

CANADA / JUDGMENT

R. v. Wiwchar

2025 BCSC 1702

COURT

Supreme Court of British Columbia

DECIDED

19 August 2025

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2025 BCSC 1702 R. v. Wiwchar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Wiwchar,

2025 BCSC 1702

Date: 20250819

Docket: 27393-A; 27393-247

Registry: Vancouver

Rex

v.

Dean Michael Wiwchar

Restriction on Publication: Pursuant to 486.31(1), 486.5(1), 631(6) & 648 C.C.C.

Inherent Jurisdiction

Before: The Honourable Madam Justice Ker

Oral Ruling on Voir Dire #14 (NOA #247)

re Disclosure Application - Ruling on Whether First Party or Third Party Records Disclosure
Regime Applies

Counsel for the Crown:

M.J. Sheardown

S.L. Dworkin

N. Grégoire

A. LaBar

Counsel for the Vancouver Police Department:

A.D. Srivastava

Counsel appearing as Amicus Curiae:

T.M. Arbogast, K.C.

K.A. Kirkpatrick

The Accused, appearing in person:

D. Wiwchar

Place and Date of Hearing:

Vancouver, B.C.

August 12 and 14, 2025

Place and Date of Judgment:

Vancouver, B.C.

August 19, 2025

- [1] These reasons for judgment were delivered as oral reasons. They have since been edited for distribution.

Introduction

- [2] The accused, Dean Michael Wiwchar, has filed a Notice of Application ("NOA 247") seeking disclosure of all matters related to a separate police investigation known as "Project Loyalty" that arises out of an unusual development in respect of two police exhibits, 19LW and 58LW, seized in the course of the investigation into the charges Mr. Wiwchar is facing. A third police exhibit, 18LW, has been lost. All three items are cellphones. 18LW is not part of the Project Loyalty investigation, notwithstanding Mr. Wiwchar's belief that it is or should be. Quite simply, it is not. Nevertheless, in NOA 247 and in his submissions, Mr. Wiwchar seeks disclosure of all materials related to the inquiries into 18LW, as well as the Project Loyalty investigative materials.
- [3] Mr. Wiwchar is charged with one count of first-degree murder and one count of conspiracy to commit murder from events that occurred in 2012. The investigation of the 2012 offences was named "Project Reality". Both Project Reality and Project Loyalty are investigations conducted by the Vancouver Police Department (the "VPD"). The history and arc of the overall proceedings in respect of Project Reality and the charges that Mr. Wiwchar faces are exceedingly convoluted. The events that precipitated the launch of the Project Loyalty investigation only further complicates matters.

- [4] This ruling deals with a preliminary issue on Mr. Wiwchar's disclosure application: are the investigative materials gathered in the course of the Project Loyalty investigation subject to the first party records or the third party records disclosure regime? If the materials are first party records, then the Stinchcombe disclosure principles apply. If the materials are third party records, then the O'Connor disclosure principles apply. The two regimes have different relevance standards and different onus standards.
- [5] Mr. Wiwchar contends that because the Project Loyalty investigation relates to the disappearance and surreptitious replacement of two of the three cellphones in issue - exhibits that were seized during the criminal investigation into the alleged conduct of himself and others in the Project Reality investigation - that any materials related to Project Loyalty ought to be considered "fruits of the investigation" and subject to disclosure pursuant to the principles enumerated in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 [Stinchcombe].
- [6] Amicus noted that Mr. Wiwchar previously argued that it is both "artificial and artifice" to consider the Project Loyalty, an investigation into how cellphones 19LW and 58LW were removed, tampered with, and replaced while in the custody of the VPD, is a separate investigation distinct from Project Reality. To the contrary, Mr. Wiwchar asserts that Project Loyalty is not just a related investigation. Rather, it directly results from and impacts the police investigation into the charges he faces as a result of the Project Reality investigation.
- [7] Amicus advances a nuanced approach to this issue. Amicus contends that in light of the steps taken thus far in respect of Project Loyalty, particularly the inquiries conducted in the aftermath of the midtrial discovery of the replaced phones (trial exhibits 205 and 206 which have become known as the "imposter phones"), that a duty exists under the McNeil regime for the Crown to make further inquiries into the state of Project Loyalty, as well as the lost phone, 18LW.
- [8] Amicus acknowledges that the ITOs sworn in support of the search warrants obtained in the Project Loyalty investigation may fall right on the line in terms of the first versus third party records disclosure regime.
- [9] The Crown and counsel for the VPD maintain that the materials Mr. Wiwchar seeks are third party records governed by the principles enumerated in *R. v. O'Connor*, [1995] 4 S.C.R. 411 [O'Connor].
- [10] One issue that must be addressed, even before the preliminary issue that is the subject of this ruling, is the scope of what Mr. Wiwchar is entitled to seek on this application. Is it all the investigative materials from Project Loyalty or only a few limited items? The chronology of this application forms part of the overall convoluted history of this file.

- [11] In this ruling I will first outline the background facts and chronology as they pertain to the issues raised on this application. I will then address the scope of what Mr. Wiwchar is permitted to seek on this application. I will then summarize the governing legal principles which, I note, are not in issue. I will then address the main issue that this ruling engages - is the disclosure that Mr. Wiwchar seeks subject to the first party records or third party records disclosure regime?

Background Facts and Chronology

- [12] Mr. Wiwchar faces two charges on Indictment 27393, one count of first degree murder and one count of conspiracy to commit murder. In respect of the charge of first degree murder, the allegation is that Mr. Wiwchar shot and killed Sandip Duhre in a restaurant inside the Wall Centre Hotel in Vancouver, B.C. The shooting occurred on the evening of January 17, 2012. The conspiracy to murder count relates to an alleged conspiracy to kill Sukhveer Dhak. It spans the timeframe between August 6, 2011, and August 8, 2012. On this latter count, the Crown contends that Mr. Wiwchar was hired as the hitman to shoot Dhak.
- [13] The alleged shooter in the Duhre homicide could not be identified by his facial or physical features. The movements of the shooter were caught on various surveillance cameras within and around the Wall Centre Hotel, but identification of the shooter from the images is unlikely.
- [14] The Crown's case against Mr. Wiwchar is circumstantial. In that vein, a significant portion of the Crown's case against Mr. Wiwchar lies in the text messages extracted from a number of cellphones seized in the course of the investigation.
- [15] On or about August 8, 2012, the police executed search warrants at the Montreal penthouse suite that Mr. Wiwchar's former co-accused, Larry Amero and Rabih Alkhalil, occupied. A number of electronic devices were seized during that search, including the three cellphones designated 18LW, 19LW, and 58LW. It is what happened to these three cellphones after they were in police custody in the VPD Property Office and their subsequent disappearance or removal and replacement that has spawned the current application and other related applications.
- [16] Mr. Wiwchar was originally tried with his two co-accused, Amero and Alkhalil. A direct indictment was filed on January 24, 2018, and, once approved, bench warrants were issued for all three accused. Justice Maisonville was appointed as the case management judge on March 6, 2018. The first case management conference was held before Maisonville J. on or about April 3, 2018. Justice Maisonville continued to closely case manage the file up until pretrial applications for all three accused commenced before her in September 2019, and were conducted over the better part of the next two and a half years.

- [17] The trial before the jury finally commenced on June 28, 2021, and was scheduled to run for approximately six months. Due to several complications, including COVID-19 related breaks, unanticipated applications brought by counsel, and finally Mr. Wiwchar's discharge of his counsel in February 2022, what was already an exceedingly complex and lengthy trial became extraordinarily protracted.
- [18] On March 7, 2022, Maisonville J. severed Mr. Wiwchar from the trial after he had dismissed his counsel.
- [19] The trial of Amero and Alkhalil continued before the jury. Midway through the Crown's closing address, Alkhalil escaped from the correctional centre where he was detained. The trial continued. On August 29, 2022, the jury returned guilty verdicts on the charges Mr. Amero faced. Likewise, the jury returned guilty verdicts on the charges Mr. Alkhalil faced, albeit the convictions were recorded in absentia.
- [20] Proceedings against Mr. Wiwchar recommenced in September 2022 and have a tortured history of starts and stops, largely due to Mr. Wiwchar's dismissal of three further different sets of defence counsel. As a result, he is now self-represented.
- [21] Amici were appointed to assist the Court in March 2023 and have been doing so ever since. Amici have managed to develop a good working relationship with Mr. Wiwchar and, although not his counsel, they have provided him with considerable assistance and support in navigating the proceedings and ensuring his positions are fully developed and explained to the Court.
- [22] As noted previously, three cellphones seized during the Project Reality investigation are now no longer in the possession of the VPD. 18LW appears to have been lost. 19LW and 58LW were removed from the VPD Property Office by someone and replaced with two other cellphones, the imposter phones which were marked as trial exhibits 205 and 206. One of the two imposter phones was not password protected. Forensic digital examinations of this cellphone, Exhibit 205, revealed a secure wipe of it on or about June 9, 2021. Placed on the cellphone was a memo written in French.
- [23] The discovery of the imposter phones occurred during the course of the Alkhalil and Amero trial on or about March 10, 2022, mere days after Mr. Wiwchar was severed from the trial. Amicus has provided a succinct chronology outlining the handling of 19LW and 58LW, and the discovery of the imposter phones:
11. A brief chronology relating to the imposter phones in question is as follows:
- 2012.08.12 - Devices 19LW and 58LW seized from Montreal Residence, sent to RCMP TAT team for technical examination
 - 2012.08.17 - 19LW and 58LW returned to VPD as no way to extract data
 - 2014.12.22 - RCMP tell VPD that new methods of exam available but not for 19LW and 58LW

- 2018.09.14-25 - RCMP tell VPD they can examine 19LW and 58LW now; ITO to search prepared
- 2018.10.31 - ITO for 19LW and 58LW filed
- 2019.01.15 - Defence notified that search warrants for 19LW and 58LW will not be executed due to lack of time prior to trial
- 2021.08.25 - Alkhalil advises counsel that 19LW and 58LW contain exculpatory evidence
- 2021.09.29 - Alkhalil files NOA-107 for release of 19LW and 58LW for testing
- 2021.11.02 - Ruling on NOA-107 (2021 BCSC 2150); dismissed; Alkhalil's counsel writes to Crown to request that 19LW and 58LW be brought to court to be entered as exhibits at the trial, Crown agrees
- 2022.03.07 - Wiwchar severed from Alkhalil and Amero trial
- 2022.03.10 - Det. Wu cross-examined and produces 19LW and 58LW; Discovers that 19LW and 58LW are not same phones as seized originally - imposter phones marked as court exhibits 205 and 206
- 2022.04.14 - Order to release exhibits 205 and 206 for examination
- 2022.04.20 - Order to release 205 to extract all non-encrypted data (discovered that phone was wiped on June 9, 2021 and contained a memo alleging corruption by police)
- 2022.06.3-4 - Amero NOA 164 to have witness power-on 19LW and 58LW in court
- 2022.06.09 - Ruling on NOA-164 (2022 BCSC 974); dismissed
- 2023.01.05 - Crown app NOA-180 to release ex 206 for examination; granted on terms
- 2023.10-2024.01 - Communications exchanged between counsel about background and further facts
- 2023.08.14 - Letter from Crown in Wiwchar trial notifying parties that ex206/58LW was damaged in the chip-off process and forensic examination cannot be done.

[24] For the purposes of this application, a more detailed picture of the convoluted history behind Police Exhibits 18LW, 19LW, and 58LW is found in Justice Maisonville's ruling on Mr. Alkhalil's lost evidence application indexed at 2022 BCSC 1106. I acknowledge that the observations and conclusions Justice Maisonville reached were the product of an agreed statement of facts and arguments, and that no such agreed statement of facts is before the Court on this current application. Nevertheless, Justice Maisonville's outline of the background of the handling of the three devices is informative for the chronology of 18LW, 19LW, and 58LW and the proceedings:

- [4] During a search conducted on August 8, 2012 at PH6 - 555 René-Levesque in Montreal (the "Montreal Residence"), several electronic devices were seized by Det. Lisa Wu from the residence, including two devices identified as 18LW and 19LW, found in Room #2 (alleged to be Mr. Amero's bedroom). On August 9, 2012, another device, 58LW, was seized from a Mercedes CLS located in the underground parking of the Montreal Residence. The seized items were secured in a police exhibit locker.
- [5] Agent William Carson took photographs of 18LW on August 8, 2012.
- [6] On August 10, 2012, Det. Wu removed the seized exhibits from the locker, including police exhibits 18LW, 19LW, and 58LW and packed them in sealed boxes for shipping. She sent them by Purolator Courier to the VPD at 3585 Graveley Street. When Det. Wu unpacked the boxes on arrival at the VPD, the sealing tag was intact. The boxes were stored in the Homicide Project Room.
- [7] The electronic devices seized from the Montreal Residence by Foglietta were put in silver "Faraday" bags, as opposed to the Ottawa exhibits which were put in clear plastic exhibit bags.
- [8] On August 17, 2012, some of the electronic exhibits, including police exhibits 18LW, 19LW, and 58LW, were shipped from the VPD to the "A" Division of the Integrated Technological Crime Unit ("ITCU") in Ottawa, and transferred to Alain Grondin for processing, triage, and analysis. On August 21, 2012, Grondin photographed and resealed these devices.
- [9] On October 10, 2012, Grondin sent police exhibits 18LW, 19LW, and 58LW back to the VPD. These devices were locked and, at the time, the expertise of the RCMP Technical Analysis Team ("TAT") with ROX did not allow decryption of encrypted PGP content.
- [10] Police exhibits 18LW, 19LW, and 58LW arrived at the VPD on October 11, 2012 and were locked in the Homicide Project Room until January 28, 2013, when they were logged into the VPD Property Office for the first time.
- [11] On July 11, 2013, at 10:40 a.m., Sgt. Hans Dykman sent an email to the VPD Property Office, asking for the release of various exhibits to Mr. Amero or his lawyer, Lawrence Myers. These items included four BlackBerry devices, police exhibits 15LW, 18LW, 19LW, and 22LW. Approximately twenty minutes later, a technician at the VPD Property Office responded to Sgt. Dykman with the word, "done".
- [12] On July 15, 2013, at 10:27 a.m., Sgt. Dykman sent another email to the VPD Property Office, asking that they change back the status of police exhibits 15LW, 18LW, 19LW, and 22LW to "Hold Evidence". Approximately twenty minutes later, a technician at the VPD Property Office responded to Sgt. Dykman with the word, "Updated".
- [13] The VPD Property Office has procedures in place for the storage of police exhibits, including procedures for exhibits being submitted and signed out of the VPD Property Office. These were in place at all material times relevant to this application.

...

18LW

- [15] On February 19, 2014, Lyndsey Black attended at the VPD Property Office to collect a number of exhibits that had been seized from the Montreal Residence. She presented a Power of Attorney on behalf Mr. Amero, authorizing her to receive property belonging to him. A receipt was issued by the VPD Property Office and signed by Ms. Black, indicating several items were returned to her.
- [16] Police exhibit 18LW was not listed as an item returned to Ms. Black.
- [17] For reasons unknown, Ms. Black did not take an iPod that was eligible to go back to her (exhibit 17LW). The iPod was disposed in 2017 as it was unclaimed property.
- [18] A copy of the receipt was disclosed to counsel for Amero on July 11, 2019.
- [19] In the early morning hours of September 19, 2018, Sgt. Dykman sent a request to the VPD Property Office, requesting the release of five devices, including police exhibits 18LW, 19LW, and 58LW. Further advancements in technology gave the police reason to believe that several devices, including police exhibits 18LW, 19LW, and 58LW, might have a data recovery forensic solution.
- [20] At approximately 8:14 a.m., VPD Property Office custodian Matthew Usui received the request from Sgt. Dykman and proceeded to sign out the five devices from file 12-8885 (including police exhibit 18LW), changing the storage location to that of "INVEST" and referenced Sgt. Dykman. However, when Mr. Usui went to retrieve the five devices, he could not locate police exhibit 18LW with the corresponding property office label 302.
- [21] Later that morning, Acting Manager of the VPD Property Office, Justin Hull, was advised that police exhibit 18LW was missing. As a result, he changed the storage location from "INVEST" to "LOCUNK" indicating "location unknown".
- [22] Mr. Hull then informed Sgt. Dykman of the missing exhibit and several emails were sent back and forth between the two of them in an attempt to clarify the continuity of the exhibit.
- [23] On September 20, 2018, Mr. Hull instructed staff at the VPD Property Office to:
- gather all other exhibits from file 12-8885 and search all boxes for any sign of police exhibit 18LW;
 - do a cursory search of the numerous boxes from the file; and
 - search the immediate vicinity of the storage location SB-196, the last known location that the exhibit was stored.
- [24] This search yielded negative results.

- [25] Mr. Hull also conducted an analysis on the box that had the VPD Property Office label 302 in an effort to locate police exhibit 18LW. A photograph was taken of the labeling on the box. This photograph shows that label 302 was crossed out, as was the corresponding label for police exhibit 19LW, label 305. It is the procedure in the VPD Property Office to cross out labels when an exhibit is removed from the box. This is so that the label is not scanned when there is an audit and to indicate the exhibit is no longer inside the box.
- [26] From the analysis of label 302, it was learned that the label was scanned during a June 2016 audit. The audit report showed that the label was located in SB-196, the last known location of police exhibit 18LW. It is the procedure of the VPD Property Office to not scan labels if they are crossed out.
- [27] During the course of the search for police exhibit 18LW in September and October 2012, Mr. Hull was unable to locate some of the internal VPD Property Office documents related to file 12-885, including receipts from 2014. He searched extensively for these records, including looking in other files, in attempt to locate them.
- [28] October 2, 2018, Mr. Hull provided a report detailing the VPD Property Office's efforts to locate police exhibit 18LW to date, along with an explanation and possible theory that the device had been inadvertently returned to Ms. Black on February 19, 2014.
- [29] Between October 2 and 9, 2012, the VPD Property Office took further steps to locate police exhibit 18LW, which yielded negative results. These steps included analyzing PRIME (Police Records Information Management Environment) property module notes to glean as much information regarding when the item arrived at the VPD Property Office, who may have signed it out, where it was stored, and when it was last touched. As well, the VPD Property Office staff conducted an extensive search of all areas of the facility, excluding the DNA freezer and fridge.
- [30] On October 9, 2018, Sgt. Dykman was informed by the VPD Property Office that their attempts to locate police exhibit 18LW were unsuccessful. In a letter dated the same day, Mr. Hull summarized the steps taken to locate police exhibit 18LW:
1. Opened and/or inspected approximately 2800 small individual boxes.
 2. Consolidated all exhibits from 12-8885 to a central location. cursory search of all boxes performed. Staff did not open any sealed envelopes or packages as per MCS directive.
 3. Searched all envelope storage trays, consisting of approximately 1500 individual trays that store a number of individual files inside.
 4. Search all computer and cell phone storage locations.
 5. Search all "big box" locations.
 6. General office search; checked inside all staff desks and other common areas.

7. Cursory search of the pallet section. Shrink wrapped exhibits from major files were not disturbed as to not interfere with continuity.
8. VPD Property Office team sessions to brainstorm new search techniques.
- [31] Mr. Hull estimated the amount of time the VPD Property Office spent looking for police exhibit 18LW to be upwards of 120 hours, including 42 hours of overtime over the weekend.
- [32] During the course of the extensive search for police exhibit 18LW, the VPD Property Office located police exhibits 30 and 16AR from file 12-8885 in storage that showed as being in the possession of investigators. Both of these items were moved to the appropriate storage location with other exhibits from this file.
- [33] On October 22, 2018, Sgt. Dykman and other members of the investigative team conducted a physical search of all the Project Reality exhibits and were unable to locate police exhibit 18LW.
- [34] On July 11, 2019, the accused were informed that police exhibit 18LW could not be located.
- [35] On June 2, 2022, as part of an ongoing investigation into the disappearance of police exhibit 18LW, Mr. Hull located the missing internal VPD Property Office documents related to file 12-8885, including the receipt from Ms. Black referred to above.
- [36] As of the date of this application, police exhibit 18LW has not been located.

19LW

- [37] In October of 2018, the VPD were granted warrants to search police exhibits 19LW and 58LW, along with 2AR, 22LW, 3LW, 4AR, and 4LW (collectively referred to as the "2018 Warrant Devices").
- [38] On November 30, 2018, Det. Antonel retrieved the 2018 Warrant Devices and delivered them to the Surrey ITCU so they could be shipped to TAT in Ottawa for analysis. Photographs were taken of the external packaging upon arrival at the Surrey ITCU but the packages were not opened. The 2018 Warrant Devices were then shipped to TAT in Ottawa, but the packages were not opened due to an intervening Crown decision that the devices should not be examined. TAT sent the items back to Surrey ITCU, and they were received by Surrey ITCU on January 15, 2019. Photographs were taken again of the external packaging upon receipt at Surrey ITCU but the packages were not opened. On January 17, 2019, Det. Antonel secured the 2018 Warrant Devices at the VPD Property Office.
- [39] By letter dated January 15, 2019, counsel for Mr. Amero and Mr. Alkhalil were advised of the Crown decision not to have the 2018 Warrant Devices examined and the Crown rationale for not doing so.

- [40] On September 29, 2021, counsel for Mr. Alkhalil filed NOA 107, seeking the release of police exhibits 19LW and 58LW for an examination. The reason given for bringing the application was that on August 25, 2021, Mr. Alkhalil had advised his counsel that these devices contained "exculpatory messages".
- [41] On October 6, 2021, Det. Wu retrieved police exhibits 19LW and 58LW from the VPD Property Office and transferred them to Sgt. Dykman. Sgt. Dykman sent the devices to TAT in Ottawa so that they could be analyzed in the event that NOA 107 was successful.
- [42] On November 2, 2021, this Court dismissed NOA 107 (R. v. Alkhalil, 2021 BCSC 2150).
- [43] On November 2, 2021, counsel for Mr. Alkhalil wrote to Crown and asked that police exhibits 19LW and 58LW be brought to court so defence counsel could enter them as exhibits at trial.
- [44] On November 8, 2021, the VPD received police exhibits 19LW and 58LW back from TAT in Ottawa. The devices did not undergo any analysis while in Ottawa.
- [45] On November 10, 2021, Sgt Dykman gave the devices to Det. Wu to take to court as had been requested by counsel for Mr. Alkhalil.
- [46] On December 8, 2021, Det. Wu brought police exhibits 19LW and 58LW to court. She testified but was stood down before cross-examination could begin. After court, Det. Wu returned the devices to the VPD Property Office.
- [47] On January 27, 2022, Det. Wu retrieved police exhibits 19LW and 58LW in anticipation of her continued testimony.
- [48] On March 10, 2022, during the course of cross-examination, Det. Wu tendered police exhibits 19LW and 58LW. It was discovered that these devices were not the ones seized at the Montreal Residence on August 8 and 9, 2012, as they had different IMEI numbers. These devices were entered as trial exhibits 205 and 206 respectively.
- [49] On April 7, 2022, counsel for Mr. Alkhalil filed NOA 154, seeking the release of trial exhibits 205 and 206 for examination.
- [50] On April 14, 2022, the Court ordered that trial exhibits 205 and 206 be released to the VPD for the limited purpose of powering them up in a Faraday room to determine if they were accessible. That same day, S/Cst. Nancy Yingling of the VPD Digital Forensics Unit, determined that trial exhibit 205 was not locked and therefore accessible, and that trial exhibit 206 was locked and therefore not readily accessible.
- [51] On April 20, 2022, the Court ordered that Trial Exhibit 205 be released to the VPD for further examination. On April 21, 2022, S/Cst. Yingling generated a Cellebrite extraction report from a forensic image of the device. The report did not include log entries, which can show internal activity on the device. The report revealed that there was no user-created content on trial exhibit 205, except two items identified in the "Notes" section of the report. Note #1 had been marked for deletion and was titled "J" but had no content in the body. Note #2 was

in French and titled "Reunion" and contained content in the body.

[52] A certified translation of Note #2 has been prepared.

[53] On April 25, 2022, S/Cst. Yingling prepared a triage report, including photographs of trial exhibit 205.

[54] On May 4, 2022, Det. John Bjornson of the Cybercrime Unit, conducted a more detailed examination of trial exhibit 205 and generated a Cellebrite extraction report from the forensic image of the device, which included log entries this time.

[55] On May 31, 2022, the Crown sent some written follow-up questions to Det. Bjornson and. on June 3, 2022. he replied back with written answers. The document containing the questions and answers was disclosed to the accused on June 4, 2022.

[56] The main information obtained from Det. Bjornson written answers in respect of trial exhibit 205 can be summarized as follows:

- There was a secure wipe on June 9, 2021 at 9:36:37 UTC+0. ["Wipe: Wsec" entry at line 4462, page 557].
- Factory default settings were restored after the June 9, 2021 secure wipe. ["Hello from your new BlackBerry!" at line 4603, page 562].
- A secure wipe permanently erases all user-created data. This includes all notes, emails, messages, photos, video, internet history, etc.
- Note #1 and Note #2 must have been added to the device sometime after the secure wipe on June 9, 2021.
- Note #1 was subsequently deleted. Note #2 remains the only user-created content in the device that has not been deleted.
- The device date/time settings indicate Aug 7, 2012 at 3:37 pm, time zone Casablanca (GMT), and is set to "Manual". This was a manual backdating.
- There are multiple date/time setting changes and all of them must have occurred after the secure wipe on June 9, 2021.
- All activity in the Timeline portion of the Cellebrite report with dates/times in 2012 must have occurred after the secure wipe on June 9, 2021.
- There are artifacts on the device showing user activity between June 9, 2021 at 9:36:37 pm UTC+0 until June 23, 2021 at 12:13:00 am UTC+0.

[57] As of the date of this application, police exhibits 19LW and 58LW have not been located. There is an ongoing investigation regarding the replacement of these devices, as well as the disappearance of 18LW.

[25] I pause to note at this juncture that when Justice Maisonville dealt with the discovery of the imposter phones and the applications that arose from this unusual development, it is clear there was no determination or distinction as between first party records and third party records disclosure. This is probably due in part to the fact that the discovery of the impostor phones arose in the middle of the trial before Maisonville, J. Moreover she was dealing with a lost evidence application addressing the removal of two police exhibits (clearly fruits of the investigation) and their replacement with two other devices which became part of the Project Reality dataset and ultimately exhibits in the trial. In addition, Project Loyalty had not been launched at the time of NOA 158, Amero and Alkhalil's applications to adjourn the trial, or NOA 160, the lost evidence application. To be sure, the Crown's submissions in the lost evidence application do make clear that:

16. There is an ongoing investigation regarding the replacement of 19LW and 58LW, as well as the disappearance of 18LW.

Significantly then, NOA 158 and 160 were not disclosure applications.

[26] Insofar as Justice Maisonville's reference to an ongoing investigation into the disappearance of 18LW is concerned, it is clear, as I have noted, that that device is not part of the Project Loyalty obstruction of justice investigation and never has been, as substantiated in the affidavit of the primary investigator on Project Loyalty, Sgt. Chatinder Thiara.

[27] In addition to the background and chronology related to Police Exhibits 18LW, 19LW, 58LW, and the imposter phones, the background to this current application is also important to understand. The Crown fairly summarizes that background in its written submissions on this application:

9. On February 20, 2024, former counsel for Dean Wiwchar, Mr. Kevin McCullough, filed Application 204 ("NOA 204") on Mr. Wiwchar's behalf, seeking three orders from the Court. First, the application sought disclosure of "all materials relating to the police inquiries into all issues relating to exhibit management, particularly, but not limited to, those related to the Missing Exhibits 18LW, 19LW, and 58LW", including "an order for disclosure of all materials relating to the management, security and storage of exhibits" (NOA 204, p. 10).
10. NOA 204 also sought an order "that statutory declarations be produced by all officers who had any access to the Missing Exhibits at any time during the course of the investigation setting out their involvement in handling the exhibits and knowledge of all matters related to the loss and tampering of the Missing Exhibits" (NOA 204, p. 10).
11. Finally, NOA 204 sought an order "that defence counsel be permitted to attend the locations that the Missing Exhibits were housed during all relevant periods" (NOA 204, p. 10).

12. Since the filing of NOA 204, on June 19, 2024, Mr. Wiwchar discharged Mr. McCullough as his counsel. On December 2, 2024, amicus filed an amended Notice of Application, "pursuant to discussions and direction from the court and in consultation with the accused" (Amended Notice of Application, p. 1). In the amended Notice of Application, the orders outlined in paragraphs 2 and 3 were abandoned.
 13. On January 7, 2025, the Crown filed a book of materials on NOA 204. On January 8, 2025, Counsel for VPD filed the affidavit of Sgt Chatinder Thiara. On January 23, 2025, NOA 204 was withdrawn by Mr. Wiwchar.
 14. On May 23, 2025, amicus advised the Crown that Mr. Wiwchar was seeking to revive NOA 204 in a limited manner. This was reflected on the updated CMC chart.
 15. At the CMC on June 18, 2025, Mr. Wiwchar advised the Court that he wished to revive NOA 204. The Court reminded him that this application had been withdrawn. However, Mr. Wiwchar was given leave to file a new focused application on the items outlined in paragraph 1 above.
 16. Mr. Wiwchar was directed to file a new notice of application focusing on this revised request by June 27, 2025. Argument on whether this disclosure request is governed by the first or third party disclosure regime was scheduled for August 12, 2025. Relevance, under either the first party (Stinchcombe) or third party (O'Connor) regime, was scheduled for August 25-26, 2025.
- [28] Mr. Wiwchar provided NOA 247 to the Criminal Registry on June 24, 2025. It was received by the Crown on or about June 27, 2025. The remedies Mr. Wiwchar seeks in NOA 247 are as follows:
- i. an order for all materials and disclosure relating to the police investigation into the missing exhibits and planted exhibits, 18LW, 19LW, 58LW, Exhibit 204 and 205, (I note that this should actually read Exhibit 205 and 206);
 - ii. an order for the policies and for all information with respect to the prevention of corruption within the department, the policy on what to do when they become aware of a corrupt member of their department, and just simply the "rules".
- [29] After NOA 247 was filed, counsel for the VPD provided the Crown with copies of the relevant policies in relation to property and evidence that comes into the custody of the VPD. The policies are from the VPD Regulations and Procedures Manual and were in place between August 8, 2012, when the devices were seized, and March 22, 2022, when it was discovered that Exhibit 19LW and 58LW had been replaced by Trial Exhibits 205 and 206. These policies have been disclosed to Mr. Wiwchar.

- [30] Insofar as seeking policies on preventing corruption are concerned, counsel for the VPD properly notes that there are no policies about addressing the prevention of police corruption. Rather, the issue of police corruption is addressed through the common law, the Criminal Code, and the provincial Police Act.
- [31] Notwithstanding the direction of the Court at the June 18, 2025, case management conference, NOA 247 is, in substance, a resurrection of the previously filed NOA 204, which Mr. Wiwchar withdrew on January 23, 2025.
- [32] That Mr. Wiwchar was only granted leave to file NOA 247 confined to a limited subset of information that he was seeking is patently obvious from the discussions at the June 18, 2025, case management conference.[1] Specifically, Mr. Wiwchar was directed to file a new application to capture the materials he was seeking as outlined to Amici on May 23, 2025, and that he was not being given leave to revive NOA 204.
- [33] What Mr. Wiwchar conveyed to Amici on May 23, 2025, five months after he withdrew NOA 204, was that he was seeking a more limited set of materials, being background documentation supporting the statements in paras. 23 to 30 of the January 8, 2025, affidavit of Sgt. Thiara (seeking all documentation, policy, and procedures concerning the processes described in these paragraphs), and copies of the ITOs filed to obtain the eight judicial authorizations referenced at para. 41 of Sgt. Thiara's affidavit.
- [34] NOA 247 does not comply with what Mr. Wiwchar was granted leave to raise on June 18, 2025. NOA 247, as filed, simply ignores the direction made by the Court.
- [35] At the hearing of this application, Mr. Wiwchar once again demonstrated his vacillation on what to advance by first conceding that he was looking to narrow the application, and said words to the effect that it was "safe to say the ITOs possessed everything [he] needed to know."
- [36] Amicus, in his submissions, indicated that Mr. Wiwchar was seeking the ITOs with respect to the imposter phones, as well as materials concerning 18LW since it was last addressed, as outlined in the chronology.
- [37] Insofar as 18LW is concerned, I understood Amicus to say any other relevant information concerning efforts made to further the investigation of the situation relative to 18LW was what was sought.
- [38] Mr. Wiwchar interjected at one point during the submissions of Amicus to say he was requesting the ITOs and "everything", suggesting there might be something else likely relevant and that he deserves everything. Mr. Wiwchar went on to assert he needed everything on 18LW to prove negligence before, during, and after the loss from the VPD Property Office. In reply, Mr. Wiwchar explained he was looking for what transpired with respect to 18LW and the ITOs, as well as "information surrounding the missing phones."

- [39] I will simply note that insofar as Mr. Wiwchar's NOA 247 seeks all materials relating to the Project Loyalty investigation into the missing and substituted exhibits, it exceeds what he was granted leave to pursue. He has failed to persuade the Court as to why he should now be allowed to revive NOA 204 in its entirety.
- [40] NOA 247 is confined to what was previously outlined to the Crown by Amici on May 23, 2025, and Mr. Wiwchar agreed to on June 18, 2025, and the Court permitted: the ITOs referred to at para. 41 of Sgt. Thiara's affidavit and the policies. The policies have been disclosed. Accordingly, NOA 247 is confined to the remaining issue: a disclosure application for the ITOs sworn to obtain eight judicial authorizations by the Project Loyalty investigation.
- [41] I note, however, one exception that will be dealt with in the analysis portion of this ruling, and that is the status of the investigation into the loss of 18LW and whether there are any further disclosable materials in relation to the investigation into the loss of that device. As noted previously, 18LW is not part of the Project Loyalty investigation.
- [42] The final bit of background information relevant to this application is what can be gleaned from the evidence in Sgt. Thiara's affidavit, which is part of Exhibit 1 on this application.
- [43] Sgt. Thiara, a police officer with the VPD for the last 17 years, became the primary investigator on Project Loyalty in August 2022. In his affidavit, he outlines his beliefs and theory as to how 19LW and 58LW were removed and replaced, as well as a number of points that would support that theory. Summarily, the affidavit establishes:
- i. Where the VPD Property Office is located, its size, and specifically where the Project Reality exhibits were stored as well as who has access to the Property Office. Additionally, Sgt. Sgt. Thiara's affidavit details the physical layout of and access to the VPD Property Office (paras. 23-30).
 - ii. Sworn members (police officers) do not have access to most of the Property Office (para. 24).
 - iii. Only property custodians (civilian members) have access to the full facility (para. 25).
 - iv. A small number of sworn members are assigned to the Property Office, but they do not perform property custodian duties and they are not investigators (para. 25).
 - v. People working on the secure side of the Property Office have electronic cards that permit them to move freely about the facility (para. 26).
 - vi. Outside contractors working on the secure side of the Property Office are vetted and issued temporary electronic access cards that can only be used when they are working in that area. Sgt. Thiara believes they do not have access to the Property Office when it is not staffed (para. 27).
- [44] While the Project Loyalty investigation has been extensive, to date it has identified no targets or suspects.

[45] Sgt. Thiara's hypotheses and conclusions thus far, as outlined in his affidavit, include the following points:

- i. Based on the facts and circumstances that form the subject matter of the investigation, the circumstances suggest that someone engaged in a deliberate effort to subvert the course of justice during the judicial proceedings (before Maisonville, J.) (para. 4).
- ii. The circumstances of what is an investigation into an obstruction of justice offence point to a sophisticated and carefully-executed plan involving more than one person to successfully complete it and to ensure that the imposter phones were brought to the attention of the presiding judge (para. 11).
- iii. The facts and circumstances known to Sgt. Thiara through his investigation "strongly suggest organized crime infiltration and involvement with the intention to thwart the Project Reality prosecution" (para. 18).
- iv. Significantly, Sgt. Thiara's affidavit contains this revelation:

37. In my opinion, the most viable theory is that the replacement of the Seized Phones with the Imposter Phones occurred in the VPD Property Office. At this stage, however, I cannot say that it can only have occurred in the Property Office. Nor can I prove that it did not occur there. I can say that in my opinion, while unlikely, the replacement could have occurred during the second transfer of the Seized Phones to Ottawa for analysis (October 6 to November 8, 2021).

[Emphasis in original.]

- v. Based on a mistaken transcription of the IMEI number of 58LW repeated throughout the disclosure dataset and the repetition of that incorrect number in the memo placed on Exhibit 205 (one of the imposter phones) Sgt. Thiara's theory is that the plan with respect to swapping the phones was hatched by an individual who had closely reviewed the disclosure (para. 40).

[46] Sgt. Thiara concludes his affidavit with the following:

45. It is my belief as the Primary Investigator that one or more persons worked in concert, across jurisdictions, to commit the offence(s) under investigation. Project Loyalty has identified no targets or suspects, although we cannot rule out the involvement of any of the accused or their associates. There is no evidence to indicate that any Project Reality investigator is implicated or in any way involved in the offence(s) under investigation. Further, there is no evidence to indicate that any sworn VPD member or any VPD civilian employee attached to the Property Office during the relevant period is implicated or in any way involved in the offence(s) under investigation.

- [47] It is clear from Sgt. Thiara's affidavit that the most plausible working theory is that elements or actors involved in organized crime were involved in the removal of 19LW and 58LW and their replacement with the imposter phones. If correct, the seriousness of the obstruction offence is quite correctly described as unprecedented.
- [48] Equally serious and alarming is the fact that Sgt. Thiara's opinion is that the most viable theory is that the replacement of 19LW and 58LW with the imposter phones occurred in the VPD Property Office. If correct, that has exceedingly serious ramifications for the integrity of the VPD Property Office.
- [49] The final background or contextual detail to note on this application is this: Mr. Wiwchar, in his submissions, relies upon the contents of Exhibit F and G to make his point that it must be "dirty cops" involved in the replacement of 19LW and 58LW. Mr. Wiwchar's points are simply speculation, unsubstantiated hearsay, and innuendo, not evidence. Exhibit F in particular, being a newspaper article about an anonymous confession by a purported Canadian police officer to a Mexican journalist in November 2018 is inadmissible hearsay of the highest order with no discernible circumstantial guarantees of trustworthiness or reliability.
- [50] Collectively, Exhibits F and G contain a surfeit of unsubstantiated allegations that have no bearing on whether the ITOs from Project Loyalty as referenced at para. 41 of Sgt. Thiara's affidavit fall under the first party record or third party record disclosure regimes. Apart from reviewing them, along with Exhibit E, I have not considered them further.

Governing Legal Principles

- [51] There are two main disclosure regimes that operate in the context of criminal cases:
- i. the first party records disclosure regime governed by the principles enunciated in Stinchcombe; and
 - ii. the third party records disclosure regime governed by the principles enumerated in O'Connor.
- [52] The legal principles that animate the analysis of whether materials are first party or third party records in the disclosure jurisprudence are not in issue on this application. Rather, it is how, in the unusual, indeed unique, circumstances of this case, the ITOs in the Project Reality investigative materials are characterized:
- are they materials that are fruits of the investigation in relation to Project Reality, or
 - are they materials clearly outside the fruits of the Project Reality investigation, or
 - are they somewhere in between, such that they have become interwoven into the Project Reality investigation, or
 - are they otherwise "obviously relevant"?

- [53] In *R. v. Gubbins*, 2018 SCC 44, Justice Rowe for the majority summarized the two disclosure regimes, writing:
- [29] To summarize, two different regimes govern disclosure in criminal cases. First party disclosure, as set out in *Stinchcombe* and supplemented by the duties on the Crown and the investigating police in *McNeil*, requires disclosure of all relevant information upon request. If the Crown refuses disclosure, it bears the burden to show that the information is clearly irrelevant. Third party disclosure per *O'Connor* requires an application to the court for third party disclosure (where the records sought do not fall under first party disclosure) for which the defence bears the burden to show that the record is likely relevant. In both instances, the purpose is "[to protect] an accused person's right to make full answer and defence, while at the same time recognizing the need to place limits on disclosure when required": *World Bank Group v. Wallace*, 2016 SCC 15, [2016] 1 S.C.R. 207, at para. 115. Such limits include avoiding fishing expeditions.
- [54] In *Gubbins*, the accused, each charged with impaired driving offences, sought disclosure of breathalyzer maintenance records and contended they were first party records governed by the *Stinchcombe* disclosure regime.
- [55] The Ontario Court of Appeal disagreed with the lower court findings that the records were first party records, and found them to be third party records. A majority of the Supreme Court of Canada upheld that conclusion. In *Gubbins*, the court was faced with determining which disclosure regime applied to the records in issue and so posed the question that the preliminary point on NOA 247 raises: which disclosure regime applies.
- [56] The decision in *Gubbins* sets out two questions to answer when making this determination:
- [33] Based on the previous discussion of disclosure regimes, to determine which regime is applicable, one should consider: (1) Is the information that is sought in the possession or control of the prosecuting Crown? and (2) Is the nature of the information sought such that the police or another Crown entity in possession or control of the information ought to have supplied it to the prosecuting Crown? This will be the case if the information can be qualified as being part of the fruits of the investigation or obviously relevant. An affirmative answer to either of these questions will call for the application of the first party disclosure regime. Otherwise, the third party disclosure regime applies. For the reasons that follow, the maintenance records are subject to third party disclosure.
- [57] Where there is possible police misconduct involved, the line between first party records and third party records for disclosure purposes can blur as a result of the principles enumerated in *R. v. McNeil*, 2009 SCC 3.

- [58] In *R. v. Johnston*, 2019 BCCA 107 (notably a case dealing with established police misconduct during the course of the Surrey Six investigation), the Court of Appeal had to address a post-conviction disclosure application that related to the admission of Person Y, one of the main witnesses in the Crown's case, into the Witness Protection Program following that person's evidence at trial. In *Johnston*, Justice Griffin summarized the difference between the two disclosure regimes identified in *Gubbins*, writing:
- [34] First party records are governed by the disclosure regime enunciated in *R. v. Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 S.C.R. 326 [*Stinchcombe*]. Third party records are governed by the disclosure regime enunciated in *R. v. O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411 [*O'Connor*].
- [35] The Supreme Court of Canada recently summarized the differences between the two disclosure regimes in *R. v. Gubbins*, 2018 SCC 44 [*Gubbins*].
- [36] In short, *Gubbins* identified the principles applicable to production of first party records under the *Stinchcombe* regime as follows (at paras. 18-24)
- a) the Crown has a duty upon request by an accused to disclose all relevant non-privileged information in its possession or control, whether inculpatory or exculpatory. The purpose is to protect the accused's Charter right to full answer and defence;
 - b) relevance is viewed from the perspective of whether there is a reasonable possibility the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence;
 - c) the Crown's duty to disclose is ongoing;
 - d) where the Crown refuses to produce, the defence can request a review. The burden is then on the Crown to show that the information is either "clearly irrelevant" or privileged;
 - e) the Crown's duty to disclose does not extend to all Crown entities, but only to the prosecuting Crown. Records in the hands of other Crown entities, including police, are considered third party records. This is subject to the qualifications that:
 - i) the Crown has a duty to make reasonable inquiries when put on notice that other Crown entities have material that is potentially relevant. This obligation was set out in more detail in *R. v. McNeil*, 2009 SCC 3 [*McNeil*];
 - ii) police have a duty to disclose to the Crown all material pertaining to the investigation of the accused, known as the "fruits of the investigation". Police investigative files, as opposed to operational records or background information, will be considered first party/ *Stinchcombe* disclosure; and

iii) police have a corresponding duty to disclose to the Crown other information beyond the "fruits of the investigation" where it is "obviously relevant" to the accused's case, which also will be considered first party/ Stinchcombe disclosure. The phrase "obviously relevant" does not indicate a new standard or degree of relevance: it relates to the accused's ability to meet the Crown's case, raise a defence or otherwise conduct the defence. An example would be records that relate to convictions for perjury for Crown witnesses.

[37] The Supreme Court of Canada in Gubbins also described the O'Connor disclosure regime for third party records. These are records that are not first party records as described above, that is, not part of the prosecuting Crown's file, the police investigative file or records that are "obviously relevant".

[38] The Court in Gubbins discussed third party records at paras. 25-28:

- a) the accused must bring an application to obtain disclosure of third party records;
- b) the burden for production is on the accused to show at the first stage that the records are "likely relevant";
- c) records will be likely relevant where "there is a reasonable possibility that the information is logically probative to an issue at trial or to the competence of a witness to testify"; or where "there is a reasonable possibility that [the records] may assist the accused in the exercise of the right to make full answer and defence";
- d) the likely relevant burden on an accused is significant, but not onerous. It is a lower threshold than true relevance; and
- e) if the records are likely relevant, there will be a second stage where the court will assess the actual or "true relevance" of the records sought and weigh competing interests to determine whether or not to order production to the accused.

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

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

[Emphasis added in Johnston.]

- [59] And more recently, the Court of Appeal again addressed the distinction between first party records and third party records in *R. v. S.F.*, 2024 BCCA 413 at paras. 55-63.

Discussion

- [60] The most informative and closest example of the application of the principles and analysis required for determination of the how the materials in issue should be characterized can be found in Justice Maisonville's decision in *R. v. Alkhalil*, 2019 BCSC 2224. This ruling addressed Mr. Wiwchar's application for disclosure of certain materials from another investigation where he, along with Alkhalil and others, were charged with the murder of John Raposo. That murder occurred in Ontario and was investigated by the Toronto Police Service (the "TPS"). Justice Maisonville determined that the records sought, notwithstanding the overlap between VPD's Project Reality investigation and the TPS's investigation, remained third party record materials. Justice Maisonville summarized the law on the issue of first party versus third party records at paras. 39 to 49 of her ruling. I adopt the recitation of the principles she enumerated and will apply them now.
- [61] The limited issue before the Court on this first stage of NOA 247 is whether the first party or third party records disclosure regime governs this application.
- [62] I begin by applying the framework from *Gubbins* for determining which is the applicable regime. *Gubbins* poses two questions to inform this determination. A positive answer to either of the two questions, meaning a "yes" to either one of the two questions, results in the application of the first party disclosure regime from *Stinchcombe*.
- [63] The first question is whether the information that is sought is in the possession or control of the prosecuting Crown. In respect of the Project Loyalty investigation file, and in particular the ITOs outlined at para. 41 of Sgt. Thiara's affidavit, the answer is clearly no.
- [64] The second question is whether the information sought on NOA 247, specifically the ITOs from Project Loyalty, is such that the VPD ought to have supplied it to the prosecuting Crown in this case. This question is answered having regard to whether the materials can be characterized as being part of the "fruits of the investigation" or obviously relevant: *Gubbins* at para. 33.
- [65] The ITOs in Project Loyalty are not fruits of the investigation in Project Reality. As *Gubbins* at para. 22 makes clear, the fruits of the investigation pertain to information generated or acquired during or as a result of the specific investigation into the charges against the accused. The ITOs in Project Loyalty may well touch on what happened to exhibits from Project Reality and how they were replaced, but that does not make the ITOs from Project Loyalty fruits of the investigation in Project Reality.

- [66] To put it another way, the fact that the investigation in Project Loyalty is concerned with how exhibits in Project Reality were removed and replaced with imposter devices does not transform the Project Loyalty investigative file, including the ITOs, into the fruits of the investigation of Project Reality.
- [67] As I noted in *R. v. Latimer*, 2020 BCSC 697 at para. 58:
- [58] Moazami, Gubbins, McNeil, Stinchcombe, and the general disclosure jurisprudence make clear that the "fruits of the investigation" means material related to the accused's case. It does not extend to material from other investigations into other persons--third party accused. These materials, that is investigations into third party accused, are usually subject to the O'Connor disclosure regime instead of the first party disclosure regime of Stinchcombe: McNeil, para. 25.
- [68] The Project Loyalty investigation relates to what happened to two exhibits in Project Reality. It is a completely separate and distinct investigation, both in respect of the offences and the targets, commenced years after the Project Reality investigation. Indeed, it was not started until sometime in August 2022 as the trial before Justice Maisonville was concluding.
- [69] The fact that there may have been some limited amounts of disclosure from the VPD to the Crown at the outset of the discovery of the replacement of 19LW and 58LW does not make the Project Loyalty file and its investigative materials first party records subject to the Stinchcombe disclosure rules: *R. v. Bacon*, 2012 BCSC 648 at para. 13.
- [70] However, the fact that the Project Loyalty materials are not part of the fruits of the investigation of the accused in Project Reality is not the end of the matter. As Gubbins and McNeil establish, records that are not part of the fruits of the investigation may still be subject to the first party records disclosure regime under Stinchcombe if they are "obviously relevant" to the defence case: Gubbins at para. 35.
- [71] As the authorities on this issue establish, obviously relevant does not create a new standard of relevance. Rather, it simply indicates to police that there will be times when they have to disclose information that is outside of the investigative file due to the nature of the information in issue. Respectfully, that appears to be the crux of the issue here.
- [72] Amici contends that because the prosecuting Crown in Alkhalil embarked upon steps to determine how 19LW and 58LW were removed and replaced with Exhibit 205 and 206, that opened the door to characterizing the materials as first party disclosure or materials that transformed into first party disclosure, as outlined in Johnston at paras.36(e)(i) and (ii).
- [73] The circumstances in Bacon wherein some materials from another investigation were disclosed through the McNeil process but not all of the materials were reviewed by the Surrey Six investigators, did not result in the entire other investigative file becoming first party records. To the contrary, the rest of the other investigative file remained third party records.

- [74] I would not go so far as to find that the Crown's duty to get to the bottom of what happened to exhibits in the Project Reality investigation in response to a midtrial lost evidence application clothes any subsequently launched police investigation into what happened (here an obstruction of justice offence investigation) as first party records for disclosure regime purposes.
- [75] I am not satisfied that those necessary steps at the time - being midtrial on the heels of the discovery of the anomalies - means that the Project Loyalty investigative materials have become so interwoven in the Project Reality investigation that it has become part of the Project Reality file. While there may be some touchstones or limited points of contact, particularly at the start, that does not go so far as to create an instance of interweaving of investigations and investigative materials.
- [76] The question, however, is this: are the Project Loyalty ITOs "obviously relevant"? To answer this, one must look to what relevance means in the context of disclosure.
- [77] Generally speaking, relevance in the disclosure context is not limited to relevance to meeting the merits of the Crown's case. Relevance, at least in the first party record disclosure context, is wider and includes the potential usefulness of the information to the defence in advancing a defence or the reasonable possibility that the information could be used by the defence to make a decision which could affect the conduct of the defence: *R. v. Basi*, 2007 BCSC 788 at paras. 19-25; *R. v. Pickton*, 2005 BCSC 1240 at paras. 9-12; *R. v. Belcourt*, 2012 BCSC 737, at para. 12; and *Latimer* at paras. 59-61.
- [78] More pointedly, in *Gubbins*, the court outlined what the term means. "Obviously relevant" describes information that is not within the investigative file, but that would nonetheless be required to be disclosed under *Stinchcombe* because it relates to the accused's ability to meet the Crown's case, raise a defence, or otherwise consider the conduct of the defence: *Gubbins* at para. 23.
- [79] When this term is applied to the context of the unique and troubling features of this case, the answer becomes somewhat clearer. The police exhibits that were part of the fruits of the investigation in Project Reality and held in the VPD Property Office were somehow removed and replaced with two imposter devices.
- [80] Significantly, Project Loyalty's investigative theory is twofold:
- i. elements of organized crime were likely involved in the swap and possibly individuals affiliated to one or more of the accused in the Project Reality investigation were involved; and
 - ii. either a civilian property custodian or a sworn member attached to the VPD Property Office was somehow "involved" in the removal of 19LW and 58LW and their replacement with Exhibits 205 and 206.[2]

- [81] In the highly unusual, indeed unique, and troubling circumstances enumerated above, coupled with the fact that Mr. Wiwchar is detained, self-represented, and facing one of the most serious offences in the Criminal Code, I have come to the conclusion that the ITOs referred to in Sgt. Thiara's affidavit meet the Gubbins "obviously relevant" standard.
- [82] Accordingly, I am directing that the Crown make further inquiries of the Project Loyalty investigation with respect to the ITOs and to review them for possible relevancy, vis-à-vis the issues germane to Mr. Wiwchar's substantive abuse of process application. I acknowledge that this ruling effectively finds that, on the Gubbins / McNeil analysis and the concept of obviously relevant, the ITOs become first party records. However, this ruling does not make the rest of the Project Loyalty investigative file first party records.
- [83] The Crown will need to review the ITOs and determine whether they are clearly irrelevant or privileged and make those claims if appropriate. If they are not clearly irrelevant, then the Crown will no doubt need to vet the ITOs for disclosure to Amici and Mr. Wiwchar. Judicial review of the vetting and any claims of privilege would then be the next step in the process.
- [84] Insofar as 18LW is concerned, its disappearance does not form part of the Project Loyalty investigative file. The investigation into its loss has remained within the confines of Project Reality as far as I can discern from the materials. Exhibit 2, Tab 1 contains a chart of the disclosure relating not only to 19LW, 58LW, Exhibits 205 and 206, but also 18LW. The items at lines 23, 26, 27, 36, 78, 79, 84, 85, 91, 92, 103, and 107 appear to either deal solely with 18LW or include 18LW. The dates would suggest that the last disclosure related to the loss of 18LW was in May 2024.
- [85] As the overall materials on this application establish, the Crown clearly understands its disclosure obligations and if there is anything further in relation to developments in the search for 18LW or by way of explanation as to how it may have been misplaced, I expect, and have no doubt, that the Crown will abide by its Stinchcombe duties in respect of that device.
- [86] That concludes my ruling.
- "Ker J."
- [1] Transcript of the Case Management Conference of June 18, 2025, Exhibit 1, Tab 2, p. 10(19) to p. 15 (11).
- [2] See the affidavit of Sgt. Thiara at paras. 11, 18, 37 & 45.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/25/17/2025BCSC1702.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-wiwchar-2025-bcsc-1702>

Prepared on 29 October 2026 · Esheria