

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Atwell*, 2022 NSSC 304

Date: 20220927

Docket: *Kentville*, No. 508588

Registry: Kentville

Between:

His Majesty the King

v.

Darroll Murray Atwell and Devyn Adam Dennis

Judge: The Honourable Justice Gail L. Gatchalian

Heard: September 27, 2022, in Kentville, Nova Scotia

Counsel: Zeb Brown, for Devyn Adam Dennis
Peter Craig, for the Crown

The original text of this decision has been corrected according to the erratum dated May 8, 2023.

By the Court:

Introduction

[1] Devyn Dennis is one of the co-accused in this matter. He says that his right to full answer and defence protected by s.7 of the *Canadian Charter of Rights and Freedoms* has been infringed. The electronic disclosure package provided to him by the Crown contains numerous redactions made on the basis of “personal information,” including redactions of witness contact information. The disclosure also contains some redactions with no accompanying explanation for the redactions. Mr. Dennis has made an application for an order directing the Crown to provide him with “an unredacted copy of the disclosure in compliance with the Crown policy entitled *Disclosure by the Crown in Criminal Cases*.” Mr. Dennis has not challenged redactions made on the basis of privilege or irrelevancy.

[2] In this Application, Mr. Dennis has not identified specific redactions and argued that there is a reasonable possibility that the redacted information may assist him in making full answer and defence. Rather, as Mr. Dennis acknowledges, he raises an issue of general principle. He is challenging the RCMPs’ policy of proactively redacting information. He is seeking a new copy of

disclosure that removes all redactions made on the basis of personal information, and any redactions that do not have an explanation.

[3] The Crown says that Mr. Dennis did not inform the court that the Crown provided defence counsel with witness contact information for approximately 125 witness in exchange for a signed undertaking from defence counsel. The undertaking was not entered into evidence. The Crown says that, until it saw Mr. Dennis' brief, it was not aware that he was taking issue with the undertaking. The Crown complains that Mr. Dennis filed this Application without first identifying specific concerns about withheld information. The Crown therefore did not have an opportunity to respond to or address a particularized concern about redacted information through discussion with defence counsel. The Crown says that this failure by Mr. Dennis to challenge a specific redaction or redactions and to particularize his position as to the possible relevance of that redaction or redactions should be fatal to the Application. The Crown states that it remains prepared to engage with defence counsel concerning reasonable particularized disclosure requests, and says that if the parties cannot reach a resolution on a specific issue, Mr. Dennis should make the appropriate form of disclosure application (a *Stinchcombe* Application) and the matter can be properly adjudicated.

[4] In response, Mr. Dennis says that there are over 200 witnesses whose contact information has been redacted and that it is not sufficient for the Crown to supply him with the witness contact information on request, but rather the *Charter* requires that information to be unredacted in the disclosure package itself. He takes this position with respect to all of the witness contact information and all other information redacted on the basis of “Personal Information” or with no explanation.

[5] Mr. Dennis did not call any evidence or introduce any exhibits. In his brief, he included some examples of redacted information to support his argument that the redactions are inconsistent, overbroad, irrational and generally incomprehensible.

[6] The Crown called one witness, Corporal James Skinner of the RCMP, to explain the organization, indexing, searchability and navigability of the electronic disclosure in this case. He was cross-examined by defence counsel. He was asked to explain why some of the redactions included as examples in Mr. Dennis’ brief may have been made, while other information was not redacted. He acknowledged that some information may have been redacted by a regular duty officer without knowledge of the vetting codes, that Corporal Skinner may have missed those by

mistake, but that he had not received an inquiry about any such redactions until this hearing.

Issue

[7] The question is whether, in the absence of a particularized challenge to a specific redaction, Mr. Dennis has established an infringement of his right to make full answer and defence.

Guiding Principles

[8] The Crown has a duty to make disclosure of all relevant information to an accused: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. This duty is inherent in the right of the accused under s.7 of the *Charter* to make full answer and defence.

Relevance is defined as “any information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence”: *R. v. McNeil*, 2009 SCC 3 at para.17.

[9] Disclosure is not absolute. Non-disclosure is justified by the law of privilege and a judge may review the decision of the Crown to withhold or delay production of information due to the security or safety of witnesses or persons who have supplied information to the investigation: *Stinchcombe, supra* at para.22. The trial

judge, on a review, should be guided by the principle that information should not be withheld if there is a reasonable possibility that the withholding of information will impair the accused's right to make full answer and defence, unless the non-disclosure is justified by the law of privilege: see *R. v. Downey*, 2018 ABQB 915 at paras.12-18.

[10] Mr. Dennis has a right to disclosure of possibly relevant information. However, it is a right that must be asserted: see *R. v. Eadie*, 2010 ONCJ 403 at para.42. As stated in *Stinchcombe*, *supra* at para.28, "The obligation to disclose will be triggered by a request by or on behalf of the accused." Once a request is made the onus shifts to the Crown to comply with the request: *Eadie* at para.44. The onus is on the defence to particularize any further disclosure requests: *ibid.*

[11] The onus on the defence to particularize, for the Crown, further disclosure requests is one that must be carried out in a timely way: *Eadie*, *supra* at para.47, citing *R. v. Michelutti* [2009] O.J. No. 2839 (SCJ). The Crown and defence are "entwined in a mutual, continuous and reciprocal process," in which they each have a duty to cooperate in a reasonable and timely manner in the disclosure process: *Eadie*, *supra* at para.48. The purpose of the duty is not simply to provide information and documents for the narrow purpose of physical production in order

to allow full answer and defence. Rather, it is directly related to conducting trials within a reasonable time: *Eadie, supra* at para.49. Although the accused does not have a direct duty to bring himself to trial, this is modified somewhat by the duty to co-operate in the disclosure process, which mutual co-operation should enhance trials within a reasonable time and avoid adjournments and delay: *ibid.*

Is There a Reasonable Possibility that the Withholding of the Redacted Personal Information Will Impair the Right of Mr. Dennis to make Full Answer and Defence?

[12] The onus is on Mr. Dennis to establish that there is a reasonable possibility that the withholding of the redacted personal information, or information redacted without an explanation, will impair his right to make full answer and defence.

[13] Before making this Application, Mr. Dennis did not particularize any further disclosure requests. He did not ask the Crown to amend the terms of the undertaking his counsel signed in exchange for the contact information of the 125 witnesses. He did not ask the Crown for the contact information of the balance of the witnesses. He did not request disclosure of other information redacted on the basis of Personal Information, or redacted without an accompanying explanation. Had such discussions taken place, some disputes might have been resolved, others narrowed and defined.

[14] Instead of asserting a right to specific information, Mr. Dennis filed this Application. Mr. Dennis' challenge to the redactions in this Application is, as acknowledged by him, general and a matter of principle. He did not ask the court to review and order an amendment of or a release from the terms of the undertaking signed by his counsel. He did not ask the court to order that the contact information for the balance of the witnesses be provided to him. He has asked for a new copy of the electronic disclosure package that removes all redactions made on the basis of personal information or made without an explanation.

[15] Mr. Dennis did not call evidence to support an argument that the information redacted in the examples cited in his brief are possibly relevant to the defence, nor did he otherwise articulate a basis for believing that, in respect of any of these specific examples, or any other specific redaction made on the basis of personal information, there is a reasonable possibility that the redacted information may assist him in the exercise of the right to make full answer and defence. For example, Mr. Dennis included in his brief a copy of a cell phone analysis that included the cell phone contacts of a particular individual. Mr. Dennis took issue with the fact that the phone numbers of some of the individual's contacts were redacted, but the phone numbers of others were not. Constable Skinner had an

explanation for this. But Mr. Dennis did not explain to the Court who the individual is, what her role is in the investigation, or the possible relevance of the redacted phone numbers of her contacts to Mr. Dennis' ability to make full answer and defence.

[16] Mr. Dennis made the following general statements about the possible relevance of witness contact information in his brief:

Witnesses are the principal source of evidence. If a practical reason has to be given for enabling the Defence to access witnesses or information about witnesses, there are many, including:

- (a) take a statement, or obtain further details;
- (b) follow up investigative leads that police disregarded;
- (c) serve a subpoena;
- (d) conduct further investigation as to collaboration among witnesses;
- (e) consider the significance of geographic locations;
- (f) collate telephone/text/computer records
- (g) identify relationships among witnesses based on a common residence or telephone or proximity to one another;
- (h) match tombstone information to other records such as employment and criminal records.

[17] However, Mr. Dennis did not relate these general propositions to any specific redactions in the disclosure, nor did he adequately explain how, as a general proposition, a failure of the Crown to unredact witness contact information in the electronic disclosure package itself, when he was provided with the witness

contact information he requested, and in the absence of a particularized concern about a specific redaction, impairs his right to make full answer and defence.

[18] As a result, I find that Mr. Dennis has failed to establish, in this Application, that there is a reasonable possibility that the withholding of redacted personal information or information redacted without an accompanying explanation has impaired his right to make full answer and defence.

[19] The Application is dismissed.

Gatchalian, J.

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ERRATUM

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Details: **May 8, 2023**

Corrects the hearing date as matter was heard on September 27, 2022, decision incorrectly stated the matter was heard on October 27, 2022, which is the release date of the decision.