**PROVINCIAL COURT OF NOVA SCOTIA**
**Citation:** R. v. Martin, 2012 NSPC 115

**Date:** 20121231
**Docket:** 2276770-2276795
**Registry:** Pictou

**Between:**

Her Majesty the Queen

v.

Darren Martin

***DECISION REGARDING DEFENCE APPLICATION FOR FURTHER DISCLOSURE AND FOR LEAVE TO FILE FURTHER DOCUMENTATION***

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| **Judge:** | The Honourable Judge Del W. Atwood |
| **Written decision:** | 31 December 2012, in Pictou, Nova Scotia |
| **Charges:** | 4x sub-s. 239(1) *Income Tax Act (Canada)*; 22 x sub-s.237(1) *Excise Tax Act (Canada)* |
| **Counsel:** | Constantin Draghici-Vasilescu, for the Public Prosecution Service of Canada |
| | Darren Martin, on his own behalf |
| | Stephen Robertson, Nova Scotia Legal Aid, *amicus curiae* |

**By the Court**:

***Synopsis***

[1] Darren Martin stands charged of four violations of para. 239(1) of the *Income Tax Act (Canada)*, and twenty-two violations of para. 327(1) of the *Excise Tax Act*. Trial dates are fixed presently for 17-21 June 2013. This is the third block of trial time to have been assigned to this matter.

[2] The trial of these charges was scheduled initially to commence on 20 March 2012; an adjournment was ordered by the Court of its own motion upon the appointment of an *amicus curiae*. On the adjourned date of 23 October 2012, Mr. Martin presented to the Court, with the leave of the Court, an application for further disclosure. The Court adjourned the case, again, of its own motion, until 29 November 2012; this was to permit the filing of briefs by the Crown and the *amicus*, to allow the parties time to present oral argument, and to set new trial dates. As noted above, those dates are now fixed, and, as far as I am concerned, are pretty much cast in stone.

***Ruling on application for disclosure***

[3] The right to have access to disclosure materials is inherent in the right to make full answer and defence, guaranteed constitutionally in section 7 of the *Charter*. As was observed in *R. v. Dixon*, the right to disclosure of all relevant material has a broad scope, and includes the right to have access to material which might have only marginal value to the ultimate issues at trial.[1] However, this right is not unqualified. A lack of due diligence in pursuing disclosure may weigh significantly in a decision to withhold *Charter* relief.[2]

[4] In this case, I conclude that Mr. Martin has not been diligent in actively seeking and pursuing proper Crown disclosure. While Mr. Martin has certainly brought to the Court an array of disclosure applications prior to the one now subject to the adjudication of the Court, those earlier applications sought the production of material unconnected completely to any issue triable in this Court. I canvassed some of that forensic history in earlier interlocutory decisions in this case.[3] It was only on

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[1][1998] S.C.J. No. 17at paras. 20-23

[2]*Id.* at para. 37.

[3]2012 NSPC 73, 2012 NSPC 76, 2012 NSPC 92.

the first day set for trial this past October that Mr. Martin advanced an application for disclosure of material touching on an issue this Court is able to hear–namely, pinning down the point in time when the Canada-Revenue-Agency audit of Mr. Martin's business transformed into an investigation with a view to laying charges. Delineating that dividing line between audit and investigation may be relevant to the material issue of whether Mr. Martin was subjected to an unconstitutional search.[4]

[5] Nevertheless, while Mr. Martin's disclosure application was neither diligent nor timely, the fact is that a ruling on the application will not delay the trial of these charges unduly, as trial dates have already been scheduled well down the road for next June; should I order the Crown to deliver further disclosure to Mr. Martin, such an order would undoubtedly be able to be fulfilled well in advance of the trial. And, so, I will consider the merits of the application.

[6] While the Court is satisfied that Mr. Martin is now focussed on a triable issue, the Court is not satisfied that Mr. Martin has established that the Crown ought to be compelled to produce the disclosure material being sought. First of all, it was clear

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[4] *See R. v. Jarvis* 2002 SCC 73 and *R. v. Borg* 2007 DTC 5671.

to the Court from Mr. Martin's oral submissions made on 29 November 2012 that he has not yet assimilated fully the disclosure material that he has already been given. One key item of disclosure sought by Mr. Martin was a so-called permanent-documentation envelope; although Mr. Martin asserted initially that this material had not been disclosed to him, he later corrected himself, and acknowledged very fairly that the permanent-document envelope had, in fact, been provided to him by the Crown in its initial delivery of disclosure.

[7] Furthermore, in additional submissions on 29 November, Mr. Martin presented to the Court an assembly of documents extracted from what has already been disclosed by the Crown; this assembly appeared to be paper copies of what were described as screen shots of data and diary items maintained by the CRA pertinent to the audit and investigation of Mr. Martin's business. There was also an internal memorandum to a Ms. Tammy Turnbull indicative of the commencement of a preliminary investigation by the CRA against Mr. Martin. Mr. Martin's submissions to the Court in relation to those documents satisfy the Court that Mr. Martin is capable of making effective and cogent submissions to the Court regarding the audit-to-investigation transition based on the material that has been disclosed to him already.

[8] Accordingly, the Court finds that Mr. Martin has not discharged the burden of proving his constitutional entitlement to the material sought, and his application is not granted. Pursuant to my order in 2012 NSPC 76, it remains open to Mr. Martin to seek leave to submit further application materials to the Court in accordance with the procedure outlined in that order.

[9] Before concluding this judgment, I feel it important to note that the submissions by the Crown on this specific application were, in my view, of limited assistance to the Court. The focus of the Crown seemed to be on pigeon-holing Mr. Martin as a category of Organized Pseudolegal Commercial Argument ["OPCA"] Litigant, a description adopted by Rooke A.C.J. in *Meads v. Meads*.[5] While that judgment is of immense benefit to trial Courts in managing cases defended by improperly guided, self-represented or agent-represented parties, it underscores the critical importance of maintaining focus on the merits of the case.[6] The argument adopted by the Crown in its written brief is, in essence, that Mr. Martin, as an OPCA litigant, has brought unmeritorious applications in the past; therefore, his present

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[5] 2012 ABQB 571.

[6] *Id.* at para.736.

application should be assessed as being unmeritorious, as well. This is a formal fallacy. The fact that Mr. Martin has previously made unsupportable applications, does not mean that the Court must dismiss axiomatically every application he might bring on in the future. In this case, Mr. Martin has raised a triable issue: at what point in time did the CRA audit of his business evolve into an offence-focussed investigation? The Crown's submissions regarding the purported authorship of Mr. Martin's present argument–allegedly a Mr. Kimery, an individual who has, himself, been involved in litigation with the CRA in another province–were similarly unhelpful, as they amounted merely to an *ad hominem* rebuttal. In my view, it matters naught who helped Mr. Martin put together his application; what matters here is the legal merit of the application. Mr. Martin's application this time around had merit and was arguable. What it lacked was persuasive evidence.

***Ruling on application for leave to file Kimery affidavit***

[10] Mr. Martin has sought leave of the Court to present an affidavit from Mr. Kimery countering the submissions about Mr. Kimery made by the Crown.

As I have found the Crown's argument regarding Mr. Kimery of no effect, I conclude that it is unnecessary to address that point further, so that leave shall not be granted.

***Counsel-table arrangements***

[11] Lastly, I intend to deal with a procedural issue that came to my attention on October 23. The Crown presented to the Court as a *fait accomplis* its decision to have the lead CRA investigator seated at the counsel table in Court to assist the prosecutor. Quite frankly, I have never been presented with such a seating arrangement before, and it is simply not acceptable to the Court. The investigator will, in all likelihood, be called upon to testify as a witness. His proper place will be the witness stand, when required; otherwise, he should be seated in the gallery of the Court, or remain without, should a witness-exclusion order be sought and granted. The Court is not an apparatus of the executive branch, and the counsel table is reserved for counsel and self-represented parties.

ORDERS ACCORDINGLY

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J.P.C.