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File No. S.HCR. 99-157572

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: R. v. Innocente, 2001 NSSC 2]

BETWEEN:

HER MAJESTY THE QUEEN

- and -

DANIEL JOSEPH INNOCENTE and GILES POIRIER

DECISION ON COSTS

HEARD: At Halifax, Nova Scotia, before the Honourable Justice Allan P. Boudreau on September 26, 27 and 28, 2000.

DECISION: January 04, 2001

COUNSEL: Claude Belanger, Q.C. and Paula Taylor, for the Crown
Kevin A. Burke, Q. C. and François Bordeleau for Giles Poirier
Warren Zimmer, Esq., for Daniel Innocente

Boudreau, J.

INTRODUCTION

[1] Mr. Daniel Innocente was charged jointly with Mr. Giles Poirier with conspiracy to traffic in cannabis resin and cocaine during the period March 25, 1996, to May 17, 1996. The first trial of this matter ended in a mistrial in March of 1999 because the jury could not reach a verdict. The retrial of both accused was scheduled to commence in early 2000.

[2] The first substantive pre-trial motion was an allegation of misconduct and abuse of process on the part of the Crown prosecutors and the police. This matter was heard from February 3 to March 15, 2000, and it resulted in the granting of a stay of proceedings on April 7, 2000. The application consumed some twenty-five days in court plus preparation time. The defence, as part of its original application, had requested that the additional remedy of costs be awarded against the Crown. The issue of costs was set over to be presented and argued on September 26, 27 and 28, 2000.

FACTS

[3] My decision of April 7, 2000, granting a stay of proceedings is based on findings of serious misconduct on the part of the Crown prosecutors and the police. I will not repeat all those facts and findings here, however I must consider all of those circumstances in this decision. The defendants, as a result, have claimed extensive costs against the Crown. Mr. Innocente was not represented by legal counsel at the first trial, therefore his claim is limited to issues arising from the pre-trial motions for the scheduled retrial only, primarily the stay application itself. Mr. Poirier was represented by legal counsel throughout and his

claim for legal cots and travel expenses covers a period commencing as far back as July of 1998 and ending with the stay application.

[4] In a separate ruling regarding Mr. Innocente's reasonable legal expenses pursuant to subsections (5) and (5.1) of section 462.34 of the **Criminal Code**, I taxed those legal expenses at the total sum of $53,258.79. On the other hand, Mr. Poirier has claimed legal fees and other expenses for the period July, 1998 to April, 2000 totaling $123,739.52. Mr. Poirier's total claim includes counsel fees, basically for court appearances, of some $72,500.00. The remainder is made up primarily of travel costs.

[5] Mr. Innocente's claim includes counsel fees for court appearances relating to Mr. Warren Zimmer's part-time court attendance during the stay application of $20,240.00, plus another $19,202.26 for preparation of the abuse of process/stay of proceedings application. However, Mr. Innocente claims the full amount at which his reasonable legal expenses will be taxed pursuant to section 462.34 of the Code. That is the amount of $53,258.79 previously mentioned. Therefore, the total claim for costs by both defendants is $176,998.31. Both defendants claim these are costs attributable to and directly incurred as a result of the misconduct of the Crown prosecutors and the police, which I have concluded existed in my decision of April 7, 2000.

THE AUTHORITIES

[6] The current leading Nova Scotia case on the award of costs in criminal matters is **R. v. Cole (D.)** 183 N.S.R. 2(d) 263 (N.S.C.A.). In that case, Bateman, J.A., analysed the current Canadian case authorities and principles applicable to such an award of costs. In **Cole**, supra, the trial judge had found that the Crown had entered a stay of proceedings pursuant to the **Criminal Code** for "improper motives". This was found by the trial judge to be an abuse of process and that ruling was not appealed by the Crown. What was appealed was the trial judge's award of costs as a result of her findings and ruling. The trial judge awarded costs of $12,000.00 to the defendant, based on her findings on the stay application.

[7] The Court of Appeal had grave doubts about the correctness of the trial judge's ruling on the stay application. It is in this light that the Court of Appeal overturned the trial judge's award of costs. This will not be an unanswered issue in the present case as my findings and ruling on the stay application are presently the subject of appeal, and undoubtedly the present ruling will also form part of any appeal. Nevertheless, the **Cole** case provides some important general guidelines for trial judges faced with an application for costs in criminal matters.

[8] There is no question that the granting of a stay of proceedings for abuse of process does not automatically result in an award of costs against the Crown and that such an

award is an exceptional remedy. This was expressed succinctly by Bateman, J.A., in **Cole,** supra, at paragraph [18]:

> "An order for costs against the Crown in a criminal prosecution is an exceptional remedy. Costs do not automatically follow a finding of abuse of process or the granting of a stay . . .". [Emphasis added].

What is relevant is the Crown's conduct as further stated in **Cole** at paragraph [18]:

> "In reviewing the costs order we must consider whether the Crown's conduct which, in the judge's opinion, was an abuse of process warranting a stay of proceedings, was such that it should attract the additional remedy of costs."

[9] In **Cole**, the Court of Appeal's decision appears to turn on the principle of "prosecutorial discretion" in the analysis of the conduct and motives of the Crown in entering a prosecutorial stay of proceedings pursuant to its powers under the **Criminal Code**. The Court of Appeal had "grave concerns" as to whether that discretion had in fact been improperly exercised. In my opinion, the principle of prosecutorial discretion, in view of my findings, has no application to the facts of the present case. The misconduct found in the present stay application did not result from the exercise of prosecutorial discretion in the sense outlined in **Cole**. I have found that the misconduct of the Crown was for oblique motives, pure and simple, and was so egregious as to merit a stay.

[10] However, even such misconduct as I have found does not automatically justify an award of costs against the Crown. That would be akin to a fine or punitive damages for improper conduct. This would go even further than claiming civil damages in a criminal matter as rejected by Glube, C.J.N.S., in **R. v. LeBlanc** [1999] N.S.J. No. 179, where she stated at paragraph [16]:

> "What has happened in this case is really an attempt to obtain damages through costs in a criminal matter instead of commencing a civil action against the R.C.M.P. . . ."

Chief Justice Glube also stated:

> "To award costs there must be exceptional circumstances, something "remarkable about the defendant's case" or "oppressive or improper conduct" proven against the Crown. [emphasis added].

[11] When then is an award of costs a proper additional remedy when a court finds serious misconduct, abuse of process and violation of an accused's Charter rights warranting a stay of proceedings? Bateman, J.A., in **Cole,** supra, lays out general comments and lists with apparent approval quotes from various cases which lay out criteria as follows:

> [50] As I have already stated, an award of costs in a criminal proceeding is a rare and exceptional remedy . . . In **R. v. Pawloski (M.)** (1993), 61 O.A.C. 76; 79 C.C.C.(3d) 353 (C.A.), Galligan, J.A., for the court, acknowledged that " . . . s. 24(1) of the **Charter** has enlarged the grounds upon which a court could exercise its discretion to grant costs" to include a **Charter** infringement (at p. 356). Although finding that an appeal from the costs order did not lie in the circumstances of that case, he emphasized that notwithstanding this expanded foundation for a court to order costs against the Crown, such relief remains an exceptional remedy.
>
> [51] Costs do not automatically follow a finding that there has been an abuse of process, nor even, the granting of a stay. Before ordering costs, the court must conduct a separate inquiry to determine whether the Crown or police actions which led to the stay support the additional remedy. In this regard, it is instructive to review past cases where costs against the Crown have been ordered.
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> [52] In **R. v. Jedynack** (1994), 15 O.R.(3d) 612 (Gen. Div.) the Crown had inadvertently not disclosed some relevant documents until just before the commencement of the trial. The Provincial Court judge ordered costs. On appeal, Goodearle, J., acknowledged that, although s. 24(1) of the **Charter** has had the effect of enlarging the grounds upon which costs may be awarded:
>
> > "[36] . . . such an order should only be made in circumstances where:
> >
> > > 1) The acts or failures to act, collectively amount to something well beyond inadvertent or careless failure to discharge a duty;
> > >
> > > 2) Rather the conduct would have to fall within the realm of recklessness, conscious indifference to duty, or whether conscious or otherwise, a marked and unacceptable departure from usual and reasonable standards of prosecution;
> > >
> > > 3) Such conduct must be seen to have resulted in an indisputable and clearly measurable infringement or denial of a right; . . .
> >
> > [37] Nothing even close to a standard of perfection should be imposed on prosecutors who, in this day and age, are overburdened with work, and as was the case here, often largely dependant upon outside resources over which they have little daily control in the

> development of their cases, which many times impact on the discharge or the manner in which they are able to discharge their duties."

[53] In **R. v. Dostaler** (1994), 91 C.C.C.(3d) 444 (N.W.T. S.C.), on the third day of a narcotics trafficking trial, the court granted the accused's motion for a mistrial and directed a new trial . . .

. . . . In awarding costs the judge noted that the accused had incurred wasted travel and counsel costs of the aborted trial which expenses would be duplicated for the new trial. He said at p. 446:

> "This is, in my respectful view, one of those clear cases where the court should exercise its discretion to award costs against the Crown. The following factors, in particular, require it:
>
> (a) there was a serious interference with the accused's right to fundamental justice;
>
> (b) the Crown and police conduct amounted to more than mere inadvertence;
>
> (c) the court ought to demonstrate its disapproval of this and police conduct;
>
> (d) the accused has a clear compensatory need."

[56] In **R. v. Corkum (R.E.)** (1997, 163 N.S.R.(2d) 197; 487 A.P.R. 197 (S.C.), Mr. Corkum was convicted on two counts of robbery. During the trial, because of non-disclosure by the Crown, the accused applied for a stay of proceedings. The application for a stay was dismissed. The non-disclosure had, however, resulted in extensive adjournments causing additional costs to the accused. In ordering the Crown to pay costs, Justice Davison found that the Crown or the police had not acted with simple inadvertence but that there had been "an indifference to be fair" and that "there was a recklessness with respect to the duty to disclose" which amounted to a "marked departure" as in **Jedynack,** supra.

> "[12] . . . In my view, we are not dealing with a simple disclosure slip-up. In my view we are not dealing with simple inadvertence. Extensive documents were not disclosed and I can only infer that there was an indifference to be fair by the police or by the crown, or both . . .

[58] Most recently in **R. v. Greganti (S.),** [2000] O.T.C. Uned. 68; [2000] O.J. No. 395 (S.C.), Stayshyn, J., having granted a stay of proceedings, ordered costs where the Crown was "in serious and deliberate violation" of the clear law of disclosure as outlined in **Stinchcombe**, supra. He found that the Crown's late disclosure deprived the accused of the ability to make full answer and defence.

[59] Finally, in **R. v. Robinson (C.J.),** [1999] A.J. No. 1469; 250 A.R. 201; 213 W.A.C. 201 (C.A.), the majority of the court confirmed that "some degree of misconduct or an unacceptable degree of negligence must be present before costs are ordered against the Crown under s. 24(1) of the **Charter**." This was in response to the view expressed by Berger, J.A., concurring by separate reasons, that "a finding of a clear **Charter** breach and a causal connection to the costs incurred are the only prerequisites to an award of costs as a remedy under s. 24(1) of the **Charter**" (per McFadyen, J., at para 28). The divergence of opinion in **Robinson**, supra, raises an interesting issue as to whether there should be a less onerous test applied in circumstances where costs against the Crown are found to be an appropriate remedy for expenses "thrown away" by the accused in cases of non-disclosure or other abusive conduct, where a stay of proceedings is not granted but a trial must be delayed or recommenced. Here it is unnecessary to develop this distinction as the costs ordered by Justice Hood were not the remedy for the alleged **Charter** breach but were granted in addition to the stay.

. . .

[61] While I would agree that those guidelines should not be treated as an exhaustive list of prerequisites to an order for costs, they do represent a reasonable starting point for a principled assessment of the issue. In **R. v. Robinson**, supra, the Alberta Court of Appeal noted that, despite that court's reluctance in **R. v. Pang** to endorse the **Jedynack** guidelines, the discretion to award costs is not entirely unrestricted. As in all cases, a court's discretion must be exercised judicially . . .

[62] In my opinion Justice Hood erred when she failed to undertake an independent review of the Crown's conduct to ascertain whether it warranted the additional remedy of costs. Instead she simply referred back to her characterization of that conduct as found in her decision on the stay application. Accordingly, she did not focus upon relevant considerations, when assessing the claim for costs. This is an error of law.

[63] Indeed, had the Crown's conduct been weighed against appropriate factors Justice Hood could not reasonably have ordered costs. Militating against an order for costs are the following:

> 1. The judge's restriction on the Crown's use of s. 579 is a novel interpretation of the law - in contrast to that in disclosure cases where the law is settled and the Crown's obligation clear;
>
> 2. The judge did not find any prejudice to the accused;
>
> 3. The accused did not suffer increased expense or costs thrown away due to the s. 579 stay;
>
> 4. The desirability of joint trials, which was the purpose of the Crown stay, is a legitimate objective;
>
> 5. The Crown's motive in entering the stay was not "oblique";
>
> 6. There was no evidence that this was a marked departure from the usual Crown practice in regard to s. 579;
>
> 7. In entering the stay and recommencing proceedings the Crown was not acting with intention to prejudice the ability of the accused to make full answer and defence;
>
> 8. The Crown was not acting to circumvent an adverse ruling;
>
> 9. The Crown did not act in contravention of a court order;
>
> 10. Had the stay not been entered, Mr. Cole would have faced the costs of a full trial. He was spared that expense through the imposition of the stay.

ANALYSIS

[12] In conducting an analysis of the circumstances leading to the granting of a stay for the purposes of assessing the propriety of the additional exceptional remedy of costs, it is difficult to see how a trial judge can conduct an "independent" examination of the impugned

conduct of the Crown/police. This is what appears to be mandated by Bateman, J.A., in **Cole**, supra. It is my understanding that an award of costs must be based upon the findings of the trial judge. That is what must, of necessity, form the basis for any award of costs against the Crown in a particular set of circumstances. I can only assume that Bateman, J.A., was referring to the fact that the findings of the trial judge must be analysed *vis a vis* the case authorities to determine if the impugned conduct was sufficiently serious or egregious to warrant the additional exceptional remedy of costs, in addition to the stay, and that the trial judge should not ordinarily alter the findings of fact already determined.

[13] In this particular case I have found serious misconduct on the part of the Crown prosecutors and the police and these are clearly set out in my decision to grant a stay of proceedings. I see no reason to alter my characterization of that conduct for the purposes of this analysis and I shall apply the facts as I have found them to be for the purposes of this cost application.

[14] I will, however, go on to analyse my findings in light of the criteria and guidance set out by Bateman, J.A., in **Cole** to determine if, in my opinion, the additional remedy of costs is warranted. My findings are summarized at paragraphs [115] to [126] of my April 7, 2000 decision. I have reviewed those findings in light of the costs issue. At paragraph [130] of that decision, I concluded the Crown was guilty of serious misconduct on issues one, four and five. This involved the intentional withholding of relevant evidence from the defence, misleading the defence and the Court, and attempting to bolster the credibility of Crown

witnesses by improper releases to the media. I also found that the Crown prosecutors had departed from their traditional roles as impartial quasi-judicial officers early on in the prosecution and that this had continued throughout the trial, after the first trial, and during the scheduled retrial motions. I found that the Crown attempted to get agreement to keep relevant information from the jury for a oblique motive. All of these are very serious findings of Crown misconduct.

[15] I find that the actions and misconduct of the Crown, collectively, amount to something well beyond inadvertent or careless failure to discharge a duty. It is a marked and unacceptable departure from usual and reasonable standards of prosecution, which has resulted in an indisputable and clearly measurable infringement of the defendants' rights. In the present case there was a serious and intentional interference with the defendants' rights to fundamental justice. There can be no question that the actions and misconduct of the Crown prejudiced the accuseds in their defence and defence strategies. The Court ought to demonstrate its disapproval of such conduct. In view of the substantial sums expended for legal services, just during the stay application itself, I am satisfied that a clear compensatory need exists. The Crown was guilty of "serious and deliberate violations" of the clear law of disclosure as outlined in **Stinchcombe**. The defendants, especially Mr. Poirier, claim to have suffered a great deal of increased expenses or costs thrown away; however, this has to be balanced somewhat against the fact the costs of a full retrial has been avoided by the stay.

CONCLUSION

[16] I find that, in the circumstances of this case, an award of costs against the Crown is an appropriate additional remedy; but not nearly to the extent claimed by the defendants. I am going to award costs, considering primarily the costs occasioned by the stay application itself; that is those costs associated with the attempted retrial of the defendants. I am not going to award the full amounts claimed or expended during this period because I am balancing this partly with the fact a full retrial was avoided by the stay. I am therefore going to award partial compensation only. I have taxed Mr. Innocente's reasonable legal expenses at some $53,000.00. His counsel was present only part of the time. I am awarding Mr. Innocente the sum of $20,000.00 costs as compensation in these circumstances. On the other hand, Mr. Poirier's counsel had the primary carriage of the stay application and other pre-trial proceedings and I award Mr. Poirier the sum of $35,000.00 costs as compensation; both inclusive of costs on the cost application itself. I find these awards are sufficient to address the issue of costs and compensation in the circumstances.

[17] I will issue an order accordingly once submitted to me by counsel for the defendants, suitably consented as to form by the Crown.

Boudreau, J.