SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Atwell*, 2023 NSSC 63

Date: 20230216
Docket: *Kentville*, No. 508588
Registry: Kentville

Between:

His Majesty the King

v.

Darroll Murray Atwell and Devyn Adam Dennis

Reconsideration Decision

Judge:	The Honourable Justice Gail L. Gatchalian
Heard:	February 15, 2023, in Kentville, Nova Scotia
Counsel:	Zeb Brown, for Devyn Adam Dennis
	Shauna MacDonald, K.C. and Peter Craig, K.C. for the Crown

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

By the Court:

Introduction

[1] On August 12, 2022, Devyn Dennis filed a Notice of Application seeking an unredacted copy of disclosure "in accordance with the *Crown Disclosure Policy*." At the hearing of that Application on September 27, 2022, counsel for Mr. Dennis clarified that he was seeking a new copy of disclosure of the investigation file without redactions made on the basis of "personal information." He also challenged redactions for which there was no accompanying explanation. Mr. Dennis did not challenge redactions made on the basis of irrelevancy or privilege.

[2] On October 27, 2022, I released a decision dismissing the Application: 2022 NSSC 304.

[3] On December 16, 2022, Mr. Dennis noted in relation to trial scheduling that the Crown's refusal to disclose information from the investigation file created an elevated risk of mid-trial disclosure issues arising when the materiality of withheld information becomes evident during the Crown's case-in-chief.

[4] On January 10, 2023, in response to these comments, I required that Mr. Dennis file a *Stinchcombe* application by January 30, 2023, specifying the disclosure he is seeking.

[5] Mr. Dennis filed this second Application on January 30, 2023, asking that the I reconsider my October 27, 2022 decision, and make an order pursuant to s.7 of the *Charter* requiring the Crown to provide him with an unredacted copy of the disclosure. At the hearing, counsel for Mr. Dennis refined his position to seek the following:

- an order requiring the Crown to deliver to him a new disclosure package without redactions made on the basis of "personal information;"
- an order requiring the Crown to take a second look at redactions made on the basis of privilege, and to confirm that privilege was properly asserted in all instances; and
- an order requiring the Crown to explain the redactions made that had no accompanying explanation for the redactions.

[6] Mr. Dennis is not challenging redactions made on the basis of irrelevancy.

[7] Mr. Dennis states that an unbroken line of authority, starting with *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, says that information in the investigative file is presumed relevant and must be disclosed unless the Crown demonstrates complete irrelevance or legal privilege. Mr. Dennis acknowledges that the trial judge may also review the decision of the Crown to withhold or delay production of information by reason of a concern for the security or safety of witnesses or persons who have supplied information to the investigation: *Stinchcombe, supra* at para.22.

[8] The Crown states that Mr. Dennis' application should be dismissed because it is a generalized complaint about the Crown's vetting process that is vague and overbroad. The Crown repeats the assertion it made during the hearing of the first Application that the defence has a responsibility to bring particular concerns about specific redactions to the Crown, and if they cannot be resolved, to bring those particularized concerns to the Court for resolution.

[9] A further issue arose at the end of the hearing with respect to whether, if the Court orders the Crown to provide a new disclosure package without redaction of "personal information," defence counsel should be subject to a requirement that he not share the information with Mr. Dennis.

Reconsideration

[10] I accept the request of Mr. Dennis that I reconsider my October 27, 2022 decision: see *The Russian Federation v. Luxtona Limited*, 2021 ONSC 4604 at paras.14 and 16 and *R. v. Chaisson*, 2022 NSSC 369 at paras.14-19. Upon review, I am satisfied that I erred in placing the onus on Mr. Dennis to establish that there is a reasonable possibility that the withholding of the redacted information will impair his right to make full answer and defence. It is in the interests of justice that I reconsider, and reverse, my decision.

Onus Is On The Crown

[11] Where, as here, the Crown withholds any information that was gathered during the investigation, it is the Crown that must demonstrate that such information is completely irrelevant or legally privileged, or that there is a concern for the security or safety of witnesses: *Stinchcombe, supra* at para.21; and see *R. v. J.J.W.*, 2008 NSPC 10 at para.18 and *R. v. Van Duzen*, 2006 ONCJ 429 at para.103.

[12] It is presumed that the material in the possession of the Crown is relevant to Mr. Dennis' case. Otherwise, the Crown would not have obtained possession of it. It is also presumed that this material will likely comprise the case against Mr.

Dennis. As a result, his interest in obtaining disclosure of all relevant material in the Crown's possession for the purpose of making full answer and defence will, as a general rule, outweigh any residual privacy interest held by third parties in the material. This is why the onus is on the Crown to justify the non-disclosure of any material in its possession: *R. v. McNeil*, 2009 SCC 3 at para.20.

[13] It is "beyond controversy" that the accused does not have to establish a case for disclosure of the investigative file: *R. v. Bottineau*, 2005 CanLII 63780 (Ont SCJ) at para.48. See also *R. v. Lalo*, 2002 NSSC 40 at paras.18-21 and *R. v. Chaplin*, 1995 CanLII 126 (SCC) at para.25.

[14] Requiring the defence to establish relevance would reverse the onus that *Stinchcombe* placed on the Crown to justify non-disclosure: *J.J.W. supra* at para.18.

Personal Information

[15] The Crown has recently provided the defence with a "vetting log" that provides some limited explanation for the redactions, except for redactions made on the basis of privilege.

[16] The vetting log shows that the information redacted on the basis of "personal information" consisted primarily of dates of birth, phone numbers, and addresses, but also includes master license plate numbers, property identification numbers, and numbers used by police to identify individuals, as well as other personal information.

[17] The Crown did not rely on any security or safety concerns to justify the continued redaction of personal information in the investigation file.

[18] The Crown took the position that the following subcategories of information redacted on the basis of "personal information" are completely irrelevant: dates of birth, property identification numbers, master license plate numbers and internal police identification numbers for individuals ("FPS" and "APID" numbers).

[19] With respect to witness contact information, the Crown asserted that it had already provided that information to counsel for Mr. Dennis upon request in a separate document.

[20] The Crown also says that it would require a tremendous amount of resources to provide a new copy of disclosure to the defence that removes the redactions of personal information.

[21] Mr. Dennis states that dates of birth are relevant because it may be useful for defence counsel to know the age of a witness before cross-examining them, for example, whether the witness is a child, a young adult, or an older adult. Mr. Dennis states that the other identifying information may assist the defence in connecting information about witnesses.

[22] Mr. Dennis states that it is not sufficient for him to have the witness contact information provided in a separate document. He says that it should be provided in a new disclosure package because the information that a witness provides, including about their contact information, may shift over time. He says that having the other personal information, such as internal police identification numbers, unredacted in the disclosure material itself may be helpful in making connections between documents and witnesses in the disclosure material.

[23] Moreover, Mr. Dennis says that he raised at the hearing of the first application the fact that he had only been provided with witness contact information for approximately 125 witnesses, when there are over 200 witnesses whose contact information has been redacted.

[24] Mr. Dennis states that it is inappropriate for the Crown to shift the resource burden to the defence, and require the defence to cross-reference information in a

witness contact list with the redactions made in the disclosure. Mr. Dennis says that, while it may require significant resources to unredact the information in the disclosure package itself, this is a situation of the Crown's own making.

[25] I am not prepared to second-guess the assertion of Mr. Dennis that the information redacted on the basis of "personal information" may be useful to the defence, and that having that information unredacted in the disclosure package itself may be useful to the defence. I am satisfied that there is a reasonable possibility of the information being useful to Mr. Dennis in making full answer and defence. See *R. v. Egger*, [1993] 2 S.C.R. 451 at p.467 and *R. v. Taillefer*, 2003 SCC 70 at para.60. Mr. Dennis' interest in having the information unredacted in the disclosure package itself is not, in my view, outweighed by the Crown's concern about the resources that will be required to produce a new disclosure package.

Redactions for "Privilege"

[26] Mr. Dennis cites two examples of redactions made on the basis of privilege for his argument that the Crown should be required to review all such redactions and confirm with the Court that privilege was property asserted in each case:

- On a fax cover sheet from the New Minas RCMP, the fax number and phone number of the office are redacted with the code for "privileged," which the Crown readily acknowledged at the hearing was a mistake.

- There were large sections redacted on police officer notes, with the code for "privileged," suggesting that police officers might have made their own decisions as to whether information was privileged, at least at first instance.

[27] The above examples are of some concern to the Court, although they are not enough to satisfy me that the Crown has in fact failed to review assertions of privilege in the investigation file. I decline to make the order requested by Mr. Dennis. Instead, I rely on the ethical obligations of Crown counsel and their role as officers of the court to ensure that every redaction made on the basis of a legal privilege was appropriately made: see *Chaplin, supra* at para.21 and *Stinchcombe, supra* at para.23.

Redactions with No Explanation

[28] The Crown says that the vetting log should provide the defence with an explanation for the redactions made on documents that had no accompanying

redaction code or explanation. According to the Crown, this may be done by looking at the unique document number on the document in question, and finding that document number on the vetting log.

[29] Counsel for Mr. Dennis should ascertain whether the vetting log provides the explanation for the redactions that he found that had no accompanying explanation. If there remain unexplained redactions, he should bring them to the Crown's attention at the earliest opportunity, and if the matter is not resolved, to the Court's attention.

Undertaking

[30] At the end of the Crown's argument, I asked what position the Crown was taking with respect to defence counsel sharing unredacted personal information with Mr. Dennis, in light of the fact that the Crown had not argued that there were any security or safety concerns justifying the continued redaction of the information.

[31] At that point, the Crown said that it *would* have safety, security and privacy concerns because they were operating on the assumption that counsel for Mr. Dennis would sign an undertaking not to share witness contact information with

Mr. Dennis, and that counsel for Mr. Dennis had not made a specific request in this Application that the information be shared with his client.

[32] In his brief filed in the fall in support of the first Application, counsel for Mr. Dennis took issue with signing an undertaking in exchange for witness contact information, stating that it was not appropriate, in part because he requires his client's assistance to review the disclosure and to prepare for trial.

[33] The Crown did not, at the first hearing or at this reconsideration hearing, identify any specific safety, security or privacy concerns about any particular witness or witnesses.

[34] The Crown relied on three cases to justify restricting disclosure of personal information to defence counsel. Those cases are not supportive of the Crown's position. In *R. v. Hitchings*, [2017] S.J. No.291, the Court stated that the Crown had not provided any indication that there were unique security or privacy concerns for any of the witnesses. Nonetheless, the Court subjected defence counsel to an undertaking not to provide the disclosed witness contact information to the accused without the consent of the Crown or order of the Court: paras.24-25. There was no analysis undertaken or case law cited by the Court to support the imposition of the undertaking. In *R. v. Smith-Tsetta*, [2021] N.W.T.J. No.34,

defence counsel was not asking to share witness contact information with the accused, and had already provided an undertaking not to do so: paras.8, 13, 23 and 25. In *R. v. Downey*, 2018 ABQB 915, defence counsel sought witness contact information and offered to give its undertaking not to release the information to the accused: para.6.

[35] The Crown has not satisfied me that defence counsel should be prohibited from sharing the disclosed personal information with Mr. Dennis.

Conclusion

[36] I am satisfied that Mr. Dennis' right to make full answer and defence entitles him to a copy of the disclosure package without redactions made on the basis of "personal information." The Crown shall provide Mr. Dennis with a new disclosure package without redactions made on the basis of "personal information" without delay.

[37] While I appreciate that this will take some time given the volume of disclosure and the number of redactions, the month-long trial in this matter is scheduled to begin in just over three months. The Crown must make every reasonable effort to provide the ordered disclosure to Mr. Dennis as soon as possible.

[38] The Crown will give the Court an update on the status of the preparation of this new disclosure package at the next pre-trial conference.

[39] Mr. Dennis is not to share the information in the ordered disclosure package with anyone, and it is to be used solely for the purpose of preparing his defence.

Gatchalian, J.

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Details: **May 8, 2023**
Corrects paragraph 1 of reconsideration decision which incorrectly states the original disclosure application was heard on October 27, 2022. The application was heard on September 27, 2022.