Case Name:

R. v. McCracken

Between
Her Majesty the Queen, and
Stephen McCracken

[1995] O.J. No. 4947

Ontario Court of Justice (Provincial Division)
Toronto, Ontario
Fairgrieve Prov. J.

Oral judgment: April 4, 1995.
(20 paras.)

Civil rights — Trials, due process, fundamental justice and fair hearings — Right of accused to obtain information or evidence — Right of accused to make full answer and defence — Criminal law — Rights of accused — Right to discovery or production — Preparation of defence, duties of police.

Application by McCracken for Crown disclosure. McCracken was charged with driving while his blood alcohol level was over .08. The Crown relied on a breathalyzer test. McCracken requested that the Crown supply a copy of manuals for the breathalyzer machine. The police had the manuals. The Crown did not comply with McCracken's request on the grounds that it did not have the manuals, and it was not obliged to obtain the manuals from the police. The Crown further argued that the manuals were available for inspection at police offices, and there were manufactures' copyright restrictions on copying and distributing the manuals. The Crown conceded that the manuals were relevant.

HELD: Application allowed. There was an air of reality in McCracken's request and it was not a fishing expedition. The Crown was ordered to produce a copy of the manuals since they were relevant, were within police possession, and it was not reasonable to require McCracken to attend at police offices. Any copying restrictions should not be allowed to interfere with the Crown's disclosure obligations.

Counsel:

S. Oseni, for the Crown.
R. Burke, for the accused.

¶ 1 **FAIRGRIEVE PROV. J.** (orally):— This is an application by Mr. McCracken, who is charged with driving with a blood alcohol level that exceeded 80 milligrams of alcohol per 100 millilitres of blood, for an order to compel the Crown to disclose to the defence three manuals concerning the approved instrument, an Intoxilyzer 5000C that, I am informed, was used to obtain evidence upon which the Crown will rely in this case.

¶ 2 It seems to me that the principles stated by the Supreme Court of Canada in Stinchcombe v. The Queen reported (1991), 68 C.C.C. (3d) 1 at page 12, are applicable to this application. In that judgment, Mr. Justice Sopinka outlined the constitutional obligation of the Crown to provide disclosure, recognizing a discretion on the part of the Crown to withhold information for particular reasons, and to delay disclosure or to control the timing of the disclosure. On page 12 His Lordship stated:

> "The discretion of Crown counsel is, however, reviewable by the trial judge. Counsel for the defence can initiate a review when an issue arises with respect to the exercise of the Crown's discretion. On a review, the Crown must justify its refusal to disclose, and as much as disclosure of all relevant information is the general rule, the Crown must bring itself within an exception to that rule. The trial judge on a review should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege."

And further down the page:

> "The trial judge may also review the Crown's exercise of discretion as to relevance and interference with the investigation to ensure that the right to make full answer and defence is not violated. I am confident that disputes over disclosure will arise infrequently when it is made clear that the counsel for the Crown is under a general duty to disclose all relevant information. The tradition of Crown counsel in this country in carrying out their role as "ministers of justice" and not as adversaries has generally been very high. Given this fact, and the obligation of defence counsel as officers of the court to act responsibly, these matters will usually be resolved without the intervention of the trial judge. When they do arise, the trial judge must resolve them. This may require not only submissions but the inspection of statements and other documents, and indeed, in some cases, viva voce evidence. A voir dire will frequently be the appropriate procedure in which to deal with these matters."

¶ 3 In this case, Mr. Burke made a timely request for disclosure prior to the trial date that was set for this matter. The Crown responded initially by a letter stating that they did not have the material being sought, and otherwise declined to provide what Mr. Burke was seeking. After a fairly lengthy application with the calling of viva voce evidence, it is incumbent, it seems to me, on the Court to decide whether the defence is entitled to this material, and whether the Crown has any valid reason for refusing to provide it.

¶ 4 I am satisfied that in the context of this case, there is what Mr. Burke described as "an air of reality" to the defence claim for disclosure, and that the defence here is not simply embarking on a fishing expedition for some ulterior purpose. I am satisfied that the defence has a valid interest in obtaining information concerning the instrument that was used by the police to gather evidence in this case, and information concerning the proper procedures to be used by a qualified technician operating the machine.

¶ 5 There was evidence that there are in fact three manuals that deal with these issues. They have been referred to now in the evidence and in the submissions. There is, first, the training manual produced by the Centre of Forensic Sciences, the Maintenance or Calibration Manual that is in the possession of Constable Patrick, and the Operator's Manual that is produced by the manufacturer of the instrument. It appears to be the case that the Crown has conceded that those three manuals are now in the possession of police officers, either Constable Grant, the qualified technician involved in this case, or Constable Patrick, who was called to give evidence on the application and who remains sitting in the courtroom now.

¶ 6 The Crown takes the position that it is not part of the prosecution's disclosure obligation to embark on research on behalf of the defence, or to conduct investigations simply because defence counsel requests it. I agree with that as a general proposition, but it seems to me that that is not the situation here. What Mr. Burke seeks relates to the instrument employed by the police as part of the investigation of his client. It seems to me that Mr. Burke is not asking for anything more than documents that are in the possession at the present time of police officers in the courtroom.

¶ 7 I interpret Ms. Oseni's submissions to be, in essence, a concession that the material sought by the defence indeed has relevance to this case. So that it seems to me, the Court would not be in a position where it could decline to order disclosure because the material sought was clearly irrelevant.

¶ 8 Ms. Oseni expressed concern about a copyright that the manufacturer apparently has with respect to the Operator's Manual. There was evidence from the Canadian distributor as to the procedure followed by the manufacturer in the United States, whereby for a fee of two hundred and fifty dollars and undertakings not to photocopy or distribute and to return the manual, copies are produced to defence counsel there. I am not aware of what disclosure obligations prosecutors in the United States have, and there has not been any argument concerning that, but it seems to me that this concern about the manufacturer's copyright certainly falls well short of any privilege that the Court ought to be seeking to protect in these circumstances.

¶ 9 The claimed copyright, in my view, ought not to be permitted to interfere with the discharge of the Crown's disclosure obligations. Surely, when this Intoxilyzer was granted approved instrument status, it must have been known to the manufacturer and to the distributor that there would be some interest on the part of the defence bar in the way the machine was operated and the way that qualified technicians operated it in particular cases. There is no confidentiality with respect to this material, and there is evidence that in fact the C.F.S. training manual is available for inspection in their library. So in that respect, it really comes down to a matter of mechanics, and whether it is reasonable for the crown to insist that defence counsel or his or her agent ought to spend hours examining the documents without the benefit of a photocopy machine in a library. While it may not be so inconvenient for people practising at the Old City Hall, generally speaking, practical problems could arise for other lawyers in the province where the same issue could arise.

¶ 10 I have not been satisfied by the Crown's argument today that there is any valid reason for refusing the order sought by the defence. There will be an order, then, that the three manuals be made available to Mr. Burke, either by way of photocopies produced by the Crown, or by way of producing the documents in the possession now of Constable Patrick, who now, I am informed, has Constable Grant's training manual as well, so that Mr. Burke can make his own photocopies using his own facilities.

¶ 11 All right. Is there anything further that needs to be said in terms of the timing of compliance with this disclosure order?

¶ 12 MR. BURKE: I don't think so, Your Honour.

¶ 13 **THE COURT**: Should there be any difficulty complying with it immediately?

¶ 14 CONSTABLE PATRICK: I don't have a maintenance manual listing, Your Honour. That contains all the schematics also of the instrument.

¶ 15 **THE COURT**: Yes. All right.

¶ 16 MR. EATCH: I believe that will be defended.

¶ 17 **THE COURT**: I'm sorry?

¶ 18 MR. EATCH: Your Honour, I believe that will be defended because of the schematics involved in the field service and maintenance package.

¶ 19 **THE COURT**: I appreciate the reasons for your making that comment. I'm not quite sure, however, that it has much relevance in terms of this criminal prosecution, involving the Crown and the accused in this case. That is the order of the trial court then with respect to this matter. We better set a date for the continuation of the trial.

¶ 20 **THE COURT**: All right. June the 21st then, it will have to be set to 111 court to be traversed to where I am sitting. All right. Mr. McCracken will have to re-attend, then, on June the 21st, nine o'clock in the morning. 111 court.

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