

CANADA / JUDGMENT

R. v. Jancey

2016 BCSC 2666

COURT

Supreme Court of British Columbia

DECIDED

19 October 2016

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2016 BCSC 2666 R. v. Jancey

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Jancey,

2016 BCSC 2666

Date: 20161019

Docket: 165185-2; 165185-3;

165185-5; 165185-6; 165185-7

Registry: Victoria

Regina

v.

Adrian Michael Jancey

Before: The Honourable Mr. Justice Bracken

Oral Ruling on Voir Dire (continuing)

re disclosure of PRIME records

Counsel for the Crown:

S. Fudge

Counsel for the Victoria Police Department appearing by teleconference:

A. Srivastava

Counsel for the Accused:

D. Berntsen

Place and Date of Trial/Hearing:

Victoria, B.C.

October 17, 18 and 19, 2016

Place and Date of Judgment:

Victoria, B.C.

October 19, 2016

- [1] THE COURT: This matter is for decision on the disclosability of certain records. I am going to treat it as a simple addition to the judgment I gave yesterday with respect to the determination of whether the records are, in fact, first party records or third party records.
- [2] The next issue then is whether the accused is entitled to disclosure of information contained in the PRIME system. The accused submits that disclosure of the information is necessary to enable him to make full answer and defence to the charge in the indictment. The allegations against the accused are not fully known at this stage. However, it is clear that the accused was a taxi driver and the allegations are that he sexually assaulted the complainant while she was a passenger in his taxi.
- [3] I gather from the submissions of counsel that one of the issues is whether the complainant consented to the alleged assault and whether, if she did consent, she had the capacity to do so as a result of the consumption of alcohol.
- [4] Mr. Berntsen, for the accused, submits that the information in PRIME will show the time and date events related to the alleged offence were entered in the system, whether any of the system was modified at a later date, and who accessed the information.
- [5] Constable Ince of the Victoria City Police testified on the voir dire. He was one of the officers involved in the investigation. There was a suggestion in his evidence that more text information than he put into PRIME in the form of an initial statement exists but has not been disclosed. The Crown says that all relevant information in the form of text material has already been disclosed to the defence.
- [6] As I have determined the records are third party records, the accused has the onus of establishing that the records sought are "likely to be relevant": *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. O'Connor*, [1995] 4 S.C.R. 411.
- [7] In *Stinchcombe*, the court stated the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of the information will impair the right of the accused to make full answer and defence. The only exception is if the non-disclosure is justified by the law of privilege: see p. 340.

- [8] In O'Connor, the majority discussed what is meant by "likely relevance" at para. 22:
- [22] In the disclosure context, the meaning of "relevance" is expressed in terms of whether the information may be useful to the defence (see Egger, *supra*, at p. 467, and Chaplin, *supra*, at p. 740). In the context of production, the test of relevance should be higher: the presiding judge must be satisfied that there is a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify. When we speak of relevance to "an issue at trial", we are referring not only to evidence that may be probative to the material issues in the case (i.e. the unfolding of events) but also to evidence relating to the credibility of witnesses and to the reliability of other evidence in the case. See *R. v. R. (L.)* (1995), 39 C.R. (4th) 390 (Ont. C.A.), at p. 398.
- [9] The majority on this point went on to say that the relevance threshold is to prevent the defence from engaging in speculative, fanciful, and time-consuming requests for production.
- [10] The second stage of the disclosure process was described at para. 31 of O'Connor. The majority all at this point said:
- [31] We also agree that, in balancing the competing rights in question, the following factors should be considered: "(1) the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record in question; (3) the nature and extent of the reasonable expectation of privacy vested in that record; (4) whether production of the record would be premised upon any discriminatory belief or bias" and "(5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record in question".
- [11] It is noted, of course, that the O'Connor case dealt with some very sensitive therapeutic records from counsellors, psychologists and psychiatrists respecting the complainants. In a recent decision, *R. v. McKay*, 2016 BCCA 391, the court discussed approaches to disclosure since *Stinchcombe*, O'Connor, and *R. v. McNeil*, 2009 SCC 3; decisions often referred to as a trilogy, all of which were decisions of the Supreme Court of Canada.
- [12] McKay dealt with disclosure of briefing notes and other documents related to informants who provided source information to the police that were used in support of an application for a search warrant. The court allowed an appeal from the decision of the trial judge, who had ordered disclosure of debriefing notes and other material related to the informants. At p. 104 of the decision, Mr. Justice Willcock said that the circumstances of the case relative to the material sought are a relevant consideration. He said:

The Charter recognizes the principles of fundamental justice, including the right to make full answer and defence. What that entails in the way of disclosure is a practical question that turns upon what issues are before the court. The right does not protect unlimited cross-examination. Nor does it require unlimited disclosure of material in the hands of the police. Turning to an analysis under *R. v. Oakes*, [1986] 1 S.C.R. 103, in order to determine whether an accused

challenging a warrant can obtain material in the hands of the police, in addition to the investigative file and the material that was before the authorizing judge, mistakenly assumes, a priori, there is a constitutional right to obtain that material. The court's first task, in the face of an application for disclosure, is to determine what the right to a full answer and defence entails in the circumstances. The question whether an infringement of that right is justified does not arise at that stage.

[13] Further in the judgment at para. 133, Justice Willcock stated:

[133] Stinchcombe does not, in the first instance, require the police to produce for the Crown or the Crown to obtain all of the police's operational files or background information unrelated to a specific investigation. It does not require the Crown to assess relevance upon the assumption that the bona fides of the police or prosecution will be in issue. To define the Crown's general disclosure obligations by asking what issues might arise in relation to a bare allegation of non-disclosure or misrepresentation in relation to the application for the warrant expands the scope of disclosure far beyond the investigative file or the fruits of the investigation. In my view, that definition clearly exceeds what was contemplated or demanded by Stinchcombe.

[14] It is clear that prior to Stinchcombe, material that should have been disclosed was withheld. The cases that followed Stinchcombe and the application of the principles in Stinchcombe have now clearly established the Crown's obligation to disclose all relevant material. It is not to be assumed that having faced that direction and that principle, that the Crown or the police now seek to hedge the information and find ways around the court's orders. It is to be assumed, rather, that the Crown honours the principles that exist within the jurisprudence and disclose what is required to be disclosed in the way of relevance.

[15] Obviously, the defence knows, perhaps much better than the Crown, what relevance information that has not been disclosed may have, and that certainly is why there is an avenue for the accused to make an application for further and better disclosure. Nevertheless, the first principle is one of acceptance from the Crown that it has done its best to disclose all relevant information.

[16] Likewise, it should not be assumed that simply because the police have an ability to withhold information that they do so contrary to the principles of law. In this case, clearly the PRIME system allows a police officer to mark a particular portion of the data as non-disclosable to the Crown. That does not necessarily mean that it is used or, more importantly, that if it is used, it was used inappropriately. It was not my understanding of the evidence of either Constable Ince or Constable Meyers, who testified on these voir dires, that they utilized that function to withhold anything that should have been disclosed.

- [17] In this application, defence counsel wishes to have disclosure of the metadata to ensure all of the text material, such as statements of the police officers involved and the times and dates of any action on the file to enter or modify data. Ms. McKinnon testified that it is not possible to delete case user notes, only to modify them, so it must be presumed that any data that has been put in under the category of user notes will exist in the original form, subject to any modifications that would be marked by a time and date stamp.
- [18] Undoubtedly, police services using PRIME possess a vast amount of data. Some of it is no doubt sensitive material of a private nature, such as the names and contact information of individuals who contact the police with information or complain about criminal activity. It is also clear from the evidence that much of the material is purely administrative in nature and has no relevance to any issue related to the investigation or prosecution of an offence. To routinely order disclosure of PRIME records that are used for administrative purposes or for providing statistical records would create an impossible burden on the police and provide little in the way of assistance to the accused.
- [19] In this case, the purpose is really to see if there is something inconsistent in the material with the expected evidence of the Crown. Other than the possibility something authored by Constable Ince, for example, is missing from the disclosure package delivered by the Crown, there is nothing other than a hope that something useful to the defence might be found in the PRIME material related to this case.
- [20] Mr. Berntsen makes the valid point that a police officer's paper notebook will show what has been crossed out or altered or if a page within the relevant notes has been removed, but in my view the possibility that some alteration might show up in the PRIME material does not meet the appropriate test in the Stinchcombe, O'Connor, and McNeil cases or in the more recent case from our Court of Appeal in McKay.
- [21] It might be said that all information that is in any way however slightly connected to the case will be of some use to the defence. Even information that settles an issue against the accused will have some utility in the preparation of the defence. However, the vast amount of data available in PRIME files cannot be ordered produced just because it possibly has some use; something more is required.
- [22] In my view, to justify the disclosure of the metadata contained in the PRIME system or other data in the PRIME system, the defence must show some discrete issue where the data might contradict prosecution evidence or corroborate a fact or submission of the defence. It is not enough to say that something of use to the defence might be found in the material. The defence must point to some area of its preparation where the material is required.
- [23] I find support for that position in *R. v. Eddy*, 2014 ABQB 164, where the court said at paras. 44 and 45:

[44] The Supreme Court has made it clear that "[w]hile the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant" (Stinchcombe at para 20) or what has no "reasonable possibility" of relevance (R. v. McNeil at para 17).

[45] The burden rests on the accused to demonstrate probable relevance when they claim that documents are being improperly withheld; if they are unable to overcome this threshold, the inquiry ends, and there is no need to review the withheld documents for disclosure. This evaluation is done by the judge, as explained in R. v. Egger at p 467:

One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed -- Stinchcombe, supra, at p. 345. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.

[24] In that case, the accused was charged with offences under the Income Tax Act. She made an application for disclosure of information compiled by all of the investigators involved in her case. The court refused to order disclosure of that material with one narrow exception. At para. 27, the court noted that:

... extraneous data just gums up an already potentially very complex process.

[25] I agree with that comment. At a time when there is great emphasis on the accused's right to be tried within a reasonable time and hard limits have now been set by the Supreme Court of Canada as to the timeliness of trials, courts must be careful to ensure that orders for disclosure are reasonable and that no unnecessary time is spent on unreasonable requests for further production.

[26] The application for disclosure in this case of the PRIME metadata is therefore dismissed. I will direct the Crown to review its file with the police officers involved to ensure that all statements of the officers entered as text messages or will-say

statements have been disclosed to the defence and to provide any missing material to Mr. Berntsen at its early convenience.

"J. K. Bracken, J."

The Honourable Mr. Justice Bracken

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/16/26/2016BCSC2666.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-jancey-2016>

Prepared on 26 October 2026 · Esheria