IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R v. Robichaud, 2008 NSPC 51

Date: 2008 April 29
Docket: 1860445
Registry: Antigonish

HER MAJESTY THE QUEEN

- versus -

PHILLIP ROBICHAUD

DECISION ON DISCLOSURE APPLICATION

Revised Decision:	The text of the original decision has been corrected according to the attached erratum dated September 25, 2008.
Judge:	The Honourable Judge John. D. Embree
Heard:	March 25, 2008, in Antigonish, Nova Scotia
Date of Decision:	April 29, 2008
Release of Decision in Writing:	September 5, 2008
Charge:	That on or about the 28th day of November, 2007, at or near Exit 30, Hwy 104, County of Antigonish, Nova Scotia, did unlawfully commit the offence of driving at speed that exceeds posted speed limit or other maximum speed limit in Act by 16 & 30 km/hr inclusive, contrary to Section 106A(b) of the Motor Vehicle Act
Counsel:	Darlene Oko, for the Crown Phillip Robichaud, in person

Embree, P.C.J. (Orally):

[1] Phillip Robichaud is facing a charge that he did allegedly on the 28th of November, 2007, commit an offence of speeding pursuant to Section 106A(b) of the Motor Vehicle Act.

[2] He appeared in Court on January 7th, 2008, entered a plea of not guilty, and trial was set for February 19th, 2008. On that date the Defendant raised the sufficiency of disclosure. The Court adjourned the matter and scheduled a hearing for a disclosure application for March 25th, 2008. The Defendant was to file a request in writing in support of that application, which he did.

[3] In that written request, dated February 20th, 2008, the Defendant seeks disclosure of the following documents. 1) Radar documents; operator manual and specifications; manufacturer's certificate of calibration; RCMP calibration log sheets, if in existence; date of manufacture of the specific radar unit; and specific options of unit. 2) Tuning fork documents: specifications, i.e. X, K, KA, resonance tolerance

in Hertz; RCMP calibration log sheets, if in existence. 3) Officer training materials: RCMP radar training manual.

[4] The applicant expanded on that in oral submissions.

[5] By letter to the Crown Attorney's office, dated January 9th, 2008, the Defendant sought all of the above items, plus: (a) the make, model and serial number of the radar instrument used, and (b) the certificate of competency of the officer who operated the radar unit here.

[6] The Defendant acknowledged receiving a Crown disclosure package. Items (a) and (b), referred to above, were disclosed. So was a Crown brief, the contents of which are not before me. The other items sought by the Defendant in the January 9th letter were not disclosed by the Crown.

[7] The Defendant asserts that he needs the items sought to make full answer and defence.

[8] He refers to a number of subjects that he suggests are important for

him to know about and/or be able to cross-examine the radar operator about. Those include: an explanation of the radar operator's training to use the device he did, and a basis to evaluate any evidence about whether the radar device was operating properly at the relevant time. Proper testing of the radar, and how that is supposed to be done, would be part of the latter.

[9] The applicant specified numerous pieces of information he says he needs, which he apparently expects to find in the radar operator's manual. I'm not going to list them all. Some of them were, installation instructions, number of antennae, kind of tuning fork needed to test it, proper maintenance procedure for the tuning forks, what band that radar operates on, what can interfere with it, is there an internal sensor, is it an LED instrument, et cetera.

[10] Regarding the police officer's training as a radar operator, the applicant says he needs to know how he was trained, what radar unit he was trained on, what procedures he was taught, who was the trainer, what were the trainer's qualifications, what testing the operator underwent and what the course training standard was.

[11] The Crown contends the disclosure has been adequate. The Crowns says that the applicant has not put forward any defence which would explain why the information sought would be necessary. It submits that the Defendant is trying to get the Crown to do an investigation on his behalf. As well, the Crown suggests that ordering disclosure of this information creates a slippery slope leading to an examination of issues which are too remote from the salient features of the Defendant's case.

[12] The Defendant referred the Court to two authorities from the Nova Scotia Court of Appeal: **The Queen v. Longmire**, which I refer to under the citation [1993] N.S.J. No. 15, and **The Queen v. Selig** (1991), 101 N.S.R. (2d) 281.

[13] **Longmire** is one of several authorities across the country involving charges of speeding where disclosure of a radar operation manual is in issue. **Selig** is a 1991 judgment which, on issues of disclosure, has been overshadowed by other more recent and more authoritative decisions from the Supreme Court of Canada.

[14] The principles of the Crown disclosure obligations have been

enunciated in such cases as **The Queen v. Stinchcombe,** [1991] 3 S.C.R. 326; **The Queen v. Egger**, [1993] 2 S.C.R. 451; **The Queen v. Chaplin,** [1995] 1 S.C.R. 727; and **The Queen v. Dixon**, [1998] 1 S.C.R. 244.

[15] A useful summary of these legal principles was provided by Mr. Justice LeBel, speaking for the Supreme Court of Canada in **The Queen v. Taillefer** (2003), 179 C.C.C. (3d) 353 at paragraphs 59, 60 and 61, where he says, starting partway through paragraph 59, and I quote:

> The rules may be summarized in a few statements. The Crown must disclose all relevant information to the accused, whether inculpatory or exculpatory, subject to the exercise of the Crown's discretion to refuse to disclose information that is privileged or plainly irrelevant. Relevance must be assessed in relation both to the charge itself and to the reasonably possible defences. The relevant information must be disclosed whether or not the Crown intends to introduce it in evidence, before election or plea. (p. 343). Moreover, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses. (p. 345). This Court has also defined the concept of 'relevance' broadly in **The Queen v. Egger.**

and the citations follow. Mr. Justice LeBel quotes then from **Egger** as follows:

> One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed - *Stinchcombe, supra,* at p. 345. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may effect the conduct of the defence such as, for example, whether to call evidence.

That's the end of the quotation from **Egger.** And Mr. Justice LeBel continues:

> As the courts have defined it, the concept of relevance favours the disclosure of evidence. Little information will be exempt from the duty that is imposed on the prosecution to disclose evidence. As this Court said in *Dixon, supra,* "the threshold requirement for disclosure is set quite low ... The Crown's duty to disclose is therefore triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence." (para. 21; see also *The Queen v. Chaplin*,

and citations are given,

> at paras. 26-27). "While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant" (*Stinchcombe, supra,* at p.339).
>
> This right is a constitutional one. It is protected by s.7 of the *Charter,* and helps to guarantee the accused's ability to exercise the right to make full answer and defence (see *R. v. Carosella*,

and citations are given,

> at para. 37; *Dixon, supra,* at para. 22). As Cory, J. speaking for this Court, wrote in *Dixon,* at para. 22:

and Mr. Justice LeBel then quotes from **Dixon:**

> [W]here 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 effected the conduct of the defence, he has also established the impairment of his *Charter* right to disclosure.

That's the end of the quotation from **Dixon**, and the end of my quotation from **Taillefer**.

[16] I note that the Supreme Court of Canada in **Chaplin** adopts differing procedures in disclosure applications where the existence of the information sought is established, and where the existence of the information sought is disputed.

[17] While **Stinchcombe** dealt with indictable offences, and the Court specifically did not rule on the application of these principles to summary conviction proceedings, I am applying the same disclosure obligations to this matter.

[18] I will refer to a series of judgments where similar questions of

disclosure to those raised by the applicant were considered.

[19] The first is **The Queen v. Shannon,** [1992] O.J. No.2652, a judgment of the Ontario Court of Appeal. There, the Defendant was charged with operating a motor vehicle with a radar warning device. A radar detector detector, the VG2 interceptor, was apparently used by the police and the Defendant obtained an order prohibiting the holding of the trial until disclosure was made by the Crown to the defence of a copy of either the operator's handbook or the service manual for the VG2 interceptor. The Ontario Court of Appeal made the following comments relevant to the application before me, and I quote from the Ontario Court of Appeal endorsement, the paragraphs of which are not numbered.

> There are only two bases upon which the technical information about the VG2 can be relevant to the conduct of the defence. The first is if the Crown were to rely on the interception made by the VG2 to prove that the device seized in the respondent's car was a radar detector. Crown counsel, Mr. Hutchinson, is correct in conceding that the Crown could not rely on the VG2 at trial in that fashion without disclosing the manual. If the VG2 interceptor, sometimes called the 'detector's detector' is used testimonially, the defence is entitled to have an opportunity to challenge its capacity, its functioning and its accuracy.

[20] The Court in **Shannon** also dealt with the order there being issued by a motions Judge at a pre-trial stage. While this application is made pre-trial, I recognize that the Trial Judge normally deals with such issues. And I intend to carry on and preside at the trial of this matter.

[21] In **Shannon**, the Court of Appeal says that the disclosure sought would only be relevant if the Crown were to rely on the VG2 at trial. I conclude from the submissions I have heard, and the disclosure already made here regarding identifying the radar instrument and the operator's training certificate, that the Crown does intend to present evidence of speed obtained from a radar instrument.

[22] I next refer to **The Queen v. Oosterman,** [1998] O.J. No. 5785, a judgment of the Ontario Court of Justice, Provincial Division. There the Defendant was charged with speeding and sought disclosure of the radar manual and the maintenance records pertaining to the radar device. The Court concluded that the radar manual met the test for relevance and should be disclosed. The Court stated at paragraph 23, and I quote:

> The officer's notes, as disclosed to the defendant, revealed he tested the radar according to manufacturer's specifications. The officer's notes do not disclose what these specifications are. It would be reasonable then for the defendant to have these specifications in determining whether to challenge or cross-examine the officer's proposed testimony about the testing.

[23] The maintenance records were not ordered to be disclosed because there was no evidence the maintenance of the radar device was in issue.

[24] I also refer to **The Queen v. Bourget,** [2007] N.W.T.J. No.78, a judgment of the Northwest Territories Territorial Court. There the Defendant was charged with speeding and sought disclosure of several things, including, copies of: 1) any written instructions, guidelines, policies held by any division of the City of Yellowknife regarding the use of radar units by the City of Yellowknife personnel; 2) portions of the radar unit operator's manual that outlined the use and limitations of the radar unit, including but not limited to, target acquisition, false readings, multiple readings, tracking and targeting; 3) the course training standards, requirements and course syllabus referenced in the radar operator's certificate.

[25] Regarding the first, the Court accepted that no such policies or guidelines existed, but if they did, they would be relevant and ought to be disclosed. As to the portions of the radar operator's manual, the Court said at paragraph 24, and I quote:

> If the radar device is used testimonially, the defence is entitled to have the opportunity to challenge its capacity, its functions and its accuracy. Therefore, if the radar device is to be used testimonially those portions of the manuals which relate to the basic theory and operation of radar, its capabilities and limitations, and which describe how to properly operate the device and test its accuracy, should be disclosed as soon as possible.

[26] The Court did not order disclosure of the training material because it was not established that the prosecutor intended to call the particular officer as an expert.

[27] In **The Queen v. Makuch,** [1996] A. J. No. 962, a judgment of the Alberta Provincial Court, the Defendant was charged with speeding and he sought an order that the Crown disclose: 1) the radar operating manual in respect to the radar unit employed against the accused; 2) the maintenance record in respect to the specific radar unit, with details on inspections, maintenance, repairs, et cetera; 3) police officer's training

record in respect to the radar unit, including any performance evaluations;

4) any textbooks or other course materials employed in the police officer's training in radar unit operations.

[28] The Court said the following, commencing partway through paragraph 13 and continuing at paragraphs 14 and 15, and I quote:

> Surely the average police officer using the radar device need only know the basic theory and operation of radar. He should also be able to give in testimony an accurate description of the specific radar device that he was operating. He should be able to testify to what the manufacturer of the radar device purports the device is capable of doing and that no doubt is set out in a manual accompanying the device. He should also be able to testify as to the proper way to operate it as per the manufacturer's instructions. He should also be able to testify as to how the manufacturer requires that the device be tested in order that the operator can be assured that the device is working properly and is capable of doing what it purports to be able to do.
>
> The operator will also be able to provide testimony as to how he was able to conclude that the speed on the radar screen was attributable to the accused's vehicle.
>
> In the Province of Alberta further validity is given to the radar reading if the device was tested for its accuracy by tuning fork devices which have been duly tested by authorized testers within one year of the alleged offence. If the officer in the individual case is going to rely on the fact that the machine he was using has been tested for its accuracy by tuning fork tests

> certainly that is a matter of extreme relevance and importance to the accused.

Then at paragraph 19, the Court says, and I quote:

> I therefore order that the Crown provide to the accused's solicitor at least five days before the trial date that is to be set sufficient information to answer the relevant matters that one would expect that the officer would be in a position to testify to, that have [been] referred to. The Crown obviously has access to this information and in reality it probably just covers part of the testimony that the radar operator will be testifying to at the trial. I am not directing that the actual radar manual in question be disclosed but if it is readily available the Crown may think in its wisdom that it should be part of the disclosure that I have ordered.

[29] The Court in **Makuch** concluded that no factual basis had been established for disclosure of the other items and that the Defendant should be in a position to make full and defence without them.

[30] Also helpful is the Newfoundland and Labrador Provincial Court judgment in **The Queen v. Wheeler**, [2007] N.J. No.175. There, also, the Defendant sought disclosure of certain material after having been charged with speeding. The Crown agreed to disclose the following: the Royal

Newfoundland Constabulary's Guidelines for the operation of the radar device utilized in this matter, the training record of the officer that issued the summary offence ticket to Mr. Wheeler in relation to the radar device, a list of courses completed by the officer that issued the summary offence ticket, the repair history and the calibration records for the radar device and a copy of all notes made on October 26th, 2006 in relation to any Highway Traffic Act Summary Offence Ticket issued by the officer who issued the summary offence ticket to Mr. Wheeler.

[31] Subsequently, the Crown said it could not provide training records for the officer because his training has occurred in other provinces. The Court ruled that the training standards used when the officer was taught to use the radar device were not relevant since the Crown was going to provide the Defendant with a copy of the operation manual.

[32] In **Longmire**, which the Defendant has referred to, I suggest the way the disclosure issue was handled by the Defendant in that case, and the way the trial proceeded, were major contributing factors in the result. There are distinguishing aspects to the case before me which will make the outcome, in part, different from that in **Longmire.**

[33] I also point out the decision in **The Queen v. McCracken,** [1995] O.J. No.4947, where similar issues arose in an over .08 Criminal Code charge, and **The Queen v. Raybak**, [1998] O.J. No.2586, which also involved a speeding charge and where different collusions were reached on some aspects of the disclosure application compared to the other judgments I've referred to already.

[34] I will follow the approach I consider is adopted in **Shannon**, **Oosterman**, **Bourget** and **Makuch.** If a radar device is going to be used testimonially in this case, which it appears to me is the Crown's intention, the Defendant is entitled to the opportunity to challenge its capacity, its functions and its accuracy. I have not seen the radar operator's manual that is relevant here. In the absence of that or some description of its contents, I'm not prepared to order its full disclosure. I consider it is appropriate to deal with this in a similar fashion to that utilized in **Bourget** and **Makuch.**

[35] The Crown is ordered to disclose those portions of the manual which deal with the radar unit's capacity, functions, operation and accuracy, including, for greater certainty, the proper procedures for testing the

operation and accuracy of the unit.

[36] Given the law of disclosure, which the Crown must abide by, and my ruling here, on examination of the radar operator's manual, the Crown may consider it appropriate to disclose it in its entirety. A similar comment was made by the Court in **Makuch.**

[37] The applicant referred to the Crown brief where he said it indicates that Constable Dykstra performed the radar function test at the start of his shift in accordance with RCMP policy for radar operators. That policy should be disclosed, and that is ordered. In that regard, I refer again to the judgment in **Wheeler** where the Court says, in paragraph 28, part way through the paragraph, and I quote:

> However, if the Royal Newfoundland Constabulary have operations standards which its officers are expected to follow when using a radar device then these are sufficiently relevant to be disclosed.

[38] On the subject of the radar operator's training, it has been disclosed that the operator attended the conventional radar operator's course and that he received a Certificate of Competency. That much is relevant.

There is no suggestion here that the Crown may ask to qualify the police officer who operated the radar as an expert witness. More details about his training and experience might need to be disclosed if that were the case.

[39] In these circumstances, given what has been presented to me on this application, and the stage of the proceedings at which this application was brought, it has not been shown that there is a reasonable possibility of the other training related information sought by the applicant being useful to him in the making of full answer and defence. (See *R. v. Dixon* at para. 21.)

[40] I was not presented with any evidence or even any submission that such a document as a certificate of calibration for the radar device exists, or that calibration log sheets for either the radar instrument or any tuning fork exists. As discussed in **Chaplin**, there is no basis for me to order production of those documents. Relevance has not been shown.

[41] The application is granted, in part, as specified. The disclosure ordered is to be provided by June 16th, 2008.

_____

John D. Embree
Provincial Court Judge

Decision released in writing this 5th day of September, 2008, at Antigonish, County of Antigonish, Province of Nova Scotia.

IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Robichaud, 2008 NSPC 51

Date: 2008 April 29
Docket: 1860445
Registry: Antigonish

Between:

HER MAJESTY THE QUEEN

-versus-

PHILLIP ROBICHAUD

ERRATUM

Revised Judgment: The text of the original judgment has been corrected according to this erratum dated **September 25, 2008**

Judge: The Honourable Judge John D. Embree

Heard: 25 March, 2008

Counsel: Wayne Bacchus, for the Crown
Phillip Robichaud, in person

Embree, J.:

1. The cover page of the decision is corrected to show that Mr. Wayne Bacchus appeared for the Crown.

(i) J.

25 September 2008
Antigonish, Nova Scotia

CERTIFICATE OF COURT REPORTER

I, Patricia Van de Sande, Court Reporter, here by certify that I have transcribed the foregoing and that it is a true and accurate transcript of the Decision in this matter, **Her Majesty the Queen versus Phillip Robichaud**, taken by way of electronic recording and reduced to typewritten copy.

_____

Court Reporter
Certification No. 200646

(DATED, this 14th day of June, 2008), Nova Scotia