Citation: *R.* v. *Drummond,* 2017 YKTC 10

Date: 20170301
Docket: 15-00220
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

JOHN ANDREW DRUMMOND

Appearances:
Leo Lane — Counsel for the Crown
Tam Boyar — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] Mr. Drummond has been charged with having committed offences contrary to ss. 253(1)(a) and (b) of the *Criminal Code*.

[2] Counsel for Mr. Drummond, Tam Boyer, has brought two applications, each of which seeks a stay of proceedings pursuant to s. 24(1) of the *Charter* or, alternatively, an order granting the exclusion of evidence pursuant to s. 24(2).

[3] In the earlier application, filed February 15, 2016, counsel alleges that Cst. Kidd had insufficient grounds to detain Mr. Drummond. In addition, counsel alleges that Cst. Kidd made an invalid breath demand and that he further failed or refused to allow Mr. Drummond to exercise his s. 10(b) *Charter* right to counsel.

[4] In the application filed September 9, 2016, (the "Disclosure Application"), counsel alleges that the Crown has not met its disclosure obligations by failing to provide the maintenance and calibration logs for the breathalyzer device used to take the breath samples from Mr. Drummond, despite repeated requests from counsel. Counsel alleges a breach of the s. 7 *Charter* rights of Mr. Drummond. Counsel submits that these logs are essential to the right to make full answer and defence to the charges brought against Mr. Drummond.

[5] In support of the Disclosure Application is the affidavit of Mr. Boyar's legal assistant, Linda Poelzer (the "Poelzer Affidavit"). Attached as Exhibit A to the Poelzer Affidavit is a copy of the Canadian Society of Forensic Science Alcohol Test Committee Recommended Best Practices for a Breath Alcohol Testing Program. Exhibits B through E are copies of correspondence between the Crown's office and defence counsel's office regarding disclosure provided by the Crown's office.

[6] Crown counsel, Leo Lane, relies on the affidavit of Christina MacNeil, business coordinator for the Public Prosecution Service of Canada (the "MacNeil Affidavit"). The MacNeil Affidavit sets out the disclosure provided by the Crown's office to Mr. Boyar, communications between the Crown's office and the RCMP and between the Crown's office and defence counsel in regard to the disclosure requests.

[7] With respect to the February 15 application, counsel agree that the evidence of Cst. Kidd should be heard in a *voir dire* and that all evidence considered to be admissible become evidence on the trial proper.

[8] With respect to the Disclosure Application, counsel agree that evidence and argument should be presented in a *voir dire*. Crown counsel seeks, however, a ruling on the s. 7 *Charter* application prior to proceeding with this *voir dire*. Crown counsel seeks a summary judgment dismissing the s. 7 application.

[9] On September 9, 2016 counsel made submissions on the Disclosure Application. I reserved judgment. On October 28, counsel were advised by email correspondence of the following:

> I have decided that I am not in a position to decide the issue of whether this is first or third party disclosure without there being a further hearing on the merits.
>
> I have further decided that I am not in a position to rule on whether there has been a s. 7 *Charter* breach until after there has been a ruling on whether the disclosure being sought is first or third party disclosure and, to the extent that any further disclosure may be required to be provided, what efforts have been made to provide any such disclosure.
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> Finally, I find that while the s. 7 *Charter* application is premature, in the circumstances of this case, I am not prepared to dismiss the application at this time. The appropriate resolution is to adjourn the application to a date to be determined after the disclosure application has been concluded. I find that there is no prejudice in adjourning the application as I have.

I adjourned the matter for further argument on the nature of the disclosure obligation. These are the written reasons for my decision.

[10] During the hearing of this application, it became apparent to me that there had been some misunderstanding between Mr. Boyar and Mr. Lane in regard to the nature of the disclosure requested.

[11] On February 29, 2016, Mr. Boyar asked Mr. Lane for the "maintenance/calibration logs for the relevant breathalyzer devices". Mr. Lane then

asked the RCMP to provide specified documents, including the "last maintenance report before June 13, 2015". He then advised Mr. Boyer that he had requested the RCMP to provide the instrument logs.

[12] On March 2, 2016 the RCMP, in response, provided Mr. Lane with documents, including a Certificate of Annual Maintenance dated May 30, 2013. These documents were provided to Mr. Boyar on March 4, 2016.

[13] Pursuant to further requests, on March 9, 2016 Mr. Lane provided Mr. Boyar with Davtech Analytical Services (Canada) Maintenance Certificates dated June 5, 2014 and May 27, 2015.

[14] Mr. Boyar responded the next day expressing his concerns that these Davtech invoices were insufficient and requested "…all records with respect to the maintenance of the breathalyzer instrument used in this case, including, without limitation, information related to the matters set out above (name and qualifications of the technician and information establishing that the tests were performed in accordance with the Recommended Standards and Procedures of the Canadian Society of Forensic Science Alcohol Test Committee)".

[15] He also requested that he be provided "all relevant information concerning [certain] repairs including information with respect to the technician who performed them and confirmation that the device was repaired in accordance with recommended standards and procedures". Mr. Lane and Mr. Boyar exchanged correspondence on several occasions between March 11 and March 23. In addition, on March 23, 2016, Mr. Lane provided Mr. Boyar with Certificates of Completion of the course specified for

the Intox EC/IR II for the two technicians who had performed the annual maintenance on the breathalyzer in question from 2013 to 2015. Also provided was the Davtech response to the questions Mr. Lane had posed to them in response to Mr. Boyar's response.

[16] That was the last communication in regard to disclosure between Mr. Lane and Mr. Boyar until September 2, 2016. Mr. Lane received e-mail communication from Mr. Boyar on September 8 advising him of his intent to bring this application on September 9, 2016.

[17] Defense counsel submits that:

1. He requested disclosure of the maintenance records;
2. Crown counsel indicated that he would provide this disclosure;
3. Some disclosure was provided; and
4. There was no indication that this was not the total amount of disclosure in regard to the requests made by defense counsel.

[18] He states that firstly, it is necessary to find out what the manufacturer of the breathalyzer device says needs to be done regarding maintenance for the device.

[19] Secondly, it is necessary to determine whether maintenance was done in accordance with the manufacturer's specifications and how the maintenance was confirmed and/or recorded.

[20] This is what defence counsel wants and what he says case law states he is entitled to have. This includes information as to whether any additional work was or was not done on the device.

[21] Mr. Boyar's position is that the disclosure provided is insufficient for him to make full answer and defence. He submits that what he requested, essentially what maintenance and repairs have been done on this particular breathalyzer machine over time, is not an onerous request. He submits that the disclosure that has been provided, and how it has been provided, is part of a piecemeal approach to the maintenance records and disclosure. There are still maintenance records for this specific breathalyzer that have not been disclosed. He submits that a more systematic and proper approach should have been taken.

[22] Mr. Boyar clarified that what he is seeking is the record showing the maintenance history of the breathalyzer device over time. If these records exist they should be disclosed in accordance with the first-party disclosure regime set out in ***R.*** v. ***Stinchcombe***, [1991] 3 S.C.R. 326. If such maintenance logs do not exist, then the failure to preserve these records is a violation of Mr. Drummond's s. 7 *Charter* right.

[23] Mr. Boyar submits that he understood that he had received all the disclosure that was available and that a careful review of the disclosure letters he sent is sufficient to see that he was not asking for disclosure of maintenance records for a limited time period only. However, he accepts that there appears to have been a misunderstanding between counsel on this point.

[24] While not abandoning his s. 7 and 24 *Charter* arguments, Mr. Boyar is not necessarily opposed to the first or third-party disclosure argument being made on a future date. He submits that if I am not prepared to make a ruling on the s. 7 application today, it should be adjourned rather than dismissed.

[25] Mr. Lane's position for the Crown is that he has provided the three most recent annual maintenance records. He had not understood from Mr. Boyar that any other maintenance records were being requested. Given that Mr. Lane had not heard from Mr. Boyar for several months after he provided the last disclosure, he assumed that Mr. Boyar was satisfied with the disclosure that he had received. He was not aware that Mr. Boyar was expecting further disclosure to be provided. Thus he was surprised that the s. 7 application was brought by defence.

[26] Mr. Lane now asks whether Mr. Boyar is seeking maintenance logs going back for the entire working life of this particular breathalyzer machine as well as seeking that Crown confirm that there was no additional work done on the machine in the time between the annual maintenance being done.

[27] As well, Mr. Lane now takes the position, having received and reviewed the case of ***R.*** v. ***Jackson***, 2015 ONCA 832, that the maintenance records in regard to the breathalyzer machine used in this case, including those already provided, are not subject to the first-party disclosure regime and should be the subject of an ***O'Connor*** application. He submits that the defence application should be dismissed as per ***Jackson*** as not being first-party disclosure. He submits that Mr. Boyar should have brought a third-party application and served the RCMP and Davtech. He stated that there is a requirement that defence counsel establish the likely relevance of the disclosure requested in order for the third-party application to be granted.

[28] Mr. Lane submits that if I believe that there is an issue of whether the maintenance records requested are first or third-party disclosure, this issue should not be the subject of argument today but should be argued at a future date.

[29] However, he submits that I should dismiss the s. 7 *Charter* application at this time. He states that this application is premature. In the event that there is a future decision that raises a s. 7 *Charter* issue on the basis of non-disclosure, Mr. Boyar can bring a further application. He submits that prior to bringing the s. 7 application the following steps should have occurred:

- Defence counsel receives the initial disclosure package;
- Counsel notifies the Crown that defence is seeking additional disclosure and indicates the specific documents being sought;
- Counsel waits for Crown to find out whether the requested records exist;
- If they exist, Crown makes a decision as to whether the Crown will or will not disclose them;
- If Crown decides to disclose, that is the end of the matter;
- If the Crown decides not to disclose, then defence counsel can bring a disclosure application to compel the Crown to disclose the documents;
- In such an application, expert evidence can be called to assist in determining relevance; and
- If the evidence establishes that the records don't exist, then it is open for defence to bring a s. 7 application.

[30] Mr. Lane submits that in this case defence has gone straight to s. 7 application on the basis that the Crown has not disclosed the documents that defence counsel wants. I also understand that defence counsel's s. 7 argument is based upon counsel's assumption that some of the requested records were not kept by the RCMP.

Analysis and Conclusion

[31] In the course of the submissions before me, counsel made submissions in regard to the existing case law in regard to whether the maintenance records requested are within the first or third-party disclosure regime. Cases cited include: ***R.*** v. ***St-Onge Lamoureux***, 2012 SCC 57, ***R.*** v. ***Fitts***, 2015 ONCJ 262, ***Jackson***, and ***R.*** v. ***Vallentgoed***, 2016 ABCA 358.

[32] Counsel agree that the case law is divided on this issue.

[33] I have decided that I am not in a position to decide the issue of whether this is first or third party disclosure without there being a further hearing on the merits.

[34] I have further decided that I am not in a position to rule on whether there has been a s. 7 *Charter* breach until after there has been a ruling on whether the disclosure being sought is first or third-party disclosure and, to the extent that any further disclosure may be required to be provided, I have a complete picture as to what efforts have been made to provide any such disclosure.

[35] Finally, I find that while the s. 7 *Charter* application is premature, in the circumstances of this case, I am not prepared to dismiss the application at this time. The appropriate resolution is to adjourn the application to a date to be determined after the disclosure application has been concluded. I find that there is no prejudice in adjourning the application as the application can be pursued, abandoned, or if necessary, amended at a future date as and if required.

[36] The parties should make further attempts to sort out whether there are more records in response to defence disclosure requests before proceeding further on the s. 7 application or with the trial itself.

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COZENS T.C.J.