SUPREME COURT OF YUKON

Citation: *R v McLaughlin*, 2022 YKSC 1

Date: 20220114
S.C. No. 20-01512
Registry: Whitehorse

BETWEEN

HER MAJESTY THE QUEEN

RESPONDENT

AND

STEVEN ALEXANDER MCLAUGHLIN

APPLICANT

Publication of evidence taken at the preliminary inquiry is prohibited by court order pursuant to s. 539(1) of the *Criminal Code*. **This publication ban is no longer in effect.**

Pursuant to s. 648(1) of the *Criminal Code* no information regarding this portion of the trial shall be published before the jury retires to consider its verdict. **This publication ban has lapsed.**

Before Chief Justice S.M. Duncan

Counsel for the Crown — Lauren Whyte

Steven Alexander McLaughlin — Appearing on his own behalf

REASONS FOR DECISION

Introduction

[1] This is an application by the accused Steven Alexander McLaughlin, (the "applicant") who seeks a stay of the proceedings based on a breach of his rights under s. 7 of the *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982* (the "*Charter*") – to make full answer and defence because of incomplete or late disclosure by the Crown. While the Crown concedes late disclosure, they say it has not

actually prejudiced or had an adverse effect on the applicant's ability to make full answer and defence at trial. The Crown does not concede incomplete disclosure.

[2] The focus of the application is threefold. The applicant argues he did not receive disclosure in a timely way while he was in Whitehorse Correctional Centre ("WCC") which detrimentally affected his ability to apply for bail and contributed to unnecessarily strict conditions. Second, he argues that the failure of his lawyer at the time to have received full disclosure before the preliminary inquiry prevented him from cross-examining witnesses and further discovery. Third, he argues that the notes of RCMP Constable Cole Nedohin were incomplete because parts were improperly redacted.

Background

[3] The applicant is charged with aggravated assault, uttering a threat to cause death, assault, and unlawful confinement. He was arrested on August 29, 2019. He is currently on release from custody. His trial is scheduled to commence on February 21, 2022, by judge and jury, in Watson Lake, Yukon.

[4] The following partial procedural history of the legal proceedings thus far is from the affidavits of Kelsey McNab and Amanda Bornhuse, paralegals with the Public Prosecution Service of Canada, Yukon Regional Office (the "Crown"). None of this evidence was objected to or denied by the applicant.

[5] The applicant has had five different lawyers to date, including the initial duty counsel. He has been representing himself since December 23, 2020.

[6] At his initial show cause hearing on August 30, 2019, where he was represented by duty counsel, the applicant consented to his remand until September 11, 2019. The matter was then adjourned three times by defence counsel, Ms. Amy Steele, for

additional disclosure. On September 20, 2019, the applicant was released with a surety after a show cause hearing. His matter was adjourned to October 16, 2019, for plea and election.

[7] On September 26, 2019, the surety rendered and a warrant for the applicant's arrest was issued. He failed to appear in court on October 16, 2019, and Ms. Steele was removed as his counsel on that day. Despite her removal from the record, Ms. Steele received additional disclosure from the Crown's office on November 13, 2019. She returned all the disclosure she received originally and in error, to the Crown's office on November 13 and 18, 2019.

[8] Meanwhile the applicant turned himself in to the RCMP on November 9, 2019, consented to remand in custody, and applied for Legal Aid. On November 27, 2019, Mr. Vincent Larochelle became counsel of record. He requested disclosure twice because the first time the Crown's office misplaced his request. He received the full disclosure package to that date on December 10, 2019, and additional disclosure on January 15, 2020. The applicant's preliminary inquiry was scheduled for April 1, 2020, in Watson Lake.

[9] On March 4, 2020, Mr. Larochelle was removed as counsel of record. He had returned disclosure to the Crown on March 3, 2020, but the Crown's office did not keep a record of what was returned. At the next court appearances on March 13, 19, and 27, 2020, the applicant advised he had not yet received a decision on his appeal of Legal Aid's denial to him of another counsel. The April 1, 2020 preliminary inquiry date was released. The matter was adjourned to April 29, 2020.

[10] The applicant requested disclosure from the Crown in court on March 27, 2020, by phone to the Crown's office on April 8 and April 14, 2020, and by letter to the Crown postmarked April 9, 2020. Specifically, he requested medical records, video from the hospital, photographs from the RCMP Forensic Unit, and electronic disclosure. To determine what disclosure the applicant had, Crown counsel contacted Mr. Larochelle who confirmed he had given the applicant paper disclosure, not including medical or other personal records.

[11] On April 17, 2020, the Crown's office sent additional disclosure to Mr. Larochelle in error as he was no longer counsel of record. This was returned by Mr. Larochelle on April 22, 2020.

[12] On April 30, 2020, Mr. Greg Johannson was appointed by Legal Aid as counsel for the applicant. The matter had been adjourned by the court on April 29 to May 14, 2020.

[13] Crown counsel delivered by hand to WCC the disclosure requested by the applicant on May 1, 2020. A corrected disclosure item #50 was provided to the applicant on or about May 4, 2020.

[14] On May 13, 2020, Crown counsel advised Mr. Johannson by email that the applicant had the disclosure at WCC and had agreed to give it to his counsel when appointed. A list of the disclosure provided to the applicant was faxed to Mr. Johannson on May 22, 2020.

[15] At the May 14, 2020 court appearance, the applicant through an agent advised the court he was seeking bail. The matter was subsequently adjourned to May 25, May

28 and June 11, 2020. On June 9, 2020, Mr. Johannson advised the trial coordinator by way of update on the file that he had not yet received the disclosure from WCC.

[16] On June 11, 2020, the applicant was released from custody on consent of the Crown. He has remained out of custody to the present time.

[17] The preliminary inquiry date was set for November 25, 2020. Electronic and additional disclosure was sent by the Crown's office to Mr. Johannson on October 15, 2020.

[18] On November 12, 2020, Mr. Johannson's office advised he was no longer representing the applicant and returned all disclosure to the Crown's office. That same day, Mr. Sheldon Tate, counsel from Kamloops, British Columbia, confirmed by email that he had been retained to represent the applicant at the preliminary inquiry. He requested disclosure by email and confirmed by letter on November 13, 2020.

[19] On November 17, 2020, the disclosure package left the Crown's office by courier. It arrived at Mr. Tate's office in Kamloops on November 24, 2020, after he had left for the Yukon to attend the preliminary inquiry. Mr. Tate had received some police reports and a transcribed witness statement by fax from the Crown's office on November 20, 2020.

[20] The preliminary inquiry proceeded on November 25, 2020, based on instructions from the applicant to Mr. Tate to consent to committal at the conclusion of the hearing. Mr. Tate additionally advised the court he had been retained only a few weeks earlier, and he did not have the full disclosure package, except for some police narratives and one witness statement. The applicant was committed for trial and the matter was adjourned to January 5, 2021, in Supreme Court.

[21] Mr. Tate advised the trial coordinator and the Crown's office on December 23, 2020, that he had been retained only for the preliminary inquiry and he returned to the Crown's office all the disclosure he received.

[22] Additional disclosure was sent by the Crown's office to Mr. Tate on April 19, 2021, in error. It is not known whether he returned that disclosure.

[23] The entire disclosure package was re-prepared for the applicant by the Crown's office and retrieved in person by him on May 4, 2021. The applicant picked up additional disclosure packages on June 2 and September 7, 2021. The first additional disclosure was ready by the Crown's office on May 27, 2021, and the next additional disclosure packages were ready on July 27 and August 30, 2021.

[24] On September 7, 2021, the applicant filed this application. He delivered particulars in writing on October 1, 2021.

[25] On September 27, 2021, the applicant requested disclosure of the forensic photographs and confirmation of the location of the cellphone seized from his property. The applicant was advised that the information was ready at the Crown's office on September 28, 2021. The applicant did not pick it up when he delivered the particulars for this application on October 1, 2021.

[26] Crown counsel and the applicant had an email discussion between September 29 and October 4, 2021, during which the applicant expressed concern about missing disclosure, in particular the notes from Constable Austring and Constable Nedohin. After discussing options, the Crown and the applicant agreed that the Crown would prepare an entire new disclosure package by October 8, 2021.

[27] Further disclosure identified as possibly missing or non-existent by the Crown's office was provided by the RCMP between October 6 and 12, 2021. This included:

a. handwritten notes from Constable Austring, Constable Nedohin, Staff Sergeant Langley and Constable Conway;

b. confirmation that Constable Cote and Corporal Brown did not have handwritten notes;

c. seven supplemental police reports: two from Constable Morton, one from Constable Beaudoin, one from Constable Kemp, one from Constable Nedohin and two from Constable Austring;

d. notes from the RCMP Emergency Response Team ("ERT") members who apprehended the applicant in November 2019;

e. audio statement of Crown witness, Conrad Worrall (transcription previously disclosed); and

f. confirmation of criminal records of three Crown witnesses.

[28] The applicant was provided with all the disclosure on October 8, 2021, including the materials ready on September 28, 2021, after the pre-trial conference in Supreme Court. Further disclosure received by the Crown from the RCMP on October 8, 2021 after the pre-trial conference, was picked up by the applicant that afternoon. On October 12, 2021, additional disclosure was prepared by the Crown's office and served on the applicant by the RCMP that day, at the same time as the materials in response to this application were served.

Issues

[29] Is there missing or incomplete disclosure in the form of redacted notes from Constable Nedohin that constitutes a breach of the applicant's s. 7 *Charter* rights, and if so, what remedy is appropriate?

[30] Does the late disclosure provided by the Crown's office to the applicant constitute a breach of his s. 7 *Charter* rights, in particular in relation to the conduct of his bail hearing and the preliminary inquiry, and if so, what remedy is appropriate?

Law

[31] The Crown's obligation to provide full and timely disclosure in a criminal matter is based on the s. 7 *Charter* principles of fundamental justice, in particular the right of an accused to make full answer and defence. This general right to make full answer and defence includes more specific rights and principles, including the right of the accused to know the case they must meet, their rights of cross-examination, the right to advance a case for the defence, and the right to full and timely disclosure. Disclosure is a means to an end: it is to ensure an accused receives a fair trial; has an adequate opportunity to respond to the prosecution case; and that the verdict is reliable (*R v Horan*, 2008 ONCA 589).

[32] Disclosure includes all information, whether inculpatory or exculpatory, that could "reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence" (*R v Egger*, [1993] 2 SCR 451 at 467).

[33] Exceptions to the Crown's disclosure obligation include irrelevant or privileged information, or information the disclosure of which is otherwise governed by law. The accused does not have a right to adduce irrelevant evidence (*R v Darrach*, 2000 SCC 46 ("*Darrach*")). Relevance is assessed in the context of each case.

[34] The timing and manner of disclosure are subject to Crown discretion, which may be exercised to delay disclosure in order to prevent harm to witnesses, to ensure the completion of an investigation, or to prevent the prejudice of the public interest in some other way. The Court in *R v Stinchcombe*, [1991] 3 SCR 326 ("*Stinchcombe"*) recognized that the Crown will often be unable to make complete disclosure at the initial stage of the disclosure process (at 339). The Crown has no constitutional obligation to make full disclosure before a bail hearing. There are also different considerations about disclosure before a preliminary inquiry, discussed below. A justice conducting a bail hearing or a preliminary inquiry has no inherent jurisdiction to order disclosure, either as a *Charter* remedy or under the *Criminal Code,* R.S.C., 1985, c. C-46. The Crown's obligation to disclose is a continuing one, applying to any additional information received by the Crown at any time. It requires that disclosure be made as it becomes available and completed as soon as is reasonably possible.

[35] Necessary to the Crown's duty to disclose as required by *Stinchcombe*, is the duty of the police to disclose to the Crown all material pertaining to their investigation of the accused (*R v McNeil*, 2009 SCC 3).

[36] A court reviewing whether the Crown has fulfilled its obligation to disclose in a timely way and in good faith must examine several relevant factors. These include:

> [64] … the essential elements of the offence, the complexity of the investigation, the volume and type of

> disclosure already provided, what the Crown refuses or is unable to provide, a preliminary assessment of how the further disclosure sought is relevant in the sense of assisting the accused, whether it is part of the case to meet, the interaction between the Crown and defence, the behaviour of the Crown and defence, the timing of disclosure and the nature of the defence requests for disclosure. … [*R v Anderson*, 2013 SKCA 92]

[37] The establishment of a breach of the Crown's obligation to disclose is not enough to establish a *Charter* breach. As stated in *R v Spackman*, 2012 ONCA 905 at para. 111:

> ... To demonstrate constitutional infringement, and thus entitlement to a just and appropriate remedy, an accused must show actual prejudice to his or her right to make full answer and defence resulted from the infringement: *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 74; *Bjelland*, at para. 21. [R *v Bjelland*, 2009 SCC 38 ("*Bjelland"*)]

[38] If the accused succeeds in showing actual prejudice sufficient to establish a *Charter* breach, then they are entitled to a remedy under s. 24(1) of the *Charter*. Remedies under s. 24(1) are flexible and contextual: *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62. The Court in *R v O'Connor*, [1995] 4 SCR 411 ("*O'Connor*") stated that in circumstances of late or insufficient Crown disclosure and a s. 7 breach, the remedy for such a violation is typically a disclosure order and adjournment. Only in extreme and clear cases where the prejudice to the accused's ability to make full answer and defence or the prejudice to the integrity of the judicial system is irremediable will a stay of proceedings be appropriate (para. 83). Factors to consider when assessing whether a stay is appropriate include:

a. whether the Crown's breach of its disclosure obligations has violated fundamental principles underlying the community's sense of decency and

fair play and thereby caused prejudice to the integrity of the judicial system;

b. the conduct and intention of the Crown, including the number and nature of adjournments attributable to the Crown's conduct, including adjournments attributable to its failure to disclose in a timely manner; and

c. the societal and individual interests in obtaining a determination of guilt or innocence, which increase commensurately to the seriousness of the charges against the accused (*O'Connor* at paras. 77-81).

[39] In other circumstances, where a disclosure order or adjournment cannot remedy the prejudice created by untimely or inadequate disclosure, the exclusion of evidence may be warranted. For example, if the information is disclosed mid-trial after irrevocable decisions about the defence have been made by the accused, where there has been misconduct amounting to abuse of process, or where an adjournment where the accused is in custody could be seen to compromise the integrity of the justice system, exclusion of the evidence may be the appropriate remedy.

Analysis

[40] Both parties have made concessions in this application. The applicant concedes he now has all disclosure, apart from the redactions of Constable Nedohin's handwritten notes. Crown counsel concedes that some disclosure was late, in particular the material disclosed in October 2021.

[41] Crown counsel argues that this late disclosure has not prejudiced the accused's right to full answer and defence, because its content is not highly relevant and in any

event there is sufficient time before trial to determine how the disclosure may affect the defence case.

Issue #1 - Redacted notes of Constable Nedohin

[42] The notes of Constable Nedohin have pages 25 and 26 redacted. The applicant testified that he had seen the unredacted copies of Constable Nedohin's notes 15 months earlier. He insists that the full unredacted version be disclosed to him.

[43] Constable Nedohin was cross-examined during the hearing by the applicant about his notes. He confirmed he had no record of sending them to the Crown's office before October 2021. At that time, he sent a photograph of the notes without any redactions. After realizing his error, he resent them with redactions in the form of "post-it notes" over information that he says was irrelevant to this investigation. In the copy attached to the Crown's affidavit, the two pages of notes (pp 25-26) have been removed. Constable Nedohin confirmed several times on cross-examination that the redacted portions, which he confirmed were pp 25-26, referred to other things done that day unrelated to the applicant's matter.

[44] The applicant testified he no longer has the unredacted notes he said he received 15 months earlier and did not produce them. He suggested they may show the police officers touched or tampered with evidence on his property and took photographs on his property without a search warrant. He provided no objective evidence of this.

[45] Constable Nedohin was forthright, consistent and clear in his testimony on cross-examination. He explained that he made no changes to his notes since writing them on August 29, 2019. The only thing he did was redact them by putting the post-it notes on the portions he said were irrelevant. He testified this is his usual practice when providing

notes to the Crown. He testified that no one had access to the electronic copies of his notes.

[46] I have no reason to disbelieve Constable Nedohin's explanation that the redacted part of his notes, which occurs near the beginning of his notes for that day, contained information irrelevant to Mr. McLaughlin's case. The remainder of his disclosed notes describe his involvement in this matter without any obvious gaps in time or activity. There is no reason to believe that the redacted portions of his notes are anything other than what he says – irrelevant to the case at bar. As noted above, the applicant has no right to the disclosure of irrelevant material (*Darrach*).

[47] As a result, the failure to produce redacted notes of Constable Nedohin does not provide a ground on which the applicant can rely to establish a *Charter* breach.

Issue #2 -Late Disclosure

a. Effect on Bail

[48] The applicant was originally released on bail to a surety shortly after his arrest. The surety rendered within a week and the applicant was unlawfully at large until he turned himself in to the RCMP on November 9, 2019. He requested and obtained bail again on June 11, 2020, on the Crown's consent.

[49] The applicant testified that he was waiting for the DNA evidence results before applying for bail while he was in custody. He argues that if he had received the DNA disclosure earlier, he would have applied for bail earlier and perhaps not been subject to such strict conditions.

[50] The materials to be tested for DNA were shipped to the testing laboratory, located outside the Yukon, on November 25, 2019. The results were provided to the

RCMP on February 4 or 5, 2020. They were disclosed by the Crown to Mr. Larochelle in error by letter dated April 17, 2020, and returned by him to the Crown on April 22, 2020.

[51] The Crown notes that the time it took for the receipt of the DNA results from the laboratory was reasonable, given its national scope of responsibility and the volume of requests. The Crown does not know when it obtained the material from the RCMP, but advises it was at WCC to the attention of the applicant by May 1, 2020.

[52] The applicant was without counsel between March 4, 2020, when Mr. Larochelle was removed from the record and April 30, 2020, when Mr. Johannson was appointed. The Crown did not provide disclosure again to the applicant after it was returned by Mr. Larochelle. The applicant had advised the Court he was waiting for the appointment of a new Legal Aid lawyer. The Crown provided the disclosure package containing the DNA evidence by hand on May 1, 2020, to the applicant's attention at WCC, the day after Mr. Johannson was appointed as counsel by Legal Aid.

[53] No application for bail was made while Mr. Larochelle was representing the applicant. Two weeks after Mr. Johannson became counsel of record, the applicant advised the Court of his intention to apply for bail. As noted above, although Mr. Johannson notified the Court and Crown on June 9, 2020, that he was having difficulty getting the disclosure package from WCC, he did not ask about it again after that date. In the meantime, a bail plan was prepared with the help of various individuals, and the Crown consented to the applicant's release to the John Howard Society (now called Connective) on conditions, on June 11, 2020.

[54] The facts surrounding this disclosure process raise some concerns. Ideally, the Crown should have had a record of when it received the DNA results from the RCMP.

The Crown should not have sent the disclosure to Mr. Larochelle in error on April 17, 2020. The Crown should have kept a record of what was returned to them from Mr. Larochelle. While it may have been reasonable for the Crown to wait until the applicant engaged a new lawyer (his fourth) before providing the disclosure package, it is unfortunate that on the day after Mr. Johannson was appointed, the Crown delivered the disclosure directly to the applicant at WCC. This caused unnecessary complication and delay in Mr. Johannson receiving the disclosure.

[55] Despite these irregularities, I accept the Crown's argument that while a bail hearing must be fair, this is not the same as what is fair at trial. Bail hearings are "meant to be expeditious, with a degree of flexibility and procedural informality sufficient to protect the liberty interests and security of the public": *R v John*, [2001] OTC 647 (Sup Ct) at para. 56. The Crown has no constitutional obligation to make full disclosure before a bail hearing (*R v O'Neil*, [2007] 161 CRR (2d) 271 (Ont Sup Ct)).

[56] In this case, I agree with the Crown that the time it took for the laboratory to process the DNA evidence was reasonable. While the DNA evidence could have been disclosed in March or April 2020, rather than in May 2020, to WCC, causing a delay in receipt by defence counsel until June 2020, I do not find that this amounted to a breach of the applicant's *Charter* rights.

[57] The applicant was granted bail on June 11, 2020, after a comprehensive bail plan was developed with the assistance of counsel, a justice worker, and the John Howard Society. He remains out of custody to the present day. He did not have counsel between March 4 and April 30, 2020. Plans for bail were developed after disclosure of the DNA evidence but before the applicant or counsel had seen it, although the Crown

of course knew the results at the latest in April, 2020. Even if the applicant had received the DNA evidence earlier, it is unlikely he would have been able to develop a successful bail plan without the assistance of counsel. There is also no evidence how receiving DNA disclosure earlier would have resulted in a relaxation of some of his conditions. The applicant's right to make full answer and defence has not been prejudiced.

[58] There is no need to discuss remedy because I have found there has been no *Charter* breach. However, I make the following observations. Since the applicant has had the DNA disclosure since June 2020, and that evidence was helpful to him, an order for disclosure or exclusion of evidence is unnecessary. A stay of proceedings is reserved for exceptional situations where the prejudice to the accused's rights to make full answer and defence or the negative effect on the integrity of the justice system is irremediable. These facts do not come close to meeting that threshold.

b. Effect on preliminary inquiry

[59] The applicant argues that his failure to have had disclosure of the material he received October 2021, and the rest of the disclosure that Mr. Tate had not received before the preliminary inquiry, prejudiced his right to make full answer and defence because he could not cross-examine certain witnesses or make certain arguments at the preliminary inquiry. However, the applicant concedes he instructed Mr. Tate to consent to his committal and proceed with the preliminary inquiry even though he had only a small part of the disclosure.

[60] The Crown sent the disclosure package to Mr. Tate on November 17, 2020, after learning he was new counsel of record on November 12, 2020, for the preliminary

inquiry on November 25, 2020. Unfortunately, Purolator courier took one week to deliver the materials to Kamloops. Nevertheless, despite not receiving the disclosure before he arrived in Whitehorse for the preliminary inquiry on November 25, 2020, Mr. Tate did not request an adjournment, and instead stated for the record that he had recently been retained and had not received disclosure except for some limited materials.

[61] Even if Mr. Tate had received the Crown's disclosure sent on November 17, 2020, the new material not disclosed until October 2021 was not part of that package.

[62] The jurisprudence is clear that the right of an accused to make full answer and defence at trial is not prejudiced by the absence of full disclosure at the preliminary inquiry. In *Bjelland*, the Court found that cross-examining a witness at a preliminary hearing is not a component of the right to make full answer and defence. While *Stinchcombe* requires that the Crown must provide the accused with disclosure, this does not mean that the accused has a *Charter* right to a particular method of disclosure. In *Bjelland*, the accused received late disclosure from the Crown, resulting in his inability to cross-examine potential Crown witnesses at the preliminary inquiry. The Court in that case found that the material provided to the accused before trial was sufficient disclosure of the Crown's case against him. He was able to make full answer and defence at trial without the need to cross-examine witnesses at a preliminary inquiry.

[63] The court in *R v Nova Scotia Pharmaceutical Society* (1992), 116 NSR (2d) 431 (SC (TD)) at para. 18, made the following similar finding:

> … While it is undoubtedly preferable that full disclosure take place before the Preliminary Inquiry, if full disclosure is made subsequently and in sufficient time before trial, the right to make full answer and defence at trial can still be achieved,

> provided evidence is not permanently lost. … .the prosecution [at a preliminary inquiry] is only required to adduce such evidence as would permit a jury, properly instructed, to convict the accused. The investigative process continues after the Preliminary Inquiry and evidence is quite often subsequently uncovered and timely disclosure should be made thereafter. …

[64] The court found that the failure of the Crown to call certain witnesses or provide certain evidence at the preliminary inquiry did not permanently prejudice the rights of the accused to make full answer and defence.

[65] In *R v Adam et al*, 2006 BCSC 350, the court reminded the accused of the purpose of a preliminary inquiry: "to determine whether there is sufficient evidence to commit the accused to trial" quoting from *R v Tapaquon*, [1993] 4 SCR 535 at 559, in turn quoting from *R v Barbeau*, [1992] 2 SCR 845 at 853. In *O'Connor* at para. 171, the court noted the "discovery" aspect of the preliminary inquiry is an incidental aspect of the inquiry into whether the Crown's evidence is sufficient to warrant the committal of the accused to trial.

[66] In this case, the Crown had disclosed the information it had in its possession at the time before the preliminary inquiry. Through no fault of the Crown, counsel for the applicant did not have that full disclosure. There were also the missing materials that the Crown did not disclose until October 2021. Nonetheless, the applicant instructed his counsel to consent to committal before the inquiry commenced, and to proceed with the preliminary inquiry. The applicant's choice to proceed in these circumstances cannot now be used as a ground for a *Charter* breach.

[67] Even if the Crown were at fault in not providing disclosure to Mr. Tate earlier or in some other manner, including the October 2021 late disclosure, the jurisprudence is

clear that the Crown's failure to properly disclose before a preliminary inquiry is rarely sufficient to result in a prejudice to the accused rights to a fair trial, if that disclosure is made in advance of trial. This ground has no merit.

c. General late disclosure

[68] Although the applicant did not argue that the late disclosure of the material provided to him in October 2021 constituted a *Charter* breach, I will address this issue as the Crown has conceded that this was late disclosure.

[69] I have reviewed the material disclosed in October 2021, found in the exhibits to the Crown's affidavit. It is not extensive and consists primarily of police reports and notes. While the Crown submitted it is not highly relevant, there is no question that it is relevant to the applicant's case and should have been disclosed earlier. The degree of relevance is not a factor to be considered. Only if the material is clearly irrelevant, does it not need to be disclosed and that is not the case here.

[70] However, the material was disclosed on October 8, 2021 for the applicant's trial, scheduled to start on February 21, 2022. This provides him with over four months to review and prepare cross-examinations and any evidence in response if desired. His ability to make full answer and defence at trial is not prejudiced by this admittedly late disclosure.

[71] The applicant's s. 8 *Charter* application was adjourned as a result of this late disclosure, on the Crown's consent. It was based on the entry of Constable Nedohin and Constable Austring to his property before a warrant was obtained, and the effect of their findings on the subsequent warrant. The late disclosure of the police notes and reports were relevant for this application. However, this application was heard and

completed in November and December 2021, well before trial. This one adjournment was not significant enough to create a *Charter* breach.

[72] Although I have not found a *Charter* breach and it is not necessary to consider remedies, I will make a brief comment on the remedy sought by the applicant and alternative remedies.

[73] The remedy sought by the applicant is a stay of proceedings. This situation is not one where the prejudice to the applicant's right to make full answer and defence is irremediable because he received the disclosure more than four months before trial. While there were irregularities in the Crown's internal processes of disclosure in this case, they do not amount to a significant impact on the integrity of the administration of justice. I note the more serious circumstances of *R v Buyck*, 2007 YKCA 11, where disclosure of a second encounter between the accused and the police officer he was accused of assaulting, resisting arrest by and escaping from, was not made until cross-examination at trial. The trial judge's decision to stay the proceedings was overturned by the Court of Appeal of Yukon because he failed to consider the applicable legal principles: the individual and societal interests in the prosecution and resolution of criminal charges; the possibility that the Crown and police officer's conduct were not a deliberate attempt to frustrate the defence; or that "a stay of proceedings is a prospective remedy" and is appropriate where it appears "that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice" (*Canada (Minister of Citizenship and Immigration) v Tobiass*, [1997] 3 SCR 391 at paras 91 and 96.

[74] In this case, there is no evidence that the Crown conduct in late disclosure was a deliberate attempt to frustrate the defence; at worst, it was a product of poor file management, pandemic challenges, and confusion created by changes in defence counsel. The Crown attempted to mitigate the problems by preparing an entire new disclosure package in October 2021 and explaining it to the applicant. The late disclosure does not rise to the level of offending society's sense of justice. The interest of society in resolving these criminal charges through a continuation of the prosecution outweighs the applicant's right to more timely disclosure.

[75] The other possible remedies, if a *Charter* breach had been found, are a disclosure order, exclusion of evidence, or adjournment of the trial. None of these is applicable or appropriate in these circumstances. All disclosure has been made so a further disclosure order is unnecessary. There is sufficient time between now and trial for the applicant to review the material and determine how it will be used at trial. An adjournment was already granted to allow the applicant time to prepare for the *Charter* application for which some of the notes were relevant. Exclusion of evidence is unwarranted therefore, and an adjournment is also unnecessary given the four-month preparation.

[76] This case did raise some concerning issues in the Crown's disclosure process. I appreciate this was a more complex case than usual given the five different defence counsel, and the pandemic which created staff shortages for the Crown and complications from staff working from home. I also appreciate the Crown's attempt to mitigate the situation through the comprehensive disclosure package prepared in October 2021. However, the Crown could have had a better file management system

related to disclosure. This would allow them to keep track of counsel on the record so disclosure would not have been sent three times in error to counsel who were off the record. The Crown should have been able to provide signed copies of all the disclosure letters on file, rather than computer generated unsigned copies. The Crown should have had a record of what they received from the RCMP and when. This may have assisted them to recognize the significant missing disclosure from the Watson Lake RCMP and ERT members involved in this matter.

[77] While these were irregularities in the Crown's usual process of disclosure, they have not resulted in a prejudice to the accused's ability to make full answer and defence at trial for the reasons set out above. The application is dismissed.

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DUNCAN C.J.