, supra at 37-38

153 It is also clear that mala fides by the police or the Crown is not a necessary pre-condition for a stay of proceedings on the grounds of abuse of process. Even where a state acted in good faith, the state agent's conduct may lead to a stay of proceeding on the grounds of abuse of process. However, a finding of mala fides on the part of the Crown or police makes it significantly more likely that a stay of proceedings will be warranted - *R. v. O'Connor*, *supra* at 42.

173 One of the most important factors in deciding whether to grant a stay of proceedings, according to L'Heureux-Dube J., is the conduct and intention of the Crown. At page 42 of her judgment, she continues:

> Among the most relevant considerations are the conduct and intention of the Crown. For instance, non-disclosure due to a refusal to comply with a court order will be regarded more seriously than non-disclosure attributable to inefficiency or oversight. It must be noted, however, that while a finding of flagrant and intentional Crown

> misconduct may make it significantly more likely that a stay of proceedings will be warranted, it does not follow that a demonstration of mala fides on the part of the Crown is a necessary precondition to such a finding. As Wilson J. observed for the court in Keyowski, supra, at p. 4820-483:
>
> To define "oppressive" as requiring misconduct or an improper motive would, in my view, unduly restrict the operation of the doctrine ... Prosecutorial misconduct and improper motivation are but two of many factors to be taken into account when a court is called upon to consider whether or not n a particular case the Crown's [Conduct] amounts to an abuse of process.

174 There are, as well, other considerations with respect to whether the conduct amounts to an abuse of process. These may include: the prejudice that may result from the inability to actually use the materials in cross-examination, or to use them as the foundation for cross-examination, to point to other opportunities to garner evidence, or to benefit the defence in making appropriate decisions relevant to the conduct of its case. The non-disclosure of the material will be aggravated where the non-disclosure was deliberate and involved active editing.

178 In *O'Connor* (*supra*) at p. 42 L'Heureux-Dube J. goes on to cite other factors such as the number and nature of adjournments attributable to the Crown's conduct:

> Every adjournment and/or additional hearing caused by the Crown's breach of its obligation to disclose

> may have physical, psychological and economic consequences upon the accused.

Also from Greganti the following comment, equally relevant to the accused before me:

> 180 Although this is not an unreasonable delay proceeding it must be of interest to consider the totality of the proceeding and its impact upon the accused.

In *R. v. Illes* [2008] 3 SCR 134 the Supreme Court says at para 24 et seq:

> 24 With respect to the fresh evidence not available to the defence at trial due to the Crown's failure to disclose, a new trial is the appropriate remedy under s. 24(1) of the Canadian Charter of Rights and Freedoms if the accused can show that his right to make full answer and defence was thereby violated. In order to discharge this burden, the accused can show either "that there is a reasonable possibility that the nondisclosure affected the outcome at trial" or that it affected "the overall fairness of the trial process" ®. v. McQuaid, [1998] 1 S.C.R. 244 (S.C.C.) [hereinafter "Dixon"], at para. 34 (emphasis in original)).
>
> 25 With respect to the first prong of the Dixon test, it is important to note that the issue here is not whether the undisclosed evidence would have made a difference to the trial outcome, but rather whether it could have made a difference. More precisely, the issue the appellate court must determine is whether there is a reasonable possibility that the additional evidence could have created a reasonable doubt in the jury's mind. See R. c. Taillefer, [2003] 3 S.C.R. 307, 2003 SCC 70 (S.C.C.), at para. 82. [Emphasis Added]
>
> 26 Our unanimous decision in Taillefer directs the court "not to examine the undisclosed evidence,

> item by item, to assess its probative value", but rather "to reconstruct the overall picture of the evidence that would have been presented to the jury had it not been for the Crown's failure to disclose the relevant evidence. Whether there is a reasonable possibility that the verdict might have been different must be determined having regard to the evidence in its entirety." (para. 82). [Emphasis Added]
>
> 27 With respect to the second prong of the Dixon test, an appellant need only establish a reasonable possibility that the overall fairness of the trial process was impaired. This burden can be discharged by showing, for example, that the undisclosed evidence could have been used to impeach the credibility of a prosecution witness (see Taillefer, at para. 84), or could have assisted the defence in its pre-trial investigations and preparations, or in its tactical decisions at trial. [Emphasis Added]

In *R. v. Watt* [2008] N.S.J. 108 at para 23 the Nova Scotia Court of Appeal noted:

> 23 In *R. v. McQuaid,* [1998] 1 S.C.R. 244 (S.C.C.), the Supreme Court of Canada considered the Crown's duty to disclose and stated:
>
> > 20 In *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, it was held that the Crown has an obligation to disclose all relevant material in its possession, so long as the material is not privileged. Material is relevant if it could reasonably be used by the defence in meeting the case for the Crown. ...
> >
> > 22 The obligation resting upon the Crown to disclose material gives rise to a corresponding constitutional right of the accused to the disclosure of all material which meets the

> *Stinchcombe* threshold. As Sopinka J. recently wrote for the majority of this Court in *R. v. Carosella*, [1997]1 S.C.R. 80, at p. 106:
>
> > The right to disclosure of material which meets the Stinchcombe threshold is one of the components of the right to make full answer and defence which in turn is a principle of fundamental justice embraced by s. 7 of the Charter. Breach of that obligation is a breach of the accused's constitutional rights without the requirement of an additional showing of prejudice.
>
> Thus, where an accused demonstrates a reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence, he has also established the impairment of his Charter right to disclosure.

In Watt the following appears at para 13 and 14:

> 13 In *R. v. Regan* (1999), 179 N.S.R. (2d) 45 (N.S. C.A.) at para. 100, Cromwell, J.A. for the majority described a stay as "a drastic remedy because its effect is that the state is permanently

prevented from prosecuting the alleged criminal act." The Supreme Court of Canada affirmed this characterization in Regan at para. 2.

14 That a stay of proceedings is an exceptional remedy reserved for exceptional circumstances is clear from *R. v. Taillefer*, [2003] 3 S.C.R. 307 (S.C.C.) where the Supreme Court of Canada stated:

> 117 This Court has frequently underlined the draconian nature of a stay of proceedings, which should be ordered only in exceptional circumstances. A stay of proceedings is appropriate only "in the clearest of cases", that is, "where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued" (*O'Connor*, *supra*, at para. 82). It is a "last resort" remedy, "to be taken when all other acceptable avenues of protecting the accused's right to full answer and defence are exhausted." [Emphasis Added]

In Watt our Court of Appeal, overturning a stay of proceedings entered by the trial judge, stated at para 19 et seq:

> 19 I turn then to my analysis of the decision granting a stay of proceedings. The judge held that the respondent's s. 7 Charter rights not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice, had been infringed. Moreover, the conduct of the Crown had damaged the integrity of the judicial system. In ¶ 68 of his decision, he quoted the criteria that must be satisfied before a stay of proceedings will be granted, as set out in

> *Canada (Minister of Citizenship & Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 (S.C.C.). With respect, he misdirected himself by failing to consider all aspects of the analysis essential in determining whether a stay should be granted. Had he done so, it would have been apparent that this was not the sort of case which called for the drastic remedy of a stay of proceedings.
>
> 20 For convenience, I repeat the test set out in para. 90 of Tobiass, supra:
>
>> If it appears that the state has conducted a prosecution in a way that renders the proceedings unfair or is otherwise damaging to the integrity of the judicial system, two criteria must be satisfied before a stay will be appropriate. They are that:
>>
>> (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
>>
>> (2) no other remedy is reasonably capable of removing that prejudice.

Watt continues at para 31 et seq:

> 31 Furthermore, the prejudice described by the judge which persuaded him to issue a stay does not impair the respondent's ability to make full answer and defence to the extent required for a stay. His decision referred to several types of prejudice:
>
>> (a) The extra preparation and related expense preparing for two trials;
>>
>> (b) The respondent continuing to be under release conditions;

> (c) The effect of the passage of time on the memory of witnesses and the locations of potential witnesses;
>
> (d) The stress of awaiting trial; and
>
> (e) The adjournment of two trials and the delay before the hearing of a third.
>
> However, showing some prejudice is not enough to support a determination that s. 7 of the Charter has been breached. . .

R. v. Andrews [2009] N.S.J. No. 654 is a case of lost evidence. The decision thus references *R. v. La* [1997] 2 S.C.R. 451 and *R. v. F.C.B*. (2000) 182 N.S.R. (2d) 215 (NSCA). There are nevertheless passages which are instructive here. At para 18 the following passage of Sopinka, J. In *R. v. Stinchcombe* (No.2) [1995] 1S.C.R. 754 is cited with approval:

> What is the conduct arising from failure to disclose that will amount to an abuse of process? By definition it must include conduct on the part of governmental authorities that violates those fundamental principles that underlie the community's sense of decency and fair play. The deliberate destruction of material by the police or other officers of the Crown for the purpose of defeating the Crown's obligation to disclose the material will, typically, fall into this category. An abuse of process, however, is not limited to conduct of officers of the Crown which proceeds from an improper motive. See *R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.), at paras. 78-81, per Justice L'Heureux-Dubé for the majority on this point. Accordingly, other serious departures from the Crown's duty to preserve material that is subject to production may also amount to an abuse of process notwithstanding that a deliberate destruction for the purpose of evading disclosure is not established. In

some cases an unacceptable degree of negligent conduct may suffice.

In either case, whether the Crown's failure to disclose amounts to an abuse of process or is otherwise a breach of the duty to disclose and therefore a breach of s. 7 of the Charter, a stay may be the appropriate remedy if it is one of those rarest of cases in which a stay may be imposed, the criteria for which have most recently been outlined in *O'Connor*, *supra*. With all due respect to the opinion expressed by my colleague Justice L'Heureux-Dubé to the effect that the right to disclosure is not a principle of fundamental justice encompassed in s. 7, this matter was settled in Stinchcombe, supra, and confirmed by the decision of this Court in *R. v. Carosella*, [1997] 1 S.C.R. 80 (S.C.C.). In Stinchcombe the right to make full answer and defence of which the right to disclosure forms an integral part was specifically recognized as a principle of fundamental justice included in s. 7 of the Charter. This was reaffirmed in Carosella. In para. 37, I stated on behalf of the majority:

> The right to disclosure of material which meets the *Stinchcombe* threshold is one of the components of the right to make full answer and defence which in turn is a principle of fundamental justice embraced by s. 7 of the Charter. Breach of that obligation is a breach of the accused's constitutional rights without the requirement of an additional showing of prejudice. To paraphrase Lamer, C.J. in Tran [[1994] 2 S.C.R. 951], the breach of this principle of fundamental justice is in itself prejudicial. The requirement to show additional prejudice or actual prejudice relates to the remedy to be fashioned pursuant to s. 24(1) of the Charter.

With respect to the timing of a stay application Sopinka, J. Is quoted at para 19 of Andrews as follows:

> The appropriateness of a stay of proceedings depends upon the effect of the conduct amounting to an abuse of process or other prejudice on the fairness of the trial. This is often best assessed in the context of the trial as it unfolds. Accordingly, the trial judge has a discretion as to whether to rule on the application for a stay immediately or after hearing some or all of the evidence. Unless it is clear that no other course of action will cure the prejudice that is occasioned by the conduct giving rise to the abuse, it will usually be preferable to reserve on the application. This will enable the judge to assess the degree of prejudice and as well to determine whether measures to minimize the prejudice have borne fruit. This is the procedure adopted by the Ontario Court of Appeal in the context of lost evidence cases. In *R. v. B. (D.J.)* (1993), 16 C.R.R. (2d) 381 (Ont. C.A.), the court said at p. 382:
>
>> The measurement of the extent of the prejudice in the circumstances of this case could not be done without hearing all the relevant evidence, the nature of which would make it clear whether the prejudice was real or minimal.
>>
>> Similarly, in *R. v. Andrew* (1992), 60 O.A.C. 324 (Ont. C.A.), the court found at p. 325 that unless the Charter violation "is patent and clear, the preferable course for the court is to proceed with the trial and then assess the issue of the violation in the context of the evidence as it unfolded at trial". See also: *R. v. François* (1993), 65 O.A.C. 306 (Ont. C.A.); *R. v. Kenny* (1991), 92 Nfld. & P.E.I.R. 318 (Nfld. T.D.).

> I would add that even if the trial judge rules on the motion at an early stage of the trial and the motion is unsuccessful at that stage, it may be renewed if there is a material change of circumstances. See *R. v. Adams*, [1995] 4 S.C.R. 707 (S.C.C.), and *R. v. Calder*, [1996] 1 S.C.R. 660 (S.C.C.). This would be the case if, subsequent to the unsuccessful application, the accused is able to show a material change in the level of prejudice.

As noted, *F.C.B.*, *supra*, was a lost evidence case. Nevertheless, if certain parallels may be drawn between a duty to preserve evidence and a duty to disclose it, between lost evidence and non-disclosed (or late-disclosed) evidence, the following extract from our Court of Appeal at para 10 et seq may be instructive:

> The basis principles applicable to the analysis of all three grounds of appeal raised in this case were summarized by Sopinka, J. in *R. v. La*, *supra*, commencing at para. 16.
>
> (1) The Crown has an obligation to disclose all relevant information in its possession.
>
> (2) The Crown's duty to disclose gives rise to a duty to preserve relevant evidence.
>
> (3) There is no absolute right to have originals of documents produced. If the Crown no longer has original documents in its possession, it must explain their absence.
>
> (4) If the explanation establishes that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached.
>
> (5) In its determination of whether there is a satisfactory explanation by the Crown, the Court

> should consider the circumstances surrounding its loss, including whether the evidence was perceived to be relevant at the time it was lost and whether the police acted reasonably in attempting to preserve it. The more relevant the evidence, the more care that should be taken to preserve it.
>
> (6) If the Crown does not establish that the file was not lost through unacceptable negligence, there has been a breach of the accused's s. 7 Charter rights.

[13] ANALYSIS

[14] The trial has not concluded, it is in progress. Has the prosecution been conducted in such a manner as to connote unfairness or vexatiousness?

> There is no evidence that Mr. Drake withheld this information deliberately, or intentionally. The crown concedes Mr. Drake knew of this disclosure, but did not pass it on to defence counsel or crown counsel. Mr. Nicholson chose not to call Mr. Drake or Constable Hall to give evidence as part of the application (at page 148 of the trial transcript, the court was told he would). There is no evidence nor is it a situation where the crown refused to comply with a court order. This is not a case of destruction of evidence.

[15] PREJUDICE

[16] Was there any inability to use the material in cross examination? No there was not. Mr. Nicholson, during crown counsel's "Khelawon Application", labelled Mr. Gaigneur and Ms. Wilson as "two liars". Disclosure of the statements by other witnesses enabled Mr. Nicholson to plan a strategy of attempting to destroy Ms. Wilson's credibility, and that is what he attempted to do on cross examination (see trial transcript pages 93-106).

[17] The Crown proceeded summarily. There is no election. This late disclosure did not affect the defendants procedural "rights".

[18] Is there an unacceptable degree of negligent conduct (on the part of the crown)?

I) Steve Drake interviewed Ms. Wilson - witness told Steve Drake.

II) At the first trial date crown counsel did not disclose (Feb 10/11)

III) On the second appearance, crown counsel did not disclose (June 3/11)

IV) The trial date was confirmed by Steve Drake / Patricia Fricker (June 6/11)

V) Later the trial date was confirmed by Allan Nicholson / Kathy Pentz (Oct 1/11)

VI) There was no disclosure to Kathy Pentz by Mr. Drake (Dec. 7/11)

VII) On February 2, the complainant, Ms. Wilson, tells Kathy Pentz who discloses to Allan Nicholson.

[19] There is no evidence before the court to make out "negligent conduct".

[20] There is no evidence or argument that this non-disclosure has caused a delay which affects the accused's right to fair trial, i.e. memories of witness affected by passage of time.

[21] <u>CONCLUSION</u>

[22] The court would characterize this as "late disclosure".

[23] "The right to disclosure is an aspect of the right to make full answer and defence which is contained implicitly in s. 7 of the Charter. It does not automatically follow that solely because the right to disclosure was violated, the Charter right to make full answer and defence was impaired.

[24] Based on all the evidence before me, I am not convinced the accused has been prejudiced by this late disclosure and therefore, I find no breach of s. 7 of the

Charter. Even if I did find a breach, it is not the clearest of cases where a stay is warranted.

[25] We are in the middle of a trial, and although the motion is unsuccessful at this stage, it may be renewed if there is a material change in circumstances. Disclosure of Ms. Wilson's comments to crown counsel has already taken place. The court can order Ms. Wilson to return to court for further cross examination if the accused wishes or any other crown witness that may be relevant to the disclosure that was the subject of the Charter motion.

[26] I am not prepared to award costs to the accused at this time. There was clearly a failure of crown's obligation to fully disclose in a timely fashion. However there is no evidence that this is a "marked and unacceptable departure from the reasonable standards expected of the prosecution."

____

The Honourable Judge Jean Whalen