PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Martin*, 2013 NSPC 21

Date: 20130320
Docket: 2276770-2276795
Registry: Pictou

Between:

Her Majesty the Queen

v.

Darren Martin

DECISION REGARDING DEFENCE APPLICATION FOR FURTHER DISCLOSURE

Judge:	The Honourable Judge Del W. Atwood, in Chambers
Written decision:	20 March 2013, in Pictou, Nova Scotia
Charges:	4x sub-s. 239(1) *Income Tax Act (Canada)*; 22 x sub-s.237(1) *Excise Tax Act (Canada)*
Counsel:	Constantin Draghici-Vasilescu, for the Public Prosecution Service of Canada
	Darren Martin, on his own behalf
	Stephen Robertson, Nova Scotia Legal Aid, *amicus curiae*

By the Court:

Synopsis

[1] Darren Martin stands charged of four violations of para. 239(1) of the *Income Tax Act (Canada)*, and twenty-two violations of para. 327(1) of the *Excise Tax Act*. Trial dates are fixed presently for 17-21 June 2013. This is the third block of trial time to have been assigned to this matter.

[2] The trial of these charges was scheduled initially to commence on 20 March 2012; an adjournment was ordered by the Court of its own motion upon the appointment of an *amicus curiae*. On the adjourned date of 23 October 2012, Mr. Martin presented to the Court, with the leave of the Court, an application for further disclosure. The Court adjourned the case, again, of its own motion, until 29 November 2012; this was to permit the filing of briefs by the Crown and the *amicus*, to allow the parties time to present oral argument, and to set new trial dates. As noted above, those dates are now fixed, and, as far as I am concerned, are pretty much cast in stone.

Ruling on application for disclosure

[3] Mr. Martin filed with the Court on 4 March 2013 an application to compel the production of additional disclosure material by the prosecution.

[4] In dealing with this application, it is important that I restate the principles governing disclosure set out in *R. v. Martin*, 2012 NSPC 115, a decision regarding an earlier application for disclosure bought by Mr. Martin.

[5] The right to have access to disclosure materials is inherent in the right to make full answer and defence, guaranteed constitutionally in section 7 of the *Charter*. As was observed in *R. v. Dixon*, the right to disclosure of all relevant material has a broad scope, and includes the right to have access to material which might have only marginal value to the ultimate issues at trial.[1] However, this right is not unqualified. A lack of due diligence in pursuing disclosure may weigh significantly in a decision to withhold *Charter* relief.[2]

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[1] [1998] S.C.J. No. 17at paras. 20-23

[2] *Id.* at para. 37.

[6] In 2012 NSPC 115, I found that Mr. Martin had not been diligent in actively seeking and pursuing proper Crown disclosure. While Mr. Martin certainly brought to the Court an array of disclosure applications, prior to the one now subject to the adjudication of the Court and prior to his 29 November 2012 application which was dealt with in 2012 NSPC 115, those earlier applications sought the production of material unconnected completely to any issue triable in this Court. I canvassed some of that forensic history in earlier interlocutory decisions in this case.[3] It was only on the first day set for trial in October 2012 that Mr. Martin advanced an application for disclosure of material touching on an issue this Court is able to hear–namely, pinning down the point in time when the Canada-Revenue-Agency audit of Mr. Martin's business transformed into an investigation with a view to the laying of charges. Delineating that dividing line between audit and investigation may be relevant to the material issue of whether Mr. Martin was subjected to an unconstitutional search.[4]

[7] With respect to my decision in 2012 NSPC 115, while the Court was satisfied that Mr. Martin was focussed on a triable issue, the Court was not satisfied that Mr.

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[3] 2012 NSPC 73, 2012 NSPC 76, 2012 NSPC 92.

[4] *See R. v. Jarvis* 2002 SCC 73 and *R. v. Borg* 2007 DTC 5671.

Martin had established that the Crown ought to be compelled to produce the disclosure material then being sought. First of all, it was clear to the Court from Mr. Martin's oral submissions made on 29 November 2012 that he had not assimilated fully the disclosure material that he had already been given. One key item of disclosure sought back then by Mr. Martin was a so-called permanent-documentation envelope; although Mr. Martin asserted initially that this material had not been disclosed to him, he later corrected himself, and acknowledged very fairly that the permanent-document envelope had, in fact, been provided to him by the Crown in its initial delivery of disclosure.

[8] Furthermore, in additional submissions on 29 November, Mr. Martin presented to the Court an assembly of documents extracted from what had already been disclosed by the Crown; this assembly appeared to be paper copies of what were described as screen shots of data and diary items maintained by the CRA pertinent to the audit and investigation of Mr. Martin's business. There was also an internal memorandum to a Ms. Tammy Turnbull indicative of the commencement of a preliminary investigation by the CRA against Mr. Martin. Mr. Martin's submissions to the Court in relation to those documents satisfied the Court that Mr. Martin was capable of making complete, effective and cogent submissions to the Court regarding

the audit-to-investigation transition based on the material that had been disclosed to him previously.

[9] Accordingly, I found in 2012 NSPC 115 that Mr. Martin had not discharged the burden of proving his constitutional entitlement to the material sought, and his application was not granted. Pursuant to my order in 2012 NSPC 76, it remained open to Mr. Martin to seek leave to submit further application materials to the Court in accordance with the procedure outlined in that order.

[10] On 29 January 2013, Mr. Martin filed a leave application with the Court in accordance with my order in 2012 NSPC 76; Mr. Martin sought again to advance a case for more disclosure. By written memorandum dated 15 February 2013, directed to my judicial assistant and distributed to the parties, I granted Mr. Martin leave to file his application according to the following terms:

> • Mr. Martin may file with the court a list of items which he believes is required to be disclosed under the terms of the Tax Operating Manual;
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> • Mr. Martin may file with the court a list of the eleven cases he relies upon in support of his disclosure request; this list is to set out case names and legal citations

> only; with that information, I will be able to obtain the full-text cases from online research sources.
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> • All leave-allowed material filed with the Court will be faxed by the Court to the Federal prosecutor and to the amicus curiae, for their reply in accordance with my order in 2012 NSPC 76. Any replies received will be faxed or e-mailed by the Court to Mr. Martin.
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> • I will review Mr. Martin's filings, along with any reply from the prosecutor and the amicus, and make a determination whether a pre-trial hearing would be required.

[11] What wound up being delivered to the Court by Mr. Martin the following day was a hefty array of documents, including an affidavit accompanied by extensive exhibits, as well as full texts of a number of reported cases, contrary to what had been leave allowed. This material was returned by court staff to Mr. Martin. I then re-imposed the 5-page filing limit as set out in 2012 NSPC 76, which, in turn, gave rise to Mr. Martin's application of 4 March 2013, now the subject of this decision.

[12] The disclosure material being sought by Mr. Martin is voluminous. It includes:

- complete course materials for the training of Canada Revenue Agency Staff;
- complete operational and investigative-policy manuals;
- extensive internal memoranda circulated within the CRA;

- all correspondence, faxes and e-mail messages between the prosecutor and the CRA staff person who, as Mr. Martin describes it, “authorized the charges”;
- an internal Crown risk-assessment document;
- a personnel hierarchy of the CRA, “from case assignment to the minister”.

[13] There are particular components of this disclosure application that stand out. For instance, Mr. Martin seeks disclosure of a document he describes in para. 27 of his application as the “GST Investigations Manual”; however, in para. 25 of his application, he appears to quote extensively from that very manual, leading me to conclude that he already has access to it.

[14] In para. 10 of his application, Mr. Martin applies for disclosure of “ALL contents of the Permanent Document Envelope.” Mr. Martin had sought disclosure of the permanent-document envelope at what was to have been the outset of his trial on 23 October 2012, but then withdrew that application on 29 November 2012 once he discovered it had been included in the inventory of materials provided to him at the outset by the prosecution; I noted this fact in 2012 NSPC 115 at para. 6, and have noted it again in para. 7 of this judgment.

[15] Ordering the prosecution to produce to Mr. Martin the volumes of material he seeks would, in my view, have the effect of transforming the forensic-disclosure

function into an entire industry; this is to say nothing of the fact that it is not clear to the Court how these documents and records would be of any possible relevance to the case Mr. Martin has to meet. Furthermore, with respect to legal-services records–which would be protected by a solicitor-client privilege–I am not satisfied that there exists any form of innocence-at-stake risk that would compel the Court to order production.[5]

[16] As I noted in 2012 NSPC 115 at para. 7, I am satisfied that Mr. Martin is capable of making cogent and complete arguments to the Court at his trial regarding the audit-to-investigation transition based on the material that has been disclosed to him already.

[17] It is the determination of the Court that the application for further disclosure not be granted. Furthermore, the issue of disclosure is now settled exhaustively, and will not be the subject of further applications.

ORDER ACCORDINGLY

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J.P.C.

[5] See *R. v. McClure*, 2001 SCC 14at paras. 5 and 47; *R. v. Brown*, 2002 SCC 32 at paras. 3-4.