
CANADA / JUDGMENT

R. v. Malenfant

2014 BCSC 1139

COURT

Supreme Court of British Columbia

DECIDED

20 June 2014

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2014 BCSC 1139 R. v. Malenfant

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Malenfant,

2014 BCSC 1139

Date: 20140620

Docket: 23534

Registry: Nelson

Between:

Regina

v.

Deborah Achleitner, Mathieu Malenfant & Norman Gerald Stainer

Before: The Honourable Madam Justice Humphries

Oral Reasons for Judgment

Counsel for the Federal Crown:

A. Switzer

Counsel for the Accused, Deborah Achleitner:

Counsel for the Accused, Mathieu Malenfant:

Counsel for the Accused, Norman Stainer

J. Cowen

D. Skogstad

D. Skogstad

Agent for B. Suffredine

Place and Date of Hearing:

Nelson, B.C.

June 13, 2014

Place and Date of Judgment:

Nelson, B.C.

June 20, 2014

- [1] The accused are charged with cultivation of marijuana and possession for the purpose of trafficking in marijuana on or about March 2, 2012 near South Slokan, B.C.
- [2] A search warrant was obtained on March 2, 2012 as a result of an Information to Obtain ("ITO") filed with the Justice Center on March 1, 2012. Disclosure of "Appendix A" to the ITO, withheld by the Crown due to informer privilege, was the subject of a prior application for disclosure, along with debriefing notes and E308 forms. That application was dismissed (see 2014 BCSC 169).
- [3] The trial, set for September 29, 2014 for five days, has not yet begun. This is an application for a stay under s. 7 of the Charter, brought by Ms. Achleitner and Mr. Malenfant. Mr. Stainer is not participating in this application.
- [4] The Notice of Application asks that the proceedings be stayed for:
 - (a) Lack of Disclosure, specifically the Appendix "A" of the ITO along with debriefing notes and E308 forms;
 - (b) By virtue of the fact that the Crown has destroyed all samples of alleged narcotic, making it impossible for the Defence to obtain an Order to analyze these samples.

DISCLOSURE

- [5] The first aspect of the application had been dealt with in the previous ruling, albeit in the context of disclosure rather than s. 7.
- [6] Argument in court took a different turn, although it was suggested I might like to revisit my previous ruling in view of the new argument made.

- [7] During oral submissions, the two accused argue that the date of "02/27/2012" on a fax heading from the Justice Center at the top of the Warrant dated March 2, 2012, allows the court to infer that, contrary to a statement in the ITO that no other authorizations had been applied for, there likely were prior communications between the affiant and the Justice Center.
- [8] As further support for this contention, Ms. Cowan points to paragraphs in the ITO which show ongoing investigation up to mid-February and then nothing until the day the warrant was applied for.
- [9] The Crown was not prepared for this new argument, although Mr. Skogstad said counsel should have been aware of it because of his client's affidavit.
- [10] Mr. Malenfant's affidavit filed March 10, 2014, says he does not trust the court's assumption in the earlier ruling that the Justice of the Peace actually got Appendix A, despite the statement in the ITO at para 12:

Attached to this Information to Obtain a Search Warrant is an Appendix "A".

- [11] The court had also confirmed this with the Crown orally during the hearing.
- [12] Mr. Malenfant goes on to say that his counsel advises him that "from time to time, these processes fall into error". He says he wishes to have the proceedings stayed because of the failure to provide him with Appendix A.
- [13] Next follows paragraph 8:

In this case, the information discloses that the Application for a Search Warrant was submitted to the Justice Center before February 27, 2012 at 1:29 p.m. The warrant was issued at 2:07 a.m. on March 2, 2012. There is no indication as to how long it remained awaiting for the attention of a Justice.

- [14] There is no suggestion in this paragraph that the accused believes there were other ITOs given to the Justice Center previously, but in written submissions filed two days before the hearing, this argument was alluded to in one paragraph:

There are two components to this Application. One is to review the decision to deny Disclosure of events concerning the Information to Obtain Search Warrant, in view of the new material indicating that there appears to be two Search Warrants issued in this case, although the contrary is stated in sworn Crown documents.

- [15] Although the Crown had not been given notice of this issue, Crown counsel made some submissions on it, reserving the right to address it further if necessary.

- [16] Ms. Switzer points out that the warrant with the impugned fax heading has the date of March 2, 2012 typed into it, and a handwritten date of March 2, 2012 above the Justice of the Peace's signature. As well, the last page of the ITO attached as an exhibit to the affidavit of Jesusa Bracia, a legal assistant in the Crown office, which is also signed by the Justice of the Peace on March 2, 2012 also contains a fax header with the date February 27, 2012.
- [17] The Crown says it does not make sense that this document, dated and signed on March 2, 2012, would have been faxed to the affiant several days earlier. All the information is consistent with one ITO being sent on March 1, 2012, and one warrant being signed and issued on March 2, 2012 and faxed back. The only Justice Center fax header date is February 27, 2012. There are no other fax headers from the Justice Center with a different date. The only explanation the Crown can offer, not having had notice of this submission, is that the date component of the fax machine at the Justice Center is not set correctly.
- [18] Mr. Skogstad suggested the Crown should have researched other search warrants issued by the Justice center to check and see if the dates were wrong. It is difficult to see how the Crown could be expected to provide this evidence, given the lack of notice.
- [19] In any event, Crown counsel takes the position that this issue should arise, if at all, on an application to cross examine the affiant pursuant to the principles set out in *R. v. Garofoli* if and when the warrant is challenged under s. 8 of the Charter during trial.
- [20] The accused suggested that at some point all the cumulative defects they allege in disclosure and the potential irregularities in the ITO process might lead to a stay.
- [21] However, on the material presently before the court, the matters raised in this argument do not present grounds for a stay at this stage, nor was it seriously contended in argument that they did, and this issue, on the present material, is not grounds to cause me to revisit my previous ruling.
- [22] In my view, the Crown's position is correct. This issue must await a challenge to the ITO, if one is to be made, once the trial gets underway.

DESTRUCTION OF THE PLANTS

- [23] The next argument is that set out in (b) above. This position also changed substantially during oral submissions. The accused now argue that destruction of the 5,000 seized plants, not destruction of the samples, means that they cannot make full answer and defence.
- [24] In his affidavit of March 10, 2104, Mr. Malenfant deposes at paras 11, 12, and 13:
11. Attached to and marked Exhibit "A" to this my affidavit is a copy of the letter written by my lawyer on March 13, 2012 asking, at paragraph 28, that any samples seized in this matter be preserved for the purposes of defence disclosure.

[para 28 of this form letter reads "Please ensure that no exhibits seized by the investigating officers are destroyed without obtaining the consent of my office as they may be required for the purpose of independent testing and analysis".]

12. My lawyer has advised me that from time to time, he has sought the release of samples for independent testing and such orders have commonly been granted.
13. In this case, we were advised that the police destroyed all samples before giving us an opportunity to have them separately analyzed or even inspected. [emphasis added]

[25] Mr. Skogstad's paralegal, Ms. Whitney, deposes that she sent the disclosure letter. She says:

Sometime later, we specifically asked to see if paragraph 28 was adhered to and whether samples remained, because we sought re-analysis.

We were advised by previous Crown Counsel, not the current one on this file, that these potential exhibits were destroyed, despite the fact that our letter requested that this not be done. [emphasis added]

[26] The written submissions filed two days before the application commenced, uses various terms indiscriminately: "samples", "exhibits", "evidence", and "the balance of the plants", with a description of the argument to be made:

The other argument is based on the fact that, despite the early request communicated to Crown Counsel to preserve samples of substances seized, the Police Authorities in this case quickly and without notice destroyed the substance seized such as to infringe upon the Accused's rights, as indicate below.

- [27] The written submissions state that nothing remains for re-analysis, but does not refer to any evidence to support this statement, except perhaps the double hearsay statement contained in Ms. Whitney's affidavit.
- [28] The argument advanced at the hearing changed from that set out in the Notice of Application - requiring a stay on the basis that all the samples were destroyed - to requiring a stay on the basis that the 5,000 plants are no longer available.
- [29] It is contended by the accused that all of the plants are necessary in order to determine if the plants are really marijuana or hemp, the level of THC in the plants (since no quantitative analysis of the THC content was done), and whether there were roots attached.
- [30] The accused filed an expert report on June 10, 2014, just prior to the hearing, in which Brian Taylor, a licensed hemp grower, gives the opinion that young hemp and marijuana plants look the same, and that hemp plants can contain small amounts of THC and not be marijuana. He states that " it would be impossible to tell a Juvenile Hemp plant from a Juvenile Marihuana plant without sophisticated testing".
- [31] He says at para 3:

Nothing in this file indicates that there has been any analysis of the percentage of THC within the product in question. Should it be below the threshold to be considered Hemp, it would be my opinion that it would not be an illegal substance under the Controlled Drugs and Substances Act.

[32] He also says at para. 5:

Without examining these plants, I am unable to determine if they have roots.

[33] The significance of this last statement remains unexplained.

[34] Counsel suggests the police were unacceptably negligent in destroying the 5000 plants, or are indulging in a pattern of behaviour that disregards the rights of an accused. A number of cases dealing with lost or destroyed evidence along the lines of *R. v. Carosella* [1997] 1 S.C.R. 80 were referred to in passing, but not examined in any detail.

[35] Particularly relied on is *R. v. Hutchings*, a decision of the Provincial Court in Kelowna, from 8 January 2002. The charges were possession and possession for the purpose of trafficking ("PPT"). In that case, the police had applied for and received authorization to destroy items seized from the accused's care. Between receiving the authorization and acting on it, the police received a request not to destroy the seized items. Nevertheless, they destroyed the items but did not tell the Crown. Two months later, the Provincial Court granted an order to allow the defence to examine the substances, which no longer existed.

[36] There were samples still in existence but the defence argued they were not necessarily representative of the whole of the items seized.

[37] The court held, without analysis, and apparently pre-trial, that the accused had been deprived of the right to make full answer and defence on the PPT charge because it "shall remain forever unknown" whether the preserved samples were representative of the whole of the items that were seized, and said also that the order for inspection which had been made previously determined the relevance of the plants. The possession for the purpose of trafficking charge was stayed; the possession charge was allowed to stand.

[38] The Crown, while reserving the right to make further submissions given the lack of notice of the actual argument which was made in court, refers to the statutory scheme that governs the preservation of marijuana for trial.

[39] Section 29 of the Controlled Drugs and Substances Act provides:

The Minister may, on prior notification being given to the Attorney General, cause to be destroyed any plant from which a substance included in Schedule I, II, III or IV may be extracted that is being produced otherwise than under the authority of and in accordance with a licence issued under the regulations.

[40] Section 605 of the Criminal Code provides:

A judge may, on summary application on behalf of the accused or the prosecutor, after three days notice to the accused or prosecutor, as the case may be, order the release of any exhibit for the purpose of a scientific or other test or examination, subject to such terms as appear to be necessary or desirable to ensure the safeguarding of the exhibit and its preservation for use at trial.

- [41] The affidavits filed by the Crown show that over twenty samples were preserved for analysis, and the 5,000 plants were destroyed on March 6, 2012 after the officers requested and received authorization from Health Canada to do so pursuant to s. 29 of the Controlled Drugs and Substances Act. Neither accused has ever made application under s. 605 to examine the samples taken by the officers during the seizure of the 5,000 plants.
- [42] Thus the Crown submits that the 5,000 plants were destroyed pursuant to a statutory scheme that was properly followed, not, as alleged by the accused, through a systemic and routine disregard of the rights of an accused person or through "unacceptable negligence", the term used in some of the cases involving destruction of evidence.
- [43] In general, the Crown says the 5,000 plants are not relevant, and are beyond its ability to disclose. There is no obligation on the Crown to preserve evidence indefinitely.
- [44] As for the samples, Crown counsel states that there is no evidence that the samples have been destroyed. According to the exhibit flow chart attached to the affidavit of Corporal Badry, the samples are in the RCMP exhibit locker in the exhibit envelopes. Only the Certificates of Analyst were entered as evidence at the preliminary hearing.
- [45] The Crown submits that even if the court were to consider a remedy in these circumstances, the application is premature as it should not be made until all the evidence has been heard at trial. Actual prejudice must be established (*R. v. Waldron* 2003 BCCA 442).
- [46] I agree. A stay is a drastic remedy and should generally only be considered after all the evidence is available to be considered. The evidence presently available does not justify a stay of proceedings.
- [47] It is not clear from the decision in *Hutchings* why it was necessary to stay the charge before all the evidence was heard, but assuming that decision has useful comments to make, what few facts can be discerned differ from the circumstances here. The seized items there, whatever they were, were destroyed after the request to retain them had been received; as well the judge that entered the stay held that the court had already, through the order for production, determined all of the seized items were relevant.
- [48] The application for a stay is adjourned pending completion of the evidence at trial, or further order of the court.
- [49] Counsel were provided with the result and a summary of these reasons by telephone on June 20, 2014, with full written reasons to be filed today. These are those reasons.

"M.A. Humphries J."

The Honourable Madam Justice M.A. Humphries

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