

CANADA / JUDGMENT

R. v. Nguyen

2023 BCSC 583

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Supreme Court of British Columbia

DECIDED

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2023 BCSC 583 R. v. Nguyen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Nguyen,

2023 BCSC 583

Date: 20230324

Docket: 82747-1, 82747-16

Registry: New Westminster

Rex

v.

Tyrel Hieu George Mahoney Nguyen

also known as Tyrel Quesnelle

Publication Restriction: Pursuant to ss. 486.5(1) and 486.5(9) of the Criminal Code, and inherent jurisdiction of the Court, a publication ban has been imposed prohibiting any information that could identify the witness.

These reasons have been redacted for publication purposes

Before: The Honourable Madam Justice Gropper

Oral Ruling on Application #16

Counsel for the Crown:

C. Fleischhaker

A. Willms

Counsel for the Attorney General of Canada:

J. Katz

Counsel for the Accused:

M. Klein, K.C.

Counsel for the Witness, A.B.:

K. Westell

Place and Date of Hearing:

Vancouver, B.C.

March 16, 2023

Place and Date of Judgment:

Vancouver, B.C.

March 24, 2023

Introduction

- [1] The applicant, Mr. Nguyen, is charged with two counts of first-degree murder and one count of attempted murder.
- [2] The Crown's case against Mr. Nguyen is primarily based on the testimony of an agent, A.B. The agent will testify about his longstanding relationship with the applicant and their involvement in criminal activities. The agent will describe admissions that Mr. Nguyen made to him about the murders and attempted murder before and after A.B. became a police agent.
- [3] A.B. had been described as and the parties have conceded that A.B. is a Vetovec witness. Determining his credibility is crucial to the outcome of the charges that the applicant faces.
- [4] A.B. is in witness protection under the Witness Protection Program Act, S.C. 1996, c. 15 (WPPA).
- [5] The applicant seeks further disclosure in relation to a summary that was provided to him by the Crown on February 15, 2012, that states:

Summary of Criminal Allegations Regarding Witness A. B.

[Redacted]

Further investigation identified A. B. as the suspect. A. B. has been arrested, charged and detained in respect of the incident.

- [6] Specifically, the applicant seeks the complete investigative file relating to the new charge against A.B. on the basis that it is subject to first-party disclosure. The Provincial Crown and the Attorney General of Canada (AGC) assert that the information the applicant seeks is subject to third-party disclosure.

Position of the Parties

The Applicant

- [7] The applicant takes the position that the disclosure it seeks is "obviously relevant", relying on the statement of Watt J.A. in *R. v. Pascal*, 2020 ONCA 287 at para. 130:

It is difficult to gainsay the relevance of the information at issue here. A criminal record. Outstanding charges. Evidence about the circumstances underlying the relevant charges. Each available for impeachment of a witness called by the Crown. Each a relevant factor in deciding whether to call [that witness] as a defence witness in the event [they were] not to be called by the Crown. Relevance is the controlling principle, not the likelihood of use or prospect of success.

- [8] The applicant submits that the prosecuting Crown and the associated investigating agency are under an obligation to make inquiry about A.B.'s new charge. While the disclosure sought is not "fruits of the investigation" in the ordinary sense, the applicant takes the position that this is first-party disclosure because disclosure is "obviously relevant" as that description is understood. *R. v. McNeil*, 2009 SCC 3 bridges the gap between third- and first-party disclosure and in the normal course it must be obtained and disclosed as first-party disclosure.

The Provincial Crown

- [9] The provincial Crown received the summary regarding A.B. on February 15, 2023 and forwarded it to defence counsel with no redactions or changes.
- [10] The provincial Crown says that the complete investigative file related to the new charge is a third-party record. The principles and law in the WPPA, public interest privilege and relevant common law also apply.
- [11] The provincial Crown submits that it has an obligation to make certain inquiries of certain entities in circumstances where it comes to know that information may exist pertaining to witness credibility or reliability in the case it is prosecuting. The provincial Crown asserts that having provided the information it came to know and possess satisfies its first-party disclosure obligations. The complete investigative file regarding the new charge is not in the possession of the provincial Crown or the police investigating the charges against Mr. Nguyen; it is information over which the provincial Crown has no control; and it is statutorily barred from obtaining or knowing the information. The provincial Crown says further that the information is subject to public interest privilege and that the provincial Crown has no authority to demand this information.

- [12] The provincial Crown asserts that the WPPA generally, and specifically ss. 11, 11.1, 11.2 and 11.5, prevent it from simply requesting the information from A.B. or the police investigators involved in the new charge, for the purpose of disclosure to the defence. The WPPA contemplates the means for dealing with disclosure requests for information relating to a protected person by providing a mechanism for disclosure and information such as the information sought by the applicant.
- [13] The provincial Crown refers to two applications in this matter regarding disclosure of records related to A.B. that were ordered to be disclosed as third-party records with the consent of all the parties to those and this application. In each of those applications, the defence sought the records in order to address A.B.'s credibility, reliability and ability to recall in order that Mr. Nguyen could make full answer and defence.
- [14] The consent order in application 82747-11 included a process for production and disclosure. Similarly, the consent order in application 82747-12 all the parties agreed that the records of the Police Records Information Management Environment [PRIME] that relate to the witness A.B. are subject to the disclosure prohibitions in the Youth Criminal Justice Act, R.S.C. 1985, c. Y-1 [YCJA] and are third-party records. That consent order also provides a mechanism for production and disclosure.
- [15] The provincial Crown says there is no authority supporting an order that the information or the "complete investigative file" in respect of the new charge are first-party records. There is no precedent that requires the court to order the complete disclosure of the investigative files to an accused person in order to cross-examine a witness on outstanding charges. There is no precedent for such a disclosure in relation to a protected person under the WPPA.

The Attorney General of Canada

- [16] The AGC says that the records sought are third-party and not first-party records as: they are not in possession of the prosecuting provincial Crown; they were neither created for nor in respect of an investigation of Mr. Nguyen and they are not "fruits of the investigation". The provincial Crown cannot obtain the records as they are barred from disclosure under the WPPA.
- [17] The AGC further submits that the production to the parties of any further information in possession of the WPPA is subject to public interest privilege in the safety and security of persons, as well as being prohibited under s. 11(1)(a) of the WPPA. The information may only be ordered under s. 11.5(4) and 11.5(5) of the WPPA. In its submissions the AGC has provided a process for disclosure of the records as third-party records:
43. Whether or not the Applicant continues to seek materials going beyond those in the possession and control of the WPP, the AGC proposes that the following procedure be followed:

- a. The AGC would concede the "likely relevance" of the Information about the incident obtained by and retained in the possession of the WPP;
- b. The AGC proceed in camera and ex parte before this Honourable Court, pursuant to the authority provided in s. 11.5(4) of the WPPA, and:
 - i. produce that record for the Court's review, along with any evidence in support of any privileges or statutory prohibitions invoked by the AGC;
 - ii. provide submissions, whether orally or in writing, in support of any privileges or statutory prohibitions invoked by the AGC;
- c. taking into account the evidence and submissions provided in camera and ex parte, the Court would then determine:
 - i. whether or not any additional information from the materials in the possession of the WPP should be provided to the Applicant; and
 - ii. the scope of additional information, if any, that should be produced, including whether or not there is any basis for seeking further materials from the as yet unserved third party.

[18] The AGC notes that in weighing the balance between production and prohibition as contemplated, it urges on the court the conclusion that the limited relevance and utility of the additional information is overbalanced by the danger that such information can lead to the identification and location of the witness.

Discussion and Analysis

First- and Third-Party Disclosure

- [19] If a record is a first-party record, then Crown must disclose all materials in its possession unless it is clearly irrelevant, privileged, or its disclosure is otherwise governed by law: *R. v. McNeil*, 2009 SCC 3 at para. 18.
- [20] In addressing the issue of whether the records sought are subject to first- or third-party disclosure, I have been directed to several appeal cases where the court was considering the production of records for the purposes of the appeal. While the steps in the analysis are the same in the appeal and trial context, the relevance analysis differs. At trial, the accused is presumed innocent and the focus of the relevance analysis is allowing the person to make full answer and defence: *R. v. Johnston*, 2019 BCCA 107 at paras. 45-46. On appeal, the accused no longer benefits from the presumption of innocence and the test must focus on the relevance of the records to the person's appeal rights: *Johnston* at paras. 50, 61.
- [21] Although it was stated in the context of disclosure in a conviction appeal, the relevant law is set out in *R. v. Schirmer*, 2022 BCCA 214 at para. 54:

[54] Based on the principles developed and applied in those cases, modified where necessary to fit the appeal context, I consider the following framework to govern the application before us:

- After conviction and during the appeal process, the Crown is duty-bound to disclose to an appellant any records in its possession or control where there is a reasonable possibility the information may assist the appellant in the prosecution of their appeal.

R. v. Trotta (2004), 23 C.R. (6th) 261 at para. 25 (Ont. C.A.); McNeil at para. 17; R. v. Johnston, 2019 BCCA 107 at paras. 47, 59-60, 66 [Johnston (2019)]; R. v. Moazami, 2020 BCCA 3 at paras. 37, 48; R. v. Orr, 2020 BCCA 319 at para. 23.

- This is a first party disclosure obligation. It subsists throughout the appeal proceedings. New information that falls in its scope must be disclosed when received. The Crown's duty to disclose first party records is triggered upon request and there is no requirement that the appellant apply to the appeal court for disclosure.

Gubbins at para. 19.

- For the purpose of first party disclosure, the Crown is the prosecuting Crown. All other federal and provincial Crown entities, including police agencies, are third parties.

R. v. Quesnelle, 2014 SCC 46 at para. 11.

- However, police agencies have a corollary disclosure obligation to provide the Crown with the "fruits of the investigation" that led to the convictions at issue in the appeal, as well as any additional information that is "obviously relevant" to the appeal.

McNeil at paras. 14, 23-24; Gubbins at para. 23; R. v. Pascal, 2020 ONCA 287 at para. 106.

- Consequently, when the Crown becomes aware of information in the possession of a police agency or other public entity that is potentially relevant to the appeal, it has a duty to make reasonable inquiries of that agency or entity and to obtain the information, where reasonably feasible, for the purpose of assessing whether it constitutes first party disclosure and must be provided to the appellant.

McNeil at paras. 49-50; Quesnelle at paras. 12, 18; R. v. McKay, 2016 BCCA 391 at para. 50, leave to appeal to SCC refused, 37315 (20 April 2017); Gubbins at para. 21; Moazami at para. 50.

- First party disclosure includes the "fruits of the investigation", as well as any records beyond the original investigative file that are "obviously relevant" to the appeal. Operational records or background information generally do not fall in scope.

McNeil at paras. 53-54; Gubbins at paras. 22-23; Johnston (2019) at para. 36(e)(ii).

· The Crown is entitled to withhold first party records if the records are clearly irrelevant, privileged or their disclosure is otherwise governed by law. When first party records are withheld, the appellant can apply for production under s. 683(1)(a) of the Criminal Code. The Crown bears the onus of justifying the non-disclosure.

McNeil at para. 18; World Bank Group v. Wallace, 2016 SCC 15 at paras. 114-115; Gubbins at para. 19.

· First party records sought in support of a fresh evidence application that are neither subject to a statutory prohibition on disclosure nor privileged can only be justifiably withheld on the basis of irrelevance. The Crown must show there is no reasonable possibility the records could assist on the application to introduce fresh evidence, and no reasonable possibility the records may be received as fresh evidence in the appeal.

Trotta at paras. 25-28; Johnston (2019) at para. 80.

· Assessing whether records constitute first party records is context-sensitive. In the appeal context, this assessment must be informed by the possible uses of the records in support of an appellant's grounds of appeal.

McKay at para. 103; Johnston (2019) at paras. 43, 61-65, 80; Moazami at para. 50; Orr at paras. 3, 23-24; R. v. Johnston, 2021 BCCA 34 at para. 340 [Johnston (2021)], leave to appeal to SCC granted, 39635 (2 December 2021).

· If the material requested by an appellant consists of third party records, the onus is reversed. The Crown has no obligation to produce this material and the appellant can only establish an entitlement to production if they show that the records are "likely relevant" to the appeal.

O'Connor; McNeil at para. 28; Johnston (2019) at paras. 42, 132.

· The assessment of "likely relevance" in the appeal context must be informed by the possible uses of the records in support of an appellant's grounds of appeal.

Johnston (2019) at para. 80; Orr at paras. 3, 23-24; Johnston (2021) at para. 340.

· To meet this test in support of a fresh evidence application, the appellant must show there is a reasonable possibility the records could assist on the application to introduce fresh evidence, and a reasonable possibility the records may be received as fresh evidence in the appeal.

Trotta at paras. 25-28.

· In assessing "likely relevance", the Court does not determine whether the records would be admissible as fresh evidence; rather, at the production stage, the assessment is focused on the reasonable possibility of admissibility. The latter threshold is necessary to prevent fishing expeditions.

Gubbins at para. 28.

· In recognition of the fact that the appellant will not have seen the records, the burden to show "likely relevance" is not onerous. However, the mere assertion that a third party record is relevant to the credibility or reliability of a witness at the trial will not suffice, even where that witness was not peripheral. Instead, the appellant must point to some case-specific evidence or information that objectively justifies the assertion of "likely relevance". They must show that the sought-after records realistically carry the potential to assist on the application to introduce fresh evidence, and realistically carry the potential to be received as fresh evidence.

Gubbins at paras. 27-28; R. v. Dunbar, Pollard, Leiding and Kravit, 2003 BCCA 667 at para. 69, citing R. v. Batte (2000), 145 C.C.C. (3d) 449 at para. 75 (Ont. C.A.).

· In an application for the production of third party records, an appellant must serve notice on the record holders, along with a subpoena (unless waived), requiring that the records be brought to court for possible production after a hearing.

O'Connor; McNeil at para. 27; Gubbins at para. 25; Johnston (2019) at para. 149; York (Regional Municipality) v. McGuigan, 2018 ONCA 1062 at para. 73.

· If an appellant meets the test for "likely relevance", the appeal court will proceed to review the records, assess their actual relevance and weigh relevant competing interests as engaged by the particular circumstances of the case, including assertions of legislated confidentiality or privilege.

Dunbar at paras. 48-70; McNeil at para. 35; World Bank at para. 113.

[emphasis in original]

[22] Based on the principles developed and applied in those cases, modified where necessary to fit the appeal context, I consider the following framework to govern this application.

[23] For the purpose of first-party disclosure the Crown is the prosecuting Crown. All other federal and provincial Crown entities, including police agencies, are third-parties. However, police agencies have a corollary disclosure obligation to provide the Crown with "the fruits of the investigation" that led to the convictions at issue in the appeal, as well as any additional information that is obviously relevant to the appeal. Consequently, when the Crown becomes aware of information in the possession of a police agency or other public entity that is potentially relevant to the appeal, it has a duty to make reasonable inquiries of that agency or entity to obtain the information where reasonably feasible.

[24] In R. v. Johnston at para. 45, citing R. v. Gubbins, 2018 SCC 44, the Court summarized the relevance test at the trial level:

- 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".
- 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".

[25] Schirmer, McNeil and Gubbins hold that documents that are obviously relevant must be disclosed as first party records even if the prosecuting Crown does not have the possession of the record. The prosecuting Crown has a duty to make enquiries where they are aware of police or other public agency records that are potentially relevant. The police then have a corollary to provide documents that are obviously relevant. McNeil at para. 51, described this as the Crown fulfilling its duty to the administration of justice and bridging the gap between first- and third-party disclosure.

[26] At para. 33 of Gubbins, the Court clarified how the framework should be applied:

...to determine which regime is applicable, one should consider: (1) Is the information that is sought in the possession or control of the prosecuting Crown? and (2) Is the nature of the information sought such that the police or another Crown entity in possession or control of the information ought to have supplied it to the prosecuting Crown? This will be the case if the information can be qualified as being part of the fruits of the investigation or obviously relevant. An affirmative answer to either of these questions will call for the application of the first party disclosure regime. Otherwise, the third party disclosure regime applies.

[27] Gubbins concerned an application for the disclosure of maintenance records for breathalyzers. The records were not in the prosecuting Crown's possession but were held by the RCMP and other agencies (para. 34). The records were not the fruits of the investigation since they were operational records created independent of the investigation (para. 35). Lastly, based on the facts of how breathalyzers operate, the maintenance records were found to be not "obviously relevant" (para. 37).

Are the records "obviously relevant"?

[28] Following the analytical steps set out in Gubbins, the records are not controlled by the provincial Crown nor are they fruits of the investigation. The question is therefore whether they are obviously relevant.

- [29] Schirmer concerned disclosure related to an investigation into a police officer who testified against the accused. After the accused was sentenced, the officer was accused of misconduct, namely leaking information to criminals (paras. 19-25). The accused sought a number of records as set out in para. 28 of that decision. The Court found at paras. 58-60:
- [58] To begin with, [the records] are not in the possession or control of the prosecuting Crown. They are held by other independent entities [that] have not been produced to the Crown...
- [59] Second, without conceding first party status, the Crown made good faith efforts to inquire into the records; however, those inquiries were declined on grounds of statutory or common law prohibitions against disclosure. ...
- [60] Third, the records were not generated or gathered or used by the police agency with conduct of the drug investigation that led to Mr. Schirmer's convictions. ... The records did not form, and could not have formed, part of the original investigative file. ...
- [30] After making that finding at para. 60, the Court in Schirmer considered whether they were obviously relevant. Since the reviewing court does not have the benefit of reviewing the documents at issue, their relevance must be obvious, clear and self-evident (para. 64). The Court concluded that obviously relevant records could relate to the credibility of the witness (para. 68). However, on the facts of that case, the Court found there was no temporal or factual nexus between the officer's post-sentencing conduct and the officer's involvement in the investigation of the accused (paras. 68-69).
- [31] Johnston concerned WPP records. After the accused was convicted, the Crown revealed that a key witness had been admitted into witness protection. The accused argued that the likely admission into witness protection should have been disclosed at trial. The accused also alleged that the witness had perjured himself by not revealing that he was likely to be admitted to the witness protection program. The witness testified that he could face significant threats in prison for testifying. The Crown had already disclosed evidence relating to the benefits the witness received for cooperating. The Court ultimately found that the WPP records were not obviously relevant since the promise of witness protection did not clearly affect the witness's credibility as he started cooperating before being admitted into the program.
- [32] The defence relies on two cases where disclosure of WPP documents were determined to be first-party records.
- [33] In *R. v. Fischer*, 2020 ABQB 67, the defence sought records relating to a Crown witness who had been refused entry into a formal WPP process but received limited assistance under the Alternate Aid Arrangement (AAA) administered by the RCMP and which fell within the WPP ambit. That court found the records to be "obviously relevant", in particular, those records related to the funding that the witness may have received that may have a significant impact on her credibility and reliability as a trial witness. The court found that those records were akin to the disciplinary records of the investigating officer as in *McNeil*.

- [34] In R. v. Giles, 2021 NSSC 69, the court followed Fischer and ordered that the WPP records were subject to first-party disclosure. In that case, the AGC had agreed that the records relating to the financial assistance to or of serious misconduct by the witness were first-party disclosure as they went to credibility and the reliability of the witness.
- [35] I am not persuaded by the reasoning in either Fischer or Giles. Giles follows Fischer, but the conclusion in Giles appears to be driven by the ACG's previous agreement that the financial assistance to or serious misconduct by the witness was first-party disclosure.
- [36] No such agreement has been made in this case. The consent orders made in Applications -11 and -12 demonstrate that. The defence is not obligated to take that same position in this application. However, it removes what appears to be a fundamental aspect of the reasoning in Giles.
- [37] Neither Fischer nor Giles were considering the disclosure of the entire investigatory files related to a new charge against the witness. I also note that neither case is binding upon me.
- [38] In this matter, the applicant has made strong submissions regarding how A.B. is a key witness and how the case will turn on the accused's ability to test A.B.'s credibility in cross-examination. The documents are relevant to the applicant's ability to make full answer and defence. However, obvious relevance requires that it be clear even without the record before the court that they are self-evidently relevant. An outstanding charge has relevance to the issues of credibility and trustworthiness but I cannot find that the complete investigative file is obviously relevant. I am not determining the outcome of the new charge.
- [39] The records are in control of a third-party investigative agency that has asserted privilege. The third-party agency is unknown.
- [40] I find the Crown has satisfied its first-party disclosure obligations in good faith, having alerted the applicant to the existence of the record.
- [41] The complete investigative file relating to the new charge against A.B. is not subject to first-party disclosure. Some disclosure may be subject to the third-party disclosure regime.
- [42] Those are my reasons in this matter.

"Gropper J."

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