

CANADA / JUDGMENT

R. v. Moazami

2020 BCCA 3

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 3 R. v. Moazami

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Moazami,

2020 BCCA 3

Date: 20200106

Dockets: CA43308; CA43857

Between:

Regina

Respondent

And

Reza Moazami

Appellant

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Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Butler

On appeal from: Orders of the Supreme Court of British Columbia, dated September 15, 2014 and February 11, 2016 (R. v. Moazami, 2014 BCSC 1727, Vancouver Docket 26108 and R. v. Moazami, 2016 BCSC 99, Vancouver Docket 26423).

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Place and Date of Hearing:

Vancouver, British Columbia

December 6, 2019

Place and Date of Judgment:

Vancouver, British Columbia

January 6, 2020

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Butler

Summary:

This is an application for the disclosure of a complete inventory of all materials relating to an investigation of a police officer who misconducted himself with some of the complainants and witnesses at two of the appellant's trials. The officer's misconduct also involved persons not connected to the appellant's trials and appeals. The appellant also sought other related relief connected to the disclosure already made. The appellant argued that he was entitled to the disclosure he sought as part of the Crown's first party disclosure obligations. Held: Application dismissed. The specific disclosure matters have been adequately resolved by explanation or by voluntary, but the Crown contends not obligatory, further disclosure. The application for a

complete inventory is dismissed. The Court was not persuaded that the Crown had failed in its disclosure obligations and any further disclosure should be made within the context of an application for third party records.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Background

- [1] Mr. Moazami applies for an order for further disclosure from the Crown in support of his two conviction appeals. He seeks an order that the Crown produce an inventory of all materials relating to an investigation into misconduct by Mr. Fisher, who was an investigating officer into the offences of which Mr. Moazami was convicted. It seems clear that this requested disclosure is a prelude to further disclosure applications. With respect to the disclosure that has already been provided, Mr. Moazami seeks that all "V4" (relevance) redactions be removed, a large number of "V1" (personal witness information) redactions be removed, and all "V2" (privilege) redactions be explained.
- [2] Mr. Moazami's first appeal (the "Avails Appeal") concerns his conviction on 30 prostitution-related and sexual offences against girls and young women between the ages of 14 and 19 years old between February 1, 2009 and October 7, 2011. The circumstances underlying those convictions are described in the reasons for conviction indexed at 2014 BCSC 1727 and reasons for sentence at 2015 BCSC 2055 (the "Avails Trial"). Mr. Moazami was sentenced to 23 years imprisonment after applying the totality principle and before credit for time served. Detective Fisher, now Mr. Fisher, played an important role in investigating Mr. Moazami. He supported the complainants and witnesses against Mr. Moazami and was a witness and observer during the trial.
- [3] The second appeal (the "Obstruct Appeal") is from Mr. Moazami's conviction for attempting to obstruct justice, which arose from his indirect contact with witnesses and complainants in an attempt to have them recant or change their evidence in exchange for money. Mr. Moazami was convicted on February 11, 2016. The reasons for judgment are indexed at 2016 BCSC 99 (the "Obstruct Trial"). On August 15, 2016, he was sentenced to three years' imprisonment, to be served consecutively to the sentences imposed after the Avails Trial. Mr. Fisher played a role in that prosecution and was a witness at trial, principally for the purpose of identifying Mr. Moazami's voice.

The Fisher Investigation

- [4] This application arises as a result of the investigation into Mr. Fisher's misconduct in his relationship with a number of complainants and witnesses with whom he had contact during a number of investigations conducted by the Vancouver Police Department's ("VPD") Counter-Exploitation Unit.

- [5] The investigation into Mr. Fisher began as a result of a disclosure by a complainant to the VPD on March 25, 2016 of improper incidents involving Mr. Fisher. This complainant was not one of Mr. Moazami's victims and played no role in either the Avails Trial or the Obstruct Trial. She was, however, to Mr. Fisher's knowledge, a complainant in another prostitution investigation.
- [6] Mr. Fisher ultimately pleaded guilty to touching this complainant for a sexual purpose on three occasions between August 22, 2015 and November 22, 2015, contrary to s. 153 of the Criminal Code, R.S.C. 1985, c. C-46, and to breach of trust contrary to s. 122 of the Criminal Code.
- [7] A second complainant came forward with allegations against Mr. Fisher. The police were informed of these allegations on May 27, 2016, and an investigation began. This complainant was a complainant against Mr. Moazami at the Avails Trial (although she recanted her police statement which was admitted as necessary and reliable-where-corroborated hearsay). The trial judge placed no weight on her evidence at trial. She played no part in the events underlying the Obstruct Trial.
- [8] Mr. Fisher ultimately pleaded guilty to committing a breach of trust by kissing this person between December 3, 2015 and December 6, 2015. Initially, Mr. Fisher was charged with attempting to obstruct justice by providing false or misleading information in relation to a stabbing in which this complainant was a witness or suspect.
- [9] Allegations involving two further complainants resulted in criminal charges against Mr. Fisher, but not convictions or admitted misconduct. One was a witness at Mr. Moazami's Avails Trial, but not a complainant. She played no role in the Obstruct Trial. The other was a complainant at the Avails Trial. She was not involved in the Obstruct Trial.
- [10] As noted, Mr. Fisher pleaded guilty to certain charges and was sentenced to 20 months' imprisonment.

Crown disclosure to Mr. Moazami and the current application

- [11] Mr. Moazami alleges that Mr. Fisher engaged in further sexual misconduct, and other forms of misconduct, with complainants and witnesses involved in his investigations.
- [12] Mr. Moazami seeks disclosure going beyond what has already been provided by the Crown, to support the argument he will make in both appeals that, inter alia, his trials involved an abuse of process resulting from Mr. Fisher's misconduct. He says that the core question is to what extent Mr. Fisher's misconduct might have affected trial fairness. The Crown agrees with that characterization of the issue and contends that its disclosure has been driven by that principle.
- [13] I will return to the principles governing the disclosure obligations of the Crown, but for current purposes it is sufficient to note that the Crown contends that it has discharged its disclosure obligations. Indeed, it says it has offered more than it is required to disclose, in

order to avoid litigation. The Crown also says it remains ready to continue considering further requests for disclosure, and stands ready to assist Mr. Moazami in making applications for third party records, which it says is now the proper way to address any outstanding issues.

[14] More specifically, the Crown contends that it has fulfilled its first party disclosure and disclosure obligations under *R. v. McNeil*, 2009 SCC 3 by disclosing:

- a) the three iterations of the reports to Crown counsel that emerged from the Fisher investigation, with references to supporting documents, witness statements, police "task action reports", etc.;
- b) the agreed statement of facts filed at Mr. Fisher's sentencing hearing;
- c) transcripts of all recorded interviews of all persons who were complainants or witnesses at Mr. Moazami's trials who were also complainants against Mr. Fisher;
- d) transcripts of recorded interviews of other complainants or witnesses at Mr. Moazami's trials who agreed to give statements to the Fisher investigators or, if the interview was not recorded, documentation of an unrecorded interview;
- e) records of communications between all complainants involved in Mr. Moazami's trials and Mr. Fisher, that were obtained as part of the Fisher investigation, as well as all records of communications between all complainants at the Avails Trial and Mr. Fisher, that were obtained as part of the Fisher investigation. (The Crown has identified a small number of communications between Mr. Fisher and one of the complainants it had not previously disclosed on grounds of irrelevance, but now will disclose them in the interests of minimizing the issues in dispute and moving the appeals towards a conclusion);
- f) documentation of unsuccessful efforts by police to interview the complainants who did not agree to be interviewed by the Fisher investigators;
- g) virtually everything sought by Mr. Moazami as part of a second disclosure application, including:
- i) additional witness statements requested with the exception of one complainant's "criminal history interview";
- ii) requested documentation related to scenarios utilizing a complainant as a police agent; and
- iii) requested documentation of evidence gathered to corroborate the accounts of two other complainants (i.e., cell tower records, receipts, bank record information, and Mr. Fisher's access card information).

[15] The Crown also offers, in an attempt to resolve issues arising in this application, to undertake a further review of and disclose certain redacted material related to text messages between Mr. Fisher and certain complainants that had been redacted for irrelevance. These redactions were described by the Crown as "chit chat". In response to this

application, the Crown also undertook a complete review of the disclosure to ensure that vetting was as minimal as possible. Significant vetting has been removed, including some of the vetting of duplicative material, simply, the Crown says, in the interests of minimizing the issues in dispute and advancing the appeals.

- [16] In respect of duplicative material, the Crown says that because of the way material was structured in a report, the same information is repeated twice. The Crown has disclosed a report summarizing the extracted contents of Mr. Fisher's cellphone. This report contains many of the communications between Mr. Fisher and the various complainants. It breaks down all calls, texts, and other phone activity by separate category; then, in a section called "Timeline", it repeats the same calls, texts and other activity in intermingled sequence. Everything has been disclosed and it would be a considerable amount of work for no demonstrable purpose to disclose the duplicate material, since it would need to be vetted for privacy issues and so on. The status of the duplicated material has been explained to Mr. Moazami's counsel.
- [17] The Crown has also gone to some length to explain both to Mr. Moazami's counsel and the Court the basis of the V4 vetting for irrelevancy, including details of the content of material vetted for relevancy. In part, that matter has been described above. To the extent it goes further, I do not see a basis on which the vetted content is disclosable, at least as first party disclosure. We were not offered any theory of relevance in submissions that explains why the Crown has a duty of first party disclosure in relation to it. Much of it, if disclosable at all, would be disclosable as a result of an O'Connor application: see *R. v. O'Connor*, [1995] 4 S.C.R. 411.
- [18] With respect to the V2 vetting, the Crown agrees to identify by page the basis of the privilege claim in each instance.
- [19] Finally, the Crown has agreed to provide disclosure of a series of other items identified in the application materials, even though the Crown regards them as being clearly irrelevant and the items were not specifically requested in this application. It proposes to make the disclosure solely in the interests of narrowing the issues in dispute.
- [20] With these developments in mind, in my opinion, the real issue on this application is whether the Crown should disclose, as part of its first party disclosure obligation, an inventory of all Fisher investigative material in order to permit Mr. Moazami to prepare and file further applications to compel the disclosure, it would seem, of most or all of the Fisher investigative materials in the possession of the Crown or the police.

Prior applications for disclosure in these appeals

- [21] Some further procedural history is helpful to set the current application in context. Mr. Moazami has been represented on his appeals by more than one counsel and for a time represented himself on the obstruct matter. The Crown has made disclosure in a number of tranches. Mr. Moazami identifies some seven rounds of disclosure. Some of that disclosure

occurred in the face of disclosure applications to which I will refer. Some of the disclosure has been made in response to requests made by counsel on behalf of Mr. Moazami. The Crown has taken the position that at least a portion of what has been disclosed goes beyond its obligations, but has been made in an effort to avoid litigation and advance the appeals.

- [22] On April 18, 2018, Mr. Moazami, while unrepresented by counsel, filed an application in the Obstruct Appeal. The application sought "James Fisher disclosure" and objected to the vetting of the disclosure already provided. It essentially sought the entire Fisher investigative file ("all additional investigating materials collected"; "communications between Fisher and victims/witnesses, counsellors, and all third parties"; "all notes and materials relevant to Fisher criminal charges"; etc.). It also sought additional third party records and the police disciplinary records of other police officers.
- [23] It is fair to say, without recounting the entire history, that considerable effort was devoted to preparing for that application, which was scheduled for September 19, 2018.
- [24] In the meantime, on August 23, 2018, counsel for Mr. Moazami (not current counsel) had also filed a disclosure application in the Avails Appeal.
- [25] In a case management hearing in the Obstruct Appeal, Mr. Moazami advised that he wished to abandon his application in favour of the application being advanced by his counsel in the Avails Appeal. Four days later, after some discussion about the implications for any possible future disclosure application in the Obstruct Appeal, Mr. Moazami abandoned his application before a division of this Court and an order to that effect was pronounced.
- [26] Counsel's application in the Avails Appeal drew on the existing disclosure and identified specific materials sought. In correspondence with the Crown regarding the application, counsel articulated the basis on which requested materials were relevant to the appeal. I read the correspondence as articulating a concern about the effect of Mr. Fisher's misconduct on the trial -- in substance, a concern about trial fairness or abuse of process. The correspondence between the parties is detailed, and the Crown responded to numerous specific questions about certain types of documents. The Crown agreed to make further disclosure.
- [27] On October 12, 2018, counsel informed the Crown that, on the basis of the disclosure the Crown had agreed to make, he saw no basis, at that point in time, to pursue the application for anything further. This position was dependent on what the agreed disclosure might reveal, in that it might be too heavily redacted or give rise to other issues.
- [28] By October 26, 2018, counsel had received the supplementary disclosure. Mr. Moazami's counsel then formally abandoned the disclosure application. Since a question arose during submissions on this application about whether this earlier application was abandoned, I cite the notice of abandonment of application, filed October 26, 2018. It reads:

The Appellant Applicant Reza Moazami hereby gives notice that he abandons his application for disclosure of investigative materials arising from the investigation in *R. v. Fisher*

- [29] Shortly after October 26, 2018, Mr. Moazami changed counsel. It is clear that in large measure the applications before us in both the *Avails* and *Obstruct Appeals* are attempts to reopen applications previously abandoned without a clear explanation of the circumstances that would justify doing so. I am not persuaded that the grounds of appeal on which Mr. Moazami has founded his current application, namely trial fairness or abuse of process, are different from the grounds underlying the previously abandoned application.
- [30] There is, it seems to me, a serious question whether Mr. Moazami is entitled to reopen those disclosure issues he previously abandoned. The risk of abandoning the application in the *obstruct matter* was clearly explained to him by the Court. The disclosure application in the *Avails Appeal* was abandoned, at least to the extent it engaged investigative materials arising from *R. v. Fisher*.
- [31] Having said this, I am prepared to assume without deciding that Mr. Moazami's current application is properly before us, and to decide the matter on that basis. This is not to say that the procedural history recounted above will not be relevant to the disposition of future disclosure issues should they arise.

Analysis Of The Current Application

- [32] As I have explained, the heart of this application is a request for a complete inventory of the materials in the *Fisher* investigative file. In response to the aspect of the application targeted at redactions, the Crown has agreed to unredact portions and has explained the redaction for others. I am satisfied that the Crown's duties have been, and are being, sufficiently discharged in this regard.
- [33] With respect to the inventory request, this application turns on a proper understanding of the legal principles controlling Crown disclosure obligations as applied to the facts underlying Mr. Moazami's appeals. The Crown says that Mr. Moazami must file third party disclosure applications for the material he seeks. In doing so, Mr. Moazami must specifically identify what he seeks, notify the third parties who are entitled to notice, and sufficiently explain why the requested material meets the "likely relevance" standard. Mr. Moazami, on the other hand, says that the Crown has not fulfilled its duties under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 and *McNeil*, and asks this Court to either compel further disclosure or to appoint a special commissioner for further assessment.
- [34] As I understand it, both parties are on common ground that this application must be dismissed if we find that the information or records Mr. Moazami seeks are properly characterized as third party requests. Mr. Moazami has not brought any proper third party disclosure applications.

- [35] I begin with the legal principles that provide the framework for assessing Mr. Moazami's application.

The Crown's disclosure obligations

- [36] The Crown has a duty to make "first party" disclosure of all relevant, non-privileged information in its possession or control to persons charged with criminal offences. The police have a corresponding duty to disclose to the Crown the "fruits of the investigation" into an accused. These obligations are captured by the principles enunciated in *Stinchcombe*: see *McNeil* at paras. 23, 53; *R. v. Gubbins*, 2018 SCC 44 at para. 23.
- [37] In *McNeil*, the Supreme Court of Canada considered the nature of disclosure obligations where police misconduct is involved in the investigation of an accused or might otherwise affect the accused's trial. These obligations survive trial and remain relevant to an appeal process. Even though the materials generated by an investigation into police misconduct are not in the possession of the prosecuting Crown and are not part of the "fruits of the investigation" into the accused, they may nonetheless fall to be produced as first party disclosure in certain circumstances. Justice Charron said, at para. 15:
- [15] 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.
- [38] The Court went on to explain the duty to disclose police investigative records and disciplinary records more fully at para. 59. A corollary to the Crown's disclosure obligation is the police duty to participate in the disclosure process. Discovery of some police misconduct records must not be left entirely to the third party process, where production is necessarily more happenstance than first party disclosure. Where "information is obviously relevant to the accused's case, it should form part of the first party disclosure package to the Crown without prompting."
- [39] In *Gubbins*, the Court clarified the meaning and purpose of the "obviously relevant" standard. At para. 23, approving of Justice Watt's reasons in *R. v. Jackson*, 2015 ONCA 832, Justice Rowe said:
- [23] In addition to information contained in the investigative file, the police should disclose to the prosecuting Crown any additional information that is obviously relevant to the accused's case. The phrase "obviously relevant" should not be taken as indicating a new standard or degree of relevance: *Jackson*, at para. 125, per Watt J.A. Rather, this phrase simply describes information that is not within the investigative file, but that would nonetheless be required to be disclosed under *Stinchcombe* because it relates to the accused's ability to meet the Crown's case, raise a defence, or otherwise consider the conduct of the defence. *McNeil* requires the police to hand such information to the Crown.

- [40] The McNeil Court offered some illustrations of the type of police misconduct records that would be disclosable on a first party basis under this standard. At para. 53, Justice Charron noted that the accused "has no right to automatic disclosure of police disciplinary matters with no realistic bearing on the case against [the accused]." As to the nature of material that must be disclosed, she said:
- [54] To state an obvious example, if a police officer is charged under the applicable provincial legislation for excessive use of force in relation to the accused's arrest, this information must be disclosed to the Crown. Where the misconduct of a police witness is not directly related to the investigation against the accused, it may nonetheless be relevant to the accused's case, in which case it should also be disclosed. For example, no one would question that the criminal record for perjury of a civilian material witness would be of relevance to the accused and should form part of the first party disclosure package.
- [41] The Court in McNeil and in Gubbins has been careful to explain that the duty on the police to produce to the Crown "obviously relevant" material outside of the "fruits of the investigation" into the accused, so that the material can then be disclosed to the accused as first party disclosure, is an exception to the general rule that police records are third party records. At para. 25, the McNeil Court reminds us: "production of criminal investigation files involving third parties, and that of police disciplinary records, usually falls to be determined in the context of an O'Connor application." In Gubbins, at para. 24, the Court approved of the Alberta Court of Appeal's reasons in *R. v. Black*, 2011 ABCA 349 at paras. 37-38, where the court said:

Only records of misconduct that are obviously relevant form a part of first party disclosure.

For all other records held by a public body, including the police, the Stinchcombe-O'Connor distinction continues to be the rule. The police are required to disclose the investigative file as first party Stinchcombe disclosure and other files or records in the hands of the police are subject to the O'Connor process. This would include files relating to complaints of criminal activity by Crown witnesses and the operational records of the police force or government body from whom records are sought.

[Emphasis added in Gubbins.]

- [42] It is important for this Court to ensure that McNeil is not evoked as a guise for disclosure requests that ought to be subject to an O'Connor application.
- [43] While police departments are obliged to turn over the fruits of the investigation and other obviously relevant records, the Crown is simultaneously under a duty to make reasonable inquiries of the police. The Crown is not "simply a passive recipient of relevant information with no obligation of its own to seek out and obtain relevant material": McNeil at para. 48. The Crown is not entitled, in its role as a minister of justice, to blindly accept without inquiry that a police department has provided it with all necessary disclosure in all cases. Accordingly, where the Crown is put on reasonably founded notice of the existence of

relevant and undisclosed information, it has a duty to make inquiries of other Crown agencies, including the police: McNeil at para. 49.

- [44] In this regard, McNeil adopted a passage from Justice Doherty's reasons in *R. v. Ahluwalia*, [2000] O.J. No. 4544 (Ont. C.A.). Mr. Moazami's counsel relies on Ahluwalia. In Ahluwalia, a Crown witness and police agent perjured himself at the accused's trial with respect to the extent of his criminal record. The defence had also not been given the witness' full criminal record in its disclosure package. The only conviction disclosed to the defence was the one that the witness admitted in his testimony. Doherty J.A. accepted that there might be an innocent explanation for the consistency between the witness' perjured evidence and the Crown's incomplete disclosure, but he found it raised "serious concerns about potential state complicity" in the perjury: para. 69.
- [45] Where Doherty J.A. found that the Crown had clearly failed was in taking the position that it had "no obligation" to "get to the bottom" of the matter once it discovered that the perjured evidence matched the incomplete disclosure. Doherty J.A. said, at para. 71:
- [71] The Crown does not appear to have made any inquiries of Makdesion [the perjured witness] or the F.B.I. agents responsible for providing Makdesion's criminal record to the Crown. As those involved in the Canadian component of the investigation disavowed any knowledge of Makdesion's full criminal record, inquiries of Makdesion and the relevant F.B.I. agents would have been the next obvious step.
- [46] Then, in the passage subsequently referred to by the Court in McNeil, he added:
- [72] The Crown has obligations to the administration of justice that do not burden other litigants. Faced with its own witness's perjury and the fact that the perjured evidence coincided with the incomplete disclosure that the Crown says it innocently passed to the defence, the Crown was obliged to take all reasonable steps to find out what had happened and to share the results of those inquiries with the defence. In my view, the Crown did not fulfill its obligations to the administration of justice by acknowledging the incomplete disclosure discovered by the defence, and after making limited inquiries, professing neither a responsibility for the incomplete disclosure nor an ability to provide any explanation for it. The Crown owed both the appellant and the court a fuller explanation than it chose to provide.
- [47] The prosecuting Crown's duty to make reasonable inquiries when on notice of relevant material in the possession of other Crown agencies allows the Crown to "bridge much of the gap" between first party disclosure and third party production: McNeil at para. 51.
- [48] A final concept is key to the application currently before this Court: these disclosure obligations survive trial. The concepts explained above apply, with appropriate modification, to post-conviction disclosure in the face of ongoing appeals.

- [49] As Justice Griffin explained in *R. v. Johnston*, 2019 BCCA 107, the Crown's obligation becomes a duty to disclose documents that may assist an appellant in prosecuting an appeal: see paras. 56-61. Justice Griffin concluded that the focus of the post-trial disclosure obligation is on the accused's appeal rights. She explained:
- [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
- [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 in *Johnston*).
- [80] 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.

The principles applied

- [50] It is common ground between the parties that the concept of relevance on this application is governed by Mr. Moazami's expected grounds of appeal. In this case, the parties do not disagree about the test for relevance. Both agree that the obligation is to disclose documents that, in the appropriate sense, relate to the conduct of Mr. Moazami's trial, its fairness and the possibility of an abuse of process. To the extent that police records of the investigation into Mr. Fisher are "obviously relevant" to Mr. Moazami's appeals, the police have a duty to produce those records and the Crown must disclose them as a part of its first party obligations. Where the Crown is put on notice of relevant information or materials that may exist and have not been produced, it has a duty to make reasonable inquiries.
- [51] The Crown contends that it has fulfilled its obligations and will continue to do so, since its disclosure obligations are continuing. It says it has disclosed everything that could reasonably affect Mr. Moazami's appeal. In particular, it has disclosed, *inter alia*, the underlying investigative materials concerning any of the complainants in the Fisher investigation who were also complainants or witnesses in the Moazami trials. The Crown

says it has invited Mr. Moazami's counsel to articulate a basis of relevance for any further disclosure that he believes should be made.

- [52] Mr. Moazami's counsel says that there are red flags in the existing disclosure supporting the inference that other relevant but undisclosed documents exist. In submissions, Mr. Arbrogast attempted to identify examples of the concerns he had about the scope of disclosure. In large measure, the criticisms seem to be directed at the adequacy, as he saw it, of the investigation into Mr. Fisher's misconduct. He suggested that the investigation into Mr. Fisher failed to get to the bottom of certain issues and its impact on Mr. Moazami's trial. But the issue here is not whether an adequate or perfect investigation occurred; it is whether the actual investigation turned up materials that should have been, but have not been, disclosed. The Crown pointed out in argument that the investigation did in fact address the impact of Mr. Fisher's misconduct on the trial and that disclosure of those materials has been made. The Crown has responded to other complaints by pointing out, for example, that certain kinds of documents do not exist and explaining why they do not. The correspondence canvases, for example, more than a dozen attempts to interview a potential witness who refused to cooperate.
- [53] One criticism made by Mr. Moazami is that the investigators failed to investigate Mr. Fisher's phone records for 2011-2014, and that this phone was "wiped". Mr. Moazami identifies this as an example of Mr. Fisher's "obstructing investigation into himself". The Crown explained in correspondence that Mr. Fisher's prior work phones were "wiped" and repurposed or destroyed, in keeping with departmental practices, prior to the investigation into Mr. Fisher. No disclosure was made because none could be.
- [54] Mr. Moazami is also critical that no "MLAT" request was made "for Fisher's various Facebook accounts". However, again as explained in correspondence dated March 6, 2019, such a request was not made because the investigation did not disclose grounds for it. Accordingly, no disclosure was made because none could be. I note, in response to a suggestion made by counsel at the oral hearing, that the Fisher investigators' failure to request an MLAT for his Facebook accounts is far from analogous to the failure of Crown counsel in Ahluwalia to make any inquiries into the reason that a Crown witness' perjured testimony aligned with incomplete disclosure provided to the defence. The Crown here, aware of the possibility that Mr. Fisher's misconduct vis-a-vis complainants or witnesses in Mr. Moazami's trials may well be relevant to Mr. Moazami's appeals, has disclosed the underlying investigative materials with respect to those complainants and witnesses.
- [55] Counsel also identified in his submissions a number of topics that he said supported his concern about the scope of disclosure. Most of the facts referred to in order to support his concerns were derived from the existing disclosure or amounted to speculation from it. In his written argument, Mr. Moazami identified a number of "references within the disclosed materials that are relevant" but "are not included in the disclosed materials." In response, the Crown has agreed to disclose a number of items in order to minimize the issues in dispute. For others, the Crown has explained why it has disclosed what it has disclosed, and

why it has not disclosed what it has not.

- [56] For example, Mr. Moazami says that he has ascertained that a task action report regarding Task Action #278 "concerned a complaint made by an organization helping sex trade workers on the Downtown East Side about inappropriate misconduct relating to Det. Fisher and a complainant at his Avails trial." The Crown, in response, clarified that Task 278 actually documents "a conversation between two police officers about the investigation of misconduct by Mr. Fisher vis-à-vis [a complainant], who was not a complainant or witness in any Moazami matter. During that conversation, one officer told the other that he was aware of a previous allegation involving IT, who was a complainant and witness at the appellant's avails trial." The Crown invited the defence to articulate a basis of relevance for disclosure of the document. The Crown has also clarified that it did disclose the materials related to the allegation involving IT. The Crown disclosed investigative materials related to IT, along with documentation of the investigators' repeated attempts to interview IT.
- [57] As a general matter, Mr. Moazami expressed concern that he has received only some 3500 pages of disclosure, while the investigative file into Mr. Fisher's misconduct is upwards of fifteen or twenty-thousand pages. The Crown properly says, in response, that Mr. Moazami is not entitled -- particularly not as first party disclosure -- to the entirety of the Fisher investigative file. The Crown's position is that it has disclosed, and will continue to disclose, the portions of the investigative file that are relevant to Mr. Moazami's appeals. On the record before us, I am not satisfied that the Crown has failed to do so.
- [58] I confess that I found it difficult to grasp the possible relevance to Mr. Moazami's trial or appeal of the examples given, to the extent that it was arguable that disclosure of those matters had not been already made.
- [59] In brief, I am not persuaded that any foundation has been laid to require the disclosure, as part of a first party disclosure package, of a complete inventory of all materials relating to the Fisher investigation. I am not persuaded that there is any reasonable basis on which to conclude that the Crown has fallen, or is falling, short of discharging its first party disclosure obligations in relation to this appeal. I cannot conclude that there are relevant documents or materials that have not been disclosed, nor can I conclude that the Crown has failed in its obligation to make reasonable inquiries of the police.
- [60] I am also not persuaded that a sufficient basis has been laid for this Court to appoint a special commissioner to examine the details of the current state of disclosure, in order to report back to the Court. In my view, if Mr. Moazami wishes further disclosure, falling outside the Crown's first party disclosure obligations, he is required to bring an O'Connor application.

Undertakings

[61] Finally, I turn to the issue of undertakings. Mr. Arbrogast has expressed frustration that an undertaking to which he has agreed makes it impossible to share information involving Mr. Fisher with counsel in other matters, and for them to share information with him.

[62] It is, I think, clear that information disclosed in relation to a criminal prosecution should not be disclosed to third parties: *R. v. Lucas* (1996), 104 C.C.C. (3d) 550 (Sask. C.A.), aff'd without comment on this point, [1998] 1 S.C.R. 439. An accused who receives disclosure material is subject to an implied undertaking not to disclose its contents for any purpose other than making full answer and defence in the proceeding or appeal: *R. v. Basi*, 2011 BCSC 314 at para. 42.

[63] Given these principles, I do not think it appropriate to interfere with the undertakings to permit general sharing of information. To do so would allow confidential third party information that is properly subject to third party disclosure considerations to be shared as if it were subject to a first party disclosure regime. The Crown has suggested some ways in which the undertakings might be modified, including:

We could consider agreeing to an amendment to the undertaking to permit discussion specifically with counsel for Mr. Albashir and Mr. Mohsenipour, but there are a number of associated difficulties. Information is disclosed to each appellant only for the purpose of prosecuting his own appeal. The matters involve different appellants, witnesses, complainants, evidence and factual contexts. Information that it is reasonably possible would assist one appellant may not be such that it is reasonably possible that it would assist another. Information that may be treated as first-party disclosure in one case may remain third-party records vis-à-vis a different appellant in another case. We have a responsibility to ensure compliance with the various disclosure regimes that may be engaged. We could not agree to an arrangement that would effectively amount to providing disclosure to one appellant through another.

[64] While no doubt it is challenging to work within the appropriate parameters governing disclosure, I would decline to interfere with arrangements that should be worked out among counsel or which could arguably become the subject of a formal O'Connor application.

[65] Accordingly, I would dismiss Mr. Moazami's application and would decline to appoint a special commissioner, as requested by him.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice Dickson"

I agree:

"The Honourable Mr. Justice Butler"

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