

CANADA / JUDGMENT

R. v. Basi

2006 BCSC 2086

COURT

Supreme Court of British Columbia

DECIDED

14 November 2006

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2006 BCSC 2086 R. v. Basi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Basi

2006 BCSC 2086

Date: 20061114

Docket: 23299

Registry: Vancouver

Regina

v.

Udhe Singh (Dave) Basi, Bobby Singh Virk

and Aneal Basi

Before: The Honourable Madam Justice Bennett

Oral Reasons for Judgment

In Chambers

November 14, 2006

Counsel for the Crown

W.S. Berardino, Q.C.

& A.N. MacKay

Counsel for the Accused, Dave Basi

P.M. Bolton, Q.C.

& C. Hatcher

Counsel for the Accused, Virk

K.G. McCullough

Counsel for the Accused, Aneal Basi

J. Doyle

Place of Hearing:

Vancouver, B.C.

- [1] THE COURT: This case involves allegations of corruption regarding former ministerial assistants of the provincial government. Other than what is apparent from the indictment and the informations to obtain wiretap authorizations, I do not know the details of any of the allegations and therefore will not be setting out a factual context with respect to the offences themselves.
- [2] The defence brings an application which relates to the mechanics of disclosure in this case. The defence is not alleging a breach of their constitutional rights at this point. The purpose of the application, in part, is to avoid the necessity of bringing an application alleging a violation of the accuseds' rights to make full answer and defence.
- [3] The defence says that, in spite of receiving voluminous disclosure, it cannot be said with certainty that they have everything that they are entitled to in order to make full answer and defence. The defence wish to be permitted into the RCMP "Project Room" where the documents are being held while the Crown and police perform a review of the documents to confirm that the defence have what they require. If this is not granted, then the defence seeks an inventory of all of the documents in the Project Room with proper descriptions, and a confirmation that these documents appear on either the list of documents disclosed or the list of documents not disclosed where privilege is claimed or relevance is disclaimed.
- [4] The Crown objects to the attendance of defence counsel in the Project Room primarily on the basis of security. No evidence was filed in relation to the security of the Project Room other than the fact that the original documents are not vetted. I add that all counsel in this case are using the word "vet" to describe the process of editing.
- [5] The Crown says it will attend the Project Room and review every document to ensure that the documents have been disclosed or appear on a list of documents that they are not disclosing.
- [6] Defence counsel also seek to cross-examine Constable Ma and Corporal Mar on the application. Constable Ma and Corporal Mar were the officers primarily responsible for disclosure. Corporal Mar has filed an affidavit in this application.

- [7] In order to understand the context of the request, it is necessary to examine the history of the disclosure process in this case.
- [8] On December 28, 2003, the police conducted what has been referred to as the "raid" on the Legislature. The police executed search warrants in relation to certain investigations. As a result of the search and other investigative work, the initial investigation evolved into several separate investigations. I will refer to these in a form of shorthand as:
- (1) the drug Investigation;
 - (2) the B.C. Rail investigations, which is this case;
 - (3) the Agricultural Land Reserve (A.L.R.) investigation; and
 - (4) the Proceeds of Crime Investigation (IPOC).
- [9] An information was laid in the B.C. Rail case in December 2004. Requests for disclosure were made by defence immediately. Apparently no disclosure was made when the charges were laid. The defence has characterized this as a "black cloud" that hung over the whole process. I do not find that it was a black cloud, given that it is not unusual that disclosure is not available the instant charges are laid.
- [10] Disclosure commenced on January 20, 2005. A direct Indictment was filed on January 28, 2005, bringing the matter immediately to this Court without a preliminary inquiry in the Provincial Court.
- [11] On March 10, 2005, a day prior to an appearance in this Court, 11,000 documents were disclosed. The disclosure is being provided electronically.
- [12] In the appearance before Associate Chief Justice Dohm on March 11, 2005, the Crown advised the Court that the disclosure was substantially completed and final disclosure would be complete in two to three weeks.
- [13] A trial date was fixed, at the urging of the Associate Chief Justice, for November 28, 2005. It was clear, shortly after that date was fixed, that disclosure was going to be an issue. There was no index for the 11,000 documents which had been produced. The software provided at the time did not have a proper search function. Apparently that issue has now been solved.
- [14] Due to the diligence on the part of defence counsel in reviewing what was disclosed, Mr. McCullough discovered a number of documents missing from the disclosure package. These are listed in the many letters he sent to the Crown outlining his concerns regarding the disclosure process, and reference may be made to documents at tabs 14, 15, 16, 17, 18, 19 and 20.
- [15] The defence is concerned that the Crown is not sufficiently involved in the disclosure process and has left the bulk of the disclosure to the police. This is supported in the affidavit of Corporal Mar wherein she states the procedure she and Constable Ma have followed to conduct disclosure. That is not to say that the Crown has not been actively involved. They

have been. Further, it is not to say that the police should not be actively involved; needless to say, they must be. However, the state of the document disclosure suggests that at least initially the disclosure was being primarily performed by the police.

- [16] Counsel have also received a list of documents that are not disclosed due to claims of privilege or relevance. This list is not very specific in terms of identifying what documents are not being disclosed and the reason why. For example, at tab 24 of the material, there is a list showing the index or inventory that had been provided at that time. It is, to say the least, sparse.
- [17] Returning now to the history of the disclosure process. On September 16, 2005, further disclosure was made. This package included 865 documents comprising of approximately 4,483 pages. This package contained significant documentation which was highly relevant to the defence. The defence complains that there is no explanation why these documents were not disclosed earlier, other than disclosure had to occur in phases due to the volume.
- [18] The trial set for November was adjourned primarily due to the delay in disclosure. I add that this was not unexpected by any of the parties.
- [19] On October 21, 2005, 68,910 more pages were disclosed, which were contained on six CD-ROMs. In December 2005, another 16,066 pages were disclosed to the defence. The documents were scanned into files.
- [20] As a result of reviewing the documents, the defence sought more disclosure. A number of the documents that they subsequently requested had, in fact, already been disclosed but were scanned into the wrong file and the index provided was so vague what was in fact contained in the file could not be ascertained. For example, Mr. Basi's tax records were filed in Mr. Virk's file. A memo relating to Commissioner Zaccardelli was filed under the file called "Operational Plan" and is listed as "correspondence memorandum". The report from Mr. River which is of some importance, was filed under "correspondence" and called a "Report of Findings" with no reference to Mr. River. Another example is the locations of the Speaker's consent to search the legislature. This consent was apparently signed in an airport hangar, however it was wrongly filed under the documents that were seized from Mr. Basi's office and referred to as "correspondence - note". These documents could not be found using the software search function. I am told the keyword search function has since been improved.
- [21] In May, June and July 2006, more disclosure was provided. An additional 10,000 pages were delivered to the defence on CDs or DVD disks. This last disclosure has an index.
- [22] In her affidavit, Corporal Mar states that up until May 2006 she was still requesting notes, reports and documents from officers involved in the investigation. Thus, in spite of the fact that charges were laid in December 2004, she did not depose that she has everything from the investigators, two and one-half years after the warrants were executed.

- [23] Defence counsel submit that because of the manner in which disclosure has occurred, the missing documents, the delayed disclosure without explanation, the improperly filed documents, the lack of a proper search function and the lack of a proper index resulted in countless wasted hours and resources by the defence.
- [24] The defence submits that in light of all that has transpired they cannot be confident that they have all the disclosure unless they do a document-by-document check with the Crown and the RCMP. The defence is concerned that if more material surfaces later they will have to apply for a mistrial or worse, there will be a miscarriage of justice.
- [25] The Crown submits the defence now has everything they need. The search function works on the electronic disclosure. They also have inventories of the material. The Crown acknowledges that the disclosure was ongoing for many months, including many months past the first trial date.
- [26] The Crown says that it will return to the Project Room and review everything one more time. The Crown submits that they have already been through the documents twice. I do not question that this has occurred; however, there have been significant problems with missing documents in spite of the Crown's best efforts.
- [27] The Crown submits that the documents are intermixed with privileged documents and informant information in the Project Room. They say that the credibility of the police system would be fundamentally impaired if counsel were allowed into the room with unvetted material.
- [28] The submission overlooks the position of the defence that they do not, at this point, want to inspect the original documents. They wish only to be present with their extensive lists and check off the documents as the Crown reviews them.
- [29] Further, the Crown submits that the relationship between confidential informants and the RCMP would be impaired if they knew that defence counsel was coming into the building. No evidence was tendered on this point.
- [30] The law is clear, and I will refer to it momentarily, that one of the remedies frequently granted in disclosure applications is to permit the inspection of original documents, often in police headquarters.
- [31] I do not accept the position of the RCMP, without evidence, that their relationship with informants would be impaired if defence counsel entered the building or Project Room.
- [32] The Crown submits that there should be no adverse inference against the Crown because disclosure took as long as it did. The disclosure was massive and all the Crown involved were working diligently to get the material to the defence as quickly as was reasonably possible.

- [33] The Crown has provided me with copies of the inventories or indices which have been prepared. Frankly, I do not find them sufficient. Many of the descriptions of the documents are vague, plus many documents have no description at all.
- [34] The defence complain of the lack of timely disclosure, lack of integrity in the disclosure process, lack of explanation for the delayed disclosure and time wasted because of a lack of a proper search function.
- [35] I accept that the Crown has worked diligently in terms of preparing and issuing disclosure. It is clear that the Crown did not receive many documents from the police in a timely way. This could be attributed to the volume of the documentation involved, the number of separate investigations, the fact various police forces were involved and the fact that it is not only the Provincial Crown but also the Department of Justice involved in the disclosure process. I do not draw any adverse inference against the Crown or the police as a result of the delay in disclosure.
- [36] I also accept the defence position that there have been a number of errors in the disclosure process. The issue is whether defence has shown that they should be permitted to sit with the Crown and police in order to confirm whether they have all the documents. I am not being asked at this juncture for a stay of proceedings or for them to inspect the original documents. The defence are merely seeking to be present when the documents are given a final review to satisfy themselves that they have all the documents which are located in the Project Room that relate to the B.C. Rail case, or at least are aware of documents that are not to be disclosed and the reason why.
- [37] I turn to the jurisprudence to see if the law requires disclosure to this extent. The law on disclosure was recently summarized by LeBel J. in *Taillefer v. Duguay*, 2003 SCC 70 at paragraphs 59 to 61, and I quote from that judgment:

After a period during which the rules governing the Crown's duty to disclose evidence were gradually developed by the provincial appeal courts in recent decades, those rules were clarified and consolidated by this Court in *Stinchcombe*. The rules may be summarized in a few statements. The Crown must disclose all relevant information to the accused, whether inculpatory or exculpatory, subject to the exercise of the Crown's discretion to refuse to disclose information that is privileged or plainly irrelevant. Relevance must be assessed in relation both to the charge itself and to the reasonably possible defences. The relevant information must be disclosed whether or not the Crown intends to introduce it in evidence, before election or plea (p. 343). Moreover, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses (p. 345). This Court has also defined the concept of "relevance" broadly, in *R. v. Egger*, [1993] 2 S.C.R. 451, at p. 467:

One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed -- Stinchcombe, *supra*, at p. 345. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.

As the courts have defined it, the concept of relevance favours the disclosure of evidence. Little information will be exempt from the duty that is imposed on the prosecution to disclose evidence. [page335] As this Court said in Dixon, *supra*, "the threshold requirement for disclosure is set quite low... . The Crown's duty to disclose is therefore triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence" (para. 21; see also R. v. Chaplin, [1995] 1 S.C.R. 727, at paras. 26-27). "While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant" (Stinchcombe, *supra*, at p. 339).

This right is a constitutional one. It is protected by s. 7 of the Charter, and helps to guarantee the accused's ability to exercise the right to make full answer and defence (see R. v. Carosella, [1997] 1 S.C.R. 80, at para. 37; Dixon, *supra*, at para. 22). As Cory J., speaking for this Court, wrote in Dixon, at para. 22:

... where an accused demonstrates a reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence, he has also established the impairment of his Charter right to disclosure. [Emphasis in original.]

[38] In R. v. Chaplin, *supra*, the Court reviewed the standard where the defence suspects that there is information that has not been disclosed at paragraph 30 to 31.

In contrast to the above, in some cases, this being one, the existence of material which is alleged to be relevant is disputed by the Crown. Once the Crown alleges that it has fulfilled its obligation to produce it cannot be required to justify the non-disclosure of material the existence of which it is unaware or denies. Before anything further is required of the Crown, therefore, the defence must establish a basis which could enable the presiding judge to conclude that there is in existence further material which is potentially relevant. Relevance means that there is a reasonable possibility of being useful to the accused in making full answer and defence. The existence of the disputed material must be sufficiently identified not only to reveal its nature but also to enable the presiding judge to determine that it may meet the test with respect to material which the Crown is obliged to produce as set out above in the passages which I have quoted from R. v. Stinchcombe and R. v. Egger, *supra*.

Although the obligation cast upon the defence which I have characterized as "a basis" is in the nature of an evidentiary burden, I prefer not to call it that because it can, and in many cases will, be discharged not by leading or pointing to evidence but by oral submissions of counsel without the necessity of a voir dire. Accordingly, I avoid the terms "air of reality" or "live issue" and other

terms used in some of the cases that are more appropriate when used to describe a true evidentiary burden. Viva voce evidence and a voir dire may, however, be required in situations in which the presiding judge cannot resolve the matter on the basis of the submissions of counsel.

- [39] There have been a number of decisions involving massive disclosure and the problems which have ensued as a result. I add parenthetically that I was told that this was the first electronic disclosure. Perhaps it was for these officers; however, there has been disclosure made electronically for at least 10 years according to the case law on this issue, so I am not sure why many of these problems have not been resolved, such as the simple problem of the lack of a proper search engine.
- [40] In *R. v. Hallstone Products Ltd.* (1999), 46 O.R. (3d) 382, La Forme J., as he then was, dealt with a case involving fraud charges. There were approximately 858,000 pages of material seized pursuant to search warrants. The Crown provided the accused with 4,900 pages of documents in hard copy. The remaining 853,000 pages were provided on 47 CD-ROM discs together with the requisite computer hardware, software program and technical support including training. Further, the Crown offered access to the actual seized documents by way of inspection. The offer for inspection was in the company of the investigators and not a private inspection.
- [41] The issue in *Hallstone* differs from the one before me, as counsel in *Hallstone* sought hard copies of all the documents and that the cost of some \$330,000 for reproduction be borne by the Crown. The offer of inspection was to stave off the request for copies of all of the documents.
- [42] At paragraph 20, La Forme J. outlined the basic principles of disclosure as discussed by Watt J. in *R. v. Blencowe* (1997), 35 O.R. (3d) 536; 118 C.C.C. (3d) 529, (Gen. Div.), and summarized them as follows in the context of massive disclosure:
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.
 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.
 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.

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.
 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 timing and adequacy of Crown disclosure.
- [43] At paragraph 28 of the judgment, La Forme J. identified many problems with the electronic disclosure similar to those which have been raised in the evidence and oral submissions in this case. He concluded that all of the documents had been disclosed, however he found that the inability of the defence counsel to access the documents and the other difficulties associated with the electronic disclosure led him to the conclusion that basic disclosure by the Crown had not been made.
- [44] In some respects, this case has not reached the degree of disclosure that Hallstone had, as unlike La Forme J., I am unable to conclude that all of the documents have either been disclosed or identified to the defence as documents that are being withheld.
- [45] In *R. v. Barges*, [2005] O.J. No. 4137 (Ont. S.C.), Glithero J. had an application relating to the disclosure of multiple documents. The remedy ordered in that case, given the significant problems with the electronic disclosure, was to require the Crown to provide proper indexes of all of the documents to the defence.
- [46] I have outlined the problems of disclosure in this case in terms of delay, electronic problems and missing or mis-filed documents. Given the material provided to me, I have concluded that the defence have demonstrated that they are not on a fishing expedition. There have been many problems in the disclosure process, primarily because of the massive number of documents and the fact that the drug disclosure has required the attention not only of the special prosecutor but also of the Department of Justice.
- [47] This is not to cast aspersions on anyone involved in the disclosure process. I fully appreciate everyone is working very hard and to the best of their ability.
- [48] Once defence counsel pointed out problems they were generally rectified, however it was due to the diligence of defence counsel that many of these problems were identified in the first place.
- [49] I have concluded that the defence have met the test in *Chaplin* regarding the discovery of documents that are unknown. I find at this point it cannot be said that basic disclosure has been met.

- [50] Each case must turn on its own facts. I do not view my finding as setting precedence permitting defence counsel this degree of access to police files in every case. Indeed, it is the special and unusual circumstance in this case which lead me to the conclusion that it is appropriate in this case to permit defence counsel to accompany the Crown and the police to the Project Room to verify the contents of the documents. The defence at this point will not be permitted to review any of the documents but only to be sufficiently advised of the description of them to determine if they have received the document or if the document is on a list of documents not disclosed. The Crown and police still retain the right with respect to the privacy relating to informant privilege or solicitor/client privilege to limit the description of documents. However, the description must be sufficient for the defence to make proper application before the Court for their production.
- [51] Finally, the Crown will also provide better and more complete indexes of the documents that they have disclosed, as well as the documents that appear on the not-disclosed list. I suspect that this could be achieved at the same time that they are reviewing the documents in the Project Room on a document-by-document basis.
- [52] In light of my conclusion, there is no need to cross-examine Constable Ma or Corporal Mar.
- "E. Bennett J."

The Honourable Madam Justice Bennett

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Prepared on 28 October 2026 · Esheria