IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

MAUREEN CRAWLEY

REASONS FOR DECISION
of the
HONOURABLE JUDGE B. E. SCHMALTZ

Application for Judicial Stay of Proceedings

Heard at:	Yellowknife, Northwest Territories September 8, 2006
Reasons:	September 12, 2006
Counsel for the Crown:	M. McGuire
Counsel for the Defendant:	M. Nightingale

(Charged under s. 4(1) *Controlled Drugs and Substances Act*)

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A. BACKGROUND

[1] Maureen Crawley is charged with 2 counts of possession of a substance contrary to s. 4(1) of the *Controlled Drugs and Substances Act*. The Information was laid December 1, 2005, and the offence date on both counts is September 20, 2005.

[2] On January 31, 2006, Ms. Crawley pleaded not guilty to both counts, and after two adjournments of the trial, the reasons for which are not relevant to this application, the trial commenced on September 8, 2006.

[3] On June 1, 2006, Counsel on behalf of Ms. Crawley filed and served a Notice of Motion (the Application) seeking a judicial stay pursuant to s. 24(1) of the *Charter*, or in the alternative, exclusion of certain evidence seized pursuant to s. 24(2) of the *Charter*. The Application alleged a violation of Ms. Crawley's rights under sections 7, 8, and 9 of the *Charter*. Grounds 2 and 3 of the Application state:

> 2. a warrant for the arrest of the Applicant issued in a manner contrary to s. 4(3) of the *Summary Conviction Procedures Act* which violated her s. 7 *Charter* right to liberty and security of the person;
>
> 3. that arrest warrant is alleged to be the basis for the police to affect the Applicant's arrest and the search is said to be incidental to the Applicant's arrest thereby continuing the original s. 7 violation … and constituting separate violations of the Applicant's rights under s. 8 and s. 9 of the *Charter*. (my emphasis)

[4] On June 7, 2006, Counsel on behalf of Ms. Crawley filed and served a Book of Authorities in support of the Application.

B. THE *VOIR DIRE*

[5] On September 8, 2006, the trial commenced. The trial began by entering into a *voir dire* to determine whether or not Ms. Crawley's *Charter* rights had been infringed, and if so whether or not a remedy should be granted, and if so, what remedy.

[6] At the beginning of the *voir dire* the Crown conceded the arrest of Ms. Crawley was an arrest without warrant, and if that arrest was unlawful, then the search of Ms. Crawley incidental to that arrest was unreasonable. The Crown further conceded that the search of Ms. Crawley was a warrantless search and therefore the onus was on the Crown to establish that the search was reasonable.

[7] Defence counsel filed a transcript of proceedings from August 18, 2005 relating to the issuance of a warrant for Maureen Crawley (Exhibit V-1), and a certified copy of a Warrant for Arrest for Maureen Joan Crawley dated August 18, 2005 (Exhibit V-2).

[8] The Crown called Cst. Wayne Bent on the *voir dire*. During Cst. Bent's cross examination on the content of his notes, Cst. Bent testified as to notations on the "Prisoner Report" also know as a "C-13". This document had not been disclosed to defence, and a brief adjournment was taken to allow Cst. Bent to locate the document and defence to review it. Cross-examination continued. Cst. Bent referred to there being two warrants outstanding for Maureen Crawley at the time she was arrested; Cst. Bent then produced a copy of a Warrant for Arrest for Maureen Joan Crawley dated September 1, 2005, having been executed on September 20, 2005 (Exhibit V-5). A copy of this warrant had not been disclosed to Defence counsel, and nor did Defence counsel know of the existence of this warrant prior to Cst. Bent referring to it during cross-examination.

[9] At this point in the *voir dire*, Defence counsel advised that she wished to make a fresh *Charter* Application on behalf of the accused, and Cst. Bent was excused. Defence then made Application for a judicial stay of proceedings on the ground of lack of disclosure or failure to provide disclosure. It is this "fresh" Application for a judicial stay of proceedings that these reasons relate to.

[10] On this Application, a copy of a letter from the Nightingale Law Office to the Crowns' Office dated March 28, 2006 was tendered as Exhibit V-6. This letter reads in part:

> Further to my correspondence of January 24, 2006, and February 27, 2006, I am still waiting to receive documentation which establishes that a valid warrant for Ms. Crawley was outstanding at the time of her arrest.
>
> Please be advised that next week I will be serving upon you notice of a *[C]harter* motion to be brought at trial challenging the legality of the arrest and subsequent search of Ms. Crawley… (my emphasis)

[11] A copy of a letter from the Crowns' Office to Ms. Nightingale dated March 29, 2006, was tendered as Exhibit V-7. This letter states in part:

> This is to confirm that the Crown has forwarded your disclosure request of March 28, 2006, to the investigators assigned to this file.

[12] Lastly, a copy of a letter from the Nightingale Law Office to the Crowns' Office dated April 24, 2006 was tendered as Exhibit V-8. This letter reads in part:

> … Thank you also for the voice message advising that the warrant upon which Ms. Crawley was arrested was vacated in November, 2005. Can you please confirm this last piece of information. I do not understand why it would be vacated 2 months after she was arrested on the warrant.
>
> I also note that Cst. Gurski indicates that Ms. Crawley was arrested under "CDSA warrants". Please advise what is meant by this, and if there is some other warrant that was relied upon in her arrest. (my emphasis)

C. ANALYSIS

i) Relevance

[13] I find it absolutely clear that the issue in this case will be the validity of the warrant that Ms. Crawley was arrested on. I also find that it could have been no less clear to the Crown than it is to me that the issue on this case was to be the validity of the warrant that Ms. Crawley was arrested on. I find that the first disclosure of the second outstanding warrant occurring during cross-examination is a textbook example of non-disclosure. And it is non-disclosure of information that goes to the very heart of what defence had clearly identified as a, if not the, central issue in this case. As Richard, J. stated in *R.* v. *Schelling* [1994] N.W.T.J. 56 (S.C.):

> In 1991 the Supreme Court of Canada made a comprehensive statement of the Crown's obligation to disclose in *R.* v. *Stinchcombe*, 68 C.C.C. (3d) 1. Therein it was confirmed that there is a general duty on the part of the Crown to disclose all material it proposes to use at trial and especially *all evidence which may assist the accused even if the Crown does not propose to adduce it*. As to what should be disclosed, the Court stated that the general principle is that all relevant information must be disclosed subject to the reviewable discretion of the Crown. The Crown need not produce that which is clearly irrelevant. On any review by the trial judge of the exercise of the Crown's discretion, the guiding principle is that information ought not to be withheld from the accused *if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence*. The right of the accused to this disclosure is not itself a constitutional right – it is simply an adjunct of the accused's constitutional right to make full answer and defence. And the disclosure obligation on the Crown elaborated in the *Stinchcombe* decision is a *continuous* one, i.e., further disclosure must be made if and when additional information is received or becomes relevant. (my emphasis)

[14] I have not had the benefit of full argument on the merits of the *Charter* application as originally framed by the Defence. However, the Crown's position on the "fresh" *Charter* Application for a judicial stay for non-disclosure is that the non disclosure, or now late disclosure, of the second warrant is irrelevant or immaterial as the Crown conceded at the start of the *voir dire* that the arrest of Ms. Crawley was an arrest without warrant. I find that argument fails on two grounds. First, the disclosure of the second warrant may make that concession in error and possibly improper. Secondly the existence of the

second warrant may well inform the issue and therefore be relevant to the arresting officer's belief that there was an outstanding warrant for the accused's arrest. The reasonableness of that belief may be relevant to the Crown's position on the initial *Charter* Application.

[15] I do find that the second warrant is relevant and the accused had a right to disclosure of that warrant, or at the very least know of its existence, in order to make full answer and defence. It may well be that the position of the accused would have been quite different had she known of the second warrant; it may also be that Defence may submit that the defects that exist with respect to the first warrant, also exist with respect to the second warrant. Without further consideration and perhaps investigation by Defence, it is impossible to say what the effect of the disclosure of the second warrant is. In any event it is not irrelevant to the issue or issues in this case, and should have been disclosed well before the commencement of this trial.

[16] The accused must establish that the non-disclosure has probably prejudiced or had an adverse effect on her ability to make full answer and defence: *R*. v. *Dostaler*, [1994] N.W.T.J. No. 43 (S.C.). I find that the non- disclosure of the second warrant has at least had a material or adverse effect on the accused's ability to make full answer and defence and is a violation of her constitutional right guaranteed by s. 7 of the *Charter*.

ii) <u>Remedy</u>

[17] The question then is what is the appropriate remedy? Defence asks for a judicial stay of these proceedings, submitting that the existence of the second warrant is extremely prejudicial to the accused. As I have found that the late disclosure amounts to a breach of the accused's right under Section 7, a judicial stay may be an appropriate and just remedy under Section 24(1) of the *Charter*. It is only in the clearest of cases that a judicial stay of proceedings will constitute an appropriate remedy under the *Charter*. A judicial stay or proceedings prevents the abuse of the court's process.

[18] Many cases interpret or clarify what is meant by the "the clearest of cases":

> A stay should be granted where "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency", or where the proceedings are "oppressive or vexatious". This is a power which can be exercised only in the 'clearest of cases'. *R.* v. *Keyowski*, [1988] 1 S.C.R. 657 (citations omitted)
>
> When a stay of proceedings is entered in a criminal case for abuse of process, the prosecution is set aside, not on the merits … but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. *United States* v. *Cobb* (2001), 152 C.C.C. (3d) 270 (S.C.C.)

> An abuse of process leading to a stay of proceedings is something more than a particular violation of one person's constitutional rights. It is conduct on the part of the state that is so oppressive, vexatious, or unfair as to contravene our fundamental notions of justice and thus undermine the very integrity of the judicial process. A judicial stay of proceedings is granted only in the clearest of cases of abuse of process. (*R*. v. *Dostaler*, [1994] N.W.T.J. No. 43 (S.C.)

See also: *R*. v. *B.W.W*., [1999] N.W.T.J. No. 42 (S.C.) at paras. 12-19; *R*. v. *Keevik*, [1996] N.W.T.J. No. 32 (S.C.); *R*. v. *Hainnu*, [1997] N.W.T.J. No. 76 (S.C.); *R*. v. *Schelling*, [1994] N.W.T.J. No. 56 (S.C.); *R*. v. *Going*, [2001] N.W.T.J. No. 65 (S.C.); *R*. v. *Dostaler*, [1994] N.W.T.J. No. 43 (S.C.).

[19] The case of *R*. v. *Going*, *supra*, was also a case that dealt with an application for a judicial stay based on non-disclosure. Documents had been sent to the police, but the police had not forwarded those documents to the Crown. Vertes, J.'s comments in *Going* are quite apt in this case:

> [O]ne would think that the Crown Attorney would demand to see whatever documents the police had in their possession. After all, it is the Crown that is ultimately answerable for the prosecution. Plus, the Crown has a constitutional obligation to inform the defence of any documents in the possession of state authorities…
> …
> All of this [non-disclosure] reveals not so much deliberate non-disclosure as a high degree of carelessness on the part of the police and Crown.

The application for a judicial stay in *Going* was denied.

[20] The non-disclosure of the second warrant in this case is extremely unfortunate, and especially so in that it was disclosure of this type that was not only specifically, but repeatedly asked for by Defence. A *Charter* Application was filed and served on the Crown, which specifically and almost exclusively relates to the issue of the arrest of the accused. A book of authorities was filed and served on the Crown.

[21] The non-disclosure of the second warrant was careless, and perhaps even inexcusable on the part of the Crown. I find Crown Counsel was not aware of the existence of the second warrant, which is unfortunate, perhaps careless, and in this case, considering the repeated requests, perhaps even negligent. But I cannot find that the conduct of the Crown in this case was vexatious or oppressive. I cannot find that Ms. Crawley cannot still have a fair trial, or that compelling Ms. Crawley to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency. I cannot find that this prosecution is tainted to such a degree that to proceed with it would tarnish the integrity of the Court. I cannot find that the only remedy, or even the appropriate remedy in this case is to enter a judicial stay of proceedings. This is not the clearest of cases.

[22] I do find that in order to make full answer and defence Ms. Crawley or counsel on her behalf will require time to consider the effect of the second warrant on the accused's position. Therefore in all the circumstances, I find that the appropriate remedy is an adjournment of this trial to allow full and proper consideration by defence of the second warrant.

Bernadette E. Schmaltz
T.C.J.

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