SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Colpitts*, 2014 NSSC 314

Date: 20140826
Docket: CRH-346068
Registry: Halifax

Between:

Her Majesty Queen

Respondent

v.

Robert Blois Colpitts

Applicant

DECISION

Judge: The Honourable Justice Kevin Coady

Heard: August 11 - 14, 2014 in Halifax, Nova Scotia

Written Decision: August 26, 2014

Counsel: Tyler Hodgson, for the Applicant
James Martin, Mark Covan, and Scott Millar, for the Respondent/Federal Crown
Barry Whynot, counsel for Bruce Elliott Clarke
Daniel Frederick Potter, Self-Represented

By the Court:

[1] The Applicant Robert Blois Colpitts is jointly charged with Daniel Frederick Potter and Bruce Elliott Clarke. The Crown alleges that between January 1, 2000 and September 13, 2001 these Defendants acted to fraudulently affect the public market price of shares of Knowledge House Incorporated (KHI). A lengthy trial is scheduled to start on January 5, 2015.

[2] Mr. Colpitts filed 2 interlocutory disclosure applications and a hearing was held on August 11-14, 2014. One application sought the following relief:

> - An order requiring the Crown to produce:
>
> (a) Any notes, working papers and e-mail correspondence with the Crown or the RCMP in the possession of the Crown's proposed expert witness; and
>
> (b) All communications with the Nova Scotia Securities Commission since August 11, 2011.

The second application sought the following relief:

> - An order requiring the Crown to abide by its undertaking and provide load files in conformity with the *Canadian Judicial Counsel National Model Practice Direction for the Use of Technology in Civil Litigation* (2008-01-31) as the standard for producing load files when exchanging documents in litigation.

The Applicant also seeks costs on the second application.

[3] The Defendants Mr. Clarke and Mr. Potter have not filed similar applications but support Mr. Colpitts.

[4] Mr. Colpitts withdrew his application respecting the Crown's expert witness. The Crown asserted that all such materials have been disclosed and Defence counsel and Mr. Potter have been invited to speak with the expert directly. Mr. Colpitts served notice that this withdrawal is made without prejudice to bringing it at a later date.

[5] Mr. Colpitts' counsel also advised that he had an agreement in principle on the "load files" application subject to receiving final instructions from Mr. Colpitts. At the time of releasing this decision this Court has not been advised that Mr. Colpitts objected to the agreement. Consequently I consider the "load files" application withdrawn.

[6] The application respecting the Nova Scotia Securities Commission (NSSC) seeks disclosure of e-mails/correspondence between the Crown and the NSSC after the indictment was preferred. The Crown's position is stated at paragraph 3 of their application brief:

> 3. However the Crown is not required to disclose anything that is obviously irrelevant. The communications between the NSSC and the Crown after the direct Indictment was filed are obviously irrelevant. The Applicant makes broad statements of principle relating to the disclosure but cites no evidence to establish why such communications could possibly be relevant. This is beyond a fishing expedition; this is a party searching for someone to go fishing with: and that 'someone' is the Court.

Mr. Colpitts argues that under *Stinchcombe* principles the Crown must disclose all information to the Defence, except evidence that is beyond the control of

the Crown, clearly irrelevant, or privileged. This position is articulated at paragraph 17 of his application brief:

> 17. The duty of disclosure is not limited to evidence that could be adduced in the following proceedings. Information that could reasonably be "used in making a decision which may affect the conduct of the defence" must also be disclosed. For example, any information that affects the defence's decision to call evidence must be disclosed. The Crown must also disclose information that enables the defence to "discover and explore new avenues of investigation".

[7] Related to this application is Justice Hood's decision at 2013 NSSC 386 respecting a large volume of NSSC documents generated by an earlier regulatory process. She concluded that *R. v. McNeil,* [2009] 1 S.C.R. 66 required the Crown to attempt to obtain those materials and, if obtained, to disclose them pursuant to *Stinchcombe*. She stated at paragraph 72:

> [72] The Crown knew of the Securities Commission investigation and that the Securities Commission had information. The Crown admits there is relevant information in the Securities Commission's files. Accordingly, the Crown had an obligation to inquire and attempt to obtain that information. I find that it breached that obligation.

The requested e-mails/correspondence were not included as they were considered irrelevant and not generated by the regulatory process. The Crown does not plead privilege.

[8] Mr. Colpitts relies on *R. v. Taillerfer*, 2003 S.C.R 70 to refute the Crown's position on relevance. He argues that relevance must be assessed in relation both to the charge itself or possible defences. In *Taillerfer, supra,* LeBel J. stated at paragraphs 59-60:

> This Court has defined the concept of "relevance" broadly, in *R. v. Egger*, [1993] 2 S.C.R. 451, at p. 467:
>
> > One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed – *Stinchcombe*, *supra*, at p. 345. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.
>
> 60 As the courts have defined it, the concept of relevance favours the disclosure of evidence. Little information will be exempt from the duty that is imposed on the prosecution to disclose evidence. As this Court said in *Dixon*, *supra*, "the threshold requirement for disclosure is set quite low… . The Crown's duty to disclose is therefore triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence" (para 21; see also *R. v. Chaplin*, [1995] 1 S.C.R. 727, at paras. 26-27). "While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant" (*Stinchcombe*, *supra*, at p. 339).

Justice LeBel references *R. v. Dixon*, [1998] 1 S.C.R. 244 in which Cory J. stated that an accused must demonstrate a "reasonable possibility" the sought after materials are relevant.

[9] In *Stinchcombe*, [1991] 3 S.C.R. 326, Sopinka J. discussed relevance at paragraph 20:

> As indicated earlier, however, this obligation to disclose is not absolute. It is subject to the discretion of counsel for the Crown …
>
> A discretion must also be exercised with respect to the relevance of information. While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant.

And further at paragraph 23:

> The trial judge may also review the Crown's exercise of discretion as to the relevance and interference with the investigation to ensure that the

> right to make full answer and defence is not violated. I am confident that disputes over disclosure will arise infrequently when it is made clear that counsel for the Crown is under a general duty to disclose *all* relevant information. The tradition of Crown counsel in this country in carrying out their role as "ministers of justice" and not as adversaries has generally been very high. Given this fact, and the obligation on defence counsel as officers of the court to act responsibly, these matters will usually be resolved without the intervention of the trial judge. When they do arise, the trial judge must resolve them. This may require not only submissions but the inspection of statements and other documents and indeed, in some cases, viva voce evidence. A voir dire will frequently be the appropriate procedure in which to deal with these matters.

[10] In *R. v. Chaplin*, [1995] 1 S.C.R. 727 Sopinka J. discussed the Crown's obligations respecting non-disclosure. He stated at paragraph 22:

> As further summarized in *R. v. Egger, supra,* at pp. 466-67:
>
> The Crown's disclosure obligation is subject to a discretion, the burden of justifying the exercise of which lies on the Crown, to withhold information which is clearly irrelevant or the nondisclosure of which is required by the rules of privilege, or to delay the disclosure of information out of necessity to protect witnesses or complete an investigation: *Stinchcombe, supra,* at pp. 335-36, 339-40. As was said in *Stinchcombe, supra,* at p. 340, "(i)nasmuch as disclosure of all relevant information is the general rule, the Crown must bring itself within an exception to that rule."
>
> ...
>
> One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed – *Stinchcombe, supra,* at p. 345. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.

Sopinka J. suggests the procedure to be followed where the existence of the sought information is established. He states at paragraph 25:

> In situations in which the existence of certain information has been identified, then the Crown must justify non-disclosure by demonstrating either that the information sought is beyond its control, or that it is clearly

> irrelevant or privileged. The trial judge must afford the Crown an opportunity to call evidence to justify such allegation of non-disclosure. As noted, in *R. v. Stinchcombe, supra*, at p. 341.

The Crown acknowledges that the subject e-mails/correspondence are in their possession.

[11] The authorities cited herein suggest that on disclosure applications the accused must establish a "reasonable possibility" of relevance (*R. v. Dixon, supra*). Further, when there is a review of prosecutorial discretion, the Crown must justify non-disclosure (*R. v. Chaplin, supra*).

[12] In *R. v. Bottineau,* [2005] O.J. No. 4034, Justice Watt discussed obligations on disclosure applications at paragraph 48:

> [48] It is equally beyond controversy that, on review, it is for Crown counsel to justify non-disclosure, not for the person charged to establish a case for disclosure. Said somewhat differently, Crown counsel must bring her or himself within an exception to the general rule that requires disclosure of all relevant information. See *R. v. Stinchcombe*, above, at p. 12, C.C.C. (3d) per Sopinka J.

Justice Watt goes on to remind us that when reviewing for relevance it is essential to keep in mind Sopinka's J.'s comments in *R. v. Eggar, supra*.

[13] In this case I am satisfied that the Crown must justify their position that the subject e-mails/correspondence are not relevant and, therefore, not disclosable. I am not satisfied that the subject documents are clearly irrelevant. Further, I am satisfied secondarily that there is a reasonable possibility these e-mails will be of

assistance to Mr. Colpitts. The Crown's submissions of irrelevancy are nothing more than assertions. I have no real evidence supporting the Crown's position.

[14] It is quite safe to assume that correspondence between the Crown and the NSSC related to the prosecution of Messrs. Colpitts, Clarke and Potter. Given the Crown's position in the "*McNeil"* application that the NSSC materials contained relevant material, there is the possibility these e-mails/correspondence contain some relevant materials. I am satisfied that the documents may reasonably assist the Defendants to meet the Crown's case, advance a defence or define their trial strategy. Consequently I order disclosure of the e-mails/correspondence to all 3 Defendants.

Coady, J.