Court of Queen's Bench of Alberta

Citation: R. v. Black, 2010 ABQB 461

Date: 20100708
Docket: 080637432U1
Registry: Edmonton

Between:

Her Majesty the Queen, and
Chief of Police, Edmonton Police Service

Applicants

- and -

William Joseph Black

Accused

Reasons for Judgment
of the
Honourable Mr. Justice Brian R. Burrows

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[1] The Crown and the Chief of the Edmonton Police Service filed separate Notices of Motion seeking an order in the nature of *certiorari* quashing a disclosure order made by Provincial Court Judge R. W. Bradley on October 1, 2009 in proceedings against William Joseph Black. Judge Bradley ordered the Crown to disclose the calibration records held by the EPS for an approved screening device which was used in the investigation leading to charges against Mr. Black. He ordered the Crown to disclose those records for the three months preceding and the two months following the date of the alleged offence, May 8, 2008.

The Decision Under Review

[2] Mr. Black is charged with impaired operation of a motor vehicle contrary to s. 253(1)(a) of the *Criminal Code* and with driving "over .08" contrary to s. 253(1)(b) of the *Criminal Code*. I understand that on May 8, 2008 an Edmonton Police Service officer demanded a sample of Mr. Black's breath for analysis pursuant to s. 254(3)(a)(i) of the *Criminal Code*, that Mr. Black complied with the demand and that as a result of the analysis of the sample of breath Mr. Black provided, the charges were laid.

[3] Pursuant to s. 254(3), before a peace officer can demand a breath sample for analysis under that subsection, he must have reasonable grounds to believe that the person of whom the demand will be made, is committing, or in the preceding three hours has committed, an offence under s. 253 (impaired driving or driving "over .08") as a result of the consumption of alcohol. I understand the Crown's position to be that in this case, the peace officer acquired those reasonable grounds through the operation of s. 253(2).

[4] Under s. 253(2), when a peace officer has reasonable grounds to suspect that a person has alcohol in their body and that the person has operated a motor vehicle within the preceding three hours, the officer may require the person to provide a breath sample for analysis in an "approved screening device". In this case, the peace officer, for reasons not mentioned in the record before me, suspected that Mr. Black had alcohol in his body and that he had been driving a motor vehicle in the preceding three hours. The officer required Mr. Black to provide a breath sample for analysis in an Intoxilyser 400D, which is an approved screening device. The results of the analysis indicated to the officer that Mr. Black had a blood alcohol level exceeding .08. The Crown's position is that the officer therefore had reasonable grounds to believe that Mr. Black had committed an offence under s. 253 and to justify his demand that Mr. Black provide a breath sample for analysis under s. 254(3)(a)(i). That second analysis was, I assume, performed using an "approved instrument" the report of which, assuming compliance with *Code* requirements, will be admissible in evidence at Mr. Black's trial.

[5] The EPS policy is that an Intoxilyser 400D should not be used unless it has been calibrated within the previous 14 days. There were stickers on the Intoxilyser 400D used in Mr. Black's case indicating that it had been inspected and certified on May 2, 2008, that it had been calibrated on the same day, that its expiry date was May 16, 2008, and that it should not be used if expired. The stickers were initialled by the officer who inspected and calibrated the device. Copies of the stickers on the device were disclosed by the Crown to Mr. Black's counsel.

[6] Mr. Black's counsel advised Judge Bradley that in his experience dealing with similar charges laid by the RCMP, the police keep a calibration log on which further particulars of the calibration operation are recorded. He advised Judge Bradley that this log is routinely disclosed when the prosecution results from an RCMP investigation.

[7] The information recorded on the calibration log includes the serial number of the device, the date of the calibration, the identification of the alcohol standard used in the calibration process (its manufacturer, lot number, and expiry date), and the readings obtained in the calibration tests. The materials before me (which, without objection from any counsel, included affidavits and other evidence not before Judge Bradley, and so not formally part of the record being judicially reviewed) indicate that in the calibration process the device is deemed to be operating properly if in each of two consecutive tests it reports a result within a range of 95 to 105. If the initial test result is not in that range, the device will be adjusted so that it produces at least two consecutive results in the range, at which point it will be certified as working properly. A sample calibration log for a different Intoxilyser 400D (that is, not the one used in Mr. Black's

case) produced in the evidence before me also showed the date of the annual maintenance of the device to which it pertained.

[8] Before Judge Bradley, Mr. Ziv argued that the existence of the calibration log he seeks is certain, that it contains information relevant to the case, and that Crown is therefore obliged to produce it. The log contains the information from which the certification on the sticker which has been disclosed is based. It is the best evidence of that which the Crown concedes (since it already automatically discloses it) is disclosable by the Crown. If the conclusion drawn from a record (that the device is serviceable) is disclosable, then the record itself must also be disclosable.

[9] The Crown argued that the only issue to which the operational status of the approved screening device is relevant is whether or not the peace officer, in using the device, would have obtained reasonable grounds for demanding a breath sample. The existence of reasonable grounds depends on the officer subjectively believing that the device is reliable and on that belief being objectively reasonable. It was obviously objectively reasonable for the peace officer to rely on the sticker information that the device was working properly. The officer obtained his reasonable suspicion without reference to the calibration log. The calibration log is therefore not relevant to any issue in the prosecution. He cited ***R. v. Scurr*** [2008] 8 W.W.R. 546 (Alta. Q.B.) in support of this reasoning.

[10] Mr. Ziv argued in response that it would not be objectively reasonable for the peace officer to have relied on the device if the calibration log showed that the device required frequent adjustment when calibrated, or that it required adjustment at the time of the calibration immediately following its use in Mr. Black's case. This reasoning is similar to that adopted by Foster J. in ***R. v. Schram*** (2003) 362 A.R. 42 (Alta. Q.B.) and by Sirrs J. in ***R. v. Caruth*** (2004) 360 A.R. 246 (Alta. Q.B.).

[11] Before Judge Bradley, both counsel referred to several cases relating to the question of whether a record held by the police, assuming relevance, is a "first party document" and therefore automatically disclosable by the Crown or whether it is a "third party document" so that the accused must seek disclosure from the police in an ***O'Connor*** application . The Supreme Court of Canada decision in ***R. v. McNeil*** [2009] 1 S.C.R. 66 was central to counsel's submissions. It was noted in argument before Judge Bradley that where the document is a first party document, the Crown must show it is clearly not relevant to avoid having to disclose it. Where it is a third party document, the accused must show it is relevant to obtain production by the third party.

[12] Judge Bradley granted the order sought by Mr. Ziv. In his reasons, he noted the following points made by the Supreme Court of Canada in ***McNeil***:

- The police have an obligation to disclose to the Crown all material pertaining to the police investigation of the accused. In fulfilling that obligation, though distinct and independent from the Crown, the police act on a first party footing, not a third party footing. (***McNeil,*** para. 14)

- The first party production obligation extends to any information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence. (***McNeil***, para. 17)

- The Crown has an obligation to seek out and obtain relevant information from the police. (***McNeil***, para. 48)

[13] As Judge Bradley saw it, the issue before him was not as to the relevance of the calibration information for the period preceding the use of the device in Mr. Black's case. Three Ontario decisions, ***R. v. Gubins*** [2009] O.J. No. 848, ***R. v. Pfaller*** [2009] O.J. No. 1999, and ***R. v. Robertson*** [2009] O.J. No. 3483 clearly established the relevance of that information. Rather, the real issue before him, as he saw it, was whether the information relating to calibration after the use of the device to test Mr. Black's breath, was relevant.

[14] He concluded:

> The question to be determined here today by this Court is the relevance of documentation concerning testing subsequent to the testing of the defendant. And this judge finds that testing could well be very relevant, depending to some extent on what information is disclosed in regard to the equipment up to the testing of the defendant.
>
> This Court is satisfied that the application is a first-party application and that the defendant is not required to make an ***O'Connor*** application.
>
> This Court is also satisfied that the testing information concerning prior tests is relevant and that the information subsequent could be relevant, and both should be provided, and the Court so orders.

Scope of Review - Application of the Chief of Police

[15] In ***Dagenais v. C.B.C.*** [1994] 3 S.C.R. 835 (para. 38) the Supreme Court of Canada held that a non-party directly affected by a publication ban made by a provincial court judge can seek *certiorari* not only where the provincial court has acted in excess of its statutory jurisdiction or in breach of the principles of natural justice, but also where there is an error of law apparent on the face of the provincial court record. As a stranger to the proceeding such an applicant would have no right of appeal. In ***A. (L.L.) v. B. (A.)*** [1995] 4 S.C.R. 536 (para. 24) the Supreme Court noted that the procedures outlined in ***Dagenais*** with regard to publication bans apply generally to other court orders related to criminal proceedings.

[16] By contrast, a party to criminal proceedings in the provincial court can only seek *certiorari* for acts in excess of jurisdiction or in breach of the principles of natural justice: ***R. v. Russell*** [2001] 2 S.C.R. 804 at para. 19. For interlocutory errors of law made in the provincial court they must await conclusion of the trial and seek a remedy through the normal appeal process.

[17] I will assume, without deciding, that it is appropriate to consider the Chief of Police a stranger to the provincial court criminal proceedings in which Judge Bradley made his order. My doubt arises from ***R. v. Ferguson*** [2009] O.J. No. 5027 where Hambly J. held that counsel for the accused was not a third party distinct from his client in provincial court criminal proceedings and was therefore not entitled to seek *Dagenais certiorari*. By analogy, it might be argued that the police who conduct the investigation and provide the evidence are not a third party sufficiently distinct from the Crown which conducts the prosecution, to justify granting them access to the special procedure outlined in ***Dagenais.***

[18] There is also uncertainty in the authorities as to the standard of review to be applied in a *Dagenais certiorari.* In ***R. v. Toronto Star Newspapers*** (2003) 67 O. R. (3d) 577 (Ont. C.A.) Doherty J.A. said: (para. 12)

> Usually, relief by way of *certiorari* is available only where jurisdictional error is established. In *Canadian Broadcasting Corp. v. Dagenais*, [1994] 3 S.C.R. 835, at pp. 864-65, the court accepted that where *certiorari* was brought to challenge a non-publication order, the Superior Court could intervene if the non-publication order limited Canadian Charter of Rights and Freedoms rights in an unjustifiable or unauthorized way. Counsel agree *Dagenais* has application to this case, which involves a sealing order as opposed to a non-publication order. Counsel also agree that *Dagenais* permits intervention by way of prerogative writ for errors that are not jurisdictional in the strict sense. Counsel disagree, however, as to how far *Dagenais* departs from jurisdictional error as a precondition to intervention by way of *certiorari*. The Crown submits that the *Dagenais* standard is met only if the decision under attack is one that no judicial officer acting reasonably could have made. Mr. Schabas, for the respondents, submits that *Dagenais* introduces a correctness standard of review.
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> I need not attempt to resolve this controversy. ...

The appeal from the decision of the Ontario Court of Appeal to the Supreme Court of Canada was dismissed without reference to this point: [2005] 2 S.C.R. 188.

[19] Given my conclusions below, it is likewise not necessary for me to attempt to determine this issue, which, in any event, was not addressed by counsel before me.

Scope of Review - The Application of the Crown

[20] As noted, the scope of the Crown's application for *certiorari* is restricted. *Certiorari* can only be granted if Judge Bradley acted outside his statutory jurisdiction or acted in breach of the principles of natural justice. The Crown submitted Judge Bradley exceeded his jurisdiction in three ways:

1. by granting the order when the Charter Notice provided to the Crown by defence counsel was inadequate,

2. by granting the order when there was no evidentiary basis to support it,

3. by granting the order contrary to authority which bound him.

R. v. McNeil - Disclosure of Relevant Police Records which are not Fruits of the Investigation

[21] In ***R. v. Stinchcombe*** [1991] 3 S.C.R. 326 the Supreme Court of Canada settled the general principles which apply to disclosure by the Crown in criminal cases. The central principle is simple. The Crown has a legal duty to disclose all relevant information. All relevant information includes information favourable to the prosecution and information favourable to the accused. Writing for the Court, Sopinka J. anticipated that many details with respect to the application of the general principle would need to be worked out in the context of concrete situations (para. 25). He expressed confidence, however, that disputes over disclosure would arise infrequently "when it is made clear that counsel for the Crown is under a general duty to disclose all relevant information". (para. 23).

[22] Almost 20 years later, there remains at least one context where disputes regarding disclosure arise with some frequency. This is where the police who conduct an investigation leading to a prosecution have (or are believed by the accused to have) information relevant to the case which was not gathered through the investigation – relevant information which exists independently of the specific investigation.

[23] Last year, in ***McNeil,*** the Supreme Court provided helpful guidance for the resolution of this type of dispute. After reviewing the established procedure firstly for ***Stinchcombe*** or "first party" disclosure and then secondly for ***O'Connor*** or "third party" disclosure, Charron J., writing for the Court, addressed the "gap" that exists between these two procedures and the bridging of that gap when the information in question is in the possession of the police.

[24] She said: (para. 47)

> As the preceding discussion makes clear, once the true relevance of the targeted records has been ascertained on an ***O'Connor*** application for production of third party records, the ultimate question of production is essentially governed by the same principles that apply to the disclosure of material in the possession of the Crown under ***Stinchcombe***. To the accused, however, the distinction between these two regimes is significant. While the accused will receive automatic disclosure of relevant material that finds its way into the hands of the prosecuting Crown, accessing relevant material in the hands of third parties will often be more happenstance. To a certain extent, that is inevitable. Third parties are under no obligation to come forth with relevant information to assist the accused in his defence. ***However, the prosecuting Crown and the investigating police force are in a different position and can assist in bridging the gap between first party***

> ***disclosure and third party production***. I will deal firstly with the Crown. (*my emphasis*)

[25] She then observed that the Crown is not simply a passive recipient of relevant information. It has a duty to seek out and obtain relevant material when the accused identifies such material and requests disclosure of it. She said: (beginning at para. 49)

> The Crown is not an ordinary litigant. As a minister of justice, the Crown's undivided loyalty is to the proper administration of justice. As such, Crown counsel who is put on notice of the existence of relevant information cannot simply disregard the matter. Unless the notice appears unfounded, Crown counsel will not be able to fully assess the merits of the case and fulfill its duty as an officer of the court without inquiring further and obtaining the information if it is reasonably feasible to do so. Ryan J.A. in *R. v. Arsenault* (1994), 153 N.B.R. (2d) 81 (C.A.), aptly described the Crown's obligation to make reasonable inquiries of other Crown agencies or departments. He stated as follows:
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> > When disclosure is demanded or requested, Crown counsel have a duty to make reasonable inquiries of other Crown agencies or departments that could reasonably be considered to be in possession of evidence. Counsel cannot be excused for any failure to make reasonable inquiries when to the knowledge of the prosecutor or the police there has been another Crown agency involved in the investigation. Relevancy cannot be left to be determined by the uninitiated. If Crown counsel is denied access to another agency's file, then this should be disclosed to the defence so that the defence may pursue whatever course is deemed to be in the best interests of the accused. This also applies to cases where the accused or defendant, as the case may be, is unrepresented .... [para. 15]
>
> The same duty to inquire applies when the Crown is informed of ***potentially relevant evidence*** pertaining to the credibility or reliability of the witnesses in a case. ... (*my emphasis*)

[26] As to the duty of the police in this context, Charron J.'s observations addressed the specific context of the case before the court where the issue was as to the disclosure of disciplinary records relating to an officer involved in the investigation of the accused. She said: (para. 53)

> While the obligation itself [the obligation to disclose all material pertaining to the investigation of the accused to the Crown] is firmly established, ***the difficulty lies in identifying the contours of relevance*** for the purposes of the police's first party disclosure obligation. The particular question that this case exemplifies is whether information of misconduct by a police officer involved in the case against the

> accused should form part of the first party disclosure package provided to the Crown for its assessment of relevance according to the edicts of ***Stinchcombe***. Obviously, the accused has no right to automatic disclosure of every aspect of a police officer's employment history, or to police disciplinary matters with no realistic bearing on the case against him or her. However, ***where the disciplinary information is relevant***, it should form part of the first party disclosure package, and its discovery should not be left to happenstance.

[27] To summarize, in ***McNeil*** the Supreme Court held that information held by the police which is relevant to the issues in a criminal prosecution, though it is not "fruits of the investigation", should nevertheless be provided by the police to the Crown when requested by the Crown as a result of it having been requested by the accused, and should be disclosed by the Crown to the accused. This is an aspect of the "first party" disclosure obligation of the Crown and the police. It is not necessary for the accused to invoke the ***O'Connor*** process to obtain such disclosure.

[28] The obligations of both the Crown and the police in this context of bridging the gap between first and third party disclosure rests solely on the relevance of the information sought. Because the information is relevant the Crown must seek it out and the police must produce it to the Crown despite the fact that it is not accurately characterized as "fruits of the investigation". Therefore where there is a dispute as to whether the situation is one in which the Crown and police have these gap bridging obligations, the resolution of that dispute will depend on a determination of the relevance or potential relevance of the information. There is no suggestion in ***McNeil*** that this must be done in the context of an ***O'Connor*** application. Indeed the very idea that the gap between ***Stinchcombe*** and ***O'Connor*** is bridgeable indicates that an ***O'Connor*** application is not necessary.

[29] Judge Bradley therefore addressed the right question and proceeded properly in determining whether the information sought by Mr. Black, the calibration records, was relevant. As noted, he concluded that it was and ordered its production.

[30] Counsel for the Chief of Police submitted that he was in error in so deciding. Counsel for the Crown submitted that in so deciding he acted outside his jurisdiction because, she submitted, he failed to follow decisions of this court which were binding on him, in particular ***R. v. Scurr*** [2008] 8 W.W.R. 546, ***R. v. Keirsted*** 2004 ABQB 491 and ***R. v. Coopsammy*** (2008) 445 A.R. 160.

[31] In my view neither submission has merit.

[32] All three of these cases referred to were decided before ***McNeil***. None of them recognized that the police, though a third party, are in the special position which gives rise to an obligation to produce relevant documents outside the fruits of the investigation as discussed in ***McNeil***. None of them required Judge Bradley to hold, as a matter of *stare decisis,* that the records in question before him were not relevant.

[33] In ***Keirsted,*** Clackson J. held (at para. 10) that the question was not whether the breathalyser test records the accused sought were relevant. He said, "It is the purpose for which it [the record] was made and the circumstances in which it was made or obtained that will determine whether the record can be said to be sufficiently related to be producible pursuant to ***Stinchcombe***." He held that the test records there sought were not sufficiently related to the investigation or prosecution. He held that the proper procedure for the accused to follow was that set out in ***O'Connor***. In my view by the time of Judge Bradley's decision, ***Keirsted*** had been overtaken by ***McNeil***. ***Keirsted*** did not therefore bind Judge Bradley.

[34] In ***Coopsammy*** Thomas J. on appeal upheld the decision of a provincial court judge that an ***O'Connor*** application was necessary in order to compel production of certain records relating to a breathalyser. Further he upheld the provincial court judge's decision that the evidence adduced in the ***O'Connor*** application failed to demonstrate the likely relevance of the records sought in the case before the court. The latter holding did not determine, as a matter of law, that records relating to the integrity of an alcohol screening device are not relevant in a prosecution. It was a determination as to the quality of the evidence before the court in the particular case. It did not bind Judge Bradley.

[35] In ***Scurr***, the relevance of the calibration log information for at least the calibration immediately preceding the use of the device on the accused was not disputed. Indeed that calibration record had been disclosed to the accused. Its relevance was admitted. Belzil J. observed (para. 65) that, "This calibration record has cogent evidentiary value in determining whether the investigating police officer could reasonably use the ASD when interacting with this accused."

[36] The point in dispute was whether the Crown could be required to produce the calibration records for calibration operations performed after the use of the ASD on the accused. Belzil J. held these were not producible as first party records. He said: (beginning at para. 66)

> At the time the ASD is used, the investigating police officer could not possibly know what a subsequent calibration check of the ASD would reveal. Accordingly, a subsequent calibration check of the ASD can have no probative value in the trial in determining whether the investigating police officer acted reasonably in using the ASD.
>
> A subsequent calibration of the ASD within the 15-day period prescribed by the ATC would relate to future use of the ASD only regarding future investigations unrelated to the charges before the Court.
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> Accordingly, production of the post investigation calibration record would not assist the accused to meet the Crown's case, advance a defence or in making a decision which may affect the conduct of the defence.

[37] Belzil J. held that the disputed calibration record was therefore not subject to ***Stinchcombe*** disclosure. He declared that whether or not the record should be disclosed should be determined according to the ***O'Connor*** procedure.

[38] Though Belzil J. appears to have considered the relevance of the record in question, he must not have intended it to be taken has having finally decided relevance, otherwise there would be no point in the accused proceeding to an ***O'Connor*** application. The decision cannot be taken as establishing as a matter of law that records of the particulars of calibration operations performed after use of the ASD on the accused have no relevance. It did not therefore bind Judge Bradley.

[39] Before Judge Bradley, counsel for Mr. Black submitted that the record of calibrations performed after the use of the ASD on Mr. Black were relevant to the operational integrity of the device which, in turn, was relevant to the objective reasonableness of the police officer's reliance on the device to provide reasonable grounds upon which to found a demand for a breath sample for analysis using an approved instrument. He observed, for example, that if the records showed that the device was in need of frequent adjustment to bring its readings within the accuracy tolerance, reasonable doubt as to the operational integrity of the device might arise. Judge Bradley accepted this observation as sufficient demonstration of the potential relevance of the records.

[40] In my view, he committed no error in so concluding. His conclusion is logical. Relevance was demonstrated to the standard sufficient to justify Judge Bradley's order.

[41] I therefore dismiss the application of the Chief of Police.

[42] As to the Crown's application, on the same analysis, I conclude that Judge Bradley did not exceed his jurisdiction by failing to follow binding Queen's Bench authority. As explained, in my view, none of the cases referred to by the Crown bound Judge Bradley.

[43] I also dismiss the remaining two submissions made by the Crown that Judge Bradley acted in excess of jurisdiction. Neither, in my view, has merit.

[44] Crown counsel before Judge Bradley raised no concern regarding the adequacy of the notice given by Mr. Black of the Charter application he sought to make. There is no indication on the record that Crown counsel before Judge Bradley did not fully appreciate the issues that were to be addressed prior to the commencement of the application. At one point he mentioned that he did not have prior notice of some of the authorities to which counsel for Mr. Black referred, but he did not ask for an adjournment.

[45] Neither did Crown counsel before Judge Bradley raise any concern regarding the form by which Mr. Ziv sought to demonstrate the relevance of the record of which he sought disclosure. The Crown did not submit before Judge Bradley that relevance could only be demonstrated through evidence. In my view it was within Judge Bradley's jurisdiction to permit relevance to be demonstrated by argument and logic rather than by evidence.

[46] I therefore also dismiss the Crown's application.

Heard on the 22nd day of June 2010.
Dated at the City of Edmonton, Alberta this 8th day of July 2010.

Brian R. Burrows
J.C.Q.B.A.

Appearances:

Chantelle Washenfelder
for the Crown

J. Mark Raven-Jackson
for the Chief of Police

Y. Rory Ziv
for the Accused