Case Name:

R. v. Chaplin

David Allan Chaplin and Dale Leonard Chaplin, appellants;
v.
Her Majesty The Queen, respondent, and
The Attorney General of Canada, intervener.

[1994] S.C.J. No. 89

[1994] A.C.S. no 89

[1995] 1 S.C.R. 727

[1995] 1 R.C.S. 727

178 N.R. 118

J.E. 95-459

27 Alta. L.R. (3d) 1

162 A.R. 272

96 C.C.C. (3d) 225

36 C.R. (4th) 201

26 C.R.R. (2d) 189

26 W.C.B. (2d) 197

1995 CanLII 126

File No.: 23865.

Supreme Court of Canada

Hearing and judgment: October 6, 1994.
Reasons delivered: February 23, 1995.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Criminal law -- Evidence -- Disclosure -- Crown's obligation to make disclosure to defence -- Defence informed that accuseds not primary or secondary wiretap targets in this investigation -- Defence requesting to be informed of whether or not accuseds primary or secondary targets in wiretaps used in other investigations -- Whether accused has right to know if a target in wiretap authorizations unrelated to investigation of current criminal charge -- Canadian Charter of Rights and Freedoms, s. 7 -- Criminal Code, R.S.C., 1985, c. C-46, ss. 187, 189(2), 193, 196.

Appellants requested the provincial prosecutor and the Department of Justice to disclose whether either appellant was named as primary or secondary target in any undisclosed wiretaps during the period 1988 to April 15, 1992. The reply was that there were no provincial wiretap authorizations in effect with respect to this investigation during that time period but both Crowns declined to confirm or deny the existence of any other authorizations. The appellants then applied for an order requiring the Crown to answer the question, which motion proceeded as a Stinchcombe application.

During the motion, the appellants admitted that they had no evidence to demonstrate the relevance to their defence of the information sought since they had no proof that there had been any wiretap authorizations or that there was derivative evidence obtained from wiretaps relevant to the charges. The appellants argued, however, that once an accused has made a Stinchcombe application for disclosure, the onus was on the Crown to justify its refusal to disclose on the basis that the material was clearly irrelevant, or raised public interest privilege.

The motions judge found that the onus in a Stinchcombe application was on the Crown and that the appellants were entitled to disclosure of the requested information. As a result of the refusal of the provincial and federal Crowns to comply with the terms of the disclosure order, the appellants applied for and were granted a judicial stay of proceedings respecting the indictment. The Alberta Court of Appeal set aside both the disclosure order and the stay of proceedings, and ordered a new trial. The issue on appeal was whether an accused facing trial on a criminal charge is entitled to know if he or she has been named as a primary or secondary target in any wiretap authorizations unrelated to the investigation of the current criminal charge, obtained in the period from the charges up to the time of trial.

Held: The appeal is dismissed.

The Crown's disclosure obligation is shaped by the principles of fundamental justice included in s. 7 of the Canadian Charter of Rights and Freedoms and, in particular, the right to make full answer and defence. Generally, the Crown must disclose all information, whether inculpatory or exculpatory,

except evidence that is beyond the control of the prosecution, clearly irrelevant, or privileged. This obligation requires that the Crown exercise the utmost good faith in determining which information must be disclosed and in providing ongoing disclosure. Failure to comply with this initial and continuing obligation to disclose relevant and non-privileged evidence may result in a stay of proceedings or other redress against the Crown, and may constitute a serious breach of ethical standards.

The Crown's obligation to disclose is not absolute and, while it must err on the side of inclusion, it need not produce what is clearly irrelevant. Relevance is determined in relation to its use by the defence. When the Crown alleges that it has discharged its obligation to disclose, an issue may arise as to whether disclosure is complete in two situations, where the defence contends that: (1) identified and existing material ought to have been produced, or that (2) material whose existence is in dispute ought to have been produced.

In the first situation, where the existence of certain information has been identified, the Crown must justify non-disclosure by demonstrating either that the information sought is beyond its control, or that it is clearly irrelevant or privileged. Justification of non-disclosure on the grounds of public interest privilege or other privilege may involve certain special procedures (such as that referred to in s. 37(2) of the Canada Evidence Act) to protect the confidentiality of the evidence.

In the second situation, the Crown may dispute the existence of material which is alleged to be relevant. Once the Crown alleges that it has fulfilled its obligation to produce, it cannot be required to justify the non-disclosure of material, the existence of which it is unaware or denies. The defence, therefore, must establish a basis which could enable the presiding judge to conclude that there is in existence further material which is potentially relevant. Relevance means a reasonable possibility of being useful to the accused in making full answer and defence. The existence of the disputed material must be sufficiently identified not only to reveal its nature but also to enable the presiding judge to determine that it may meet the test with respect to material which the Crown is obliged to produce. The matter may often be resolved by oral submissions of counsel without need of a voir dire, though viva voce evidence and a voir dire may be required where the presiding judge cannot resolve the matter on the basis of submissions by counsel. The requirement that the defence provide a basis for its demand for further production serves to preclude speculative and time-consuming disclosure requests, and avoid impeding ongoing criminal investigations.

If the defence establishes a basis for the conclusion that the evidence may exist, the Crown must then justify a continuing refusal to disclose. This obligation is the same as that in first instance. If the matter cannot be resolved without viva voce evidence, the Crown must be afforded an opportunity to call relevant evidence. In cases involving confidential information, it may be appropriate for the trial judge to order a hearing in camera, or privately inspect the material in issue, applying procedures such as those set out in s. 37(2) of the Canada Evidence Act. In cases involving wiretaps, the procedure for protecting confidential information is dealt with in R. v. Garofoli.

Applying the foregoing to this appeal, the accuseds failed to establish a basis for the existence of wiretap authorizations or evidence derived therefrom which is potentially relevant to making full answer and defence.

Cases Cited

Considered: R. v. Stinchcombe, [1991] 3 S.C.R. 326; R. v. Egger, [1993] 2 S.C.R. 451; referred to: Dersch v. Canada (Attorney General), [1990] 2 S.C.R. 1505; R. v. Roach (1985), 23 C.C.C. (3d) 262; R. v. Simon (1992), 54 O.A.C. 398; R. v. Hutter (1993), 86 C.C.C. (3d) 81; R. v. Durette, [1994] 1 S.C.R. 469; R. v. Desjardins (No. 5) (1991), 88 Nfld. & P.E.I.R. 149; R. v. Duarte, [1990] 1 S.C.R. 30; R. v. Garofoli, [1990] 2 S.C.R. 1421 .

Statutes and Regulations Cited

Canada Evidence Act, R.S.C., 1985, c. C-5, s. 37(2).
Canadian Charter of Rights and Freedoms, ss. 7, 10(b), 11(d).
Criminal Code, R.S.C., 1985, c. C-46, ss. 187 [am. c. 27 (1st Supp.), s. 24], 189(2) [idem, s. 203], 193 [am. c. 30 (4th Supp.), s. 45], 196 [am. c. 27 (1st Supp.), s. 28], 625.1(2) [ad. idem, s. 127], 691(2)(a).

APPEAL from a judgment of the Alberta Court of Appeal (1993), 145 A.R. 153, 55 W.A.C. 153, 14 Alta. L.R. (3d) 283, 20 C.R.R. (2d) 152, allowing an appeal from a judgment of Veit J. granting a judicial stay of proceedings. Appeal dismissed.

David J. Martin, for the appellants.
Jack Watson, Q.C., for the respondent.
Ronald C. Reimer, for the intervener.

Solicitor for the appellants: David J. Martin, Vancouver.
Solicitor for the respondent: The Attorney General for Alberta, Edmonton.
Solicitor for the intervener: The Attorney General of Canada, Ottawa.

The judgment of the Court was delivered by

1 **SOPINKA J.**:-- This appeal concerns the limits of Crown disclosure obligations in criminal prosecutions, flowing from this Court's decision in R. v. Stinchcombe, [1991] 3 S.C.R. 326, and amplifies the procedural structure of disclosure obligations as articulated in R. v. Stinchcombe, and subsequent case law. Specifically, the issue is whether an accused facing trial on a criminal charge is entitled to know if he or she has been named as a primary or secondary target in any wiretap authorizations unrelated to the investigation of the current criminal charge, obtained in the period from the charge up to the time of trial.

Facts

2 Pursuant to an indictment, dated July 9, 1991, the appellant, David Allan Chaplin, was charged with 22 counts, and the appellant, Dale Leonard Chaplin, was charged with four counts of break and enter and theft, allegedly committed between 1984 and 1989. The appellants were arrested on these charges in December, 1989, and were free on bail through to the commencement of their trial. The preliminary inquiry into these charges resulted in an order for the appellants to stand trial.

3 Since the appellants elected trial by judge and jury, on March 20, 1992, a pre-hearing conference pursuant to s. 625.1(2) of the Criminal Code, R.S.C., 1985, c. C-46 (ad. R.S.C., 1985, c. 27 (1st Supp.), s. 127), took place. Given the complex evidentiary and constitutional issues raised by the appellants, McDonald J. directed that April 15, 1992 to May 1, 1992 be set aside for the trial judge to deal with all motions and evidentiary matters that could be determined in the absence of the jury.

4 Before the hearing commenced, the appellants made a written request to the provincial prosecutor and to the Edmonton office of the Department of Justice, requesting that provincial and federal authorities disclose whether either of the appellants were named as primary or secondary targets in any undisclosed Criminal Code, Part VI electronic interceptions during the period 1988 to April 15, 1992.

5 Counsel representing the provincial and federal governments notified the appellants that:

(a) there were no provincial wiretap authorizations in effect pertaining to this particular investigation during the time period in question;
(b) the provincial Crown declined to confirm or deny the existence of any other provincial authorization that may have been in existence during the same time period; and
(c) the federal Crown refused to confirm or deny the existence of any such authorization during the relevant time period that may have been obtained

in relation to matters under federal jurisdiction.

It is very significant that the Crown disclosed that there were no wiretap authorizations pertaining to the investigation of the charges being tried in the time period in question.

6 As a result of the Crown's refusal, the appellants applied for an order directing the Crown to answer the following question:

> During the period 1988 to April 15, 1992, were we [the appellants] named as either primary or secondary targets of any authorizations to intercept private communications granted in Edmonton or elsewhere in Alberta or in British Columbia?

In their application, the appellants also requested that, if they were in fact named as primary or secondary targets in any such authorizations, the Crown disclose to them the authorizations, the supporting affidavits and documents, the logs, transcripts, records, copies of all recordings, and names and status of each person involved in the surveillance.

7 After an issue as to presentation of evidence relied upon in support of the application and two adjournments, the application proceeded as a Stinchcombe application as to whether the appellants had an absolute right to ask the question and expect an answer. The trial court heard the application on the basis of argument on first principles, and if first principles failed, the parties would be permitted to call evidence to address the issue of whether disclosure was required.

8 The appellants' reasons for seeking disclosure from the Crown were three-fold:

> (a) to permit them to establish an evidentiary foundation for invoking the exclusionary rule in s. 189(2) of the Code dealing with derivative evidence;
> (b) to prepare for cross-examination of witnesses and fully explore the nature of the Crown's case in order to secure their right to a fair hearing as mandated by s. 7 of the Canadian Charter of Rights and Freedoms; and
> (c) to determine whether their constitutionally mandated rights to a fair trial and consultation with counsel in private have been violated by police interception of privileged communications between them and their

lawyers contrary to ss. 7, 10(b), and 11(d) of the Charter.

The respondent's reasons for refusing disclosure were:

> (a) to answer the question would effectively bar investigating bodies from the use of wiretap authorizations against persons charged with an offence or who may be charged with an offence if the only basis for the demand needs to be speculation without the necessity of showing any nexus between the disclosure sought and the case the accused is facing;
>
> (b) an answer to the question would not conclude the matter and the question could be raised up to the end of the trial; and
>
> (c) the circumstances of this case did not clearly trigger any of the provisions of s. 193(2).

The intervener's reasons for objecting to disclosure of the requested information were based on its lack of relevance and on public interest privilege.

9 At the application, the respondent submitted that this was a Charter application and consequently that the onus was on the appellants to demonstrate a Charter breach. In a Stinchcombe application, the initial onus of demonstrating the relevance to their case of the requested information was on the accuseds. The appellants admitted that they had no evidence to demonstrate the relevance to their defence of the information sought since they had no proof that there had been any wiretap authorizations or that there was derivative evidence obtained therefrom relevant to the charges. The appellants argued, however, that once the accused has made a Stinchcombe application for disclosure, the onus was on the Crown to justify its refusal to disclose on the basis that the material was clearly irrelevant, or raised public interest privilege.

10 The intervener, who had been brought into the proceedings on the appellants' motion requesting an order for disclosure of federal wiretap investigations, was granted leave to intervene in the Alberta Court of Appeal. The Attorney General of Canada was also granted leave to intervene in this Court.

11 The respondent's application to quash the appellants' notice of appeal as of right pursuant to s. 691(2)(a), asserting that the judgment of the Alberta Court of Appeal setting aside a stay of proceeding and directing a new trial did not give rise to an appeal as of right, was dismissed by this Court on March 4, 1994.

Judgments Below

Alberta Court of Queen's Bench

12 On April 21, 1992, Veit J. of the Alberta Court of Queen's Bench ruled that the onus in a Stinchcombe application was on the Crown, and that the appellants were entitled to disclosure of the requested information. As a result of the refusal of the provincial and federal Crowns to comply with the terms of the disclosure order, the appellants applied for and were granted on April 29, 1992, a judicial stay of proceedings respecting the indictment.

13 In making the disclosure order on April 21, 1992, Veit J. held that the onus was on the Crown to provide full disclosure. If the Crown refused full disclosure, the Court had to determine what must be disclosed. She noted that sometimes, the Crown's onus will be easily satisfied, such as where the requested disclosure is outside the knowledge of the prosecutorial authorities, irrelevant to the charge, or subject to a non-disclosure privilege. She also noted that the public policy concerns authorizing interception of confidential communications confront the right of an individual to make full answer and defence. The public policy objective of protecting informants may be achieved by editing disclosures.

14 Veit J. held that the Crown had not established that it was impractical for it to answer the question. The question was specific and the answer could easily be given after making necessary internal investigations. She rejected the argument that the accused persons had not established the relevancy of the evidence to their ability to make full answer and defence since such requirement would effectively make the Crown's police witness the arbiter of disclosure. There was prima facie relevance to the accuseds' claim given derivative evidence considerations, and potential state interception of solicitor/client communications. The appellants were in a "Catch 22" situation similar to that in Dersch v. Canada (Attorney General), [1990] 2 S.C.R. 1505, unable to prove that the answer to the question would be useful in the same way that those asking for an interception packet to be opened cannot prove that the packet will contain useful information. She rejected the provincial Crown's floodgates concern on the basis that she did not have to resolve the limits of disclosure.

15 After Veit J.'s judgment was delivered, the provincial Crown prosecutor asked to call evidence demonstrating that the answers to the questions sought were irrelevant, prior to the order to answer being made. Veit J. refused to permit the calling of evidence showing that no person involved in the investigation or prosecution had knowledge of any information obtained by virtue of any wiretap investigation of the appellants, holding that such evidence was irrelevant (since the police officers would just state that they did not know of any interception), and unnecessary.

16 After an adjournment, the respondent returned stating that it would not answer the question, relying on: (a) the presumption of regularity that the provisions of s. 196 of the Code had been complied with and that there were no expired wiretaps; and (b) with respect to unexpired wiretaps not having yet triggered s. 196, on public policy grounds that to answer the question would bar investigations under wiretap authorizations and that the request was purely speculative. Veit J. again

refused to permit the respondent leave to call evidence, based on Dersch v. Canada (Attorney General), supra, and the fact that some Charter breaches were so serious that a causal connection to the evidence need not be established before a remedy will be granted. Lack of finality was not considered a problem since R. v. Stinchcombe, supra, mandates on-going disclosure. She then ordered a judicial stay of proceedings as a remedy for failure to disclose the information.

Alberta Court of Appeal (1993), 145 A.R. 153

17 On November 4, 1993, Stratton J.A., writing for the Alberta Court of Appeal, set aside both the disclosure order and the stay of proceedings, and ordered a new trial. Since he found that Veit J. did not have the discretion to make the disclosure order, he did not deal with the issues surrounding the stay of proceedings.

18 Stratton J.A. stated that Crown Counsel's assertion of "no relevance" was prima facie determinative. The Crown need not disclose what is clearly irrelevant to the accused's right to make full answer and defence (at p. 157):

> Where the Crown's statement of no relevance is challenged by an accused, the accused must establish a reasonable possibility that the accused's right to make full answer and defence will be impaired.

While noting that there may be cases involving pure questions of law, where a factual basis is not needed to support a contention of non-disclosure, this case required a factual basis. The court did note the limits to Crown disclosure suggested by R. v. Stinchcombe, supra, at p. 339, that "[w]hile the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant". Yet, Stratton J.A. stated, at p. 158, that "[t]here must be some evidence adduced which gives an air of reality to what is otherwise pure speculation". Given the cases cited in support of this principle, R. v. Roach (1985), 23 C.C.C. (3d) 262 (Alta. C.A.), and R. v. Simon (1992), 54 O.A.C. 398 (C.A.), Stratton J.A. appeared to be imposing an evidentiary burden on the accused to bring forth enough evidence to put in issue a reasonable possibility that the accused's right to make full answer and defence will be impaired. The accuseds' assertion

(at
p. 159) of "a theoretical possibility founded only upon the
conjecture of defence counsel" of relevance was "not
sufficient"
to trigger the Stinchcombe disclosure obligations.
Furthermore,
Stratton J.A. distinguished the Dersch "Catch-22" situation
from
this appeal on the basis that in that case, there had been
notice the Crown intended to introduce derivative evidence
from
wiretaps, thus establishing an evidentiary foundation. In
contrast, this appeal was pure speculation in that it sought
the
disclosure of hypothetical material. Accordingly, Stratton
J.A.
allowed the appeal and ordered a new trial.

19 In obiter, Stratton J.A. also stated that if the appellants had actually invested their assertions with an air of reality, the trial judge would have denied the Crown its right to adjudicative fairness in not permitting an opportunity to call evidence to attempt to justify its disclosure refusal. Stratton J.A. did not address the intervener's alternative submission that non-disclosure was justified on the basis of public interest privilege.

Analysis

General Crown Obligation to Disclose Information

20 The rationale behind the Crown's disclosure obligation stems from s. 7 of the Charter reflecting, as this Court stated in R. v. Stinchcombe, supra, at p. 336:

. . . the overriding concern that failure to disclose
impedes the ability of the accused to make full answer and
defence. This common law right has acquired new vigour by
virtue of its inclusion in s. 7 of the Canadian Charter of
Rights and Freedoms as one of the principles of fundamental
justice. . . . The right to make full answer and defence is
one of the pillars of criminal justice on which we heavily
depend to ensure that the innocent are not convicted.

This underlying principle shapes the limits of disclosure.

21 This Court has clearly established that the Crown is under a general duty to disclose all

information, whether inculpatory or exculpatory, except evidence that is beyond the control of the prosecution, clearly irrelevant, or privileged: R. v. Stinchcombe, supra, at p. 339; R. v. Egger, [1993] 2 S.C.R. 451. The Crown obligation to disclose all relevant and non-privileged evidence, whether favourable or unfavourable, to the accused requires that the Crown exercise the utmost good faith in determining which information must be disclosed and in providing ongoing disclosure. Failure to comply with this initial and continuing obligation to disclose relevant and non-privileged evidence may result in a stay of proceedings or other redress against the Crown, and may constitute a serious breach of ethical standards. With respect to the latter, of necessity, great reliance must be placed on the integrity of the police and prosecution bar to act in the utmost good faith. It is for this reason that departures from this onerous obligation are treated as very serious breaches of professional ethics.

22 Nonetheless, the Crown's obligation to disclose is not absolute (R. v. Stinchcombe, supra, at p. 339):

> While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant.

Relevance is determined in relation to its use by the defence (at p. 340):

> 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.

As further summarized in R. v. Egger, supra, at pp. 466-67:

> The Crown's disclosure obligation is subject to a discretion, the burden of justifying the exercise of which lies on the Crown, to withhold information which is clearly irrelevant or the nondisclosure of which is required by the rules of privilege, or to delay the disclosure of information out of the necessity to protect witnesses or complete an investigation: Stinchcombe, supra, at pp. 335-36, 339-40. As was said in Stinchcombe, supra, at p. 340, "(i)nasmuch as disclosure of all relevant information is the general rule, the Crown must bring itself within an exception to that rule".

...

> One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed - Stinchcombe, supra, at p. 345. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.

23 When the Crown alleges that it has discharged its obligation to disclose, an issue may arise as to whether disclosure is complete in two situations:

(1) the defence contends that material that has been identified and is in existence ought to have been produced; or
(2) the defence contends that that material whose existence is in dispute ought to have been produced.

24 I will deal with each of these situations.

Procedure Where Existence of Information is Established

25 In situations in which the existence of certain information has been identified, then the Crown must justify non-disclosure by demonstrating either that the information sought is beyond its control, or that it is clearly irrelevant or privileged. The trial judge must afford the Crown an opportunity to call evidence to justify such allegation of non-disclosure. As noted in R. v. Stinchcombe, supra, at p. 341:

> 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.

Justification of non-disclosure on the grounds of public interest privilege or other privilege may involve certain special procedures such as the procedure referred to in s. 37(2) of the Canada Evidence Act, R.S.C. 1985, c. C-5, to protect the confidentiality of the evidence.

26 An example of a case where the existence of the information was not in issue, but its relevance disputed was R. v. Hutter (1993), 86 C.C.C. (3d) 81 (Ont. C.A.). Dubin C.J., writing for the court,

held at p. 89 that the Crown was required to disclose information in its possession concerning the accused's bad character, even though that evidence could only be used in rebuttal by the Crown:

> The information in the hands of the Crown with respect to the character of the appellant could "reasonably be used by the accused in advancing a defence in making a decision which could affect the conduct of the defence such as, for example, whether to call evidence".

27 In wiretap cases, the existence of wiretaps (unlike the case at bar) is usually not in issue. In Dersch, supra, for example, the accuseds had been given notice that the Crown intended to adduce evidence obtained as a result of Criminal Code wiretap authorizations made as part of the investigations into the charges being tried. The accuseds applied for an order for access to the contents of the sealed packets containing the affidavits in support of the authorizations, claiming that they were needed for them to make full answer and defence. In restoring the order of the trial judge to grant the application, this Court noted that the accuseds could not gain access to the affidavit unless they could prove the grounds for such access, and could not prove such grounds unless they had access. The significant and distinguishing feature of that case, however, from this appeal is that the existence of the wiretap in relation to the charges being tried was never in doubt.

28 Another example of this type of case where the existence of wiretaps was not in issue was R. v. Durette, [1994] 1 S.C.R. 469. In that case, the accused persons were charged with conspiracy to traffic in methamphetamine after extensive police investigations. Significantly, the nature of the investigation suggested that the police had used wiretaps. The defence sought disclosure of the sealed wiretap authorization affidavit packet, which the trial judge had edited after receiving suggestions from the Crown. The majority in this Court held that the defence had a right to the unedited contents of the packet, and the decision narrowly focused on the disclosure of wiretap authorization affidavits.

29 Other lower court decisions have similarly involved factual situations where the fact of the interception of communications has not been in issue. For example, in R. v. Desjardins (No. 5) (1991), 88 Nfld. & P.E.I.R. 149 (Nfld. S.C.T.D.), the Charter right to counsel was alleged to have been violated by the interception of solicitor-client communications. These allegations were similar to the allegations made by the defence in this appeal. Significantly, in that case, there was no issue concerning the interception of communications as defence counsel had established that a bugging device had been found (at pp. 155-56).

Procedure Where Existence of Material is Disputed

30 In contrast to the above, in some cases, this being one, the existence of material which is alleged to be relevant is disputed by the Crown. Once the Crown alleges that it has fulfilled its obligation to produce it cannot be required to justify the non-disclosure of material the existence of which it is unaware or denies. Before anything further is required of the Crown, therefore, the

defence must establish a basis which could enable the presiding judge to conclude that there is in existence further material which is potentially relevant. Relevance means that there is a reasonable possibility of being useful to the accused in making full answer and defence. The existence of the disputed material must be sufficiently identified not only to reveal its nature but also to enable the presiding judge to determine that it may meet the test with respect to material which the Crown is obliged to produce as set out above in the passages which I have quoted from R. v. Stinchcombe and R. v. Egger, supra.

31 Although the obligation cast upon the defence which I have characterized as "a basis" is in the nature of an evidentiary burden, I prefer not to call it that because it can, and in many cases will, be discharged not by leading or pointing to evidence but by oral submissions of counsel without the necessity of a voir dire. Accordingly, I avoid the terms "air of reality" or "live issue" and other terms used in some of the cases that are more appropriate when used to describe a true evidentiary burden. Viva voce evidence and a voir dire may, however, be required in situations in which the presiding judge cannot resolve the matter on the basis of the submissions of counsel.

32 Apart from its practical necessity in advancing the debate to which I refer above, the requirement that the defence provide a basis for its demand for further production serves to preclude speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming disclosure requests. In cases involving wiretaps, such as this appeal, this is particularly important. Fishing expeditions and conjecture must be separated from legitimate requests for disclosure. Routine disclosure of the existence of wiretaps in relation to a particular accused who has been charged, but who is the subject of wiretaps for ongoing criminal investigations in relation to other suspected offences, would impede the ability of the state to investigate a broad array of sophisticated crimes which are otherwise difficult to detect, such as drug-trafficking, extortion, fraud and insider trading: R. v. Duarte, [1990] 1 S.C.R. 30, at p. 44. Wiretaps are generally only effective if their existence is unknown to the persons under investigation. This is implicitly recognized in the secrecy provisions of Part VI of the Code, s. 187 and s. 193 which govern until the investigation expires, and the deferred notification of the existence of a wiretap by s. 196.

33 If the defence establishes a basis in accordance with its obligation in that regard as outlined above, the Crown must then justify a continuing refusal to disclose. The obligation of the Crown is the same as its obligation in first instance which is defined in R. v. Stinchcombe, supra, and elaborated in R. v. Egger, supra. Generally, if the matter cannot be resolved without viva voce evidence, the Crown must be afforded an opportunity to call relevant evidence. In cases involving confidential information, it may be appropriate for the trial judge to order a hearing in camera or to inspect the material in issue privately, applying procedures such as those set out in s. 37(2) of the Canada Evidence Act. In cases involving wiretaps, the procedure for protecting confidential information is dealt with in R. v. Garofoli, [1990] 2 S.C.R. 1421, at p. 1460.

Disposition

34 Applying the foregoing to this appeal, I am of the opinion that the accuseds failed at trial to establish a basis for the existence of wiretap authorizations or evidence derived therefrom which is potentially relevant to making full answer and defence.

35 The critical fact here is that the Crown stated that no wiretaps had been authorized as part of the investigation leading to the charges, making this appeal fundamentally different than the situation in Dersch v. Canada (Attorney general), supra, where wiretaps in relation to the charges being tried were known to have existed. It is also different from R. v. Durette, supra, where the Crown relied primarily upon wiretap and derivative wiretap evidence. In those two cases, a denial of access to the wiretap authorizations could have clearly impaired the accused's ability to make full answer and defence. Reference to the possible existence of other wiretaps and their connection to the issues in this appeal, however, is purely speculative and mere conjecture. In sum, it is at best, a fishing expedition, and worst, an attempt to determine whether the police have investigated the accused persons in relation to other suspected offences. The appellants provided no basis for believing that there were wiretap authorizations even in existence in relation to investigation of other charges, or that the Crown had relied upon such wiretaps or derivative evidence therefrom in preparing its case. In the circumstances, the Crown was not called upon to justify further the position it had taken and there was no need for further evidence. Nonetheless, on the basis of the view of the matter taken by the trial judge which required the Crown to justify its position, the refusal to permit the Crown to call evidence was, with respect, in error.

36 The appeal from the judgment of the Alberta Court of Appeal is thus dismissed.

cp/d/hbb/DRS/DRS