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Supreme Court of Canada undermines Trial Judges' discretion under Charter s. 24(1)

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Cases Considered:

Bjelland v. The Queen, 2009 SCC 38

In *Bjelland v. The Queen*, 2009 SCC 38, the Supreme Court of Canada considered the question of whether faulty disclosure by the Crown could lead to the exclusion of the evidence concerned under s. 24(1) of the *Charter*. The majority, in a 4-3 decision, developed a test for the exclusion of evidence under s. 24(1) and applied it in a very restrictive way. This raises concerns about their respect for the discretion of trial judges as granted by s. 24(1) of the *Charter*.

Facts

The facts are that the accused was charged with importing cocaine and possession for the purposes of trafficking contrary to s. 5(2) and 6(1) of the *Controlled Drugs and Substances Act*, S.C.1996, c. 19. On December 23, 2003, seventeen vacuum-sealed packets, worth between $828,000 and $1.7 million were found at Canadian/U.S. Customs in two large metal drawers in a trailer he was towing behind his truck. He was driving and accompanied by a passenger when he arrived at the border crossing at Del Bonita, Alberta.

Bjelland's counsel asked for disclosure. There were a number of pre-preliminary hearing conferences and it appeared that the Crown had completed disclosure. A preliminary inquiry was held in October 2004 and January 2005, and the accused committed for trial. The accused elected trial by judge and jury and the trial was set for November 14, 2005. On November 4, 2005, Crown consented to an adjournment to March 20, 2006, because the accused had new counsel. On February 14, 2006, the trial was moved to May 1, 2006 because neither counsel was ready to proceed. On March 21, 2006, Crown indicated to defence counsel that further disclosure would be forthcoming with respect to an accomplice. On March 24, the accused re-elected trial by judge alone. On March 29, 2006, Crown disclosed the transcript of a KGB statement from Friedman taken on December 16, 2004, and indicated that it would be calling Friedman as a witness. Friedman's evidence related to the fact that Bjelland had used the drawers in his trailer to smuggle drugs into the U.S. in the past. The charges against Friedman had been stayed. During April, the Crown also revealed that it intended to call one of Friedman's accomplices, Holland, as well, and disclosed an agreed statement of facts relating to Holland's sentencing that indicated that Bjelland had smuggled cocaine in the drawers of his trailer. The nature of this

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evidence raised issues relating to Friedman's and Holland's credibility and the Crown also disclosed that there were questions defence counsel should pursue relating to one of the police officers who took Friedman's statement.

Trial Court decision

Bjelland applied for a stay of proceedings based on the late disclosure and, as alternatives, the exclusion of the new evidence or disclosure and costs of the motion. He argued that the late disclosure resulted in prejudice to his ability to make full answer and defence. The Crown argued that late disclosure was necessary due to fear for Friedman's safety and that the delay was also caused by the fact that the witnesses were being investigated by U.S. authorities. The application was heard by the trial judge, Justice J.H. Langston of the Alberta Court of Queen's Bench, who determined that the late disclosure was not necessary to protect Friedman or due to the other investigations, but did not show malice but only "misfeasance". He refused to order the stay since the case was not egregious enough but determined that the admission of the evidence would reward the Crown's negligence. As a result, he excluded the evidence under s. 24(1) of the *Charter* in order to put the parties back in the same position they were in before the late disclosure.

Alberta Court of Appeal Decision (*R. v. Bjelland* (2007), 53 C.R. (6th) 241, 2007 ABCA 425)

The Alberta Court of Appeal, by a 2 to 1 majority (per Hunt and Martin, J.J.A.) concluded that the standard of review, based on *R. v. Regan*, [2002] 1 S.C.R. 297 at para. 217, was that an appellate court could intervene only if the trial judge misdirected himself or if his decision was so clearly wrong as to amount to an injustice. They determined that the late disclosure did violate s. 7 of the *Charter*, and affect the accused's right to make full answer and defence. Despite the high standard, they determined that the trial judge had misdirected himself "by failing to consider whether a less severe remedy than the exclusion of significant evidence could cure the harm done to the respondent by the late disclosure, while still preserving the integrity of the justice system" (at para. 30.) They found that the trial judge focused on punishing the Crown, but did not give adequate weight to society's interest in crime prevention, and "thus overlooked relevant legal principles" (at para. 30).

The dissenting judge, Justice Scott Brooker, pointed out that the test for reviewing the discretion under s. 24(1) of the *Charter* is a particularly stringent test, since the discretion to determine an appropriate remedy under s. 24(1) is a particularly strong one. Section 24(1) states: "Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied, may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." The dissenting judge drew attention to the emphasis the Supreme Court has put on the nature of this discretion, referring to the following statement the Court made in *R. v. Mills*, [1986] 1 S.C.R. 863 at 965 and has repeatedly referred to since:

> It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.

The dissenting judge focused on the fact that "there is no specific legal test that the trial judge must employ when determining the appropriate remedy under section 24(1), with the exception of when a stay is being considered" (at para. 43). He stated that the trial judge did consider all of the necessary factors, but weighed them differently than the Court of Appeal would have, and thus the discretion should not have been disturbed.

Supreme Court of Canada decision and commentary

On the basis of the dissent at the Court of Appeal, this case was appealed to the Supreme Court of Canada. By a majority of 4 to 3, the Supreme Court affirmed the Alberta Court of Appeal decision.

In reasons authored by Justice Marshall Rothstein, the majority determines that the exclusion of evidence as a remedy under s. 24(2) "could not be ruled out", but that "such a remedy will only be available in those cases where a less intrusive remedy cannot be fashioned to safeguard the fairness of the trial process and the integrity of the justice system" (at para 19).

With regard to excluding evidence under s. 24(1) due to a failure of disclosure by the Crown, the majority says: "Thus, a trial judge should only exclude evidence for late disclosure in exceptional cases: (a) where the late disclosure renders the trial process unfair and this unfairness cannot be remedied through an adjournment and disclosure order or (b) where exclusion is necessary to maintain the integrity of the justice system" (at para. 24).

The dissent, written by Justice Morris Fish, points out that this is a new test, and a narrow one that undermines the discretion of the trial judge that the Supreme Court had been careful to preserve in the past. The dissent is also concerned with the test itself, its relationship to the test for exclusion under s. 24(2) and the fact that the test is as stringent as the test for a stay of proceedings under s. 24(1).

The majority explains the need for a limit on the discretion as follows:

> because the exclusion of evidence impacts on trial fairness from society's perspective insofar as it impairs the truth-seeking function of trials, where a trial judge can fashion an appropriate remedy for late disclosure that does not deny procedural fairness to the accused and where admission of the evidence does not otherwise compromise the integrity of the justice system, it will not be appropriate and just to exclude evidence under s. 24(1) (at para 24).

This is a disappointingly brief and unreflective explanation of the rationale for an important new limitation on the discretion clearly provided for trial judges under subsection 24(1). It places the "truth-seeking" function at the pinnacle of the integrity of the justice system, without in any way recognizing the complexity of the trial process designed to get to that truth.

Nevertheless, it is good to have some guidelines on the situations where evidence should be excluded under s. 24(1). Despite the concerns of the dissenting judges at the SCC about the confusion between the exclusion of evidence under subsections 24(1) and (2), it would be inappropriate to have a broader test for excluding evidence under subsection 24(1) than exists under subsection 24(2). This is because subsection 24(2) is dealing with evidence that was obtained through a *Charter* infringement. There is a direct and causal relationship that makes exclusion of the evidence an obviously relevant remedy and that is why there is a special rule. Excluding evidence under subsection 24(1) is a far less obvious proposition, and the Court is right to be concerned not to allow a broader window for exclusion under subsection (1) than is allowed under subsection (2). Moreover, there is nothing inherently wrong with the test that they set out: that "admission [of the evidence] would result in an unfair trial or would otherwise undermine the integrity of the justice system" (at para 3). Since there is nothing wrong with the evidence itself, surely the fairness of the trial and the integrity of the justice system should be the concerns when considering a remedy under s. 24(1).

The dissent argues that this is the test for staying proceedings for abuse of process or under s. 24(1) of the *Charter*, as discussed in *O'Connor v. The Queen*, [1995] 4 S.C.R. 411. However, it is important to recognize that in *O'Connor*, the Supreme Court used this test with an additional requirement, that the burden of proof for abuse of process required that it be used only in "the clearest of cases". Fairness of the trial and integrity of the justice system are the concerns underlying most *Charter* issues, and they cannot be reserved only for cases when the court is willing to provide a remedy of stay for abuse of process. However, the accused should not have to show an impact on the fairness of the trial or the integrity of the justice system at a level commensurate with "the clearest of cases" when staying for abuse of process is not the remedy being considered. In fact, in *O'Connor* itself, the Court pointed out that ignoring certain evidence was a lesser alternative to a stay of proceedings, and that this demonstrated a "bold and innovative" approach (at para 66).

That would, one would think, have left it open to the Court to allow lower courts to exercise their discretion in excluding evidence when the issues of the failure of disclosure complicate the fairness of the trial and undermine the integrity of the justice system, even if it is not "clearest of cases."

Therefore, what is problematic in the majority decision here is their extremely narrow view of what would affect the fairness of the trial or the integrity of the justice system, and their imposing of this narrow view on the discretion of the trial judges.

Let us, for instance, consider what happened in this case. To put it bluntly, the Crown took risks with disclosure and the accused suffered. That is what the trial judge was concerned with. This case was set for trial on November 14, 2005. The accused applied for an adjournment because he had changed counsel on November 4, a mere 10 days before trial. The Crown had not disclosed the evidence in question, clearly very problematic evidence, at that point. Moreover, given the nature of the additional evidence (and the fact that the Holland statement of facts had apparently

gone unnoticed at this point), it is unclear whether they would have used the evidence if the trial had proceeded at that time.

The case was then set for trial on March 20, 2006, and was adjourned on February 14, 2006, due to the lack of preparation of both counsel. Again, there had been no effort to disclose by this point. The Crown did not even indicate that further disclosure would be coming until March 21, a date subsequent to the two trial dates set. Again, it is unclear what would have happened if the trial had proceeded on March 20.

Whether or not the accused is entitled to this information before preliminary inquiry and electing mode of trial, and whether or not some of those defects can be remedied in the order of disclosure and adjournment, the fact is that this method of proceeding is not good for the criminal justice system, and it does disadvantage the accused. While there was no finding of "misconduct" on the part of the Crown (in other words, they were not purposefully trying to unfairly disadvantage the accused), nevertheless, they were testing an uncertain situation (whether disclosure in this case should be delayed due to possible safety concerns regarding a witness, and due to another ongoing investigation) by disadvantaging the accused (forcing the accused to proceed without full information about the nature of the case against him, and delaying investigation of potential weaknesses in the Crown's case.)

As it turned out, the Crown was wrong in its assessment of the need to delay disclosure. The remedy for this, according to the majority in the Alberta Court of Appeal and the Supreme Court of Canada, was that the trial should be further delayed, also not a good thing for the criminal justice system, and defence counsel's preparation based on faulty information ignored. This is not efficient, nor does it give rise to trust in the justice system. Moreover, there is nothing in this remedy that will encourage more efficiency in the future. It also fails to recognize that the trial was set for a much earlier time, and could well have proceeded at that point without this evidence.

The trial judge was right to point out the ever-moving target, and would be right to think that that related to the integrity of the justice system and the fairness of the trial. Thus, he was exercising his discretion within appropriate bounds. He was not misdirecting himself, or clearly wrong. His judgement of what mattered in the integrity of the criminal justice system was simply different from the judgement of four judges on the Supreme Court of Canada. He was applying a standard that was lower than "the clearest of cases", and that he was entitled to do. Therefore, his judgement should have been respected; the fact that he was much closer to the action, both of this particular case and trials in general, should have been respected.

The SCC was correct in setting out a clearer test, but wrong in their assessment of what it meant and how it applied in this case. They should have left the exercise of discretion intact.

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