Citation: *R. v. Charlie*, 2008 YKTC 90 Date: 20081215
Docket: 08-00293A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Chief Judge Ruddy

R e g i n a

Respondent

v.

Geno Charlie

Applicant

Appearances:
Melissa Atkinson Counsel for the Respondent
Malcolm Campbell Counsel for the Applicant

DECISION

Costs Application

[1] Geno Charlie is facing a number of serious charges including a break, enter and commit, and an assault causing bodily harm. Trial on all matters is currently set for February 10, 2009 in Old Crow. Mr. Charlie remains in custody pending his trial. On November 13, 2008, counsel for Mr. Charlie filed an application for disclosure and for costs. After two court appearances, counsel for Mr. Charlie was eventually satisfied with respect to the disclosure application, but maintained his application for costs relating to the disclosure application.

Chronology:

- **July 31, 2008:** Offence date;
- **August 1, 2008:** Statements taken from Mr. Charlie and from the complainant, Edna Kaye, using both a digital recorder and an 8mm video camera;
- **August 20, 2008:** Disclosure requested by Mr. Charlie's counsel;

- **August 26, 2008:** Initial disclosure package received (which did not include the statements provided by the accused and the complainant);
- **August 27, 2008:** Additional disclosure letter sent requesting the outstanding statements. No response was received until October 10, 2008;
- **September 17, 2008:** Mr. Charlie elected to be tried in Territorial Court and entered a plea of not guilty;
- **September 17 and 19, 2008:** Crown opposed the matter being set for trial on either the September 23rd or the November 25th Old Crow circuits due to witness availability issues. The matter was set down for trial on the Old Crow circuit scheduled for February 10, 2009 (Crown now indicates they may also have witness availability issues for that date as well);
- **Late September, 2008:** The Old Crow RCMP began work on transcribing the missing statements. Crown was unable to provide an explanation for the delay in transcribing. Once the RCMP attempted transcription they realized that the digital recorder had not worked properly and did not provide an audio recording of the statements;
- **October 10, 2008:** Counsel for Mr. Charlie received a letter from the Crown, in response to the August 27th request for outstanding disclosure, advising that Crown would be following up with the Old Crow RCMP with respect to the statements and advising that there were also outstanding medical records from Whitehorse General Hospital which had not yet been disclosed. The Crown emailed the Old Crow RCMP and received a response indicating only that they were working on it;
- **October 11, 2008:** The Old Crow RCMP attempted, unsuccessfully, to transfer the 8mm video onto DVD as the audio quality of the 8mm video was not good enough to transcribe from. The 8mm video was forwarded to the RCMP Identification section in Whitehorse to transfer onto DVD and to transcribe;
- **October 31, 2008:** The RCMP Identification section, believing the 8mm video had been sent to them in error, returned it to the Old Crow detachment, where it arrived on October 31st. The Old Crow RCMP re-sent the 8mm video to Whitehorse;
- **November 13, 2008:** Mr. Charlie's counsel filed an application for disclosure and costs;
- **November 17, 2008:** First appearance on the application. Counsel for Mr. Charlie indicated that subsequent to the filing of the application, the outstanding medical records had since been provided to him. Designated Old Crow Crown was unavailable. The Crown in attendance was able to provide only limited information relating to the technical problems encountered with respect to the statements. This information had not been previously provided to the defence. The application was adjourned to November 21, 2008 for the Crown to provide further information;
- **November 19, 2008:** DVDs of the outstanding statements were provided to defence counsel;

- **November 21, 2008:** Second appearance on the application. Crown indicated that transcription of the statements had been put on the urgent list as of 3:00 p.m. November 20, 2008, and they were expected to be completed by Monday or Tuesday of the following week. Mr. Charlie's counsel indicated that he was no longer seeking an order for disclosure in the circumstances, but still wished to pursue his application for costs relating to the disclosure application.

Issues:

[2] The issue to be determined is whether Mr. Charlie is entitled to recover the costs of the disclosure application; and, if so, the appropriate amount to be recovered.

The Test:

[3] In support of his application, defence counsel filed two decisions: *R.* v. *Jedynack* (1994) 16 O.R. (3d) 612, out of the Ontario Court (General Division), and *R.* v. *Sevigny*, 2002 YKTC 32 out of this court. In reply, Crown filed *R.* v. *Delorme,* 2005 N.W.T.S.C. 78, out of the NWT Supreme Court.

[4] From a review of these cases, I am satisfied that the Territorial Court does have the power to award costs against the Crown for failure to meet its disclosure obligations (*Jedynack*, *Sevigny*). The appropriate test to be applied in determining whether an award of costs ought to be made is most clearly enunciated in the most recent of the cases before me, R. v. Delorme:

> So the standard has shifted from "oppressive conduct" to a "marked and unacceptable departure" from the conduct reasonably to be expected of Crown counsel. The difference is slight but there is a difference nonetheless. The older standard implies to me the sense of either deliberate conduct meant to thwart the disclosure rights of the accused or conduct so negligent as to amount to the same thing. The current standard is more of an objective one based on reasonable expectations as to the conduct of the diligent prosecutor. There is no need to demonstrate some bad faith or a deliberate attempt to evade the Crown's disclosure obligations (para. 12).

[5] The Crown argues that they have met this standard, noting that the delay was a result of technical difficulties and that reasonable steps were being taken to address those difficulties.

[6] With respect, I disagree. While the case law is clear that the Crown is not expected to meet a standard of perfection, in my view, there are several factors which, when viewed cumulatively, amount to a marked and unacceptable departure from the standards expected of a diligent prosecutor.

[7] In considering these factors, it must also be recognized that the outstanding disclosure in this case, in particular the statement of the complainant, is disclosure which goes to the very heart of the case against Mr. Charlie. This cannot be described as minor or peripheral disclosure. Indeed the court would have been hard pressed to insist upon a plea in these circumstances had Mr. Charlie refused to enter one until such time as the disclosure had been provided. Clearly, given his custodial status, he opted not to do so. He should not now be prejudiced further for making his best efforts to move the matter forward.

[8] While the technical difficulties experienced would clearly have justified some expected and reasonable delay, there are several instances of unexplained and unacceptable delays over the course of the events leading up to the disclosure application. These include the failure of the RCMP to attend to transcription of statements taken on August 1st until late September, after Mr. Charlie had entered his plea; the failure of the Crown to contact the RCMP regarding the disclosure and to respond to defence counsel's second disclosure request dated August 27th until October 10th; and the failure of the Crown to follow up on the RCMP's October 10th email advising that they were "working on it" until after the defence had filed their disclosure application on November 13th.

[9] In conjunction with these delays, there has also been a marked and unacceptable lack of appropriate communication. When asked about the disclosure on October 10th, the RCMP failed to advise the Crown of the technical difficulties. The Crown failed to seek any further explanation, seemingly satisfied with the response "we're working on it" coming some two and a half months after the offence date. Furthermore, the Crown did nothing further to follow up with the RCMP after the email of October 10th until the defence had filed their disclosure application on November 13th. At no time was the defence advised of the status of the disclosure or the technical difficulties. The only information provided to the defence came in the letter of October 10th wherein the Crown advised they would follow up with the RCMP. The Crown failed even to advise the defence of the RCMP response that they were "working on it". Had the defence been apprised of the circumstances on an ongoing basis and in a timely fashion, they would clearly not have been required to bring this disclosure application.

[10] These delays and communication failures must also be looked at within the context of Mr. Charlie's custodial status. While not detained, I am advised that Mr. Charlie has minimal prospects for release. Given the strong likelihood that Mr. Charlie will remain in custody until such time as these matters are resolved, the obligation on the Crown to provide timely disclosure becomes that much more urgent.

[11] It is not enough for the Crown now to say that there was no urgency in attending to disclosure as the matter was not scheduled to proceed to trial until February 10, 2009. Mr. Charlie made his plea in the absence of significant and central disclosure. That disclosure, once received, could potentially alter Mr. Charlie's situation in any number of ways. It may suggest weaknesses in the Crown's case which could improve his prospects for release. It may influence a change in plea which again could affect his custodial status. It may influence Mr. Charlie to seek expert advice or testimony. It may influence the witnesses Mr.

Charlie chooses to call, which may, in turn, affect the scheduled trial date, if those witnesses were not previously anticipated such that their availability was not canvassed before the date was fixed.

[12] While one can only speculate on the potential impact of the outstanding disclosure, I am nonetheless satisfied that there is a basis upon which to conclude that Mr. Charlie has been prejudiced by the Crown's failure to meet its disclosure obligations in a timely fashion.

[13] In all of the circumstances, I conclude that there has been a marked and unacceptable departure from the standard expected of the Crown in meeting its disclosure obligations, and that Mr. Charlie has suffered prejudice. As a result, I am also satisfied that Mr. Charlie is entitled to an award of costs as compensation for the preparation of and court attendance on this disclosure application, which would not have been required but for the Crown's failure to meet its obligations.

[14] It must be noted that an award for costs in this case is intended to compensate the defence for added work and expense; not to punish the Crown. I must stress that I have not found there to have been any bad faith on behalf of the Crown in this instance. There is no evidence of intention; only of inattention.

[15] Having ruled in Mr. Charlie's favour, I must now determine an appropriate monetary amount for the award of costs.

[16] Counsel for Mr. Charlie seeks compensation in the amount of $550. In support of this position, he has filed section 76(1) of the *Territorial Court Act* which reads:

> 76(1) Subject to this Act, the rules of practice and procedure followed in the Supreme Court shall, modified as suits the case, be followed in all actions and proceedings in the court.

[17] In addition, counsel has filed an excerpt from the *Yukon Supreme Court Rules* which sets out lump sum amounts for applications requiring a ½ day or less as follows:

Scale A	$300
Scale B	$550
Scale C	$850

[18] Counsel describes the difference between the three scales as being minimal difficulty, ordinary difficulty, and great difficulty, and argues that this application amounts to one of ordinary difficulty; and, therefore, should result in a Scale B lump sum award.

[19] Having reviewed the documents filed and considered the submissions of counsel, I am of the view that while the application ought not to have been necessary, it was nonetheless one of minimal difficulty in the circumstances of this case. It did not require extensive research, documentation or knowledge. It required only time. As a result, I hereby order that Mr. Charlie is entitled to an award of costs in the amount of $300.

Ruddy C.J.T.C.