

CANADA / JUDGMENT

## R. v. Ali

2020 BCSC 942

COURT

Supreme Court of British Columbia

DECIDED

11 March 2020

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2020 BCSC 942 R. v. Ali

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ali,

2020 BCSC 942

Date: 20200311

Docket: 29405-1; 29405-2

Registry: Vancouver

Regina

v.

### Ibrahim Ali

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Corrected Judgment: The text of the judgment was corrected throughout on December 18, 2024

Before: The Honourable Mr. Justice L.W. Bernard

Oral Ruling on Stinchcombe Application

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Place and Dates of Hearing:

Vancouver, B.C.

December 9-13, 2019

Place and Date of Judgment:

Vancouver, B.C.

March 11, 2020

## A. Overview

- [1] THE COURT: In this Stinchcombe application for first party disclosure, the defence seeks "all fruits of the investigation" the Crown has, to date, declined to disclose on the basis of irrelevance. For a subset of this undisclosed material, in addition to irrelevance as a justification the Crown also asserts claims of privilege if irrelevance should fail.
- [2] Mr. Ali is charged with the first degree murder of 13-year-old MS. The charge arises from the discovery of the deceased body of MS in a wooded area of Central Park in Burnaby, British Columbia, at approximately 1:00 a.m. on July 19, 2017. MS's clothing was askew: her shirt and bra were pulled up, and her shorts and underwear were pulled down. Semen was found in her vagina and anus, and Mr. Ali was eventually identified as a suspect through DNA analysis.
- [3] MS lived near to Central Park. She was last seen by her mother on the afternoon of July 18, 2017, at home. Subsequently recovered CCTV footage captured MS apparently heading into Central Park for a run, in the early evening. When MS had not returned home by 9:30 p.m. and was not answering her cellphone, MS's mother grew worried. At 11:45 p.m., MS was reported as "missing" to the police. The police were able to locate her cellphone on a

secondary path in Central Park, and this led to the discovery of her body 15 to 20 metres east of that path in a treed area.

- [4] The post-mortem examination of MS revealed evidence of pre-mortem and possibly post-mortem sexual assault and of death by strangulation. In vaginal and anal swabs, sperm was found. A DNA analysis of that sperm identified a single donor, designated as "Male 1". A comparison of Male 1's DNA with the National DNA Data Bank did not produce a match. The sperm was the sole evidence of identification of MS's assailant or assailants, and this remained so through an intensive and wide-ranging police investigation that was understandably focused on finding the man whose DNA matched Male 1.
- [5] In August 2017, the police received a "genetic profile" of Male 1 from a DNA laboratory in the U.S.A. The lab reported that Male 1's DNA sample most closely resembled DNA samples, within its data bank, from people of Kurdish descent. From the genetic profile, the lab predicted that Male 1 was of "primary descent from the northern Middle East and bore the following physical characteristics: light brown or fair skin with no freckles, brown or hazel eyes, and black hair."
- [6] With this information in hand, the police "prioritized a greater portion of their investigative resources" at men in the community who were believed to be of Kurdish descent. They obtained consent and cast-off DNA samples from some of these men, gathered information (including licence plate numbers) at various local Kurdish festivals and, in the course of an undercover operation at a Kurdish gathering to celebrate Newroz, gathered approximately 150 DNA samples. In the analysis of these DNA samples none was a match to Male 1; however, one shared many genetic characteristics. This sample was sent to the same U.S.A. lab, and in a "kinship" report dated August 20, 2018, the lab reported that it was highly likely that the sample belonged to a full sibling of Male 1.
- [7] From the undercover operation, the police knew the identity of the sample donor as Chamdin Ali; thus, they placed his brother Ibrahim Ali, who resided within four-to-five blocks of Central Park, under surveillance. During this surveillance, a cast-off sample of Ibrahim Ali's DNA (from a discarded cigarette butt) was obtained. In a DNA analysis, this sample matched Male 1's DNA sample.
- [8] Ibrahim Ali was arrested on September 7, 2018. A second DNA sample obtained pursuant to a post-arrest DNA warrant, also matched the DNA of Male 1 for the sperm found within MS's vagina and her anus, with a reported "estimated probability of selecting an unrelated individual at random from the Canadian Caucasian population with the same profile, as one in 72 quintillion."

[9] A preliminary cellular telephone tower analysis of Ibrahim Ali's cellphone number showed that between 8:15 p.m. and 9:40 p.m. on July 18, 2017, calls were made through a cellular tower in the vicinity of his residence and Central Park. His banking records showed debit-card use at retail outlets in the vicinity of Central Park, between 7:00 p.m. and 9:30 p.m. on the same date.

[10] Once the police had identified Ibrahim Ali as their suspect, they reviewed all the evidence they had previously gathered, for any links to him; none were found. Accordingly, as I understand it, the Crown's case on identification of Ibrahim Ali as MS's assailant and killer, rests essentially upon DNA evidence.

[11] The Crown summarized the breadth of the police investigation as follows:

Over 500 police officers were involved in this investigation, many of whom were solely involved in surveillance. Throughout the course of the investigation, the police identified over [795] possible persons of interest. Surveillance was conducted on over 50 possible persons of interest. Over 450 persons were eliminated as possible persons of interest through DNA sampling.

And:

None of the persons investigated by the police as possible persons of interest were found to have any connection to the deceased, MS.

[12] The Crown described the early (pre "kinship report") investigative steps as follows, and noted that none of the DNA samples obtained in this period matched the profile of Male 1:

12. During the initial stages of the investigation, the police conducted broadly focussed investigations which included:

A. interviewing [MS]'s family and friends;

B. attending at buildings near Central Park where RCMP obtained tenant lists and knocked on doors in order to speak with anybody who was present;

C. taking statements from anybody who may have been present in Central Park at the time of the killing (this included members of the cast or crew of the TV show *Once Upon a Time*);

D. obtaining surveillance images and video from businesses, buses and buildings near Central Park;

E. investigating individuals who had previously been convicted of, or suspected of sexual assault, indecent act, robbery and some other offences (so long as their DNA was not already in the National DNA database);

F. obtaining DNA samples, either by consent or otherwise, from individuals who had previously been convicted of, or suspected of sexual assault, indecent act, robbery and some other offences (so long as their DNA was not already in the National DNA database) and from individuals who may have been in Central Park at the time of the killing;

- G. installing cameras on trails at Central Park;
- H. obtaining photographs taken at various vigils for [MS] and at the funeral of [MS];
- I. reviewing tips from the public provided on an RCMP telephone 'Infoline' and Crimestoppers;
- J. obtaining Compass Card (transit) records;
- K. obtaining cellular tower information; and,
- L. the arrest of two individuals, one who lived in a tent proximate to the location where [MS]'s body was located ([SR]); and another who had some mental health issues, and who told police officers that he had committed the offence, but was later determined to be in Alberta at the time of the offence ([GD]).

[13] The Crown reports that it has disclosed to the defence, in electronic form, over 29,700 pages of material, including over 4,500 pages of material from the RCMP National Forensic Laboratory Service, 1,137 photographs, and approximately 260 hours of multimedia (video and audio). It says that the foregoing is comprised of 2,407 documents, 124 audio files, and 179 video files. It provided the following list of the materials disclosed:

31. The materials which have been disclosed to date include:

- A. information related to the crime scene including police statements, crime scene photographs, maps and diagrams;
- B. the Post-Mortem Report, Neuropathology Report, Human Death Report and related photos;
- C. statements including transcripts from paramedics, transport personnel and first responder's radio transmissions;
- D. statements including transcripts from family members, including 911 call recordings, and from friends, schoolmates and teachers of [MS];
- E. witness statements including (mostly) transcripts of individuals in Central Park on the offence date;
- F. video surveillance from [MS]'s residence, Tim Horton's, and Coast Mountain Bus Line, including video analysis reports;
- G. DNA Reports including submission materials, working files, continuity evidence and notes regarding Male 1 and the match with the Applicant's DNA;
- H. DNA Reports regarding all possible persons of interest excluded by DNA analysis (consent and cast off samples);
- I. Parabon Nanolabs DNA phenotype Report and Kinship Report including tasking and reports for submission to Parabon;

- J. material from the undercover operation at the Newroz Celebration including questionnaires and photographs of the Applicant's brother;
- K. notes from approximately 278 police investigator, and Task Action Reports regarding the actions of police investigators;
- L. surveillance reports relating to the Applicant;
- M. Production Order results and analysis for the Applicant's phone number including tracking data;
- N. 28 warrants and production orders including DNA warrants and warrant execution materials and notes, ITOs and associated results regarding a General Warrant, cellular phone tower dumps, compass card records, bus data and video;
- O. warned statements including video and audio of the Applicant, translated from Arabic into English;
- P. translated transcripts and statements including video and audio of the Applicant's family and friends;
- Q. audio recordings, video recordings and documents relating to the Applicant's arrest and booking;
- R. the Applicant's Burnaby Hospital records and Vancity banking records;
- S. the Applicant's Facebook profile and posts;
- T. Behavioural Analysis Report;
- U. materials relating to the arrest of, and investigation into [SR] (person of interest), including task action reports, notes, photos, examination of his tent, and warned statement;
- V. materials regarding the arrest of, and investigation into [GD];
- W. reports regarding [MS]'s electronic devices (phone and tablet), Facebook and Google accounts;
- X. media releases;
- Y. documentation relating to holdback materials; and
- Z. tasks and associated reports relating to some video canvassing.

[14] Given the breadth of the instant disclosure application, the Crown has stated as follows:

Mindful of defence counsel's overarching request for everything in the possession of the police, in late summer 2019 Crown counsel, together with a paralegal, attended the police station and over a number of days reviewed each Task Action and Task Detail Report, together with many of the underlying documents.

...

In order to err on the side of inclusion, the Crown has identified some additional materials that the Crown will be providing disclosure of. This includes statements from "all" [this was amended from "a number of" in oral submissions] employees of the Once Upon a Time television production who were in Central Park during the evening of July 18, 2017. Those individuals, in the Crown's view, provided no relevant information. Notwithstanding that, the Crown has asked that these statements be prepared for the purpose of disclosure to defence counsel.

- [15] The Crown states it has repeatedly asked the defence for any indication why the disclosure sought might have relevance, but it reports that the defence's response has simply been "we want everything".
- [16] In its written submission, the Crown has identified, by category, the undisclosed "fruits of the investigation" and has provided its justification for the non-disclosure. In each and every instance, the Crown takes the position these materials are clearly irrelevant. This aspect of the Crown's submission spans 10 typewritten pages, and is appended hereto as Appendix A. (N.B.: Oral submissions were also made.)
- [17] An example from this list of non-disclosed investigative fruit the defence seeks is "[S] family photos". This category includes photos and family videos of MS as a small child, dating back to 2007. The Crown says that in the absence of some sort of indication of how these items could possibly be relevant, its position is that they have no relevance and will not be disclosed.
- [18] Two other examples are "photographs of people with whom the police spoke" and "CCTV footage". The former includes employees of Burnaby Public Works and the cast and crew who were filming a television show in Central Park on July 18, 2017, none of whom will be called as a Crown witness. The Crown says that it will disclose all the statements taken from persons who were identified as being in Central Park between 7:00 p.m. on July 18, 2017, and 1:00 a.m. on July 19, 2017, but it regards the photos as clearly irrelevant. Similarly, the Crown says the non-disclosed CCTV footage (which comprises over 1,000 hours of video from various locations surrounding Central Park, including the exteriors and interiors of businesses) is clearly irrelevant because it only captures people who are going about their daily business and does not show either MS or Mr. Ali.
- [19] Notably, the Crown reports that the police examined this evidence both before and after Mr. Ali became a known suspect. The Crown considers it to be peripheral and irrelevant material which exists only because the police initially cast a very wide net at a time when they had virtually no leads on the identity of the suspect. The Crown submits that disclosure is not conditioned by the defence's speculation that there might be something of significance which might be usable by the defence, drawing these words from *R. v. Anderson*, *infra*. Nonetheless, the Crown has offered to make the CCTV footage available for viewing by the defence, at the police station.

- [20] Other examples are "statements (in various forms, questionnaires, audio recordings, etc.) from possible persons of interest" and "photographs of possible persons of interest". For the purposes of this investigation, the police broadly defined a person of interest as "anyone who might have information concerning the investigation, including witnesses or potential suspects". The Crown reports that there were initially over 1,700 persons who fell into this sweeping category.
- [21] The Crown says all these possible persons of interest were found to have no connection to MS or the crime under investigation; accordingly, its position is that their statements and photographs are irrelevant. Examples in this category were GD and SR. GD, who apparently suffers from mental illness, claimed responsibility for the crime, but was quickly excluded as a suspect when it was determined that he was, in fact, in Calgary, Alberta, at the relevant time. SR, who was living in a tent in Central Park at the time, was excluded as a suspect through DNA analysis.

## B. Legal Principles

- [22] The seminal case in relation to first party disclosure is *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, in which the Court ruled that the Crown must disclose to the defence all relevant material, whether inculpatory or exculpatory and whether intended to be tendered as evidence or not, with discretion afforded as to the timing and manner of disclosure bearing in mind issues of privilege and of jeopardy to persons and investigations.
- [23] In relation to "relevant material" as a qualification, Mr. Justice Sopinka said:
- [20] As indicated earlier, however, this obligation to disclose is not absolute. It is subject to the discretion of counsel for the Crown. This discretion extends both to the withholding of information and to the timing of disclosure. For example, counsel for the Crown has a duty to respect the rules of privilege. In the case of informers the Crown has a duty to protect their identity. In some cases serious prejudice or even harm may result to a person who has supplied evidence or information to the investigation. While it is a harsh reality of justice that ultimately any person with relevant evidence must appear to testify, the discretion extends to the timing and manner of disclosure in such circumstances. A discretion must also be exercised with respect to the relevance of information. While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant. The experience to be gained from the civil side of the practice is that counsel, as officers of the court and acting responsibly, can be relied upon not to withhold pertinent information. Transgressions with respect to this duty constitute a very serious breach of legal ethics. The initial obligation to separate "the wheat from the chaff" must therefore rest with Crown counsel. There may also be situations in which early disclosure may impede completion of an investigation. Delayed disclosure on this account is not to be encouraged and should be rare. Completion of the investigation before proceeding with the prosecution of a charge or charges is very much within the control of the Crown. Nevertheless, it is not always possible to predict events which may require an investigation to be re-opened and the Crown must have some

discretion to delay disclosure in these circumstances.

- [21] 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. Inasmuch as disclosure of all relevant information is the general rule, the Crown must bring itself within an exception to that rule.
- [22] 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. The trial judge might also, in certain circumstances, conclude that the recognition of an existing privilege does not constitute a reasonable limit on the constitutional right to make full answer and defence and thus require disclosure in spite of the law of privilege. The trial judge may also review the decision of the Crown to withhold or delay production of information by reason of concern for the security or safety of witnesses or persons who have supplied information to the investigation. In such circumstances, while much leeway must be accorded to the exercise of the discretion of the counsel for the Crown with respect to the manner and timing of the disclosure, the absolute withholding of information which is relevant to the defence can only be justified on the basis of the existence of a legal privilege which excludes the information from disclosure.
- [23] 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 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 on 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.
- ...
- [33] I am of the opinion that, subject to the discretion to which I have referred above, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses. Where statements are not in existence, other information such as notes should be produced, and, if there are no notes, then in addition to the name, address and occupation of the witness, all information in the possession of the prosecution relating to any relevant

evidence that the person could give should be supplied. I do not find the comments of the Commission in its 1984 Report persuasive. If the information is of no use then presumably it is irrelevant and will be excluded in the exercise of the discretion of the Crown. If the information is of some use then it is relevant and the determination as to whether it is sufficiently useful to put into evidence should be made by the defence and not the prosecutor. [page346] Moreover, I do not understand the Commission's statement that "[t]heir statements are not evidence". That is true of all witness statements. They themselves are not evidence but are produced not because they will be put in evidence in that form but will enable the evidence to be called viva voce. That prosecutors are reluctant to disclose statements because use of them in cross-examination is thereby rendered less effective is understandable. That is an objection to all forms of discovery and disclosure. Tactical advantage must be sacrificed in the interests of fairness and the ascertainment of the true facts of the case.

- [24] Eighteen years later, in *R. v. McNeil*, 2009 SCC 3, Madam Justice Charron reiterated and summarized the "Stinchcombe" rule as follows:
- [18] While the Stinchcombe automatic disclosure obligation is not absolute, it admits of few exceptions. Unless the information is clearly irrelevant, privileged, or its disclosure is otherwise governed by law, the Crown must disclose to the accused all material in its possession. The Crown retains discretion as to the manner and timing of disclosure where the circumstances are such that disclosure in the usual course may result in harm to anyone or prejudice to the public interest. The Crown's exercise of discretion in fulfilling its obligation to disclose is reviewable by a court.
- [25] In *R. v. Anderson*, 2013 SKCA 92, the Saskatchewan Court of Appeal reviewed the trial judge's determination that the Crown had met its disclosure obligations, and made the following apposite general and case-specific remarks:
- [64] As a practical matter, during a review of the Crown's disclosure obligations prior to trial or during trial, a trial judge must look at a myriad of relevant factors touching on whether the Crown has fulfilled its obligation in good faith and in a timely manner. Without providing an exhaustive list, this could include looking at the essential elements of the offence, the complexity of the investigation, the volume and type of disclosure already provided, what the Crown refuses or is unable to provide, a preliminary assessment of how the further disclosure sought is relevant in the sense of assisting the accused, whether it is part of the case to meet, the interaction between the Crown and defence, the behaviour of the Crown and defence, the timing of disclosure and the nature of the defence requests for disclosure. The interplay of these factors is case specific.
- ...
- [70] The trial judge concluded that the Crown had generally met its obligations to disclose. There are a number of findings underpinning that conclusion. To begin with, it may be inferred that he found the defence requests unreasonable in the context of the nature of the case. He

cites, as an example of evidence of marginal value to the defence even if it were true, the unmeritorious request of the defence to have police computers sent for forensic analysis to determine if texts taunting Mr. Anderson about his arrest were the work of the police; this without a scintilla of proof the texts came from them.

- [71] He cites defence requests for more disclosure in the context of the immense size of the investigation and the tens of thousands of pages of disclosure already given. He also cites the defence position that it is entitled to every piece of paper related to the case and that it need not establish relevance, but rather the Crown must list any and all documents of any sort and establish their irrelevance.
- [72] He drew the conclusion that, in the context of the disclosure already given, the defence request for more disclosure was a fishing expedition (T1006) and that the demands were frivolous and abusive. There is support for this conclusion.
- [73] The fishing expedition approach of the defence, in this case, is exemplified by this excerpt from the first page of Mr. Anderson's counsel's September 29, 2011, letter:

Please disclose as follows:

- 1) Emails between police officers and police officers and others assisting in this investigation (i.e. banks, hotels, businesses, phone companies, civilians). This type of disclosure is critical as a method of alerting the defence to unconstitutional investigative steps, along with identifying violations of the disclosure obligations of the police.

It appears from this that three years and four months after Mr. Anderson was charged, the defence were trolling peripheral waters, i.e., communications with banks, hotels, businesses, phone companies and civilians, hoping to find unconstitutional investigative steps or violations of the police's disclosure obligations.

- [74] What Mr. Anderson submits is that the possibility of an arguable defence in the material sought cannot be eliminated and therefore the Crown must disclose these items to make sure there is no stone unturned. While this is theoretically true, it is not the law. The obligation of the Crown to keep disclosing more and more peripheral material is not conditioned by the defence's speculation that there might be something of significance which might be useable by the defence. This is what the trial judge referred to as marginal material at best.
- [75] The right to make full answer and defence does not entitle Mr. Anderson, after tens of thousands of pages of disclosure already given, to make general requests for every last piece of paper involved in the investigation based on speculation that it is relevant or that somewhere in the great morass of investigatory documents yet to come lies the pearl of inappropriate police behaviour which may form the basis of a constitutional argument. This much is evident from the comments of Doherty J.A. in *Girimonte*:

12 Disclosure demands which are no more than "fishing expeditions", seeking everything short of the proverbial kitchen sink undermine the good faith and candour which should govern the conduct of counsel. It would be obvious to anyone that the prosecution would resist compliance with such a far-fetched demand. Disclosure demands like some of those made in this case seem calculated to create needless controversy and waste valuable resources rather than to assist the accused in making full answer and defence.

[76] In *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 194, the Court stated:

194 Perfect justice in the eyes of the accused might suggest that an accused person should be shown every scintilla of information which might possibly be useful to his defence. From the accused's perspective, the catalogue would include not only information touching on the events at issue, but anything that might conceivably be used in cross-examination to discredit or shake a Crown witness. When other perspectives are considered, however, the picture changes. The need for a system of justice which is workable, affordable and expeditious; the danger of diverting the jury from the true issues; and the privacy interests of those who find themselves caught up in the justice system -- all these point to a more realistic standard of disclosure consistent with fundamental fairness. That, and nothing more, is what the law requires.

[77] In the context of these cases, the defence argument that one cannot eliminate the possibility that the sought after disclosure will be of benefit to the accused wears thin.

...

[88] The fact that the Crown changed its view of whether or not a document should be disclosed does not, in my view, drive a conclusion that the Crown has deliberately withheld relevant disclosure or not met its disclosure obligation. Some documents are glaringly relevant, others less so and some not obviously so. This may change as disclosure proceeds especially in a complex case with voluminous disclosure. The Crown may object to disclosure on relevance or some other principled bases but because of its continuing obligation to disclose, it has a right to revisit those items it objected to disclose and reconsider its objections. The initial resistance by the Crown, even if it is later shown to be unwarranted, does not in every case result in a finding that the Crown was in breach of its obligations. Late disclosure, which occurs because the Crown reconsiders its earlier objections to disclose, should not necessarily be taken as a failure of its disclosure obligations in the absence of improper purpose.

## C. Discussion

[26] In this disclosure application, the defence seeks all fruits of the investigation not yet disclosed. This term was defined in *R. v. Gubbins*, 2018 SCC 44, at para. 22:

[22] The "fruits of the investigation" refers to the police's investigative files, as opposed to operational records or background information. This information is generated or acquired during or as a result of the specific investigation into the charges against the accused. Such information is necessarily captured by first party/Stinchcombe disclosure, as it likely includes

relevant, non-privileged information related to the matters the Crown intends to adduce in evidence against an accused, as well as any information in respect of which there is a reasonable possibility that it may assist an accused in the exercise of the right to make full answer and defence. The information may relate to the unfolding of the narrative of material events, to the credibility of witnesses or the reliability of evidence that may form part of the case to meet.

In its normal, natural everyday sense, the phrase "fruits of the investigation" posits a relationship between the subject matter sought and the investigation that leads to the charges against an accused.

(R. v. Jackson, 2015 ONCA 832, 128 O.R. (3d) 161, at paras. 92-93)

[27] The foundation of the defence position is revealed in paras. 27 and 28 of its written submission:

Mr. Ali's overarching proposition on this application is that all the material he presently seeks is, by definition, the "fruits of the investigation" and therefore disclosable. To repeat Justice Rowe's comments, "information . . . generated or acquired during or as a result of the specific investigation into the charges against the accused" is the "fruits of the investigation", and it is "necessarily captured by first party/Stinchcombe disclosure" obligations.

There is little more that can or needs to be said. The court will order disclosure in this case on an application of this very simple test. The court need only ask the simple question of whether the individual pieces of evidence the Crown has withheld were "generated or acquired during or as a result of the specific investigation into the charges against the accused". An affirmative answer means that the evidence in question is, by definition, relevant and must be disclosed.

[28] With due respect for learned defence counsel, I am unable to agree that Gubbins is authority for the proposition that everything generated or acquired during or as a result of an investigation is "by definition" relevant and must therefore be disclosed. The passage of Justice Rowe cited by the defence merely recognizes that the "first party/Stinchcombe" regime is engaged in relation to the fruits of an investigation. The law governing first party disclosure is clear and unaltered by Gubbins. The Crown is afforded the discretion not to disclose fruits of the investigation it regards as clearly irrelevant, with that determination reviewable by the court.

- [29] As Mr. Justice Sopinka observed in *Stinchcombe*, the initial obligation to separate the "wheat from the chaff" or, in other words, the relevant from the clearly irrelevant, rests with Crown counsel. The wheat/chaff distinction recognizes that the fruits of an investigation may include material that is clearly irrelevant and, therefore, not required to be disclosed in order to satisfy the Crown's "first party" disclosure obligation.
- [30] *Stinchcombe* implicitly recognizes the unique nature of investigations. Some may be straightforward, while in others the investigative path may be long, winding, and lead to many dead ends. The latter have the potential to produce masses of material that may be clearly irrelevant. Without the initial separation of the wheat from the chaff by the Crown, the volume of disclosure could be overwhelming, burying the defence under heaps of clearly irrelevant material and effectively grinding a case to a halt. This is particularly so given the widespread use of technology generally, as well as the specific technological advances in relation to evidence-gathering tools.
- [31] In this application, it is plainly evident that the Crown recognizes and accepts its legal duty to disclose all relevant information to the defence, in keeping with its overarching duty as "officers of the court" and "ministers of justice" to bring forward the evidence of every material fact known to the prosecution whether favourable to the accused or otherwise. In *Stinchcombe*, Mr. Justice Sopinka commented that transgressions of this duty constitute a very serious breach of legal ethics. Notably, Ms. Keeley, on behalf of the very experienced prosecution team, has assured both the Court and the defence team that they would never place their professional reputations in jeopardy by breaching their duty of disclosure.
- [32] It is clear that the Crown has embraced the enormous task of "separating the wheat from the chaff" in relation to an investigation that was very broad, far-reaching, unfocused, and somewhat random, particularly in its earliest phase: that is, from July 19, 2017 to mid-August 2017. In this approximately one-month period, the police had virtually nothing to go on other than that their suspect was male. In these circumstances, it would not be surprising if the fruits of the investigation included clearly irrelevant evidence.
- [33] In this review of the Crown's discretion to not disclose certain investigative material on the basis of clear irrelevance, it falls to the Crown to justify its refusals. To meet its onus, the Crown has identified and addressed the non-disclosure by category and sub-category, and provided a corresponding comprehensive "Laporte Inventory". I am satisfied that this is a reasonable approach, given the enormity of the volume of material. I reject the defence suggestion that the justification must be page by page (or the equivalent for recordings), as an excessively arduous and needlessly time-consuming process given the sweeping scope of the defence application, made without input from the defence to help focus the issue. Notably in *Stinchcombe*, Mr. Justice Sopinka contemplated a cooperative process by recognizing the importance of both the Crown and the defence acting responsibly in relation to disclosure; moreover, he expressed confidence that if that were to occur, then disclosure issues would usually be resolved without intervention of the trial judge.

- [34] In each category and sub-category of non-disclosure here, the Crown has described the material in question and explained why it is, in the Crown's view, clearly irrelevant. In each instance, the Crown added that it would be open to a reconsideration of its position on any of this material with the benefit of some indication from the defence of its possible relevance. As I understand it, the defence has not been forthcoming in this regard. This is, of course, consistent with its stated position that all fruits of the investigation are, by definition, relevant; however, now that it has been determined such a proposition is unsound, the defence may consider a more focused approach to any disclosure it seeks, with some helpful articulation of possible relevance for the Crown first to consider, and then for the court to consider if necessary.
- [35] Notwithstanding the defence's overarching position that all investigative fruit is, by definition, relevant, in this application the defence has specifically addressed relevance in relation to two specific categories: (a) witness statements and videos, and (b) persons of interest.
- [36] In relation to (a), the defence noted that "the police carried out a sweeping canvass of the area around the crime scene, and in doing so, interviewed numerous witnesses and seized video surveillance footage from commercial and residential premises in the area." The defence accepts that these statements and videos did not yield any evidence relating to Mr. Ali, but submits that is precisely why they are relevant. At para. 30 of its written argument, it says:

Mr. Ali's simple proposition, which has been communicated to the Crown, is that every witness who did not see the accused in the vicinity of the alleged offence is another witness who fails to prove the Crown's case and who tends to support the defence. The reality is that every witness who did not see the accused is a potential trial witness. To similar effect, every second of video recording which does not show the accused is a second of video recording that fails to prove the Crown's case. Evidence which shows where the accused was not during the relevant period is, quite obviously, relevant on any standard.

- [37] This is a sweeping submission without any helpful contextualized reasoning to assess the possible relevance of witnesses who saw nothing, or of video recordings that do not capture Mr. Ali. The Crown has, nevertheless, agreed to disclose all statements obtained from persons who were identified as being in Central Park between 7:00 p.m. on July 18, 2017, and 1:00 a.m. on July 19, 2017, presumably because there is both a temporal and geographical nexus of this evidence to the alleged offence.
- [38] In relation to the video recordings, the Crown reports that over 1,000 hours of CCTV footage was gathered from businesses/residences surrounding Central Park and from SkyTrain/buses, none of which shows Mr. Ali. Without some contextual articulation of the possible relevance of evidence of "where the accused Ali was not", I would not interfere with the Crown's assessment of it as clearly irrelevant.

[39] Reference to D Watt, *Watt's Manual of Criminal Evidence*, (Toronto: Thompson Reuters, 2019) at page 28, for the meaning of relevance in an evidentiary context is apt, at this juncture:

Relevance is not a legal concept, rather, a matter of everyday experience and common sense. It is not an inherent characteristic of any item of evidence, rather, it exists as a relation between an item of evidence and a proposition of fact that its proponent seeks to establish by its introduction. In determining relevance, context is critical.

An item of evidence is properly characterized and rejected as irrelevant if it is not probative of the fact a party seeks to establish by its introduction by reason of its natural, common sense connection with that fact. An item of evidence is relevant where it is probative of the fact a party seeks to establish by its introduction through the same process of reasoning.

[40] In *Anderson*, supra, at paras. 59 through 61, the Court considered the meaning of relevance specifically within the disclosure context:

[59] The meaning of "relevance" has been recently addressed by the Court in *R. v. West*, 2010 NSCA 16, 288 N.S.R. (2d) 293:

160 What is relevant in any given case is determined by a wide variety of factors, principally by the facts in issue. The facts in issue are set by the charges before the court and the defences being raised by the accused (see *R. v. Arp*, [1998] 3 S.C.R. 339, [1998] S.C.J. No. 82 at para. 38). In *R. v. Watson*, [1996] O.J. No. 2695 (Ont. C.A.) para. 30-35, Doherty J.A. wrote of the requisite approach to assessing relevance as follows:

30 . . . Relevance must be assessed in the context of the entire case and the respective positions taken by the Crown and the defence: *R. v. Sims* (1994), 87 C.C.C. (3d) 402 (B.C.C.A.) at pp. 420-427, 28 C.R. (4th) 231 (B.C.C.A.). There is no rule limiting prior misconduct by the deceased to cases in which self-defence is raised.

31 In *R. v. Corbett*, [1988] 1 S.C.R. 670 at p. 714, 41 C.C.C. (3d) 385 at p. 416, La Forest J. (in dissent) described the significance of relevance to our law of evidence:

All relevant evidence is admissible, subject to a discretion to exclude matters that may unduly prejudice, mislead or confuse the trier of fact, take up too much time, or that should otherwise be excluded on clear grounds of law or policy.

32 In explaining what he meant by relevance, La Forest J. referred to *Morris v. R.*, [1983] 2 S.C.R. 190, 7 C.C.C. (3d) 97, and then said at p. 715 S.C.R., pp. 417-418 C.C.C.:

It should be noted that this passage [from *R. v. Morris*] followed a general discussion of the concept of relevance in which the court affirmed that no minimum probative value is required for evidence to be deemed relevant. The court made it clear that relevance does not involve considerations of sufficiency of probative value. . . . A cardinal principle of our law of evidence, then, is that any matter that has any tendency, as a matter of logic and human experience, to prove a fact in issue, is admissible in evidence, subject, of course, to the overriding judicial

discretion to exclude such matter for the practical and policy reasons already identified.

33 While La Forest J. dissented in the result in *Corbett*, his discussion of the significance and meaning of relevance is consistent with previous and subsequent majority decisions of the Supreme Court of Canada: *Morris v. R.*, supra, per McIntyre J., at pp. 191-92 S.C.R., pp. 98-99 C.C.C., per Lamer J. (dissenting in the result) at pp. 200-01 S.C.R., pp. 105-06 C.C.C.; *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at pp. 609-12, 66 C.C.C. (3d) 321 at pp. 389-92. Relevance as explained in these authorities requires a determination of whether as a matter of human experience and logic the existence of "Fact A" makes the existence or non-existence of "Fact B" more probable than it would be without the existence of "Fact A". If it does then "Fact A" is relevant to "Fact B". As long as "Fact B" is itself a material fact in issue or is relevant to a material fact in issue in the litigation then "Fact A" is relevant and prima facie admissible.

[60] In *Egger*, at p. 467, the Court tied relevance to usefulness to the defence:

... 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.

[61] However, an accused does not have a right to adduce irrelevant evidence (*R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443, para. 37).

[41] Bearing in mind the foregoing authorities, I am unable to discern from the defence submission how evidence that Mr. Ali was, for example, not seen in various business premises or on public transit, could possibly be probative of any fact either party might seek to establish or could reasonably be used by the defence, in the absence of a rational connection between these locations and the alleged offence such that Mr. Ali's absence from them would have some relevance. If the defence is able to provide such, I would urge them to do so, first to the Crown, and then to the Court in a subsequent application if the issue cannot be resolved without judicial intervention.

[42] I turn next to (b) "persons of interest". The defence began by observing that "the police identified and investigated over 1,300 men as so-called persons of interest before they settled on Mr. Ali as the main suspect in this investigation" and said:

One would ordinarily expect that the mere title - "persons of interest" - is enough to make that aspect of the investigation relevant and disclosable. The Crown has nevertheless refused to disclose much of that material.

The starting point to understanding why the Crown must disclose the fruits of the investigation relating to the other persons of interest is the decision of Justice Abella for the court in *R. v. Grandinetti*, 2005 SCC 5. One of the points in issue in *Grandinetti* was the admissibility of the "potential involvement of a third party in the commission of [the] offence".

...

There are several important points to take from Justice Abella's reasons in *Grandinetti*. The first is that it is "self-evident" that an accused is entitled to lead evidence that a third person committed the offence at issue. Stated in terms of the disclosure obligation on the Crown, an accused is entitled to lead evidence of the potential involvement of a third party, as an exercise of his or her right to make full answer and defence. Quite obviously, if an accused is entitled to lead evidence of the potential involvement of a third party, he or she must be entitled to know what evidence about that issue exists in the Crown's file.

[43] The law regarding alternate suspects is not contentious here. I am satisfied that the Crown recognizes its duty under *Stinchcombe* to disclose any fruits of the investigation showing any potential involvement of an alternate suspect, and that it should err on the side of disclosure in this regard. The relevance of this sort of material was addressed by Mr. Justice Sopinka, delivering the judgment of the Court in *R. v. Egger*, [1993] 2 S.C.R. 451:

[20] The trial judge reviewing the Crown's disclosure decisions, and by backward extension the Crown itself in exercising its discretion,

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 [page467] defence, unless the non-disclosure is justified by the law of privilege. [*Stinchcombe*, at p. 340.]

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.

[44] The Crown maintains its position that the material the defence seeks is clearly irrelevant, again stating that it is open to reconsidering its position with some indication of possible relevance from the defence. It notes that "the police cast a wide net in an effort to find any possible suspect" and submits that "merely because the police at one point in time considered a person to be a possible person of interest does not make the information regarding that person relevant." In this regard, it bears repeating that given the paucity of information in the police hands at the outset of the investigation, a "person of interest" was unusually broadly defined as "anyone who might have information concerning the investigation, including witnesses and potential suspects". In other words, it captured many

people who were never regarded as possible suspects. The breadth of this definition explains the enormity of the number of persons who fell into this category, and the corresponding volume of information gathered. The Crown submits that:

. . . there must be a sufficient connection between a possible person of interest / alternate suspect and the crime, otherwise any evidence about the third party is immaterial, and . . . clearly irrelevant. Mere speculation that there may be something of significance is not a sufficient basis for disclosure.

As noted in *R. v. Anderson*, supra [at paragraph 74, and here paragraph 74 should be inserted if reasons are ordered]:

[74] What Mr. Anderson submits is that the possibility of an arguable defence in the material sought cannot be eliminated and therefore the Crown must disclose these items to make sure there is no stone unturned. While this is theoretically true, it is not the law. The obligation of the Crown to keep disclosing more and more peripheral material is not conditioned by the defence's speculation that there might be something of significance which might be useable by the defence. . . .

[45] Without some contextual articulation of possible relevance of all the material within this broad category - which includes "anyone who might have information concerning the investigation" - I am satisfied the Crown has met its onus regarding clear irrelevance of this category of material. Importantly, I am satisfied it recognizes its obligation to disclose any material with possible relevance to an alternate suspect defence, and that it is open to reconsidering its position with some assistance from the defence regarding relevance.

## D. Conclusion

[46] As observed herein, this first party disclosure application was advanced on the basis that all fruits of the investigation are, by definition, relevant and, therefore, irrelevance is not a justification for non-disclosure. For the reasons given, I have concluded that this rationale is unsound and that this application must be dismissed. In so doing, I do not suggest that the matter of disclosure is resolved; however, there is a need to bring some focus to the defence requests given the nature of the case against Mr. Ali and the breadth of the investigation, particularly in its early stages when the police had virtually nothing to go on other than that their suspect was a man.

[47] I am urging counsel to work together to achieve full and timely disclosure. Notably, the law recognizes disclosure as not only an ongoing process, but as one that is best achieved through cooperation, discussion, and a clear understanding of the parties' respective positions. If there are genuine disagreements and resort to the trial judge is necessary for resolution, I will be pleased to hear further applications. Also, if in the context of this application I have materially misconstrued or misstated either the case against Mr. Ali or the nature of the police investigation, then this may be addressed in a future disclosure application.

"Bernard J."

## Appendix A

### Crown Position

56. In this section, the Crown addresses the reasons for the non-disclosure of the items heretofore not disclosed to defence counsel. The reasons are categorized in the groupings set out above.

#### Documents in the Possession of the Police

##### A. Photos. Video / CCTV

###### 1. [S] family photos

The images included in this section are photographs and video of the [S] family taken at a time prior to the death of MS. They include images of [MS] as a very small child. The images date as far back as 2007. In the Crown submission, these are clearly irrelevant. They are not logically probative of any issue at trial.

###### 2. Funeral / Vigil / Memorial

The images included in this section were taken at the funeral for [MS], and at various vigils and memorials for [MS]. They include images of attendees at these events and images of items left at the vigils. In the Crown submission, these are clearly irrelevant.

###### 3. Newroz / other Kurdish events

The images in this subcategory were all taken during the undercover operation at the Kurdish Newroz celebration at Barnett Marine Park on March 25, 2018, during Which the RCMP collected approximately 150 DNA samples. These include videos and photos of vehicles including their licence plates, as well as members of the crowd and individuals as they participated in the undercover operation. These videos and photos may also include images of the undercover operators conducting the operation. The police have reviewed all of the videos and photographs, and the images showing the sibling of the Applicant have been disclosed. The other images are not logically probative of any issue at trial. In the Crown submission, the images in this subcategory are clearly irrelevant.

###### 4. Witnesses

During the course of the investigation, the police obtained photographs of various people that they spoke with. For example, the police took photographs of employees of Burnaby Public Works and cast or crew members who had been involved in the filming of a television show in Central Park. This was in addition to the taking of statements from those same individuals. The Crown will be providing disclosure of the statements of any of those individuals who were identified as being in Central Park between 7 pm on July 18 and 1 am on July 19, 2017. In the Crown submission, photographs of individuals spoken to by the police are not probative of any

issue at trial and are clearly irrelevant.

5. Taken by third parties

This subcategory includes videos or photographs taken by third parties on July 18 and 19, 2017. This investigation was incredibly extensive and many members of the public offered their assistance by providing photographs, video or dash cam images they had captured. The police have viewed the images in this category. Neither the Applicant nor the deceased is in any of these images. In the Crown submission, these images and videos are clearly irrelevant.

6. CCTV

During the initial stages of the investigation, the police obtained hundreds of images and over one thousand hours of CCTV video from various locations surrounding Central Park including business locations (interior and exterior), residences, Skytrain and busses, in an effort to locate the deceased and any interactions the deceased had with others prior to her death. The police reviewed all of this material prior to the identification of the Applicant as a suspect, and have reviewed it again following his identification. Defence counsel has been provided with copies of all videos or photographs that depict the deceased, as well as other video from her residence which does not depict the deceased. The Applicant was not noted on any of the undisclosed videos or photographs. In the Crown's submission, videos and photographs that do not show the deceased or the Applicant, taken at locations that are not immediately proximate to the area where the deceased was found are clearly irrelevant, as they merely show other people going about their daily business. The disclosure of such peripheral material is not conditioned by the defence's speculation that there might be something of significance which might be useable by the defence. Notwithstanding that, the Crown has advised counsel that if they wish to review those materials, they can arrange to do so at the police station. To date, counsel has declined that opportunity.

7. Post-offence trail cameras

Following the death of [MS], the police installed cameras on some of the trails in Central Park. Police officers have reviewed the images taken by those cameras. The images show people going about their daily business. The images are clearly irrelevant, and cannot be logically probative of any issue in the trial.

8. Volleyball players

During the course of the investigation, the police learned that there are volleyball courts in Central Park. In August 2017, the police took surveillance photographs of various players at the volleyball courts. The police did not establish any connection between any of those players and the deceased or the crime. These are clearly irrelevant.

## B. Administrative Materials

Under this heading, the Crown has included documents that deal with purely administrative or non-operational functions on the part of the police. These include, for example, assignments of tasks, tracking of documents, communications with the deceased's family and the Crown, and other internal administrative materials. As such, they are irrelevant and need not be disclosed.

## C. Tips

As previously noted, the investigation into the death of [MS] was extensive. A large number of individuals provided unsolicited or solicited information in the form of tips to Crime Stoppers or to the police through a phone line or in person.

The information provided was investigated. The information under this heading is clearly irrelevant as none of it was connected to [MS], and rather dealt with supposition or speculation.

### 1. Crime Stoppers

Under this heading the Crown has included all of the Crime Stoppers tips and related information. The tips were reviewed by the police and determined to be clearly irrelevant to the death of [MS]. Moreover, this information is subject to informer privilege.

### 2. Police Infoline / other

Under this heading, the Crown has included tips provided to the police through phone or in person. The police reviewed all of the tips. Ones that were determined to be potentially relevant have been disclosed. The remainder of the tips were not logically, relevant to the death of [MS]. Disclosure of such peripheral material is not conditioned by the defence's speculation that there might be something of significance which might be useable by the defence. The Crown will provide examples of the types of tips contained within this category of documents.

## D. Persons of Interest / Possible Interest

In the course of this investigation, the police cast a wide net in an effort to find any possible suspect. Merely because the police at one point in time considered a person to be a possible person of interest, does not make the information regarding that person relevant. In the Crown's submission, in determining possible relevance, the Court must consider whether there is a reasonable possibility the information might assist the accused in the right to make full answer and defence. In the

Crown's submission, there must be a sufficient connection between a possible person of interest / alternate suspect and the crime, otherwise any evidence about the third party is immaterial, and in the Crown's submission, clearly irrelevant. Mere speculation that there may be something of significance is not a sufficient basis for disclosure.

As noted in *R. v. Anderson*, *supra*,

[74] What Mr. Anderson submits is that the possibility of an arguable defence in the material sought cannot be eliminated and therefore the Crown must disclose these items to make sure there is no stone unturned. While this is theoretically true, it is not the law. The obligation of the Crown to keep disclosing more and more peripheral material is not conditioned by the defence's speculation that there might be something of significance which might be useable by the defence.

1. Analysis (Lists etc.)

Under this heading, the Crown has included various lists of people that the police obtained in efforts to try to identify any possible persons of interest. None of the individuals on the list were determined to have any connection to the offence or to the deceased, and therefore the lists are clearly irrelevant.

2. Biographical / Operational

Under this heading are documents that provide biographical information about individuals who were at one time considered possible persons of interest. None of these individuals were determined to have a connection with [MS]. DNA was taken from many of these individuals. None of their DNA matched the Male 1 profile. There is no connection between any of these individuals and the offence. Accordingly, these documents are clearly irrelevant. The Crown will provide examples of the type of information contained within this category of documents.

3. Canvassing

Under this heading are documents related to intelligence and information gathering in an attempt to determine possible persons of interest. This included inquiries from other police files, government agencies and questionnaires to individuals. None of the individuals noted as possible persons of interest were determined to have any connection to the offence. Accordingly, these documents are clearly irrelevant.

4. Exhibits

Under this heading are documents detailing consent DNA samples, seizure of cast-off DNA and other exhibits seized from individuals believed to be possible persons of interest, and photographs of identification documents. None of the possible persons of interest were determined to have any connection to [MS] or the offence. Accordingly, these documents are clearly irrelevant.

5. Notes and Surveillance

Under this heading are police notes and other materials dealing with surveillance of, and interactions with individuals who had previously been identified as possible persons of interest. None of the possible persons of interest were determined to have any connection to [MS] or the offence. Accordingly, these documents are clearly irrelevant.

6. Agencies - Outside / Partner /Specialized

During the course of this investigation, the police liaised with various outside agencies in order to obtain information about possible persons of interest. Under this heading are documents related to those liaisons, and various lists obtained by the police as a result of these contacts with other agencies. None of the possible persons of interest were determined to have any connection to [MS] or the offence. Accordingly, these documents are clearly irrelevant.

#### 7. Statements

During this investigation, the police obtained statements, in the form of questionnaires, audio recordings etc., from individuals believed to be possible persons of interest. Under this heading are the documents and recordings related to possible persons of interest from whom no relevant information was obtained. None of these possible persons of interest were determined to have any connection to [MS] or the offence. Accordingly, these documents are clearly irrelevant. The Crown will provide examples of the type of information contained within this category of documents.

Of note, some of this type of material has already been disclosed, for example the material related to [GD] and [SR].

#### 8. Photos

Under this heading are photographs of individuals who had been noted as possible persons of interest. None of the possible persons of interest were determined to have any connection to [MS] or the offence. Accordingly, these documents are clearly irrelevant.

### E. Neighbourhood Canvass / Lists

During the investigation the police obtained lists of tenants from nearby buildings, and knocked on doors to ask people if they had heard / seen / knew anything about the offence. In many cases knocks were unanswered and the police were not able to even obtain the name of the resident. Under this heading, the Crown has included neighbourhood canvass reports from various buildings and from their attempts to obtain information from residents. Also included are statement forms and statements taken from residents. None of the individuals whose statements are included herein had any information about the killing of [MS]. Accordingly the material is clearly irrelevant. The Crown will provide examples of the type of information contained within this category of documents.

### F. Witnesses

In addition to speaking with various Burnaby residents, the police also spoke with individuals who had been connected to Central Park - either as an employee of Burnaby Public Works, cast or crew members working on the TV production of Once Upon a Time, or otherwise. The Crown is preparing disclosure of statements of all those individuals who had been in Central Park between 7pm on July 18 and 1 am on July 19, 2017, even if they had no information to provide to the police. The materials on this list comprise statements and other materials from individuals who

were not identified as being in Central Park during those times, and who did not provide any relevant material to the police. Accordingly, it is the Crown's submission that the material is clearly irrelevant.

#### G. Social Media:

##### 1. Re: [MS]

The police investigated [MS]'s social media accounts and also set up a public information website. Included in this category are IP addresses regarding the people who visited the [MS] website and administrative liaisons and requests to outside organizations regarding access to [MS]'s social media accounts, and other administrative materials. These are clearly irrelevant.

##### 2. Re: Once Upon a Time

As the TV series Once Upon a Time was filming in Central Park during the evening of July 18, 2017, the police made various social media inquiries into the television show. Attached under this category are the social media queries and the information found on social media. This is clearly irrelevant.

##### 3. Postings by third parties

During the investigation the police contacted the Real Time Intelligence Centre (RTIC) to request geo-fencing for social media posts within a specific timeframe. They also obtained YouTube videos posted by a third party. These materials are clearly irrelevant to the issues in this case.

#### H. Empty Folders

Under this heading, the Crown has included blank documents or folders that include no information within them. These are clearly irrelevant.

#### I. Miscellaneous

This category contains material such as e-mails related to garbage removal, unrelated protection orders and some items where underlying documents have already been disclosed. The materials in this category does not provide substantive information relevant to the offence, and is clearly irrelevant

#### J. To be Disclosed / Reviewed by Crown

In order to err on the side of inclusive disclosure, the Crown will be disclosing these materials.

#### K. Already disclosed

Under this heading are materials that, despite being on this list, have already been disclosed to counsel.

#### Documents in the Possession of the Crown

#### L. To be disclosed (awaiting redaction)

Under this heading are materials that the Crown will be disclosing, but are awaiting redaction of personal information.

### **M. To be disclosed (subject to undertakings)**

Following the arrest of the Applicant, the police conducted an undercover/ cell- , plant operation. Video cameras in the police station captured images of the Applicant as he was being transferred through various areas of the detachment. Various police officers, including undercover operators are captured in those images. The Crown has proposed disclosing these video images to defence counsel on an undertaking.

### **N. Newroz photographs and video**

As noted, the police conducted an undercover operation (UCO) at the Newroz celebration in Barnett Marine Park. During that operation the police surreptitiously obtained approximately 150 DNA samples. One of those samples was obtained from the Applicant's brother (Chamdin Ali). The photographs and video showing him, and the questionnaire form noting the information provided by Chamdin Ali have been disclosed.

The materials included under this heading are over 3400 photographs taken of other people and their vehicles during the Newroz celebration as well as the questionnaire forms filled out with information about those individuals who participated in the UCO. None of the DNA samples seized during this UCO matched the Male 1 profile. The only DNA sample which was sent to Parabon Laboratory and which was believed to be connected to Male 1 was the Applicant's brother's sample. None of the sample donors, otherthan the Applicant's brother are known to have any familial connection to the Applicant or any connection to the deceased.

In the Crown's submission the photographs and questionnaires are clearly not relevant.

### **O. Other festivals on other dates**

During this investigation, the police attended various Kurdish celebrations where they obtained the licence plates of attendee's vehicles. These were not followed up upon, and are clearly not relevant.

57. The Applicant in his Notice of Application has broken down the categories of material he wishes disclosed in a manner different than that described by the Crown. Accordingly, the Crown will answer the Applicant's requests by referencing the paragraph of this Reply in which the Crown addresses those documents:

- A. The material sought in paragraph 1(a-g) has been addressed in paragraph 55N and 55O.
- B. The material sought in paragraph 1h has been addressed in paragraph 55M.
- C. The material sought in paragraph 2a has been addressed in paragraph 55B.
- D. The material sought in paragraph 2b has been addressed in paragraph 55B.

- E. The material sought in paragraph 2(c-d, i-j)) has been addressed in paragraph 55D.
- F. The material sought in paragraph 2e is believed by the Crown to refer to photographs taken by Emma Blinkhorn, which is being disclosed and is addressed in paragraph 55J.
- G. The material sought in paragraph 2f has been addressed in paragraph 55F.
- H. The material sought in paragraph 2g has been addressed in paragraph 55G2.
- I. The material sought in paragraph 2h has been addressed in paragraph 55A6.
- J. The material sought in paragraph 2k has been addressed in paragraph 55A3.
- K. The material sought in paragraph 2l has been addressed in paragraph 55C.
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Prepared on 24 October 2026 · Esheria