Case Name:

R. v. McLean

Between
Her Majesty the Queen, and
Brent Gordon McLean, Accused

[2012] A.J. No. 1339

Action No. 081195513P1

Alberta Provincial Court

S.R. Creagh Prov. Ct. J.

November 22, 2012.

(73 paras.)

Counsel:

P.D. Davies, for the Crown.

S.K.C. Prithipaul, (Agent for R. **Ziv)**, for the Accused.

Reasons for Decision

1 **S.R. CREAGH PROV. CT. J.**:-- On July 21st, 2008, a vehicle operated by the accused crashed into a tree. The police attended the collision scene and took the accused to a police station where he provided two samples of his breath. The accused was then released on a promise to appear in court on September 29th, 2008. The accused eventually retained counsel, who wrote to the Crown seeking the usual disclosure.

2 Sometime later, counsel for the accused requested disclosure of the security video of the police station that would have been made while was the accused was at the station to provide the breath samples. After some initial confusion, the Crown was able to advise the defence counsel that security cameras were in operation at the station that night, but, as was provided by the EPS policy then in force, any images or data captured by the security system were kept for only 7 days. Thereafter they were either destroyed or overwritten. In other words, the information captured by the security system no longer exists and is not available for the disclosure.

3 The accused now brings an application for a stay of proceedings because this information is lost. This is an interim ruling on that motion. The full motion is set to be heard with the trial on a date to be set. The issue I address today is the

likely relevance of any information or data captured by the security system that day. This question is fundamental to the application for the stay because if the information sought does not make the test of likely relevance, it is not subject to disclosure, and its loss cannot give rise to a remedy.

4 Defence counsel argues that whatever data or images existed were likely relevant -- excuse me, were likely relevant to two issues on the trial. The first concerns the observed symptoms of alcohol consumption displayed by the accused. The defence argues that the video could show gross symptoms of impairment such as whether the accused was unsteady on his feet, whether he staggered as he walked, and general balance issues. Secondly, he says, that the images could show whether the machine used to test the breath was operating properly and whether the tests themselves were properly conducted. Defence counsel argues that this latter information is particularly important in light of the 2008 amendments to the Criminal Code concerning the defence of evidence to the contrary as recently interpreted by the Supreme Court of Canada.

5 In very broad strokes, the following principles apply in determining what material is subject to disclosure. The test to be used when determining whether information is to be disclosed is whether the information is likely relevant to an issue in the case, see the R. v. Stinchcombe, [1991] 3 S.C.R. 326, and R. v. O'Connor, [1995] 4 S.C.R. 411.

6 And I will just pause here to note that I am not going to read citations. If someone wants citations, I will send them along later.

7 As noted in R. v. Chaplin, [1995] 1 S.C.R. 727, relevance of information is to be determined in light of its use by the defence and whether there is a reasonable possibility that it will aid an accused in making full answer and defence. While the Crown need not disclose material that is not relevant, it must err on the side of caution when determining likely relevance. And finally, for completeness sake, although I believe it is not relevant in this case, the decision to disclose is subject always to any considerations of privilege. So that concludes my summary of the broad-stroke general principles to apply.

8 In analyzing the question for the purposes of this case, I begin by noting that the disclosure of security video, such as the video maintained by convenience stores and other commercial enterprises, has become routine and can be very useful to both the Crown and the defence in presenting their cases. Whether police station security video meets these criteria has been the subject of some discussion in the case law. For the purpose of my ruling today, I will focus on only two decisions, R. v. Dulude, [2004] O.J. No. 3576, and R. v. Henry (phonetic), which is a decision of Mr. Justice Hillier of the Court of Queen's Bench of Alberta delivered April 19th, 2012.

9 In Dulude, while the Ontario Court of Appeal noted that, quote, the relevance threshold is very -- excuse me. The Ontario Court of Appeal -- pardon me. I am just turning myself around. Let me start that again. In Dulude, while the Ontario Court of Appeal noted that the relevance threshold is very low and refers to the case of McQuaid, [1998] 1 S.C.R. 285, for that principle, Justice Cory notes that, in McQuaid, that disclosure may include material which has only marginal value to the ultimate issues on the trial. The Ontario Court of Appeal then upheld the ruling of the trial judge that a police station video met this standard where the issue -- where the charge at issue was a failure or a refusal to provide a breath sample.

10 R. v. Henry is a summary conviction appeal from a decision of my colleague Judge Walter. That case concerned issues roughly similar to this one, whether the video was relevant and what the remedy for failure to preserve the material would be. My colleague concluded that the video was not relevant and declined to give a remedy for the failure to preserve the material. In the course of his reasons on the point, Justice Hillier reviewed a series of cases from both Ontario and British Columbia which appeared to focus on the consequence of routine failure to preserve the video in the face of judicial orders for disclosure of the videos. As Justice Hillier notes, and I quote: (as read)

> The dynamic in this jurisdiction appears to be vastly different, at least up to the present time.

11 Closed quote. And Justice Hillier upheld my colleague's assessment of the likely relevance of the video. He noted

that the proposed relevance of the video, that is to cross-examine the officers on symptoms of impairment such as staggering, did not arise in this case because the officers who had testified specifically testified that they did not rely on observations of staggering as an indicia of impairment.

12 Unlike my colleague, I have no such evidence before me. I am proceeding only on the basis that the video was made, and since the information it contained was destroyed before it could be viewed by counsel, I have no idea what is on it. Given the facts in this case, I conclude that the information on the security video would likely be relevant to the issues in the case. Therefore, were it still in existence, I would order the Crown to obtain it from the Edmonton Police Service for the purpose of disclosure, but as noted, that is not possible because in accordance with the policy of the day, the information on the system has been destroyed.

13 I now adjourn the rest of this application to the trial date. As discussed in the R. v. Dulude, the proper time to consider the other questions that arise in this application is at the conclusion of the trial when I will have the full record to assist in my assessment of the degree of prejudice, if any, caused by the failure to preserve this material. See also R. v. Bero, [2000] O.J. No. 4199, as authority for that latter proposition.

14 So to sum up, the only question I was asked to determine today was whether the video would be disclosable. I hold that it meets the low threshold test of likely relevance, and it is disclosable material. Thank you.

15 MS. PRITHIPAUL: Thank you, Your Honour. I will transmit that to Mr. Ziv's office, although --

16 THE COURT: Thank you.

17 MS. PRITHIPAUL: -- I think someone is here who caught most of the last part.

18 THE COURT: All right. And what --

19 MS. DAVIES: Are you Mr. Ziv's agent?

20 UNIDENTIFIED COUNSEL: Yes. I am his agent.

21 THE COURT: All right.

22 MS. DAVIES: Are you able to set a date for continuation today?

23 UNIDENTIFIED COUNSEL: I can contact Mr. Ziv's assistant right now and see if we can work out a date.

24 THE COURT: What is your pleasure?

25 MS. DAVIES: It is easier to do with somebody here, absolutely. Then --

26 THE COURT: All right. Go ahead then.

27 MS. DAVIES: -- I will go down and attend the trial coordinator's --

28 THE COURT: All right.

29 MS. DAVIES: -- with --

30 MS. PRITHIPAUL: And, Your Honour, if we could perhaps just adjourn our matter for a few minutes. At least I could talk to Mr. Ziv's agent, give him my notes --

31 THE COURT: Thank you.

32 MS. PRITHIPAUL: -- and he can take that back to his office.

33 THE COURT: All right. Well, we will be returning -- once Ms. Prithipaul has finished that, we will be returning to the preliminary inquiry. So you may be sitting for a bit while we find an appropriate break in the preliminary inquiry to set the date once you come back.

34 MS. PRITHIPAUL: Thank you.

35 MS. DAVIES: I still think it's a better way than doing it without a --

36 THE COURT: I defer to your expertise on that.

37 MS. DAVIES: Okay.

38 THE COURT: And I will just be out back.

39 MS. PRITHIPAUL: Thank you.

(ADJOURNMENT)

(OTHER MATTERS SPOKEN TO)

40 THE COURT: You have a date?

41 MS. DAVIES: I do.

42 THE COURT: What is the date?

43 MS. DAVIES: Your Honour, on January -- returning to the McLean matter. On January 11th at 1:00, we have one case management in courtroom 353 and then we have two dates -- 2 days for continuation, September 5th and 6th.

44 THE COURT: Did you say September?

45 MS. DAVIES: Yes. Yes, Your Honour. I did.

46 THE COURT: September. Well, okay.

47 MS. DAVIES: And if madam clerk could endorse it, you are seized. Otherwise, it will create a glitch in the system.

48 THE COURT: All right. Thank you. That is September 5 and 6?

49 MS. DAVIES: Yes, Your Honour.

50 THE COURT: All right.

51 MS. DAVIES: Did my friend provide a copy for the Court?

52 UNIDENTIFIED COUNSEL: I did.

53 MS. DAVIES: Thank you.

54 THE COURT: All right. Thank you. And please note, madam clerk, that I am seized with the matter.

55 THE COURT CLERK: I will, Your Honour.

56 THE COURT: All right.

57 MS. DAVIES: Thank you.

58 THE COURT: And the case conference for the 11th of January in courtroom 353, will that be -- do you want it before me or do you want it before another judge?

59 MS. DAVIES: I don't mind either way. Whatever is to the Court's convenience.

60 THE COURT: Do you have any instructions?

61 UNIDENTIFIED COUNSEL: I don't, Your Honour.

62 THE COURT: All right. You can tell Mr. Ziv I would not be offended if he does not want me to do it -- I do not offend that easily, really -- and if he could please just communicate in writing with the Crown and myself as to his preference. And if he is content, then I will deal with the case management conference myself at that time; and if he wants a new -- a different judge to do that management function, I will find one.

63 MS. DAVIES: Yes. And the Crown has no preference. I do not mind. I just want to make sure we are on the same page, and we know --

64 THE COURT: Yes.

65 MS. DAVIES: -- and what is going to happen.

66 THE COURT: I would prefer to do it myself, but I would like to leave that option for the defence. Thank you.

67 MS. DAVIES: Yes. Thank you.

68 THE COURT: All right. We will see you then. Thank you.

69 UNIDENTIFIED COUNSEL: Thank you, Your Honour.

70 MS. DAVIES: And I'm thanking my friend.

71 THE COURT: Yes, sir.

72 UNIDENTIFIED COUNSEL: I apologize for being late. I was stuck in Mayerthorpe.

73 THE COURT: Okay. Thank you.

qp/s/qlcct/qllmr/qlced/qlltl