

Her Majesty the Queen v. Dale Whitman, a Justice of the Peace for the Province of Nova Scotia,
and Jonathan William Ellis
(CRH 368181; 2012 NSSC 329)

Indexed As: R. v. Whitman (D.) et al.

Nova Scotia Supreme Court
Pickup, J.
September 25, 2012.

Summary:

Police officers executed a search warrant at Ellis's property. The police found some 236 pounds of cannabis marijuana. Ellis was charged, with others, with an offence contrary to s. 5(2) of the Controlled Drugs and Substances Act. The Crown sought to quash subpoenas issued by Whitman, a Justice of the Peace, requiring the attendance of four police officers to give evidence at the preliminary inquiry. The Crown applied for an order in the nature of certiorari pursuant to the Criminal Code and Civil Procedure Rule 64.

The Nova Scotia Supreme Court dismissed the application. The court first determined that the preliminary inquiry judge was the proper person to determine the issue, namely, whether the four proposed witnesses were "likely to give material evidence". In the alternative, the defence had met its burden of establishing that the four officers were likely to give material evidence as to the background of the validity of the search warrant. "[T]he Crown is taking a very narrow view of the purposes of a preliminary inquiry, and the Crown does not recognize the ancillary function, which can, under recent jurisprudence, allow for the exploration of facts which would later support a Charter argument."

Criminal Law - Topic 3500

Preliminary inquiry - General principles - Nature and purpose of preliminary inquiry - [See third **Evidence - Topic 4475**].

Criminal Law - Topic 3526

Preliminary inquiry - Jurisdiction - General - [See second **Evidence - Topic 4475**].

Criminal Law - Topic 3576

Preliminary inquiry - Evidence - General - [See second **Evidence - Topic 4475**].

Criminal Law - Topic 5413

Evidence and witnesses - Witnesses - Subpoena or summons - Review of order for issue of - [See first **Evidence - Topic 4475**].

Evidence - Topic 4475

Witnesses - Attendance and oath - Attendance - Subpoena - Setting aside - The Nova Scotia Supreme Court stated that "[o]n a challenge to a subpoena the burden is on the party seeking to uphold the subpoena to show that the proposed witness is likely to provide material evidence. Therefore, the defence bears the burden of establishing that

the officers can give material evidence at the preliminary inquiry. I am satisfied that if a party seeking to uphold a subpoena is not able to demonstrate that the witness would 'likely' or 'probably' have material evidence then certiorari may issue to quash the subpoenas." - See paragraph 8.

Evidence - Topic 4475

Witnesses - Attendance and oath - Attendance - Subpoena - Setting aside - Police officers executed a search warrant at Ellis's property - The police found some 236 pounds of cannabis marijuana - Ellis was charged, with others, with an offence contrary to s. 5(2) of the Controlled Drugs and Substances Act - Prior to the preliminary inquiry the Crown advised that it would not be calling four police officers who had been listed as possible witnesses - Subpoenas were obtained by the defence, to examine all four officers - The defence was seeking disclosure of allegedly relevant facts surrounding the granting of the search warrant - The Crown applied for certiorari, seeking to quash the subpoenas - The Nova Scotia Supreme Court agreed with the defence that the application was premature - The Crown was asking the court to preempt the jurisdiction of the preliminary inquiry judge who had not made any ruling - "It is important to note that a preliminary inquiry judge has jurisdiction to make all evidentiary rulings, and the issue of whether these witnesses are relevant to the inquiry can be put squarely before the preliminary inquiry judge to resolve." - See paragraphs 14 to 19.

Evidence - Topic 4475

Witnesses - Attendance and oath - Attendance - Subpoena - Setting aside - Police officers executed a search warrant at Ellis's property - The police found some 236 pounds of cannabis marijuana - Ellis was charged, with others, with an offence contrary to s. 5(2) of the Controlled Drugs and Substances Act - Prior to the preliminary inquiry, the Crown advised that it would not be calling four police officers who had been listed as possible witnesses - Subpoenas were obtained by the defence, to examine all four officers - One officer authored and swore the information to obtain a search warrant (ITO) - The remaining officers were the source handlers for two confidential informants that provided information contained in the ITO - The Crown applied for certiorari, seeking to quash the subpoenas - The Nova Scotia Supreme Court first determined that the preliminary inquiry judge was the proper person to determine the issue, namely, whether the four proposed witnesses were "likely to give material evidence" - In the alternative, the court dealt with the merits of the application, and declined to issue certiorari - A review of the purposes of a preliminary inquiry was relevant to the court's analysis - The court noted that "the Supreme Court of Canada did recognize the ancillary role of a preliminary inquiry to allow discovery of the Crown's case. ... Under s. 545(5) of the Criminal Code, the preliminary inquiry judge hears each witness called by the accused 'who testifies to any matter relevant to the inquiry'. ... The matter before me is essentially a search warrant case and the defence seeks to question these officers on the circumstances surrounding the obtaining of the search warrant. ... I am satisfied that this [s. 545(5)] would include hearing evidence as to the circumstances surrounding the obtaining of a search warrant." - See paragraphs 20 to 35.

Cases Noticed:

- R. v. Harris (M.) (1994), 74 O.A.C. 398; 93 C.C.C.(3d) 478 (C.A.), reld to. [para. 8].
R. v. McGrath (D.) (2007), 258 N.S.R.(2d) 11; 824 A.P.R. 11; 2007 NSSC 255, reld to. [para. 14].
R. v. Hynes (D.W.), [2001] 3 S.C.R. 623; 278 N.R. 299; 208 Nfld. & P.E.I.R. 181; 624 A.P.R. 181; 2001 SCC 82, reld to. [para. 23].
R. v. S.A.B., [1998] B.C.J. No. 3087 (S.C.), reld to. [para. 25].
R. v. Rao (J.), [2012] B.C.A.C. TBEEd. JN.037; 2012 BCCA 275, reld to. [para. 31].
R. v. Drozney (A.), [2004] O.T.C. 320 (S.C.), reld to. [para. 33].

Statutes Noticed:

Criminal Code, R.S.C. 1985, c. C-46, sect. 535 [para. 9]; sect. 541(1), sect. 541(5) [para. 10].

Counsel:

Jeffrey S. Moors, for the Crown;
Trevor McGuigan, for the defendant.

This application for certiorari was heard on September 7, 2012, in Halifax, Nova Scotia, before Pickup, J., of the Nova Scotia Supreme Court, who delivered the following judgment, with reasons, dated September 25, 2012.

Application dismissed.

Editor: E. Joanne Oley

Criminal Law - Topic 3500

Preliminary inquiry - General principles - Nature and purpose of preliminary inquiry - Police officers executed a search warrant at Ellis's property - The police found some 236 pounds of cannabis marijuana - Ellis was charged, with others, with an offence contrary to s. 5(2) of the Controlled Drugs and Substances Act - Prior to the preliminary inquiry, the Crown advised that it would not be calling four police officers who had been listed as possible witnesses - Subpoenas were obtained by the defence, to examine all four officers - One officer authored and swore the information to obtain a search warrant (ITO) - The remaining officers were the source handlers for two confidential informants that provided information contained in the ITO - The Crown applied for certiorari, seeking to quash the subpoenas - The Nova Scotia Supreme Court first determined that the preliminary inquiry judge was the proper person to determine the issue, namely, whether the four proposed witnesses were "likely to give material evidence" - In the alternative, the court dealt with the merits of the application, and declined to issue certiorari - A review of the purposes of a preliminary inquiry was relevant to the court's analysis - The court noted that "the Supreme Court of Canada did recognize the ancillary role of a preliminary inquiry to allow discovery of the Crown's case. ... Under s. 545(5) of the Criminal Code, the preliminary inquiry judge hears each witness called by the accused 'who testifies to any matter relevant to the inquiry'. ... The matter before me is essentially a search warrant

case and the defence seeks to question these officers on the circumstances surrounding the obtaining of the search warrant. ... I am satisfied that this [s. 545(5)] would include hearing evidence as to the circumstances surrounding the obtaining of a search warrant." - See paragraphs 20 to 35.

Criminal Law - Topic 3526

Preliminary inquiry - Jurisdiction - General - Police officers executed a search warrant at Ellis's property - The police found some 236 pounds of cannabis marijuana - Ellis was charged, with others, with an offence contrary to s. 5(2) of the Controlled Drugs and Substances Act - Prior to the preliminary inquiry the Crown advised that it would not be calling four police officers who had been listed as possible witnesses - Subpoenas were obtained by the defence, to examine all four officers - The defence was seeking disclosure of allegedly relevant facts surrounding the granting of the search warrant - The Crown applied for certiorari, seeking to quash the subpoenas - The Nova Scotia Supreme Court agreed with the defence that the application was premature - The Crown was asking the court to preempt the jurisdiction of the preliminary inquiry judge who had not made any ruling - "It is important to note that a preliminary inquiry judge has jurisdiction to make all evidentiary rulings, and the issue of whether these witnesses are relevant to the inquiry can be put squarely before the preliminary inquiry judge to resolve." - See paragraphs 14 to 19.

Criminal Law - Topic 3576

Preliminary inquiry - Evidence - General - Police officers executed a search warrant at Ellis's property - The police found some 236 pounds of cannabis marijuana - Ellis was charged, with others, with an offence contrary to s. 5(2) of the Controlled Drugs and Substances Act - Prior to the preliminary inquiry the Crown advised that it would not be calling four police officers who had been listed as possible witnesses - Subpoenas were obtained by the defence, to examine all four officers - The defence was seeking disclosure of allegedly relevant facts surrounding the granting of the search warrant - The Crown applied for certiorari, seeking to quash the subpoenas - The Nova Scotia Supreme Court agreed with the defence that the application was premature - The Crown was asking the court to preempt the jurisdiction of the preliminary inquiry judge who had not made any ruling - "It is important to note that a preliminary inquiry judge has jurisdiction to make all evidentiary rulings, and the issue of whether these witnesses are relevant to the inquiry can be put squarely before the preliminary inquiry judge to resolve." - See paragraphs 14 to 19.

Criminal Law - Topic 5413

Evidence and witnesses - Witnesses - Subpoena or summons - Review of order for issue of - The Nova Scotia Supreme Court stated that "[o]n a challenge to a subpoena the burden is on the party seeking to uphold the subpoena to show that the proposed witness is likely to provide material evidence. Therefore, the defence bears the burden of establishing that the officers can give material evidence at the preliminary inquiry. I am satisfied that if a party seeking to uphold a subpoena is not able to demonstrate that the witness would 'likely' or 'probably' have material evidence then certiorari may issue to quash the subpoenas." - See paragraph 8.

