PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Davis*, 2023 NSPC 31

Date: 20230606
Docket: 85059621
Registry: Kentville

Between:

His Majesty the King

v.

Philip Winston David

Restriction on Publication, s. 539

Interim Decision on Section 540(7) Application

Judge:	The Honourable Judge Ronda van der Hoek,
Heard:	October 17, 2022, in Windsor, Nova Scotia October 28, 2022, in Kentville, Nova Scotia December 15, 2022, in Kentville, Nova Scotia May 29, 2023, in Windsor, Nov Scotia
Decision	June 6, 2023
Charge:	Section 5(2) Controlled *Drugs and Substances Act*
Counsel:	Michael Taylor, QC, for the Crown David Hirtle, for the Defendant

By the Court:

Introduction:

[1] Mr. Davis is in the midst of a preliminary inquiry. The Crown filed a s. 540(7) notice alerting the Court and the defence counsel that would seek to admit as trustworthy and credible thirteen documents, attached to the notice and tabbed 1-13.

[2] Committal is in issue, and the Crown called three witnesses including Cst. Slade, the investigating officer. Defence counsel made no concessions with respect to any matters during the hearing and that included the thirteen documents attached to the notice.

[3] Following the Crown's submissions, the Court reserved and returned to express concern that most of the thirteen documents had not actually been tendered as exhibits in the hearing, nor had any witness spoken to them. Not wanting to risk exceeding its jurisdiction, the Court asked to hear from the Crown as to statutory authority or case law suggesting my concerns were without merit. Defence counsel maintains his stated position.

[4] The Crown sought a written statement of my concerns so that he could better address them when the matter returns at the end of the week. This constitutes the answer to the request.

Background:

[5] The s. 540(7) notice, attaching 13 individually tabbed documents, was not entered as an exhibit attached to an affidavit of an officer describing how the Court might assess trustworthiness or credibility, nor did the Crown mark as an exhibit the s. 540(7) notice, with the attached documents. Those are two methods the Court generally sees used in preliminary inquiries both paper and otherwise.

[6] Instead, the only exhibits entered on the preliminary inquiry were Exhibit #1- six *General Occurrence Reports* prepared by Cst. Slade (Tabs 1-6) and Exhibit #2- a list of items seized incidental to the arrest of Mr. Davis and from his apartment pursuant to warrant (Tab 8).

[7] Tabs 7, 9, 10, 11, 13 were not marked as exhibits, nor did any Crown witness refer to them in testimony. Even Cst. Slade, who authored the *General Occurrence Reports*, Exhibit #1, did not refer to them in his testimony or adopt them. Fortunately, he did testify to most of the information contained in the reports, which leaves those details available for the Court's consideration on the ultimate issue-committal, and potentially for consideration on the s. 540(7) application.

[8] The Court reviewed a few decisions. In *R. v. Rao*, 2012 BCCA 275 the Crown **sought to tender as evidence on the preliminary hearing** 35 separate documents, including police reports, statements of witnesses, forensic reports, and exhibit logs. The Court described the process that placed those documents before the preliminary inquiry judge: " On August 10, 2010, the preliminary inquiry judge issued the First Ruling in which she held that the paper record tendered by the Crown was admissible on the inquiry pursuant to s. 540(7) of the *Code*, and the binder of those materials was marked Exhibit "A" for identification. On August 17, 2010, the first scheduled day of the preliminary inquiry, the binder became Exhibit 1 on the inquiry. The Crown then closed its case." The Court said, "it is apparent from the wording of s. 540(9) that it expressly anticipates that witnesses providing the information under s. 540(7) may be subject to cross examination", which would seem to beg the question, if the documents are not filed by an affiant who attests to them, who exactly would be subject to a potential s. 540(9) application? In *R. v. McFarlane*, [2005] OJ No. 6374 (Ont. CJ) the Crown tendered all the exhibits through an officer who was familiar with the evidence, and the defence made application to cross examine him. At the end of the hearing, the Court ruled one exhibit inadmissible. In *R. v. Francis*, 2005 ONCJ 150, the Crown called the investigating officer to tender the exhibits, some were not deemed admissible,

and the Court ruled the Crown would have to call more evidence on the preliminary inquiry. It was not clear in the decision whether the Crown had closed its case and sought an interim ruling.

[9] Lacking a foundation to assess the items listed in the notice but not exhibited, there appears to be no authority under s. 540 upon which the Court can assess their credibility or trustworthiness. The problem this presents is the Court is unable to consider the drug expert report of Cst. Lane, a crown sheet, and the notes etc. of Cst. Cornelisse. Given the drug expert's report is a vital consideration when assessing the issue of committal, it is important to address admissibility, because without that document the Court may be unable to determine if the seized items could establish possession for the purpose of trafficking or only simple possession.

[10] That said, the Court can accept Exhibit 2, the list of seized items as trustworthy given Cst. Slade testified and confirmed some of the most important items listed there were seized in his presence. As a result, I can also find the document credible.

[11] Defence counsel was concerned about the amount of hearsay contained in the *General Occurrence Reports*, Exhibit #1, and given my concerns about assessing them in a vacuum, I will err on the side of not admitting them as

credible and trustworthy, although I note Cst. Slade provided a significant amount of information contained in the exhibit to consider on committal.

[12] The defence also took issue with admission of what was described as a Crown Sheet, that the Crown indicated on the first day he would file as an exhibit on the second day of the preliminary inquiry. While I am skeptical a Crown Sheet could ever be admitted pursuant to s. 540(7), the Crown did not file that document as an exhibit, which further supports my concern that documents not filed as exhibits cannot be considered on a s. 540(7) application. I await the Crown's comment.

[13] So, my preliminary ruling permits a s. 540(7) application with regard to Exhibit #2, the seized item list, and a final ruling on the other items including Exhibit #1 awaits the Crown's submissions regarding admissibility.

This interim ruling is subject to my right to revisit following submissions from the Crown on June 9, 2023.

van der Hoek PCJ