
CANADA / JUDGMENT

R. v. Belcourt

2011 BCSC 1739

COURT

Supreme Court of British Columbia

DECIDED

16 December 2011

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2011 BCSC 1739 R. v. Belcourt

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Belcourt,

2011 BCSC 1739

Date: 20111216

Docket: 149245-1

Registry: Victoria

Regina

v.

Andrew Jonathon Belcourt and Samuel McGrath

Ban on publication pursuant to s. 648(1) of C.C.C.

Before: The Honourable Mr. Justice Macaulay

Ruling Re Disclosure: No. 1

Counsel for the Crown:

P.A. Juk

Counsel for the Defence:

Andrew Belcourt

T.J. Russell

Counsel for the Defence:

Samuel McGrath

M.J.B. Munro

Place and Date of Hearing:

Victoria, B.C.

December 12 and 13, 2011

Place and Date of Judgment:

Victoria, B.C.

December 16, 2011

[1] The accused, Belcourt and McGrath, are charged with:

1. Second degree murder;
2. Robbery with a firearm; and
3. Break and enter of a dwelling house and commission of robbery.

As part of its disclosure obligation, the Crown delivered to the defence electronic copies of materials collected or created during the course of the police investigation. Before releasing the materials, the Crown redacted parts identified as V1.

[2] According to the Crown, V1 redactions are made pursuant to a province-wide protocol between the Crown and police agencies for all personal information in disclosure packages respecting investigators, other state agents such as crime lab personnel, witnesses, contacts, or even persons referred to in information received by the police. While the Crown sometimes withholds such information to protect the safety of individuals, it is apparent that is not the reason for the redaction in all cases.

[3] Pursuant to the case law respecting disclosure, I am invited to review the exercise by the Crown of its discretion. In particular, the defence seeks consideration of the following issues:

1. Entitlement of the Crown to redact contact information;
2. Whether the Crown is required to provide the defence with other personal information that the Crown says is not relevant; and
3. The conditions, if any, to be imposed on the defence respecting the confidentiality of such contact and other personal information as the court may order to be disclosed.

All counsel agreed that the Crown is entitled to withhold contact information for three individuals, Maxwell Deleeuw, Chantal Young and Patrick Cassels, or any other person in respect of whom the Crown can establish reasonable grounds for concern about their personal safety or security. In light of that, counsel for Belcourt says that there is, otherwise, no need for any conditions to be imposed on the defence as set out in No. 3 above.

- [4] Obviously, if any of the information referred to above discloses, or could reveal, the identity of a confidential informant, the Crown must assert privilege. In such event, the matter of privilege must be addressed independently and the orders that I otherwise propose to make at the conclusion of these reasons will not apply to any such information absent further court order.
- [5] Contact information, for the purpose of this decision, includes names, addresses, phone numbers or email addresses. Other personal information may include birth dates or age, occupation, driver's license, financial or other similar private information. At this point, the defence seeks all contact information subject to the exceptions listed above and the listing, by type, of all other personal information. As I understand it, the only other personal information that the defence actively seeks production of at this time relates to the birth date or age of the individual.
- [6] Apart from potential safety issues, the only other rationale provided by the Crown for withholding V1 contact information is to protect the individual concerned from inappropriate contact. I am not persuaded that a blanket approach to redacting contact information is consistent with the obligation of the Crown under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, and other decisions since, to disclose all relevant information in its possession relating to the investigation against the accused. In saying that, I recognize that the obligation on the Crown is not absolute.
- [7] As Madam Justice Charron stated, for the unanimous court, in *R. v. McNeil*, 2009 SCC 3, at para. 18:
 - 18. While the *Stinchcombe* automatic disclosure obligation is not absolute, it admits of few exceptions. Unless the information is clearly irrelevant, privileged, or its disclosure is otherwise governed by law, the Crown must disclose to the accused all material in its possession. The Crown retains discretion as to the manner and timing of disclosure where the circumstances are such that disclosure in the usual course may result in harm to anyone or prejudice to the public interest. The Crown's exercise of discretion in fulfilling its obligation to disclose is reviewable by a court.

Further, at para. 20:

- 20. Implicit in the Crown's broad duty to disclose the contents of its file under *Stinchcombe* are not the absence of any residual expectation of privacy, but rather the following two assumptions. The first is that the material in possession of the prosecuting Crown is relevant to the accused's case. Otherwise, the Crown would not have obtained possession of it

(O'Connor, at para. 12). The second assumption is that this material will likely comprise the case against the accused. As a result, the accused's interest in obtaining disclosure of all relevant material in the Crown's possession for the purpose of making full answer and defence will, as a general rule, outweigh any residual privacy interest held by third parties in the material. These two assumptions explain why the onus is on the Crown to justify the non-disclosure of any material in its possession.

In the present case, the Crown must justify the non-disclosure of the contact and other personal information sought by the defence.

- [8] As an aside, the Crown did not argue that the redacted contact and other personal information is privileged, although the Crown referred to one decision in which the court held that personal information, the disclosure of which compromises safety, may fall within public interest immunity or privilege (see *R. v. Taylor*, 2010 ONSC 5448, at para. 45).
- [9] Instead, the Crown contended that contact information is clearly irrelevant and that the defence is engaged in an improper fishing expedition. I do not accept that the contact information is clearly irrelevant.
- [10] I trace back at least to *Stinchcombe* the proposition that the Crown must not withhold information that will impair the right of the accused to make full answer and defence (*Stinchcombe*, para. 22). As Charron J. also stated in *McNeil*, at para. 17, the obligation to disclose extends beyond information that the Crown intends to adduce in evidence against the accused 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."
- [11] Previously, in *R. v. Egger*, [1993] 2 S.C.R. 451, Sopinka J., for the court, described the Crown's disclosure obligation as subject to exception, including to withhold information which is clearly irrelevant, but added, at para. 20:
20. 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* 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.

I have no doubt that the defence can reasonably use at least some of the V1 redacted information in the present case.

- [12] Contact information is reasonably capable of assisting the defence in making full answer and defence. Presumably, the police obtain contact information from individuals so that those with a legitimate reason to contact them can do so. The person, whose contact information is redacted and, as a result, only available to the Crown, may or may not be a Crown witness but, in any event, it is for the defence to decide whether to conduct an interview or to subpoena the individual to testify. The defence should not have to ask the

Crown for the specific contact information relating to those whom it chooses to contact.

- [13] Nor should the defence have to disclose to the Crown the list of potential defence witnesses that it seeks to subpoena in order to ascertain where they might be served. It is trite law that there is no property in a witness and, absent considerations of safety, contact information in the possession of the Crown should be provided to the defence.
- [14] I extend the same reasoning to other personal information such as birth date, age or occupation. It is not necessary for me to consider the seeking of more intrusive personal information on this application. I limit my consideration to what might reasonably be considered demographic type personal information.
- [15] All counsel typically consider demographic information in formulating judgments and approaches to determining the reliability of an individual's ability to accurately perceive and recall events. A simple example will illustrate. If the main eyewitness to observe an alleged act of dangerous driving is 97 years old, that information is reasonably capable of assisting the defence and should be disclosed.
- [16] I recognize that the personal information recorded about individuals during a police investigation may extend well beyond that which is reasonably capable of assisting the defence. I do not accept the defence contention that all types of such information must be identified by the Crown similar to identifying the nature of any assertion of privilege. For example, the police may record license plate information, driver's license information, or other personal identifiers of someone. Absent something to suggest that the information is of assistance to the defence in the circumstances of the particular case, for example, as the only means to contact the person, such information is not only private but likely to be clearly irrelevant.
- [17] The Crown's obligation to disclose does not extend to clearly irrelevant personal information. The Crown is not obligated to generically list such information and provide that to the defence. It is unnecessary and a waste of resources for them to do so.
- [18] Counsel for the defence asserted that the obligation is akin to the obligation on the Crown to identify the type of privilege on which it intends to rely. In my view, the circumstances are quite different. When the Crown resists the production of relevant material on the basis of privilege, the Crown provides particulars of the type of privilege to assist opposing counsel and the court in meaningfully addressing the associated legal issues. There is no need nor, in my view, is there any legal requirement that the Crown provide a detailed list of materials that it says are clearly irrelevant. I decline to order the Crown to provide further particulars than it has already done.
- [19] Finally, I address the question of undertakings. Counsel for Belcourt proposed undertakings, based on specific instructions from the client, to apply to the use by the defence of contact or personal information respecting persons that the Crown establishes reasonable grounds for concern about their personal safety. In light of the concession that

the Crown can establish such grounds respecting the individuals referred to earlier, in respect of whom he no longer seeks the information, he maintained that there is no further need for undertakings.

- [20] The Crown submitted that an undertaking is appropriate given the personal nature of the information to be released respecting the individuals in respect of whom there is no concern about their personal safety. According to the Crown, investigators, witnesses and other persons whose names may surface during an investigation requiring disclosure should not have their contact and other personal information broadcast beyond the limited extent necessary for the accused to make full answer and defence.
- [21] I am aware that the Supreme Court of Canada concluded, in *R. v Basi*, 2009 SCC 52, that the trial judge erred in imposing undertakings on defence counsel before permitting them to attend an in camera hearing to determine whether informer privilege was justified. In that instance, however, the procedure adopted contravened the necessity for the court to maintain the privilege, without exception, pending its determination (para. 44).
- [22] The current situation differs. Privilege is not at issue, only the potential harm associated with the improper release of relevant, but private, information respecting third party individuals. I accept that it is open to me to craft an order intended to ameliorate the risk so long as my order does not impede the ability of the accused to make full answer and defence.
- [23] McNeil recognized, at para. 18, that the Crown retains "discretion as to the manner and timing of disclosure where the circumstances are such that disclosure in the usual course may result in harm to anyone or prejudice to the public interest." That discretion is reviewable by the court and it follows, in my view, that the court may also impose conditions respecting the manner of disclosure in such circumstances.
- [24] I find support for this approach in the discussion of the role of the court in making production orders respecting third party records, found at para. 46 of McNeil:
46. Hence, to ensure that only relevant material is produced and that no unwarranted invasion of privacy interests occurs, the court may find it necessary to make a production order subject to redactions or other conditions. In addition, when just and appropriate to do so, the court may well impose restrictions on the dissemination of the information produced for purposes unrelated to the accused's full answer and defence or prosecution of an appeal (Emphasis added.)

That is because the considerations when making a production order for third party records are, with respect to the effect of release, the same as those applicable to Crown disclosure.

- [25] In the result, I make the following orders respecting disclosure by the Crown to the defence in this case:

1. Any names, addresses, phone numbers, email addresses (the "contact information") in the un-redacted disclosure material provided by the police to the Crown in relation to this matter, except in relation to Maxwell Deleeuw, Chantal Young, Patrick Cassels, or any other person in respect of whom the Crown can establish reasonable grounds for concern about their personal safety or security;
 2. Any other personal information, limited to birth date, age or occupation, in the un-redacted disclosure material provided by the police to the Crown in relation to this matter, except in relation to Maxwell Deleeuw, Chantal Young, Patrick Cassels, or any other person in respect of whom the Crown can establish reasonable grounds for concern about their personal safety or security; and
 3. Before receiving the contact and other personal information, counsel for the defence shall undertake to the Crown:
 - (a) Not to disclose the contact information to the accused;
 - (b) Not to copy, reproduce or disclose the contact information in any way, except as specifically provided in this order;
 - (c) Not to copy, reproduce or disclose the contact information to any other person, except other members of the Law Society of British Columbia with whom they are associated in the practice of law or such professional agents or advisers as they may retain to assist them in the defence of this matter and then only after providing those persons with a copy of this order and directing them not to further disclose the contact information; and
 - (d) To use the contact information solely for the purpose of assisting the accused to make full answer and defence to the charges set out in the indictment and for no other purpose.
- [26] I see no need to impose any restrictions on the other personal information that I have directed the Crown to disclose because it does not give rise to similar concerns.

"M.D. Macaulay, J."

The Honourable Mr. Justice Macaulay

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Prepared on 25 October 2026 · Esheria