

CANADA / JUDGMENT

R. v. Haevischer

2024 BCSC 1635

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2024 BCSC 1635 R. v. Haevischer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Haevischer,

2024 BCSC 1635

Date: 20240904

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Registry: New Westminster

Rex

v.

Cody Rae Haevischer

Before: The Honourable Madam Justice Devlin

Oral Reasons for Judgment

Application for Disclosure of Witness Protection Materials

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Place and Date of Hearing:

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April 3-5, 2024

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Vancouver, B.C.

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Introduction.. 2

Background Context. 6

Project E-Peseta: Person Y's Cooperation and Incarceration. 6

Person Y's Evidence at Trial on his Conditions of Confinement 10

Relevant Court of Appeal Rulings. 13

Parties' Positions. 19

Mr. Haevischer 19

Allegation of Perjury. 19

Application to Re-open. 20

Categories of Records Sought by Mr. Haevischer 23

Provincial Crown and Attorney General of Canada. 25

Governing Legal Principles. 27

Abuse of Process Application. 27

First Party Disclosure. 28

Third Party Production. 29

Discussion.. 30

Is the Crown Required to Disclose the Knowledge Materials?. 30

Are the Additional Materials First or Third Party Records?. 33

Has Mr. Haevischer Satisfied the "Likely Relevance" Threshold?. 35

Conclusion.. 36

Redacted Materials. 37

THE COURT: This decision was delivered in the form of Oral Reasons. The Reasons have since been edited for publication.

Introduction

- [1] On August 21, 2023, Cody Rae Haevischer filed a revised Notice of Application, further amended on May 29, 2024 (the "Abuse NOA"), seeking a judicial stay of proceedings for an abuse of process (the "Stay Application"). In the Abuse NOA, Mr. Haevischer relies on both the trial fairness and residual categories of the abuse of process doctrine. The hearing of the Stay Application is scheduled to commence on October 21, 2024.
- [2] These proceedings relate to the execution-style killing of six people on October 19, 2007, in an apartment building in Surrey, BC. The incident is widely known as the "Surrey Six murders". The murders were carried out by members of the Red Scorpions gang (the "RS"), a criminal organization involved in the Lower Mainland's violent drug trade. On October 2, 2014, Justice Wedge found Mr. Haevischer and Matthew Johnston guilty of six counts of first degree murder and one count of conspiracy to commit murder in connection with the Surrey Six case: *R. v. Haevischer*, 2014 BCSC 1863 [Verdict Reasons].
- [3] Before their convictions were entered, Mr. Haevischer and Mr. Johnston initiated the Stay Application. Justice Wedge summarily dismissed the application at first instance, but appeals to the Court of Appeal and Supreme Court of Canada remitted the application to this Court for an evidentiary hearing: see *R. v. Haevischer*, 2014 BCSC 2172; *R. v. Johnston*, 2021 BCCA 34 [Johnston 2021]; and *R. v. Haevischer*, 2023 SCC 11 [Haevischer SCC].[1]
- [4] On this application, made by way of a Notice of Application filed January 5, 2024 (the "WPP NOA"), Mr. Haevischer applies for disclosure of various materials in furtherance of the Stay Application (the "Disclosure Application").
- [5] The Disclosure Application concerns Person Y, a former member of the RS and a key witness at Mr. Haevischer's trial.[2] In particular, the application relates to Person Y's conditions of confinement. Person Y began serving a life sentence of imprisonment before Mr. Haevischer and Mr. Johnston's trial, for two murders unrelated to the Surrey Six case. His cooperation with authorities, first as a police agent in the Surrey Six investigation and then as a Crown witness at trial, posed risks to his safety in prison and caused challenges to

the police and the Correctional Service of Canada (the "CSC").

- [6] Person Y testified at trial about the conditions he had endured in confinement and the conditions he expected to endure in the future. This evidence was elicited in the context of challenges to his credibility. Broadly speaking, Person Y characterized his past and future confinement as isolated, protective, and precarious. Crown counsel referred to this evidence in their closing submissions.
- [7] Disclosure made to the defence before and during trial indicated that Person Y had agreed to cooperate with police on the promise that he would be given similar conditions of confinement as those provided to other inmates. The disclosure also indicated that at the early stages of his cooperation with police as an agent (before he began serving a life sentence of imprisonment), Person Y was told and acknowledged that he was not eligible for admission to the federal Witness Protection Program (the "WPP").
- [8] Additional materials that have been disclosed to the defence revealed that in the months preceding his testimony at trial, Person Y was in discussions with WPP authorities. Person Y in fact entered the WPP on April 6, 2014: mere days after concluding his testimony at trial. This fact was not disclosed to defence during the trial, because the Crown determined at the time that it was irrelevant and privileged. The defence first learned of Person Y's enrolment in the WPP after trial, and received further disclosure on the matter during the appeal process.
- [9] In light of these developments, Mr. Haevischer intends to advance several allegations at the hearing of the Stay Application that relate to Person Y's conditions of confinement. First, he alleges that the Crown misled the court in its closing submissions. He says that when Crown counsel referred to Person Y's evidence on his expected conditions of confinement, the Crown knew that Person Y had been admitted to the WPP shortly after his testimony. Second, the defence alleges that the Crown and police's non-disclosure of Person Y's admission to the WPP, or of his anticipated entry into the program, constitute state misconduct. Third, Mr. Haevischer alleges that Person Y perjured himself, on the view that Person Y's testimony at trial was inconsistent with his actual expectations at the time about his anticipated conditions of confinement.
- [10] The Disclosure Application contemplates several categories of records that Mr. Haevischer submits are relevant to the above allegations. First, the defence seeks the lifting of redactions contained in vetted materials that have already been disclosed to them (the "Redacted Materials"). Second, the defence seeks first party disclosure or third party production of additional information related to the WPP and to Person Y's post-trial conditions of confinement (the "Additional Materials"). Third, the defence seeks disclosure of information relating to the "state of knowledge" of the Crown and police about Person Y's conditions of confinement and entry into the WPP, including negotiations about those matters (the "Knowledge Materials").

- [11] In the course of his submissions, Mr. Haevischer emphasized that his ultimate aim in bringing this application is to uncover the "bargain struck" between Person Y and state authorities over the conditions of his confinement, including the negotiations, promises, and demands made in support of the "bargain", and whether the "bargain was realized".
- [12] Mr. Haevischer concedes that some of the Additional Materials are in the hands of third parties. He submits that those materials fall within the "fruits of the investigation", or are so "obviously relevant" that they should be disclosed as first party records. Alternatively, Mr. Haevischer says the materials satisfy the "likely relevance" threshold of the first stage of the test in *R. v. O'Connor*, [1995] 4 S.C.R. 411, 1995 CanLII 51 [O'Connor].
- [13] The Crown resists Mr. Haevischer's application, as does the Attorney General of Canada (the "AG Canada"). The latter represented the Royal Canadian Mounted Police (the "RCMP") at the hearing of this application, with respect to records held by the WPP. The Crown and AG Canada say the materials sought by Mr. Haevischer are either privileged or irrelevant. They refer to findings of our Court of Appeal regarding Person Y's testimony and conditions of confinement to suggest that Mr. Haevischer is simply re-arguing positions which have already been rejected on appeal. The Crown and AG Canada also submit that Mr. Haevischer has received sufficient disclosure to advance the substance of his allegations in respect of Person Y's trial evidence and conditions of confinement. This includes disclosure indicating that the Crown and police knew, by the time of his participation at trial, that Person Y was in discussions with WPP officials about entry into the program and that the CSC intended to transfer him to new accommodations after his testimony. The Crown is prepared to make various admissions of fact on the issue.
- [14] Submissions on the Disclosure Application were heard in open court on April 3 to 5, 2024. As discussed below, the open-court proceedings were re-opened in a limited capacity following a hearing on August 15, with further submissions on August 19, 2024. Additional submissions on the assertions of privilege in the Redacted Materials were heard in camera and ex parte, with the assistance of amici curiae. The in camera proceedings are the subject of a separate ruling, indexed as *R. v. Haevischer*, 2024 BCSC 1639 [Sealed Disclosure Reasons].

Background Context

Project E-Peseta: Person Y's Cooperation and Incarceration

- [15] The Surrey Six murders were carried out by the RS, as part of a conspiracy to kill Corey Lal, a rival drug trafficker. On October 19, 2007, several RS members, including Mr. Haevischer and Mr. Johnston, attended Mr. Lal's "stash house" at the Balmoral Tower in Surrey, BC. The violence inflicted there resulted in the deaths of six people. See Verdict Reasons at paras. 1, 193-194, 205.

- [16] The ensuing investigation by the RCMP, called "Project E-Peseta", was complex. Investigators faced unique challenges as a result of the murders' connection to organized crime. A key strategy adopted as part of Project E-Peseta was the recruitment and use of members and associates of the RS as witnesses and police agents. See Haevischer SCC at para. 12.
- [17] Among such witnesses was Person Y, who had conspired with fellow members of the RS to kill Mr. Lal. In the months after the Surrey Six murders, Person Y became disillusioned with the RS and with his criminal lifestyle: Verdict Reasons at para. 427. He approached the police in December 2007 to provide information pertinent to the Surrey Six investigation: Verdict Reasons at para. 430.
- [18] Person Y's initial cooperation with police took the form of work as a police agent. Exhibits attached to the affidavit of Vanessa Lang, sworn on June 18, 2018, in support of Mr. Haevischer and Mr. Johnston's appeal and filed again on this application, detail the agreements and discussions between Person Y and authorities at the time.[3] In particular, on January 27, 2008, Person Y signed a letter of acknowledgment setting out the terms of his participation in Project E-Peseta as a police agent. On February 1, 2008, he entered a related immunity agreement with the Crown shielding him from liability for the death of Mr. Lal. In meetings with WPP agents at the time, Person Y was told and acknowledged that he would not qualify for admission to the program, and that other arrangements would be made to ensure his safety. Per Ms. Lang's affidavit, the defence received vetted disclosure of the contents of these conversations before trial.
- [19] Person Y subsequently participated in evidence-gathering scenarios orchestrated by Project E-Peseta investigators: see Verdict Reasons at paras. 426-455. On April 17, 2008, after participating in the scenarios as an agent, Person Y signed a release and indemnity agreement with the RCMP in which he acknowledged that he does not meet the criteria for enrolment in the WPP. According to Ms. Lang's affidavit, a redacted version of this agreement was also disclosed to the defence before trial.
- [20] Person Y was not in custody at the time that he first contacted police, and had not been charged with an offence. After completing his work as a police agent, Person Y spent significant time in South America, where he lived freely and out of reach of Canadian authorities. He nonetheless returned to Canada voluntarily in 2010 to resume his cooperation with authorities.[4] On April 13, 2010, Person Y entered guilty pleas to two counts of first degree murder, for which he began serving a life sentence of imprisonment. Those murders are not related to the Surrey Six case. Verdict Reasons at paras. 469-473 and Johnston 2021 at para. 347.
- [21] Person Y received significant monies from the RCMP for his work as an agent. In all, he received "benefits from the police in an amount which ultimately exceeded \$1.3 million": Johnston 2021 at para. 94.

- [22] Some comments are necessary on Person Y's confinement before the trial. It is common ground that justice system collaborators like Person Y face a risk of significant harm or even death while in prison, owing to a prison culture which vilifies and endangers "rats". See, for example: Publication Ban RFJ at para. 113(a); R. v. Johnston, 2019 BCCA 107 at para. 114 [Johnston 2019]; and Johnston 2021 at para. 318.
- [23] The police and the CSC thus faced challenges in ensuring Person Y's safety, on the one hand, and fulfilling the promise to Person Y that he would be afforded conditions similar to other inmates, on the other. The defence received pre-trial disclosure of the resulting conditions that Person Y endured in confinement. Justice Griffin, writing for the Court in Johnston 2019, canvassed the extent of this disclosure:
- [116] The Crown, as part of pre-trial disclosure, disclosed records of correspondence between the RCMP and Person Y's lawyer suggesting that:
- a) Person Y was unhappy with efforts to keep him safe within the CSC and felt that he was not provided with what he was promised;
 - b) after his sentencing in 2010 and subsequent transfer to a CSC institution, he was recognized by another inmate and then moved to administrative segregation. That segregation included such conditions as 24-hour lockdown, a shower only twice a week and no daylight access;
 - c) segregation had a detrimental effect on him, particularly on his mental health, and he demanded and was promised access to a psychiatrist or psychologist;
 - d) he was terrified about being placed in a certain CSC institution because he alleged that the Deputy Warden said to him "I promise to put you on a range where you will be victimized and forced to pay rent to survive";
 - e) the RCMP was repeating its commitment to work with the CSC, but told Person Y that the CSC had sole discretion regarding inmate custodial arrangements, locations and policy; and
 - f) Person Y, through his lawyer, took the position in a letter to the RCMP dated October 6, 2010, that: CSC was failing to provide assurances to him or the RCMP that he could be housed in a way in which he would not be exposed to danger absent indefinite administrative segregation; he was upset at the danger and then the isolation and segregation, without visitors or phone calls; and he had been put through "needless mental strain and anguish" in respect of his incarceration.

[Emphasis added.]

- [24] Justice Griffin also noted that the pre-trial disclosure provided to the defence "included Person Y's position that his cooperation hinged on placement within the CSC that did not require him to be in worse conditions than the average inmate": Johnston 2019 at para. 96 (emphasis added). As well, the defence received disclosure during the appeal process indicating that Person Y was so dissatisfied with his pre-trial custodial circumstances that he had threatened to withdraw his cooperation with authorities. One example is a letter from

RCMP Assistant Commissioner Wayne Rideout to CSC Regional Deputy Commissioner Peter German, dated October 18, 2013. According to Ms. Lang's affidavit, this letter was disclosed to the defence in February 2016. An unredacted portion of the letter advises that "[t]he inmate [Person Y] and his counsel have also stated that the inmate's cooperation is unlikely to continue if segregation is considered as a protection option" (emphasis added).

[25] Finally, before trial the defence was also aware that Person Y had spent time outside of segregation. In particular, before testifying at trial Person Y had successfully applied for a ban on the publication of his identity. Person Y filed an affidavit in support of the application, sworn on February 26, 2013 (i.e., more than a year before his testimony). Person Y deposed that at the time he was "currently serving my sentence in a general population, outside of segregation". He urged imposition of the publication ban to avoid jeopardizing his safety in prison, and "to avoid having to serve any portion of my sentence in segregation, let alone a lengthy period".

[26] I have set out this background to illustrate the evolution of Person Y's circumstances from the time that he began cooperating with authorities to his incarceration (both in the lead-up to and after Mr. Haevischer's trial). In sum, Person Y in late 2007 was a "career gangster" (Verdict Reasons at para. 21) who approached police, while out of custody, shortly after the Surrey Six murders. He was enlisted as a police agent, and received compensation for his work. He then spent significant time outside of Canada, returning to plead guilty to two counts of first degree murder in April 2010. From that moment onward, his circumstances dramatically transformed. He became an inmate serving a life sentence of imprisonment who, as a former police agent and a justice system collaborator, would be labelled by others in the prison system as a "rat" and would face significant risks to his safety as a result.

[27] With this context in mind, I turn to Person Y's testimony at trial.

Person Y's Evidence at Trial on his Conditions of Confinement

[28] Person Y was a key Crown witness in the trial of Mr. Haevischer and Mr. Johnston. He testified over 12 days in March and April 2014, including nearly ten days of cross-examination: Verdict Reasons at para. 478. By the time that he testified at trial, Person Y had experienced four years in custody: Johnston 2019 at para. 115. In cross-examination, Person Y gave evidence on his conditions of confinement and on his expectations regarding his future incarceration.[5]

[29] First, Person Y testified as follows on whether he was motivated by profit:

Let me tell you this, there is no money that can pay me for the -- for -- for the -- the difference and from the time, and I have the -- the situation of being an agent in prison. I'm sentence to 25-to-life and I'm -- my time compared to any -- any gangster going in for 25-to-life, is apples and oranges now. I'm not sentence to be -- to be subject to 24-hours verbal abuse and attacks and having this living -- living with the end of the -- in the -- in segregation at the very end alone because I can't go

anywhere else because I'm less than a child molester so I'm -- so if -- if you're talking about that type of paid for, you can't pay for those things. Money doesn't come into it.

[Trial transcript, March 27, 2014, p. 3956.] [Emphasis added.]

[30] Counsel for Mr. Johnston then put to Person Y that he was motivated by revenge, and in particular an animus towards James Bacon, a leader of the RS. Person Y responded as follows:

Q Your motive is not justice, your motive is revenge.

A Revenge?

Q Just like you --

A You think -- what would revenge mean for me, man? I'm in prison. I'm never leaving solitary confinement or protective -- super-duper protective custody. Revenge?

Q Yeah.

A Revenge is nothing man. You think I care about revenge? That's -- what does that get me? Nothing. I care about just dealing with my conscience, man. I could care less about your little revenge. Oh, I -- I hate more -- I get more intense about politics, about what is going on with the -- what's going on in the U.S. in politics than I do worried about Jamie Bacon or Matt Johnston or Blake Cody Haevischer, believe -- they -- they don't even make my list. I don't care.

This is justice, but revenge, sorry, sir, I -- I don't carry that in my heart and that means nothing to me. Revenge -- the revenge -- technically they have the last laugh, even when they get found guilty, because they get -- they get to go into a system with open arms, so they're gangsters for six homicides, they're big tough gangsters and they didn't rat, so what's revenge? And then I will sit in a hole for the rest of my life. No, I'm doing this because I made a commitment to do this and this is the one right thing I'm doing in my life, period.

[Trial transcript, April 1, 2014, pp. 4212-4213] [Emphasis added.]

[31] Finally, defence counsel suggested to Person Y that he would be "sitting in a hole" for the rest of his life because of his own actions, to which Person Y responded:

For my own actions, but I -- the Canadian justice is twenty-five to life, not having -- not having to go sit in -- in ultra-high protection because I'm one of the biggest rats or agents that -- that these guys are going to be in the system for twenty-five years or however long, they're not going to -- they're going to look -- they're campaigning to make sure wherever I am that it's going to be known.

No, I -- I look forward to the rest of my life in -- in some type of solitary confinement and that's it, and you know what? I did something right. I fin -- I stopped the hypocrisy and that -- what I promised -- what I said in front of those jurors [in an unrelated criminal matter], okay, I wasn't man enough to answer for everything at that point. I -- I didn't -- I -- but I am now.

[Trial transcript, April 1, 2014, pp. 4213-4214.] [Emphasis added.]

[32] Crown counsel Mark Levitz, K.C., referred to this evidence in his closing submissions, made on July 2, 2014 (some three months after Person Y testified and his admission into the WPP). [6] In support of Person Y's credibility and motive, Mr. Levitz said the following:

And again, My Lady, there is a large body of independent evidence that corroborates his evidence and which, again in our submission, makes him a highly credible and reliable witness. Furthermore, he was very forthright, his life was an open book, he had taken full responsibility for his past actions by pleading guilty to two unrelated murders now, basically serving the rest of his life in jail. And that, in my respectful submission, supports what he said his motive was for coming forth, and that's his disillusionment with the life of crime and his desire to be done with the game. And although, yes, he had - he doesn't like Jamie Bacon, and, yes, he received a lot of money from the police. The fact that he pled guilty and is serving rest of his life in jail, that, in my respectful submission, supports his motive for coming forward, his disillusionment with this life the he lived for so many years.

[Trial transcript, July 2, 2024, pp. 5562-5563.] [Emphasis added.]

[33] Mr. Levitz then moved to other topics, before returning once more to Person Y's credibility and his incarceration:

But in any event [Person Y] said he approached the police because he became disillusioned with the life of crime and wanted to make certain that he can never return to it again. And as I pointed out, if there ever was corroboration of a statement made by a Vetrovec witness, we've got it here in spades where not only did he make amends, he's now spending the rest of his life, as he said, in high security jail, protected -- protective type custody. That's how he's making amends.

[Trial transcript, July 2, 2014, pp. 5621-5622.] [Emphasis added.]

[34] Justice Wedge relied on Person Y's evidence to convict Mr. Haevischer and Mr. Johnston. She approached Person Y's evidence with caution, pursuant to *R. v. Vetrovec*, [1982] 1 S.C.R. 811, 1982 CanLII 20 [Vetrovec]. Justice Wedge recognized Person Y's criminal antecedents and his history of horrific violence, but found him to be a "rather unique Vetrovec witness" for several reasons. These included his cooperation with police while not in custody, his voluntary return to Canada, and crucially a lack of any apparent motive to lie. On this final point, Wedge J. emphasized that while Person Y had received a significant sum of money from the police, those payments could hardly be considered "a substantial benefit when serving 25 years to life of hard time" (emphasis added). She expressly referred to Person Y's evidence on his conditions of confinement, set out earlier, in reaching this conclusion. Verdict Reasons at paras. 466-481.

Relevant Court of Appeal Rulings

- [35] Mr. Haevischer and Mr. Johnston initiated the Stay Application after receiving their guilty verdicts. Although Wedge J. summarily dismissed the Stay Application, it has since been remitted to this Court for an evidentiary hearing.
- [36] Mr. Haevischer and Mr. Johnston did not restrict their appeals to the summary dismissal of the Stay Application. Instead, they advanced numerous grounds of appeal against their convictions, none of which were ultimately successful.
- [37] One ground of appeal concerned Person Y's conditions of confinement and his entry into the WPP. To recall, prior to trial the defence had received disclosure indicating that when Person Y first approached the police in late 2007, he was told and had acknowledge his inadmissibility for the WPP. After the trial, the defence received disclosure that revealed Person Y had been enrolled in the WPP five days after he completed his testimony. This disclosure followed an unfolding of events in proceedings concerning Mr. Bacon which need not be reviewed here. See Johnston 2019 at paras. 3-4.
- [38] As a result, Mr. Haevischer and Mr. Johnston argued on appeal that the Crown's non-disclosure of information relating to Person Y and the WPP violated their right to make full answer and defence, and had vitiated the fairness of their trial. In addition, the appellants argued that Person Y had "perjured" himself when testifying about his expectations for the conditions of his future confinement. They argued that Person Y had known at the time of his testimony that he may be admitted to the WPP, and submitted that enrolment in the program was inconsistent with his evidence that he would be incarcerated in "solitary confinement or super-duper protective custody", and "in a hole". The appellants sought to adduce fresh evidence in support of these submissions. Johnston 2019 at para. 106 and Johnston 2021 at paras. 330-332.
- [39] In advance of the substantive appeal, Mr. Haevischer and Mr. Johnston applied for disclosure of "materials and information relating to the Crown witness, Person Y, and the WPP": Johnston 2019 at para. 6. Without conceding relevance, the Crown disclosed the materials in its possession to the defence before the disclosure application on appeal was determined: Johnston 2019 at para. 31.
- [40] Justice Griffin, in her reasons on the disclosure application, confirmed that "WPP Records dealing with promises made to Person Y about the WPP, and any of his demands regarding the same, are first party records": Johnston 2019 at para. 104. However, Griffin J.A. concluded that there was no reasonable possibility the materials could assist the defence's forthcoming appeal, and therefore she did not assess the validity of the privileges asserted by the Crown: at para. 125.
- [41] In particular, Griffin J.A. did not "accept the thrust of the appellants' position that Person Y's entrance into the WPP was so clearly at odds with his testimony that it amounted to apparent perjury and therefore the Crown had a duty to inquire further and to obtain

records from third parties": Johnston 2019 at para. 130. She determined that "non-disclosure of information concerning Person Y and the WPP in the context of what was disclosed is at best minor and tangential": at para. 123. She also noted that Person Y used "colourful language" on the stand (at para. 112), and described his evidence as follows:

[113] The thrust of Person Y's evidence, which the appellants focus on in bringing these applications, was not a bare assertion that he was going to be in solitary confinement for the rest of his life as a result of cooperating with police. Rather, read as a whole, his evidence was that he faced a threat as a prisoner because of the fact that he was cooperating with police and would be labelled a "rat" by other inmates. His evidence suggested he felt it was against his interests to cooperate with police, as this meant he would suffer disadvantage due to his need for protection in custody, especially compared with other gangsters in prison who would be welcomed with "open arms".

[Emphasis added.]

[42] As quoted above, Griffin J.A. also summarized the records of correspondence between the RCMP and Person Y's lawyer that were provided as part of pre-trial disclosure.

[43] Having considered the above, Justice Griffin concluded as follows:

[117] I do not see any reasonable basis to suggest that a promise that Person Y would be enrolled in the WPP, as a means of trying to keep him safe in prison, would have provided him with an expectation that he would be better off in custody than he would have been if he had not been a cooperating witness, or even that his experience in custody would be equivalent to other non-cooperating gangsters. He had not yet experienced whether being enrolled in the WPP while in custody within the CSC would in fact work to keep him safe. This protective measure was something other inmates who were not police cooperators did not need.

[118] If the defence wished to challenge Person Y's testimony about his fears regarding his future custodial conditions, they had evidence of the following facts about Person Y's safety: he had in fact been kept safe until then; he insisted on and was given assurances that he would be kept safe; and he insisted on not being in worse conditions than other inmates as a condition of testifying and the RCMP promised to work with him to achieve this. The defence had the opportunity to put to Person Y that his fears and expectations were unfounded and that he was not truly concerned about his future conditions of custody. [Emphasis added.]

[44] Justice Griffin then considered the WPP materials sought by the appellants in the hands of third parties. As referenced above, Griffin J.A. rejected the appellants' submission that the Crown had a duty to inquire about and obtain these materials (i.e., to "bridge the gap") as part of their disclosure obligations: Johnston 2019 at paras. 130-131. Justice Griffin further determined that the materials should not be produced as third party records. She explained that records "regarding Person Y's entry into the WPP, or that relate in general terms to how the WPP works or how the WPP works in respect of persons in custody generally", were not

likely relevant to the appeal: at para. 133.

- [45] The Court in Johnston 2021 largely echoed Griffin J.A.'s findings. The Court agreed that Person Y's evidence did not amount to a "bare assertion that he would spend the rest of his life in solitary confinement", and reasoned that the WPP records undisclosed at trial did not contradict Person Y's evidence in the manner suggested by the appellants: Johnston 2021 at para. 344. The following comments of the Court are apposite to the Disclosure Application:
- [345] In our view, Person Y's evidence that he would be serving his sentence "in a hole" or placed in solitary confinement or "super-duper protective custody" was consistent with his experience at that time in serving his sentence. By April 2014, he had spent much of his placement in CSC in solitary confinement or had been in RCMP custody. At times he lacked companionship and basic amenities like daylight and exercise for at least one hour per day. Further, his application to the WPP, which was in the works, was not complete at the time of his testimony.
- [346] Second, even if Person Y's evidence could be read in the manner the appellants suggest, the newly disclosed WPP information does not materially change the reason the judge relied on the impugned testimony in her assessment of Person Y's credibility. She concluded it was unrealistic to contend the money Person Y received or the potential for revenge against the Red Scorpions motivated his decision to testify against the appellants given that he was serving "25 years to life of hard time" made worse by his cooperation. The undisclosed information does not undermine the judge's conclusion that the financial incentives or opportunity for revenge would be outweighed by the "hard time" Person Y knew he would face in order to keep him safe as a result of his cooperation. As Griffin J.A. explained in Johnston, there is no reasonable basis to suggest "a promise that Person Y would be enrolled in the WPP, as a means of trying to keep him safe in prison, would have provided him with an expectation that he would be better off in custody than he would have been if he had not been a cooperating witness": at para. 117.
- [350] We agree with the conclusion in Johnston that the undisclosed WPP information could not reasonably be expected to have made a difference to the appellants' ability to impeach Person Y's credibility. This is in part because of our conclusion above that Person Y's evidence was not necessarily inconsistent with the undisclosed WPP information, and in part because - as Griffin J.A. explained in Johnston - Person Y was testifying to his belief or expectation about his future prison conditions, which would be difficult to impeach: at para. 115. This is particularly so as correspondence from Person Y's counsel indicates he believed the RCMP had failed on multiple occasions to respect their promises with respect to Person Y's confinement conditions.
- [351] We also agree with the Court in Johnston that if the appellants had wished to challenge Person Y's evidence about his custodial conditions, they could have done so using information disclosed to them, including the fact he had been promised similar treatment and privileges as other inmates as a condition of cooperation: at para. 118.

[Emphasis added.]

- [46] The Court agreed with Griffin J.A.'s finding that the undisclosed information relating to Person Y and the WPP was "at best minor and tangential" to his credibility (Johnston 2021 at para. 354), stating that:
- [352] We further disagree that the lack of disclosure prevented the appellants from applying for further information about Person Y's custodial circumstances or challenging the Crown's privilege claims. Although we accept that in some circumstances, later disclosure can shed light on areas that seemed less important without knowledge of that additional information, this is not such a case. The appellants knew Person Y had been promised a certain standard of care within the RCMP and the CSC as a condition of testifying. They also knew Person Y had gone between RCMP and CSC custody and that the Crown viewed these movements as being irrelevant and privileged. The appellants were not prevented from cross-examining Person Y about this information. The WPP information does not meaningfully change any of the information available to the appellants before Person Y's testimony.
- [353] Even if the appellants had applied for further disclosure or challenged the privilege claims on the basis of the WPP information and the sealed evidence before us on this application, we conclude it would not have made a difference to the appellants' conduct at trial. [Two sentences removed.]
- [47] Before I proceed, I wish to clarify the effect of the Court of Appeal's rulings on the present application, and generally on Mr. Haevischer's forthcoming Stay Application. To be clear, the Court of Appeal was not asked to determine the implications to an abuse of process application of Person Y's trial evidence on the conditions of his confinement, or of the Crown and police's non-disclosure of matters described above. The question before the Court of Appeal was confined to the effects of Person Y's evidence and the Crown and police's non-disclosure on the grounds of appeal advanced by Mr. Haevischer and Mr. Johnston, which ultimately concerned the fairness of their trial. See *R. v. Haevischer*, 2023 BCSC 2111 at paras. 32-34 [Summary Dismissal Reasons].
- [48] However, as I discussed in the Summary Dismissal Reasons, the Court of Appeal's rulings in Johnston 2019 and Johnston 2021 evidently inform this Court's task with respect to the Stay Application: at para. 32. This includes allegations of misconduct framed under the residual category of the abuse of process doctrine, as well as requests for disclosure or production made by Mr. Haevischer in support of the Stay Application. In other words, while the legal issues and possible remedies engaged in the proceedings before the Court of Appeal and in this Court are distinct, the factual foundation (including Person Y's participation at trial and the actions of state actors before, during, and after the trial) remains largely the same. The Court of Appeal's factual determinations in respect of this shared foundation are binding on me, notwithstanding that Mr. Haevischer now seeks a judicial stay of proceedings instead of appellate intervention. I cannot accede to the view advanced by Mr. Haevischer that this

Court may effectively ignore the determinations of the Court of Appeal simply because the legal issues before me are different or because (as discussed below) the record before me slightly differs from the record considered by the Court of Appeal. I will continue to be guided by the Court of Appeal's findings whenever they are relevant to these proceedings.

- [49] Having described in considerable detail the background circumstances of the Disclosure Application, I will now summarize the positions of the parties, before setting out the governing legal principles and conducting my analysis.
- [50] I note that the Sealed Disclosure Reasons address the parties' submissions on the Crown's assertion of public interest privilege and the statutory prohibition on disclosure pursuant to the Witness Protection Program Act, S.C. 1996, c. 15 [WPPA]. Those positions are not canvassed in these Reasons.

Parties' Positions

Mr. Haevischer

- [51] To properly contextualize Mr. Haevischer's positions on the Disclosure Application, I must first address a preliminary issue relating to Mr. Haevischer's unsuccessful submission at the Court of Appeal that Person Y perjured himself, and his repetition of that submission in the Abuse NOA and WPP NOA.

Allegation of Perjury

- [52] It must be remembered that Mr. Haevischer brings the Disclosure Application in support of his Stay Application. In that respect, the Abuse NOA makes the following allegations:[7]
41. The police failed to provide a full accounting of benefits provided to the witnesses who testified at trial. This included, inter alia:
- a. Failing to disclose their offer of witness protection to a key witness at trial, Person Y;
 - b. Failing to disclose the details of a special custodial arrangement for Person Y post-trial; and
- Failing to disclose the untruthful evidence of Person Y regarding his expected conditions of confinement.
65. Crown counsel deliberately withheld information regarding Person Y's entry into the Witness Protection Program from defence counsel at trial in violation of their Stinchcombe obligations.

66. In order to bolster Person Y's credibility and secure a conviction against the Applicant and his co-accused, Crown counsel intentionally or recklessly permitted Person Y to mislead the court regarding his anticipated conditions of confinement post-trial. In his closing submissions at trial, Crown counsel expressly referred to the inaccurate evidence of Person Y regarding his anticipated life in solitary confinement and deprivation where he would "sit in the hole for the rest of [his] life".
69. The accused were unfairly denied a meaningful opportunity to properly and fully cross-examine Person Y on his misleading testimony.

[Emphasis added.]

- [53] The Crown and AG Canada challenged Mr. Haevischer's continued characterization of Person Y's evidence as misleading, inaccurate, and untruthful, given the Court of Appeal's findings on the allegation of perjury. Mr. Haevischer initially clarified that he has abandoned the position that Person Y perjured himself, although (as discussed below) he has since resiled from that position.
- [54] Accordingly, at the initial hearing of the Disclosure Application counsel for Mr. Haevischer recast their abuse of process allegations relating to Person Y as follows. First, Mr. Haevischer alleges the police and Crown's non-disclosure of Person Y's entry into the WPP (and generally of his conditions of confinement post-trial) constitutes abusive state conduct. Second, he alleges the Crown misled the court in its closing submissions when it referred to Person Y's evidence about his conditions of confinement. He emphasizes that those closing submissions took place several months after Person Y's testimony, during which time he alleges the Crown learned that Person Y's circumstances had changed.
- [55] However, developments after the hearing of the Disclosure Application prompted Mr. Haevischer to apply to re-open this matter. I turn to those developments now.

Application to Re-open

- [56] After the hearing of the Disclosure Application, but before I provided these Reasons to the parties, Mr. Haevischer conducted two interviews with former Superintendent John Robin of the RCMP. The interviews took place on July 18 and August 5, 2024. The information that Supt. Robin shared in these interviews prompted Mr. Haevischer to apply to re-open this application. Mr. Haevischer indicated that he would like to resile from the position he had articulated at the Disclosure Application hearing that he no longer alleges Person Y perjured himself.
- [57] Mr. Haevischer filed a Notice of Application to re-open the Disclosure Application on August 13, 2024. Along with the notice, Mr. Haevischer also filed an affidavit of Ms. Dlab, sworn on August 12, 2024, which attached a two-page will-say of Supt. Robin. On August 13, 2024, Mr. Haevischer also filed an affidavit of Na Young Bae, sworn on August 9, 2024, which attached a 19-page transcript of Supt. Robin's August 5, 2024 interview. Finally, on August 14, 2024, Mr.

Haevischer filed a second affidavit of Ms. Bae, sworn on the same date, which attached a seven-page transcript of the "final portion" of Supt. Robin's first defence interview, conducted on July 18, 2024. Those materials are all under seal.

[58] I will not review the contents of Mr. Haevischer's interviews with Supt. Robin at length. The pertinent information elicited by defence counsel during the interviews generally relates to:

- The conditions of Person Y's confinement in the lead up to and after trial, including Person Y's wellbeing;
- The efforts of Supt. Robin, on behalf of the RCMP, in advocating that the CSC take the necessary steps to keep Person Y safe and secure while in the federal correctional system, and to provide Person Y with conditions of confinement similar to those of other inmates;
- The recollection of Supt. Robin about the likelihood that Person Y would be transferred to different accommodations within the CSC after his testimony; and
- The extent to which Supt. Robin kept specific Crown counsel aware of the conditions Person Y was expected to receive after his participation at trial, and of Supt. Robin's efforts regarding those conditions.

[59] Mr. Haevischer's re-opening application was heard on August 15, 2024. Both Mr. Haevischer and the Crown (in response) relied on the Ontario Court of Appeal's decision in *R. v. R.V.*, 2018 ONCA 547 [R.V.], rev'd on other grounds 2019 SCC 41, for the general principles governing an application to re-open or reconsider a criminal application.

[60] Mr. Haevischer argued that the information he had obtained as a result of the interviews with Supt. Robin constituted a material change in circumstances justifying re-opening of the application. As well, counsel for Mr. Haevischer submitted that the information provided by Supt. Robin had changed the "evidentiary foundation" available to this Court on the Disclosure Application, as compared to the record before the Court of Appeal.

[61] The Crown opposed re-opening this matter. They argued that the information the defence had obtained from Supt. Robin did not constitute a material change in circumstances. In particular, they submitted that the information could not reasonably impact on either the request for disclosure of the Knowledge Materials or on the Crown and AG Canada's claims of privilege.[8] The Crown also argued that re-opening the Disclosure Application would prejudice the parties and unduly delay these proceedings.

[62] After hearing the parties' submissions, on August 15, 2024, I exercised my discretion to permit Mr. Haevischer to re-open the Disclosure Application. I did so for the narrow purpose of allowing Mr. Haevischer to revive his allegation that Person Y had perjured himself, and to supplement the record on the Disclosure Application with the two interview transcripts attached as exhibits to the affidavits of Ms. Bae.

- [63] The power of a trial judge to reconsider or re-open a prior ruling or application is well recognized. This discretion must be exercised judicially. For the general law on applications to reopen in a criminal context, see: *R.V.* at paras. 98-103; *USA v. Fraser*, 2015 BCSC 338 at paras. 23-38; *R. v. I.C.*, 2010 ONSC 32 at paras. 152-163; *R. v. Gauthier*, 2021 BCSC 968 at paras. 19-24, *aff'd* 2022 BCCA 377; and *R. v. Hernandez*, 2008 BCSC 1473 at para. 7.
- [64] The above cases indicate that an important consideration in determining whether to permit re-opening is the stage of proceedings in which the application to re-open is brought. In these circumstances, Mr. Haevischer applied to re-open the Disclosure Application before I had delivered this ruling. I found that a fair adjudication of the Disclosure Application required permitting Mr. Haevischer to modify his position, on the record, with respect to the allegation of perjury against Person Y, and to supplement the record with the information the defence had obtained from Supt. Robin. I determined that doing so would not occasion prejudice or delay to the parties so long as the re-opening was limited to the narrow purpose I have described.
- [65] For those reasons, I permitted Mr. Haevischer to re-open this application. On August 19, 2024, counsel for Mr. Haevischer formally revived, on the record, their allegation against Person Y that he perjured himself. I have considered that allegation in my determination of the Disclosure Application.
- [66] Having addressed these developments, I will now discuss Mr. Haevischer's positions on the disclosure of the various records sought on this application.

Categories of Records Sought by Mr. Haevischer

- [67] Mr. Haevischer categorized the records sought on this application into three groups: the "First-Party Privilege Documents";[9] the "WPP Negotiations Materials"; and the "Conditions of Confinement Materials". He concedes that these categories may overlap. I adopt a different categorization of the same materials in my analysis, for clarity.
- [68] During his submissions, counsel for Mr. Haevischer repeatedly explained that his objective in seeking this disclosure is to uncover the "bargain struck" between Person Y and state authorities regarding Person Y's post-testimony conditions of confinement, including the "negotiations" leading to the "bargain" and whether and when the "bargain was realized".
- [69] One component of Mr. Haevischer's disclosure request concerns records which I have identified as the "Knowledge Materials". Specifically, the defence seeks disclosure of the Crown and police's knowledge and involvement regarding: (a) discussions and negotiations between Person Y and the WPP in respect of his "pending or possible" enrolment in the program; and (b) Person Y's post-trial conditions of confinement, and negotiations or discussions regarding those conditions. Framed in the language used by Mr. Haevischer, the request for disclosure of the Knowledge Materials concerns the Crown and police's knowledge of the purported "bargain struck" by Person Y and CSC and WPP authorities.

- [70] The WPP NOA particularizes the Knowledge Materials as including the "dates, sequence, awareness and involvement of the police and Crown counsel" in relation to Person Y's conditions of confinement and his entry into the WPP. The WPP NOA suggests these materials may take the form of communications, documents, notes, agreements, and other information. In this respect, Mr. Haevischer submits that "to effectively prosecute the claims set out in the Amended Abuse Notice, [he] must be able to identify the names of both the Crown and police officers who were aware of the fact of the Witness's pending entry into the WPP, how they came to know of this fact, and when they came to know of this fact". He says denial of disclosure of that information would prevent him from "effectively present[ing] his case on this issue in the abuse hearing".
- [71] Mr. Haevischer says that any Knowledge Materials outside the possession of the Crown, and likewise the balance of Additional Materials in the hands of the CSC and WPP, are "obviously relevant" such that the Crown must "bridge the gap" in disclosure and obtain the records. Alternatively, he submits that the records are likely relevant since there is a reasonable possibility that they are logically probative to the "unfolding of events that form the subject matter of the abuse hearing".

Provincial Crown and Attorney General of Canada

- [72] The Crown and AG Canada made similar submissions in the open hearing of the Disclosure Application. I will focus on the submissions of the Crown, to avoid repetition and in recognition of Mr. Haevischer's primary position that the Crown must disclose as first party records the entirety of the Additional Materials, including records not within its actual possession or control. I do so remaining mindful of the respondents' separate sets of submissions, and the distinct roles on this application of the prosecuting Crown and the AG Canada.
- [73] The Crown says that the records sought by Mr. Haevischer are either irrelevant or privileged. They rely on *R. v. Belcourt*, 2012 BCSC 737, for the general principles of disclosure in the context of abuse of process applications: at paras. 44-52.
- [74] First, in respect of the Knowledge Materials, the Crown characterizes the specific Crown knowledge information sought by Mr. Haevischer as "inconsequential and irrelevant" to the allegations contained in the Abuse NOA. They say that Mr. Haevischer "does not need the names, dates, sequence and awareness of individual (former) Crown counsel to make his intended argument".
- [75] The Crown is prepared to make substantial admissions of fact regarding this aspect of the application. The Crown set out these admissions in their written submissions, as follows:
1. The trial Crown and police were aware prior to the commencement of Person Y's testimony that Person Y was in discussions with witness protection officers for entry into the WPP.

2. The trial Crown and police were aware prior to the commencement of Person Y's testimony that Person Y's enrollment in the WPP was [redacted information] for his safety and security.
3. The trial Crown and police were aware prior to the commencement of Person Y's testimony that the CSC intended to transfer Person Y to [redacted information] that would provide Person Y with a safe and secure environment and afford him a similar level of treatment and privileges provided to other inmates; and
4. The trial Crown and police were aware prior to the conclusion of Person Y's testimony that Person Y would be admitted, following his testimony [redacted information].

[Emphasis added.]

[76] The Crown argues that these admissions of fact--together with materials already disclosed to Mr. Haevischer--provide an ample factual foundation for Mr. Haevischer to advance his allegations surrounding Person Y at the Stay Application. For example, they refer to three applications made by the Crown, with supporting affidavits, to transfer or keep Person Y in the custody of the RCMP, which have been disclosed to the defence in vetted form. I will return to those affidavits in my analysis, below.

[77] On the whole, the Crown cite *R. v. Darwish*, 2010 ONCA 124, leave to appeal to SCC ref'd, 33654 (21 October 2010), for the proposition that the Crown need not undertake an "investigation" into allegations of state misconduct unless the allegations are "material and potentially meritorious": at para. 38. They say the defence has not satisfied this standard, and urge the court to exercise its trial management powers to decline to order "an investigation into unnecessary and irrelevant Crown knowledge information".

[78] As for materials in possession of third parties (the CSC and WPP), the Crown says that the materials are neither "fruits of the investigation" nor are they so "obviously relevant" that they ought to be disclosed as first party records. The Crown also advises that the record holders assert public interest privilege and the statutory prohibition on disclosure in the WPPA. The Crown says that it cannot be ordered to disclose materials it cannot obtain, citing *R. v. Schirmer*, 2022 BCCA 214 at para. 58 [Schirmer]. As such, they submit the materials are properly characterized as third party records, and say that the Court of Appeal's ruling on these same materials should be determinative of their relevance.

Governing Legal Principles

Abuse of Process Application

[79] I begin with some comments on the context within which this application is made.

[80] Mr. Haevischer has been found guilty of six counts of first degree murder and one count of conspiracy to commit murder. He has already had the opportunity to substantively meet the charges against him and no longer enjoys the presumption of innocence. Mr. Haevischer now carries the burden, as the applicant, of advancing his application for a judicial stay of proceedings. The principles governing criminal applications and the powers of judges to manage such applications are therefore engaged.

[81] The Supreme Court of Canada in *Haevischer* SCC provided important guidance on this issue. Justice Martin, writing for the Court, stated as follows:

[106]

If summary dismissal is refused, judges will also be called upon to determine how the voir dire on the underlying application should be conducted, including whether there should be an evidentiary hearing or whether the matter can proceed solely on the basis of argument, an agreed statement of facts or some combination of methods. Allowing an application to proceed to a voir dire is not a free licence to counsel to argue an application however they choose. The time and leeway given to counsel to present and argue the application should be proportionate: just enough to ensure that the application is fairly treated. Beyond that point, additional time and leeway can cause undue delay.

[107]

Exercising these case management powers not only calls for proportionate proceedings which balance trial efficiency and trial fairness, but may require a comparative assessment of what approach best meets the exigencies and equities of a particular case. Judges should bear in mind that the summary dismissal power is not their only tool to manage the underlying application and consider whether their other case management powers are better suited to managing the underlying application (*Samaniego*; *Cody*, at para. 38). The values of trial efficiency and trial fairness may be better served by holding a voir dire on the underlying application that is tailored through the use of judicial discretion to only what is necessary for a fair consideration of the substance of the allegations. When judges exercise their case management powers in this way, they fulfill the underlying purposes of case management powers: ensuring that trials proceed in a fair, effective and efficient manner (*Samaniego*, at para. 21).

[*Italic emphasis in original; underlined emphasis added.*]

[82] Accordingly, the ultimate purpose of disclosure in these circumstances is to ensure that Mr. Haevischer is furnished with the necessary information to effectively advance the Stay Application, such that a fair consideration of the substance of his allegations can be undertaken. Mr. Haevischer does not have free licence to argue his allegations in whatever way he chooses. This, in my view, extends to limiting Mr. Haevischer from seeking information which has no relevance to his allegations or the disclosure of which would not otherwise advance the substance of his application for a stay of proceedings. As I stated in the Summary Dismissal Reasons, this Court is endowed with case management powers,

including the power to determine how the voir dire initiated by Mr. Haevischer will be conducted: at para. 36.

[83] With these observations in mind, I turn to the general principles of first party disclosure and third party production.

First Party Disclosure

[84] The principles of first party disclosure are well-settled.

[85] The prosecuting Crown has a duty to disclose upon request all relevant, non-privileged information in its possession or control, whether that information is inculpatory or exculpatory. *R. v. Gubbins*, 2018 SCC 44 at para. 18 [Gubbins], citing *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 1991 CanLII 45 [Stinchcombe] and *R. v. Dixon*, [1998] 1 S.C.R. 244, 1998 CanLII 805 at para. 22.

[86] The Crown's duty of disclosure is not absolute. The Crown may withhold disclosure on the basis of irrelevance or privilege. Where the Crown does so, the defence can request a review. The Crown must then justify its non-disclosure by showing that the withheld information is clearly irrelevant or privileged. *Gubbins* at para. 19, citing *Stinchcombe* at 339-340.

[87] Only the prosecuting Crown has the duty to make first party disclosure. Other Crown entities, including the investigating police, are third parties. Simply put, the law cannot obligate "the Crown to disclose materials that it does not have or cannot obtain". *Gubbins* at para. 20, citing *R. v. McNeil*, 2009 SCC 3 at para. 22 [McNeil]; see also *Schirmer* at para. 58.

[88] However, in *McNeil* the Supreme Court of Canada clarified that the Crown does have "a duty to make reasonable inquiries when put on notice of material in the hands of police or other Crown entities that is potentially relevant". The police have a corollary obligation to disclose to the Crown "all material pertaining to its investigation of the accused". These materials are known as the "fruits of the investigation". *Gubbins* at para. 21, citing *McNeil* at paras. 14, 22-23, 49, and 52; see also *Schirmer* at paras. 54 and 60.

[89] Finally, the police have a duty to disclose information to the Crown beyond the "fruits of the investigation" where such information is "obviously relevant" to the defendant's case. The phrase "describes information that is not within the investigative file, but that would nonetheless be required to be disclosed under *Stinchcombe* because it relates to the accused's ability to meet the Crown's case, raise a defence, or otherwise consider the conduct of the defence": *Gubbins* at para. 23; see also *Schirmer* at paras. 64 and 73.

[90] I now turn to the principles governing the production of records not captured by the Crown's disclosure obligations.

Third Party Production

[91] The general principles governing the production of third party records are not in dispute.

- [92] Third party production in the criminal context is governed by the two-step process set out in O'Connor. Justice Fitch recently summarized the O'Connor regime in *R. v. Lowry*, 2023 BCCA 423:
- [3] At the first stage, the applicant must demonstrate that the records sought are "likely relevant" in the context of the use that is proposed to be made of them in the underlying proceeding: *R. v. O'Connor*, [1995] 4 S.C.R. 411, 1995 CanLII 51 at para. 19; *R. v. Johnston*, 2019 BCCA 107 at paras. 60-61. If the applicant meets the likely relevance threshold, the documents will be produced to the Court.
- [4] At the second stage, the Court must weigh the salutary and deleterious effects of a production order to determine whether, and to what extent, the records should be produced to the applicant. This will involve consideration of the extent to which production of the record is necessary, the probative value of the record, and countervailing interests, including third-party privacy interests that could be implicated by an order disclosing the record to the applicant: O'Connor at paras. 30-31. At the second stage, it will often be helpful for courts to assess first the true or actual relevance of the targeted record, which will frequently be determinative of the application: *R. v. McNeil*, 2009 SCC 3 at para. 39; *R. v. Gubbins*, 2018 SCC 44 at para. 27.
- [93] The "likely relevance" threshold is not onerous, but is designed to avoid "fishing expeditions". The standard is met where there is a reasonable possibility the information sought is logically probative to an issue at trial or the competence of a witness to testify: Gubbins at paras. 26-29.
- [94] Having set out the governing legal principles, I will now determine whether the Knowledge Materials and the Additional Materials should be disclosed or produced to Mr. Haevischer.

Discussion

Is the Crown Required to Disclose the Knowledge Materials?

- [95] I will first discuss the proposed disclosure of the Knowledge Materials. To recall, the request for this disclosure concerns materials, if they exist, relating to the "awareness" and "knowledge" of Crown counsel and police with respect to Person Y's conditions of confinement and admission to the WPP. The disclosure, if ordered, of at least some of these materials would appear to require the Crown to undertake an inquiry or "investigation" of former counsel who acted at the trial of this matter, more than a decade ago.
- [96] I emphasize that the relevance of a record "should be defined by the possible use to which the information could be put": Johnston 2019 at para. 62 (emphasis added), citing *World Bank Group v. Wallace*, 2016 SCC 15. To that end, I agree with the Crown that the Knowledge Materials, as a whole, are highly superfluous and therefore irrelevant to the Stay Application. I find that Mr. Haevischer already possesses all the necessary information to forcefully advance his allegation that the Crown misled the court in its closing submissions at trial, along with his allegation of abusive non-disclosure, at the Stay Application. The

possible use to be made of the Knowledge Materials, if they exist, at the Stay Application would not assist in the fair and efficient adjudication of Mr. Haevischer's allegations. I base this conclusion on the following.

- [97] First, as described by Griffin J.A. in Johnston 2019, the defence knew by trial of Person Y's demands relating to the conditions of his confinement, that he was dissatisfied with his custodial circumstances, that he had spent significant time in segregation, and that his cooperation continued to hinge on receiving conditions no worse than other inmates. That disclosure has since been supplemented by disclosure indicating that Person Y threatened to withdraw his cooperation if he remained in segregation.
- [98] As well, the disclosure available to Mr. Haevischer already provides dates by which specific Crown counsel involved in his trial were aware of the particular conditions of confinement endured by Person Y, in the form of affidavit evidence. This disclosure is contained in unredacted portions of the Redacted Materials. To repeat, the Redacted Materials were not disclosed to the defence at trial because the Crown had determined at the time that they were not relevant and were also privileged. The Crown made the materials available to the defence without conceding their relevance.
- [99] Namely, the Redacted Materials contain three affidavits of Corporal Eric Boucher, made in support of Transfer of Prisoner Orders (i.e., "spring orders") by Crown counsel to place Person Y in the custody of the RCMP before trial. The applications for these spring orders are dated and indicate the specific Crown counsel who made each application. The first of these applications was made by Mr. Levitz on August 8, 2013. The subsequent applications were made on November 8, 2013, by Catherine Murray (now Justice Murray) and on February 7, 2014, by Daniel Loucks (now Provincial Court Judge Loucks).
- [100] Crucially, unredacted portions of the affidavits of Cpl. Boucher detail Person Y's conditions of confinement, including the risks to his safety as a justice system collaborator, his experience of isolation ("virtual segregation") in CSC custody and related health issues, the concerns about his inability to give meaningful evidence due to his deteriorating health while in the care of the CSC, and the improvements in his circumstances once in RCMP custody. The most recent of these affidavits described his conditions while in the charge of the RCMP as "reasonably close to living conditions [he] would experience in CSC". The affidavit also referenced a forthcoming transfer of Person Y to "his new accommodations within CSC after he gives his testimony".
- [101] It is reasonable to assume that trial Crown counsel were aware of the content of the affidavit materials that they relied upon in support of these pre-trial spring orders. Thus, I conclude that Mr. Haevischer already has materials contemplating precisely the "dates, sequence, awareness and involvement" (per the WPP NOA) of specific Crown counsel and RCMP members, in respect of Person Y's pre-trial and anticipated post-trial conditions of confinement.

- [102] As well, the information the defence has obtained from its interviews of Supt. Robin confirms the general awareness of particular Crown counsel before and during trial about Person Y's conditions of confinement, and about the expectations for his post-trial confinement. Superintendent Robin advised the defence that he regularly met with trial Crown counsel to update them about Person Y's custodial circumstances, the efforts of the RCMP in advocating for improvements in his conditions, and the likelihood that the CSC would move Person Y to other accommodations after the trial. Superintendent Robin answered questions about his discussions with specific Crown counsel on the subject, and in particular Justice Murray, Judge Loucks, and Mr. Levitz. I find that the availability of this information further obviates the need for disclosure of the Knowledge Materials.
- [103] Finally, these materials are supplemented by the comprehensive admissions of fact that the Crown is prepared to make to facilitate the hearing of the Stay Application. As I set out earlier, the Crown is prepared to admit that prior to Person Y's testimony it was aware that: he was in discussion with WPP authorities about entry into the program; enrolment would be for his safety and security; the CSC intended to transfer him to accommodations where he would be afforded treatment and privileges similar to other inmates; and he would be so admitted after his testimony.
- [104] In my view, nothing further is required to ensure that the "substance" of the allegations made by Mr. Haevischer against the Crown in respect of its non-disclosure of Person Y's post-trial circumstances, and in respect of the Crown's closing submissions, are fairly considered, and that the Stay Application may thus proceed in a "fair, effective and efficient manner": Haevischer SCC at para. 107 (emphasis in original). I find that the Knowledge Materials, if they exist, would be entirely unnecessary and irrelevant for this purpose. For the reasons I have articulated, I find the materials available to Mr. Haevischer provide him with the necessary foundation to pursue his argument at the Stay Application that the Crown was aware of Person Y's discussions with the WPP, before he testified, and of Person Y's subsequent admission to the WPP after his testimony.
- [105] Accordingly, I dismiss Mr. Haevischer's request for disclosure of the Knowledge Materials.
- [106] I will now consider the Additional Materials, in the hands of third parties.

Are the Additional Materials First or Third Party Records?

- [107] Mr. Haevischer acknowledges that the Additional Materials are in the hands of third parties (i.e., the CSC and the WPP). He nonetheless says that the materials are either fruits of the investigation or are so obviously relevant that the Crown is obligated to disclose them. I do not agree.
- [108] The Court of Appeal has determined that these same records (i.e., records in the hands of the CSC and WPP pertaining to Person Y's enrolment in the program and to the conditions of his confinement post-trial) are properly characterized as third party records. That finding is binding on me. See Johnston 2019 at paras. 130-133.

- [109] I acknowledge, as explained earlier in these Reasons, that the issue before the Court of Appeal was relevance to the grounds of appeal advanced in respect of Person Y. By contrast, in this case relevance relates to the allegations made against the Crown and police surrounding Person Y's evidence and incarceration.
- [110] As stated in Johnston 2019, whether a particular record is relevant "is a judgment call taking into consideration the context of the particular case": at para. 43 (emphasis added). I also note the comments of Justice Watt, cited by Griffin J.A. in that same paragraph, that determining relevance calls for the exercise of "human experience and logic": R. v. Jackson, 2015 ONCA 832 at para. 122, leave to appeal to SCC ref'd, 36829 (30 June 2016).
- [111] To that end, I find that the allegations made by Mr. Haevischer in the Abuse NOA relating to Person Y do not render the WPP and CSC materials in the hands of third parties any more relevant than they were on appeal. Having already determined that the Crown has provided Mr. Haevischer sufficient disclosure (supplemented by admissions of fact) to advance his allegations of abuse at the hearing of the Stay Application, I do not accede to the submission that the Crown must go further and "bridge the gap" between its first party disclosure obligations and the production of these additional records.
- [112] These records relate, as Griffin J.A. described, to "Person Y's safety and security within the CSC penitentiary system", and do not concern the actual investigation into the conduct for which Mr. Haevischer was convicted: Johnston 2019 at para. 128. In this respect, I find that the Additional Materials do not constitute the "fruits of the investigation" for the purposes of McNeil. Nor are they so "obviously relevant"--in light of the abundant disclosure already available to Mr. Haevischer squarely on the allegations he intends to advance at the Stay Application--that the Crown is obligated to "bridge the gap" in disclosure and make them available to the defence.
- [113] I also accept the Crown's submission that even if it did attempt to obtain these records, the record holders assert privilege at common law and invoke the statutory prohibition on disclosure pursuant to the WPPA, which would preclude disclosure of the records to the Crown. As discussed earlier, this Court cannot obligate the Crown to disclose materials it cannot obtain.
- [114] Mr. Haevischer thus has the onus of demonstrating that these materials are "likely relevant", such that they should be produced to the court for a determination of their actual relevance.

Has Mr. Haevischer Satisfied the "Likely Relevance" Threshold?

- [115] For the following reasons, I find that the Additional Materials, in the hands of third parties, are not likely relevant to the Stay Application.
- [116] It remains open for Mr. Haevischer to argue that when the Crown relied on Person Y's testimony in its closing submissions the Crown misled the court, given the changes in Person Y's custodial circumstances. I want to be clear that the merits of that submission and

of Mr. Haevischer's other allegations of abuse are not for me to decide on this application. What I find on this application is that the changes in Person Y's custodial circumstances, and the events that preceded them, are already known to the parties. At the risk of repeating myself, I emphasize that all parties involved in this case now know that:

- Person Y demanded and was promised that he would be afforded conditions of confinement "no worse" than those provided to other inmates;
- The risks to his safety as a result of his cooperation with authorities made fulfilling the demand difficult;
- He had threatened to withdraw his cooperation on the view that authorities had not fulfilled their end of the "bargain";
- He spent some, but not all, of his time before trial in administrative segregation;
- He discussed with authorities the possibility of his entry into the WPP and a transfer of accommodation before the trial, with a view to being placed in a location that would keep him secure while allowing him to live in conditions comparable to other inmates; and
- His enrolment in the WPP and change in circumstances was effected days after his testimony.

[117] Mr. Haevischer's request for production of various other materials in the hands of the CSC and WPP about Person Y's conditions of confinement and entry into the WPP would add nothing to the determination of the Stay Application. In my view, the request effectively amounts to a fishing expedition. These records are not likely relevant for the purposes of O'Connor.

[118] Accordingly, Mr. Haevischer's application for disclosure or production of the Additional Material is dismissed.

Conclusion

[119] I reiterate that the Disclosure Application was brought in the context of a post-verdict application for a judicial stay of proceedings. Mr. Haevischer no longer enjoys the presumption of innocence. The court's task has shifted from determining Mr. Haevischer's guilt or innocence, to determining the extent and effect of alleged state misconduct committed during the investigation and prosecution of his offences. In that respect, Mr. Haevischer, as the applicant, does not have free licence to advance his application for a judicial stay of proceedings in any way he sees fit, and cannot expect to receive every scintilla of information that, in his view, may support or inform his allegations of abuse. These proceedings must unfold fairly, effectively, and efficiently. In furtherance of this objective, this Court is empowered to tailor the scope of the Stay Application, including disclosure in support of the application, to only what is necessary for a fair consideration of the substance of the allegations: Haevischer SCC at para. 107.

[120] I find that disclosure of the Knowledge Materials and production of the Additional Materials would not assist this objective, in the circumstances. Such disclosure or production is entirely unnecessary in light of the ample relevant disclosure and admissions already available to Mr. Haevischer for the purpose of the Stay Application.

[121] For the foregoing reasons, Mr. Haevischer's application for disclosure of the Knowledge Materials and Additional Materials is dismissed.

Redacted Materials

[122] As previously mentioned, the review of the Redacted Materials is the subject of the Sealed Disclosure Reasons. I have largely upheld the redactions in those materials on the basis of irrelevance, public interest privilege, or the prohibition on disclosure under the WPPA. The majority of redactions that I have removed have been removed for consistency, and in particular to reflect that the information they purport to withhold is already unredacted elsewhere in the Redacted Materials.

[123] In accordance with my findings in the Sealed Disclosure Reasons, the provincial Crown must disclose to counsel for Mr. Haevischer a revised version of the Redacted Materials.

"Devlin J."

[1] Mr. Johnston passed away after the appeal was argued before the Supreme Court of Canada.

[2] Person Y's identity remains protected by an active publication ban: *R. v. Haevischer*, 2013 BCSC 1085 [Publication Ban RFJ].

[3] I note that Ms. Lang's affidavit is under seal. I also note that some exhibits contained in Ms. Lang's affidavit were reproduced in two other affidavits filed on this application: the second affidavit of Lily Sun, affirmed on March 19, 2024; and the first affidavit of Na Young Bae, sworn on March 5, 2024.

[4] Person Y in fact returned to Canada twice from South America. He first did so in October 2009, to provide a statement to RCMP investigators about his involvement in past offences. He then went back to South America, returning to Canada a second time in April 2010 to plead guilty to the two murder charges for which he continues to serve a life sentence of imprisonment. See Verdict Reasons at paras. 471-472.

[5] The excerpts of Person Y's testimony relating to these matters were filed on this application as exhibits to the first affidavit of Lily Sun, affirmed on March 19, 2024. The page numbers of the trial transcript cited below reflect the page numbers that appear in the exhibits to Ms. Sun's affidavit.

[6] Excerpts of those closing submissions were filed collectively on this application as Exhibit A of the second affidavit of Na Young Bae, sworn on April 2, 2024.

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- [7] Some of the allegations made by Mr. Haevischer in the Abuse NOA are repeated, verbatim, under separate headings for the trial fairness and residual categories of the abuse of process doctrine. I have not repeated them here, for brevity.
- [8] The Crown invokes the WPPA and asserts public interest privilege over the defence's notice of application and the affidavits the defence filed in respect of the re-opening application. The privilege issues arising from the disclosure of information by Supt. Robin and another witness to Mr. Haevischer are the subject matter of a separate application, and are not addressed in these Reasons or in the Sealed Disclosure Reasons.
- [9] Which I have called the "Redacted Materials", and which are the subject of the Sealed Disclosure Reasons.
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