

ONTARIO COURT OF JUSTICE

B E T W E E N :

**Sean Millar, Miranda Tulin, Kristopher Rose, Bonnie-Lynn Ketchum, Zaker Hussain
and Timothy Pile**
Applicants

— AND —

The Corporation of the City of Thunder Bay
Respondent

Before Justice of the Peace Bruce I. Leaman
Heard on July 30, 2009
Reasons for Judgment on Motion released on July 30, 2009

Mr. V. R. Paddon **for the applicants**
Ms Lelsie Dack **for the respondent**

JUSTICE OF THE PEACE LEAMAN:

[1] Before the court is a motion for disclosure brought on behalf of six defendants, namely Sean Millar, Miranda Tulin, Kristopher Rose, Bonnie-Lynn Ketchum, Zaker Hussain and Timothy Pile. The motion requests this court to order the Ontario Provincial Police (hereafter “the OPP) to produce to the defendants’ representative a certified copy of the full user’s and installation manual for the Genesis II radar device, and the full OPP radar Basic Operator Manual used to conduct initial and recertification courses. In the alternative, the motion requests the OPP disclose certain enumerated pages from those manuals. Of course it is the prosecution, and not the OPP, from whom the disclosure flows.

[2] I have reviewed the materials submitted by the representative of the applicants, including the Notice of Motion, Book of Authorities, Affidavit of William Teed and appended pages purportedly extracted from the manuals set out above (not attached as exhibits to Mr. Teed’s affidavit). I have also reviewed the prosecution’s materials, which

include the respondent's Factum, Book of Authorities, and Affidavits of Sandy Axent and OPP Sgt. David Bel.

[3] As set out in s. 46(2) of the Provincial Offences Act (hereafter "the Act"), it is fundamental that the applicants have the right to make full answer and defence. The ability to exercise that right depends, in large part, on disclosure of information relevant to the charge. The Supreme Court of Canada decision of *Stinchcombe v. The Queen* (1991), 68 C.C.C. (3d) 1 and the cases that followed it require the prosecution to disclose items relevant to the charges against defendants. Case law has developed that holds that the extent of disclosure required to be provided might depend on the seriousness of the charges before the court and the consequences of conviction.

[4] It should be noted that, subject to review by a court, the decision regarding what should be disclosed is within the discretion of the prosecution. The motion before this Court has been necessitated by the prosecution's decision not to provide to the defence the items it had previously requested by way of disclosure. In essence, the prosecution has refused to disclose these items because it feels they are not relevant and that at least one of the manuals is copyright.

[5] The issues to be determined on this motion are as follows:

- a) Does this court have jurisdiction to make an order for disclosure?
- b) Are the documents being requested relevant?
- c) Should the prosecution disclose the requested documents to the defence?
- d) What effect, if any, does the issue of copyright have on disclosure?

Does this court have jurisdiction to make a disclosure order?

[6] The first issue to be determined is whether this court has jurisdiction to make the orders sought. Most of the case law presented by Mr. Paddon on behalf of the defendants and Ms Dack for the prosecution, as well as some other cases that the court has discovered during its research for this motion suggest it is the trial court that typically decides this type of motion. Indeed, only one case of which this court is aware suggests that it need not be the trial court that hears a motion for disclosure. In *R. v. Foote*, [2006] ONCJ 369, Madame Justice Duchesneau-McLachlan of the Ontario Court of Justice, sitting in appeal of His Worship Lecouteur's decision, at paragraph 23 stated: "These motions do NOT have to be heard by the trial justice. They are not the same as applications under the Charter. Indeed the rules simply indicate that they are to be brought before a justice of the same level of court" (emphasis in the original).

[7] The Ontario Court of Appeal in the case of *R. v. Shannon* [1992] O.J. No. 2652 ruled that a motions court judge dealing with an application for prerogative remedies in the Superior Court of Justice erred in ordering disclosure of the manual for a radar detector detector as that issue should have been left for the trial justice of the peace. However, that

case is distinguishable, in this court's opinion, because, unlike the situation in Shannon where the Crown could have tried to prove the presence of the radar detector by some means other than with evidence of the operation of the radar detector detector, in speeding cases such as the ones before the court, the prosecution almost invariably relies on the readings obtained using a speed measuring device to prove the charge.

[8] Because in Part I matters, s. 5(2) of the Act requires that the clerk of the court send a Notice of Trial to a person who files a Certificate of Offence requesting a trial, and because no information is sent with that Notice of Trial respecting procedural matters such as requesting disclosure or adjournments, there is no preliminary appearance prior to the trial date at which a person charged or his or her representative could address the issue of Court-ordered disclosure. Practically, s. 5(2) requires a defendant to request of the Court on the scheduled trial date (that is, of the trial justice of the peace) the disclosure of any items the prosecution has seen fit not to disclose that the defence feels are relevant. This would, of necessity in many cases, require the hearing of a lengthy motion for disclosure, an adjournment of the matter on the scheduled trial date if the disclosure was ordered by the Court, and the inconvenience to witnesses who had been summonsed to attend the trial on the original date. The effect of mandating that only the trial justice of the peace may determine contested issues surrounding disclosure would be frequent delays and a loss of control by the Court over its process. Therefore, this Court prefers the approach taken in Footé that any justice of the peace—not just the trial justice of the peace—is able to hear a motion for disclosure and accepts that it has the jurisdiction to hear the motion before it today.

Are the documents being requested relevant?

[9] The next issue to be decided is whether the items being requested are relevant. In this regard, the case law is consistent in holding that the obligation rests on the applicants to show, through acceptable evidence, the relevance of the items sought to be disclosed. The cases have held it is not enough for the defence to merely ask for disclosure, and there is no absolute right to the disclosure of an entire radar manual in speeding cases.

[10] An excellent summary of the law in the area of disclosure of radar manuals is R. v. Oosterman, [1998] O.J. No. 5785. In that case Justice of the Peace Quon cites several decisions—both within Ontario and without—in which the issue has been addressed. His Worship Quon, at paragraph 18, quotes Her Worship Babcock in the case of R. v. Reybroek [1998] O.J. No. 2586 (O. C.J.), as follows:

At paragraph 10 in Reybroek, Babcock J.[sic] adopted the reasoning in R. v. Longmire [1993] N.S.J. No. 15 (N.S.C.A.) (January 18, 1993) and stated "the defendant has not laid a rational basis or factual foundation for the disclosure requested". The Nova Scotia Court of Appeal in Longmire found the appellant had not been deprived of the rights to a fair trial and to make full answer and defence because of the Crown's refusal to provide him with a copy of the radar operation manual. The Court of Appeal did not find the trial judge had erred in declining to stay the charge, for the Crown's refusal to disclose the radar manual. The Court

reasoned the appellant did not lay a rational basis or factual foundation for his request before the trial judge, and therefore was not entitled to the disclosure request.

[11] At paragraph 21, His Worship Quon continues:

In Reybroek, the defendant had failed to demonstrate why the requested documents were relevant to his defence. Since there was not a factual foundation established, the court determined the radar manual or maintenance notes were not relevant and therefore would not order these documents be released to the defence.

[12] His Worship concludes, at paragraph 22, “In determining relevance of the documents requested in the case before me, I used the following test for relevance: ‘Is the material being sought reasonably possible of being useful to the defendant in making full answer and defence’.” That seems, to this Court, to be a very reasonable test in assessing this motion.

[13] In its material, the prosecution included an affidavit of Sgt. Bel of the OPP sworn July 22, 2009. Attached to that affidavit as exhibits are copies of officers’ notes that make reference to testing, in accordance with manufacturer’s specifications, the speed measuring devices they used in connection with the applicants they charged. Sgt. Bel’s affidavit confirms that these notes were disclosed to the applicants’ representative.

[14] The decision reached by His Worship Quon in Oosterman on the issue of whether radar manuals should be disclosed reads as follows (paragraph 26):

I regard the radar manual being sought by the defendant to be relevant in that it contains information relating to the specifications referred to in the officer's notes. On a balance of probabilities, I am satisfied that the defendant's ability to make full answer and defence to the charge of speeding may be adversely affected if the radar manual is not disclosed to the defendant. Accordingly, the manual must be disclosed to the defence.

[15] Generally speaking, this Court concurs with His Worship Quon’s decision on the issue of the disclosure of radar manuals, based on the evidence contained in Sgt. Bel’s Affidavit, namely the copies of the officers’ notes that refer to testing the speed measuring devices in accordance with the manufacturer’s specifications.

[16] There has been no affidavit evidence led by the defence on this motion relating to any of the applicants that leads this Court to conclude that the OPP’s Radar Basic Operator’s Manual would be relevant and therefore subject to an order for disclosure. Nor was Sgt. Bel’s affidavit or his oral testimony on the motion of assistance to the defence on this point. The only reference to the relevancy of the OPP manual was in Mr. Paddon’s oral argument, which the Court did not find compelling. Consequently, that part of the disclosure motion is denied.

Should the Prosecution disclose the requested documents to the Applicants?

[17] The next issue to be determined is whether the items requested should be ordered disclosed. On this point, it is unfortunate for some of the applicants that their representative chose to bring their motion in the form that he did—that is, jointly. Based on Sgt. Bel’s affidavit evidence, the Genesis II radar manual would be applicable to only the applicants Kristopher Rose and Sean Millar. Different speed measuring devices, that have their own distinct manuals, were used in the matters involving Bonnie-Lynn Ketchum, Zaker Hussain and Timothy Pile. This Court has no evidence what speed measuring device was used in the case of Miranda Tulin. Consequently, any order this court may make for the disclosure of some or all of the items requested in the motion must be limited to the applicants Rose and Millar, because it appears that only in their cases would the Genesis II manual be relevant. This remains true even in light of the oral evidence of Sgt. Bel respecting the common elements of all radar use, such as the Doppler Effect, tracking history, target identification, effect of terrain and weather. Unless disclosed voluntarily by the prosecution as a result of this decision, if instructed by his clients, Mr. Paddon should, at his earliest opportunity, make a motion for disclosure of the manuals relating to the correct types of speed measuring devices involved in the remaining applicants’ matters, the details of which have already been disclosed to the defence by the prosecution.

[18] As the cases have stated, the Court need not order the disclosure of the entire manual if an order is made. As Justice Adams stated in R. v. Sequin, [2007] O.J. No. 382 at paragraph 18:

The Justice of the Peace may order that the radar unit manual be produced to the appellant. The decision is discretionary. The Justice may also order that only a part of the voluminous manual may be produced. The application for production either whole or in part, however, must have some material basis. The Justice of the Peace may then be in a position to determine the question of relevancy. If there is no relevance then no order is appropriate. If there is relevance relating only to a part of the manual, then only a part of the manual should be ordered. The onus, however, is on the applicant. And the decision, if necessary, must be made on the side of inclusion.

[19] Because this Court has not been satisfied on the evidence before it that the entire Genesis II radar manual requested is relevant for the purposes of making full answer and defence, it will only consider making an order for disclosure of the parts of that manual relating to the testing and operation of the unit. The difficulty in the motion before the court as it relates to the applicants Rose and Millar is that although the defence included copies of some pages from what is purported to be the Genesis II radar manual, they are not exhibits to Mr. Teed’s Affidavit sworn May 1, 2009. This Court, therefore, will not draw the inference that the pages referred to in his affidavit are the same pages included in the applicants’ bound materials. This issue is further complicated by the fact that the list of pages sought in the alternative by the defence to be disclosed do not correspond with the pages in the bound materials since pages 21, 25 and 27 are missing.

[20] It is clear, however, that the applicants Rose and Millar have satisfied this Court, through the affidavit and oral evidence of Sgt. Bel and the oral argument of Mr. Paddon, that

in order to make full answer and defence to the charge each is facing, the prosecution should disclose the pages of the Genesis II User's and Installation manual relating to the testing and operation of the unit. An order is therefore made to that effect.

[21] This Court adopts the reasoning in the decision of Justice Thomas in R. v. Vanier, [2005] O.J. No. 5466, at paragraph 16: "The photocopy of a portion of the unit manual, and the offer of access to the balance was enough to minimally satisfy the Prosecution's obligation regarding the manual disclosure." Therefore, it is hereby ordered that the prosecutor provide by way of disclosure in the matters of Mr. Rose and Mr. Millar, photocopies of the pages of the Genesis II User's and Installation Manual relating to testing procedures and operation of that model of radar unit.

What effect, if any does copyright have on Disclosure?

[22] The issue of copyright can quickly be addressed. This court concurs with the conclusions reached by His Worship Quon in Oosterman, at paragraph 29:

Copyright as intellectual property protects the interest of the creator or owner in the manual and to ensure the right of the copyright owner to capitalize or benefit exclusively in the use of the writing or document. I fail to see how the defendant will be able to make full answer and defence without a copy of the manual. If the defendant's only intention is to obtain a copy in order to prepare its defence the manual should not be kept from the defendant because of some copyright interest. The underlying principle is the defendant's right to make full answer and defence, and in this particular case, that right is paramount to any interest that the owner of the manual may have in the copyright over the manual.

Miscellaneous matters

[23] There are a few additional matters that the Court will address with respect to this motion and motions of this nature in general. In this Court's opinion, it is not reasonable for the prosecution to take the position that the radar manual in question today (or indeed any radar manual) or relevant parts thereof need not be disclosed because the manual may be purchased by the defendant from the manufacturer or its distributor. That would impose an unnecessary financial burden on any defendant, especially those self-represented.

[24] That said, it would certainly be of assistance to this and other courts dealing with speeding charges where the testing or operation of the devices might be in issue to have available at trial a certified copy of the user's manual relating to the model of speed measuring device relating to that particular charge that could be referred to by the prosecution or the defence, or in appropriate circumstances, the Court. Obviously, from the comments above, this would best be done by the prosecution, with the assistance of the charging police service.

[25] Finally, the Court feels compelled to comment further with respect to the need for this motion to have been brought at all. This Court hopes its decision today has made it clear that in this type of case, where the officer's testing and operation of the speed measuring

device will almost always be challenged, it behoves the prosecution, bearing in mind the right of the person charged to make full answer and defence to err on the side of inclusion when considering what to disclose. The expense to the state in disclosing these extra pages from the appropriate manual is surely outweighed by fairness to the defendant and the enhancement of the administration of justice.

Released: July 30, 2009

Signed: “Justice of the Peace Bruce I. Leaman”