

CANADA / JUDGMENT

R. v. Dadmand

2021 BCCA 250

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 250 R. v. Dadmand

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Dadmand,

2021 BCCA 250

Date: 20210625

Docket: CA45862

Between:

Regina

Respondent

And

Novid Stefano Dadmand

Appellant

Restriction on publication: A publication ban has been imposed under s. 486.4 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or a witness.

Before:

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Grauer

The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated
August 15, 2016 (conviction) (R. v. Dadmand, 2016 BCSC 1565, Vancouver Docket 26772).

Counsel for the Appellant

(via videoconference):

E. Purtzki

Counsel for the Respondent

(via videoconference):

G.D. McKinnon, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

October 22, 2020

Place and Date of Judgment:

Vancouver, British Columbia

June 25, 2021

Written Reasons by:

The Honourable Mr. Justice Butler

Concurred in by:

The Honourable Mr. Justice Grauer

The Honourable Mr. Justice Voith

Summary:

The accused appeals his convictions for the sexual assault of five complainants. Prior to trial, he applied for disclosure of all materials searched and seized by the police pursuant to a search warrant, including those which related to complainants not named in his indictment (the "Uncharged Complainants"). He submitted that such disclosure was necessary to enable him to challenge, and for the court to review on an ex post basis, the reasonableness of the police search under s. 8 of the Charter. The judge dismissed his application, finding that there was no reasonable possibility that the disclosure related to the Uncharged Complainants could assist him in making full answer and defence or in otherwise conducting his defence of the case. Held: Appeal dismissed. In the circumstances, the lack of disclosure related to the Uncharged Complainants did not impact the accused's ability to challenge the police search as unreasonable. A meaningful ex post review did not require full disclosure of the contents of the search, as acknowledged by counsel prior to the disclosure application. Rather, the accused was able to

challenge the manner of search through examination of the police officers, including the lack of temporal limits and whether it exceeded the scope of the warrant. The disclosure sought by the accused extends beyond the principles of relevancy established in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 and amounts to a fishing expedition. The judge did not err in concluding there was no reasonable possibility that the non-disclosed information could have assisted the accused's ability to make full answer and defence through its effect on the overall fairness of the trial process.

Reasons for Judgment of the Honourable Mr. Justice Butler:

Introduction

- [1] At issue in this appeal is whether an accused requires full disclosure of all information searched and seized by the police pursuant to a warrant in order to challenge the constitutionality of the search under s. 8 of the Charter. The appellant says that the required disclosure extends to information about complainants not named in an indictment--not for purposes related to the merits of the charges ultimately laid, but to enable him to challenge the search itself as unreasonable. He submits that full disclosure is the only way for him to challenge, and for the court to review, the width and breadth of the search on an ex post basis.
- [2] The appellant, Novid Dadmand, became the subject of a police investigation in 2014 for his activities in connection with a fake modelling agency. Mr. Dadmand was believed to have met with several women on false pretenses and to have sexually assaulted them. In March 2014, the RCMP obtained and executed a search warrant for Mr. Dadmand's home. Following the police search and seizure of various items from his residence, including electronic devices containing video and photographic evidence, Mr. Dadmand was charged and tried in relation to six complainants. The Information to Obtain ("ITO") had referred to six complainants, but only two of those were actually named in the indictment.
- [3] Prior to his trial, Mr. Dadmand filed notices of application challenging the validity of the search warrant and the manner of the search and seizure of his electronic devices. He also brought a motion for disclosure for all items searched and seized from his residence, including materials relating to complainants not named in his indictment (the "Uncharged Complainants"). Mr. Dadmand argued that he was entitled to know the full scope of the information obtained from the items seized pursuant to the warrant, and that there was a reasonable possibility that the material relating to the Uncharged Complainants could assist him in making full answer and defence. He also submitted that he needed full disclosure of the materials searched and seized to challenge the breadth of the police search. The Crown submitted that such disclosure was clearly irrelevant, as it would not be calling any of the Uncharged Complainants at trial or otherwise make any use of the materials in its prosecution.

- [4] On April 5, 2016, Justice Pearlman dismissed Mr. Dadmand's application for disclosure of all items seized pursuant to the search warrant, including the materials relating to the Uncharged Complainants. He found that Mr. Dadmand was unable to establish a "reasonable possibility" that the materials relating to the Uncharged Complainants could assist him in making full answer and defence or in otherwise conducting his defence. He subsequently dismissed Mr. Dadmand's challenges to the validity of the search warrant and the manner of the police search. The judge convicted Mr. Dadmand of five counts of sexual assault on August 15, 2016.
- [5] Mr. Dadmand appeals his convictions on the basis that the judge erred in failing to order disclosure of all material searched and seized from his electronic devices, including that which related to the Uncharged Complainants. He says that there is a reasonable possibility that the non-disclosure affected the overall fairness of the trial process by preventing him from challenging the manner and breadth of the police search. The Crown opposes the appeal and argues that the judge's ruling did not violate Mr. Dadmand's right to disclosure under *R. v. Stinchombe*, [1991] 3 S.C.R. 326, and that the non-disclosure did not affect the fairness of the trial process.
- [6] For the reasons below, I would dismiss Mr. Dadmand's appeal.

Background and Procedural History

- [7] On March 17, 2014, a member of the RCMP swore an ITO and obtained a search warrant for Mr. Dadmand's residence in Richmond seeking to seize several items from his residence, in particular:
- (a) documents and templates resembling modelling contracts, including electronically stored documents and templates;
 - (b) video, photographs, contact information, and correspondence stored electronically; and
 - (c) computers and other electronic information, storage devices, namely cellular phones, smart phones, tablets, and flash drives containing lockdown files, video, photographs, contact information, and correspondence.
- [8] On March 19, 2014, after Mr. Dadmand was arrested, RCMP officers executed the warrant and seized a number of items. These included computers and laptops; phones and other mobile devices; USB drives; recordable compact discs; and other documents. The subsequent searches of the devices revealed videos and photographs of Mr. Dadmand engaging in sexual acts with several women, including some who could not be identified.

- [9] Mr. Dadmand was charged with seven counts of sexual assault by way of direct indictment. Of the six women initially referred to in the ITO, Mr. Dadmand was tried for the sexual assault of two of them: D.T. and H.S. He was also tried in relation to four additional complainants, S.T., J.N., J.B., and A.T., based on the information obtained by the police pursuant to the warrant.

Disclosure application

- [10] Prior to voir dres to be held on: 1) the validity of the search warrant; and 2) whether the search itself was unreasonable, Mr. Dadmand moved for disclosure of all items searched and seized from his residence. He had been provided with disclosure of all items searched and seized relating to the charged complainants but not relating to the Uncharged Complainants. Mr. Dadmand argued that the Crown might use the materials to cross-examine him if he testified; that the Crown might choose to adduce similar fact evidence from the Uncharged Complainants; that it might reveal collusion between complainants; or that the materials might otherwise be of use to his defence when he obtained them. He also argued that full disclosure was necessary in order for him to be able to challenge the breadth of the police search. In his amended disclosure application, he stated:

At his trial, the Applicant will be challenging the admissibility of the items seized during the Search Warrant. This challenge involves arguments relating to the ITO and investigations supporting it.

Mr. Dadmand's counsel stated in oral submissions:

In its possession the Crown has a number of files. We are not sure of the width and breadth of the electronic files, but we require disclosure of any all - any and all materials seized, electronic or otherwise, from Mr. Dadmand - Mr. Dadmand's residence in the context of that search. In our submission those materials are clearly relevant, because they are going to be the subject of a Charter challenge.

so I'm clear, we seek the disclosure - any uncharged complainants, we seek disclosure of all of the material that was taken in the search warrant, and is my friend's position that the material that was seized, that is subject of the Charter application is still not disclosable, or is it simply that any material from unrelated investigations is disclosable, because we seek everything that they wanted to take - took from Mr. Dadmand we're saying is - we're seeking its exclusion and the first place we've got to start is we have to look at it and review it, and that - therefore ergo it is relevant.

In reply, counsel elaborated:

I can advise that the defence is also challenging in my application the width and breadth of the search. We necessarily need to know what was searched for our application to - to go forward and I - and I submit that materials of - the material that was seized, part and parcel of our application is the breadth of the search.

- [11] In its submissions, Crown counsel affirmed that it would not be calling any of the unnamed complainants. It stated that the material was clearly irrelevant:

What we have here are dozens of separate police files, given separate file numbers, opened in relation to individual women who were victimized by Mr. Dadmand. There is no relationship between any of these women. None is known to the other. Their evidence certainly doesn't overlap in that respect.

Only materials are evidenced that could be common to the prosecution in relation to all files, that is that could be relevant to the prosecution and defence on all counts would be the generic information of the generic materials found in the accused's home, things relating to the fraudulent scheme generally. So for example the Jurgita Modelling contract template, that of course would be something that is relevant to all counts. All things related to the Brad person, Mr. Dadmand's use of Plenty of Fish and various other websites, that of course has been disclosed.

So, keeping in mind the definition of relevant, in our case what could defence counsel possibly make use of a video of a woman not named in the indictment having sex with Mr. Dadmand? What use could possible be made of that? And I can't think of a way it could be used.

- [12] As indicated above, the judge heard Mr. Dadmand's application for disclosure and the parties' submissions on April 4, 2016 and gave oral reasons dismissing the application the following day, indexed as 2016 BCSC 2715 (the "Disclosure Ruling").
- [13] After reviewing the positions of the parties, the judge cited Stinchcombe for the principles governing the Crown's obligations for disclosure, including the general principle that all relevant information must be disclosed. He found that the essential question was whether there was a "reasonable possibility of the information relating to the uncharged complainants being useful to the accused in making full answer and defence": at paras. 11-13, relying on *R. v. Basi*, Virk and Basi, 2007 BCSC 788; *R. v. Taillefer*; *R. v. Duguay*, 2003 SCC 70; and *R. v. Dixon*, [1998] 1 S.C.R. 244.
- [14] The judge held that in this case, while the information relating to the Uncharged Complainants may have been useful to the accused if the Crown intended to call any of them to give evidence, it had abandoned any intention to do so. He rejected suggestions put forward by the defence with respect to the utility of the material as speculative, including that they might reveal collusion between complainants or that they might be of some use to the defence when they saw them. He dismissed Mr. Dadmand's application for disclosure of the materials relating to the Uncharged Complainants accordingly:
- [17] Having considered the matter, I have concluded that the suggestions put forward by the defence with respect to the possible utility of this material is speculative, and that speculation does not meet the threshold of a reasonable possibility.

- [18] I am, therefore, not persuaded that the defence has met the threshold of showing that there is a reasonable possibility that this information may assist Mr. Dadmand in making full answer and defence or in otherwise conducting his defence of this case.

Validity of the search warrant

- [15] The judge next considered Mr. Dadmand's Vukelich application and challenge to the validity of the search warrant. On April 22, 2016, he granted Mr. Dadmand leave to cross-examine Sgt. Row, the RCMP officer who swore the ITO. This was to be limited to matters relating to the disclosure of material facts concerning the offences alleged in the ITO and the factual bases for Sgt. Row's belief that materials sought on the search could be found at the accused's residence: 2016 BCSC 720 at para. 49.
- [16] In seeking to exclude evidence, Mr. Dadmand initially challenged both the facial and sub-facial validity of the search warrant. He abandoned his challenge to its facial validity on April 26, 2016, and the judge dismissed his remaining challenge to its sub-facial validity on April 27, 2016. He concluded that the Justice of the Peace who issued the warrant could find reasonable and probable grounds for believing that the offences alleged had been committed and it was probable that evidence relating to those offences would be found at Mr. Dadmand's residence, and through searches of his electronic devices as described in the warrant: 2016 BCSC 764 at para. 89.

Voir dire on unreasonable search and seizure

- [17] The judge subsequently considered and dismissed Mr. Dadmand's challenge to the manner in which the police conducted their search (in reasons indexed as 2016 BCSC 878; the "Unreasonable Search Ruling"). Mr. Dadmand argued that his s. 8 right to be secure from unreasonable search and seizure had been breached in multiple ways, including through searches for child pornography that were not authorized by the warrant and through the police's failure to place any temporal limits on the scope of their searches.
- [18] Prior to the voir dire, the judge informed counsel that as to the reasonableness of the search, "some evidence will be required about what steps, if any, the officers who conducted the search took, to restrict the scope of the search to matters relevant to the charges in issue". The Crown stated that it would make available whatever officers the defence wished to call on their application, and that the names of the officers were included in the materials disclosed to the defence.
- [19] Counsel for Mr. Dadmand stated in addressing the breadth of the search, he did not need the "entire contents of the investigate file". He elaborated:

What I'm not asking for is the files themselves. I don't believe that it would be relevant. I believe it would be a poor use of time. And frankly, I don't believe we need them.

. we'll take some more time and I do have the entire disclosure package here and I intend to review it, and find either officers that are available, or if that is not possible, find an officer who could, for the better lack of a term, "quarterback", who searched what and when.

[Emphasis added.]

- [20] Defence counsel then advised that he wished to have two officers produced for examination, Cpl. Howard and Cpl. Luk. These were the officers who had conducted forensic searches of Mr. Dadmand's computers and phones, using RCMP technology, which extracted files for review by other investigators.
- [21] In his ruling, the judge summarized the officers' evidence in some detail. He noted that Cpl. Howard used a program called 'Digital Investigators of Computer Exhibits' ("DICE") to conduct keyword and other searches of Mr. Dadmand's computers. He testified that numerous files were extracted and exported to a disk for review by the lead investigators. On cross-examination, Cpl. Howard testified that there were no temporal limits on any of the DICE searches he conducted. Meanwhile, Cpl. Luk performed 'Cellebrite' searches on a number of mobile devices seized from Mr. Dadmand's residence and similarly preserved files for review by investigators. He also made no attempt to limit the searches to the date ranges of the offences alleged but used the search warrant as a guide in setting parameters.
- [22] After describing the officers' testimony, the judge reviewed the applicable legal principles and s. 8 jurisprudence. With respect to Mr. Dadmand's principal challenge to the manner of the search--the absence of any temporal limit--he noted that the warrant itself imposed no timeframe within which the search was to be conducted. While the warrant did set out the alleged offences and provided date ranges for them, the police did not know at that stage of the investigation when Mr. Dadmand had initiated the alleged modelling scheme: at paras. 82-83.
- [23] Unlike the case of *R. v. Marek*, 2016 ABQB 18, which the judge found to provide a "comprehensive and recent summary of the law relating to the conduct of police searches of computers", there was no evidence "from the accused describing the contents or range of materials kept on the various devices": at paras. 62, 84. Further, the police--contrary to their counterparts in *Marek*--had identified categories of documents and devices to be searched, all of which were potentially relevant to the investigation of the offences set out in the ITO and the warrant: at para. 86. The judge concluded:
- [87] In the absence of evidence concerning the scope of the material searched and seized by the police, and bearing in mind the lack of knowledge of the police of when Mr. Dadmand embarked upon his alleged modelling scheme, I am not persuaded that the lack of time limits on the scope of the searches in this case was unreasonable or unreasonably intruded upon Mr. Dadmand's privacy interests. Accordingly, I conclude that the failure of the police to impose temporal limits on the scope of their searches in the course of executing those searches did not constitute a breach of Mr. Dadmand's s. 8 Charter rights.

[Emphasis added.]

[24] The judge found that the child pornography searches conducted by Cpl. Howard were not authorized by the search warrant and were in breach of s. 8. However, neither search produced a result. No information was extracted or reviewed by police as a result of the suspected child pornography searches: at paras. 27, 75, 88.

Section 24(2) ruling and trial

[25] On May 2, 2016, the judge concluded that the impact of the police's violation was minimal; that evidence from the electronic devices was important to the Crown's case; and that the admission of the evidence would not bring the admission of justice into disrepute. Weighing the relevant factors, he found that the balance tipped in favour of admission rather than exclusion, and dismissed Mr. Dadmand's application to exclude evidence under s. 24(2): 2016 BCSC 877 at paras. 24-25.

[26] Mr. Dadmand's trial was heard over 24 days from April to June 2016. I need not review the judge's reasons released on August 15, 2016, as they are not challenged or relevant to the issues on this appeal. The judge found Mr. Dadmand guilty of five counts of sexual assault and acquitted him of one count.

Issues on Appeal

[27] Mr. Dadmand advances a single ground of appeal: whether the trial judge erred in failing to order disclosure of all materials that were seized and searched on his electronic devices. He seeks an order that the convictions be set aside and a new trial ordered because of the impact of the non-disclosure on the fairness of the trial process.

Positions of the Parties

Mr. Dadmand

[28] Mr. Dadmand submits that disclosure of all information searched and seized would have allowed him to determine the scope of the searches of the electronic devices by the police. He says that the failure to order such disclosure was particularly unfair because the judge dismissed his challenge to the manner of search on the basis that he had failed to adduce evidence of the "contents or range of materials kept on the various devices". Mr. Dadmand submits that he could not have done so without the requested disclosure. He says the effect of the judge's ruling was to put him in an "impossible Catch-22" situation where he was expected to catalogue the content of the drives but could not do so because he was denied access to the full disclosure.

[29] In *R. v. Vu*, 2013 SCC 60, the Supreme Court of Canada held that the conditions as to the manner in which searches of electronic devices are to be carried out by police (i.e., the "search protocols") are to be reviewed on an ex post basis. The Court also held that a warrant to search electronic devices does not provide the police with a "license to scour the devices

indiscriminately". In *R. v. Fearon*, 2014 SCC 77, the Court held that in order to perform meaningful judicial review of the legality of a search, there must be "detailed evidence about precisely what was searched, how and why": at para. 87. In this case, Mr. Dadmand submits that in order to conduct an after-the-fact review as to the manner of search, full disclosure of all content seized and searched by the police was required. Without such disclosure, he says that it was impossible for him to meet his onus of demonstrating a breach of s. 8 or for the court to assess whether the manner of search was unreasonable.

- [30] Mr. Dadmand also submits that the trial judge did not fully address his application for disclosure. Rather, the judge dismissed his application by focusing on whether disclosure of the material had any relevance to the trial and therefore whether it implicated his ability to make full answer and defence on the substance of the charges against him. He argues that the judge ignored his second ground: that full disclosure of all material searched and seized was relevant to an assessment of the constitutionality of the manner of search, and to a meaningful ex post review.
- [31] In the circumstances of this case, Mr. Dadmand says it was fundamentally unfair to deny him disclosure of all that was searched and seized but dismiss his challenge to the manner of search because he led no evidence as to the actual scope of the search. He submits that, had he been provided full disclosure as requested, he would have known exactly who the officers were that searched the materials extracted by Cpls. Howard and Luk and what they had searched. Armed with that information, he could have called those officers to testify to determine whether they had searched irrelevant information. Mr. Dadmand further submits that full and complete disclosure is especially critical in the case of searches of electronic devices.
- [32] In response to the Crown suggestion that Mr. Dadmand is changing his position on appeal, he says that his changing tactics at trial were necessitated by the Disclosure Ruling and that he never abandoned the argument that he was entitled to disclosure of all materials searched.
- [33] Lastly, Mr. Dadmand submits that the failure to order full disclosure occasioned a miscarriage of justice. He says there was a "reasonable possibility" that the fairness of the trial process was impacted and that a new trial ought to be ordered.

The Crown

- [34] The Crown submits that where a new trial is sought on the basis of non-disclosure, two criteria must be met: first, that the accused's Stinchcombe right to disclosure was violated; second, that there is a reasonable possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial process. The Crown submits that Mr. Dadmand cannot demonstrate that the Disclosure Ruling violated his right to disclosure under Stinchcombe or that non-disclosure affected the outcome or fairness of the trial.

- [35] With regard to Mr. Dadmand's right to disclosure, the Crown submits that it was not the judge's Disclosure Ruling that prevented counsel from eliciting information about the scope of the search. Rather, it was the defence's decision not to seek or tender evidence from the officers who conducted the searches during Mr. Dadmand's unreasonable search application. The Crown notes that, contrary to Mr. Dadmand's submission, the identity of those officers was available to the defence based on the disclosure provided by the Crown and was stated again during examinations.
- [36] The Crown argues that a fatal flaw in the appellant's argument is that it runs contrary to his strategy at trial. Before the unreasonable search application, the defence conceded that he did not require disclosure of all of the materials searched; in submissions, he focused instead on the failure of the police to place any temporal limits on their search. The Crown says the appellant had ample opportunity to elicit evidence about the content and scope of the materials seized but expressly chose not to pursue this avenue.
- [37] The Crown also submits that the judge did not fail to consider the ground for full disclosure Mr. Dadmand now advances on appeal; namely, that materials relating to the Uncharged Complainants might assist the defence in advancing its position that the search was unreasonably broad. The Crown notes that the Disclosure Ruling reflects the arguments made by Mr. Dadmand at the time, which related almost exclusively to the "primary ground" he advanced (which is not pursued on appeal): that the materials might assist him in making full answer and defence to the substantive charges. However, the Crown says that the judge clearly considered and dismissed the disclosure application on both grounds advanced by Mr. Dadmand.
- [38] Further, the Crown argues that Mr. Dadmand misconstrues the right to disclosure as a right to embark on a fishing expedition for materials that were clearly irrelevant. It submits that Mr. Dadmand must do more than merely speculate that the requested disclosure might assist him in challenging the manner of search. The Crown also emphasizes defence counsel's acknowledgment that he did not need all materials seized by the police pursuant to the warrant to do so. In light of the position taken at trial, what was relevant was obtaining information from the officers about their manner of search, and specifically, in the context of the arguments advanced by Mr. Dadmand, whether they had conducted the search without temporal limits.
- [39] The Crown submits that Vu and Fearon affirm the importance of having information about what was searched (and how, and why) but do not support Mr. Dadmand's argument that disclosure of all materials seized by the police are relevant to challenging the scope of a search or in conducting a judicial "ex post" review. It says that a search is not overbroad just because it was not tailored to a date range for files search, and that the "ultimate results or fruits of the search" cannot be used to turn a reasonable search into an unreasonable one (citing *R. v. John*, 2018 ONCA 702). In sum, based on the foregoing, the Crown submits that Mr. Dadmand has not met the threshold test of establishing a violation of his right to disclosure.

- [40] Second, the Crown submits that there is no reasonable possibility that non-disclosure affected the overall fairness of the trial process. The Crown notes that it made clear that it would make available any officers the defence wanted to call on its application; that the names of the officers were available in the disclosed materials; that defence counsel conceded that he did not need the "entire contents of the investigative file" to advance his application; and that the defence's approach was to elicit evidence from Cpls. Howard and Luk about what evidence they extracted, and whether there were any parameters, but that it chose not to call the investigators who reviewed the materials to testify.
- [41] In conclusion, the Crown states that, in applying the governing authorities to the complete record of proceedings, there was no miscarriage of justice and there is no basis for ordering a new trial.

Analysis

Standard of review

- [42] The standard of review applicable to the judge's Disclosure Ruling is not in dispute. The question of whether the Crown has met its disclosure obligation is subject to a correctness standard of review, to determine whether the Crown has met the legal standard set forth by the governing disclosure cases: *R. v. McKay*, 2016 BCCA 391 at para. 40, citing *R. v. Anderson*, 2013 SKCA 92 at para. 52.

The Crown's duty of disclosure

- [43] In accordance with the well-established standard set out in *Stinchcombe*, the Crown has an obligation to disclose all relevant material in its possession. Material is relevant if it could reasonably be used by the defence in meeting the case for the Crown. This includes evidence that is both inculpatory and exculpatory, whether or not the Crown intends to introduce it in evidence: *Stinchcombe* at p. 345.
- [44] In *Dixon*, the Supreme Court of Canada noted that the threshold requirement for disclosure is "set quite low" and that a broad range of material is subject to disclosure. The Crown's duty to disclose is triggered whenever there is a "reasonable possibility of the information being useful to the accused in making full answer and defence": at para. 21 (my emphasis).
- [45] The obligation resting upon the Crown to disclose material gives rise to a corresponding constitutional right of the accused to the disclosure of all material which meets the *Stinchcombe* threshold. The accused's right to disclosure is one of the components of the right to make full answer and defence, which in turn is a principle of fundamental justice within s. 7 of the Charter: *Dixon* at para. 22, citing *R. v. Carosella*, [1997] 1 S.C.R. 80. In *Dixon*, the Court concluded in para. 22:

Thus, where an accused demonstrates a reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence, he has also established the impairment of his Charter right to disclosure.

[Emphasis in original.]

[46] The judge reviewed the principles governing the Crown's duty to disclose at paras. 9-12 of the Disclosure Ruling. He determined that the essential question was whether there was a "reasonable possibility of the information relating to the uncharged complainants being useful to the accused in making full answer and defence to the offences charged": at para. 13. In my view, there is no question that the judge correctly articulated the test to be applied. The issue is whether he misapplied the test in the circumstances of this case.

[47] In order to determine whether the accused's right to make full answer and defence was impacted by a lack of disclosure, it is necessary to undertake a two-step analysis based on the following considerations (Dixon at para. 36):

First, in order to assess the reliability of the result, the undisclosed information must be examined to determine the impact it might have had on the decision to convict. Obviously this will be an easier task if the accused was tried before a judge alone, and reasons were given for the conviction. If at the first stage an appellate court is persuaded that there is a reasonable possibility that, on its face, the undisclosed information affects the reliability of the conviction, a new trial should be ordered. Even if the undisclosed information does not itself affect the reliability of the result at trial, the effect of the non-disclosure on the overall fairness of the trial process must be considered at the second stage of analysis. This will be done by assessing, on the basis of a reasonable possibility, the lines of inquiry with witnesses or the opportunities to garner additional evidence that could have been available to the defence if the relevant information had been disclosed. In short, the reasonable possibility that the undisclosed information impaired the right to make full answer and defence relates not only to the content of the information itself, but also to the realistic opportunities to explore possible uses of the undisclosed information for purposes of investigation and gathering evidence.

[Emphasis in original.]

In other words, the overall fairness of the trial process is subsumed within the right to make full answer and defence. After assessing the reliability of the result at trial, a court is to consider the effect of the non-disclosure on the overall fairness of the trial process, in determining whether a lack of disclosure impacted an accused's right to make full answer and defence.

[48] The Court subsequently noted that in considering the fairness of the process, defence counsel's diligence in pursuing disclosure from the Crown must be taken into account. A lack of due diligence is a "significant factor" in determining whether the Crown's non-disclosure did indeed affect the fairness of the trial process: at para. 37.

- [49] In *Taillefer*, the Court affirmed the two-step Dixon analysis for whether a lack of disclosure has impaired an accused's right to make full answer and defence, first with respect to the verdict, then with regard to the actual fairness of the trial process. The Court elaborated on the second stage:
- [84] The reasonable possibility of affecting the overall fairness of the trial "must be based on reasonably possible uses of the non-disclosed evidence or reasonably possible avenues of investigation that were closed to the accused as a result of the non-disclosure" (Dixon, *supra*, at para. 34 (emphasis in original)). Here again, the appellate court must not assess the possible uses of the fresh evidence based on an item-by-item analysis of the probative value of the evidence. It must ascertain whether the failure to disclose deprived the accused of certain evidential or investigative resources. That would be the case, for example, if the undisclosed statement of a witness could reasonably have been used to impeach the credibility of a prosecution witness. The conclusion would necessarily be the same if the prosecution fails to disclose to the defence that there is a witness who could have led to the timely discovery of other witnesses who were useful to the defence.

[Emphasis in original.]

- [50] In *R. v. Illes*, 2008 SCC 57, the Court further discussed the second stage of the Dixon test and reiterated that the burden on an appellant "can be discharged by showing, for example, that the undisclosed evidence could have been used to impeach the credibility of a prosecution witness (see *Taillefer* at para. 84), or could have assisted the defence in its pre-trial investigations and preparations, or in its tactical decisions at trial": at para. 27.
- [51] In summary, whether there is a reasonable possibility that the overall fairness of the trial process was impaired must be based on "reasonably possible uses of the non-disclosed evidence or reasonably possible avenues of investigation that were closed to the accused as a result of the non-disclosure": *Illes* at para. 65; *Dixon* at paras. 36, 39; *Taillefer* at para. 84; see also *R. v. Johnston*, 2019 BCCA 107 at para. 74. The examples given of what could amount to a reasonable possibility of impairment of trial fairness strongly suggest that it must be based on something more than mere speculation.

Application

- [52] In this case, Mr. Dadmand does not argue that the effect of the non-disclosure impacted the reliability of his conviction. His argument is based on the second stage of the Dixon analysis: the overall fairness of the trial process.
- [53] The use that Mr. Dadmand suggests could be made of the non-disclosed evidence is somewhat different from the examples given in *Dixon*, *Taillefer*, or *Illes* of situations in which the fairness of the trial process could be impacted through a lack of disclosure. Rather, he argues that the Crown's failure to disclose information relating to the Uncharged Complainants impacted the overall fairness of the trial process because it limited his ability to challenge the manner of the search and seizure as unreasonable. Mr. Dadmand says that

he could not know the full extent of what was seized and searched, and thus whether his constitutional rights were impacted, without full disclosure relating to the Uncharged Complainants.

- [54] Counsel has not referred us to, nor have I been able to locate, any authority for the proposition he advances. The appellant argues that the realistic opportunities to explore possible uses of the undisclosed information includes the use of that information for the purpose of challenging the manner of the police search. I will accept, for the purpose of the analysis below, that this is so. Indeed, if an accused could demonstrate that there is a reasonable possibility that the failure to disclose information impaired his ability to advance a Charter challenge, there is no principled reason that such a failure should not result in a breach of s. 8 rights.
- [55] However, the analysis required to consider the appellant's argument is not restricted to s. 8 of the Charter. The right to disclosure is a constitutional right protected by s. 7 of the Charter, and is distinct from the right to be free from unreasonable search and seizure under s. 8. In this case, Mr. Dadmand's lone ground of appeal implicates both Charter rights: he says that his right to disclosure was violated, which in turn impacted his ability to challenge the manner or breadth of the police search and seizure and whether it was conducted in accordance with constitutional principles. As such, and while Mr. Dadmand does not directly challenge the judge's Unreasonable Search Ruling on appeal, it is necessary to consider the principles applicable to police searches of electronic devices. This is required to determine whether the judge's Disclosure Ruling effectively prevented Mr. Dadmand from challenging the scope or breadth of the police search.

Unreasonable searches under s. 8

- [56] The principles applicable to police searches and seizures are not in dispute on appeal. In *Vu*, the Supreme Court affirmed that the manner of search is generally reviewed after the fact. In the context of computer searches, police must receive specific, prior authorization--and cannot simply search the contents of a computer pursuant to a general warrant--given the markedly different privacy interests at stake. While specific "search protocols" are not required to be imposed in advance, police do not have license to scour electronic devices indiscriminately. They remain bound to adhere to the rule that the manner of search must be reasonable and no more intrusive than reasonably necessary to achieve its objectives: at paras. 22, 47, 55-61 (my emphasis). The Court elaborated:
- [21] Section 8 of the Charter -- which gives everyone the right to be free of unreasonable searches and seizures -- seeks to strike an appropriate balance between the right to be free of state interference and the legitimate needs of law enforcement. In addition to the overriding requirement that a reasonable law must authorize the search, this balance is generally achieved in two main ways.

[22] First, the police must obtain judicial authorization for the search before they conduct it, usually in the form of a search warrant. The prior authorization requirement ensures that, before a search is conducted, a judicial officer is satisfied that the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance the goals of law enforcement: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 160. Second, an authorized search must be conducted in a reasonable manner. This ensures that the search is no more intrusive than is reasonably necessary to achieve its objectives. In short, prior authorization prevents unjustified intrusions while the requirement that the search be conducted reasonably limits potential abuse of the authorization to search.

[23] I accept the general proposition, as stated by the Court of Appeal, that "[a] warrant authorizing a search of a specific location for specific things confers on those executing that warrant the authority to conduct a reasonable examination of anything at that location within which the specified things might be found" (para. 63). In other words, specific prior authorization to search anything at that location is not required. The question is whether this general proposition applies to computers or whether specific, prior authorization to search a computer is required.

[Emphasis added.]

The Court later concluded that specific, prior authorization is required for computer searches: at paras. 45-49.

[57] In this case, the warrant did indeed provide specific, prior authorization to seize computers and other electronic devices (see para. 7 above). Mr. Dadmand's challenge to the validity of the warrant was unsuccessful. On appeal, he does not dispute the authorization provided by the warrant; rather, he takes issue with the second stage of the *Vu* analysis, and whether the police's (authorized) search was reasonable or no more intrusive than reasonably necessary.

[58] The Crown agrees that to determine whether a search is no more intrusive than is reasonably necessary, an ex post review is required, including whether the searches were authorized by the terms of the search warrant. It cites *R. v. Jones*, 2011 ONCA 632, for the proposition that police are entitled to examine files or folders, at least in a cursory fashion, in order to determine whether they are likely to contain evidence of the type they are seeking: at para. 44. This is consistent with the Supreme Court's later statements in *Vu*, which acknowledged the difficulty of predicting in advance where relevant files might be found on a computer: at para. 55, noting a number of United States authorities.

[59] In *John*, the Court considered whether police searches of an accused's computer for child pornography were unreasonably invasive. In finding that the search in that case was reasonable, the Court stated as follows:

- [24] I do not accept the argument that there must be prior evidence of concealment of incriminating evidence before police can look at all images and videos stored on a computer in this kind of investigation where some child pornography has been located on the computer on initial examination. Rather, a search of all images and videos is appropriate in an investigation like this precisely to determine whether there is more child pornography on the computer. To limit police to searches by hash values, file names and download folders would be to provide a roadmap for concealment of files containing child pornography.
- [25] I also do not accept the argument that the search was overbroad because it was not tailored to a date range in terms of the files searched. Here the police were looking for images and videos of child pornography and evidence that might show who was responsible for that content. This was not a broad search of multiple devices or large amounts of data unrelated to the specific investigation, such as in *R. v. Sop*, 2014 ONSC 4610, at paras. 116-149, or *R. v. Marek*, 2016 ABQB 18, at paras. 120-147.
- [26] Finally, I reject the argument that the search of all images and videos here was overly invasive because the vast majority of the offending material would have been located using a combination of hash value comparison, keyword searching of file name, and searching the file folders most likely to contain child pornography. This argument fails because it uses the ultimate results or fruits of the search to dictate whether the scope of the search was reasonable. Given the limitations of searching only by hash value or file or folder name discussed above, hindsight should not be used in this way to turn what was once a reasonable search in all the circumstances into an unreasonable one.
- [Emphasis added.]
- [60] While Mr. Dadmand does not rely on Marek on appeal, he did so in his submissions on the unreasonable search application for the principle that the police's failure to apply a reasonable date filter to the contents of the computer may render a search unreasonable: at para. 147. In that case, the content of the seized devices included thousands of personal photos of an extremely personal nature; intimate correspondence; financial and medical information; banking records; and other personal information dating back over a decade that was the subject of a "wholesale" export to investigators: at paras. 11, 143. Mr. Marek swore to these contents in an affidavit filed in support of his motion to exclude evidence.
- [61] In his Unreasonable Search Ruling, the judge addressed Marek in some detail. He noted that in Marek, there was no relationship between the information that had been seized and the alleged offence (publication of obscene material online). As a result, the exported material exceeded the purposes of the investigation as set out in the ITO. In my view, the judge correctly distinguished Marek on the basis that the search in that case was not constrained by the nature of the charges, and by the absence of evidence from Mr. Dadmand describing the contents or range of materials kept on the various devices:

- [84] Further, the evidence about the materials actually extracted from the computer or the materials subject to further search by the investigators is limited. There is evidence that Cpl. Howard extracted all of the video files sought by the police relating to the females named in the subfiles stored on Computer B21, and that those materials were made available to the investigators. The search of that material was authorized by the warrant and it was not unreasonable for the police to locate and extract that material.
- [62] In sum, an accused's s. 8 challenge to a police search and seizure considers whether an authorized search is no more intrusive than is reasonably necessary to achieve its objective. This requires an ex post review of whether the search was reasonable in all the circumstances, including whether it was authorized by the terms of a search warrant. As I will explain below, the appellant's challenge to the Crown's lack of disclosure therefore depends on whether that non-disclosure impacted his ability to challenge, on an ex post basis, the manner and breadth of the police search.

Did the lack of disclosure effect Mr. Dadmand's ability to challenge the police's search and seizure as unreasonable?

- [63] In my view, Mr. Dadmand's argument fails for three main reasons. I would find that the judge did not err in his Disclosure Ruling in the particular circumstances of this case and that the effect of that ruling did not impair Mr. Dadmand's ability to meaningfully challenge the breadth of the police search and seizure.

Mr. Dadmand's challenge to the manner of search did not depend on the contents of what was seized

- [64] The Crown obligation to disclose is founded on the relevance of the material to be disclosed. It must be remembered that relevance is contextual. It is assessed "in the context of the entire case and the positions of counsel" and is a "matter of everyday experience and common sense": *R. v. Jackson*, 2015 ONCA 832 at para. 122; *Johnston* at para. 43. Relevance for the purpose of Mr. Dadmand's intended challenge to the manner of the search had to be framed by the arguments of counsel and the objective for which disclosure was sought: *McKay* at para. 138.
- [65] In light of the arguments advanced by defence counsel and the objectives of the disclosure request, Mr. Dadmand's ability to challenge the search did not depend on receipt of all of the materials searched. Disclosure of the full contents of the materials (including those relating to the Uncharged Complainants) would not itself dictate whether the police search was unreasonable or was no more intrusive than reasonably necessary. Further, the full contents were not required for Mr. Dadmand to advance that argument. Rather, what is directly relevant to an ex post review is evidence about the manner of the police search: what they searched on the electronic devices, how they did so, what (if any) parameters they used, and whether they exceeded the terms of the warrant. In this case, Mr. Dadmand had the opportunity to determine all of those questions by examining the officers who conducted

the searches--who could testify and give evidence as to the police's manner of search.

[66] This was acknowledged by Mr. Dadmand during the course of the unreasonable search application. In submissions, defence counsel stated (repeated from above for convenience; my emphasis):

from the defence perspective, we don't need the file. If it's a doc. file, we don't need the file. There was reference before to video files of uncharged, unnamed complainants. We don't need the file.

But, what I believe we would need is an inventory of the contents of the disclosure that is currently in the police file.

What I'm not asking for is the files themselves. I don't believe that it would be relevant. I believe it would be a poor use of time. And frankly, I don't believe we need them.

. we'll take some more time and I do have the entire disclosure package here and I intend to review it, and find either officers that are available, or if that is not possible, find an officer who could, for the better lack of a term, "quarterback", who searched what and when.

[67] In response, Crown counsel advised that to his knowledge there was no inventory of the entire contents of the computer. Defence counsel stated that he could produce the names of officers he wished to question on the search and the parameters attached. Counsel subsequently advised that he only wished to have two officers produced for examination: Cpls. Howard and Luk, who extracted the files from Mr. Dadmand's electronic devices for further review by investigators using the DICE and Cellebrite programs. Further, as I have noted below, contrary to his assertion, he did have the names of the officers who actually reviewed the material that was seized and copied and could have examined them should he have chosen to do so.

[68] As such, Mr. Dadmand was able to question the police on their manner of search and on what was extracted for further review. He chose not to question the officers who reviewed the exported files, and conceded that the files themselves (i.e., the full contents of the disclosure relating to the Uncharged Complainants) would not be needed to challenge the manner of the police search. Later, in submissions emphasizing the importance of the lack of a temporal limit to police searches, counsel stated that "if there are no limits, it matters not what they seized" (my emphasis).

[69] For the sake of completeness, I note that the judge ordered the Crown to disclose an inventory if it had one. The Crown later indicated that it did not have an inventory. No further mention was made of this issue and the defence did not pursue it further. A report listing all of the DICE keyword searches conducted by Cpl. Howard was disclosed, on which the officer was questioned by the defence. While an inventory may have helped, this was not available, and defence counsel had the ability to question the officers on the manner and breadth of their searches as requested.

- [70] Mr. Dadmand relies on Fearon, which he says affirmed the need for "detailed evidence about precisely what was searched, how and why". However, the circumstances before the Court were quite different from the circumstances in this case. At issue in Fearon was a warrantless search of a cell phone incident to arrest. The Court noted that detailed evidence about what was searched is particularly important for after-the-fact review, "in the case of warrantless searches where there has been no prior judicial screening as occurs when a warrant is required": at para. 87.
- [71] More importantly, evidence to establish the manner of a search--the what, how and why referred to in Fearon--does not depend on receiving the contents of disclosure relating to the Uncharged Complainants in the first place. In John, the Ontario Court of Appeal rejected the argument that the accused could use the ultimate results or fruits of the search to dictate whether the scope of the search was reasonable: at para. 26. The Court also rejected the argument that the search was overbroad because it was not tailored to a specific date range.
- [72] In this case, the judge considered and rejected Mr. Dadmand's lengthy arguments about the manner of the search, including on the primary ground that it was overbroad because of the lack of a temporal limit. He concluded that a search without a temporal limit was reasonable because the warrant itself did not specify a date range and because the police did not then know when Mr. Dadmand had initiated the offences for which he was being investigated. Mr. Dadmand does not challenge this finding on appeal.
- [73] In some circumstances, it is possible that the scope or content of the disclosure may assist in determining whether a police search was unreasonable. Marek provides an example of such a case. However, in my view, the judge correctly distinguished the circumstances before him from those in Marek. In that case, the accused swore an affidavit stating that he was the only person who used the personal computers seized, and that the information included intimate correspondence, thousands of personal photographs of an intimate nature, financial, medical and personal information, banking records, bills, and information about his social, family and business activities: at para. 11. While the court accepted that the search "needed to be broad", it concluded that the unfiltered export of more than a decade of deeply personal information unrelated to the charged offence was overbroad: at para. 147.
- [74] By contrast, the material extracted from Mr. Dadmand's computers was filtered by search parameters to take into account the nature of the charges. The undisclosed information that Mr. Dadmand seeks relating to the Uncharged Complainants appears to be connected to what he was being investigated for--and to what was authorized under the terms of the warrant.
- [75] In these circumstances, the contents of disclosure would not have assisted in determining whether the search itself was unreasonable. There was information before the court from the officers about the manner of the search, including the parameters used, and nothing to suggest that the police "scoured indiscriminately" or otherwise searched in a manner more intrusive than reasonably necessary. As Mr. Dadmand's counsel conceded at the time, he did

not need the files or content of the disclosure itself in order to challenge the manner of the police search as overbroad or otherwise unreasonable.

Defence counsel's diligence in pursuing disclosure

- [76] Second, and related to the discussion above, defence counsel's diligence in pursuing disclosure from the Crown is a significant factor that this Court can consider in determining whether the non-disclosure affected the fairness of the trial process: Dixon at para. 37, citing *R. v. Bramwell* (1996), 72 B.C.A.C. 125 (C.A.). On appeal, Mr. Dadmand takes a contrary position to that which he took at the voir dire on unreasonable search and seizure. He now says that in order to carry out an ex post review as to the manner of search, full disclosure of all the content seized by the police was required. However, at trial, defence counsel conceded that the content of the disclosure was not necessary to challenge the reasonableness of the search.
- [77] In response to the Crown's argument that this change of position is an important factor on appeal, Mr. Dadmand says that the concession was made at trial because the dismissal of his disclosure application foreclosed any other basis for his argument that the search was overbroad and unreasonable. I would not accept Mr. Dadmand's argument on this issue. Counsel's lack of diligence in pursuing the disclosure argument--by which I mean that he did not pursue the argument he now makes on appeal--is a factor to consider in determining whether the alleged non-disclosure affected trial fairness. A review of the trial record demonstrates that Mr. Dadmand could have pursued the argument he now makes on appeal but explicitly chose not to do so.
- [78] Mr. Dadmand states in his factum that had he "been provided the full disclosure of the searches he had requested, the appellant would have known exactly who the officers were and what exactly they had searched", referring to the officers or investigators who reviewed the content exported by Cpls. Howard and Luk. Armed with that information, Mr. Dadmand says he could have called those officers to testify on voir dire about what they had searched. This is incorrect. The names of those officers were in the materials disclosed to the defence. The Crown stated that it would make available any of the officers the defence wished to examine. In direct examination, Cpl. Howard named Cst. Nash and Cst. Zacher as two of the investigators who reviewed the data he extracted. As discussed above, defence counsel acknowledged that he would review the disclosure package and find officers available to testify about "who searched what and when". He chose not to conduct further examinations beyond Cpls. Howard and Luk. In addition, once he concluded the cross-examination of those officers, he did not renew the application for disclosure of the full contents of the material searched and did not seek to examine any of the officers who actually reviewed the material.
- [79] As a result, I would find that the defence's diligence, or lack thereof, is a significant factor weighing against its position on appeal. The Disclosure Ruling did not prevent defence counsel from eliciting information about the manner and scope of the search. Rather,

counsel chose not to pursue the disclosure he now seeks. In these circumstances, it can hardly be said that the overall fairness of the trial process was impacted. Mr. Dadmand advanced the lack of a temporal restriction as the primary basis of his s. 8 challenge; having decided not to pursue additional information about the manner and scope of the search, Mr. Dadmand cannot now say that trial fairness was affected in any way by the Disclosure Ruling.

Relevance does not equate to full disclosure

- [80] Third, in my view, the effect of Mr. Dadmand's position would be to alter the existing principles governing disclosure in a way that would improperly expand the Crown's disclosure obligations and promote inefficiency in the trial process. It would mean that Stinchcombe principles on relevance would no longer apply, as the Crown would be required to provide full disclosure of everything searched and seized by the police--even if it had no relevance to the charge(s)--in order to enable an accused to challenge the manner of a police search as unreasonable. This would amount to the authorization of what could only be described as a "fishing expedition". It must be remembered that here, Mr. Dadmand does not argue that the undisclosed materials were relevant in any way to the substantive charges concerning the six complainants or the reliability of the verdict at trial.
- [81] As the Crown argues, overly broad disclosure requests can cause unnecessary delays and derail pre-trial proceedings. Giving effect to this argument would contribute to the inefficient use of court time and would unnecessarily prolong trials. In my view, so would ordering an 'inventory' of the entire contents searched and seized where no such inventory existed--and again, where the defence had every opportunity to question the relevant officers to obtain the information it sought about the manner and breadth of their search.
- [82] In some cases, it is certainly possible that disclosure of information relating to uncharged or unnamed complainants could be relevant for the purpose of challenging the manner of a police search or seizure as unreasonable. However, in the circumstances of this case, I would conclude that the disclosure of the full contents of the search, including disclosure of information relating to the Uncharged Complainants, did not affect Mr. Dadmand's ability to challenge the manner or breadth of the police search and seizure. There was, thus, no reasonable possibility that the non-disclosure of the full contents of the search impacted the fairness of the trial process within the second stage of the Dixon analysis, and by extension, Mr. Dadmand's ability to make full answer and defence.
- [83] While this is a complete answer to the issues raised on appeal, I will also briefly address Mr. Dadmand's other submissions relating to the judge's Disclosure Ruling.

Did the judge otherwise err in his Disclosure Ruling?

- [84] Mr. Dadmand raises two additional arguments that I will address. First, he raises the issue of burden, saying that he was placed in a 'Catch-22' situation by the judge whereby he was "expected to catalogue" the content of what was seized but was denied the ability to do just

that. He argues that this clearly demonstrates unfairness in the trial process. Second, he argues that the judge's analysis in the Disclosure Ruling focused only on the possible use of the undisclosed material at trial in making full answer and defence to the substantive charges, and not on its relevance to assessing the constitutionality of the manner of search.

- [85] First, I would reject the argument that the judge's ruling improperly placed a burden on him to catalogue the contents of what was searched on his electronic devices. At paras. 17 and 18, the judge noted that defence counsel's suggestions about the possible utility of the undisclosed material were speculative. He found that the defence did not meet the "threshold" of showing a reasonable possibility that the undisclosed information could be used to assist him. The appellant now suggests that this placed a burden on the defence to show that the material relating to the Uncharged Complainants was relevant. The appellant notes the judge's statements at paras. 84 and 87 of the Unreasonable Search Ruling, where he emphasized the absence of evidence concerning the scope of the material searched and seized by the police.
- [86] As the Crown concedes in its submissions, if the Crown refuses to disclose materials on the ground they are "clearly irrelevant", the burden is on the Crown to justify non-disclosure: *R. v. Gubbins*, 2018 SCC 44 at para. 29; *McKay* at para. 34. "Clearly irrelevant" means there is no reasonable possibility of relevance. Accordingly, if the judge intended by his comments to suggest that Mr. Dadmand bore the burden of proving that the non-disclosed material was relevant, that would be incorrect. However, I am of the view that the judge did not err in his statement or application of the test for disclosure.
- [87] The judge correctly articulated the test at paras. 13 and 18 of the Disclosure Ruling. His statement to the effect that Mr. Dadmand did not meet the "threshold of showing" a reasonable possibility that the material may assist Mr. Dadmand in conducting his defence of this case was, in my view, referring to the principle that the defence must provide a basis for disclosure in the face of the Crown's position that the materials were irrelevant. That is the clear import of the statement in *Dixon*, viewed from the perspective of an appellate court:
- [27] The Crown has an obligation to disclose all information, whether inculpatory or exculpatory, that could "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" (*Egger*, *supra*, at p. 467). Even so, "[w]hile the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant" (*Stinchcombe*, *supra*, at p. 339). The statements of Carvery and Levia contain no relevant information at all, and there is no reasonable possibility that their statements could have been of any use to the appellant at trial.

- [88] In this case, the judge did not place a burden on the accused; rather, he considered whether "there was a reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown". As set out in paras. 13-16, the judge considered the bases for disclosure put forward by the defence. He concluded "that the suggestions put forward by the defence with respect to the possible utility of this material is speculative, and that speculation does not meet the threshold of a reasonable possibility."
- [89] Further, it is evident from the Unreasonable Search Ruling that the judge's comments about the absence of evidence "from the accused describing the contents or range of materials kept on the various devices" or "concerning the scope of the material searched and seized" was to emphasize the distinction between the circumstances before him and those in Marek, on which Mr. Dadmand was relying.
- [90] In short, I would reject this argument, as it is evident that the judge properly considered and applied the "reasonable possibility" test to determine whether he should order disclosure of the material relating to the Uncharged Complainants, and whether Mr. Dadmand's right to disclosure had been impaired. The material itself was clearly irrelevant to both Mr. Dadmand's ability to respond to the substantive charges and his challenge to the manner and scope of the police search.
- [91] Second, I am of the view there is little merit to the suggestion that the judge ignored the second ground for the disclosure of the full contents of the material searched. In the Disclosure Ruling, the judge concluded:
- [18] I am, therefore, not persuaded that the defence has met the threshold of showing that there is a reasonable possibility that this information may assist Mr. Dadmand in making full answer and defence or in otherwise conducting his defence of this case.

[Emphasis added.]

- [92] As I have already noted, the language used by the judge--"in otherwise conducting his defence of this case"--flows from and closely mirrors the Court's language in Dixon:
- [22] Thus, where an accused demonstrates a reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence, he has also established the impairment of his Charter right to disclosure.

[Emphasis added.]

- [93] Upon review of the judge's reasons as a whole, I would find that they clearly demonstrate that he was alive to Mr. Dadmand's secondary submission that full disclosure was necessary to challenge the police search. I would agree with the Crown that the appellant's argument is premised on the incorrect assumption that the ability to make full answer and defence is separate from the overall fairness of the trial process. Rather, the overall fairness of the trial process is subsumed within the right to make full answer and defence: Dixon at para. 36.

Moreover, lest there be any doubt, the judge directly addressed Mr. Dadmand's secondary ground for disclosure through "in otherwise conducting his defence of this case".

- [94] It is not surprising that the Disclosure Ruling focused on the first ground advanced by Mr. Dadmand: the possible relevance of that material to the substantive charges. The principal argument advanced in Mr. Dadmand's amended notice of application was that full disclosure was necessary in case the Crown adduced similar fact evidence or otherwise used the information in a substantive way. As such, the judge's Disclosure Ruling focused on whether there was a reasonable possibility that the evidence relating to the Uncharged Complainants would be relevant in some way at trial or to the substantive charges. But he nonetheless clearly disposed of both grounds for disclosure in his ruling.

Disposition

- [95] In summary, Mr. Dadmand's s. 8 arguments did not depend on receiving the full contents of the material seized and searched. He was able to meaningfully challenge the manner of the police search on the unreasonable search application, and chose not to conduct further examinations of officers that could have assisted his application. I find that the judge did not err in concluding that there was no reasonable possibility that the non-disclosed information relating to the Uncharged Complainants could have assisted Mr. Dadmand's ability to make full answer and defence through its effect on the overall fairness of the trial process.

- [96] I would dismiss Mr. Dadmand's appeal.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Mr. Justice Voith"

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