

CANADA / JUDGMENT

R. v. Sipes

2010 BCSC 1625

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Supreme Court of British Columbia

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sipes,

2010 BCSC 1625

Date: 20101117

Docket: 66431

Registry: Kelowna

Regina

v.

Dale Gordon Sipes, Leslie Podolski, Sheldon Richard O'Donnell,

Peter Manolakos and Douglas Corey Brownell

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Before: The Honourable Mr. Justice Smart

SERVICE OF NOTICE OF THIRD PARTY RECORD APPLICATIONS AND SUBPOENAS

Reasons for Judgment

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Place and Date of Judgment:

Vancouver, B.C.

November 17, 2010

I. INTRODUCTION

[1] [Content Redacted] are anticipated to be key Crown witnesses at trial. The accused wish to bring third-party record applications with respect to each of them. The records are those of various Canadian Correctional Institutions (the "Institutions") which have housed the witnesses over the last three or four years. The records sought are broad in scope and general in description.

[2] The witnesses are in serving life sentences in the Institutions. The Crown is concerned for their safety if other inmates become aware that they are cooperating Crown witnesses. For this reason, the Crown has not disclosed any information concerning the Institutions where they are or have been housed. It did, however, offer to effect service of third party record applications on the witnesses and Institutions.

- [3] Third-party record applications are commonly referred to as O'Connor applications. They are governed by the law as stated in *R. v. O'Connor*, [1995] 4 S.C.R. 411 and amplified in *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66. The procedure outlined in these decisions describes a two-stage process which takes place before the trial judge after the appropriate notice of application has been served on the witness and the notice and a subpoena duces tecum (the "subpoena") has been served on the third-party record holder. At the first stage, the applicant must demonstrate the "likely relevance" of the records sought.
- [4] Having reviewed the notices of the third party record application (the "Notices"), the Crown resists serving the Notices and subpoenas on behalf of the accused. Instead, the Crown has brought this application requesting the court dismiss both applications on the basis the records sought would not survive the threshold burden imposed at the first stage on an O'Connor application; namely, likely relevance. In other words, the Crown seeks an order dismissing the third-party record applications prior to the Notices being given to the witnesses or the third party record holders.
- [5] The accused respond that the Crown's application is ill conceived and premature. They argue that submissions directed at the merits of the applications should occur after the witnesses and Institutions are served and communicate what positions, if any, they will take.
- [6] The Crown's application raises numerous questions, including:
- (i) Do I have jurisdiction to decide the Crown's application?
 - (ii) If I do, should I exercise my jurisdiction?
 - (iii) If I have jurisdiction and decide to exercise it, what is the standard I should apply in deciding the application?
 - (iv) Should the application be granted or dismissed?
 - (v) If I dismiss the application, should I allow the Crown to redact or redraft the Notices in order to protect the safety of the witnesses and when must the records be brought to court?
- [7] I will provide some further background to put these applications into context and briefly summarize the law as explained in *O'Connor* and *McNeil*. I will then explain the contents of the Notices and the records sought, briefly review the submissions of counsel and provide my analysis for my decisions to the questions I have identified.

II. BACKGROUND

- [8] The Crown alleges that the accused were members of a criminal organization named the Greeks; that the Greeks operated an illegal drug trafficking business in the Vernon area; and that between mid-2004 and mid-2005 the Greeks committed seven murders. Three of the alleged murders are charged on the Indictment before me. The accused were allegedly members or associates of the Greeks and each of them are charged with one or more of the murders on the Indictment. The trial is presently scheduled to begin with a jury on April 4,

2011.

- [9] The witnesses were allegedly members of the Greeks. [Content Redacted]. Each has entered into an immunity agreement with the Crown and is a cooperating Crown witness. Each is expected to provide evidence implicating the accused in the murders charged on the Indictment. The Crown has provided the accused with the witnesses' police interviews as well as "will states" of the evidence it anticipates leading from them. The credibility of the witnesses will be a crucial issue for the jury to decide.

III. O'CONNOR APPLICATIONS

- [10] The law that governs an O'Connor application was reviewed by Charron J. in McNeil. She explained the procedure at para. 27 of McNeil:

Stated briefly, the procedure to be followed on an O'Connor application is the following:

- (1) The accused first obtains a subpoena duces tecum under ss. 698(1) and 700(1) of the Criminal Code and serves it on the third party record holder. The subpoena compels the person to whom it is directed to attend court with the targeted records or materials.
- (2) The accused also brings an application, supported by appropriate affidavit evidence, showing that the records sought are likely to be relevant in his or her trial. Notice of the application is given to the prosecuting Crown, the person who is the subject of the records and any other person who may have a privacy interest in the records targeted for production.
- (3) The O'Connor application is brought before the judge seized with the trial, although it may be heard before the trial commences. If production is unopposed, of course, the application for production becomes moot and there is no need for a hearing.
- (4) If the record holder or some other interested person advances a well-founded claim that the targeted documents are privileged, in all but the rarest cases where the accused's innocence is at stake, the existence of privilege will effectively bar the accused's application for production of the targeted documents, regardless of their relevance. Issues of privilege are therefore best resolved at the outset of the O'Connor process.
- (5) Where privilege is not in question, the judge determines whether production should be compelled in accordance with the two-stage test established in O'Connor. At the first stage, if satisfied that the record is likely relevant to the proceeding against the accused, the judge may order production of the record for the court's inspection. At the next stage, with the records in hand, the judge determines whether, and to what extent, production should be ordered to the accused.

- [11] Justice Charron stated that the first stage screening for likely relevance reflects the difference between disclosure of first-party and third-party records. She stressed the need to ensure that third-party applications are justified and not merely "fishing expeditions", at para. 28:

We have already seen that the presumptive duty on Crown counsel to disclose the fruits of the investigation in their possession under Stinchcombe is premised on the assumptions that the information is relevant and that it will likely comprise the case against the accused. No such assumptions can be made in respect of documents in the hands of a third party who is a stranger to the litigation. The applicant must therefore justify to the court the use of state power to compel their production -- hence the initial onus on the person seeking production to show "likely relevance". In addition, it is important for the effective administration of justice that criminal trials remain focussed on the issues to be tried and that scarce judicial resources not be squandered in "fishing expeditions" for irrelevant evidence. The likely relevance threshold reflects this gate-keeper function.

- [12] While Charron J. emphasized the need to ensure judicial resources were not squandered on spurious applications and expressed the threshold burden as a "significant" one, she also said that it was not an "onerous burden". She defined the burden as one requiring an applicant to demonstrate a reasonable possibility that the records sought are logically probative to an issue at trial. She said, at para. 33:

"Likely relevant" under the common law O'Connor regime means that there is "a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify" (O'Connor, at para. 22 (emphasis deleted)). An "issue at trial" here includes not only material issues concerning the unfolding of the events which form the subject matter of the proceedings, but also "evidence relating to the credibility of witnesses and to the reliability of other evidence in the case" (O'Connor, at para. 22). At this stage of the proceedings, the court cannot insist on a demonstration of the precise manner in which the targeted documents could be used at trial. The imposition of such a stringent threshold burden would put the accused, who has not seen the documents, in an impossible Catch-22 position.

IV. THE NOTICES AND THE RECORDS SOUGHT

- [13] The Notices are similar in content and form and seek similar records. I will refer to one of the Notices. It commences with a request that Crown counsel serve the Notice and attached affidavit on the witness and all correctional institutions which have housed him from [Content Redacted] until present; or alternatively, provide the information necessary for the accused to do so.
- [14] It then identifies the records sought as the following:

1. Any and all records in their possession relating to [the witness's] state of mental and or physical health, including but not limited to his Offender Health Care Records and pre-trial institutional equivalents and Psychology Records and pre-trial institutional equivalents;
 2. Any and all records in their possession relating to [the witness's] history as an inmate, including but not limited to any Case Management Files and pre-trial institutional equivalents, Preventative Security Records and pre-trial institutional equivalents;
- [15] It then states the grounds for the application. The grounds include information about the charges against the accused, the witness's cooperation with the police and Crown, and the evidence that the Crown expects him to provide at trial. It also includes statements or allegations about the witness such as that stated at para. 15:

[The witness] is known to have lied on numerous occasions to the RCMP about the charges on the indictment as well as other related homicides. [He] has a convincing demeanour even when he is lying and the witness [Content Redacted]. All of these factors suggest that [he] has sociopath tendencies and the applicants have reason to believe that one or more psychological reports held at one or more of the correctional institutions which have housed [the witness] will assist in this inquiry.

- [16] The Notice for a second witness generally mirrors this Notice but seeks an additional record, his personal diary.
- [17] The affidavits which are attached to the Notices include the witnesses' "will states" and police statements.

V. POSITIONS OF COUNSEL

- [18] Crown counsel reviews the applicable law concerning an O'Connor application and the requirement that an applicant demonstrate the likely relevance of the records sought at the first stage of the application. They urge me to apply the same standard in deciding this preliminary application.
- [19] The Crown were unable to provide any case authorities dealing with a Crown application to dismiss an O'Connor application prior to service, although it did provide *R. v. Violette*, 2008 BCSC 1142.
- [20] Violette dealt with an application by Crown counsel to quash subpoenas that had been served on a Crown witness and the Canada Revenue Agency seeking production of various records. The decision is distinguishable given that the application was after service and the witness and third party recorder holder were both represented by counsel at the application.
- [21] After submissions were completed, the Crown provided counsel and the court with *R. v. Basi*, 2009 BCSC 756, a decision which was only released on November 10, 2010. Basi is a decision of Bennett J. (as she then was) in which she considered third party record

applications for documents held by members of the Legislative Assembly, including Cabinet Members, the Speaker of the House, the Conflict of Interest Commissioner, and many other government officials. The circumstances of the application before her differ in many respects from the one before me, but her analysis is helpful.

[22] Justice Bennett said at para. 27:

In summary, the defence need to refine their O'Connor application and make it more precise and manageable. For example, they seek records from numerous Cabinet Ministers, both past and present, as well as their Deputies, Assistants and staff. The records sought will have to be much more clearly articulated as I will not embark upon such a broad application, because it approaches on what Madam Justice Charron referred to in McNeil as fishing. I say that knowing that many relevant documents have been produced as a result of the defence efforts. However, this application goes too far in its scope.

[23] Justice Bennett required the defence to file an affidavit to establish the likely relevance of each group of records sought. She also departed from the usual O'Connor procedure. She directed that the applications and affidavits be served on the third parties but directed that the subpoenas not be served until after the likely relevance of the requested documents was decided. She said the following at paras. 29 and 30:

[29] Finally, it is necessary to depart from O'Connor in one important aspect. O'Connor was decided in the context of identifiable records, such as a complainant's counselling or medical records. McNeil was decided on the basis of identifiable police records. Here there are potentially thousands of records, and particularly e-mail, which could take a tremendous amount of time and effort to uncover. For example, the FOI request took, as I understand it, over a year to complete.

[30] Therefore, while the application will be served on the third parties along with the supporting affidavits, subpoenas duces tecum will not be issued unless and until I am satisfied that the documents are likely relevant. I see no point in spending extensive government resources gathering documents that may never be ordered produced to the Court....

[24] I heard further submissions from counsel concerning Basi. Both Crown counsel and defence counsel argue that the decision supports their respective positions.

[25] Defence counsel argue that the Court in Basi departed from the usual procedure as the application concerned numerous unidentifiable records. They submit that the Notices in the present application deal with clearly identifiable records and, as such, urge me not to follow the procedure in Basi. They suggest that directing service of the Notices, but not the subpoenas, may delay the start of the trial.

- [26] Crown counsel argues the Notices are "overly broad and laden with boilerplate statements" and amount to a request to see all of the Institutional records pertaining to each of the witnesses. They submit that the requests are nothing more than a fishing expedition based on speculation. They focus particularly on the request for records pertaining to the witnesses' physical and mental health.
- [27] Crown counsel submits that service of the Notices would result in significant prejudice to the Crown, the witnesses and the Institutions. The prejudice includes the following:
- (i) as there are a total of eight Institutions at which the witnesses have been housed since their present incarceration, the Crown will be put to the expense and trouble of serving all eight as well as the witnesses;
 - (ii) the Institutions in turn will be put to the expense and trouble of gathering what may be many hundreds of documents and bringing them to court;
 - (iii) service of the Notices at the Institutions may create a risk of harm or intimidation for the witnesses as the contents could be advertently or inadvertently disclosed to other inmates and reveal that the witnesses are cooperating in the prosecution of the accused; and
 - (iv) the Notices contain inaccurate statements and inflammatory allegations about the witnesses that may cause them distress; and, I infer, perhaps strain their relationship with Crown counsel and leave them less cooperative.
- [28] Crown counsel acknowledges that if I proceed and find likely relevance has been demonstrated on this preliminary application, I will have to reconsider that finding, after service. In other words, Crown counsel submits that I should determine likely relevance in the absence of the witnesses and third parties. If I am satisfied that it has been established, I should reconsider that decision, after service, if the witnesses and third parties oppose production.
- [29] Mr. Nathanson responds that the accused have "service as of right" if the Crown will not disclose the information necessary to permit the defence to do so. He suggests that the Crown are engaged in a stalling exercise designed to frustrate the accused's efforts to obtain documents that are necessary to assist them in challenging the evidence of these critical Crown witnesses.
- [30] He directs me to Davies J.'s decision in *R. v. Rojas*, 2003 BCSC 1064, where the court dealt with a defence application for correctional records relating to a Crown witness. At para. 4, Davies J. said:

.... While the proposed witness does have some privacy interest in his correctional records, it is a limited one. These are records maintained in a public institution and widely shared within that institution for decision-making processes, including placement and parole decisions. Further, information in those records is frequently made available to the courts directly and indirectly through submissions of counsel and through pre-sentence reports.

- [31] Mr. Nathanson argues that if I conclude that I should decide the Crown's application, the burden on the accused to justify service should be a much lower standard than likely relevance.
- [32] Defence counsel dispute that service of the Notices will cause the prejudice to the witnesses and Institutions that the Crown suggests. They suggest that the Notices can be served on counsel for the Institutions, not the Institutions themselves. Further, the RCMP can serve the witnesses personally and the Notices can be kept in a secure place just as occurs with any sensitive disclosure provided to an accused awaiting trial while incarcerated.
- [33] Mr. Bauman refers me to *R. v. Bartkowski*, 2004 BCSC 480, as an example of where the court permitted the threshold issue of likely relevance to be argued after service to the third party witnesses but without service on the record holders. Macaulay J. explained the procedure at paras. 8 and 9:
- [8] With the assistance of the Crown and counsel retained by the Crown to represent the interests of the individual witnesses, defence counsel made arrangements to serve the witnesses. Due to the need to avoid disclosing the witnesses' whereabouts, the names and addresses of some third party record holders such as drug counsellors were also redacted. To this point, also by agreement with the Crown, the defence has not served any third party record holders as required.
- [9] Instead, with my leave, only the Crown and defence argued the threshold issue. Likely for the reasons alluded to earlier, counsel for the witnesses did not seek to participate. All counsel anticipated that if I find, based on the evidence before me, that the documents sought, or any of them, are likely relevant, the Crown will arrange to serve the necessary subpoenas and notice so that the custodians and the witnesses, whose privacy interests are implicated, may participate in the balancing process contemplated by the second stage of the application.
- [34] Mr. Jetté adds that the witnesses may consent to disclosure of the records and the court cannot know whether that may occur until after service.
- [35] Mr. Ross also refers me to *Violette*. He submits that there can be no dispute that the records exist and the only real issue is the content of the records. He argues that the subpoenas should issue unless the records are clearly irrelevant; and the records sought on these applications are not.
- [36] Mr. Orris cautions me not to add an additional step or hurdle in the O'Connor procedure that accused persons must follow to obtain third party records. He accepts that I have jurisdiction to hear the Crown's application but argues I should decline to exercise that jurisdiction as the Notices are clearly not frivolous or vexatious. He expresses concern that if I exercise jurisdiction on this application, the Crown will bring these kinds of preliminary applications as a matter of routine in the future.

- [37] He submits that if I do exercise jurisdiction and decide the Crown's application, I should impose a high burden on the Crown to demonstrate why these third party record applications should be summarily dismissed before service.

VI. ANALYSIS

- [38] In my view, the procedure outlined in O'Connor and McNeil was not intended to be a scientific formula that must be followed as a matter of rote. Rather, it was intended to permit a fair balancing of competing values and interests when an accused seeks records in the possession of third parties. When a variation in procedure will enhance this balancing exercise, it may be appropriate to do so. The usual O'Connor procedure may be adapted to fit the circumstances of the particular application provided the principles articulated in O'Connor are respected. This is what Bennett J. did in Basi.
- [39] With these preliminary observations I will now address the questions I posed at the commencement of this decision.
- (i) Does the Court Have Jurisdiction to Decide the Crown's Application?
- [40] I am satisfied that I have jurisdiction to hear a Crown application to dismiss an O'Connor application prior to service of the subpoenas or Notices. This power is consistent with the authority trial judges have to manage trials and ensure a fair and efficient process for all parties and participants.
- (ii) Should I Exercise my Jurisdiction in the Circumstances of this Application?
- [41] I expect that it will be rare that a court will be asked to exercise its jurisdiction to decide an application such as the one before me. I also expect judges will be wary of adding another step to the process for accused persons seeking third party records given that doing so may add cost, delay, and complexity.
- [42] One circumstance where a court may conclude that it should exercise jurisdiction is where the O'Connor application is clearly frivolous or vexatious. Another may be, as here, where the accused are seeking the Crown's assistance to serve the O'Connor documents and the Crown concludes that the application, while not frivolous or vexatious, is without merit and service may cause prejudice to the interested third parties.
- [43] In bringing this preliminary application, the Crown is essentially seeking a ruling that it does not have to effect service of the Notices. It is the reverse of what would likely occur if the Crown simply refused to serve the Notices. In this situation, the defence would inevitably apply to the court for an order compelling service or disclosure of the witness's whereabouts so the defence could do so. In my view, by proceeding in the manner it has, the Crown has taken the responsible position of raising the issue with the Court rather than doing nothing and leaving it to the defence to do so.

- [44] If the defence is correct that they have an unfettered right to have the Crown serve the Notices, the Crown would be bound to effect service no matter how onerous, frivolous or vexatious the application was. A self-represented accused could demand service on any number of third party record holders for any number of Crown witnesses whose whereabouts cannot be disclosed for valid reasons, notwithstanding the merits of the application.
- [45] In my view, a request for an order dismissing an O'Connor application before service will be rare. It is not a request that will be made for reasons of trial tactics. While Crown counsel are advocates, their overriding duty is to the proper administration of justice. As Charron J. stated at para. 49 of McNeil:

The Crown is not an ordinary litigant. As a minister of justice, the Crown's undivided loyalty is to the proper administration of justice.

- [46] Crown counsel, as ministers of justice, have an equal interest in ensuring that an accused is able to make full answer and defence. It will usually be in the best interests of the administration of justice that an O'Connor application proceed as outlined at para. 27 of McNeil.
- [47] I have concluded that I should exercise my jurisdiction and decide the Crown's application given the reasons that ground the application.

(iii) What is the Standard the Court Should Apply?

- [48] The arguments of counsel evolved during the course of submissions. The focus shifted to a consideration as to whether the subpoenas could issue, or if issued, whether they would be quashed. The issuance of subpoenas duces tecum is governed by s. 700 of the Criminal Code. Whether or not Mr. Orris is correct that he could serve the subpoenas on the Institutions without the Crown's assistance, it would still be necessary to serve the witnesses with the Notices. As L'Heureux-Dubé J. noted in O'Connor at para. 136:

When the subpoena is served, the accused should give written notice to anyone with an interest in the confidentiality of the records that a motion will be brought for an order for production of the records. Interested parties include the Crown, the person who is the subject of the records, the guardian of the records, and any other person required by statute to be notified. Failure to give notice to all interested parties will be fatal to the application, although the accused may reapply and, as matter of convenience, notice to the guardian of the records may accompany the subpoenas duces tecum. [Emphasis added.]

- [49] I have concluded that I should consider the Crown's application based on the request in the Notices that the Crown serve them on the witnesses and the third party record holders.
- [50] The question remains: what standard should I apply in deciding this preliminary application to dismiss the O'Connor applications?

- [51] I respectfully disagree with the Crown that I should apply the likely relevant standard. To do so would be to apply and decide the first stage of the O'Connor application without notice to the other interested parties. If I did so and found that the likely relevant standard had been established, the other interested parties, after being served, may want to re-litigate the issue. To do so would be problematic and unfair to the third parties who would know I had already come to a conclusion in their absence. Further, it would be an inefficient use of counsel's time and judicial resources.
- [52] In my view, the burden should be on the Crown applying to dismiss an O'Connor application prior to service and that test should be an onerous one.
- [53] For the purposes of this application I will apply the following test: whether there is no reasonable possibility that the accused will be able to demonstrate likely relevance for any of the records sought.
- [54] I have ignored the possibility that the third parties might consent to the release of the records because if there is no reasonable possibility that the records are likely relevant to an issue at trial their non-disclosure is of no concern.

(iv) Should the Crown's Application Succeed?

- [55] The Crown has not satisfied me that there is no reasonable possibility that the accused will be successful in their application for third party records. While it may ultimately be determined that the application is overly broad, I am not satisfied there is no possibility that the accused will be unsuccessful with respect to all of the records sought. For example, records pertaining to serious misconduct by the witnesses while serving their sentences may be fertile ground to attack their character and honesty and therefore their credibility as witnesses.
- [56] Having dismissed the Crown's application, I then move to consider the form and content of the Notices and service of the subpoenas.

(v) Form and Content of the Notices and Service of the Subpoenas

- [57] With respect to the form and content of the Notices, the Crown should seek further directions from the court if it wishes to redact portions of the Notice or redraft them. The Crown should provide the defence with what it proposes serving so, if necessary, the defence can make submissions to the court and the court can be satisfied that the third parties are receiving adequate notice.
- [58] Concerning the manner of service, in my view, this is best left to the discretion of the Crown. A few suggestions emerged during oral argument that may be of assistance to the Crown. With respect to the Institutions, if the Institutions have counsel it may be that counsel can be served so as to avoid some of the security concerns raised by the Crown. With respect to the witnesses, the RCMP may be able to arrange service so as to minimize the concerns raised by the Crown. In any case, it is open to the Crown to seek further

directions from the court with respect to service, if necessary.

- [59] With respect to the burden of gathering the records sought, the Crown can delay service of the subpoenas until after likely relevance of the records has been demonstrated. The bifurcation of service of the Notices and the subpoenas is what occurred in *Basi* and is a sensible deviation from the usual O'Connor procedure when the circumstances support doing so.
- [60] I am satisfied that proceeding this way will not delay the trial. The Notices will be served months before the trial is scheduled to commence. It will permit the first stage of the O'Connor application to proceed without any delay that might be caused by requiring the record holders to collect and bring the records to court. If likely relevance is demonstrated, the time required to collect the required records will be no different than it would have been prior to the first stage inquiry. If likely relevance is not demonstrated, collecting the records will be unnecessary.
- [61] In the circumstances of this application, I am of the view that proceeding with a bifurcated process is unlikely to delay the commencement of the trial and will avoid the burden on the record holders of gathering the records until their likely relevance has been established. The process respects the interests of the third party record holder without compromising the interests of the accused or the public in a fair and expeditious trial.

VII. CONCLUSION

- [62] I find that I have jurisdiction to decide the Crown's application and that I should exercise my jurisdiction to do so.
- [63] In deciding the application, the burden is on the Crown to demonstrate that there is no reasonable possibility that the accused will be able to demonstrate likely relevance for any of the records sought.
- [64] Applying that standard, I find the Crown has failed to meet it and the Crown's application is dismissed subject to two qualifications.
- [65] First, while the Notices must be served, the subpoenas need not be until after likely relevance of the records sought has been demonstrated. This will ensure that the record holders are not required to locate, collect and bring the records to court unless and until the threshold burden of likely relevance has been demonstrated.
- [66] Second, the Crown may apply to the court for permission to redraft or redact portions of the Notices. However, the manner of service of the Notices on the Institutions and the witnesses will be left to the discretion of the Crown.

"SMART J."

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