SUPREME COURT OF NOVA SCOTIA
Citation: ***R. v. Calder***, 2010 NSSC 146

Date: 20100414
Docket: CRH 316393
Registry: Halifax

Between:

Her Majesty the Queen

v.

Anne Calder

DECISION ON CHARTER APPLICATION

Restriction on Publication: It is ordered that there shall be a ban on publication of any reference to "new evidence" mentioned by counsel in submissions in court on April 13, 2010. The ban will also apply to paragraph [5] of this decision.

Judge:	The Honourable Justice Peter Bryson
Heard:	April 13, 2010, in Halifax, Nova Scotia
Decision:	April 14, 2010 **(Orally)**
Written Release:	April 19, 2010
Counsel:	Paul Adams, for the Crown Craig Garson, Q.C., for the Defendant

By the Court:

[1] Anne Calder brings an application for relief under s. 24(1) of the *Charter* alleging that the Crown's intention to lead newly discovered evidence in these proceedings compromises her s. 7 and 11(d) *Charter* rights. In essence, she claims that her ability to make "full answer and defence" to the charges against her will be impaired if this new evidence is adduced in this trial against her. She seeks exclusion of this evidence or a mistrial, with corollary relief.

[2] Ms. Calder faces a three count Indictment for trafficking and possession for the purpose of trafficking contrary to the provisions of ss. 5(1) and (2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

[3] The new evidence first came to Crown counsel's attention during a lunch break last week, following the hearing of a *voir dire* and a day and one-half of evidence in the trial proper. Defence counsel was immediately notified and disclosure was provided to defence counsel within twenty-four hours of the Crown learning of the new evidence.

New Evidence

[4] To place the significance of the new evidence in context, it is necessary to say something about the posture adopted by Ms. Calder in her defence. It is clear that she has taken the position that she had no knowledge of the contents of the prisoner package seized following the search of Thomas Izzard and of the other evidence of drugs seized from her home pursuant to a search warrant executed soon thereafter. To that end, through her counsel, she negotiated a number of matters with the Crown. At a very early stage, she negotiated an agreement that would preserve her right to re-elect from a trial by judge and jury to trial by judge alone on appropriate notice to the Crown. In fact, this re-election did not occur until March 9, approximately a month before the trial began and at a time when Crown disclosure was complete. More recently, Ms. Calder negotiated an agreement with the Crown that she would not contest the admissibility of a video taped statement that she gave to police on the night of July 14, 2009 on the Crown's undertaking to tender that evidence in the Crown's case. She also agreed that if a motion to dismiss at the conclusion of the Crown's case was unsuccessful, she would testify in her own defence. The Crown rightly points out that this

undertaking was unenforceable. Nevertheless it was made in the context of the Crown's agreement to lead the video taped statement. During that statement, Ms. Calder was questioned about her knowledge of the drugs found in this case. She was plainly putting her knowledge in issue.

[5] [Removed - publication ban]

[6] It is immediately obvious that the new evidence can be used by the Crown to impeach Ms. Calder's testimony and contradict things she had told to Sergeant Kelly in her video taped statement. It is clear that the evidence goes to the *mens rea* element of the offences alleged against Ms. Calder and goes directly to the issue of her credibility.

[7] The Crown and the defence both agree about the potential importance of the evidence to the issues at trial and what use the Crown would make of this new evidence.

[8] Ms. Calder argues that the Crown's intention to adduce the newly discovered evidence has adversely affected her approach to the trial. She made important tactical decisions on the strength of disclosure received from the Crown relating to such things as her election to trial, agreements with respect to the video taped evidence and her undertaking to give evidence in the event that charges against her were not dismissed on a defence motion following the close of the Crown's case. Ms. Calder says she gave up her right to contest the admissibility of the video taped evidence, her right not to call defence evidence and her right to remain silent.

Burden

[9] It is clear from *R. v. O'Connor*, [1995] 4 S.C.R. 411, *R. v. Bjelland* [2009] 2 S.C.R. 651 and other Supreme Court and lower court decisions that the burden rests with Ms. Calder to prove on a balance of probabilities that a *Charter* breach has occurred. It is not enough to show non-disclosure; rather actual prejudice must also be demonstrated. According to the Supreme Court of Canada in *Bjelland*, ¶ 26, Ms. Calder must show how the late disclosure evidence would have affected the decisions that she made. If she is successful, it is then for the court to fashion a remedy that preserves and balances the interests of both the accused and the Crown.

Disclosure

[10] There is no dispute between the parties on the general obligations of disclosure imposed on the Crown beginning with the Supreme Court's decision in *Stinchcombe*, [1991] 3 S.C.R. 326, which has been followed and elaborated on ever since it was decided in 1991. Importantly, in *Stinchcombe*, the Supreme Court recognized that initial disclosure by the Crown should occur before the accused is called upon to elect the mode of trial or to plead. The Supreme Court recognized in *Stinchcombe* that these rights were crucial steps the accused must take that may affect her rights in fundamental ways.

[11] In *R. v. Dixon*, [1998] 1 S.C.R. 244, Justice Cory, quoting the Supreme Court in *R. v. Egger*, [1993] 2 S.C.R. 451, pointed out that Crown disclosure can affect such questions as how the accused meets the Crown's case, advances a defence or otherwise makes a decision that may affect the conduct of the defence – i.e., whether to call evidence. In the circumstances of this case, Ms. Calder has satisfied me that last week's late disclosure to her did adversely affect her owing to decisions that she had already made regarding her defence and trial strategy.

[12] The Crown has argued strenuously that the information which it has now recently disclosed was already in the possession of Ms. Calder because she participated in the discussions with Corporal Vail. The Crown cites the Nova Scotia Court of Appeal in *R. v. C. S. P.* (1995), 141 N.S.R. (2d) 207 and particularly refers the court to ¶ 17. In response, Ms. Calder argues that the key is not her general state of knowledge but her knowledge of the evidence the Crown intends to adduce her against her. In *C. S. P.* the information brought to the accused's attention was information that enhanced the accused's ability to challenge the complainant's credibility, although it turned out that the accused already had the information. This case is quite different where the evidence to be adduced is highly prejudicial in light of the pre-trial agreements and decisions made by Ms. Calder. Moreover, as Ms. Calder points out, the fact that the accused may have been previously aware of evidence that the Crown suddenly wishes to adduce, cannot be the test. By way of example, the Alberta Court of Appeal did not take that view in *R. v. Antinello*, [1995] 165 A.R. 122, where new evidence regarding an inculpatory statement by the accused was brought forward. Clearly the accused in that case would have known of his own inculpatory statement. The

key was not the state of his knowledge, but his knowledge of the *evidence* against him.

[13] I am satisfied on a balance of probabilities that Ms. Calder has succeeded in proving a breach of her right to make full answer and defence. I hasten to add, however, that I don't consider the breach by the Crown to have been deliberate. The information which was only disclosed last week was in the possession of the police and I cannot treat Corporal Vail as somehow unconnected with the Crown, difficult though it may have been to "connect the dots." I do accept that Crown counsel had no prior knowledge of this evidence and that until last week, neither did the immediate investigative team. Counsel acted quickly and appropriately when he learned of this new evidence. Nevertheless, a *Charter* breach is made out on the evidence.

Prejudice

[14] Ms. Calder has been prejudiced in a number of ways by this new evidence:

(1) First, she has pursued a strategy that placed in issue her knowledge about the contents of the drug packages.

(2) Further to that strategy she agreed not to contest the admissibility of the video taped statement that she gave to police.

(3) Also further to that strategy, she agreed to testify if her motion to dismiss at the end of the Crown's case were unsuccessful.

(4) At an early stage, she entered into a specific agreement regarding re-election of her method of trial, which preserved that re-election until she had full Crown disclosure.

[15] It is obvious that not every late disclosure will prejudice a *mens rea* defence. But in this case, Ms. Calder took positive steps to place her knowledge and intent at issue. She agreed to have the video taped statement go in without contest. During that video, knowledge and intent are canvassed by Sergeant Kelly, who even raises the issue of willful blindness.

[16] The Crown argues that this new evidence does not go to voluntariness. And one might argue that Ms. Calder was not giving up much because the video taped statement may well have been ruled admissible anyway. But this is not the point. The point is that Ms. Calder gave up the right to challenge its admissibility, based on what the defence then knew of the Crown's case.

Remedy

[17] Having found that Ms. Calder has been prejudiced, the court must decide on an appropriate remedy. In *R. v. Bjelland*, *supra*, the Supreme Court of Canada emphasized the need to fashion a remedy appropriate to the prejudice suffered by an accused from late disclosure. However, in crafting this remedy, the court must not simply have regard to the rights of the accused but also to the rights of the Crown and the public generally. The accused is entitled to a fair process. But the trial must be fair from the perspective of the Crown and society more broadly. Here it is useful to refer to the words of Justice McLachlin, (as she then was) cited in *Bjelland* from *R. v. Harrer*, [1995] 3 S.C.R. 562 at ¶ 45:

> At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused's point of view: R. v. Lyons, [1987] 2 S.C.R. 309, at p. 362, per La Forest J. Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness for the accused. [Emphasis added.]

[18] In *Bjelland* the Court was considering whether or not a trial judge's decision to exclude evidence for late disclosure was an appropriate remedy. The Court held that a trial judge should only exclude evidence for late disclosure in *exceptional cases* where late disclosure renders the trial process unfair and this unfairness cannot be corrected through an adjournment and a disclosure order or where exclusion is necessary to maintain the integrity of the justice system itself. The exclusion of evidence has an impact on trial fairness from society's point of view because it impairs the truth seeking function of the court.

[19] It can be argued that some of the agreements Ms. Calder made and the choices to which she committed can still be retrieved. The court could relieve her

of previous agreements with respect to admissibility of the video taped statement and the qualified commitment to testify in her own defence, which is probably unenforceable anyway. That would not address her choice of mode of trial which as *Stinchcombe* points out, is an important choice that may affect her rights in a fundamental way.

[20] Having considered the matter carefully, I am not satisfied that I can cure the prejudice of late disclosure to Ms. Calder by an adjournment or other order at this late stage. In particular, the one thing which I cannot retrieve for Ms. Calder is her right to re-elect, which was a concern for her from the beginning as is apparent from the correspondence between counsel which has been placed before the court.

[21] In my view, Ms. Calder's brief correctly summarizes her evidence with respect to her decision to re-elect. In this respect, I refer to excerpts from pages 3 and 4 as follows:

> . . . **Based on the disclosure provided and the disclosure anticipated to be forthcoming** Ms. Calder made significant decisions with respect to the conduct of her defence. Specifically, **based on the disclosure provided and the disclosure anticipated to be forthcoming**, Ms. Calder provided instructions to elect trial by a Judge and jury and to waive her right to a Preliminary Inquiry. Of significance is the safeguard which defence counsel negotiated with the Crown prior to her first appearance on September 2nd. Specifically, the Crown agreed in writing that should Ms. Calder wish to re-elect her mode of trial from a Supreme Court Judge and jury to be tried by a Supreme Court Judge alone the consent of the prosecutor to said re-election would be provided with the expectation the Crown would receive reasonable notice of such a request prior to trial.
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> . . . Ms. Calder's decision to give up her right to be tried by a Judge and jury was a significant decision following a thorough review of all the evidence disclosed together with other factors. Ms. Calder's formal re-election took place before Your Lordship on March 9th.

[22] Notably in *Bjelland*, the Court criticized the trial judge for not offering the accused a right of re-election – but of course that motion was heard by the trial judge before the trial had begun and before evidence had been called. That option is no longer available to me.

[23] On the other hand, I am satisfied that proceeding with the trial without this new evidence would be unfair to the Crown and would not be in society's interests

generally because cases should be decided on all relevant and admissible evidence. The "truth seeking" function of the court would be compromised if I were to grant an order excluding evidence which the parties clearly recognize as important. In my view, this new evidence should be heard, but not by this court and not in this trial. Accordingly, and with much reluctance I have come to the conclusion that a mistrial should be ordered.

[24] The court is always reluctant to order a mistrial except in the clearest of cases and when the impugned conduct undermines trial fairness or the decision making process (*R. v. R.* (1994) 94 C.C.C. (3d) 168 Ont. C.A.; *R. v. Paterson*, (1998), 122 C.C.C. (3d) 254 B.C.C.A.

[25] On the other hand, there is compelling authority that a mistrial is the appropriate remedy for late disclosure which has affected an accused's pre-trial rights: (*R. v. T. (L.A.)* 1993 O.J. No. 1650 (Ont. C.A.)). *R. v. T.* the Court of Appeal states in the 4th last paragraph:

> It is apparent from the court's statement in *Stinchcombe*, *supra*, at p. 14, previously quoted, that the disclosure of evidence by the Crown can affect the defence's election with respect to mode of trial or to the plea. Defence counsel argued that the late disclosure by the Crown may have affected the accused's choice of forum in his decision to testify. While this argument would not necessarily succeed in every case, I would give effect to it in this case having regard, among other things, to the clear statement of defence counsel on the record. The late disclosure may have also affected the ability of defence counsel to attack the complainant's credibility which was critical in this case.

[26] The Crown expresses a well founded concern that late disclosure could result in re-elections on a regular basis. If this were to happen before a trial, it should not present a significant problem because the accused can be given the opportunity of re-electing at that stage. If the accused is sincere about re-electing, she has her remedy. If not, the trial can proceed as scheduled. On the other hand, if late disclosure happens after the trial begins, the accused would still need to lead evidence that the right to re-elect was one that was preserved and was important in the context of full disclosure. In this case, Ms. Calder has satisfied me that the right of re-election was important to her and was preserved and was not exercised until full Crown disclosure had been concluded.

[27] With respect to the corollary relief sought by Ms. Calder – I agree that she should be released from undertakings and agreements reached to date and that she should have a right to re-elect. However, I am not satisfied that she should be entitled to a preliminary inquiry. The preliminary inquiry rights were waived at an early stage when disclosure was to her knowledge by no means complete. I recognize that preliminary inquiries do have the incidental purpose of providing some pre-trial discovery to the accused. But primarily they are for the purpose of determining whether an accused should be committed for trial. Moreover, there is no suggestion that Crown disclosure is incomplete. Accordingly, I would not order that Ms. Calder now be entitled to a preliminary inquiry.

[28] There has been a mistrial. Ms. Calder is relieved from her previous agreements and undertakings with the Crown regarding trial process. She is entitled to re-elect.

Bryson, J.

Addendum

At the conclusion of the decision, Ms. Calder moved for a continuation of the publication ban on the "newly discovered evidence" mentioned in court yesterday and in the decision today. The ban is continued and will also apply to paragraph [5] of this decision.