**CITATION:** R. v. Megraw, 2013 ONSC 7672
**BARRIE COURT FILE NO.:** CR-13-200-SCJ
**DATE:** 20131211

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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| **BETWEEN:** | ) | |
| Her Majesty the Queen | ) | Lynne A. Saunders, for the Crown |
| – and – | ) | |
| Kevin Michael Megraw | ) | Douglas J. Spiller, for the Defendant |
| Defendant | ) | |
| | ) | **HEARD:** December 2, 2013 |

**RULING ON CERTIORARI APPLICATION**

**GILMORE J.:**

**Overview**

[1] The defendant is charged with one count of criminal harassment involving the complainant Marianne Malcolm.

[2] A hearing was held on October 9, 2013 in relation to a defence application for certain disclosure. All of the requests for disclosure were dismissed save for one request related to the complainant's brothers. The complainant told the police that she had spoken to her brothers ("the witnesses") about the incident prior to reporting the matter to the police. More specifically, Ms. Malcolm consulted with one of her brothers, who is an ex-police officer, as to what she should do about her complaints in relation to the accused's alleged conduct. She also told the police that she spoke to her other brother "John" about the accused's alleged conduct before she spoke to the police.

[3] After hearing submissions on the material sought by the defendant in relation to the conversations between the complainant and her brothers, the trial judge, Justice G. Krelove, ordered that the Crown was to provide defence counsel's contact information to both brothers and allow them to contact defence counsel directly. If they failed to do so by October 17, 2013,

then the Crown was to provide to defence counsel the full names, address and cellular or home phone number of each brother by October 21, 2013. The Crown was not permitted to offer either of the brothers any advice regarding the phone calls, other than advising them that they could seek legal advice if they wished.

[4] The Crown has apparently contacted the witnesses but did not provide their contact information as required by October 21, 2013. Rather than doing so, the Crown has brought this application for certiorari to quash the order of Krelove J. on the grounds that he exceeded his jurisdiction in making such an order.

**Position of the Crown**

[5] The Crown submits that certiorari is the best remedy in these circumstances as it has the effect of freezing the order of Krelove J. An appeal would offer the Crown no relief as the order of Krelove J. would have to be complied with before the appeal could be heard.

[6] The Crown informed the court that the witnesses have never been interviewed by police, as it was the view of the Crown that they had no material evidence to give. The Crown takes the position that the order of the trial judge will have the effect of requiring the Crown to participate in the compelling of evidence. The Crown views the effect of the order to be that these witnesses will be compelled to speak to defence and that Krelove J. should not have "descended into the arena" in that manner.

[7] The Crown referred to *R. v. Dynatec Corp.*[1]. In that case, the Court of Appeal of Ontario allowed an appeal of a motion's judge order in which the judge purported to order Charter-like remedies where no Charter breach had been found. Among other things, this included ordering the Crown to produce an affidavit which the court likened to requiring the Crown to create evidence for the benefit of the defence. The Crown in the case at bar argued that Krelove J. made no Charter ruling nor did he find any Charter breach. Therefore it could be inferred that Krelove J. ordered the production of witness information in relation to the accused's ability to make full answer and defence; however, he made no specific reference to any Charter concern.

[8] The Crown also referenced *R v. Sterling*[2], a Saskatchewan Court of Appeal case in which a chambers judge ordered that certain key Crown witnesses were to appear before the clerk of the court and answer questions put to them by the defence. This was ordered because the court thought the accuseds' right to make full answer and defence had been violated where a preferred indictment had stripped them of their right to have a preliminary enquiry. The Crown appeal was allowed for several reasons. First, the court was concerned that the witnesses who were to be examined had not been served with the defence application. As well, the so-called failure of the Crown to make witnesses available to be questioned by the defence in advance of trial was not a Charter "violation" as identified by the chambers judge.

[1] [2004] O.J. No. 1991 (ONCA)
[2] [1993] S.J. No. 354 (SaskCA)

[9] The Crown argued that the *Sterling* case should be examined closely by this court for its principles. First, the defence application was not served on the witnesses, meaning that the witnesses' right to participate in the process was determined in their absence. As well, the remedy fashioned by the trial judge was not grounded in the determination of a Charter breach after the hearing of a Charter application; the remedy fashioned by the trial judge was not one known to the law.

[10] Finally, the Crown referenced *R. v. H.W.*[3] for the proposition that the right to make full answer and defence does not include the right to have the best possible rules and the best procedures for the accused. The accused is entitled to "rules and procedures which are fair in the manner in which they enable him to defend against and answer the Crown's case."[4]

[11] In summary, the Crown's position is that had the trial judge simply ordered that the contact information of the witnesses be given to the defence, this application would not have been brought. It is the fact that the effect of the order requires that the witnesses speak to defence counsel which results in the trial judge having exceeded his jurisdiction.

**The Position of the Defence**

[12] The defence does not agree with the characterization of the order made by Krelove J. The court did not compel the witnesses to appear or to be questioned. The order was fashioned in a manner to ensure the least possible intrusiveness to the witnesses, and avoids a subpoena, sworn affidavit or any requirement to become involved in the process at all, other than to engage in a dialogue with defence counsel.

[13] The results of the disclosure motion should be put into context. The majority of the relief requested by the defence was denied. In this one area related to the complainant's brothers, the defence had some small measure of success.

[14] It should also be remembered that it was the complainant who mentioned that she had spoken with her brothers. As the Crown must prove that the complainant feared for her own safety or the safety of others known to her, the complainant's subjective fear is an important element of the case. What she told her brothers about the case may be directly relevant to her subjective fear of the defendant's conduct.

[15] The defence submits that the context of the order was a disclosure application (held in the form of a voir dire). There is no necessity that a Charter breach be found for disclosure to be ordered. In *R. v. T.L.C.*[5], the court ordered discovery of the mother of the complainant in order to give to the defence the names of certain counsellors and therapists who had dealt with the complainant since the accused had been charged with sexually assaulting her. The court

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[3] [2001] O.J. No. 5621 (ONSCJ).
[4] *Ibid* at para 20.
[5] [1998] A.J. No. 1082.

discussed the balance between relevance of disclosure, the right to make full answer and defence and privacy rights of witnesses.

[16] In summary, the defence disagrees with the Crown's interpretation of the trial judge's order in relation to the witnesses and submits that the order did not compel the witnesses to do anything and as such the trial judge did not exceed his jurisdiction.



**Analysis and Ruling**

[17] The Crown's application is dismissed for the following reasons:

(a) I find that the trial judge was careful in the wording of his order to ensure that the witnesses were not compelled to speak to defence counsel about the case. He took precautions to ensure that options were given to the witnesses by first allowing them to contact defence counsel directly (thereby not revealing their own contact information). Failing that, defence counsel is permitted to contact them but that cannot be interpreted to mean that they are required to speak to him. At all times, the witnesses have the option to answer defence counsel's call and then decline to speak to him further.

(b) The witnesses were treated fairly in that they were given the option to seek legal advice. The Crown was not permitted to say more than that which ensured that witnesses were not given the Crown's perspective on whether they should speak to the defence or not.

(c) This case is not like *Dynatec* in which the court purported to order Charter like remedies where no Charter breach had been established. I agree with the defence that this was a *Stinchcombe* application and that no Charter breach need be established. The accused is clearly entitled to receive disclosure. The issue as to the scope of what is relevant, within the control of the Crown or privileged is reasonably determined on a disclosure *voir dire* without having to establish a breach of the accused's section 7 Charter rights.

(d) The trial judge was cautious in his approach. The fact that the witnesses may have relevant information for the defence must be balanced with demands for disclosure that extend to "speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming disclosure requests"[6]. The trial judge, in achieving such a balance, did not require that statements be taken from the witnesses, that they be compelled to come to court or indeed do anything except communicate to defence counsel that they would give or not give information. I disagree with the Crown that the effect of the order was to require the Crown to participate in the compelling of evidence. In my view the witnesses need only communicate to defence counsel that they choose not to participate and the matter

[6] *R. v. Chaplin* [1995] 1 S.C.R. 727 at para 32.

ends there. The Crown's role was only to provide information that was within their control and nothing more.

(e) I do not view the fact that the witnesses were not served with the defence application to be of any significance. It would be different if the defence sought to obtain an affidavit from the witnesses, require them to produce personal documents or some other relief that was more substantive. In this case, however, the defence sought an opportunity to determine if the witnesses had relevant information with respect to the complainant's subjective fear. For example, if the complainant told one of her brothers that she considered the conduct of the accused to be a joke that would be relevant to her subjective fear of the accused. Alternatively, if she told her brother that her fear of the accused's conduct led to her changing her lifestyle or having certain fears which she had not had before the incidents, that would also be relevant. Given that the complainant's subjective fear of the accused's conduct is an essential element of the offence which must be proven by the Crown, ensuring that defence counsel had a proper opportunity to connect with the witnesses was not unreasonable nor did it exceed the jurisdiction of the trial judge.

[18] In all of the circumstances I do not find that the trial judge exceeded his jurisdiction. The Crown shall provide the full names, addresses and cellular or home telephone numbers of each of the relevant witnesses to the defence forthwith. Defence counsel shall, of course, keep such information confidential in accordance with his professional obligations.

Justice C.A. Gilmore

**Released:** December 11, 2013