SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Chaisson*, 2021 NSSC 197

Date: 20210609
Docket: SAT No. 503668
Registry: Pictou

Between:

Her Majesty the Queen

v.

Gabriel George Chaisson

DECISION ON STAY APPLICATION

Judge:	The Honourable Justice Scott C. Norton
Heard:	June 3, 2021, in Antigonish, Nova Scotia
Decision:	June 9, 2021
Counsel:	Wayne J. MacMillan, for the Crown T.J. McKeough, for the Accused

By the Court:

Introduction

[1] Mr. Chaisson brings this application for a stay of the charges contained in the Indictment on the grounds that the conduct of the police in making application for a search warrant amounts to an abuse of process under section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ("*Charter*").

Facts

[2] Mr. Chaisson is charged with one count of possession of cocaine for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, c.19 ("CDSA") on October 9, 2020 at or near Goshen, Nova Scotia and four counts of breach of a condition of a release order contrary to s. 145(5)(a) of the *Criminal Code*.

[3] Cst. John Donaldson of the Royal Canadian Mounted Police, Antigonish Detachment, prepared an Information to Obtain in Form 1 pursuant to s. 487.1 of the *Criminal Code* ("ITO") on October 6, 2020 on the basis that he had reasonable grounds to believe and did believe there would be a hand gun, ammunition, firearm or other prohibited device at Mr. Chaisson's residence at Goshen, NS.

[4] Cst. Donaldson sent the ITO and supporting documents by fax to the Justice of the Peace Centre for review on October 8, 2020. The ITO and Search Warrant signed by Justice of the Peace Judith Gass were received by Cst. Donaldson within a short period of time.

[5] At the hearing of the Application on June 3, 2021, this Court heard evidence from Cst. John D. Donaldson and Cpl. James Allen Jessome, both of the Royal Canadian Mounted Police and assigned to the Street Crime Unit in Antigonish, Nova Scotia.

Issues

[6] The issue before this Court is whether the manner in which the search warrant was obtained constitutes an abuse of process and, if so, should the charges against the Applicant be stayed?

Law

[7] The parties agree on the applicable law.

[8] With the advent of the *Charter*, the common law doctrine of abuse of process was merged with the rights of an accused under section 7 of the *Charter*.

[9] In *R. v. O'Connor*, 1995 4 S.C.R. 411, the Supreme Court of Canada held that there are two categories under which a stay for an abuse of process can be made. The "*Charter* category" relates to the fairness of an individual's trial resulting from state misconduct and asks whether the accused's fair trial interests have been irremediably harmed. The second category is unrelated to the fairness of the trial but involves state conduct that contravenes fundamental notions of justice and undermines the integrity of the judicial process. This second category, which represents the common law remedy, survives as a "residual" discretion, albeit a small one, to stay a prosecution aimed at protecting judicial integrity.

[10] L'Heureux-Dubé J., writing for the majority in *O'Connor*, stated at para 73:

> 73 As I have already noted, the common law doctrine of abuse of process has found application in a variety of different circumstances involving state conduct touching upon the integrity of the judicial system and the fairness of the individual accused's trial. For this reason, I do not think that it is helpful to speak of there being any one particular "right against abuse of process" within the *Charter*. Depending on the circumstances, different *Charter* guarantees may be engaged. For instance, where the accused claims that the Crown's conduct has prejudiced his ability to have a trial within a reasonable time, abuses may be best addressed by reference to s. 11(b) of the *Charter*, to which the jurisprudence of this Court has now established fairly clear guidelines (*Morin*, supra). Alternatively, the circumstances may indicate an infringement of the accused's right to a fair trial, embodied in ss. 7 and 11(d) of the *Charter*. In both of these situations, concern for the individual rights of the accused may be accompanied by concerns about the integrity of the judicial system. In addition, there is a residual category of conduct caught by s. 7 of the *Charter*. This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes

> fundamental notions of justice and thus undermines the integrity of the judicial process.
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> [Emphasis added]

[11] In *R. v. Piccirrilli*, 2014 SCC 16, the Supreme Court of Canada examined the issue of a stay of proceedings in cases where there had been an abuse of process. The trial judge had stayed proceedings for abuse of process because of attempts by the Crown to intimidate the accused into forgoing their right to trial by threatening additional charges should the accused choose to plead not guilty; collusion on the part of two police officers to mislead the Court about a seizure of a firearm; and improper means used by the Crown in obtaining the medical records of one of the accused. The Supreme Court of Canada, by a 6-1 split decision, held that the trial judge had erred in granting a stay and affirmed the rule that a stay of proceedings for an abuse of process should only be warranted in the clearest of cases. The Court stated that two types of state conduct may warrant a stay. The first is conduct that compromises the fairness of an accused's trial (the "main category"). The second is conduct that does not threaten trial fairness but risks undermining the integrity of the judicial process (the "residual" category).

[12] The majority held that the test for determining whether a stay of proceedings is warranted is the same for both categories and consists of three requirements (para 32):

1. There must be prejudice to the accused's right to a fair trial or to the integrity of the justice system that will be manifested, perpetuated and aggravated through the conduct of the trial, or by its outcome;

2. There must be no alternate remedy capable of redressing the prejudice; and

3. Where there is still uncertainty over whether a stay is warranted after steps 1 and 2, the Court must balance the interests in favour of granting a stay against the interest that society has in having a final decision on the merits.

[13] Mr. Chaisson invoked the residual category in this Application. The Court in *Piccirilli* explained part 1 of the test in that circumstance as follows, at para 35:

> 35 By contrast, when the residual category is invoked, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial — even a fair one — will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency. This harms the integrity of the justice system. In these kinds of cases, the first stage of the test is met.
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> …
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> 39 At the second stage of the test, the question is whether any other remedy short of a stay is capable of redressing the prejudice. Different remedies may apply depending on whether the prejudice relates to the accused's right to a fair trial (the main category) or whether it relates to the integrity of the justice system (the residual category) … Where the residual category is invoked, however, and the prejudice complained of is prejudice to the integrity of the justice system, remedies

> must be directed towards that harm. It must be remembered that for those cases which fall solely within the residual category, the goal is not to provide redress to an accused for a wrong that has been done to him or her in the past. Instead, the focus is on whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward.
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> 40 Finally, the balancing of interests that occurs at the third stage of the test takes on added significance when the residual category is invoked. This Court has stated that the balancing need only be undertaken where there is still uncertainty as to whether a stay is appropriate after the first two parts of the test have been completed (*Tobiass,* at para. 92) …
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> 41 However, when the residual category is invoked, the balancing stage takes on added importance. Where prejudice to the integrity of the justice system is alleged, the court is asked to decide which of two options better protects the integrity of the system: staying the proceedings, or having a trial despite the impugned conduct. This inquiry necessarily demands balancing. The court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits. Clearly, the more egregious the state conduct, the greater the need for the court to dissociate itself from it. When the conduct in question shocks the community's conscience and/or offends its sense of fair play and decency, it becomes less likely that society's interest in a full trial on the merits will prevail in the balancing process. But in residual category cases, balance must always be considered.
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> [Emphasis added]

[14] The present Application before the Court is made in the context that this Court previously ruled that there were reasonable and probable grounds to obtain the search warrant (*R. v. Chaisson,* 2021 NSSC 123*).*

[15] The Applicant points to two bases for a finding of abuse of process:

1. Cpl. Jessome allowed previously disproven information to be reused and made false statements about its reliability.

2. The RCMP chose to seek a search warrant on the basis of firearm information and excluded drug trafficking information when their ultimate goal was to search for drug trafficking evidence.

Reused Information

[16] The Applicant asserts that Cpl. Jessome permitted Cst. Donaldson to use information from a confidential informant in the October 6, 2020 ITO that he knew had been proven unreliable when a search was conducted pursuant to a previous ITO dated February 28, 2020.

[17] On the morning of the hearing, the Applicant asked for Cpl. Jessome to be made available for examination. No prior request for his attendance had been made. The Crown arranged for his attendance. Having been given no advance notice, Cpl. Jessome had not reviewed the file or the ITO's in issue in advance of taking the stand. Accordingly, he was unable to answer some questions from memory. In the circumstances, the Court does not draw any negative inference from that inability to remember.

[18] Cpl. Jessome testified that, on the basis of the information from this confidential informant, RCMP member James Patrick Dollard obtained the February 28 ITO to search for a handgun, ammunition and a large amount of copper wire.

Cpl. Jessome acknowledged that upon executing the search warrant on February 29, 2020, no evidence of copper wire or prior presence of copper wire was obtained. He further testified that although there were some things that were not found, there was plenty that they did find.

[19] As a result, he continued to believe that the confidential informant was a reliable source of information. He did not recall having any conversation with Cst. Donaldson about the result of the February search. He did not caution Cst. Donaldson to not rely on information from the confidential informant where the copper wire was not found on that search because he continued to believe in the reliability of the source.

[20] Cst. Donaldson testified that he and Cpl. Jessome did not discuss the February search. He testified that he knew a search had been conducted but did not know anything about the content of the February 28, 2020 ITO because it was sealed in the office. In preparing his October 6, 2020 ITO, he referred to debriefing memos that are on file at the detachment indexed under the name of the source informant. There is no file that exists with all debriefing notes that mention a particular suspect such as the Applicant. He spoke with Cpl. Jessome who confirmed the reliability of the source.

[21] Cst. Donaldson was asked by the Applicant's counsel to compare certain paragraphs in the October 2020 ITO he prepared with the February 2020 ITO prepared by Cst. Dollard. Cst. Donaldson explained that he did not have access to Dollard's ITO when he prepared his own ITO. He explained that the information he used came from the debriefing files and would have been probably copied verbatim from those memos. He explained that he chose to include or exclude information based on his assessment of what would be persuasive to the Justice of the Peace reviewing the ITO. He acknowledged that some information he included was not relevant to a firearms search warrant and that his inclusion or exclusion of some information taken from the debriefing memos were not all logically consistent. He denied absolutely that he excluded references to certain facts because he knew them to have been shown to be untrue or unreliable.

[22] Near the conclusion of his examination, Cst. Donaldson agreed with the Applicant's counsel that he did not know of the results of the February search. He was then directed to paragraph 14 of his October ITO in which he reported having learned from the "PROS file" that there were no firearms located as a result of this search. He explained this inconsistency as his misunderstanding that the previous question asked related to whether he was told of the results of the search which he had consistently denied. This Court carefully reviewed its notes of the examination

and in answer to at least two previous questions, Cst. Donaldson testified that he knew there was a search conducted. This Court accepts his explanation for apparent contradiction at the end of his testimony.

[23] On the basis of this evidence, the Applicant asserts that Cpl. Jessome's belief in the reliability of the source was unreasonable and that permitting Cst. Donaldson to rely on this information without telling him it may be unreliable resulted in Cst. Donaldson misleading the Court to obtain the October search warrant and as such to an abuse of process.

[24] As the authorities direct, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. The Court finds that the evidence does not meet this test. The testimony of Cst. Donaldson and Cpl. Jessome were consistent and corroborative. It was bolstered by Cpl. Jessome having no advance notice he would be called to testify. Unlike in some of the authorities cited, there was no evidence or suggestion of collusion. The mere fact that information from a confidential source does not materialise in evidence at the search does not, without more, make that source unreliable, particularly where, as according to Cpl. Jessome, other information proved reliable.

Search for Firearms not Drugs

[25] The second argument made by the Applicant is that the RCMP chose to seek a search warrant for firearms when their ultimate goal was to find evidence of drug trafficking and that in doing so their conduct amounted to misleading the Justice of the Peace and, in doing so, an abuse of process.

[26] Both Cst. Donaldson and Cpl. Jessome testified that their experience with the Justice of the Peace Centre ("JPC") was that on search warrant requests to search for evidence of drugs, the JPC required evidence that there was "recency" to the drugs being present at the property to be searched. They testified that drugs are inherently transient and consumable. They come in and go out and get used up. In the present case, they both testified that in their judgment they could not provide sufficient evidence of "recency" in relation to the presence of drugs or drug trafficking evidence at the property of the Applicant to obtain a warrant to search for drugs.

[27] By contrast, firearms are not transient or consumable. If a firearm is present at a property it is more likely to continue to be present. Firearms are also a higher public safety risk to the general public. Accordingly, the experience of the two RCMP witnesses is that obtaining a warrant to search for firearms is more easily obtained on reasonable and probable grounds.

[28] Both witnesses testified that if they had reasonable and probable grounds to believe that drugs were present, they would have sought that warrant in addition to the firearms warrant.

[29] The Applicant says that the only reasonable inference from the evidence is that the police misled the JPC as to the intent of their search. They used a firearms search warrant as a basis to search for drugs. The Applicant asserts that this is conduct that the Court cannot condone as it amounts to an abuse of process.

[30] Again, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. The Court does not accept that the evidence meets this test. The police witnesses testified that their experience led them to the judgment that they did not have sufficient evidence of recency of the existence of drugs to obtain a warrant to search. There is no evidence of conspiracy, collusion, fraud or other conduct of bad faith such as would be offensive to societal notions of fair play and decency.

[31] In *R. v. Morris*, 1998 NSCA 229, the Nova Scotia Court of Appeal considered this issue. Justice Cromwell, as he then was, writing for the Court stated at paras 40-45:

c. Does inaccurate and misleading information invalidate the warrant?

40 The appellant submits that the search was unreasonable because the warrant was obtained by deliberately misleading information. Several cases are cited: *R. v. Donaldson* (1990), 58 C.C.C. (3d) 294 (B.C. C.A.); *R. v. Sismey* (1990), 55 C.C.C. (3d) 281 (B.C. C.A.); R. *v. Dellapenna*, supra; R. v. Innocente (1992), 113 N.S.R. (2d) 256 (N.S. C.A.); *R. v. Fletcher* (1994), 140 N.S.R. (2d) 254 (N.S. S.C.). Many other relevant authorities are collected in Ewaschuk, *Criminal Pleadings and Practice in Canada* (2d) at 3:1410 and 3:1420. *Sismey*, supra, states the rule that if the justice of the peace is "intentionally misled" the warrant cannot stand. In Dellapenna, the Court found that the information leading to the warrant was" ...so inaccurate and misleading that the search conducted under it was unreasonable" at para 48.

41 It is helpful to place the appellant's submission in the context of the two requirements for search warrants mentioned earlier: reasonable grounds of belief and prior authorization. At the level of principle, the appellant's submission amounts to this: in order to preserve the effectiveness of the prior authorization process, the warrant must be invalidated if that process has been undermined by placing inaccurate and misleading information before the Justice of the Peace. While there are certainly cases which support the appellant's argument, I am of the view the Supreme Court of Canada has now clearly ruled against it. The Court, in my opinion, has decided that presenting false or misleading material before the Justice of the Peace does not automatically vitiate the warrant. The primary focus on review is on whether the issuing justice could properly have concluded that reasonable and probable cause existed. The prior authorization process is protected in other, less inflexible ways than automatic vitiation of the warrant where it is shown that inaccurate and misleading information was presented to obtain it.

42 This approach was adopted in the wiretap cases, *Garofoli*, supra, and *Canada (Procureur général) c. Bisson*, [1994] 3 S.C.R. 1097, 94 C.C.C. (3d) 94 (S.C.C.). For example, in *Bisson* at p. 1098, the Court stated:

> ...errors in the information presented to the authorizing judge, whether advertent or even fraudulent, are only factors to be considered in deciding to set aside the authorization and do not by themselves lead to automatic vitiation of the ... authorization. (emphasis added)

43 The same principle has been adopted by the Court in search warrant cases: *R. v. Grant*, supra and *R. v. Plant*, [1993] 3 S.C.R. 281 (S.C.C.). These cases stress that errors, even fraudulent errors, do not automatically invalidate the warrant.

44 This does not mean that errors, particularly deliberate ones, are irrelevant in the review process. While not leading to automatic vitiation of the warrant, there remains the need to protect the prior authorization process. The cases just referred to do not foreclose a reviewing judge, in appropriate circumstances, from concluding on the totality of the circumstances that the conduct of the police in seeking prior authorization was so subversive of that process that the resulting

> warrant must be set aside to protect the process and the preventive function it serves. As I will discuss later in these reasons, the integrity of the prior authorization process is also protected by the approach on review to fraudulent or intentionally misleading material placed before the Justice.
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> 45 The recent judgment of Esson, J.A. in *R. v. Monroe* (1997), 8 C.R. (5th) 324 (B.C. C.A.) is consistent with my interpretation of the effect of *Garofoli, Bisson, Grant and Plant* on decisions such as *Donaldson* and *Sismey*. Esson, J.A. said, at paragraph 27:
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> > Although it is now clear that deception of the justice will not automatically lead to the warrant being quashed, the words of Hinkson J.A., speaking for the Court in *R. v. Donaldson*, supra at 311, continue to reflect the reasons why deception must be viewed seriously:
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> > > It is not to be overlooked that an application to a justice of the peace for a search warrant is made *ex parte*. Thus it is essential that the police not deceive the justice as to the basis on which the search warrants are being sought.
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> [Emphasis added]

[32] The Court finds that there was nothing misleading about the October 6, 2020 ITO presented to the JPC. The ITO included references to the history of the Applicant's involvement with drugs and that he allegedly sells drugs from his house. The conduct of the police in the presentation of the ITO and in their testimony before the Court was in no way subversive of the process resulting in the warrant. With respect, there is no evidence of conduct that would shock the community's conscience or offend its sense of fair play and decency.

[33] The Applicant having failed to satisfy step 1 of the test, there is no reason to address steps 2 and 3.

[34] The Application is dismissed.