

Case Name:

R. v. Redtree Contract Carriers; R. v. Dynamex Canada Corp.; R. v. Martin

Between

**Her Majesty the Queen, and
Redtree Contract Carriers, Dynamex Canada Corporation
and Kent Martin**

[2004] O.J. No. 5906

Information Nos. 00-76489680, 00-76490119, 00-76490114

and 00-76489679

Ontario Court of Justice
London, Ontario

A.R. Webster J.

Oral judgment: June 24, 2004.

(118 paras.)

Constitutional law -- Canadian Charter of Rights and Freedoms -- Legal rights -- Procedural rights -- To make full answer and defence -- Criminal law -- Procedure -- Trials -- Adjournment -- Crown's duties -- Disclosure.

Appeal by the accused in each of the three cases from a Justice of the Peace's decision to deny the request for an adjournment. The Justice found that the matters were not complex. The motion for an adjournment was brought the day following receipt of the disclosed materials. The defence counsel argued that there had been a delay in Crown disclosure. The defence claimed that it only received the materials seven days prior to trial. Convictions were entered against all the accused.

HELD: Appeal allowed. Everyone had a right to have their cases heard properly. A proper hearing included receiving disclosure and having ample time to review disclosure. It was a denial of natural justice to deny the defence time to review disclosure. It was not the accused's fault that the courts did not have sufficient time to hear all the matters. The convictions were quashed and a new trial

was ordered.

Statutes, Regulations and Rules Cited:

Evidence Act,

Highway Traffic Act, s. 85(1), s. 110(7), s. 190(3), s. 190(6)

Provincial Offences Act, s. 9, s. 9.1, s. 138(1)

Charges: s. 110(7) Highway Traffic Act - Oversize/Overweight Vehicle -- s. 190(6) Highway Traffic Act - Unlawful Permit -- s. 85(1) Highway Traffic Act - Operate/Permit Vehicle Fail -- s. 190(3) Highway Traffic Act - Fail Maintain/Carry

Counsel:

A. Hampson Provincial Prosecutor

S. Baigent Agent for Redtree Contract Carriers, Dynamex Canada Corporation and Kent Martin

1 A.R. WEBSTER J. (orally):-- All right, before the court then are applications or notices of appeal of a - Kent - for Redtree Contract Carrier - Redtree Contract carrier, two cases - Dynamex Canada Corporation and what's the forth?

2 MS. BAIGENT: Martin Kent.

3 THE COURT: Martin Kent.

4 MS. BAIGENT: I'm sorry, yes, Martin Kent ...

5 THE COURT: All right.

6 MS. HAMPSON: Kent Martin.

7 MS. BAIGENT: ... Kent Martin, I'm sorry.

8 THE COURT: Kent Martin, sorry. Okay, then I'll hear your - your submissions. I've read the material that you've provided to me, mainly the applications, the transcripts of the - where you ... wherein your clients renewed their request for further time, an adjournment before His Worship Justice of the Peace, S.A. Taylor on February the 10th, 2004, in each case, which was disallowed.

The agent withdrew, a conviction was entered under Section 9 and this is in light of a previous motion which was brought before His Worship, Robert Ponton, the day before, again turning it down, turning down your request for further time. All right, go ahead.

9 MS. BAIGENT: The - I'm speaking to four separate matters today, you know, though the charges may differ, the grounds of appeal are exactly the same, in that the learned justice erred in not allowing an adjournment of the trial as a result of the Crown failing to provide timely disclosure. These appeals are brought forth under Section 138(1) of the Provincial Offences Act, in that the defendants are looking to have the court set - direct a new trial for each of the matters. The relevant and pertinent time lines are as follows, for all matters a notice of trial was issued by the court on January the 7th, 2004. This notice of trial was sent to our office via regular mail and was received January 14th, the date for trial was given as February 10th, 2004. A request for disclosure was made on or about January 20th, 2004. In all but the Dynamex matter, disclosure was not received until February the 3rd, 2004, some seven days before the trial. Disclosure for the Dynamex matter was provided on Friday, January 30th at 5:06 p.m. essentially after the close of business on Friday and would not have been seen until Monday, February 2nd. Ms. Burness, knowing that her duty as an agent is to fully review and discuss any matters or possible avenues of defence, arising from disclosure of the officer's notes, etcetera, was aware that the remaining seven days, would not allow her ample time to carefully review all disclosure with the defendant and produce a notice of intention to file business records, as described under the Evidence Act. Ms. Burness immediately instructed that a motion be prepared and served. An affidavit in support of motion was sworn on February 4th, a day after the receipt of the disclosure, requesting an adjournment of the upcoming trial date of February 10th, 2004. The grounds for the motion were simple and straightforward, in that it was the defendants position that there was not enough time, prior to trial, following the receipt of disclosure, in order to properly review said disclosure with the defendants and prepare for trial. The motion was brought at the first opportunity, which was February 9th, 2004. The motion was heard before Justice Ponton, who in reviewing the types of charges deemed that the cases were not complex and as such, defence preparation would be minimal and the matter should proceed to trial. The request for adjournment was denied, even though this was the first request for an adjournment brought before the court, for any of the matters and the motion was brought at the earliest opportunity. On February 10th these matters proceeded to trial in front of Justice Taylor, who in all matters concurred with Justice Ponton, that as the matters were relatively non-complex, that seven days should have been ample time to review the disclosure with the defendant and prepare a full answer and defence and proceed to trial. As a result of Justice Taylor's ruling, Ms. Burness removed herself as a - from record, as she was not prepared to take these matters to trial. Convictions were registered in matters under Section 9.1 of the Provincials - Provincial Offences Act. In essence the defendants were punished and convicted - convictions were registered as a result of hiring an agent who was fully cognizant of her duties, as outlined in the Morden decision. I'm here today on all of these matters, as it is our position that Justice Taylor erred, by not allowing Ms. Burness request for an adjournment in these matters, in order to properly review disclosure that was provided some seven days before trial. In each matter, Justice Taylor made direct reference to the matter of not being complex or complicated. And if I can direct the court in the Dynamex

10 THE COURT: Is that a subjective test or an objective test? Morden is the name of the case?

11 MS. BAIGENT: It's the Morden decision. It's under Section 50.

12 THE COURT: Decision of what?

13 MS. BAIGENT: It's an annotated case and the Morden decision speaks to what the duties are of not only an agent when representing a defendant, but also that of the Justice.

14 THE COURT: Oh, we know all that. I mean I know that, I mean I know that.

15 MS. BAIGENT: Okay.

16 THE COURT: It doesn't talk about whether or not you should grant an adjournment or not?

17 MS. BAIGENT: No, but it speaks to what an agent needs to do in order to be prepared to go to trial.

18 THE COURT: Um huh.

19 MS. BAIGENT: There are

20 THE COURT: Well, meet with the - meet with the client, review the facts, you know, request disclosure, get the disclosure, review the disclosure and review it with the client.

21 MS. BAIGENT: Exactly.

22 THE COURT: Okay.

23 MS. BAIGENT: Exactly.

24 THE COURT: Prepare the witnesses.

25 MS. BAIGENT: That's right.

26 THE COURT: Blah, blah, blah.

27 MS. BAIGENT: With all due respect to Justice Taylor, we feel that this was a serious miscarriage of justice. It is our duty as agents to ensure that defendants are fully aware of all aspects of the case, namely what they are charged with. As I am sure you are aware, there has been an overwhelming indication from courts, in the past couple of months, that paralegals are not taking the time or shouldering the responsibility of meeting with their clients to discuss this matter and review disclosure. There has been directions put forth by the London Provincials Offences Court, that in order to enter a guilty plea on behalf of the defendant or to represent a defendant, an agent must confirm that they have obtained and reviewed disclosure with a defendant. Ms. Burness is

keenly aware of the parameters of the process for agents in the province of Ontario, as put forth in the Morden decision. She is also keenly aware of the ability and the implied duty of the - of the court, to ensure that defendants are informed by agents, as set out in Section 50(3) of the Provincial Offences Act. It was agreed by Ms. Burness that seven days did not provide ample time to review all this disclosure, including officer's notes with the defendant. It was - it was - during the motion at trial, it was the suggestion of Ms. Hampson that disclosure is relatively certified copies of registrations, as well as copies of the drivers own notes and fail to maintain in the Martin Kent matter and a fail to maintain daily law, literally what happens is the officer takes a photocopy of that - takes a photocopy of that log and the driver is then asked to amend the log, before he goes on his way. That being said, the defendant would not have the original drivers log. We need a copy of the disclosure; we need a copy of the officer's notes. There are many times that the defendant does not recall pertinent information or important aspects of the defence until they have carefully reviewed the disclosure and the contents of the officer's notes. With respect to Justice Taylor's comments that the matters are relatively non-complex, we would ask the court to take into consideration, that at the present time there are no tables, regulations, etcetera, that assign varying levels of complexity, due to certain offences. This concept of complexity is a preconceived notion on the part of both Justice Ponton and Justice Taylor and should not have been applied prior to the hearing of these matters. This preconceived notions and comments as to the type of defence put forth for a specific offence, specifically contravenes Section 46(2), that states that the defendant has a right to full answer and defence. There is no qualifying clause in Section 46(2), that it's only in non-complex cases. If I can say

28 THE COURT: I don't think you have to get me any authority on that, that's pretty basic, the full right to answer and defence.

29 MS. BAIGENT: The right to - the right to

30 THE COURT: Well, it says it in the Provincial Offences Act and that, you certainly have it common law.

31 MS. BAIGENT: The right to timely and full - and full disclosure is constitutionally mandated under Section 7, again there is no qualifying clause in knowing complex cases, we are not allowed to timely - timely disclosure. Further regardless of Justice Taylor's preconceived notion regarding relatively complexity, it is imperative to note the circumstances of what happens when a registered - when a conviction is registered against a transport company. Transport companies hire agents because they take these matters very seriously, each conviction carries with it a CVOR points, that are associated. Transport trucking companies have what they call an operating registry. Each conviction there is points that are registered. The same as when you have a driver's license and if you get to many demerit points they pull your license. A transport truck - a transport company is the same, if it - if it accumulates too many CVOR points their operating register - registry is pulled. Their plates are pulled and they cannot trip it, to carry on business for 30-60 to 90 days and that being said, while the Justice may think this is a relatively non-complex matter, once a register has

been convicted on the operating registry there is always a possibility of future convictions, than that conviction, looking back and say there's a previous history. Therefore submissions as to penalty, as to not taking the earlier conviction seriously, of course increases twofold.

32 THE COURT: So did you have all the disclosure that you needed? Did you have it all, I mean you had it, you just didn't have enough time?

33 MS. BAIGENT: That's exactly it.

34 THE COURT: But you got the notes of the ...

35 MS. BAIGENT: We got - yes, there was - there was no ...

36 THE COURT: ... officer and all that stuff.

37 MS. BAIGENT: ... we made no motion.

38 THE COURT: You still have all that stuff?

39 MS. BAIGENT: We still have all of it. All we simply wanted to do was take the time to sit down with the clients and review the officer's notes, review all the - all the disclosure and prepare for trial. That's simply what we were asking for. We simply want a new trial date.

40 THE COURT: Good.

41 MS. HAMPSON: Your Honour, as I indicated before, if the issue is failing to provide timely disclosure, then I have a problem with that. I have a difficulty with that because given the circumstances when the note

42 THE COURT: Well, who said timely? Is there any definition?

43 MS. HAMPSON: That's there. That's there.

44 THE COURT: Yes, but what's the definition of timely? Is it in the mind - mind of the person giving the disclosure or in the mind of the person receiving the disclosure?

45 MS. HAMPSON: Well, Your - Your Honour the disclosure was provided in my respectful submission.

46 THE COURT: Well, but ...

47 MS. HAMPSON: ... in a timely manner.

48 THE COURT: ... you say that, but who - is it an objective decision or subjective decision? I mean is it the person who gets it, who wants more time or is it the person who gives it and says you

should have had enough time, or is it some judge who says, there that's enough time, this is a non-complex matter? I've never had a case where - where somebody who asks for more time for the disclosure, to review disclosure, has not been granted it, nor have I ever had a case where a person asking for more time for - to review disclosure, that it's been - been opposed by, not you, I'm not talking about here, but opposed by counsel at the trial or at any time. Never in 23 years, I've never had anybody, any Crown stand up and say, oh well, this is a relatively non-complex matter and they should have had enough time. I don't know what the rush is, that's what the problem here in this case is. What's the rush?

49 MS. HAMPSON: Your - Your Honour, as I've tried to explain the - the problem with the Provincial Offences matters, is that there is very little trial time.

50 THE COURT: Yes, but should the citizens of the country, of this country, in this province, be prejudiced because you, not you, but your principal, that being the Province of Ontario, or the City of London are not making more time available. Why should we say to people, well we don't have enough time to hear your trial, so you're going to have to go. Well you know, that's - that's not an excuse.

51 MS. HAMPSON: Well, Your Honour, what happens is we get

52 THE COURT: Mr. Justice Ponton may think it is an excuse, but it ain't an excuse. In real terms, people have a right to have their cases heard and the problems that the prosecution are going to have if they don't give them that right to be heard, they are going to be coming to courts of appeal and courts of appeal are going to say go back and do it right.

53 MS. HAMPSON: And, Your Honour, the other problem that we have are being faced with delay arguments ...

54 THE COURT: I don't care, whose problem is that?

55 MS. HAMPSON: ... in terms of not enough time and then having

56 THE COURT: That's the city's problem, if they're going to have delay arguments, they're not going to have their revenue are they? They're not going to get their revenue out of these cases.

57 MS. HAMPSON: It's the systemic delay and it causes ...

58 THE COURT: Right.

59 MS. HAMPSON: ... the problem and that causes ...

60 THE COURT: Well, that's not my problem.

61 MS. HAMPSON: ... it all to

62 THE COURT: That's not my problem and it's not the citizens' problem.

63 MS. HAMPSON: I agree, Your Honour. I agree, Your Honour, but it falls on the prosecution, we have the obligation to bring these matters to court, we have the ...

64 THE COURT: No question.

65 MS. HAMPSON: ... obligation to bring defendants to court.

66 THE COURT: But I've never had - never had a case where the prosecutor stood up and said, they've had enough time, we're going ahead with this case. I mean, they know that it is a fool's errand because you're going to go through the case, well in this case you didn't go through the case, you just had a Section 9, a fool's errand because it's going to turn around and come back and bite you, every time, if it's not done right. They have a right - the citizen has a right to have their case heard properly and not to have short cuts because we don't have time to hear their case. What the - what the Justice of the Peace is saying, we don't have enough time to hear these cases, so I'm sorry you're not going to get a hearing. A proper hearing, which includes disclosure, ample time to review disclosure and you know, all that stuff has to be done properly.

67 MS. HAMPSON: But, Your Honour, if that had been - if that was the argument and that was the position of Ms. Burness on that day, then maybe these matters would

68 THE COURT: Well, she said the same thing as this woman said today. I've read the transcript.

69 MS. HAMPSON: They're saying that the - the issue was caused by the failing to provide disclosure in timely matter.

70 THE COURT: Well, that's what they're saying, disclosure does not just mean - disclosure is a two part - there's a two part to disclosure. There is you providing it ...

71 MS. HAMPSON: Yes.

72 THE COURT: ... and them reviewing it with their client. That's disclosure, ...

73 MS. HAMPSON: Yes.

74 THE COURT: ... it's not just here it is, you've got disclosure, finished. That's not - the disclosure process includes the giving of it, the taking of it, the reviewing of it. That's all disclosure and you've got to have enough time to do all this.

75 MS. HAMPSON: And I agree, you have to have enough time to ...

76 THE COURT: And you're saying seven days is enough.

77 MS. HAMPSON: ... do that. But if they're not saying - well what else could we do in the circumstances?

78 THE COURT: I'm not saying - I'm not blaming you.

79 MS. HAMPSON: Well, Your Honour, that - that is exactly what the defendant ...

80 THE COURT: No, I'm - I'm finding fault ...

81 MS. HAMPSON: That is exactly what

82 THE COURT: ... I'm finding fault with the learned Justice - Justices of the Peace, who reviewed this and made their - well I don't know what Ponton did, I might have to review that, but

83 MS. HAMPSON: We don't - we don't have his transcript, so.

REASONS FOR JUDGMENT

84 Mr. Justice - Justice of the Peace, Taylor, is talking about non-complex matters, you are saying there are time limitations, that we have got problems with how much time - court time we have to hear these cases. So, it has got to go ahead and be heard because now we have got the time to do it. I do not think any court in the land would allow anything like that to happen. That is just not proper, that is a denial of natural justice, to say to somebody, you are going to have your trial anyway, you should have enough time, too bad. That is not proper, not at all. You are a lawyer, I am a lawyer, you know that you can not have people being forced on and say that it is not a complex case. Who's to say it is not a complex case, me? I do not know if it is a complex case. People have a right to consult with their lawyers and have the time to review the disclosure, no matter how "Mickey Mouse" the Justice of the Peace or the prosecutor thinks it is. I am astounded at this attitude of the system. The system is trying to - what they are doing is having the system running the people's lives. Too bad, City of London, if you do not have enough time to hear cases, you better put some more money in the system. I have always felt that these people come to this court on these appeals and if they have not been dealt with properly, they go back and do it again. That is the way it should be done and if we do not continually send that message to the city, they are going to continually prejudice the rights of the accused. That is what is happening here, in my view. You can not just say, too bad you have had your chance, go back, forget about it, pay the fine and be done with it. That is not right, just because these are Highway Traffic Act offences, people go home and they come to these courts and this is where the rubber meets the road. These courts, these provincial courts, these courts are where the most people ever get to court, is on Highway Traffic Act matters and if they have not been dealt with properly or fairly or walk out of here saying, well, I screwed that up, like the man earlier today, well, I guess I screwed that up, but at least I got a decent hearing. That is all they really want and if they are not given a chance to have a decent hearing, well then the system failed them. They have a right to expect more from their tax dollars, that is my

view. So, I am sending it back, I am sending all of these cases back with those words to the Justice of the Peace, that you can not burden the public with the Justice of the Peace's request or need to get these things through the system. If it takes twice as long, too bad, they are going to be done properly whatever it takes and clearly these have not been done properly. They put the agent in a position where she had to leave, she could not stand there and support her client because she had to get out so there could be a Section 9 and they could appeal it. They should have been able to appeal the ruling. So this is not right, all these matters or convictions are going to be quashed and they are going back for a new trial, to be set in August, August the 26th, courtroom 5, new trial set on all matters. Now, have you got enough time for your disclosure between now and the 26th of August?

85 MS. HAMPSON: Your Honour, August 26th is a Thursday, it's appeal day, these have to go back to 824 Dundas Street.

86 THE COURT: All right.

87 THE CLERK: On a Monday, right? On a Monday?

88 MS. HAMPSON: Yes, any Monday, we are here every Monday. I can advise Your - Your

89 THE COURT: 22nd then, or 23rd, 24th. Yes 23rd, is that a Monday?

90 MS. HAMPSON: I would like it to go back sooner than that because I can advise, Your Honour, I don't have any trial time, so.

91 THE COURT: What do you mean sooner? You don't have any trial time sooner?

92 MS. HAMPSON: No, I don't.

93 THE COURT: You want it to go back sooner than the 23rd?

94 MS. HAMPSON: It - if can go back to July 5th, that's a Monday, we can see if there is any trial time available. If there's no trial time available then ...

95 THE COURT: Is that satisfactory to you?

96 MS. HAMPSON: ... it's going to go over to another day.

97 THE COURT: July the 5th?

98 MS. BAIGENT: Is it put over to July 5th to carry on trial ...

99 THE COURT: Set a new date.

100 MS. BAIGENT: ... or just to set a new date?

101 MS. HAMPSON: To set a new date.

102 THE COURT: Set a new date.

103 MS. BAIGENT: Yes, that's fine. That's fine.

104 MS. HAMPSON: But I can advise, Your Honour, that we don't have any trial time, we don't.

105 THE COURT: I don't care.

106 MS. HAMPSON: I - I

107 THE COURT: I must have made that clear.

108 MS. HAMPSON: Your Honour, I - I

109 THE COURT: I must have made that clear. I am sure I have. I do not really care if it ever gets heard, that is not my problem. My problem is to see that people who come in this court are dealt with fairly and I am not satisfied that these people have been dealt with fairly. The case - seven days for disclosure they - she - in her affidavit or in her submissions on the record and in a number of these cases, the person who is, I am - don't know her name, the lady who was here, before the learned Justice of the Peace, she made it quite clear and she set out the days, with so many days for this, so many days, we get the material in and it goes through a fax machine and we are not waiting at the fax machine to see that it comes in. We have to sit down with our client, you know, I would never, ever - as a trial judge, I would never touch a case if somebody stood up and said, virtually said, look I have not had enough time to prepare for this. What is the point because all it is going to do, if I go ahead with it, is to send it upstairs on appeal. The Appeal Court send it back to me. This becomes a waste of time. Never take a case where there is some indication that we are not getting a fair hearing because you are just

110 MS. HAMPSON: Perhaps - perhaps, Your Honour, if the agent had made it clear that there was nothing else, in terms of how timely this disclosure could have been provided by the ministry, because we did what we had to do. If that was the issue ...

111 THE COURT: You did what you thought you had to do.

112 MS. HAMPSON: That's all we could do.

113 THE COURT: They are doing what they thought they had to do.

114 MS. HAMPSON: Exactly.

115 THE COURT: The problem is people are not taking - the ministry is not taking into consideration what the poor old defence counsel has to do. They are not - they are no - oh well, we

gave enough time with that, seven days later you should have had it and done it. I mean this is not the only case they have and this is not the only client they have. Who knows, maybe 10, 15, 20 days, who knows how long it takes to get the disclosure to their client to get instructions back? Who knows, when you get disclosure and you have a chance to review it with a client, very often it comes up with a guilty plea, you do not have to have a trial, so you are really wasting all sorts of time. That is what the whole point of disclosure is.

116 MS. HAMPSON: I agree, I agree.

117 THE COURT: All right, thank you very much.

118 MS. BAIGENT: Thank you.

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