Date: 2005 09 22
Docket: S-1-CR-2004000034

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

GERALD ANTHONY DELORME

Applicant

MEMORANDUM OF JUDGMENT

[1] The applicant, Gerald Anthony Delorme, was tried and convicted of second-degree murder. Prior to his trial, however, counsel for Delorme applied for an order awarding costs, payable by the respondent Crown, as a remedy for a breach of his rights protected by the *Charter of Rights and Freedoms*. Specifically, the claim was for costs incurred due to an adjournment of the trial caused by the late disclosure of materials by the Crown.

[2] At the hearing of this application, defence counsel stated explicitly for the record that the instruction to seek costs emanated not from the accused but from the executive director of the Legal Services Board, the body that regulates the provision of legal aid services. Counsel advised that even if the accused had given instructions to not make the application, counsel would have no alternative but to follow the instructions of the executive director. By virtue of the *Legal Services Act*, R.S.N.W.T. 1988, c.L-4, the client is subservient to the Board on any question of costs recovery. Any costs recovered by a legally-aided client, for example, must be paid over to the Board.

[3] This position raised, in my mind at least, the question of standing to seek costs as a Charter remedy. The application was premised on a breach of the accused's right to timely disclosure, a right that is recognized now as a principle of fundamental justice included in s.7 of the Charter. Therefore this application seeks costs as a remedy pursuant to s.24(1) of the Charter. But s.24(1) provides that "anyone whose rights or freedoms ... have been infringed or denied" may apply to obtain an appropriate and just remedy. This says to me that the right to seek a remedy is personal to the person whose rights have been denied, such as the accused, and a third party, even one such as the Legal Services Board, lacks status to claim a remedy.

[4] I asked counsel for further submissions on this point. I was, however, subsequently advised that the accused now advances the application for costs. Therefore the question is moot.

[5] The question of status, however, is not merely a technical one. It is sometimes easy to overlook the distinction between the personal accused and the agency funding his or her defence (particularly in a jurisdiction where legal aid is the primary source of funding for criminal defendants). I suggest that is what happened in those cases where costs were ordered to be paid to the legal aid funding agencies (see, for example, the decision in *R.* v. *Sevigny*, [2002] Y.J. No. 23). But the wording of s.24 of the Charter is clear. If one is applying for a remedy under subsection 1, just as with an order for the exclusion of evidence under subsection 2, the claim can only be advanced by the person whose Charter rights have been infringed. I do not say that a legally-aided client is not entitled to recover costs as a Charter remedy. On the contrary, such a remedy is available to anyone whose rights have been infringed or denied where such a remedy is appropriate and just. I am merely saying that any claim for a remedy must be made by the person affected, and not the agency that pays the bills. There may be a requirement for the individual to pay over to the agency any costs recovered, but that is something outside of the purview of s.24(1) and of no concern to the court.

[6] The parties agree that an accused person has the right to timely disclosure. The Crown also concedes that a trial judge has the jurisdiction to award costs against the Crown for the lack of timely disclosure even though the non-disclosure has not impaired the accused's right to make full answer and defence.

[7] In this case the trial was originally scheduled to commence in May of this year. Prior to that, however, pretrial motions were scheduled to start in February to determine the admissibility of various statements by the accused. Those pre-trial

motions were expected to last 2 weeks. As it turned out, due to the late and still continuing disclosure by the Crown of large volumes of material, the pre-trial motions were adjourned and rescheduled for a later date. As a result the start of the trial was delayed as well.

[8] The consequence of the adjournment was that the defence was put to the expense of travelling to Yellowknife (lead counsel for the defence is from Ontario while second counsel lives and practices in Hay River) as well as time spent in preparation. The total costs claimed to be directly attributable to the adjournment are in excess of $22,000.00.

[9] The traditional view has been that costs are rarely awarded in a criminal proceeding and only where there has been "oppressive conduct" by the Crown, as stated for example in *R.* v. *Dostaler* (1994), 91 C.C.C. (3d) 444 (N.W.T.S.C.), or where there is "serious misconduct" on the part of the Crown, as in *R.* v. *Robinson* (1999), 142 C.C.C. (3d) 303 (Alta.C.A.). More recently, however, the courts have adopted a slightly less stringent approach, particularly in cases where the Crown has failed to meet its disclosure obligations.

[10] In *R.* v. *974649 Ontario Inc.* (2001), 159 C.C.C. (3d) 321, the Supreme Court of Canada addressed the standard for awarding costs as a Charter remedy. It did so in the context of a jurisdictional question as to whether a provincial offences court had the authority to grant costs as a Charter remedy. It held that the provincial offences court is empowered to grant Charter remedies as a "court of competent jurisdiction". In doing so it also said as follows (per McLachlin C.J.C. on behalf of the Court) on the specific question of costs as a remedy for non-disclosure (at paras. 80-81):

> Costs awards have a long history as a traditional criminal law remedy. Although sparingly used prior to the advent of the Charter, superior courts have always possessed the inherent jurisdiction to award costs against the Crown: *R.* v. *Ouellette*, [1980] 1 S.C.R. 568, 52 C.C.C. (2d) 336, 111 D.L.R. (3d) 216; *R.* v. *Pawlowski* (1993), 12 O.R. (3d) 709 at p. 712, 79 C.C.C. (3d) 353, 101 D.L.R. (4th) 267 (C.A.). In recent years, costs awards have attained more prominence as an effective remedy in criminal cases; in particular, they have assumed a vital role in enforcing the standards of disclosure established by this Court in *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1. See, for example: Pawlowski, supra; Pang, supra; R. v. Regan (1999), 137 C.C.C. (3d) 449 (N.S.C.A.)

> Such awards, while not without a compensatory element, are integrally connected to the court's control of its trial process, and intended as a means of disciplining and discouraging flagrant and unjustified incidents of non-disclosure.

[11] McLachlin C.J.C. went on to note (at para.87) that "Crown counsel are not held to a standard of perfection, and costs will not flow from every failure to disclose in a timely fashion. Rather, the developing jurisprudence uniformly restricts such awards, at a minimum, to circumstances of a marked and unacceptable departure from the reasonable standards expected of the prosecution."

[12] 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.

[13] In this case there is no allegation of bad faith. The problem was that the police did not have a highly organized method of tracking and collecting all disclosable material and forwarding it in a timely manner to the Crown. Another part of the problem was that originally there were 4 accused charged with murder and a large number of officers participated in various phases of the investigation. Still another part of the problem was that the accused's counsel did not come on the case until after the preliminary inquiry. It was only then that detailed disclosure requests were made of the Crown. This instigated a wider search that uncovered the voluminous material disclosed just before, up to, and even after the February adjournment. For whatever reason, there had been no such requests made by the accused's previous counsel.

[14] In my opinion, greater care and more timely effort could and should have been made by the police to make sure they had all relevant material collected. But the Crown must take responsibility for the disclosure process, including the role of the police: *R.* v. *L.A.T.* (1993), 84 C.C.C. (3d) 90 (Ont.C.A.). The Crown, to their credit in this case, did not dispute that. It is true that many cases speak of the need for the defence to make a request for disclosure. But the operative principle is that the

Crown's duty to disclose is triggered whenever there is a reasonable possibility of information being useful to the accused in making full answer and defence: *R.* v. *Dixon* (1998), 122 C.C.C. (3d) 1 (S.C.C.). It seems to me that much of the late-disclosed material would have been recognized early on as material that should be disclosed, even in the absence of a request, if there had been a more efficient system in place for documenting and marshalling information.

[15] The ongoing disclosure of voluminous material led directly to the need to adjourn the February proceedings. The date for those proceedings was set months in advance and Crown counsel must have realized, in the circumstances, that any failure to make timely disclosure could result in an adjournment. In turn, Crown counsel must have realized that, in such event, because defence counsel had to travel to Yellowknife, significant costs may be incurred for nothing. In this situation there was an obligation on the police and the Crown to make sure that timely disclosure of all relevant material was made. This is especially so in light of the fact that the defence was raising concerns about disclosure back in October.

[16] In my opinion, the lack of timely disclosure in this case was a marked and unacceptable departure from those standards that can be reasonably expected of the prosecution. Such departure amounted to a breach of the accused's right to disclosure and, in the circumstances, justifies an award of costs. Such an award is not meant to punish the police or the Crown. It is meant to enforce the standards for disclosure that have now been constitutionalized. It also accords with what McLachlin C.J.C. described in *R.* v. *974649 Ontario Inc.* (at paras. 18-19) as a broad and purposive interpretation of s.24(1), which is remedial in nature and meant to provide full, effective and meaningful remedies for Charter violations.

[17] I am not convinced, however, that the full amount claimed should be awarded. There is no doubt that part of the time in preparation was well-spent and of use when eventually the case did proceed. Nevertheless, a significant amount should still be awarded in order to have meaning.

[18] I therefore order that the Crown pay costs to the accused in the all-inclusive sum of $15,000.00. Counsel may work out whatever arrangements are necessary for the transfer of funds. If the Legal Services Board has a claim to those costs, then that is something to be worked out between the Board and the accused.

J.Z. Vertes
J.S.C.

Dated this 22nd day of September 2005.

Counsel for the Crown: Noel Sinclair and
Caroline Carrasco

Counsel for the Accused: Catherine Rhinelander and
Michael Hansen

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