Citation: *R. v. Denechezhe*, 2021 YKTC 18

Date: 20210526
Docket: 19-00916
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Cozens

REGINA

v.

CHRISTINE ANGELIQUE DENECHEZHE
AND PAUL ADRIAN FRASER

Appearances:
Benjamin Eberhard — Counsel for the Crown
Jennifer Cunningham — Counsel for Paul Fraser
Jennifer Budgell — Counsel for Christine Denechezhe

RULING ON APPLICATION

[1] COZENS C.J.T.C. (Oral) Mr. Fraser and Ms. Denechezhe are charged with having committed the following offences:

- s. 4(1*) Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("*CDSA*") x 2;
- s. 88 of the *Criminal Code*;
- s. 462.31(2) of the *Criminal Code*;
- s. 354(1)(a) of the *Criminal Code* x 2;

- s. 91(1) of the *Criminal Code*;

- s. 92(1) of the *Criminal Code*; and

- s. 117.01(1) of the *Criminal Code* x 2.

[2] On August 27, 2020, the matter was set over for trial on April 13-15, 2021. It was understood that there would be an application for leave to cross-examine the affiant, Cst. Pompeo, at the trial, in what is known as a ***Garofoli*** Application.

[3] On April 6, 2021, counsel for Mr. Fraser and Ms. Denechezhe applied for an adjournment of the trial dates and ***Garofoli*** Application on the basis of an unresolved disclosure issue. The adjournment application was denied by Seidemann III J.

[4] Counsel for Mr. Fraser and Ms. Denechezhe then filed a Notice of Application on April 8, 2021, which was followed by a filed Amended Notice of Application on April 9, 2021.

[5] In the Amended Notice of Application, counsel are seeking a remedy under s. 24(2) of the *Charter* excluding the following evidence:

- the evidence obtained during a search of 202-32 Waterfront Place and 89-2 MacDonald Road following a search warrant issued pursuant to s. 117.04(1);

- the evidence obtained during a search of 202-32 Waterfront Place following a search warrant issued pursuant to s. 11 of the *CDSA*;

- excising references to any of the evidence obtained during the above searches from any Informations to Obtain that led to the issuance of further search warrants;

- the evidence obtained from the execution of any further search warrants that were issued based on the evidence obtained from the searches at 202-32 Waterfront Place and 89-2 MacDonald Rd; and

- if the s. 117.04(1) search warrants are upheld, exclusion of any evidence obtained from the search warrants as set out in paras. 12.b., i, ii, iii, iv, v, and vi of the Amended Notice of Application.

[6] Counsel are also seeking that leave be granted to cross-examine Cst. Pompeo, the affiant of the Information to Obtain ("ITO"), as well as Mark London, the Informant, in his capacity as an employee of the Yukon Government working as a Safer Communities and Neighbourhoods ("SCAN") investigator.

[7] Counsel are further seeking that an anticipated disclosure application be heard prior to the ruling on the application for leave of the Court to cross-examine the affiant and Mr. London.

[8] On April 9, 2021, counsel for Mr. Fraser and Ms. Denechezhe also filed a Notice of Application for Disclosure Review, seeking the following:

a) Draft copies of the Information to Obtain ("ITO") for the s. 117.04(1) Search Warrant due to the fact that the affiant, Cst. Pompeo, did not take notes during the process of drafting the ITO;

b) Crown disclosure for the search warrant executed at 26 South Klondike Highway [ITO] at [paras.] 14 and 20;

c) Crown disclosure for the 3 additional search warrants executed as a result of the search warrant executed at 26 South Klondike Highway [ITO] at [paras.] 15 and 21;

d) The Operational Plan submitted by the affiant, Cst. Pompeo on May 22, 2019 to Insp. MacKinnon;

e) Information about the type and nature of the surveillance that the Safer Neighbourhoods and Community ("SCAN") Unit had on the Applicant, Mr. Fraser's home and/or vehicles and any notes about the surveillance that led to the Information provided at [paras.] 12, 18, 23, 24, 27, 37 of the ITO; and

f) The Information to Obtain and Search Warrant for the information provided at [para.] 34 of the ITO.

[9] On April 13, 2021, the matter was spoken to and stood down until 2:00 p.m. that day to allow counsel additional time to prepare for the disclosure application to be heard.

[10] When Court resumed at 2:00 p.m., Crown counsel brought an application for summary dismissal of the Defendant's disclosure application. Submissions on the Crown's summary dismissal application commenced, and continued on April 14, 2021. My ruling on the summary dismissal application was reserved until today's date. This is my ruling.

Submissions of Counsel

Counsel for the Accused

[11] Counsel for Mr. Fraser and Ms. Denechezhe filed the Applicants' Argument for Disclosure Review (the "Written Argument") on April 13, 2021.

[12] In brief, counsel note that a s. 117.04(1) search warrant was executed at their clients' residence at 202-32 Waterfront Place on June 6, 2019. Observations that were made on that day during the search resulted in the RCMP obtaining a *CDSA* warrant that was executed on June 7, 2019. The items seized during the execution of these two search warrants led to the issuance of other search warrants and production orders.

[13] Counsel submits that the disclosure they are seeking is essential for them to properly conduct the ***Garofoli*** Application. Counsel recognizes that there must be some basis for believing that there is a reasonable possibility that disclosure will be of assistance on the application.

[14] Counsel submit that:

- The disclosure request is narrow and focused solely on items which will be of probative value to the central issue of whether the s. 117.04(1) warrant should have been issued;

- That none of the material relates to confidential informants; and

- The requested disclosure will in fact have the effect of streamlining the proceedings.

[15] Counsel further submit that the disclosure sought forms part of the investigative file and is required to be disclosed. It is not third party disclosure. Cst. Pompeo relied on the requested disclosure when preparing the ITO. The first that defence counsel heard about the Crown position that the disclosure was considered to be third party

disclosure, was during Crown counsel's submissions on the summary dismissal application.

[16] In the Written Argument, counsel provide their position as to how the disclosure sought is relevant to the ***Garofoli*** Application.

[17] Counsel note in para. 22 of the s. 117.04(1) search warrant ITO, that Cst. Pompeo stated:

> On May 14, 2019, a search warrant was executed at 26 South Klondike Highway, Whitehorse (26 South Klondike Highway). Three persons who are associated to Fraser were arrested. Identification, along with paper documents in Fraser's name were located, along with 1.7 kilograms of powder and crack cocaine. No firearm was found.

[18] Counsel for Mr. Fraser, Ms. Cunningham, has received the disclosure in relation to 26 South Klondike Highway on a separate file. However, due to the limitations imposed by the Crown on defence counsel on the use of Crown disclosure, via the implied undertaking upon which disclosure is provided and received, counsel for Mr. Fraser is concerned that she is not able to use this disclosure for the purposes of this present proceeding. Her position is informed, in part at least, on the Crown position that counsel for Ms. Denechezhe, Ms. Budgell, is not entitled to receive this same disclosure. Ms. Cunningham submits that Crown counsel has confirmed this to be the case.

[19] Ms. Cunningham notes that Ms. Budgell requested the disclosure in relation to the search warrant executed at 26 South Klondike Highway, and three search warrants that followed, on March 21, 2021. Ms. Cunningham submits that it was not until

April 1, 2021 that she learned from Crown counsel that the requested disclosure would not be forthcoming.

[20] This non-disclosure was the reason for the bringing of the unsuccessful April 6, 2020 adjournment application by both counsel.

Crown Counsel

[21] Counsel's first line of argument is that the disclosure application should be summarily dismissed due to a lack of due diligence on the part of counsel for Mr. Fraser and Ms. Denechezhe.

[22] Counsel also takes the position that the disclosure sought is not part of the investigative file on these charges, and therefore not disclosable as being part of the investigation.

[23] The s. 117.04(1) search warrant is a public safety warrant and the importance of the disclosure sought should be measured in light of this type of warrant, not a *Criminal Code* warrant.

[24] The disclosure requested is so broad, so far-reaching, and so irrelevant to the statutory pre-condition for a ***Garofoli*** Application, that it should be summarily dismissed.

[25] In sum, the late disclosure request, the lack of due diligence on the part of defence counsel, and the type of disclosure sought is the basis for the Crown's summary dismissal application.

[26] Counsel notes the comments of Seidemann III J. in dismissing the adjournment application, that he was not convinced that the disclosure sought was of sufficient importance to grant the adjournment. Counsel submits that the finding of Seidemann III J. bears context on the application before me.

[27] Counsel submits that cross-examination of the affiant is sufficient to allow defence to argue its ***Garofoli*** Application. Counsel submits that in my role as a case management judge I can summarily dismiss the disclosure application.

Chronology

[28] The charges stem from a search warrant issued pursuant to s. 117.01(1) executed at the residence of both accused and at Mr. Fraser's storage locker.

[29] According to the Record of Crown Disclosure ("RCD"), an initial disclosure package was prepared, dated March 16, 2020.

[30] The charges were before the court on March 25, 2020.

[31] Initial requests for disclosure were made by Ms. Budgell on behalf of Ms. Denechezhe on May 5, 2020, and by Ms. Cunningham, on behalf of Mr. Fraser, on March 25, 2020 and again on May 25, 2020.

[32] In her initial request, Ms. Budgell requested full disclosure, including:

> 7. Notes of any and all investigating police officers (both typed and handwritten) or other State agents with any involvement in the investigation;
> …

> 9. The Information to Obtain for all search warrants executed in relation to the investigation.

[33] Ms. Cunningham's first disclosure request was a one-liner, but in her May 25, 2020 request she asked for:

> 6. Notes of any and all investigating police officers (both typed and handwritten) or other State agents with any involvement in the investigation;
>
> …
>
> 8. The Information to Obtain all search warrants and production orders executed in relation to the investigation (both approved and unapproved); and all source documents or material cited in any information to obtain. [Emphasis added]

[34] Since the initial disclosure request, a brief chronology of events regarding disclosure is as follows:

June 1, 2020

[35] Crown counsel communicated with Ms. Cunningham regarding data extraction issues.

June 15, 2020

[36] Ms. Budgell requested the disclosure sought in her May 5, 2020 disclosure request.

June 16, 2020

[37] Crown counsel communicated to Ms. Budgell regarding 22 headings for outstanding disclosure, as well as the data extraction issue, and to Ms. Cunningham regarding the same 22 headings.

June 22, 2020

[38] The RCD indicates further disclosure was prepared.

July 7, 2020

[39] The RCD indicates further disclosure was prepared. This included the ITO.

July 20, 2020

[40] Ms. Cunningham made a further disclosure request, including:

- any and all of the material Cst. Pompeo relied on while writing the Information to Obtain pursuant to s. 487.3 of the Code. This included a list of 15 points of clarification, many of which related to specific paragraphs of the ITO.

August 7, 2020

[41] Crown counsel communicated to both counsel indicating the Crown had not initially received the July 20 disclosure letter until that day.

October 20, 2020

[42] Crown counsel communicated to both counsel that no response regarding disclosure requests had yet been received from Cst. Pompeo.

November 18, 2020

[43] The RCD indicates further disclosure was prepared.

February 24, 2021

[44] The RCD indicates further disclosure was prepared.

March 2, 2021

[45] The RCD indicates further disclosure was prepared.

March 21, 2021

[46] Ms. Budgell requested disclosure (notes and reports) related to the search warrant for 26 South Klondike Highway, and three additional search warrants that were executed as a result of the search warrant at 26 South Klondike Highway. Referenced in this request are paras. 14, 15, 20, and 21 of the ITO, as well as some outstanding disclosure from the July 20, 2020 disclosure request by Ms. Cunningham, and further additional disclosure. Ms. Budgell also sought some clarification regarding disclosure she had already received.

[47] Of note, Ms. Budgell made this disclosure request as a result of realizing that she did not have all the disclosure that she had expected she would have had by this time. Ms. Budgell stated that she mistakenly thought Ms. Cunningham had requested this disclosure on July 20, 2020, and that she had received it.

March 22, 2021

[48] Crown counsel wrote to Ms. Budgell indicating that the RCMP had been forwarded her disclosure request, as well as providing her some responses to her other disclosure requests.

[49] Counsel further corresponded with Ms. Budgell, requesting an explanation of the relevance of the South Klondike Highway investigation.

March 22, 2021

[50] Ms. Budgell provided a response to Crown counsel's request for an explanation of the relevance of the South Klondike Highway investigation.

March 22, 2021

[51] Ms. Cunningham corresponded with Crown seeking further disclosure.

March 23, 2021

[52] Crown counsel communicated to both counsel that the "new" disclosure requests of Ms. Cunningham have been passed onto the investigators, and that some of the requests of Ms. Budgell have been provided already, and asking further clarity as to what disclosure remained outstanding.

March 25, 2021

[53] Ms. Budgell communicated with Crown counsel clarifying what disclosure remains outstanding, (including some of which is the subject of this disclosure application).

March 25, 2021

[54] Crown counsel communicated to both counsel indicating that the disclosure requests had been sent to investigators.

March 30, 2021

Crown counsel provided counsel with e-memos regarding disclosure responses from the RCMP.

April 1, 2021

[55] Crown counsel provided counsel with an e-memo indicating Cst. Pompeo's response to the disclosure requests.

[56] Crown counsel provided counsel with further e-memos regarding RCMP responses to other disclosure requests.

April 1, 2021

[57] Ms. Cunningham communicated with the trial coordinator indicating that an adjournment of the April 13 to 15, 2021 trial dates would be sought, on the basis of outstanding disclosure.

April 1, 2021

[58] Crown counsel, after receiving Ms. Cunningham's e-mail to the trial coordinator, communicated to both counsel that the Crown disagrees that there is any outstanding disclosure relevant to the ***Garofoli*** Application, and indicating Crown will contest an adjournment.

[59] Crown counsel also asked questions regarding whether some disclosure had been received, as well as seeking clarification of the receipt of certain items of disclosure.

April 6, 2021

[60] Ms. Budgell communicated with Crown counsel, on behalf of both counsel, seeking disclosure of the listed items.

April 6, 2021

[61] Ms. Cunningham communicated with Crown counsel indicating that this was the first she and Ms. Budgell were aware that Crown was not going to be providing the requested disclosure in regard to the search warrants issued at 26 South Klondike Highway and the three subsequent search warrants that were issued.

April 6, 2021

[62] Crown counsel communicated to both counsel that the Crown would be contesting the adjournment application, and reminded counsel that "The Crown will always comply with its disclosure obligations under the law".

Subsequent Proceedings

[63] There were further communications between counsel regarding disclosure that followed, and some additional disclosure was provided, although most of the contentious disclosure remains outstanding.

[64] I note that on April 13, 2021, Crown counsel indicated that Cst. Pompeo's notes with respect to the search warrant executed at 26 South Klondike Highway would be disclosed "imminently", and in fact were disclosed that day. I do not take this as a

concession by Crown counsel that the requested disclosure was required to be disclosed.

[65] Both defence counsel indicate that they still require notes and reports from the other three search warrants that followed the search at 26 South Klondike Highway. Counsel intends to argue at the disclosure application, should it proceed, that the notes from these other three searches are in the same category as the notes and reports from 26 South Klondike Highway, and should also be disclosed.

Pre-Trial Conferences

[66] There were three pre-trial conferences held before Ruddy J. None of these were recorded. It was clear at the August 6, 2020 pre-trial conference that a ***Garofoli*** Application was anticipated at trial. The August 6, 2020 pre-trial conference notes have no mention of outstanding disclosure issues.

[67] In the August 24, 2020 pre-trial conference there is a note from Ruddy J. that "disclosure not yet finished". There is a note by the trial coordinator to "follow up PTC w/Ruddy once disclosure [is complete]".

[68] Most recently, in the pre-trial conference notes from March 26, 2021, it is noted that it was confirmed that the ***Garofoli*** Application would be heard first. There was a disclosure discussion on that date. Ruddy J. wrote: "source documents cpl o/s and officer notes". "Request had been sent to affiant".

[69] The trial co-ordinator's notes state that there is a: "Small amount of outstanding disclosure…Crown has forwarded request to Cst. Pompeo."

[70] Who would have thought from these pre-trial conference notes just over two weeks before the trial date that we would find ourselves where we are today.

[71] As an aside, certainly, this case, following on the heels of others, has highlighted the need for the Court to take a more active and interventionist role in pre-trial conferences to ensure that counsel have addressed their minds to all the outstanding issues, in particular disclosure. I expect that more of these pre-trial conferences will now be on the record so that transcripts of these proceedings will be available. The loss of trial time already incurred in this case is of great concern to the Court, and something that requires steps to be taken to try to prevent a repeat occurrence or occurrences.

[72] I note the following comment in para. 62 of ***R.*** v. ***Morton***, 2020 ABCA 250:

> The court is entitled to presume that counsel come to a pre-trial conference with a thorough knowledge of the file, and that the positions they take are informed and accurate. These positions inform the scheduling of a trial and can be taken as binding for the purpose, absent a strong explanation for any reversal.

[73] The closer one gets to trial, the more certainty each succeeding pre-trial conference should provide. There should be little, if anything, left undecided less than three weeks before a three-day trial, in particular one set approximately seven months before the final pre-trial conference, and after two pre-trial conferences have already been held.

Analysis

[74] As the application before me is for summary dismissal of the disclosure application, and my ruling is not with respect to whether the disclosure sought should or should not be provided, I do not consider it necessary to review in detail the submissions on the merits of the disclosure application itself. These submissions, I expect, were somewhat less detailed than would be the case if there was a fully argued disclosure application before me. It is necessary, of course, to consider whether there is a sufficient foundation to allow the disclosure application to go forward. If there is not, then the application must be dismissed.

[75] In the ***United States of America*** v. ***Fraser***, 2014 BCSC 227, Watchuk J. denied a Crown request for summary dismissal of a defence disclosure application, stating in paras. 14-17:

> 14 It is not in dispute that the court can control its own process. For example, in *USA v. Ranga*, 2012 BCCA 81, the British Columbia Court of Appeal held that the party seeking a *Charter voir dire* in an extradition context bears the onus of establishing that one should be held (para. 16).
>
> 15 While there are parallels with the process by which the court controls the granting of *voir dires*, the persons sought here are not applying for a *voir dire* at this time. They are seeking disclosure of information which they say is available to the Crown so that a *Charter* application can be brought. It is not able to be determined if there is an air of reality to the claim of a breach of s. 7 of the *Charter* until after the disclosure application is heard.
>
> 16 To return to the issues before the court in this application, the disclosure application does disclose a justiciable issue because it raises s. 7 issues which are within the jurisdiction of the court. The issue of whether the disclosure requested has a causal connection to this proceeding is a matter to be determined at the hearing of the disclosure application. That question cannot be decided in a factual and evidential vacuum but must be decided on the hearing of the substantive disclosure application.

> 17 The Crown's application for summary dismissal of the disclosure application is therefore dismissed.

[76] In ***R.*** v. ***Papasotiriou-Lanteigne***, 2017 ONSC 5337, the Court granted the Crown's summary dismissal application of defence counsel's application to have Crown counsel removed from the case, stating in paras. 37 and 38:

> 37 In the end result, I have concluded that there is no reasonable prospect that the respondents could succeed in their application to have Crown counsel remove. …
>
> 38 …I am not prepared to spend court time hearing evidence on an application that has no reasonable prospect of succeeding.

[77] In ***R.*** v. ***Cobb***, 2021 QCCQ 546, the Crown application for summary dismissal of a defence application for a stay of proceedings was granted on the basis that the application for a stay was unmeritorious on its face, there was no reasonable prospect of success, and it was doomed to fail.

[78] In ***R.*** v. ***Basios***, 2017 ONCJ 6, the Crown sought summary dismissal of a disclosure application by defence counsel, on the basis that the request for documents was a fishing expedition based on a speculative theory. The Court conducted a thorough analysis of the principles regarding disclosure of documents in a ***Garofoli*** application and concluded that some of the requested disclosure should not be provided while other disclosure sought should be, and that some disclosure would be the subject of further submissions.

[79] In ***Morton***, the Court was ruling on an appeal of a trial judge's decision on a defence disclosure application.

[80] In paras. 59-66, and in the following case specific analysis, the Court noted factors such as:

- The defence obligation to be diligent in pursuing disclosure as meshing with the court's obligation to have criminal trials held in a reasonable time;

- Trial fairness, including the threat trial delay has on trial fairness and the role that late disclosure applications have in negatively impacting trial delay;

- The right of an accused to make full answer and defence; and

- The context of a trial and the inferences that can be drawn from the timing of a late disclosure request.

[81] The Court noted in para. 64 that: "Trial judges are empowered to summarily dismiss frivolous applications".

[82] There is no question that, as a trial judge, I have the ability to summarily dismiss applications from proceeding that I feel have no merit or reasonable prospect of success. I have done so in the analogous case of ***R.*** v. ***Dick*** (unreported) where I refused to allow court time to be utilized to enter into a *voir dire* on the basis of an allegation of a s. 10 *Charter* breach. In my opinion, there was no utility in entering into a *voir dire* at trial in the particular circumstances of the case, given the inability of the *voir dire* to effect the trial result (counsel were, however, advised this was a factor that could be raised at a sentencing hearing, should the matter get that far).

[83] The lateness of the defence counsel application for disclosure rests largely at the feet of both defence counsel in this case. Counsel for Mr. Fraser assumed she could use the disclosure she had in her possession on another file for the purposes associated with this file. She did not follow up on her assumption to confirm she was correct. It was not until she learned the Crown position with respect to the disclosure request from counsel for Ms. Denechezhe, that she turned her mind to whether her implied undertaking prevented her from using the disclosure in her possession on other files.

[84] Counsel for Ms. Denechezhe had been operating on the assumption that counsel for Mr. Fraser had requested the disclosure now in question in July 2020, and that all this requested disclosure had been provided in November 2020. It was her understanding that when the Crown sent the disclosure to Ms. Cunningham, that she would, as a matter of course, also receive it.

[85] There is no indication that the July 20, 2020 disclosure request by Ms. Cunningham was cc'd to Ms. Budgell. It would appear that Ms. Cunningham and Ms. Budgell must have talked about the July 2020 disclosure request in order for Ms. Budgell to have anticipated that this request by Ms. Cunningham included the documents now in dispute.

[86] However, this discussion, assuming that there was one, could not have been clear, as Ms. Cunningham and Ms. Budgell appear not to be *ad idem* as to what was being requested, given what Ms. Cunningham did not request.

[87] It also appears that Ms. Budgell did not review the disclosure that was provided in November 2020, or it would have been apparent to her that not everything she anticipated receiving was there.

[88] It was not until Ms. Budgell was commencing her trial preparation for this matter in March 2021, that she became aware that this specific disclosure had not been requested by Ms. Cunningham, had therefore not been sent by Crown, and that, as such, she did not have it in her possession. Ms. Budgell accepts responsibility for this failure. She submits, however, that notwithstanding her oversight, Crown counsel would have been able to provide this disclosure in sufficient time for trial, had the Crown chosen to do so.

[89] This lack of communication between defence counsel is somewhat surprising to me. There is much in the material filed before me to show that counsel are working somewhat lock-step with each other in this case, and are not in the position of having clients who are finger-pointing against each other. I appreciate that there have been major files both counsel have been and are involved in, that require their attention to be elsewhere for much of the time. This explains perhaps some of the context for the lack of attentiveness to this case since last fall, until March of this year. I remain somewhat surprised however, nonetheless. It is perhaps precarious practice for counsel to rely on other counsel, and not on themselves, to ensure trial readiness in every aspect of a case, in the absence of clear communication between them.

[90] It appears from the above-mentioned notes from the March 26, 2021 pre-trial conference, that there was nothing indicating that there was a significant issue with

respect to outstanding disclosure, such that the trial dates of April 13 to 15, 2021, would be in jeopardy.

[91] Surely, I would have thought that there would have been specific discussion regarding the disclosure request that had been made on March 21, 2021, at the pre-trial conference, if this “outstanding” disclosure could potentially derail the trial.

[92] All counsel present were aware that these disclosure requests had been made. While Crown counsel had not yet formulated a position at this point, there was no indication that there was going to be a problem, or even that there was uncertainty in that regard. Ms. Budgell did not raise the issue and Mr. Eberhard for the Crown did not either. Ms. Budgell assumed that the requested disclosure would be forthcoming. As much, at least, of it had already been provided to Ms. Cunningham on another file, it did not appear that it would be a time-consuming process for Crown counsel to prepare and provide it.

[93] Assuming for the moment that Ms. Cunningham was not aware of Ms. Budgell’s March 21, 2021 disclosure request (although this would also surprise me), at the least Ms. Budgell or Mr. Eberhard could have flagged this as an issue before Ruddy J., in order to allow her to address it in a timely fashion, however, it appears that no one did.

Conclusion

[94] There is a somewhat complex history to this file, exacerbated by misplaced assumptions, misunderstanding, and miscommunication, primarily on the part of counsel for the accused.

[95] There were opportunities at pre-trial conferences, in particular on March 26, 2021, to ensure that no outstanding disclosure issues would arise so close to trial that the trial dates would be lost. Both defence and Crown counsel could have raised this before Ruddy J., but no one did.

[96] Unfortunately, like ships passing in the night, this particular disclosure issue was never addressed head on, and the errors created by the underlying assumptions continued and were exacerbated. In the end, the disclosure application, which was then overtaken by the summary dismissal application, and then by my reserving decision on the summary dismissal application, ended up burning three days of trial time.

[97] At this point, I would prefer to deal with the merits of the defense disclosure application on the basis of full argument, rather than summarily dismissing it. There may be larger issues at play between Crown and defence counsel that have meaning and potential impact on future cases, rather than in just this one case. I understand this.

[98] However, dismissing the defense application in a summary fashion is not how I believe the matter should be dealt with. There is a sufficient basis for the disclosure application to allow it to be fully argued before me. I cannot say that the disclosure application is clearly frivolous, purely speculative, or has no prospect at all of succeeding, at least in part. That remains to be determined at a full hearing.

[99] While I agree that there has been a lack of due diligence on the part of counsel for both accused in making clear and timely disclosure requests, this problem was more attributable to miscommunication, misunderstanding and mistakes, than to a reckless

disregard to comply with their obligation to diligently pursue disclosure, or to an intentional course of action. The track record on the file indicates that there were times when disclosure, in general, was a focus for counsel, and, in particular, after Ms. Budgell discovered, late as it was, that she did not have all the disclosure that she sought, counsel were diligent in further pursuing it.

[100] Crown counsel, who throughout has appeared to be diligent in responding to disclosure requests, was placed somewhat at a late disadvantage following the March 21, 2021 disclosure request from Ms. Budgell.

[101] This said, Crown counsel could have taken steps at the March 26, 2021 pre-trial conference to ensure the issue was at least more squarely before Ruddy J. as a potential problem, given that it appeared Crown had not yet decided whether to provide the requested disclosure, or otherwise decline to do so.

[102] In all the circumstances that exist in this case, I have decided that the disclosure application will be heard on its merits, with full argument.

[103] One thing I can say with certainty; counsel can expect that pre-trial conferences will, in cases that require it, be conducted differently in future and the expectations for all counsel to be fully prepared, higher.

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COZENS C.J.T.C.