COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R. v. Buyck***,
2007 YKCA 10

Date: 20070904
Docket: YU568

Between:

Regina

Appellant

And

Roy Kenneth Buyck

Respondent

Before: The Honourable Madam Justice Ryan
The Honourable Madam Justice Levine
The Honourable Mr. Justice Smith

N. Sinclair	Counsel for the Appellant
J. Van Wart	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia June 7, 2007
Place and Date of Judgment:	Vancouver, British Columbia September 4, 2007

Written Reasons by:
The Honourable Madam Justice Levine

Concurred in by:
The Honourable Madam Justice Ryan
The Honourable Mr. Justice Smith

Reasons for Judgment of the Honourable Madam Justice Levine:

Introduction

[1] This is an appeal by the Crown from an order by the trial judge staying proceedings against the respondent, Roy Kenneth Buyck. The respondent was charged with assaulting a peace officer, resisting arrest, assault with a weapon, and escaping lawful custody, as a result of an incident between the respondent and R.C.M.P. Constable Rolland Smith in Mayo, Yukon on December 10, 2005. Constable Smith and the respondent had a second encounter and a conversation on March 15, 2006. The facts and particulars of that encounter and conversation were not fully disclosed to the respondent's counsel until Constable Smith was cross-examined at trial. The trial judge found that the respondent's rights to disclosure and to make full answer and defence under s. 7 of the Canadian ***Charter of Rights and Freedoms*** had been violated, and ordered a stay of proceedings: 2006 YKSC 49.

Background

Charges Arising from Incident on December 10, 2005

[2] Constable Smith stopped the respondent's vehicle for a "routine check" just before midnight on December 10, 2005. Constable Smith detected a strong odour of marihuana coming from the respondent's truck, and observed what appeared to be a marihuana cigarette stub in the ashtray. He decided to arrest the respondent. According to the evidence of Constable Smith, the respondent resisted when Constable Smith attempted to place handcuffs on him. The respondent picked up a

shovel from the box of his truck and swung it at Constable Smith, who sprayed the respondent with pepper spray and pushed him to the ground. The respondent advanced on Constable Smith, who unsnapped the button on the holster of his gun. At that point, the respondent returned to his truck and drove off.

[3] The respondent turned himself in to the Mayo R.C.M.P. detachment at approximately 1:00 a.m. on December 11, 2005. He was detained in custody until December 14, 2005, when he was released on a recognizance with a surety and conditions, including a requirement that he not be in the community of Mayo except in the company of three named individuals.

Encounter between Constable Smith and the Respondent on March 15, 2006

[4] On March 15, 2006 at approximately 7:30 p.m., while Constable Smith was on routine patrol in Mayo, he saw the respondent driving his truck. Constable Smith stopped the respondent to conduct a compliance check concerning the terms of the respondent's recognizance.

[5] According to Constable Smith's evidence, he had a brief discussion with the respondent about the terms of the recognizance. Constable Smith testified that the respondent admitted he was not complying with the conditions, and Constable Smith said he would use his discretion and only give him a warning.

[6] The respondent then asked if he could talk about something else with Constable Smith. Constable Smith stated that the respondent said: "I wanted to apologize for what happened the other night. I was totally wrong and I went home

and got down on my knees and thanked God that I was still alive, and I have to get off the grass." According to Constable Smith, the respondent also said something to the effect that he saw Constable Smith reach for his gun, and he wanted to get away.

[7] Constable Smith did not take any notes of the encounter with the respondent on March 15, 2006.

VICS Recordings

[8] Constable Smith's police vehicle was equipped with a "Video in Car System" ("VICS"). This system included a windshield mounted video camera connected to a portable microphone carried by the police officer. Constable Smith testified that officer safety is the principal reason for recording encounters between police and suspects or other members of the public.

[9] On December 10, 2005, the VICS was turned off for the first few minutes of Constable Smith's encounter with the respondent. When Constable Smith remembered to turn it on, he did not direct the camera to the direction of the respondent's vehicle, with the result that the incident was not video-recorded, although it seems that there was an audio recording of some of it.

[10] On March 15, 2006, the VICS was turned on, and the encounter between Constable Smith and the respondent was video and audio recorded. The policy of the Mayo R.C.M.P. was to record over VICS recordings after 30 days, unless the recording was required for court or investigative purposes. According to Constable

Smith's evidence, he did not draw a significant connection between his encounter with the respondent on March 15, 2006, and the incident on December 10, 2005, so he did not preserve the tape of the March 15, 2006 encounter.

Disclosure of March 15, 2006 Encounter

[11] On April 18, 2006, Constable Smith sent an e-mail to Crown counsel, reporting the substance of the encounter and conversation with the respondent on March 15, 2006. The e-mail was forwarded to defence counsel that day.

[12] On August 3, 2006, defence counsel requested a copy of any notes or recordings of the March 15, 2006 meeting. Crown counsel faxed the request to Constable Smith, who replied by fax that he had not made any notes, but "came back and typed up a report on the incident, in the form of an e-mail to [Crown counsel]". He also said: "There is nothing else to disclose that I can think of." In particular, he did not reveal that there had been a VICS recording that had been erased.

The Trial

[13] The trial of the respondent commenced on August 7, 2006. Constable Smith testified about the events of December 10, 2005 and March 15, 2006. Defence counsel admitted the voluntariness of the respondent's statement made on March 15, 2006. On cross-examination Constable Smith revealed, for the first time, that there had been a VICS recording of the March 15, 2006 encounter that he had not

preserved. He also testified in cross-examination that there were things he had said to the respondent that were not reported in his e-mail to Crown counsel.

[14] Constable Smith's evidence was followed by another Crown witness who had seen parts of the confrontation between Constable Smith and the respondent on December 10, 2005. His evidence differed from that of Constable Smith in some respects. The witness testified that, following the incident, the respondent had on many occasions acknowledged his fault and expressed remorse for his role in the events of that evening.

Application for Judicial Stay of Proceedings

[15] Following the close of the Crown's case, defence counsel brought an application for a stay of proceedings. The respondent claimed that the destruction of the VICS tape of the March 15, 2006 encounter violated his right to disclosure, affecting his ability to make full answer and defence, and in the alternative, that the destruction of the tape was an abuse of process.

[16] The defence did not adduce any evidence on the motion. Crown and defence jointly filed a partial record of disclosure correspondence, including defence counsel's initial request for disclosure dated January 4, 2006 (before the encounter of March 15, 2006), and supplementary requests for disclosure on April 18, July 4, August 3, and August 4, 2006.

Trial Judge's Reasons for Judicial Stay of Proceedings

[17] The trial judge found that the failure of Constable Smith to preserve the VICS recording of the encounter on March 15, 2006, was "unacceptably and inexcusably negligent" (at para. 26). He found Constable Smith's reply to the disclosure request of August 3, 2006 "objectively misleading", because he did not disclose the previous existence of the VICS recording, and that it had been destroyed (at para. 21). He concluded that there may have been other things said during the conversation between the respondent and Constable Smith, stating (at para. 23): "…that is not an exercise of pure speculation, but one of deductive logic." Thus, the destroyed VICS recording was relevant (para. 10). Had Constable Smith disclosed that it had been destroyed, that may have influenced the manner in which defence counsel conducted the defence (para. 21).

[18] The trial judge concluded that Constable Smith's conduct did not amount to an abuse of process (para. 28), but violated the respondent's right to make full answer and defence (para. 29). He found that the prejudice to the respondent could only be remedied by a stay of proceedings (para. 31). He rejected an adjournment or exclusion of the evidence, stating (at para. 31): "There is simply too much about that conversation which remains unknown and which the accused might have used to his benefit." He found further (at para. 31):

> …despite the officer's relatively straightforward evidence at trial, the fact that he objectively misled both Crown and defence counsel as to the prior existence of the VICS tape gives rise to the prospect of irreparable prejudice to the integrity of the judicial system if the prosecution were continued in such circumstances.

[19] The trial judge also rejected Crown counsel's submission that he should reserve his decision on the remedy for the ***Charter*** breach until the close of the trial, as recommended in ***R. v. La***, [1997] 2 S.C.R. 680.

Issues on Appeal

[20] The Crown does not dispute the trial judge's findings that the failure to preserve and disclose the VICS recording of the March 15, 2006 encounter was "unacceptably and inexcusably negligent", violating the respondent's right to disclosure under s. 7 of the ***Charter***, or that the police officer's response to the request for disclosure relating to the March 15, 2006 encounter was "objectively misleading".

[21] The issue on the appeal is whether the trial judge erred in law in finding that a stay of proceedings was the appropriate remedy for the ***Charter*** breach, and that there would be "irreparable prejudice to the integrity of the judicial system if the prosecution were continued".

[22] The Crown also contends that the trial judge erred in law in ruling on the application for a stay of proceedings before the end of the trial.

The Law

[23] The legal principles applicable to whether a stay of proceedings is the appropriate remedy when relevant evidence is lost or destroyed, violating an accused's right to full disclosure, and when the integrity of the judicial system is engaged, are well-established, as is the appellate standard of review of the decision

of a trial judge on an application for a stay of proceedings. These principles were helpfully summarized by the Ontario Court of Appeal in ***R. v. Bradford*** (2001), 52 O.R. (3d) 257 at paras. 3-6:

> [3] An appellate court will only be justified in interfering with a trial judge's discretionary decision to order a stay of proceedings if ". . . the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice": *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 at p. 1375, 37 B.C.L.R. (2d) 145, and as quoted with approval in *R. v. Carosella*, [1997] 1 S.C.R. 80 at p. 110, 112 C.C.C. (3d) 289 at p. 309; and *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 at p. 427, 118 C.C.C. (3d) 443 at p. 470.
>
> [4] The current state of the law respecting the impact of lost evidence and when a stay should be granted is succinctly summarized in *R. v. B. (F.C.)* (2000), 182 N.S.R. (2d) 215, 142 C.C.C. (3d) 540 at pp. 547-48 (C.A.), leave to appeal to the Supreme Court of Canada denied, [2000] S.C.C.A. No. 194:
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> > The basic principles . . . were summarized by Sopinka J. in *R. v. La*, *supra*, commencing at para. 16. Those principles derived from *R. v. Stinchcombe (No. 1)*, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1; *R. v. Egger*, [1993] 2 S.C.R. 451, 82 C.C.C. (3d) 193; *R. v. Stinchcombe (No. 2)*, *supra*; *R. v. Chaplin*, [1995] 1 S.C.R. 727, 96 C.C.C. (3d) 225; *R. v. O'Connor* [(1995), 103 C.C.C. (3d) 1 (S.C.C.)]; and, *R. v. Carosella*, *supra*, and further developed in *La*, are:
> >
> > (1) The Crown has an obligation to disclose all relevant information in its possession.
> >
> > (2) The Crown's duty to disclose gives rise to a duty to preserve relevant evidence.
> >
> > (3) There is no absolute right to have originals of documents produced. If the Crown no longer has original documents in its possession, it must explain their absence.
> >
> > (4) If the explanation establishes that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached.

(5) In its determination of whether there is a satisfactory explanation by the Crown, the Court should consider the circumstances surrounding its loss, including whether the evidence was perceived to be relevant at the time it was lost and whether the police acted reasonably in attempting to preserve it. The more relevant the evidence, the more care that should be taken to preserve it.

(6) If the Crown does not establish that the file was not lost through unacceptable negligence, there has been a breach of the accused's s. 7 *Charter* rights.

(7) In addition to a breach of s. 7 of the *Charter*, a failure to produce evidence may be found to be an abuse of process, if for example, the conduct leading to the destruction of evidence was deliberately for the purpose of defeating the disclosure obligation.

(8) In either case, a s. 7 breach because of failure to disclose, or an abuse of process, a stay is the appropriate remedy, only if it is one of those rare cases that meets the criteria set out in *O'Connor*.

(9) Even if the Crown has shown that there was no unacceptable negligence resulting in the loss of evidence, in some extraordinary case, there may still be a s. 7 breach if the loss can be shown to be so prejudicial to the right to make a full answer and defence that it impairs the right to a fair trial. In this case, a stay may be an appropriate remedy.

(10) In order to assess the degree of prejudice resulting from the lost evidence, it is usually preferable to rule on the stay application after hearing all of the evidence.

The *O'Connor* criteria referred to in the eighth point are as stated by Justice L'Heureux-Dubé at para. 82 of *O'Connor*:

It must always be remembered that a stay of proceedings is only appropriate "in the clearest of cases", where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable

> prejudice would be caused to the integrity of the judicial system if the prosecution were continued.

[5] Earlier, in *R. v. O'Connor*, [[1995] 4 S.C.R. 411, 103 C.C.C. (3d) 1] the two criteria for a stay referred to in the eighth point are expressed by Professor Paciocco and adopted by L'Heureux-Dubé J., at p. 465 S.C.R., p. 41 C.C.C., as comprising:

> (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
>
> (2) no other remedy is reasonably capable of removing that prejudice.

[6] In assessing the prejudice to the accused's right to make full answer and defence as secured by s. 7 of the *Charter*, it is important to bear in mind that the accused is entitled to a trial that is fundamentally fair and not the fairest of all possible trials. As stated by McLachlin J. in *O'Connor*, *supra*, at p. 517 S.C.R., pp. 78-79 C.C.C.:

> . . . the Canadian *Charter of Rights and Freedoms* guarantees not the fairest of all possible trials, but rather a trial which is fundamentally fair: *R. v. Harrer*, [[1995] 3 S.C.R. 562]. What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. Perfection in justice is as chimeric as perfection in any other social agency. What the law demands is not perfect justice, but fundamentally fair justice.

[24] In this case, the trial judge found a stay of proceedings to be the appropriate remedy for both the breach of the respondent's ***Charter*** right to full disclosure, and for "irreparable prejudice to the integrity of the judicial system".

Analysis

[25] The overriding issue in this case is whether it is one of the "clearest of cases" referred to by L'Heureux-Dubé J. in ***R. v. O'Connor***, [1995] 4 S.C.R. 411 at para. 82, where a stay of proceedings is appropriate.

[26] The trial judge's reasons focused on the breach of the respondent's right to disclosure. He adverted to the prejudice to the respondent, and the alternatives of an adjournment or excluding the evidence. He did not, however, fully consider, in the context of the applicable legal principles, whether this was "one of those rarest of cases" (see ***La*** at para. 23) where a stay of proceedings was the only appropriate remedy.

Integrity of the Judicial System

[27] In concluding that the integrity of the judicial system would be irreparably prejudiced if the trial continued, the trial judge did not consider the individual and societal interests in the prosecution and resolution of criminal charges (see ***O'Connor*** at para. 78; ***Bradford*** at para. 46; ***R. v. Bero*** (2000), 151 C.C.C. (3d) 545, [2000] O.J. No. 4199 at para. 43 (C.A.)), or that the conduct of the police officer and the Crown was not a deliberate attempt to frustrate the respondent's defence (see ***O'Connor*** at para. 79; ***Bero*** at paras. 44-45; ***R. v. Dulude*** (2004), 189 C.C.C. (3d) 18, [2004] O.J. No. 3576 at para. 37 (C.A.); ***R. v. Knox*** (2006), 209 C.C.C. (3d) 76, [2006] O.J. No. 1976 at para. 33 (C.A.)). Nor did the trial judge consider the principle stated in ***Canada (Minister of Citizenship and Immigration) v. Tobiass***, [1997] 3 S.C.R. 391 at paras. 91 and 96, that "a stay of proceedings is a prospective

remedy", and is appropriate where it appears "that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice."

[28] When these principles are taken into account, it cannot be said that a stay of proceedings was either appropriate or necessary to preserve public confidence in the administration of justice. While the police officer's conduct was negligent and "objectively misleading", there is no basis to conclude that such conduct would be perpetuated or aggravated by allowing the prosecution to continue, or that ending the prosecution because of that conduct outweighs the interest of society in a verdict on the merits.

[29] In failing to consider these principles, the trial judge misdirected himself, with the result that he was clearly wrong in concluding that the integrity of the judicial system would be compromised by continuing the trial, and a stay of proceedings was the appropriate remedy.

*Remedy for **Charter** Breach*

[30] The trial judge similarly failed to consider the applicable principles when he concluded that prejudice to the respondent's right to make full answer and defence could not be remedied by anything other than a stay of proceedings. He ordered the stay on the basis that "[t]here is simply too much about that conversation which remains unknown and which the accused might have used to his benefit" (trial judge's reasons for judgment at para. 31), when the respondent, who was present during the encounter on March 15, 2006, had the onus to prove the degree of

prejudice arising from the missing recording. Further, the trial judge did not consider the missing recording in the context of the other Crown evidence (see ***Bradford*** at para. 39), and he did not consider other lesser remedies, such as a mistrial or assessing the police officer's credibility in light of the missing evidence (see ***Bero***, at para. 54). When the respondent did not produce evidence on the stay application, by deciding the application for a stay before the end of the trial, the trial judge foreclosed the opportunity for the court to weigh the degree of prejudice to the respondent in light of all of the evidence.

[31] The trial judge stated two reasons for rejecting the Crown's submissions that the determination of the remedy for the breach should be deferred to the end of the trial (at para. 30):

> First, I cannot imagine that my opinion on the prejudice to the accused would be changed by hearing any further evidence. Second, it would be unfair to the accused to make him elect whether to call evidence in the face of such a breach.

[32] The first reason is simply unacceptable. A trial judge may decide an issue only on the basis of the evidence he or she hears in the courtroom. There is no room in judicial analysis for imagining what further evidence might be heard.

[33] The second reason bears more consideration. In ***R. v. Carosella***, [1997] 1 S.C.R. 80 at paras. 27-37, the Supreme Court of Canada made it clear that there is no onus on an accused person to show actual prejudice in order to prove that the ***Charter*** right to full disclosure has been breached. As stated in ***R. v. Dixon***, [1998] 1 S.C.R. 244 at para. 22:

> Thus, 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.

[34] The degree of prejudice resulting from the breach of an accused's ***Charter*** right is, however, relevant to the remedy for the breach: see ***Carosella*** at para. 37, where Sopinka J. said: "The requirement to show additional prejudice or actual prejudice relates to the remedy to be fashioned pursuant to s. 24(1) of the *Charter*." (See also ***La*** at para. 25, and ***Bero*** at para. 48, where Doherty J.A. for the Ontario Court of Appeal said:

> The degree of prejudice caused to an accused by a failure to preserve relevant evidence and the availability of other means short of a stay to alleviate that prejudice are the primary considerations in deciding whether a stay is warranted by virtue of the prejudice caused to an accused's ability to make full answer and defence: *R. v. La*, *supra*, at pp. 109-110.[)]

[35] That is why the Supreme Court of Canada in ***R. v. La*** (at para. 27), and the Ontario Court of Appeal in ***Bero*** (at para. 18), ***Dulude*** (at para. 9), ***Knox*** (at para. 26), and ***R. v. Scott*** (2002), 159 O.A.C. 283, [2002] O.J. No. 2180 at para. 7, have stated that an application for a stay of proceedings should be determined at the end of the trial, when all the evidence has been heard, and the court can properly consider the degree of prejudice to the accused from the missing evidence.

[36] In this case, the respondent was present at the March 15, 2006 encounter, and presumably, at the trial only five months later, had some memory of what had transpired. The respondent was not required to show the degree to which he was

prejudiced by the missing recording in order to prove that his ***Charter*** right to full disclosure was breached. Moreover, it was probably logical for the trial judge to find that the recording would have shown there was more to the encounter than was disclosed by Constable Smith in his e-mail and his testimony.

[37] It was wrong in law, however, for the trial judge to conclude, in this case, that the prejudice to the respondent was irremediable by anything but a stay of proceedings because too much remained unknown about the conversation. In effect, the trial judge granted a stay by default. The onus was on the respondent to demonstrate that this was one of those rare cases where a stay of proceedings was the only appropriate remedy: see ***Carosella*** at para. 37; ***Dixon*** at paras. 23 and 35. The respondent elected not to present any evidence on his application for a stay of proceedings, although his knowledge of what had transpired during his conversation with the police officer on March 15, 2006 may have resolved some of the "unknowns". The trial judge decided that the stay was the appropriate remedy, in my opinion, without requiring the respondent to demonstrate the degree of prejudice resulting from the missing recording to his ability to make full answer and defence.

[38] The trial judge could not, of course, require the respondent to elect to present evidence on the stay application. In the absence of that evidence, however, the proper conclusion was that the respondent had not met the onus.

[39] In my opinion, the trial judge misdirected himself concerning what further evidence he might hear and in concluding that it was unfair to the respondent to be required to elect whether to call evidence to support his application for a stay. In the

absence of that evidence, postponing the decision on the remedy for the ***Charter*** breach to the end of the trial would have assisted the trial judge to determine whether a stay of proceedings was the appropriate remedy, properly considering the significant factors of the degree of prejudice to the respondent and other means short of a stay to alleviate the prejudice. In the result, his decision was clearly wrong.

Conclusion

[40] The trial judge erred in law in ordering a stay of proceedings of the prosecution of the respondent. He failed to consider the applicable legal principles in concluding that a stay of proceedings was the appropriate remedy for the breach of the respondent's ***Charter*** right to full disclosure, and in concluding that the integrity of the justice system would be irreparably prejudiced if the prosecution continued. He misdirected himself, and his decision was clearly wrong.

[41] I would allow the appeal, set aside the stay of proceedings, and order a new trial.

"The Honourable Madam Justice Levine"

AGREE:

"The Honourable Madam Justice Ryan"

I AGREE:

"The Honourable Mr. Justice Smith"