

CANADA / JUDGMENT

R. v. Teixeira

2024 BCSC 356

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 356 R. v. Teixeira

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Teixeira,

2024 BCSC 356

Date: 20240228

Docket: 82939-86

Registry: New Westminster

Rex

v.

Brandon Nathan Teixeira

Corrected Judgment: The text of the judgment has been redacted for publication purposes and was corrected on the front page and at paragraph 55 on March 7, 2024 and December 19, 2025.

Restriction on publication: There are restrictions on publication of these reasons pursuant to s. 486.5(1), s. 486.5(9) and s. 684 of the Criminal Code of Canada and the Inherent Jurisdiction of this Court. The restrictions remain in place until further order of the Court.

Before: The Honourable Justice Duncan

Ruling on Application #86

Re Objection to Disclosure under s. 37 of the Canada Evidence Act

Counsel for the Crown:

M. Barrenger

D. Wiedemann

A. Smith

Counsel for the Accused:

R. Mansoori-Dara

R. Thirkell

Counsel for the Attorney General

of Canada:

J. Katz

M. Inuzuka

Counsel for Amicus Curiae:

C. Elden

Place and Date of Trial/Hearing:

New Westminster, B.C.

November 15-17 and 27-29, 2023; and December 21, 2023

Place and Date of Judgment:

New Westminster, B.C.

February 28, 2024

Introduction

- [1] The Attorney General of Canada and the B.C. Prosecution Service (the "Crown") have each filed a certificate under s. 37 of the Canada Evidence Act, R.S.C. 1985, c. C-5 [CEA], objecting to a disclosure order I made on August 16, 2023.
- [2] The application arises out of the Crown's inadvertent removal of a redaction over the name of an individual, referred to in these proceedings as Other Inmate, from a disclosure package sent to defence counsel. In May 2019, Other Inmate was housed with the Crown's key witness, Witness X, at a correctional facility that has, does, and will house individuals [redacted].

- [3] The Attorney General of Canada advances the position that Other Inmate's name and other related information should remain redacted in the disclosure package because defence counsel want to investigate his claims about Witness X and ask him who else was on the unit at the same time in an effort to dig out more information about Witness X. Mr. Katz, counsel for the Attorney General of Canada, maintains that insofar as this investigation relates to the credibility of a witness, it is not a central issue at trial.
- [4] In the alternative, the Attorney General of Canada shares the Crown's position that the unredacted disclosure should only be released with conditions limiting the scope of questions that counsel for the accused, Brandon Teixeira, are permitted to ask Other Inmate in pre-trial investigations.
- [5] The Attorney General of Canada's certificate was sworn by Carlene Stuart, Deputy Director of Preventive Security and Intelligence for the Correctional Service of Canada ("CSC"). Ms. Stuart states, *inter alia*:
3. I swear this Certificate in response to the decision of the Honourable Justice Duncan, dated August 16, 2023, directing the Attorney General of British Columbia (the "Crown") to provide to Defence Counsel disclosure materials in which redactions for public interest privilege, specifically those referred to in *R. v. Teixeira*, 2023 BCSC 768 as the "Other Inmate" and the "Community Member", (collectively the "Information"), be lifted with no restrictions on the use of the Information by Defence Counsel.
 4. I certify pursuant to s. 37 of the Canada Evidence Act that disclosure and/or use without restriction of the Information would be contrary to the public interest and I object to their disclosure on that ground, namely the safety and security of federal inmates, penitentiaries, and CSC staff and any related persons. More particularly I object to the production and disclosure of such information as prejudicial to the public interest, on the following grounds:
 - a) disclosure of the Information will undermine the efforts of the CSC to provide for the safety and security of Witness X and other past, present and future inmates; and
 - b) Disclosure of the Information is contrary to the statutory purpose of the CSC that includes maintaining the safe custody and supervision of offenders and protection of society.
- [6] The Crown's certificate was sworn by Adrienne Smith, who states:

I certify pursuant to s. 37 of the Canada Evidence Act that disclosure and/or use of the Sensitive Information without restriction would be contrary to the public interest. The safety and security of former and current federal inmates, the safety and security of friend and/or family members of former and current federal inmates, the safety and security of federal penitentiaries, and the safety and security of Correction [sic] Service of Canada staff and related persons, would be compromised by disclosure of the Sensitive Information. I object to disclosure of the Sensitive Information on these bases.

- [7] The Sensitive Information referred to in these reasons includes the names of Other Inmate and Community Member, as well as the phone number used to contact Community Member. I refer to the Sensitive Information at times as the disputed disclosure.

The Background

- [8] The background to these s. 37 certificates is lengthy and complex.
- [9] Mr. Teixeira is charged with first degree murder and attempted murder. Pre-trial applications have been underway since August of 2021. A trial date is yet to be set.
- [10] In early 2022, Crown counsel inadvertently lifted some redactions from a disclosure package, which was then sent to defence counsel. The lifted redactions revealed the real name of Other Inmate.
- [11] Armed with the name of Other Inmate from the disclosure package, defence counsel located an interview he had done with [redacted] reporter for the [redacted]. The interview was in the [redacted] and posted on YouTube. Other Inmate used his real name and referred [redacted] where he had served time with Witness X. The Attorney General of Canada has since made efforts, apparently successful, to have [redacted] removed from the public domain.
- [12] The Crown realized in June 2022 that the redactions had been inadvertently lifted and requested that defence counsel return the unredacted disclosure. Defence counsel promptly did so, then pursued disclosure of the information in its unredacted form. Defence counsel sought the names of Other Inmate, an individual referred to as Community Member, and the phone number that Other Inmate used to contact Community Member.
- [13] As I will explain later in these reasons, the conditions sought on disclosure of the Sensitive Information by the Crown and the Attorney General of Canada would also prohibit defence counsel from making inquiries about the location from which Other Inmate made the phone call, as well as asking about other individuals incarcerated with Other Inmate at the time of the phone call.
- [14] The Crown offered unredacted disclosure in exchange for these conditions shortly after the inadvertent disclosure of Other Inmate's name was discovered in the summer of 2022. Defence counsel has steadfastly refused to enter into any type of agreement that would fetter the questions they can ask Other Inmate.
- [15] To put the Sensitive Information in context, the Crown's case against Mr. Teixeira turns almost entirely on the evidence of Witness X, a former associate of Mr. Teixeira. Witness X acted as a police agent in relation to the investigation of Mr. Teixeira and others. He was paid \$250,000 for that work. Witness X then entered into a Limited Immunity Agreement ("LIA") and provided a Non-Jeopardy Interview ("NJI") concerning his involvement in the murder of Nicholas Khabra. He pleaded guilty to conspiracy to commit that murder and received a favourable sentence. Witness X will receive an additional \$250,000 for his testimony at Mr.

Teixeira's trial. He is expected to say that Mr. Teixeira shot and then stabbed Mr. Khabra to death in satisfaction of a \$160,000 contract on the latter's life, offered by Ricky Korasek. Witness X will also say that Mr. Teixeira had a personal "beef" with Mr. Khabra.

- [16] Other Inmate was incarcerated with Witness X in May 2019 at a location over which the Attorney General of Canada and the Crown claim public interest privilege. Other Inmate made a phone call to Community Member and invited Witness X to participate in that call. The defence has a redacted transcript of the exchange.
- [17] Other Inmate later wrote to his police handler, alleging that Witness X organized an assault on him in the institution and that he knew things about Witness X that the police did not know. There is also an indication that Witness X told Other Inmate a different version of events about the death of Mr. Khabra than he has provided on other occasions, including to police. The police and CSC regard Other Inmate as an attention-seeking individual of dubious veracity.
- [18] The Crown's assertion of public interest privilege in the disputed disclosure became the subject of Application 58. At the first stage, there was an in camera evidentiary hearing with Ms. Stuart as a witness. She had provided an affidavit outlining the CSC's concerns about the inadvertent disclosure. I appointed amicus curiae to cross-examine her on behalf of the accused.
- [19] At the conclusion of the in camera hearing, I found that there was a public interest privilege in the unredacted disclosure. In my reasons for judgment indexed at 2023 BCSC 155, I characterized the privilege as attaching to the name of Other Inmate and related materials in the disclosure package: at para. 107. A preferable description of the privilege I upheld comes from Mr. Katz's submissions on this application: the safety of incarcerated witnesses and the operational integrity of the means and methods used to protect them.
- [20] At a subsequent stage of Application 58, I heard submissions concerning whether and to what extent the disclosure could be given to the defence. I was given scant information by defence counsel about the relevance of the evidence, beyond that it was tangentially possibly relevant. Defence counsel simply took the position that they were entitled to the unredacted information on the basis that it was first party disclosure and not clearly irrelevant. As a result, I upheld the public interest privilege and refused to order disclosure of the information in its unredacted form: my reasons indexed at 2023 BCSC 768.
- [21] Subsequently, in Application 85, defence counsel sought various orders, up to and including a stay of proceedings, to remedy the fact that they and Mr. Teixeira knew the name of Other Inmate as a result of the unredacted disclosure, but could not investigate what he might know about Witness X, potentially putting the solicitor-client relationship at risk if Mr. Teixeira gave them instructions to seek out and interview Other Inmate. Maintaining the redactions, they said, prejudiced their ability to challenge Witness X's credibility and reliability by removing an avenue of investigation.

- [22] In the course of arguing Application 85, which remains suspended pending the outcome of proceedings relating to disclosure of the Sensitive Information, defence counsel placed the disputed disclosure into context by relating it to other disclosure they had received, significantly increasing its likely relevance. This caused me to question whether I had been correct in upholding the privilege and withholding disclosure and led to a re-opening of the balancing of privilege versus disclosure: my reasons indexed at 2023 BCSC 1475.
- [23] In 2023 BCSC 1475, I discussed the relevance or importance of the disclosure. There were five general subject areas:
- a) the May 3, 2019 phone call: Other Inmate called Community Member, asking him to pretend he was an associate of "Shop" (Amir Eghtesad, a high-ranking member of an organized crime group who was in federal custody) and engage Witness X in some conversation about Shop and other subject areas: paras. 22-26;
 - b) the letter Other Inmate wrote to his handlers: Other Inmate claimed he had damaging information about Witness X that needed to be brought out, that Witness X was bragging about doing all sorts of crime while he was an agent and getting away with it, and that there was probably a lot police did not know about Witness X that should be brought forward: paras 27-31;
 - c) Police notes and other disclosure: Other Inmate and Y, formerly a Crown witness, were apparently transported together in custody from western Canada to eastern Canada. Y told police that Other Inmate said Witness X had pulled a fast one on the cops, that he shot Khabra and Teixeira did the stabbing, and that Witness X wanted to kill Y and another individual, likely Ricky Korasek, who put up the money for the Khabra hit: paras. 32-37;
 - d) Witness X and Y had been directed not to communicate: defence counsel maintains that Other Inmate must have told Y where Witness X was being held because Witness X and Y sent cards or notes to each other in contravention of directions not to communicate: paras. 38-39; and
 - e) relevance of additional inmates at the institution: defence counsel wanted to probe the association between Witness X and Amir Eghtesad, as well ask Other Inmate for details on the assault he claimed Witness X had orchestrated against him by others, including the names of additional inmates on the unit: paras 40-42.
- [24] I agreed with the Crown that much of the disclosure sought would likely be inadmissible at trial, because it was collateral or double and triple hearsay, but admissibility is not the touchstone of disclosure. There may be something of value to the defence in speaking with Other Inmate or Community Member, or at least it could not be said that those inquiries were irrelevant. The inquiries could provide a trail for the defence to relevant or helpful evidence, or in preparing for cross-examination of Crown witnesses, particularly Witness X.

- [25] The Crown maintained that the defence could learn what they wanted without asking Other Inmate about additional inmates or the name of the institution and that the conditions sought on disclosure did not prevent full answer and defence.
- [26] Ultimately, I ordered the disclosure of the information without conditions. I did so as I was not persuaded by the Crown that I had the jurisdiction at common law or pursuant to inherent jurisdiction to impose the conditions sought: 2023 BCSC 1475.
- [27] To reiterate, the conditions sought by the Crown and the Attorney General of Canada would prohibit defence counsel from asking Other Inmate about the name of the location and the names of additional inmates and would prevent defence counsel from disclosing that information to Mr. Teixeira, if it was disclosed to them by Other Inmate.
- [28] The Attorney General of Canada and the Crown responded to the disclosure order in 2023 BCSC 1475 with their respective s. 37 objections.
- [29] There is no set procedure on a s. 37 application. The dual applications concerning the same subject matter caused some procedural difficulty. Initially, I determined that the Attorney General of Canada's objection be dealt with and decided first; however, after submissions from the Crown, I directed that I would hear submissions from the Attorney General of Canada and the Crown and then provide defence counsel time to prepare a response to both objections.
- [30] The submissions of the Attorney General of Canada and the Crown were completed on November 16, 2023 with defence submissions set to begin on November 28. On November 16, defence counsel advised that they wanted to appear before me, in camera and ex parte the Crown. While the Crown was concerned and opposed to this unusual request, I acceded to it.
- [31] On November 17, defence counsel appeared before me, without Mr. Teixeira but with his consent to do so in his absence. I was assigned to civil and family chambers that day and could not predict with any certainty when a video link with Mr. Teixeira could be facilitated.
- [32] During the in camera hearing, Mr. Mansoori-Dara and Mr. Thirkell, two of Mr. Teixeira's defence team, advised me that they were aware of some aspects of the Sensitive Information that the Crown and the Attorney General of Canada sought to withhold from them, through sources independent of the inadvertent disclosure of Other Inmate's name. They intended to inform the Crown about the state of their knowledge without revealing any details of the defence brief, over concerns of litigation privilege. Counsel acknowledged that this knowledge was one of the reasons why they refused to sign an undertaking in exchange for the disclosure in the summer of 2022.

[33] On November 27, defence counsel appeared before me, again in camera, to propose a summary of the information they possessed. The summary was reduced to writing, marked as Exhibit W on this application, and disclosed to the Attorney General of Canada and the Crown. An error as to the date was corrected by Memorandum on January 20, 2024.

[34] The corrected version of Exhibit W states:

Counsel and Mr. Teixeira have been aware of the name of the Institution prior to Crown's inadvertent disclosure in February of 2022. This information was available in the public domain.

Counsel were able to corroborate this pre-existing information through various sources. They are:

- i) Other sources in the public domain and independent from Crown's inadvertent disclosure in February of 2022; and
- ii) Other Inmate's interview with [redacted] reporter, as a result of Crown's inadvertent disclosure in February of 2022.

Counsel and Mr. Teixeira have also been aware of the names of two inmates who were housed with Witness X prior to Crown's inadvertent disclosure in February of 2022. Counsel have not set out to confirm the accuracy of this information.

[35] Defence counsel made their submissions responding to both s. 37 objections and the application was adjourned to December 21 for the Attorney General of Canada and the Crown to make responsive submissions and address the defence disclosure.

[36] Both the Crown and the Attorney General of Canada want to know more from defence counsel about how they came across this information in Exhibit W; however, there is no requirement for the defence to disclose its sources. The justice system depends on counsel acting within ethical guidelines. I have full confidence that Mr. Teixeira's counsel take both their ethical responsibilities and roles as officers of the court very seriously and no further disclosure of how the information came into their possession is either necessary or desirable.

Section 37 of the CEA

[37] The primary statutory provision at issue in this application is s. 37 of the CEA, which provides:

37 (1) Subject to sections 38 to 38.16, a Minister of the Crown in right of Canada or other official may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.

(1.1) If an objection is made under subsection (1), the court, person or body shall ensure that the information is not disclosed other than in accordance with this Act.

- (2) If an objection to the disclosure of information is made before a superior court, that court may determine the objection.
 - (3) If an objection to the disclosure of information is made before a court, person or body other than a superior court, the objection may be determined, on application, by
 - (a) the Federal Court, in the case of a person or body vested with power to compel production by or under an Act of Parliament if the person or body is not a court established under a law of a province; or
 - (b) the trial division or trial court of the superior court of the province within which the court, person or body exercises its jurisdiction, in any other case.
 - (4) An application under subsection (3) shall be made within 10 days after the objection is made or within any further or lesser time that the court having jurisdiction to hear the application considers appropriate in the circumstances.
- (4.1) Unless the court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, the court may authorize by order the disclosure of the information.
- (5) If the court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, but that the public interest in disclosure outweighs in importance the specified public interest, the court may, by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any encroachment upon the specified public interest resulting from disclosure, authorize the disclosure, subject to any conditions that the court considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.
 - (6) If the court does not authorize disclosure under subsection (4.1) or (5), the court shall, by order, prohibit disclosure of the information.
 - (7) An order of the court that authorizes disclosure does not take effect until the time provided or granted to appeal the order has expired or, if the order is appealed, the time provided or granted to appeal a judgment of an appeal court that confirms the order has expired and no further appeal from a judgment that confirms the order is available.
 - (8) A person who wishes to introduce into evidence material the disclosure of which is authorized under subsection (5), but who may not be able to do so by reason of the rules of admissibility that apply before the court, person or body with jurisdiction to compel the production of information, may request from the court having jurisdiction under subsection (2) or (3) an order permitting the introduction into evidence of the material in a form or subject to any conditions fixed by that court, as long as that form and those conditions comply with the order made under subsection (5).

- (9) For the purpose of subsection (8), the court having jurisdiction under subsection (2) or (3) shall consider all the factors that would be relevant for a determination of admissibility before the court, person or body.
- [38] The other statute which factors into this application is the WPPA. I will refer to the relevant provisions later in these reasons.

The Evidence on this Application

- [39] A number of exhibits were marked on this application to provide the evidentiary foundation. Ms. Stuart's affidavit of September 28, 2022 and transcripts of her direct and cross-examination were filed under seal. In addition, counsel filed a series of exhibits from Applications 58 and 85. Exhibits P and O on this application are defence materials from Application 85 which frame some of the significance of Other Inmate's evidence.
- [40] The Attorney General of Canada tendered further affidavit evidence on this application to fortify its position that disclosure of the Sensitive Information, or in the alternative, disclosure without conditions, would cause significant harm to past, present, and future inmates at CSC facilities. I reviewed the affidavit in camera with the assistance of amicus curiae, Colleen Elden, and arrived at redactions to both the affidavit and the written argument of the Attorney General of Canada on this application.
- [41] The affidavit was sworn by a member of the Witness Protection Section of the RCMP. In summary, the following assertions in the affidavit are part of the evidentiary or contextual aspect of the Attorney General of Canada's objection to disclosure:
- a) CSC has developed [practices], for the safe management of cooperating witnesses in federal custody;
 - b) Witness X [redacted] with other cooperating witnesses also facing similar risk;
 - c) [CSC practices to assist with WPPA efficacy];
 - d) [CSC practices to assist with WPPA efficacy];
 - e) [CSC practices to assist with WPPA efficacy];
 - f) During the time that Witness X and Other Inmate were incarcerated together there were also other offenders present [redacted];
 - g) The disclosure to counsel for Mr. Teixeira of the names of other offenders [would breach s. 11 of the WPPA]; and

- h) The substantial harm that could result from the disclosure of the location or identities [redacted] can be mitigated by either prohibiting the disclosure of the names of Other Inmate and Community Member, or by limiting the use of that information in a manner that prevents counsel or their client from learning either the location or the identities of other offenders present with Other Inmate and Witness X.

The Attorney General of Canada's Position on this Application

- [42] Mr. Katz, counsel for the Attorney General of Canada, maintains there has been no change to the character of the Sensitive Information or the privilege surrounding it since my determination in 2023 BCSC 155. The only new arguments in support of releasing the Sensitive Information in its unredacted form relate to its possible relevance in assessing the credibility of Witness X.
- [43] Mr. Katz says this possible relevance is insufficient to override the important public interest at play. Once it is established that the information sought falls within a specific public interest under s. 37 of the CEA, "[i]t follows that disclosure of the information would encroach upon that privilege, because a privilege is breached whenever the protected information is divulged": *R. v. Amer*, 2017 ABQB 651 at para. 61.
- [44] Mr. Katz poses the key question in this application as whether non-disclosure without conditions, or disclosure with conditions, may affect the outcome of the trial.
- [45] As to the option of non-disclosure, because this proceeding is a *de novo* application, Mr. Katz can seek to revisit my previous conclusion in 2023 BCSC 1475 that the evidence is of sufficient relevance to outweigh the public interest privilege I found after the *in camera* hearing. The Attorney General of Canada was not granted standing in previous hearings concerning disclosure, other than to make privilege objections during the *in camera* hearing. I arrived at that conclusion because the disclosure was first party, in the possession and control of the Crown.
- [46] Mr. Katz maintains the outcome of the trial would not be affected by upholding the privilege and refusing disclosure of Other Inmate's name because of how remote the possible relevance of the evidence is from the key issue at trial, which is the credibility of Witness X. Mr. Katz cites a number of authorities in analogous circumstances where, although there was some relevance to the information sought, the trial judge upheld the privilege claim.
- [47] As one example, in *R. v. Skinner*, 2017 BCSC 805, Justice C. Ross considered an application for third party records over which the Attorney General of Canada maintained a claim of public interest privilege. Ross J. reviewed the documents through the lens of *R. v. O'Connor*, [1995] 4 S.C.R. 411, and *R. v. McNeil*, 2009 SCC 3, adding in the Attorney General of Canada's claim for public interest privilege as a factor in the assessment of whether or not to order production. Ross J. concluded that while the documents could not be said to be completely irrelevant, their true relevance was minimal in relation to the matters in issue at trial.

- [48] Mr. Katz also cites *R. v. Hernandez*, 2010 BCCA 514, *R. v. X.Y.*, 2019 NUCJ 11 at para. 19, and *R. v. Western Taylor*, 2010 ONSC 5448, as examples where claims of public interest privilege were upheld, and information withheld, despite some relevance in the evidence sought.
- [49] In *Western Taylor*, Justice van Rensburg upheld the Crown's public interest privilege claim on the basis that disclosure of the information could compromise the safety of a Crown witness who had provided statements concerning other investigations and individuals unrelated to the accused, information which was redacted from Crown disclosure. The ruling was premised largely on the basis of relevance, but the trial judge said:
- [52] While I would consider everything in the statement of a key Crown witness to be "fair game" for cross-examination and therefore potentially relevant to his credibility, I would uphold the Crown's decision not to disclose certain information which is clearly not relevant to *Western Taylor* or the investigation of the offence in which he is alleged to have participated. This is based primarily on considerations of relevance, but I would also find that the revelation of such information might well put at risk the safety of an individual, namely Colin Reid. In arriving at that decision I have considered the information contained in the Affidavit of Constable Bothello with respect to general concerns and information with respect to specific concerns. I am satisfied that the protection of this information will not interfere with the accused's right to make full answer and defence.
- [50] There are no doubt many examples of cases where credibility is not the central issue at trial, and withholding or redacting statements would not interfere with the accused's right to make full answer and defence, but I cannot find that this is one of them.
- [51] To reiterate, Witness X is being paid to give evidence against Mr. Teixeira. Witness X is the only Crown witness who will say that Mr. Teixeira was the one who shot and then stabbed Mr. Khabra, thereby carrying out a murder for hire. There is no forensic evidence that puts the gun and knife in Mr. Teixeira's hands.
- [52] Other Inmate purports to have information about Witness X, including a version of events in which Witness X takes credit as the role of the shooter. This is contrary to Witness X's statement to police where he says Mr. Teixeira told him to hide in the vehicle while he went to speak with Mr. Khabra before shooting and then stabbing him to death.
- [53] Mr. Katz submits in the alternative that I can disclose the information sought with conditions, drawing on language in the WPPA.
- [54] The disclosure of information relevant to [redacted] is subject to both public interest privilege and to a statutory prohibition. The intersection of those two concepts is illustrated in [redacted]. The intersection or overlap between the concepts is illustrated through an examination of the WPPA.

[55] Section 2 of the WPPA defines a "protectee" as "a person who is receiving protection under the program", and defines "protected person" as a "current or former protectee or a current or former designated program protectee." The WPPA places a statutory prohibition on disclosure concerning a protected person:

Disclosures prohibited

11 (1) Subject to sections 11.1 to 11.5, no person shall directly or indirectly disclose

- (a) any information that reveals, or from which may be inferred, the location or a change of identity of a person that they know is a protected person;
- (b) any information about the means and methods by which protected persons are protected, knowing that or being reckless as to whether the disclosure could result in substantial harm to any protected person; or
- (c) the identity and role of a person who provides protection or directly or indirectly assists in providing protection, knowing that or being reckless as to whether the disclosure could result in substantial harm to
 - (i) that person,
 - (ii) a member of that person's family, or
 - (iii) any protected person.
- (2) For the purpose of paragraph (1)(b), information about the means and methods by which protected persons are protected includes information about
 - (a) covert operational methods used to provide protection;
 - (b) covert administrative methods used to support the provision of protection;
 - (c) any means used to record or exchange confidential information relating to protection or used to gain access to that information; and
 - (d) the location of facilities used to provide protection.

Court -- confidentiality

- (4) Once a disclosure described in subsection 11(1) is made to a court, the court shall take any measures that it considers necessary to ensure that the information remains confidential.
- (5) A court may make a disclosure described in subsection 11(1) for the purpose of preventing a miscarriage of justice, but in doing so it shall disclose only the information that it considers necessary for that purpose and shall disclose the information only to persons who require it for that purpose.

- [56] Mr. Katz submits that at every stage of the proceedings related to the disclosure of the Sensitive Information, I have found it is subject to a public interest privilege, namely, the safety of incarcerated witnesses and the operational integrity of the means and methods used to protect them. Means and methods includes information about [redacted].
- [57] Disclosure of the Sensitive Information will undermine the efforts of the CSC to provide for the safety and security of Witness X and other past, present, and future inmates and disclosure is contrary to the statutory purpose of the CSC, which includes maintaining the safe custody and supervision of offenders and protection of society.
- [58] Pursuant to s. 37(4.1) of the CEA, Mr. Katz submits that my previous rulings amount to a finding that disclosure would encroach on the specified public interest. The issue then becomes whether under s. 37(5) the public interest in disclosure to the defence outweighs the importance of the specified public interest. If I determine that the public interest in disclosure does outweigh the importance of the specified public interest, I have the discretion to order release of the information subject to any conditions I consider appropriate.
- [59] Pursuant to the WPPA, where a disclosure described in s. 11(1) is made to a court, that court is mandated to take "any measures that it considers necessary to ensure that the information remains confidential." Mr. Katz maintains that this describes the nature of the disclosure at issue before me. Unredacted disclosure may disclose, or lead to disclosure directly or by inference, the institutional location from which the phone call came, which leads to the potential for substantial harm to [redacted]. Even the identity of Other Inmate, via the mosaic effect, could lead to inferences about location, although it is now apparent that defence counsel and Mr. Teixeira have this knowledge from another source.
- [60] Mr. Katz submits that allowing defence counsel access to Other Inmate without conditions further leads to the risk of identification of other prisoners present at the same time as Other Inmate and Witness X. That will disclose location [redacted], all disclosures prohibited by [redacted] of the WPPA. Counsel maintains that my primary responsibility is to limit any encroachment and ensure the information remains confidential. I accept that is the focus of the WPPA, but it appears that defence counsel and Mr. Teixeira know the names of two inmates who were on the same unit as Witness X.
- [61] The difference between the CEA and the WPPA is that the latter carries a statutory responsibility to ensure the information remains confidential unless, pursuant to s. 11.5(5), disclosure is only for the purpose of preventing a miscarriage of justice. Mr. Katz maintains that I must be satisfied, when balancing disclosure of information which falls under the WPPA within a s. 37 CEA hearing, that the threshold test is the prevention of a miscarriage of justice rather than full answer and defence. He acknowledges that this is a novel argument which does not appear to have been advanced elsewhere.

- [62] The miscarriage of justice test is not defined in the WPPA, but is well canvassed in appellate jurisprudence: see *R. v. Khan*, 2001 SCC 86.
- [63] Compendiously, the Attorney General of Canada maintains that in the absence of the need to prevent a miscarriage of justice, I must uphold the privilege in order to prevent a violation of the WPPA.

The Crown

- [64] Mr. Barrenger for the Crown largely echoed the position of the Attorney General of Canada: pursuant to s. 37(5) of the CEA, the court is required to protect the substantial public interest in the Sensitive Information and can only order disclosure of that information subject to conditions.
- [65] The conditions proposed by the Crown are (as listed in their Notice of Application, and revised in oral submissions on December 21, 2023):

The specific terms of the conditions may be determined but ought to reflect the following:

Counsel must advise Other Inmate, prior to commencing any interview with him, that he is not to provide them with the name of the institution he was at, nor the names or personal identifying information of any inmates who were there other than Witness X;

Any inquiries or investigation by counsel cannot include any questions about the name or location of the institution Other Inmate was housed with Witness X;

Any inquiries of investigation with Other Inmate or the Community Member by counsel cannot include any questions that would serve to identify additional inmates, besides Witness X, who were housed at the institution where Other Inmate and Witness X resided;

In the event that the Other Inmate provides unsolicited information in relation to the name of the institution or any personal or identifying information about additional inmates at that institution, such information cannot be used for any purpose and cannot be shared with the accused Respondent;

The stipulations above apply equally to any interviews with the Community Member.

- [66] The Crown maintains that their proposed conditions strike the right balance between protecting the public interest privilege and respecting the accused's right to full answer and defence. The Crown is particularly concerned about identifying a [redacted] and any inmates who may have been, or will be held there in future. The defence disclosure that they and Mr. Teixeira were already aware of the name of the institution before Crown's inadvertent disclosure in February of 2022, via the public domain, somewhat attenuates this concern.

- [67] Mr. Barrenger relies on my previous finding that there is a strong public interest in protecting the sensitive information in 2023 BCSC 155 at para. 103. The balance of disclosure against the accused's right to make full answer and defence is substantially the same under the statutory provision as it is at common law, but the scheme under s. 37 of the CEA is different than common law.
- [68] The Crown says that there are three options to resolve a matter under s. 37, citing the Supreme Court of Canada's reasons in *R. v. Brassington*, 2018 SCC 37 at para. 25:
- [25] A court to which such an objection [i.e. pursuant to s.37(1)] is made assesses the public interest claim and, in light of that assessment, can order disclosure (s. 37(4.1)), order disclosure subject to conditions and editing (s. 37(5)), or prohibit disclosure (s. 37(6)).
- [69] The Crown says that s. 37(5) requires a balancing of the accused's interest in disclosure as against the specified public interest. The court is not limited to a binary "full disclosure" or "no disclosure" model, but may allow for limited disclosure, a summary of the disclosure, or even admitted facts pertaining to the disclosure.
- [70] Whatever form disclosure may take, Mr. Barrenger maintains that s. 37(5) provides a broad grant of discretion with the language "subject to any conditions that the court considers appropriate", citing *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, as support for the proposition that the discretion provided to judges under the CEA is wide and designed for maximum flexibility.
- [71] Mr. Barrenger acknowledges that there is very little guidance in the s. 37 case law with respect to the types of conditions that can be imposed on disclosure, but suggests that ss. 38 and 39 of the CEA provide some insight. He acknowledges that those sections relate to public interest in different contexts, such as international relations or national security, but they go so far as to permit summaries of information and prevent defence counsel from sharing information with clients.
- [72] The Crown acknowledges that in *R. v. Basi*, 2009 SCC 52, the undertaking of counsel not to disclose the information learned in camera about the identity of an informer placed an unacceptable strain on the solicitor-client relationship, but notes that the provisions of the WPPA prevent defence counsel from disclosing information relating to protected persons as well as means and methods of protecting them. The information at issue is already cloaked in a statutory rationale for limiting communications with counsel.
- [73] Mr. Barrenger maintains that the relevance of the Sensitive Information sought by the defence is limited and some of the use the defence wants to make of it - probing whether any other individuals who served time with Witness X and Other Inmate might have anything to say about Witness X - is tangential to the issues at trial. The conditions proposed would permit defence counsel to speak with Other Inmate in a focussed way about his particular allegations against Witness X without transgressing the WPPA, but a broad-ranging and unconstrained discussion would lead to that result.

- [74] The Crown adds that it is possible Other Inmate or Community Member may blurt out highly sensitive information. This requires conditions prohibiting counsel from asking those questions, advising Other Inmate and Community Member not to provide them with this information, and a condition prohibiting counsel from conveying this information to their client.
- [75] Mr. Barrenger submits that the proposed conditions would not create conflicting legal and professional duties and would not meaningfully interfere with the solicitor-client relationship, because unsolicited information would be either completely irrelevant or a breach of the WPPA. In either case, Mr. Teixeira is not entitled to that information.
- [76] Overall, the Crown maintains that the defence has offered inadequate, speculative rationales for why they need to speak to Other Inmate about the identity of additional persons in the institution. The defence has a substantial body of disclosure to use in challenging the credibility and reliability of Witness X and the speculative nature of what they might learn from additional inmates does not outweigh the public interest privileges asserted.
- [77] The Crown acknowledges *R. v. Barros*, 2011 SCC 51, permits counsel, within the limits of law and ethics, to conduct investigations, but it does not require the state to assist with those investigations by disclosing material that would manifestly undermine and encroach upon substantial public interests.
- [78] The right to full answer and defence entitles the accused to rules and procedures which are fair in the manner in which they enable the accused to defend against and answer the case against him. The concept of a fair trial, however, requires the balancing of competing interests. The inquiry cannot be simply whether the accused can point to any impediment, no matter how inconsequential to his ability to defend himself.
- [79] Finally, Mr. Barrenger takes issue with the defence submissions that the conditions sought would infringe on aspects of solicitor-client privilege and free communication between counsel, or impede the ability of counsel to adequately investigate on the accused's behalf, thus infringing the "duty of commitment".
- [80] The conditions sought do not involve abrogating privilege as neither counsel nor the accused would be forced to reveal their communications. The authorities defence counsel rely on in support of their assertion that the proposed conditions would infringe the free communication between counsel and client have no application here. And the defence reliance on the duty of commitment is inapplicable. It is a principle of fundamental justice that refers to lawyers being committed to serving their clients' legitimate interests free of other obligations that might interfere with that duty. None of the conditions sought by the Crown would create a divided loyalty.

The Defence Submissions

- [81] A portion of the submissions of defence counsel were focussed on procedural concerns concerning the s. 37 process. For the sake of clarity, I will reiterate the procedure, at times imperfect, that has been followed.
- [82] There is no specified procedure for a s. 37 application. The federal court and superior courts across the country have found that they have the discretion to choose their own procedure based on the circumstances: see, for example, *R. v. Pilotte*, [2002] O.J. No. 866 (CA) at para. 52, and *National Inquiry into Missing and Murdered Indigenous Women and Girls v. Canada (Attorney General)*, 2019 FC 741 at para. 45; *Basi*, supra, at para. 55; *R. v. Pickton*, 2006 BCSC 392 [Pickton (2006)] at paras. 4-6, 10; *Attorney General of Canada v. S. Robert Chad*, 2018 FC 319 at paras. 10-12; *Wang v. Canada (Public Safety and Emergency Preparedness)*, 2016 FC 493.
- [83] This application began as the Crown's assertion of public interest privilege over the Sensitive Information at common law. After an in camera hearing at which the defence was represented by amicus, I found that the Crown had established the specific public interest. The defence initially failed to establish that the disclosure of the Sensitive Information should be made without redactions.
- [84] Subsequently, the defence satisfied me that there was relevance in the disclosure without redactions, but I was not satisfied I had jurisdiction at common law to impose the conditions sought by the Crown. Accordingly, I ordered that the Sensitive Information be disclosed without redactions.
- [85] Within ten days of the disclosure order, the Attorney General of Canada and then the Crown, filed certificates pursuant to the CEA, objecting to the disclosure. I did not require a further evidentiary hearing on the Sensitive Information or whether or not it still satisfied the test for public interest privilege. I admitted an additional affidavit tendered by the Attorney General of Canada. Defence counsel did not seek to cross-examine that individual on their affidavit.
- [86] I provided all counsel with an opportunity to file written submissions and extensive books of authorities. I provided defence counsel with extra time to respond to the Crown's submissions once I decided to hear its objection more or less jointly with the Attorney General of Canada's. I am mindful that the burden rests on the applicants to demonstrate that the public interest privilege claimed outweighs the interest in unfettered access to the disputed disclosure.
- [87] As for its substantive response, defence counsel object to the types of conditions the Attorney General of Canada and the Crown seek to impose on the disclosure because they negatively impact Mr. Teixeira's fair trial rights and solicitor-client relationship and they are without precedent. There has not been a single case tendered by the Crown or the Attorney General of Canada to support the imposition of the types of conditions sought.

- [88] Counsel maintain that the right of access to potential sources of information includes the accused's lawful and constitutional ability to identify informants. As Justice Binnie observed in *Barros*, albeit in the context of informer privilege:
- [38] The defence is entitled to do what it can to poke holes in the prosecution's case, provided that the methods used are otherwise lawful. An accused is within his or her rights to gather whatever information may raise a reasonable doubt even where the conditions triggering the "innocence at stake" exception are not satisfied. That exception pertains to disclosure by the state of the informer's identity, not to information obtained by the defence through its own resources.
- [89] The imposition of conditions that have the potential to hamper the defence's ability to make full inquiry are generally undesirable: *R. v. Pickton*, 2005 BCSC 967 at para. 10.
- [90] Mr. Mansoori-Dara cautions against resort to the provisions in ss. 38.01 and other sections of the CEA for guidance, because they are worded differently than s. 37. If Parliament had meant to confer the jurisdiction to make the same types of orders under s. 37, it would have done so explicitly. Section 37 and the associated jurisprudence lack language that allows for the type of derogation from the solicitor-client relationship proposed in this case. The Crown describes the possible scope of orders pursuant to s. 37(5) as broad but cannot identify the limits of a judicial exercise of that discretion.
- [91] The defence submits that the WPPA issue is not actually before the court, because the defence is not seeking disclosure of information in the WPPA "silo". They seek three pieces of first party disclosure - name of Other Inmate, name of Community Member and Community Member's phone number. The Crown and Attorney General of Canada want to prevent the defence from engaging in constitutionally protected investigations as part of Mr. Teixeira's right to make full answer and defence by invoking injunctive relief which would hobble those legitimate investigations. The disclosure is important, because any information about Witness X is important, given his role in these proceedings.
- [92] Overall, the defence maintains that the jurisprudence from this province - *Hernandez*, *supra*, *R. v. Meuckon*, (1990), 78 C.R. (3d) 196, 57 C.C.C. (3d) 193 (B.C.C.A.), and *R. v. Lam*, 2000 BCCA 545 - support their position that s. 37(5) is, in most cases, binary. Either the privilege claim is upheld and the disclosure denied, or the disclosure is provided to fulfill the right to full answer and defence. Intermediate measures, such as a summary of the evidence, do not fit the circumstances of this case. Conditions on disclosure would fetter the exercise of the right to full answer and defence. Given the importance of the disclosure to the defence, a disclosure order should be made.

Analysis

- [93] Section 37 disclosure orders are dealt with by subsections (4.1), (5), and (6). A court may make a disclosure order pursuant to (4.1) where there is either no public interest at stake or no encroachment on a specified public interest.
- [94] Section 37(5) governs the disclosure of information where there is a specified public interest but, after balancing, the public interest in disclosure outweighs the specified public interest.
- [95] Before authorizing disclosure pursuant to subsection (5), the Court must consider "both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any encroachment upon the specified public interest resulting from disclosure". Subsection (5) allows the Court to "authorize the disclosure, subject to any conditions that the court considers appropriate".
- [96] For ease of reference, section 37(5) reads, in full:

If the court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, but that the public interest in disclosure outweighs in importance the specified public interest, the court may, by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any encroachment upon the specified public interest resulting from disclosure, authorize the disclosure, subject to any conditions that the court considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.

- [97] The language of subsection (5) appears to include the consideration of conditions on the disclosure of information as relevant to the balancing stage between the specified public interest and the public interest in disclosure.
- [98] If the Court does not order disclosure pursuant to subsections (4.1) or (5), then the Court shall, by order, prohibit disclosure of the information in question pursuant to (6).

Burden of Proof

- [99] The onus is on the party objecting to disclosure to satisfy the Court that public interest privilege precludes disclosure: Robert Hubbard's Law of Privilege in Canada at s. 3.14, citing R. v. Kim, 2003 ABQB 1025 at para. 7. The Crown has the onus of establishing, on a balance of probabilities, that investigative privilege applies to the information it seeks to withhold: Amer at para. 33.

Orders under Subsection (4.1) and (5)

- [100] There can be no disclosure order if the Court concludes that the requested information "would encroach upon a specified public interest" under subsection(4.1), unless, on balance, the public interest in disclosure outweighs the specified public interest subsection (5). Under subsection (5) the Court can impose conditions on disclosure. The conditions that can be imposed are considered in the balancing of the interests under subsection (5).
- [101] The relevance of the evidence is sometimes considered at different stages. Some cases determine relevance as a threshold question: Wang at para. 56; Pickton (2006), supra, at paras. 8-9; R. v. Schlatter, 2020 ONCA 402. Other cases assess relevance in the encroachment or balancing section of the analysis: National Inquiry at para. 54.
- [102] The Court of Appeal in R. v. Meuckon, supra, at paras. 24-27, endorsed the view that the first consideration should be whether the information might possibly affect the outcome of the trial:

In my opinion, if the privilege is claimed in a criminal trial, the trial judge must decide first whether the information might possibly affect the outcome of the trial. His decision on that question may well be influenced by whether the trial is being conducted by a judge alone or by a judge and jury. If a decision to uphold the claim of privilege and to prevent the disclosure of the information could not affect the outcome of the trial, then the privilege claim should generally be upheld. But if the decision to uphold the claim of privilege might affect the outcome of the trial, then the trial judge must consider whether the upholding of the claim of privilege would have the effect of preventing the accused from making full answer and defence. If the trial judge concludes that the claim of privilege would have that effect he should then consider giving the Crown the alternative of either withdrawing the claim of privilege or entering a stay of proceedings. If the Crown refuses to do either, then the trial judge may permit the introduction of the evidence though the trial judge may impose whatever safeguards seem appropriate.

In short, the trial judge should consider whether the public interest in allowing the accused to make full answer and defence to a criminal charge can be overridden by the interest asserted by the Crown. The ultimate safeguard of the privileged information lies in the Crown's power to enter a stay of proceedings.

[103] In R. v. Raza, 1998 B.C.J. No. 3246, Justice Josephson said:

8 In R. v. Richards (1997), 115 C.C.C. (3d) 377 (Ont. C.A.), the Ontario Court of Appeal, after referring with approval to Meuckon, went on to say at page 381:

Where the claim is made, the judge must first decide whether the information sought is relevant to an issue in the proceedings. Second, if relevant, evidence of the investigative techniques used will not be disclosed if the public interest in effective police investigation and the protection of those involved in or who assist in such investigation outweighs the legitimate interests of the accused in disclosure of the techniques.

9 I cite that case primarily because it appears to equate the measure of "affecting the outcome of the case", as those words were used in *Meuckon*, to one of relevance. Relevance, of course, must be assessed according to the wide ranging definition set out in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (S.C.C.).

[104] The authorities generally apply the following path of reasoning to the s. 37(5) analysis:

- a) Define the specified public interest;
- b) Consider whether disclosure of the information "would encroach upon" that specified public interest (this is the subsection (4.1) analysis);
 - i. If there is no encroachment on the specified public interest or no specified public interest at stake, an order may be made under subsection (4.1) for disclosure;
 - ii. If there is an encroachment then move to balancing the specified public interest and the public interest in disclosure;
- c) Balance the specified public interest and the public interest in disclosure (this is the subsection (5) analysis). There are different factors to consider depending upon the privilege claimed:
 - i. Consider conditions that can be made as a part of the balancing stage and, if this will allow disclosure, disclosure may be ordered pursuant to (5) on the conditions that are necessary and;
 - ii. If no order should be made under either of subsections (4.1) or (5), then the Court must make an order prohibiting disclosure under subsection (6).

The Specified Public Interest

[105] In 2023 BCSC 155, I upheld the public interest privilege claimed. That interest was not simply the Sensitive Information, but the uses to which it may be put, which in turn may impact the safety of incarcerated witnesses and the operational integrity of the means and methods used to protect them. This remains the specified public interest on this application.

[106] I reject the defence contention that the disclosure sought is very narrow and only consists of the names of Other Inmate and Community Member and the latter's phone number. Those pieces of information cannot be hived off from what counsel might learn from Other Inmate and Community Member.

Encroachment

- [107] In Wang at paras. 34-35, the Court cautioned against relying on "generalized assertions of possible disadvantage" to establish encroachment on a specified public interest. The party with the burden of proof must establish that the disclosure of the information in question would have a "concrete deleterious effect".
- [108] The assessment of encroachment has changed somewhat since the Crown objected to disclosure during the common law public interest privilege proceedings. The change relates to the information that defence counsel and Mr. Teixeira have come to know from sources apart from the disputed disclosure.
- [109] Overall, given the alternate sources the defence has concerning aspects of the Sensitive Information, including the names of two people who were on the unit, and the fact that Other Inmate went public with his complaints about the location where he served time with Witness X, the encroachment on the privilege is minimal. However, as there still remains a degree of encroachment on the privilege, an order cannot be made for disclosure under s. 37(4.1). I turn now to balancing under (5).

Balancing

- [110] The balancing exercise under (5) is highly fact-specific and depends heavily on the nature of the privilege claimed and the nature of the case. However, the case law provides some guidance on the various factors courts have considered at this stage of the analysis.
- [111] In *Khan v. R.*, [1996] 2 F.C. 316, at para. 25, Justice Rothstein articulated the following factors at the balancing stage of the analysis:
- (a) the nature of the public interest sought to be protected by confidentiality [...];
 - (b) whether the evidence in question will "probably establish a fact crucial to the defence" [...];
 - (c) the seriousness of the charge or issues involved [...];
 - (d) the admissibility of the documentation and the usefulness of it [...];
 - (e) whether the applicants have established that there are no other reasonable ways of obtaining the information [...]; and
 - (f) whether the disclosures sought amount to general discovery or a fishing expedition.

[Citations omitted.]

- [112] In a similar vein, the Court in *National Inquiry*, supra, considered slightly different factors in determining whether to release RCMP files to the National Inquiry into Missing and Murdered Indigenous Women and Girls, related to two particular files of missing/murdered women. Those factors were:

- a. the subject matter of the s. 37 litigation;
- b. the probative value, relevance, and necessity of the evidence;
- c. the nature of the public interest to be protected;
- d. the effect of non-disclosure on the public perception of the administration of justice;
- e. the allegations of wrongdoing;
- f. the sensitivity of the information;
- g. prior publication of the evidence; and
- h. whether this was general discovery or a fishing expedition.

[113] The Court first recognized the importance of both of the competing interests at stake. With respect to probative value, the Court considered whether the information sought was of "critical importance" to the National Inquiry that was seeking disclosure of the files. The Court held that the RCMP had a specified public interest in protecting the integrity of ongoing police investigations and had demonstrated that disclosure of the files in question would encroach on this important public interest. They provided concrete evidence about how the disclosure of the files could have deleterious effects on the ongoing police investigations. The risk of highly sensitive information being disseminated beyond the RCMP was increased by disclosure to the National Inquiry and the mandate of the National Inquiry did not outweigh the public interest in protecting those investigations. The Court refused to order disclosure of the RCMP files.

[114] In *R. v. Mirarchi*, 2015 QCCS 6628, a common law investigative technique privilege case, the Court considered the following factors at the balancing stage of the analysis:

154 Upon review of the applicable jurisprudential and doctrinal principles referred to above, as regards this common law privilege claim, the Court balances the following factors:

1. the sensitivity of the investigative technique and the impact disclosure would have on the present case and on future investigations;
2. the length of time that has passed since the investigative technique was utilized;
3. the circumstances in which, and the extent to which the investigative technique has been made public; whether the technique is truly public or whether the accused learned of it through improper means;
4. the good faith or bad faith of law enforcement and/ or the Crown in invoking the privilege; whether the privilege claim is motivated by something other than a genuine concern for the secrecy of the information;
5. the nature of the criminal charge weighing against the accused;

6. the effect of disclosure or non-disclosure on the public perception of the administration of justice;
7. whether the information sought is relevant to an issue in the proceedings to the extent that it may possibly affect the outcome of the trial;
8. if relevant, whether the public interest in effective police investigation and the protection of those involved in such investigations, outweigh the interests (public and individual) in protecting the legitimate right of the accused to receive disclosure of information with respect to the investigative police techniques, in the exercise of the accused's right to make full answer and defence;
9. in considering relevancy,
 - (i) the proximity and connection of the information to triable issues;
 - (ii) whether there is other evidence of guilt unrelated to the information;
 - (iii) whether the information is the source of the sole evidence incriminating the accused.

[115] The evidence sought in *Mirarchi* was the principal, if not the only source of proving the guilt of the accused, which the Court found weighed in favour of disclosure. The Court concluded that the accused's interest in disclosure went to the heart of the prosecution and could affect the outcome of the case, as well as make an impact on defence strategy, including the extent of cross-examinations and whether to tender evidence. In the result, the interests of the accused in having a fair trial and the ability to make full answer and defence, outweighed the public interest in protecting the police investigative techniques. To find otherwise would negatively impact on the administration of justice and public perception of the administration of justice.

[116] Of the non-exhaustive lists of principles related to the balancing exercise in the foregoing authorities, I consider the following to be applicable in the circumstances before me:

- a) the nature of the privilege sought to be protected;
- b) the seriousness of the charge;
- c) the effect of non-disclosure on the public perception of the administration of justice;
- d) prior publication of the evidence; and
- e) the relevance of the evidence to an issue in the proceedings to the extent that it may possibly affect the outcome at trial.

[117] I found at Stage One of the common law proceeding that there was an important public interest privilege at stake. The protection of individuals, both inmates and individuals who administer the WPP, is at the heart of the privilege. That has not changed.

- [118] As to the other factors noted above, Mr. Teixeira is charged with first degree murder and attempted murder. He faces a sentence of life with no parole for 25 years if convicted. There is no forensic evidence to corroborate Witness X's version of events in his NJI in which he told police that Mr. Teixeira was responsible for shooting Mr. Khabra, nor is there forensic evidence to prove that Mr. Teixeira stabbed Mr. Khabra. Conviction rests almost entirely on whether or not the jury accepts Witness X's evidence that Mr. Teixeira was the individual who shot and stabbed Mr. Khabra.
- [119] The effect of non-disclosure on the public perception of the administration of justice pulls towards disclosure. I say this because Witness X is being paid for his evidence. That is a powerful incentive for him to "stick to the script" he gave police. The jury must be in a position to fully assess his character and credibility. It is also a compelling reason to permit defence counsel to investigate additional evidence tending to discredit Witness X, notwithstanding the significant disclosure they have already received.
- [120] While credibility is often characterized as collateral or secondary to the main issue in a case, Witness X's credibility is central to determining the identity of the individual who shot and stabbed Mr. Khabra.
- [121] I must also consider that some of the Sensitive Information was either in the public domain, or was known by defence counsel and Mr. Teixeira, prior to the inadvertent Crown disclosure. I accept that defence counsel and Mr. Teixeira were aware of the unit where Witness X served time with Other Inmate before the inadvertent Crown disclosure and that this information was available in the public domain. I also accept that defence counsel and Mr. Teixeira were already aware of the names of two other people on that unit who served time with Witness X, and they knew this information from sources independent of the inadvertent Crown disclosure. Defence counsel was also able to corroborate some information using the interview Other Inmate did with [redacted], before the Crown realized that there had been inadvertent disclosure of Other Inmate's name.
- [122] Concerns over disclosure of information concerning the [redacted] were a significant feature of Ms. Stuart's evidence, both in her affidavit and in her testimony during the in camera hearing. Given that defence counsel and Mr. Teixeira are already aware of that aspect of the Sensitive Information from other sources, this tends to alleviate Ms. Stuart's concerns. This is not to suggest that [redacted] should be broadcast at trial. There can be measures put in place to ensure [redacted] is not disseminated.
- [123] Another theme on this application was concern over what Other Inmate or Community Member might say if interviewed by defence counsel, including whether they might reveal the [redacted] under the WPPA. As already discussed, defence counsel and Mr. Teixeira know the names of two individuals who served time with Witness X. Defence counsel are free to question those individuals without restriction, per Barros, except that they may not disclose information they learn to anyone, including their client, if it falls within s. 11(1) and (2) of the WPPA. I accept that defence counsel are, and will continue to be, mindful of

the statutory prohibitions on disclosure pursuant to the WPPA. Those restrictions would apply, with equal force, to any interview with Other Inmate or Community Member.

[124] I acknowledge that some aspects of defence counsel's proposed investigation involve tangential issues, in particular their quest to find out the names of other inmates, not just those who Other Inmate may identify as the ones who assaulted him at the direction of Witness X; however, prohibiting defence inquiries of Other Inmate to the limited areas proposed by the Crown may impact on legitimate defence exploration of avenues of defence.

[125] The overarching consideration in the balancing exercise is how significant Witness X is to the Crown's case. As defence counsel note in their written argument:

The disclosure produced to date demonstrates that Other Inmate can provide information about at least one conversation he had with the Crown's key witness - Witness "X" - during which Witness "X" confessed to firing all the shots that killed Mr Khabra. In other words, Witness "X" has given another version of the actus reus than he gave police in his NJI - and it is also different from what Person "Y" reports he was told about the events by Person "X" (where Witness "X" admits to firing some of the shots)

[126] Mr. Katz advocates for a standard that the disclosure must be necessary to prevent a miscarriage of justice, pursuant to s. 11(5) of the WPPA. There is no guidance in the jurisprudence on applying a higher standard to disclosure than the Stinchcombe test and I decline to incorporate that standard into this analysis.

[127] I will repeat what I have noted already: if defence counsel come into information that they know falls into s. 11(1) and (2) of the WPPA, they cannot disclose it without an order under s. 11(5) of the WPPA, which incorporates the miscarriage of justice standard.

[128] I am particularly mindful of s. 11(1)(c) of the WPPA which serves to protect the identities and roles of persons who provide protection or directly or indirectly assist in doing so. I cannot conceive of a realistic situation in which the identities of people falling into those categories would possibly be relevant to full answer and defence. Extreme care must be taken by defence counsel to ensure that no information that may fall within this subsection is disclosed to Mr. Teixeira.

[129] Overall, I find that the outcome of the trial might be affected by non-disclosure of Other Inmate's name and the name and phone number of Community Member, or by disclosure with conditions limiting defence counsel's ability to make inquiries of Other Inmate and Community Member. Those conditions would cut off a legitimate avenue of inquiry or investigation that may assist with full answer and defence.

Conclusion

[130] The disclosure order of August 16, 2023 is confirmed.

"Duncan J."

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