

CANADA / JUDGMENT

R. v. Johnston

2019 BCCA 107

COURT

British Columbia Court of Appeal

DECIDED

10 April 2019

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2019 BCCA 107 R. v. Johnston

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Johnston,

2019 BCCA 107

Date: 20190410

Dockets: CA42488; CA42490

Docket: CA42488

Between:

Regina

Respondent

And

Matthew James Johnston

Appellant

- and -

Docket: CA42490

Between:

Regina

Respondent

And

Cody Rae Haevischer

Appellant

SEALED FILE

Restriction on publication: A publication ban has been imposed under s. 486.5(1) and s. 486.5(9) of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify victims, or witnesses referred to in this judgment as "Person Y" and "Person X". This publication ban applies indefinitely unless otherwise ordered.

NOTE: In keeping with the publication ban this published judgment has been redacted from the original reasons for judgment, which are sealed. The redaction and number of words redacted is indicated within square brackets. A correction has been made to paragraph 4.

A copy of the Statement made by a single justice on April 10, 2019 pronouncing judgment pursuant to s. 21(3) of the Court of Appeal Act is attached as Appendix A.

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Dickson

The Honourable Madam Justice Griffin

On appeal from: An order of the Supreme Court of British Columbia, dated October 2, 2014 (R. v. Haevischer, 2014 BCSC 1863, New Westminster Docket X072945-B).

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Place and Date of Hearing:

Vancouver, British Columbia

November 15, 2018

Place and Date of Judgment:

Vancouver, British Columbia

April 10, 2019

Written Reasons by:

The Honourable Madam Justice Griffin

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Dickson

Summary:

The appellants were convicted of six counts of first degree murder and one count of conspiracy to commit murder for their involvement in the "Surrey Six" murders. They apply for an order requiring the Crown and the RCMP or other record holders to produce materials and information relating to the Crown witness, Person Y, and the Witness Protection Program. They also seek additional documents relating to an Ontario Provincial Police investigation of certain police officers involved in the investigation, and documents relating to the police management of several witnesses. They also request that this Court direct the Crown to answer certain questions in respect of post-trial disclosure. Held: Applications dismissed. On appeal, the relevance test for disclosure or production of records is whether there is a reasonable possibility the records might

assist the appellant in prosecuting an appeal. Here, the appellants argue that the WPP records could assist in establishing breach of a Crown duty to disclose at trial. Leaving aside the determination of claims of privilege, even if a breach of the Crown duty of disclosure was established, there is not a reasonable possibility that production of the WPP records will assist the appellants in arguing on appeal that the non-disclosure affected either the outcome at trial or the fairness of the trial process. As for the other requested documents, the Crown has met its disclosure obligations. The Crown also answered the questions satisfactorily.

Reasons for Judgment of the Honourable Madam Justice Griffin:

Introduction

- [1] The appellants, Cody Rae Haevischer and Matthew James Johnston, have filed appeals from their convictions of six counts of first degree murder and one count of conspiracy to commit murder (CA42490 and CA42488, respectively). The execution-style murders occurred in Surrey, BC on October 19, 2007, and became known as the "Surrey Six" murders.
- [2] The convictions were pronounced on October 2, 2014, after a judge-alone trial: 2014 BCSC 1863. On November 19, 2014, the court dismissed the appellants' subsequent applications for a stay of proceedings: 2014 BCSC 2172.
- [3] After the trial, the appellants received disclosure from the Crown flowing from proceedings related to James Bacon, another person accused of involvement in the Surrey Six murders.
- [4] This disclosure revealed to the appellants that an important witness at trial, Person Y, was admitted into the federal Witness Protection Program (the "WPP") [1 word redacted] after he testified. Person Y was a former gang member and associate of the persons accused of involvement in the Surrey Six murders. After the murders, Person Y cooperated with the police and became an agent, but was also subsequently sentenced to life imprisonment for other first degree murders.
- [5] The Crown has now provided the following explanation: the reason why Person Y was admitted into the WPP was solely for [3 words redacted] the Correctional Service of Canada ("CSC"), for his safety and protection.
- [6] In advance of the appeal, the appellants have brought applications seeking further post-trial disclosure as follows:
 - 1. an order requiring the Crown and/or the RCMP and/or other record holders to produce materials and information relating to the Crown witness, Person Y, and the WPP (the "WPP Records") and challenge any assertions of privilege in regards to the same materials;
 - 2. an order requiring the Crown to produce:

- a. documents relating to an Ontario Provincial Police ("OPP") investigation of certain police officers involved in the investigation of the Surrey Six murders (the "OPP Documents"), as well as an itemized list of the OPP Documents; and
 - b. documents relating to the police management of several witnesses.
- [7] On these applications, the Attorney General of Canada ("Canada") represented the RCMP and other non-prosecuting entities, such as the CSC, holding records related to Person Y and the WPP.
- [8] Person Y has been in custody since April 2010 and is not eligible for parole until 2035. Some of the records sought relate to his safety in custody and his personal information. Counsel appeared on his behalf on these applications.
- [9] Mr. Haevischer's notice of application sought an order requiring the Crown to produce a complete list of documents withheld from the date of the commencement of the investigation. At the hearing, this relief was abandoned and thus was dismissed with liberty to reapply.
- [10] Finally, Mr. Haevischer requests that this Court direct the Crown to answer the following in respect of the post-trial disclosure already received by the appellants:
- 1. When did the Crown first know about the existence of the previously withheld disclosure provided to the appellants beginning October 18, 2017 (the "New Disclosure")?
 - 2. On what basis did the Crown fail to disclose the New Disclosure?
 - 3. Did the Crown have possession of the New Disclosure during the appellants' trial?

Procedure on Present Applications

- [11] Both the Crown and Canada take the position that even if the WPP Records do meet the threshold relevance test for disclosure and production, all or some of them are privileged or subject to statutory prohibitions on production pursuant to the Witness Protection Program Act, S.C. 1996, c. 15 [WPP Act]. In summary, these claims of privilege relate to concerns about public and witness safety. Privilege is asserted over such things as additional details about how exactly the WPP might interface with the CSC as it relates to a prisoner in custody, both in general and with respect to Person Y specifically.
- [12] All parties before us agreed that the logical way of proceeding was for this Court to determine threshold relevance issues in the first stage of these applications. This judgment, therefore, does not address matters of privilege.
- [13] If, after the first stage, this Court determines that all or some of the categories of documents sought meet the threshold relevance test, a process to address any remaining production issues, including resolving any assertions of privilege over those documents, will be dealt with at a second stage.

- [14] At the first stage of these applications, determining threshold relevance, the Crown and Canada both advance some explanations, based on information they assert is privileged, as to their grounds for asserting the material sought is not relevant. A portion of the hearing was held in camera in the absence of the appellants and their counsel, where this privileged information was disclosed. Amicus curiae acted in the in camera hearing to stand adverse to the Crown and Canada and to make submissions on the appellants' behalf.

The WPP Records

- [15] The main focus of the appellants' applications before us was the request for disclosure of the WPP Records in relation to Person Y. These include records held by both the Crown and Canada.
- [16] I will approach these applications by first reviewing the background context of Person Y as a witness at trial.
- [17] I will then discuss the legal regimes for production of first party and third party records, and the legal approach to relevance and disclosure of new records on appeal.
- [18] Next, I will analyze the question of whether the test for disclosure or production of the WPP Records is met, in the above context.

Person Y

- [19] The Crown theory at trial was that the appellants were members of the Red Scorpions gang led by Mr. Bacon and Michael Le, and active in the drug trade. They conspired, together with a third person, Person X, to murder Corey Lal, an individual involved in the drug trade. Mr. Lal used an apartment in a tower in Surrey in the course of his drug trade. The plan unfolded to murder him there. Other persons who were present in the suite or by coincidence happened to be nearby were murdered too, bringing the murder toll to six.
- [20] Person Y was a key Crown witness at trial. He was one of four witnesses who were associates of the gang and implicated the appellants in the murders. He approached police first, in December 2007, just over a month after the murders. Later, in April 2010, he pleaded guilty to two first degree murder charges unrelated to the Surrey Six murders and was sentenced to life imprisonment.
- [21] In her reasons, the trial judge made extensive references to Person Y. She described him as a career gangster, Red Scorpions' member and co-conspirator who acted as somewhat of a bodyguard to Mr. Bacon. She treated him as an unsavoury witness, whose evidence needed to be approached with caution in accordance with *R. v. Vetrovec*, [1982] 1 S.C.R. 811.
- [22] At trial, the appellants challenged Person Y's credibility and reliability.

- [23] The trial judge concluded that defence counsel's assertions in respect of Person Y's untrustworthiness did not undermine his credibility or reliability on most essential matters. Considering his evidence and the circumstances that brought him before the court, the trial judge found that Person Y intended to "tell a true story to the Court." Thus, she accepted Person Y's evidence on "many of its essential points."
- [24] When considering Person Y's credibility and reliability, the trial judge took into account many factors (at paras. 468-481):
- a) Person Y had a history of serious and horrific violent criminal behaviour which led him to describe himself as a "monster" and a "despicable human being". The trial judge also found this to make him somewhat unique as a Vetrovec witness, in terms of his degree of self-awareness;
 - b) he went to police of his own volition, and his cooperation was not the result of an arrest for his part in the offences. Notably, he volunteered that he gave his Glock semi-automatic handgun to Person X prior to the police telling him that they discovered a Glock bearing his DNA at the crime scene;
 - c) he had the opportunity to evade Canadian law enforcement as he spent periods of time in South America in 2009. When he returned to Canada from South America in April 2010, he had been living free in Brazil and beyond the reach of Canadian law enforcement. He could have walked away from any commitments made to the police about his guilty pleas and testimony;
 - d) he provided information with the understanding that, as a consequence of providing his statements, he would be charged with two counts of first degree murder for crimes separate from the Surrey Six murders;
 - e) Person Y made no plea agreement with the Crown that would, in return for his testimony, affect his period of imprisonment. He entered his guilty pleas knowing that, as a former police agent and current justice system cooperator, he was facing "25 years of very hard time" in prison;
 - f) the RCMP paid significant monies to Person Y for his work as an agent, including over \$475,000 plus an ongoing payment for incidental and canteen expenses in jail, as well as his legal expenses of \$472,627. However, the trial judge did not find these payments to influence or shape Person Y's evidence in favour of the Crown because: (i) none of it was paid as an incentive to tell police about his involvement in the murders; (ii) one must consider the benefits comparatively, as Person Y acknowledged earning substantial sums as a criminal in the drug business; and (iii) it was unlikely the money constituted a substantial benefit when serving 25 years to life of hard time;
 - g) during his nearly ten days under cross-examination, Person Y did not attempt to minimize his past criminal activities or his role in the conspiracy to kill Mr. Lal;

- h) when uncertain about aspects of his evidence, Person Y declined to implicate the appellants;
- i) Person Y had no motive to falsify his evidence; and
- j) independent evidence corroborated Person Y's evidence in many respects.

[25] Of the many factors considered by the trial judge in assessing Person Y's credibility, the appellants on these applications focus on her reliance on his evidence that he faced tougher prison conditions as a result of cooperating with police than he otherwise would have as a gangster.

[26] For example, dealing with the defence challenge that Person Y had a profit motive to testify, the trial judge observed at para. 477 of her reasons that the money he received was not likely to be seen as a substantial benefit when serving 25 years to life of hard time:

[477] While unquestionably a very significant total sum, whether these financial benefits would influence or shape Person Y's evidence in favour of the Crown must be considered in context. First, none of it was paid to him as an incentive to tell the police about his involvement in the murders. Much of the payment was for his work as a police agent following his own decision to cooperate. Second, Person Y acknowledged earning substantial sums as a criminal in the drug business so the benefits must be considered comparatively. Third, and most importantly, it is unlikely that even the amount of money Person Y received can be considered a substantial benefit when serving 25 years to life of hard time. When it was put to Person Y in cross-examination that his cooperation was motivated at least in part by profit, his response was as follows:

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 sentenced 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 sentenced 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.

[Transcript, March 27, 2014, p. 28]

[Emphasis added.]

[27] As set out above, the trial judge took into consideration Person Y's evidence that he would, due to his cooperation with police, face a worse experience in prison than the typical gangster who is sentenced for murder, adding at para. 479 of her reasons:

[479] Person Y had no motive to falsify his evidence. He freely acknowledged his disdain for Mr. Johnston as a person, but he had nothing to gain by implicating either accused. Counsel for Mr. Haevischer observed in his final submissions that Person Y did not appear to have a bias in favour of the Crown's case; and that if he had any bias, it was against his former boss, Mr. Bacon. It was suggested to Person Y in cross-examination that his cooperation

was driven by his hatred for Mr. Bacon, and that the accused were simply "collateral damage" in his desire to seek revenge against Mr. Bacon. Person Y's response put that suggestion in perspective:

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.

[Transcript, April 1, 2014, pp. 60-61]

[Emphasis added.]

[28] Through disclosure made post-trial, the appellants learned that Person Y was enrolled in the WPP [6 words redacted] after completing his testimony.

[29] The appellants say it must have been known before Person Y testified that his enrollment in the WPP was likely to occur and the Crown should have disclosed this information as it would have allowed them the opportunity to impeach Person Y.

The WPP Records Sought in Relation to Person Y

[30] The appellants submit they do not seek Person Y's [15 words redacted] location within the CSC, but they do seek the following materials:

- a. All information relating to the topic of [Person Y] seeking and being afforded entry into the WPP.

- b. All communications, documents, notes, agreements and information relating to [Person Y] and the WPP, including determinations as to his inadmissibility, and his admission and subsequent exit from the WPP, and including negotiations over these matters.
 - c. All information and materials arising under the [WPP Act], including [Person Y's] personal history, all application(s), recommendations, assessments and analysis of the s. 7 factors, protection agreements, and all determinations of admission and inadmissibility and removal.
 - d. Specific information as to the dates, sequence, awareness and involvement of RCMP and Crown counsel, in relation to [Person Y] entering the WPP.
 - e. All information describing changes and benefits arising for [Person Y] as a result of being admitted to the WPP, including but not restricted to financial and personal benefits, and changes to his conditions of confinement.
- [31] Without conceding relevance, the Crown submits that it has now disclosed to the appellants, as part of the response to these applications, the information in its possession that relates to the topic of Person Y seeking and being afforded entry into the WPP, redacted for privilege. As mentioned, the appellants seek to challenge the assertions of privilege.
- [32] Further, the Crown does not concede that other WPP Records are in its possession. The Crown asserts that WPP Records are held by federal government authorities, whether the RCMP or the CSC, and are "third party records".

The Two Disclosure Regimes: First Party or Third Party Records

- [33] The parties agree there are somewhat different regimes governing the Crown's obligation to disclose documents, depending on whether the WPP Records are characterized as "first party records" or "third party records".
- [34] First party records are governed by the disclosure regime enunciated in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 [Stinchcombe]. Third party records are governed by the disclosure regime enunciated in *R. v. O'Connor*, [1995] 4 S.C.R. 411 [O'Connor].
- [35] The Supreme Court of Canada recently summarized the differences between the two disclosure regimes in *R. v. Gubbins*, 2018 SCC 44 [Gubbins].
- [36] In short, Gubbins identified the principles applicable to production of first party records under the Stinchcombe regime as follows (at paras. 18-24):
- a) the Crown has a duty upon request by an accused to disclose all relevant non-privileged information in its possession or control, whether inculpatory or exculpatory. The purpose is to protect the accused's Charter right to full answer and defence;

- b) relevance is viewed from the perspective of whether there is a reasonable possibility the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence;
 - c) the Crown's duty to disclose is ongoing;
 - d) where the Crown refuses to produce, the defence can request a review. The burden is then on the Crown to show that the information is either "clearly irrelevant" or privileged;
 - e) the Crown's duty to disclose does not extend to all Crown entities, but only to the prosecuting Crown. Records in the hands of other Crown entities, including police, are considered third party records. This is subject to the qualifications that:
 - i) the Crown has a duty to make reasonable inquiries when put on notice that other Crown entities have material that is potentially relevant. This obligation was set out in more detail in *R. v. McNeil*, 2009 SCC 3 [McNeil];
 - ii) police have a duty to disclose to the Crown all material pertaining to the investigation of the accused, known as the "fruits of the investigation". Police investigative files, as opposed to operational records or background information, will be considered first party/Stinchcombe disclosure; and
 - iii) police have a corresponding duty to disclose to the Crown other information beyond the "fruits of the investigation" where it is "obviously relevant" to the accused's case, which also will be considered first party/Stinchcombe disclosure. The phrase "obviously relevant" does not indicate a new standard or degree of relevance: it relates to the accused's ability to meet the Crown's case, raise a defence or otherwise conduct the defence. An example would be records that relate to convictions for perjury for Crown witnesses.
- [37] The Supreme Court of Canada in *Gubbins* also described the O'Connor disclosure regime for third party records. These are records that are not first party records as described above, that is, not part of the prosecuting Crown's file, the police investigative file or records that are "obviously relevant".
- [38] The Court in *Gubbins* discussed third party records at paras. 25-28:
- a) the accused must bring an application to obtain disclosure of third party records;
 - b) the burden for production is on the accused to show at the first stage that the records are "likely relevant";
 - c) records will be likely relevant where "there is a reasonable possibility that the information is logically probative to an issue at trial or to the competence of a witness to testify"; or where "there is a reasonable possibility that [the records] may assist the accused in the exercise of the right to make full answer and defence";

- d) the likely relevant burden on an accused is significant, but not onerous. It is a lower threshold than true relevance; and
- e) if the records are likely relevant, there will be a second stage where the court will assess the actual or "true relevance" of the records sought and weigh competing interests to determine whether or not to order production to the accused.

[39] As summarized in Gubbins at para. 29:

[29] To summarize, two different regimes govern disclosure in criminal cases. First party disclosure, as set out in Stinchcombe and supplemented by the duties on the Crown and the investigating police in McNeil, requires disclosure of all relevant information upon request. If the Crown refuses disclosure, it bears the burden to show that the information is "clearly irrelevant". Third party disclosure per O'Connor requires an application to the court for third party disclosure (where the records sought do not fall under first party disclosure) for which the defence bears the burden to show that the record is "likely relevant". In both instances, the purpose is "[to protect] an accused person's right to make full answer and defence, while at the same time recognizing the need to place limits on disclosure when required": *World Bank Group v. Wallace*, 2016 SCC 15, [2016] 1 S.C.R. 207, at para. 115. Such limits include avoiding fishing expeditions.

[Emphasis added.]

Relevance and Disclosure of New Records on Appeal

- [40] The above analysis illustrates that two different processes govern disclosure and production of records in criminal cases, depending on whether the records are first party records or third party records. Most importantly, the onus and mechanics of production differ.
- [41] Where the records sought are first party records, the Crown has a duty to disclose them upon request. The Crown duty means that when considering production issues, the Crown must err on the side of over-disclosure of documents. This is why it can only withhold disclosure of documents that are "clearly irrelevant" or privileged.
- [42] On the other hand, where the records sought are third party records, the party that holds the records is not under a duty to produce them upon request. Rather, the burden for production is on the accused to persuade the court that a production order should be made because the third party records are "likely relevant". In this regard, the court serves a gatekeeper role to ensure the defence is not engaging in "speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming" requests for production: O'Connor at para 24, citing *R. v. Chaplin*, [1995] 1 S.C.R. 727 at 744.

- [43] Whether a document is relevant or not is a judgment call taking into consideration the context of the particular case. As described by Justice Watt in *R. v. Jackson*, 2015 ONCA 832, it is "a matter of everyday experience and common sense" (at para. 120). Further, at para. 122:
- [122] Relevance is also contextual. It is assessed in the context of the entire case and the positions of counsel. Relevance demands a determination of whether, as a matter of human experience and logic, the existence of a particular fact, directly or indirectly, makes the existence or non-existence of another fact more probable than it would be otherwise: *R. v. Cloutier*, [1979] 2 S.C.R. 709, at p. 731.
- [44] It is because of the Crown duty that, sometimes, the Crown will produce documents that have a remote relationship to the issues in the case. These same types of documents might be considered by a judge, on application by the accused for production from a third party, to not meet the test for relevance. In other words, the process for first party disclosure by the Crown is quite liberal, in keeping with the Crown duty, whereas the process for production from a third party is more stringent.
- [45] While there is a difference in the process of disclosure and production, I do not consider that there is much to be made of differences in the language used in the evolving case law to describe the scope or concept of relevance in relation to first party records as compared to third party records. One can illustrate this point by putting side-by-side the language describing the test of relevance as summarized in *Gubbins* (at paras. 18, 26-27):
- a) for first party records, the purpose of disclosure is to protect the accused's Charter right to full answer and defence, which will be impaired where there is a "reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence"; and
 - b) for third party records, information will be "likely relevant" where there is "a reasonable possibility that the information is logically probative to an issue at trial or to the competence of a witness to testify" or "may assist the accused in the exercise of the right to make full answer and defence".
- [46] The above summary of the concept of relevance in relation to disclosure or production of information is stated in the context of a trial proceeding. In other words, the concept of relevance of documents during the trial proceeding is the same whether it is subject to a Crown duty to disclose or to a court order for production from a third party: is there a reasonable possibility the information might assist the accused in the right to make full answer and defence, whether because it is logically probative to an issue at trial or to the competence of a witness to testify, or because it could have been used in meeting the Crown case, advancing a defence or otherwise making a decision which could have affected the conduct of the defence.

- [47] The law is clear that the disclosure regimes for first party records and third party records survive trial and continue during the appeal process: McNeil.
- [48] The parties disagree as to what extent the concept of relevance in these regimes is modified on appeal. The parties are at odds on the interpretation of the Supreme Court of Canada's judgment in McNeil, due in part to the fact it did not mention an earlier judgment of the Ontario Court of Appeal in *R. v. Trotta* (2004), 23 C.R. (6th) 261 (Ont. C.A.) [Trotta].
- [49] The Ontario Court of Appeal in Trotta dealt with an application for production of documents pending appeals from conviction. The parents of an infant were convicted of various offences related to the child's death. In part, their convictions were based on the evidence of an expert witness, Dr. Smith. Dr. Smith's expertise and conduct in a number of criminal investigations were subsequently called into question and Crown counsel and the coroner undertook reviews of his work. The appellants sought production of, amongst other things, the material associated with these reviews, but abandoned their request for documents that might be subject to third party privacy claims unless those claims were waived.
- [50] The court in Trotta considered the issues under the Stinchcombe first party disclosure regime. It found that the analytical framework of the Crown's first party disclosure obligation on appeal differs from that at trial. Necessitating this different framework is the fact that a convicted accused is no longer presumed innocent and has exhausted his or her right to make full answer and defence. Instead, the Crown's disclosure obligation on appeal must consider an appellant's rights of appeal, including the right to adduce fresh evidence (at paras. 23-24).
- [51] In Trotta, the court held that the Crown's first party disclosure obligation on appeal "must extend to any information in the possession of the Crown that there is a reasonable possibility may assist the accused in the prosecution of his or her appeal", assuming there exists no privilege claim or third party claim that could limit the appellant's right to disclosure (at para. 25 and footnote 4; emphasis added).
- [52] In McNeil, the Supreme Court of Canada dealt with an O'Connor motion for production of police disciplinary and criminal investigation records concerning an arresting police officer's alleged drug-related misconduct. That police officer was the main police witness for the Crown in prosecuting the accused for drug-related offences. After conviction, but before sentencing, the accused learned something of the investigation into the police officer and brought an application before the Ontario Court of Appeal for production of all documents relating to the officer's misconduct, claiming it would support a fresh evidence application on appeal from conviction. The Ontario Court of Appeal, in part, applied Trotta in analyzing the relevancy threshold for production of documents on appeal and ordered production of the criminal investigation files related to the charges against the officer, subject to redactions and privilege claims. In so doing, the court directed the prosecuting Crown to determine whether the documents were in fact relevant to the appeal and, if so, to make disclosure to the accused: *R. v. McNeil* (2006), 43 C.R. (6th) 370 (Ont. C.A.).

- [53] By the time the case reached the Supreme Court of Canada, the issue in McNeil regarding production was moot. Nevertheless, the Supreme Court of Canada in McNeil decided to deal with the issue concerning the production of the records of police misconduct.
- [54] The Court in McNeil considered that records of police misconduct may in some instances be first party records, and in others they will be third party records. These types of records will be first party records where the police misconduct is either related to the investigation or could reasonably impact on the case against the accused. As first party records, the Crown will have an obligation to inquire of the police and the police will have an obligation to disclose them to the Crown, which in turn will be obliged to disclose them to the defence. If not within this limited category, the records will be third party records, and the O'Connor regime governs. In that case, the accused must show the documents would be likely relevant at the first stage of production in order to obtain an order that they be produced to the court for review.
- [55] The Court in McNeil described the Stinchcombe first party disclosure obligation as follows (at para. 17):
- [17] The Crown's obligation to disclose all relevant information in its possession relating to the investigation against an accused is well established. The duty is triggered upon request and does not require an application to the court. Stinchcombe made clear that relevant information in the first party production context includes not only information related to those matters the Crown intends to adduce in evidence against the accused, but also any information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence (pp. 343-44). The Crown's obligation survives the trial and, in the appellate context, the scope of relevant information therefore includes any information in respect of which there is a reasonable possibility that it may assist the appellant in prosecuting an appeal.
- [Emphasis added.]
- [56] Mr. Haevischer's position is that at para. 17 of McNeil, set out above, the Court's reference to the Stinchcombe-based Crown disclosure obligation surviving the trial means that the scope of the Crown's pre-trial disclosure obligation continues on appeal. That is, that the Crown on appeal has a continuing obligation to disclose all documents that meet the test of pre-trial relevance, which is anchored in the right to make full answer and defence. On Mr. Haevischer's reading, McNeil further holds in the above para. 17 that, during the appeal process, the Stinchcombe obligation expands to also "include" documents that may assist an appellant in prosecuting an appeal.
- [57] The McNeil description of the scope of the Crown obligation to disclose documents during an appeal proceeding, submits Mr. Haevischer, is a broader Crown disclosure obligation than described in Trotta.
- [58] I do not read McNeil in the way Mr. Haevischer suggests.

- [59] I note that para. 17 of McNeil is the first paragraph of a section of the Supreme Court of Canada's reasons explaining the Crown's Stinchcombe-based duty to disclose the fruits of the investigation. The paragraph explains the obligation exists in the trial context but that it does not end after trial; rather, the obligation to disclose continues in the appeal context. I do not read that paragraph as an attempt to fully articulate the test of relevance for Crown disclosure obligations during the appeal process; rather, it is an attempt to identify the continuing nature of the Crown's duty to disclose, which does not end on conviction.
- [60] This continuing duty to disclose is consistent with the broad duty on the Crown as a faithful officer of the court, entrusted with seeing that justice is served: O'Connor at para. 102.
- [61] In my view, relevance must be viewed in the context of the possible use of information contained in the records in a particular proceeding. The context for the possible use of the records at trial relates to the accused's right to make full answer and defence. That context informs broad disclosure on the part of the Crown. On appeal, the context is different and focuses on the accused's appeal rights.
- [62] I take support in this view that relevance should be defined by the possible use to which the information could be put, not only from McNeil, but also from *World Bank Group v. Wallace*, 2016 SCC 15 [World Bank Group].
- [63] The issue in *World Bank Group* concerned a defence application for production of documents under the O'Connor framework, in the context of an application to challenge a wiretap authorization pursuant to *R. v. Garofoli*, [1990] 2 S.C.R. 1421. The Supreme Court of Canada held that the analysis of relevance for production purposes had to be probative of the issues on a Garofoli application, and, as such, would typically be narrower than an O'Connor application. The former dealt with a challenge to the wiretap authorization, the latter with an accused person's right to make full answer and defence. Thus, the Supreme Court of Canada held that, in order to obtain third party production in the Garofoli context, an accused must show "a reasonable likelihood that the records sought will be of probative value to the issues on the application", that is, it must be reasonably likely that the records would be "useful". This was a narrower scope than the issues relevant to the case as a whole (at paras. 132-134).
- [64] The leading authorities attempt to put some reasonable parameters around the obligations of disclosure. They do so to ensure that the justice system does not become disproportionately overburdened in dealing with disclosure and grind to a halt or suffer delay in addressing more important issues. This is an important policy reason for subjecting applications for production of records to a relevance test, as noted repeatedly in the authorities, including Gubbins at para. 26, citing O'Connor; McNeil at paras. 28-29; and *World Bank Group* at paras. 130, 133.

- [65] For these reasons, the determination of what documents are relevant for production purposes in an appeal proceeding should take into account the context that appeals are generally brought based on the trial record and there is limited scope for the introduction of fresh or new evidence.
- [66] As stated in the last sentence of para. 17 of McNeil, the information to be disclosed by the Crown on appeal, consistent with its continuing duty to disclose, will be "any information in respect of which there is a reasonable possibility that it may assist the appellant in prosecuting an appeal" (emphasis added). This is similar to the test expressed in Trotta.
- [67] In McNeil, the Court described the post-trial O'Connor third-party production obligation in the context of appeal rights: it was incumbent on the accused to show that the targeted documents were likely relevant to his proposed application to introduce fresh evidence on his appeal from conviction (at para. 7). I pause to note that this was based on the accused's claim that he required the material to assist him in making a fresh evidence application on appeal.
- [68] In Trotta, the court refined the relevance question on that appeal as a two-step test. First, the applicant needed to show a reasonable possibility the material sought could assist on the application to adduce fresh evidence on appeal. Second, the applicant needed to demonstrate a reasonable possibility that the evidence to which the request for production was linked might be received as fresh evidence on appeal (at para. 25). In this regard, the court relied on the test for fresh evidence in *R. v. Palmer*, [1980] 1 S.C.R. 759 [Palmer].
- [69] In *Palmer*, Justice McIntyre set out the relevant criteria to be considered on an application to adduce fresh evidence on appeal as follows (at 775):
- 1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: [citation omitted].
 - 2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
 - 3) The evidence must be credible in the sense that it is reasonably capable of belief, and
 - 4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[Emphasis added.]

- [70] In Trotta, the court did not order disclosure because it was not satisfied that, when considered with the rest of the evidence adduced at trial, the material sought could possibly have affected the verdict (at para. 38). In other words, the material did not satisfy the fourth prong of the *Palmer* test.

- [71] Counsel for Mr. Haevischer points out that there is more than one basis for admitting fresh evidence on appeal. Where the ground of appeal is based on an allegation that the Crown breached its duty of disclosure, the test in *R. v. Dixon*, [1998] 1 S.C.R. 244 [Dixon] applies.
- [72] The Dixon test asks whether an accused has established a breach of his Stinchcombe-based right of Crown disclosure, and, if so, whether there is a "reasonable possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial process" (at paras. 33-34).
- [73] In *R. v. Taillefer*; *R. v. Duguay*, 2003 SCC 70 [Taillefer], the Court held that the Dixon test is less stringent than the Palmer test and applies in cases involving a breach of the Crown duty to disclose where the argument is that the non-disclosure affected either the outcome or overall trial fairness or, in other words, when the validity of the trial itself is in issue (at paras. 76-78).
- [74] As further explained in Taillefer, relying on Dixon, the reasonable possibility of affecting the overall fairness of the trial is based on reasonably possible uses of the non-disclosed evidence or reasonably possible avenues of investigation that were closed to the accused as a result of non-disclosure (at para. 84):
- [84] The reasonable possibility of affecting the overall fairness of the trial "must be based on reasonably possible uses of the non-disclosed evidence or reasonably possible avenues of investigation that were closed to the accused as a result of the non-disclosure" (Dixon, *supra*, at para. 34 (emphasis in original)). Here again, the appellate court must not assess the possible uses of the fresh evidence based on an item-by-item analysis of the probative value of the evidence. It must ascertain whether the failure to disclose deprived the accused of certain evidential or investigative resources. That would be the case, for example, if the undisclosed statement of a witness could reasonably have been used to impeach the credibility of a prosecution witness. The conclusion would necessarily be the same if the prosecution fails to disclose to the defence that there is a witness who could have led to the timely discovery of other witnesses who were useful to the defence.
- [Emphasis in original.]
- [75] In Dixon, the Court also emphasized that, when considering the overall fairness of the trial process, the due diligence of the defence in pursuing disclosure from the Crown also should be considered (at paras. 37-38).
- [76] The Ontario Court of Appeal in *R. v. Singh*, 2010 ONCA 11 [Singh] considered an application for disclosure on appeal where the appellant argued that it would assist in an application to produce fresh evidence on appeal relating to the integrity of the trial process. The appellant sought disclosure of records related to the interpretation services provided at his trial specifically, and generally with respect to systemic issues involving interpreters.

- [77] The court in Singh endorsed the proposition in Trotta that the Crown's disclosure obligation on appeal is different than at trial, and is defined by the appellate context (at paras. 36-37).
- [78] In Singh, the court noted that the proposed use of the evidence on appeal was different than in Trotta. In so doing, the court acknowledged that the approach in Trotta, of considering whether there is a reasonable possibility that the evidence to which the request for production is linked might be received as fresh evidence on appeal (under the Palmer test), would not strictly apply in a case where the proposed fresh evidence relates to the integrity of the trial process (at para. 39). Nevertheless, the court held that the aim of the second prong of the Trotta test is that the appellant must show "a reasonable possibility that a production order will assist in developing a successful ground of appeal" (at para. 40). The court applied this more general test, concluding there was no air of reality to the appellant's claim that there were interpretation problems in his case, something he should have been able to show.
- [79] I accept the distinction made by counsel for Mr. Haevischer between fresh evidence adduced pursuant to the Palmer test and fresh evidence adduced based on Dixon. The latter case differs in that the validity of the trial itself is in issue; the applicant seeks disclosure to illustrate that the Crown breached its duty to disclose and that there is a reasonable possibility the non-disclosure affected either the outcome at trial or the fairness of the trial process.
- [80] In summary, I agree with the analysis in Trotta and Singh which I read as consistent with McNeil. Leaving aside the onus of disclosure or production, I conclude that, on appeal, the relevance test for disclosure or production of records is generally whether there is a reasonable possibility the records might assist the appellant in prosecuting an appeal. This requires consideration of the possible uses of the newly sought information to support grounds of appeal, for example, whether the information might support a fresh evidence application under either the Palmer test or the Dixon test.
- [81] In the present case, the appellants argue there is a reasonable possibility the WPP Records would be of assistance in an application to admit fresh evidence on appeal under the Dixon test. Based on the appellants' submissions, it appears that the fresh evidence they envision would arise from the WPP Records themselves. Given that the Dixon test is the less stringent test for admissibility of fresh evidence on appeal, that is the framework I will consider.
- [82] To determine the threshold relevance of the WPP Records, I therefore consider the broader question to be whether there is a reasonable possibility that the disclosure will assist an application to adduce fresh evidence on appeal based on the Dixon test. More precisely, the questions are whether there is a reasonable possibility the records will assist the appellants' arguments that: first, the Crown breached its duty to disclose at trial; and second, there is a reasonable possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial process.

- [83] I recognize that it is somewhat awkward to state two degrees of "reasonable possibility" in relation to the second question. Nevertheless, the analysis of this second step has to keep in mind that the test of threshold relevance for disclosure of documents on appeal should be a lower threshold than the test on appeal for actual admission of the fresh evidence. The parties are not seeking a ruling on the admissibility of the fresh evidence at this stage of the proceeding.
- [84] I have also kept in mind, for the purposes of the present applications, that the appellants have not received complete, unredacted copies of the WPP Records and are consequently at a disadvantage in making submissions as to the potential threshold relevance of the information.

Analysis of the Threshold Relevance of the WPP Records

- [85] To begin with, I see no basis for concluding that post-trial management of Person Y within the corrections system after he was admitted into the WPP could be relevant in the prosecution of the appeal. I do not see a reasonable possibility that this could have affected Person Y's testimony or challenges to his credibility, nor could it have been disclosed prior to trial. In my view, the records relating to Person Y's WPP status and time in custody after he testified and following his acceptance into the WPP are irrelevant. The appellants' applications for these records must be dismissed.
- [86] I accept that Person Y's enrollment in the WPP [3 words redacted] after he completed his testimony is probative of the likelihood that there were discussions between Person Y and persons in authority regarding his pending or possible enrollment in the WPP, before he completed his testimony.
- [87] I consider that the real issue on the present applications has to do with production of records relating to Person Y's admission into the WPP in the time period leading up to and including Person Y's enrollment in the WPP on [3 words redacted]. I will direct the rest of my analysis to this category of records.
- [88] I will address the first question, whether there is a reasonable possibility that the disclosure of the WPP Records will assist the appellants in an argument that the Crown breached its duty to disclose at trial, by examining whether there is a possible argument that the records could disclose a benefit or inducement to Person Y.
- [89] I will next address the possible uses to which the defence could have put the information had they known it. I will consider this in the context of whether there is a reasonable possibility that the non-disclosure of the WPP Records affected the outcome at trial or the overall fairness of the trial process.

Duty to Disclose at Trial: Could the WPP Records Reveal an Undisclosed Benefit?

- [90] Management of Crown witnesses by police investigators, including the promise of any benefits or special treatment pre-trial, can bear on the witnesses' motives and states of mind during trial testimony, and whether those inducements influenced them to shape their testimony: Palmer at para. 32. Benefits received by a witness may provide fodder for the defence to challenge the independence, reliability and credibility of the witness.
- [91] Materials relating to possible witness benefits or inducements are relevant and the Crown must clearly disclose them as first party records during the trial proceeding. The Crown readily concedes this.
- [92] The Crown submits, without conceding relevance, that it has now produced all of the records in its possession addressing the topic of Person Y seeking, being offered or discussing entrance into the WPP up to the time he was admitted into the WPP, subject to redactions for privilege. The privilege asserted is both common law public interest privilege based on the safety of witnesses and statutory privilege based on the WPP Act.
- [93] The Crown submits that Person Y's entrance into the WPP did not confer any additional or new benefit on Person Y that had not already been disclosed to the defence and could not have been used to challenge Person Y's credibility.
- [94] The Crown submits that the details regarding how the WPP works are privileged. Thus, it cannot disclose why it has such confidence that the records are clearly irrelevant and do not disclose a benefit. However, as noted above, the Crown has now provided this explanation to the appellants: Person Y was admitted into the WPP solely for [2 words redacted] the CSC, for his safety and protection.
- [95] In order to understand the Crown's position, it is necessary to have a fuller understanding of the disclosure it made before trial.
- [96] Throughout the pre-trial disclosure, the Crown submits it disclosed all monetary and non-monetary benefits received by Person Y. These included not only substantial sums paid to Person Y, but also written promises to him by the RCMP to work with the CSC to ensure that he was transferred to a CSC facility capable of providing a safe and secure environment where he would be afforded a similar level of treatment and privileges provided to other inmates. The disclosure also 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 due to his cooperation.
- [97] The Crown thus asserts that it disclosed non-monetary benefits in the form of commitments, agreements and efforts by the RCMP to assist Person Y in being housed in custody in conditions where he would be kept safe and also would receive similar treatment and privileges as that provided to other inmates.
- [98] The Crown also made it clear to the defence on many occasions over the course of pre-trial disclosure, by way of written notice, of the basis for it withholding, as irrelevant, information relating to: witness safety, including the locations used in the protection of

witnesses; dealings with the CSC or other information that would identify the institution of incarceration of a protected witness; strategies employed by the police to protect the witness; movement of incarcerated witnesses; and "administrative information" in witness protection files, described as follows:

Administrative Information:

Information in witness protection files dealing with the administrative aspects of protecting a witness. The documents (or portions thereof) are of little or no relevance as they do not bear on bad character or any benefits obtained by the witness. Their disclosure, however, would undermine the security of the Witness Protection Program.

[99] The Crown also explained to the defence, in writing, that not only did it consider the above information related to witness safety and incarceration details irrelevant, it was also constrained by privilege from producing relevant information regarding witnesses protected under the WPP:

The Crown's ability to make disclosure of relevant information is constrained by statute.

The Witness Protection Program Act prohibits disclosure of the location or name change of a Protectee. It also prohibits disclosure of any techniques or locations used in the protection of Protectees. The redaction code V02-W Witness Protection is used when redacting this information.

[100] The Crown considered Person Y's enrollment in the WPP to be clearly irrelevant but, even if relevant, it was a privileged administrative matter related to his safety while in custody.

[101] Also part of the context is that the Crown disclosed to the defence before trial that Person Y had been moved around within the CSC from time to time. The Crown also disclosed that Person Y had been moved from the custody of the CSC to RCMP custody at times in advance of trial, during trial preparation and during the trial itself. It could not have been unexpected by the defence that there would be some changes in Person Y's custodial arrangements after testifying, because he would no longer be involved in trial preparation.

[102] Further, the Crown disclosed that Person Y met with witness protection officers, and that some parts of the records regarding witness protection were redacted based on assertions of privilege. The asserted privilege was coded to indicate that the redactions were of information that could not be disclosed under the WPP Act, or because disclosure would create a risk to the safety of a protected Crown witness or protected individual.

[103] The Crown's position is that, on the facts of this case, Person Y's entrance into the WPP was not the key fact. Instead, the Crown submits, the key fact was that Person Y demanded and the RCMP promised him to do what they could so that his conditions of incarceration would be such that he would be kept safe and be afforded similar treatment and privileges as other inmates. The Crown fully disclosed this deal.

- [104] Despite this nuanced position, I consider it possible that Person Y viewed enrollment in the WPP as a benefit, even if the Crown did not. As such, and without determining the issue beyond this first stage of threshold relevance, and subject to the Crown's assertions of privilege, I conclude that the WPP Records dealing with promises made to Person Y about the WPP, and any of his demands regarding the same, are first party records. Subject to claims of privilege, there is at least a reasonable possibility that disclosure of these records will assist the appellants in an argument on appeal that the earlier failure to disclose this information was in breach of the Crown duty to disclose all benefits and inducements offered to the witness. For ease of reference, I will call these the "First Party WPP Records".
- [105] This conclusion is only the first step in the necessary analysis. I have engaged in a somewhat lengthy review of the context, above, as it is also relevant to the second step of the inquiry. The second step of the inquiry into threshold relevance for the purposes of these applications is whether there is a reasonable possibility the First Party WPP Records will assist an appellant argument that there is a reasonable possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial process.

Possible Use of the First Party WPP Records by the Defence: Affecting the Outcome or Fairness of the Trial

- [106] The appellants' arguments focused on the practical use they might have made of the records at trial, had they been disclosed. They argue that had they known that Person Y was about to be admitted into the WPP, they could have better demonstrated that Person Y was not credible in response to questions about his motives for testifying. The appellants suggest that the records may illustrate that Person Y perjured himself when he talked about his expectations regarding his future conditions of imprisonment.
- [107] One of the key factual premises of the appellants' position seems to be based on their allegation that Person Y was untruthful when he testified about the implications of his cooperation with police, namely, that it would mean he would be in a "hole" or suffer isolating conditions in custody. The appellants suggest that, as Person Y knew he was going into the WPP, this was false evidence. At the very least the appellants suggest that, had the defence known that Person Y was accepted into the WPP, they could have cross-examined his assertions and undermined his credibility.
- [108] These arguments need to be considered in a broader context than simply parsing some of Person Y's words in his testimony.
- [109] The future conditions Person Y faced in custody did not directly relate to the investigation or evidence against the appellants. It strictly related to Person Y's credibility.
- [110] When Person Y testified, the appellants knew of a number of benefits that Person Y received as a result of cooperating with the police. They also knew that the RCMP promised to work with the CSC to provide Person Y with the conditions of custody he demanded: to be kept safe and be afforded similar treatment and privileges as other inmates.

- [111] In considering the overall context of Person Y's evidence, one must keep in mind this is not a case where a witness cooperated with police only after being promised entry into the WPP. Person Y's conduct in coming forward to assist the police pre-dated his pleading guilty to other charges and was prior to any protection or custodial issues.
- [112] Further, I consider that it must have been obvious at the time he testified, without the need for further evidence, that Person Y used colourful language when he said he faced being in a "hole" for the rest of his life. To establish he was not going to be in a "hole" would not establish that he perjured himself or attempted to mislead the court.
- [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".
- [114] This Court received evidence and can take judicial notice of the fact that inmates who cooperate as witnesses for the Crown, especially as against the interests of gang members, face heightened security threats while in jail. While measures may be taken to protect the identity and security of such inmates, whether within the context of the WPP working together with the CSC or otherwise, these measures are not iron-clad and there is no guarantee that another inmate will not recognize a protected inmate or that disclosure of the true identity or location of a cooperating witness will not leak out, or that segregation will not be necessary or become necessary to protect a cooperating inmate. Further, it is clear that protective measures will need to involve keeping the cooperating gangster safe and apart from other members of the same gang. The protective measures also have to keep employees of the CSC safe.
- [115] It is also important to keep in mind that, in his testimony, Person Y was reflecting only a belief or expectation about his future prison conditions. It would be very hard to impeach such an expectation, especially where, as here, it had to be in part based on his actual experience as to what his life as a prisoner had turned out to be like as a result of cooperating with the police, despite the assurances he had received. By the time he testified, he had experienced four years of custody.
- [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.

[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.

[119] I note that the sought-after information is less significant and even more peripheral than the evidence considered insignificant on appeal in *Dixon*, which consisted of undisclosed witness statements about the material facts in issue, some of which contradicted Crown witnesses at trial (at paras. 45-46). This is in contrast to the large body of undisclosed evidence in *Taillefer*, which included prior inconsistent statements of witnesses that could have been used to impeach their credibility at trial (at para. 62). To the same effect, see *R. v. Creamer* (1995), 97 C.C.C. (3d) 108 (B.C.C.A.).

- [120] The facts of this case are quite unlike the case of *R. v. Ahluwalia* (2000), 149 C.C.C. (3d) 193 (Ont. C.A.) [Ahluwalia]. In *Ahluwalia*, the court admitted fresh evidence on appeal that a key Crown witness, a police agent, lied in the witness stand about his criminal record. The police agent was key to disproving the defence of entrapment. An FBI agent who was handling this police agent and who was aware of the full criminal record was in the courtroom at the time of the false testimony. The court concluded that the police agent committed perjury at trial, and that the fresh evidence raised a reasonable possibility of state complicity in that perjury. The court ordered a new entrapment hearing.
- [121] A similar result to that in *Ahluwalia* occurred in *R. v. Bowering*, 2008 BCCA 347, in which post-trial it was revealed that the complainant had been untruthful about her criminal record. This Court ordered a new trial so that the trier of fact could fully consider the impact of the fresh evidence.
- [122] As mentioned by the Supreme Court of Canada in the Crown civil liability context, not all failures to disclose are equivalent: *Henry v. British Columbia (Attorney General)*, 2015 SCC 24 at para. 69. These failures can range from intentional suppression of crucial evidence to good faith errors in judgment in relation to tangential information of marginal value: *Dixon* at para. 23.
- [123] This is not a case where a key piece of evidence relating to the credibility of a key Crown witness was withheld from the defence during the trial. The non-disclosure of information concerning Person Y and the WPP in the context of what was disclosed is at best minor and tangential.
- [124] It bears repeating: where breach of the Crown duty to disclose is alleged on appeal, the *Dixon* test requires an appellant to show a reasonable possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial process.
- [125] In this case, even if the First Party WPP Records sought are not privileged (which is not yet determined), I see no reasonable possibility that information in the records will assist the appellants in a fresh evidence application on appeal. Even considering that what the appellants are seeking at present is simply disclosure, not a ruling on a fresh evidence application, I see no reasonable possibility that the records will give rise to a viable argument that the information could have affected the outcome of trial or fairness of trial.
- [126] Therefore, I conclude, for appeal purposes, that there is no obligation on the Crown to produce the First Party WPP Records.

Canada's Records

- [127] I will consider Canada's records as separate from the WPP Records I described above as the First Party WPP Records.

- [128] Canada has explained that records relating to the WPP and Person Y arose after Person Y became a cooperating witness and was convicted, and relate solely to Person Y's safety and security within the CSC penitentiary system. The WPP is administered by the RCMP, but the information is kept separate from investigators. Thus, Canada submits that the records in its possession have nothing to do with the investigations of the appellants and are properly considered third party records.
- [129] The Crown submits that records relating to Person Y and the WPP that are in the possession of the RCMP administrators of the WPP are all third party records.
- [130] As is clear from my analysis above, I do 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.
- [131] I therefore do not consider that the Crown had an obligation to obtain additional records from Canada regarding Person Y and the WPP. In other words, the submissions and evidence on these applications do not persuade me that this was a case where additional records concerning the WPP held by other Crown entities were obviously relevant, requiring the Crown to inquire and "[bridge] the gap" between first party disclosure and third party production, as described in McNeil at paras. 47-51.
- [132] I conclude that, in the circumstances of this case, the records held by Canada regarding the WPP and Person Y are third party records. The appellants therefore have the burden of establishing that the information contained in the records is likely relevant.
- [133] The appellants have not met the test of demonstrating that records in the possession of Canada 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, are likely relevant to the appeal. For the same reasons as set out above, I cannot see any reasonable possibility that such records would support a ground of appeal.

Application for Other Records

- [134] I turn now to the application for disclosure of the OPP Documents and certain witness management records.
- [135] I will start with the OPP Documents. As mentioned, several of the police officers involved in the Surrey Six investigation are now subject to their own criminal investigation, conducted by the OPP.
- [136] The Crown submits that, over the course of almost five years, it has made multiple sets of disclosure arising from the OPP file.

- [137] Further, given the appellants' latest requests, the Crown made inquiries to the OPP regarding additional OPP documents, received the materials, and then concluded none are likely to assist in the conduct of the appeal.
- [138] The Crown submits that, having concluded none of the records are likely to assist in the conduct of the appeal, there is no first party disclosure obligation on its part. The Crown submits that the appellants bear the onus of establishing a reasonable possibility that the OPP Documents will assist them on this appeal.
- [139] In McNeil, the Court was clear that some records of police misconduct may be first party records of which there is a duty on the Crown to inquire and disclose; some may be third party records governed by the O'Connor regime. As held at para. 15 of McNeil:
- [15] As I will explain, records relating to findings of serious misconduct by police officers involved in the investigation against the accused properly fall within the scope of the "first party" disclosure package due to the Crown, where the police misconduct is either related to the investigation, or the finding of misconduct could reasonably impact on the case against the accused. The Crown, in turn, must provide disclosure to the accused in accordance with its obligations under Stinchcombe. Production of disciplinary records and criminal investigation files in the possession of the police that do not fall within the scope of this first party disclosure package is governed by the O'Connor regime for third party production.
- [140] The OPP investigation relates to allegations of serious police misconduct in connection with the Surrey Six investigation. In accordance with McNeil, this would put a duty on the Crown to inquire of the police and a duty on the police to produce to the Crown the records relating to this serious misconduct.
- [141] It does not appear contested that the Crown's Stinchcombe-based disclosure obligation does extend, subject to claims of privilege, to documents that provide evidence of police misconduct at the time of the officers' involvement in the Surrey Six investigation. The Crown has a duty to inquire and obtain these records as first party records. The OPP has a duty to provide them to the Crown. But I understand that all such records were produced during the trial proceeding.
- [142] The appellants brought applications post-trial for a stay of proceedings. They alleged, in part, abuse of process arising from, amongst other things, police misconduct. In part, they relied on the disclosure of the OPP Documents made by the Crown during the trial proceedings.
- [143] It is clear from the ruling of the trial judge refusing the stay application, indexed as 2014 BCSC 2172, that the police misconduct was disclosed by that date. For the purposes of that application, the trial judge accepted as true the facts alleged by the appellants (at para. 28).

- [144] The appellants say they were provided with disclosure which informed their stay application brought in October and November 2014, but say they received no further disclosure after January 27, 2016.
- [145] The Crown submits that what it has not produced are documents arising subsequent to the trial proceeding that are "clearly irrelevant" to the appeal.
- [146] The Crown submits that, from the extensive disclosure it has made, the appellants have not produced any information to support an argument that there is a line of inquiry that requires follow-up disclosure to support a ground of appeal.
- [147] I do not have a good sense of what it is that the appellants are anticipating exists in the OPP Documents, relating to the grounds of appeal, that the Crown has not already produced. I note that the Crown is not required to turn over all material received from the police regardless of relevance: McNeil at paras. 58-60.
- [148] Crown counsel advised during submissions that if there was new evidence relating to misconduct of the police involved in the Surrey Six investigation, they would consider it something that needed to be disclosed.
- [149] Should the appellants wish production of a broader category of records in the hands of the OPP, the process for making an O'Connor application for third party production is set out in McNeil at para. 27, albeit it should be modified here to take into account that relevance is to be considered in the context of the appeal stage of the proceeding. The appellants do not appear to have taken two required steps: serving a subpoena and the application on the OPP. This disposes of this broader aspect of the application.
- [150] In short, I am not satisfied on the material before me that the Crown has not already met its Stinchcombe-based disclosure obligation in respect of the OPP Documents.
- [151] As for the documents sought relating to witness management, the Crown submits that during the trial proceeding, it made all Stinchcombe-based disclosure of this category of information that was not clearly irrelevant or not privileged. The Crown has illustrated the wide disclosure it has already made, including disclosure of records of all benefits conferred on witnesses. The Crown submits that any continuing records in this regard are clearly irrelevant within the appeal context.
- [152] The appellants have not articulated any reasonable possibility that additional production of such records might inform a ground of appeal.
- [153] This aspect of the application is therefore dismissed.

Haevischer Application for a Direction that the Crown Answer Questions

- [154] In answer to the latter aspect of Mr. Haevischer's application, the Crown provided responses to the three questions. However, the Crown redacted some parts of its answers based on claims of irrelevance and, or privilege. For this reason, Mr. Haevischer relied on amicus curiae to advance submissions in camera as to whether or not the Crown answered the questions satisfactorily.
- [155] I am satisfied, based on the submissions of amicus and the Crown, that the Crown answered the questions satisfactorily and that no further directions are required.

Conclusion

- [156] I would dismiss the appellants' applications for further disclosure and production of the WPP Records.
- [157] I am satisfied there is no reasonable possibility that disclosure will assist the appellants' arguments on appeal that there is a reasonable possibility the non-disclosure of the First Party WPP Records affected the outcome at trial or the fairness of the trial process.
- [158] As for records held by Canada relating to Person Y and the WPP, for similar reasons I am not satisfied that there is a reasonable possibility that production will assist the appellants in prosecuting an appeal.
- [159] It follows from my conclusions above that it is unnecessary to engage a second stage process to determine whether all or parts of the WPP Records are privileged.
- [160] I would also dismiss the balance of the applications.

"The Honourable Madam Justice Griffin"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice Dickson"

APPENDIX A

STATEMENT CONCERNING APPLICATIONS IN THESE APPEALS AS READ BY A SINGLE JUDGE PRONOUNCING JUDGMENT PURSUANT TO S. 21(3) OF THE COURT OF APPEAL ACT

This is a statement that will be posted on the Court's website concerning applications in these appeals until it is replaced with reasons for judgment, that may be redacted, as now explained.

Matthew James Johnston and Cody Rae Haevischer are appellants from their convictions of six counts of first degree murder on October 2, 2014, in respect of the death of six persons in Surrey, British Columbia, on October 19, 2007. In advance of the hearing of their appeals, the appellants have applied for further disclosure, to support potential applications to adduce fresh and new evidence at the hearing of the appeals.

The applications are dismissed.

The reasons for judgment have been signed, but not yet released to the public. There is a sealing order in this Court. There are also publication bans in effect from the trial, matters of privilege, and issues that have prompted appointment of amicus curiae in order to provide an adversarial context for certain matters that must be heard in camera. These circumstances mean that the full reasons for judgment on these applications must be sealed until it is determined whether some redaction is required to respect the orders, bans and privilege issues. If redaction is required, only a redacted version may be released to the public.

The redaction process will be conducted involving those counsel that are engaged in the passages, if any, said to require redaction. The reasons for judgment, with redactions, if any, will be released in chambers and made available to the public as is our custom.

The Court acknowledges the cooperation of all counsel in handling the mechanics of the delivery of judgment in these applications.

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