

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

MICHAEL JARVIE ET AL

Applicants

- and -

HER MAJESTY THE QUEEN

Respondent

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)
) M. Friedberg, D. Dirstine, L. Colwin, D.
) Steinberg, J. Hill, D. Miller, L. Galway, for
) the Applicants
) R. Daigneault, self-represented
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) E. Maguire, for the Respondent
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TEMPLETON, J.

R U L I N G

[1] This is an application for an order requiring the respondent Crown to make full and proper disclosure of all relevant, non-privileged materials in the respondent's possession or control relating to this proceeding.

[2] The applicants are charged with numerous offences relating to an alleged club known as the Outlaw Motorcycle Club. A three (3) year investigation involving infiltration by a police agent into the club resulted in the execution of search warrants on fifty (50) sites and charges laid against approximately eighty (80) people. The charges range from drug offences, firearms,

property, attempt murder, proceeds of crime, criminal organization to conspiracy to obstruct justice.

[3] The Crown has classified the charges under two headings; those concerning criminal organization and the balance of the charges referred to by the Crown as “substantive offences”.

[4] Each person charged with one or more ‘substantive offence’ arising out of the investigation has received disclosure in paper form relating to the specific offence with which he/she is charged.

[5] The majority of the disclosure concerning the criminal organization charges, however, has been provided in electronic form and it is this disclosure that forms the basis of the application before the court.

[6] The Crown has possession and control of all of the disclosure in both paper and electronic formats.

[7] Counsel for each applicant save and except Mr. Daigneault who is self-represented and in custody, has received 1 CD (compact disc for use with a computer) containing a brief concerning the criminal organization allegations and a paper copy of the Appendix; 1 CD of the police agent’s transcribed notes; 1 CD of transcripts of video debrief meetings with the police agent; 4 CDs concerning evidence of the alleged criminal organization including an exhibit list and seized documentary and photographic evidence; 55 CDs of audio recordings of relevant intercepts; and, 24 CDs with a paper copy of the Index that include scanned documents generated throughout the investigation. These documents consist of a timeline, progress reports, police agent’s notes, police officer notes, the surveillance registry and reports, assignments, incoming reports, occurrences, an organizational chart of the joint forces project and reports from other police agencies. The electronic disclosure contained in the 24 CDs apparently amounts to 56,557 pages of scanned documentation.

[8] On all of the evidence before me and in hearing the submissions of counsel, I am satisfied and find that effective access by an accused party to this information contained in the 24 CDs as

well as the balance of the information provided is essential to satisfy the obligation on the Crown to provide disclosure with respect to the charges before the Court. The impugned CDs contain disclosure of information that lies at the core of the prosecutor's case with respect to the offences concerning criminal organization.

[9] The issue before the court is the definition of 'meaningful access'.

[10] The Crown indicates that the contents of the 24 CDs may be read using a computer program known as Adobe Acrobat Reader. This program allows a user to view, navigate and print documents in the Adobe Portable Document format (.pdf).

[11] The first difficulty the applicants have encountered is that the documents were not scanned using the necessary '.pdf' format but were scanned as '.tif' documents. I accept that the applicants have, therefore, experienced significant difficulty in opening the files contained on these particular CDs. This finding is further supported by virtue of an incident during the course of the hearing before me. The Crown attempted to open a file contained on an impugned CD using Adobe Acrobat Reader. The file did not open and the same or a similar message that had previously been conveyed to counsel for the applicants appeared on the screen. Another method of opening the file was then employed by the Crown and she was successful. However, at this point in time, the word "Kodak" appeared in the bottom left corner of the screen.

[12] There is no evidence with respect to the significance or role of "Kodak" with respect to the process used by the Crown to open the files on the CD during the demonstration. However, it is reasonable to infer that access to a component or program generated by Kodak is required to successfully open the files contained on the CDs provided by the Crown. This component/program has neither been provided to the applicants nor have the applicants been shown how to access it. In fairness, I accept that the Crown was unaware of this particular issue until the demonstration before me.

[13] There is a computer software program known as "Supertext". This program has been used by the police in other cases. "CD View" is apparently a "junior program" which has been provided to counsel for an accused in other cases involving electronic disclosure and training has

been offered to counsel with respect to the software. See *R. v. Foy* [2001] O.J. No. 617]. The strengths and weaknesses of “Supertext” are reviewed by Maher J. in *R. v. Cheung* [2000] A.J. No. 704.

[14] In the case before me, I am told that the information was not bookmarked at the time it was scanned into the computer using the program Supertext. The Crown has indicated that to scan the information again properly using Supertext would take months. The information was, therefore, scanned again using the ‘.pdf’ format and input using Supertext abandoned.

[15] It is impossible for counsel to search any of the handwritten documents (i.e. officer’s notes) scanned into the system using this method. Further, the documents cannot be bookmarked for future reference.

[16] In addition, approximately 4500 pages have been scanned into the system either sideways or upside down and/or require adjustment in size to be able to read them.

[17] The documents are stored in electronic files that have been identified as numbered “scan jobs” (i.e. Scanjob 20030213 144542.tif). There is no evidence before me as to the significance of this identifier or why the files were identified in this manner rather than by subject matter.

[18] The evidence before me that I accept is that to properly access the disclosure in a meaningful way if the information is accessible at all, there is a significant time delay for the user. For example, size and/or orientation adjustment must be made for each improperly scanned page called up to the screen.

[19] The applicants further complain that cross-examination of a witness relying on more than one document at a time will be impossible without a second computer because of the inability to use a split screen if both documents are on the same CD and statements and reports are contained on numerous CDs.

[20] The applicants argue that it is impossible to review the disclosure with their clients who are in custody because of the lack of facilities.

[21] Legal Aid has refused to pay for the printing of the electronic disclosure provided by the Crown. I accept the evidence before me as credible and trustworthy that, in any event, printing the documents is also an exercise in frustration since when documents have been printed the users have sometimes found information missing from the printed page.

Position of the Parties

[22] The applicants submit that the form of the disclosure contained in the 24 CDs has resulted in frustration, inaccessibility to information concerning the case their client's have to meet and unnecessary expense arising out of the time required in order to access any information. The inability to access the disclosure in a meaningful way has seriously hampered their clients' right to make full answer and defence.

[23] It is the Crown's position that the disclosure obligations have been met. The files are accessible and, when used in conjunction with the Indexes provided are clear, organized and complete. For all the offences except counts 1 and 2 (dealing with criminal organization), the accused persons have received a hard (paper) copy of the disclosure. Further, there is a great deal of duplication with respect to the information on the impugned CDs. With the right program, the documents are accessible. The evidence is that the ability for a user to search a document is not the issue. The applicants are seeking disclosure in paper notwithstanding resolution of the problems they have encountered. The only evidence before the court is that a computer will be installed in the detention center for use by those applicants who are in custody.

[24] The applicants seek an order requiring the Crown to deliver disclosure in paper form. According to the evidence, this will require approximately 24 boxes for each applicant. As in *R. v. Hallstone Products Ltd.*, [1999] O.J. No. 4308, the applicants argue that the electronic disclosure is not a substitute for the hard copies that are necessary to enable them to make full answer and defence.

Analysis

[25] The ultimate purpose of disclosure in the criminal context is “to inform”. In Canada, any person charged with having committed a criminal offence has the constitutional right to know the case against him/her and make full answer and defence. Indeed, the obligation on the prosecution to disclose to an accused all relevant material that is in the possession or control of the Crown arises from this constitutional right. *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

[26] The Crown is not obliged to provide perfect disclosure as noted by Langdon J. in *Foy*, *supra*. The Crown is required, however, to provide basic disclosure which is to be assessed on a case by case basis. As stated by LaForme J. in *R. v. Hallstone*, [1999] O.J. No. 4308, ‘basic disclosure’ will always include that material supplied to Crown counsel for use in prosecuting a particular case.

[27] After reviewing specific authorities and some of the recommendations of the Attorney General’s Advisory Committee on Charge Screening, Disclosure and Resolution Discussions (the Martin Committee Report), Justice Watt in *R. v. Blencowe* (1997), 35 O.R. (3d) 536 set out the following principles:

1. There is the duty of the Crown to disclose all relevant material, inculpatory and exculpatory, sufficient to allow an accused to make full answer and defence. Disclosure may be withheld, or delayed in certain circumstances and initial disclosure should be made before an accused is asked to elect mode of trial or to plead. Non-disclosure is justified on the basis of: (i) no control by the Crown; (ii) clear irrelevance; and (iii) privilege (pp. 541-42 O.R., p. 534 C.C.C.).
2. The right of disclosure is not absolute nor does it demand production of original material. However, the defence has the right to inspect the original if it is in the control of the Crown. The defence is also entitled to a copy of any such material that the Crown intends to rely on at trial (p. 542 O.R., p. 534 C.C.C.).
3. Disclosure, in cases where there are large numbers of documents such as business records, is complied with by providing defence with photostatic copies or CD-ROM (p. 542 O.R., p. 535 C.C.C.).
4. Where materials are the subject of a privacy or security interest, privacy for the defence in viewing them may be limited unless there is a sufficient undertaking given by defence counsel. This would apply in exceptional cases (pp. 542-43 O.R., pp. 535-36 C.C.C.).
5. An accused ought not to bear the costs of “basic disclosure”. Such costs are to be the responsibility of the Attorney General. Basic disclosure is generally speaking, the Crown brief and it will vary from case to case (p. 544 O.R., p. 537 C.C.C.).

6. Trial judges have the responsibility of resolving disputes regarding such things as fining and adequacy of Crown disclosure (p. 545 O.R., p. 537 C.C.C.).

[28] There is no evidence before me that any information contained on the 24 CDs ought to be considered irrelevant or unimportant to the defence.

[29] In my opinion, the method of communication used by the prosecution to inform a person of the case he/she is to meet must, within reason, be effective in order for the obligation on the prosecution as set out in *Stinchcombe*, *supra* to be satisfied.

[30] In this case, it seems that problems regarding the electronic storage of the information arising from the investigation and forming part of the prosecutor's case against the applicants arose at the outset.

[31] As indicated, the scanned documents were not bookmarked properly in the software program, Supertext. I accept the Crown's submission that upon discovery, to start again would have resulted in significant delay.

[32] Although I place no weight on this issue as a ground for granting the application, I also note that continued sloppy or inexperienced practice in document scanning has resulted in the need for intervention of the end user with respect to orientation of thousands of documents. The time necessary to orient and size each page will result in additional costs to the defence.

[33] I accept the evidence before me that due to the technical problems described briefly above with respect to printing and as described in the testimony called at the hearing, printing the documents stored on the CDs in this particular case would not be an entirely feasible alternative to the difficulties presented.

[34] I am not satisfied that one computer as proposed by the prosecution, if and when it is installed in the detention center, will be adequate to meet the needs of all of the applicants in custody with respect to analysis and review of the disclosure. I find this even if I were satisfied (which I am not) that these persons will have the opportunity and/or skills to use the computer.

[35] Ms. Adams, counsel for the applicant Michael Jarvie, testified that she would seek a paper copy of the disclosure even if the CDs were searchable. The Application does not succeed on that ground.

Conclusion

[36] Given the technological difficulties encountered by counsel for the applicants in this particular case, unfortunately disclosure of the information on the 24 CDs does not satisfy the obligation on the Crown as set out in *Stinchcombe*, *supra*.

[37] I am not suggesting that electronic disclosure would not in other circumstances be totally appropriate and reliable. Indeed, there are a number of recent cases in which electronic disclosure has been achieved effectively and successfully. Further, I am not suggesting that the difficulties encountered with respect to searching an electronic document or using an electronic document in court are grounds to grant this application. Indeed, in many cases involving voluminous paper material, electronic disclosure may be the format of choice for all parties. The search capabilities afforded by electronic storage of information may well be superior in other cases to the search capabilities afforded to counsel by way of paper disclosure.

[38] In this particular case, however, the method use to store and communicate to the applicants the information arising from the investigation is so seriously technically flawed as to impair the applicants' ability to make full answer and defence should another reliable method not be employed.

[39] There is little doubt that production of the disclosure on paper will be costly. I note, however, that the Crown has indicated to the court that there is a great deal of duplication with respect to the information on the CDs. It is reasonable to assume, therefore, that much of the information on the CDs has already been disclosed on paper and that the cost of production will be reduced accordingly.

Disposition

[40] The Crown will disclose to each of the applicants one aggregate hard copy of the information contained on all of the compact discs which are the subject of this application, the cost of which will be borne by the Crown.

"Justice L. C. Templeton"
Justice L. C. Templeton

DATE: August 13, 2003

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RULING

TEMPLETON J.

Released: August 13, 2003