Citation: *R.* v. *Koyczan,* 2017 YKTC 30

Date: 20170619
Docket: 16-00269
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

KIMBERLY JOYCE KOYCZAN

Appearances:
Keith Parkkari — Counsel for the Crown
Jennifer Cunningham — Counsel for the Defence

RULING ON APPLICATION
(Disclosure of Occurrence Reports)

[1] Kimberly Koyczan has been charged with having committed the offences of assault with a weapon, assault causing bodily harm and uttering a threat to cause death. The alleged victim of these offences is Teri-Lynn Schinkel.

[2] The Crown has proceeded by summary election. The Case File Synopsis that was disclosed by the Crown to counsel for Ms. Koyczan provides a brief summary of the allegations, in part, as follows:

> On July 4, 2016, Cst. TOWER was advised that Family and Children Services called to report that Teri-Lynn SCHINKEL had been stabbed down her leg and neck a week or two ago. Cst. TOWER spoke with SCHINKEL who provided Cst. TOWER with a statement that revealed she had been out for drinks with a friend when they met up with Kim KOYCZAN and a male named Ryan at a bar before going back to

> KOYCZAN's home. Upon SCHINKEL and her friend leaving the residence KOYCZAN came after SCHINKEL with a knife and threatened to kill her before stabbing her 7 times in the leg and 1 time in the neck. SCHINKEL was then taken to the hospital by an unknown lady who was walking her dog. …

[3] The Case File Synopsis noted that in a statement provided by Ms. Schinkel to Cst. Tower on July 12, 2016, the following details, in part, were provided:

- She was stabbed 8 times by Kim KOYCZAN
- Two weeks ago on June 27, 2016 at 0230 hours, by the Northland & Takhini Trailer Court bus stop area on Range Road
- She was with Roberta MORGAN, Kimberly KOYCZAN and her boyfriend Ryan
- Roberta is SCHINKEL's neighbour
- Roberta and SCHINKEL met KOYCZAN and Ryan at the Casa Loma and had some drinks then went to KOYCZAN's home
- Once at the home they got in KOYCZAN's car, but Ryan grabbed the keys
- They got out of the car and started walking towards Porter Creek, Ryan yelled don't do it
- KOYCZAN had a knife and said "I'm going to kill you bitch"
- KOYCZAN swung the knife at SCHINKEL's neck and then they went to the ground where KOYCZAN stabbed her 7 times in the leg
- SCHINKEL got the knife away from KOYCZAN and threw it away
- SCHINKEL then blacked out but remembers being full of blood and walking away where a lady walking a dog found her and brought her to the hospital

  …

[4] Crown counsel provided Ms. Koyczan's counsel with Ms. Schinkel's criminal record. This record shows that Ms. Schinkel was convicted in 2009 of resist arrest and, in 2010, of failing to comply with a probation order, failing to comply with conditions of undertaking given before an officer in charge, failing to comply with recognizance and mischief under $5000.

[5] An Offence Record Report and Supplementary Criminal Record were also disclosed that showed a number of charges against Ms. Schinkel which resulted in convictions in 2014 as follows:

- impaired driving causing bodily harm;
- refusal to provide a breath sample; and
- dangerous operation of a motor vehicle.

[6] The Offence Record Report also showed a number of charges against Ms. Schinkel in which a stay of proceedings was directed, as follows:

- 2012: Assault with a weapon (x2);
- 2010: Assault, Failure to comply with probation order (x2), failure to comply with condition of undertaking or recognizance; and
- 2009: Assault police officer, mischief under $5,000.

[7] On October 26, 2016, counsel for Ms. Koyczan requested that Crown counsel provide:

a) Any occurrence reports where the complainant acted in a violent manner;

b) Any occurrence reports where the complainant acted in a non-credible or unreliable manner.

[8] Pursuant to this disclosure request, Crown counsel provided a 23-page document listing 50 occurrence summaries involving Ms. Schinkel. All but 15 of the occurrence summaries were completely redacted by the Crown.

[9] An occurrence summary is a brief, generally around 100 words or less, synopsis of a police response to a complaint. This may or may not be associated with criminal charges or any further investigation. An occurrence report, however, tends to provide significantly more detail than an occurrence summary.

[10] On November 14, 2016, counsel for Ms. Schinkel requested further disclosure of the investigation and any statements in the possession of the RCMP and/or the Crown in regard to 13 of these occurrence summaries, in particular #'s 1, 2, 4, 8, 18, 23, 29, 30, 37, 41, 42, 44 and 48. Counsel also requested a summary of occurrences where Ms. Schinkel acted in a violent or non-credible or unreliable manner in other jurisdictions in Canada, noting Alberta and British Columbia in particular as well as a summary of the redacted occurrence summaries from the list of 50 provided.

[11] On November 29, 2016, in response and citing the case of ***R.*** v. ***Jackson***, 2015 ONCA 832, Crown counsel took the position that the information defence counsel was requesting was not the fruits of the investigation and was therefore third-party information. Crown counsel advised defence counsel that she would be required to pursue a ***Stinchcombe***/***O'Connor*** application in order to obtain a court order to receive the disclosure requested (***R.*** v. ***Stinchcombe***, [1991] 3 S.C.R. 326, ***R.*** v. ***O'Connor***, [1995] 4 S.C.R. 411).

[12] On March 31, 2017, counsel for Ms. Koyczan filed an application seeking further disclosure. In particular, this initial disclosure application requested:

> 1. A brief summary of the occurrence reports that the Crown has held back as "clearly irrelevant" concerning Teri Lynn Schinkel or review by the trial judge of that discretion, specifically of items 3-7, 9-16, 19-22, 24-28, 31, 33-36, 38-40, 43, 46-47, and 50 listed on the occurrence summary. (*I note that these are items that were redacted in the 23 page document of occurrence summaries disclosed by Crown counsel*)
>
> 2. Disclosure of the occurrence reports marked 1, 8, 17, 18, 23, 29, 30, 32, 37, 41, 42, 44, 45, 48 and 49 in the occurrence summary.
>
> 3. Disclosure of the documents that the Crown has in its possession where Ms. Schinkel was subject to criminal charges and Ms. Schinkel was alleged to have acted in a violent and/or not credible or reliable manner.
>
> 4. Disclosure of any RCMP occurrence reports in the Edmonton area that are arguably false.

[13] I note that in this application counsel requested disclosure of two occurrence reports not previously requested on November 14, 2016, after initial disclosure of the occurrence summaries, in particular the summaries of #'s 45 and 49, but did not request further disclosure of the occurrence reports for #'s 2 and 4, although these had been previously requested on November 14, 2016. The Occurrence Summary Item ("Item") #2, however, is the occurrence summary of the incident that led to the present charges against Ms. Koyczan, so I expect that counsel was already in possession of the occurrence reports and additional information.

[14] At the first date for hearing of the disclosure application, and after some discussions with counsel, Crown counsel, in the interest of expediting the matter, did not

oppose the occurrence summaries being provided to me for my review and consideration as to relevance.

[15] Upon review of the un-redacted occurrence summaries, I noted that the following Items were irrelevant and not subject to disclosure: 3, 6-7, 9-12, 14-16, 19-22, 24-28, 30-31, 33-36, 38-40, 43, 46-47, 50.

[16] I noted the following Items to be not clearly irrelevant: 1-2, 4-5, 8, 13, 17-18, 23, 29, 32, 37, 41-42, 44-45, 48-49. Of these Items, Crown counsel had already disclosed the occurrence summaries of Items 1-2, 4, 8, 18, 23, 29, 37, 41-42, 44-45 and 48-49. Based upon my ruling, Crown counsel then provided disclosure of the occurrence summaries of Items 5, 13, 17, 32, and 49.

[17] Although I had considered Item 30 to be irrelevant, Crown counsel had already previously provided defence counsel with this occurrence summary.

[18] When the matter returned to Court on May 10, 2017, counsel for Ms. Schinkel provided an Argument of the Defence-Disclosure Application Part II. In this she requested that Crown counsel now provide:

a) Occurrences from criminal prosecution files in the possession of the Crown relating to Teri-Lynn Schinkel as submitted at argument in this hearing.

b) The full occurrence summaries for the following: 1, 4, 5, 18, 23, 29, 37, 41, 42, 44, 45, 48, 49 where Ms. Schinkel was alleged to have acted in a violent and/or not credible or reliable manner. (*Item 8 is not included in this request although counsel had previously specifically referred to Item 8 as being an Item for which she was requesting a full occurrence report*)

[19] I note that defence counsel abandoned her request for occurrence reports from any Edmonton-area charges.

[20] Counsel submitted that since Crown counsel has the occurrence summaries, counsel has a duty to "bridge the gap" as per ***McNeil*** (***R.*** v. ***McNeil***, 2009 SCC 3) and obtain the complete occurrence reports "…since we know that the occurrences may possibly assist the accused at trial in effecting cross-examination [of] Ms. Schenkel about alleged past acts of violence and alleged misrepresentations to the RCMP during their investigations". Counsel further submits that within the full occurrence reports "…there may be information obtained that leads to avenues of further investigation by the defence and potential defence witnesses". She submits that these occurrence reports are currently in the possession of the RCMP and, as such, Crown counsel has an obligation to obtain and disclose them to the defence.

[21] Defence counsel provided a brief synopsis of the occurrence summaries for which she is requesting further disclosure, which was followed by Crown counsel providing his synopsis (*the Crown synopsis is in italics*):

> 1. October 24, 2016 where Ms. Schinkel was the suspect of an unprovoked assault. (….*involves a third party complainant)*
>
> 4. June 24, 2016 where Ms. Schinkel was arrested and was "resistant and combative." (…*involves a noise complaint made by a third party. It involves Ms. Schinkel being intoxicated, becoming uncooperative with police, and being arrested for being drunk in public*)
>
> 5. May 2, 2016 where Ms. Schinkel is allegedly attacking a person. (*…involves a third party complainant and another potential third party*)
>
> 8. January 7, 2016 where Ms. Schinkel reported to the police that the dispute was caused by a person the police officer determined was not present. (*I note that Crown counsel did not provide a synopsis of this*

occurrence summary. This is perhaps because defence counsel did not request the occurrence report for #8 in paragraph 17(b) of the Disclosure Application Part II in which she listed the occurrence summary numbers for which she was requesting further disclosure)

18. December 19, 2014 where the police state that Ms. Schinkel may have provided false information to Cst. Jury and Ms. Schinkel reported that a person threatened to kill his/her social worker. *(…involves a complaint by Ms. Schinkel about a third party. Determination of credibility was made by Cst. Jury. To determine whether the complaint was credible the investigator spoke with all parties involved*)

23. May 20, 2014 where Ms. Schinkel was cautioned by Cst. Bray based on sending threatening messages. (*…involves a complaint by a third party. The only link to Ms. Schinkel appears to be a conflict between Schinkel and the third party, and not based on the texts as stated by the applicant. There is no indication on the face of the summary that the matter involves violence or issues of credibility*)

29. April 5, 2013 where Ms. Schinkel was reportedly sending threatening text messages. (*…involves a third party complaint of threatening texts by Ms. Schinkel. There is no indication on the face of the summary that the matter involves actual violence or issues of credibility*)

37. April 8, 2012 where Ms. Schinkel allegedly assaulted someone. (*…involves a third party complainant and 2 other third parties)*

41. January 3, 2012 where Ms. Schinkel allegedly made harassing phone calls. (*…involves a complaint by a third party and in addition to naming Ms. Schinkel, is a complaint against another person. The complaint is of unwanted phone calls and on the face of the summary does not include issues of violence or credibility*)

42. November 27, 2011 where Ms. Schinkel was allegedly threatening to beat someone up. (*…involves a complaint by a third party. The complaint also names another third party. The complaint involves unwanted phone calls with threats. There is no indication on the face of the summary that the matter involves violence or issues of credibility*)

44. January 26, 2011 where Ms. Schinkel allegedly attacked someone with a hammer. (*…involves a complaint by a third party alleging an assault by Ms. Schinkel on another third party)*

45. January 19, 2010 where Ms. Schinkel allegedly assaulted a person. (*…involves an allegation of Ms. Schinkel committing an assault. The summary involves third parties*)

> 48. April 11, 2009 where Ms. Schenkel was allegedly fighting with a person. (*…involves a complaint of Ms. Schinkel fighting. It involves the complainant, and one or 2 other third parties*)
>
> 49. March 22, 2009 where Ms. Schinkel is allegedly fighting with a person and is arrested for breaching her probation. (*…involves a multifaceted complaint involving at least 4 third parties*)

[22] Defence counsel indicates that the requested records pertain only to Ms. Schinkel who is the main witness for the Crown and that they relate to a relevant line of inquiry for the defence. In particular the line of inquiry is in relation to Ms. Schinkel acting violently or in a threatening manner and about her allegedly providing false information to the police. They are relevant to the defence of self-defence, which will be an issue at trial, and to Ms. Schinkel's credibility and reliability in her narrative of the assault against her by Ms. Koyczan.

[23] Counsel submits that the charges against Ms. Koyczan "stand or fall on the credibility of Ms. Schinkel and the importance to the defence of any material affecting her credibility cannot be overstated". The relevance of the police occurrence reports is that:

1) They may disclose discreditable conduct by the witness which could affect the weight given to her evidence;

2) They may reveal that the witness has previously made false reports or provided misleading information to the authorities;

3) Since there is evidence of the accused and Ms. Schinkel engaged in an altercation, Ms. Schinkel's propensity for violence may be relevant to self-defence.

[24] Counsel for Ms. Koyczan asserts that the information that is requested is readily accessible to the investigating police and thus "within the Crown's effective 'control', in

the sense that the Crown can ordinarily get it from the police merely by asking for it" and, as such, "when this information is requested by the defence it will generally be 'reasonable' and 'feasible' to expect the Crown [to] make the necessary inquiries because this takes only minimal effort".

[25] From the whole of the submissions, I understand that counsel for Ms. Koyczan is now seeking the occurrence reports in regard to both a) and b) in para. 18 above, which will perhaps provide further information than that contained in the occurrence summaries . This is a less broad request for disclosure than indicated in counsel's November 14, 2016 correspondence which asked for details of the investigation and any statements taken with respect to the Items specified in the occurrence summaries.

[26] As per a) above, counsel had sought, as I understood it, occurrence reports, not just "occurrences" as stated, for the following matters which counsel asserts are documents already in the Crown's possession:

<u>Charges that resulted in criminal convictions</u>

> 2009-09-02: Resist arrest conviction
>
> 2010-09-21: Fail to comply with probation order, fail to comply with conditions of undertaking given by officer in charge, fail to comply with recognizance, mischief under $5000
>
> 2014-08-14: Impaired operation of motor vehicle causing bodily harm, Failure/Refusal to provide breath sample, Dangerous operation of a motor vehicle causing bodily harm

[27] With respect to these charges for which Ms. Schinkel was convicted, I note that:

- The resist arrest corresponds with Item #49 in the occurrence summaries that were disclosed;

- The fail to comply with probation order, fail to comply with conditions of undertaking given by officer in charge, fail to comply with recognizance, mischief under $5000 correspond with Item #45 in the occurrence summaries that were disclosed; and

- The impaired operation of motor vehicle causing bodily harm, failure/refusal to provide breath sample and dangerous operation of a motor vehicle causing bodily harm, correspond with Item #24 of the occurrence summaries that were provided.

[28] With respect to items 49 and 45, counsel for Ms. Koyczan had, in her submissions, indicated that it is not the Crown's obligation to provide disclosure of information not related to the fruits of the investigation that is otherwise publicly available. Counsel stated that any matters for which Ms. Schinkel had been convicted are matters of public record, and the records should firstly be attempted to be accessed by defence counsel. I note that such publicly accessible documents could include recordings and/or transcripts of court proceedings, including findings of fact, and published Reasons for Judgment and/or Reasons for Sentence.

[29] Based upon the above, items 24, 45, and 49, while already in the possession of the Crown, are also publicly available, at least insofar as they relate to matters for which Ms. Schinkel was convicted. There are, as will be seen below, matters within the occurrence summaries for items 45 and 49 for which stays of proceedings were entered.

[30] Item 24 has already been determined to be irrelevant and defence counsel is not pursuing further disclosure in regard to this occurrence summary or the convictions:

Charges that resulted in a stay of proceedings

- 2009-09-09: Assault on police officer, mischief under $5000;

- 2010-09-21: Assault, fail to comply with probation order (x2), fail to comply with condition or undertaking or recognizance;
- 2012-07-17: Assault with a weapon; and
- 2012-06-17: Assault with a weapon.

[31] I note that:

- The assault police officer and mischief under $5000 correspond with Item #49 in the occurrence summaries that were disclosed;
- The assault, fail to comply with probation order (x2) and fail to comply with condition or undertaking or recognizance correspond with Item #45 in the occurrence summaries that were disclosed; and
- The two assault with a weapon charges correspond with Item #37 in the occurrence summaries that were disclosed.

[32] With respect to the matters for which stays were entered, counsel submits that the Crown has an obligation to disclose the occurrence reports from their files and, if they no longer have the files, the Crown has an obligation to obtain the occurrence reports from the RCMP as part of their first-party disclosure obligation.

[33] Defence counsel submits that it is trite law that a non-accused Crown witness can be cross-examined on misconduct whether it is a conviction, a charge or a stay of proceedings. Defence is able to cross-examine on bad character. Counsel submits, as an example, that if a witness failed to comply with a probation order seven years ago, that may or may not be something that she would wish to cross-examine the witness on at trial. She would want to review the occurrence reports related to the breach charge in order to make that determination. The standard of clear relevance is difficult to determine without adequate disclosure.

[34] Counsel submits that not only should the Crown provide defence counsel with the criminal record of a witness as part of its initial disclosure package, upon request, Crown should also provide a summary of the circumstances that led to the charges and resulted in the criminal conviction.

[35] With respect to charges for which a stay of proceedings has been entered, the Crown first-party disclosure obligation is triggered only by a request from defence counsel for further disclosure.

[36] This said, Defence counsel takes the position that Crown counsel is not required to disclose documents in relation to a witness that are publicly available.

[37] Crown counsel acknowledges that "the Crown is alive to its obligation on the Crown to disclose any information that may be relevant to the charged offence". The Crown takes the position that, while the occurrence summaries are in the hands of the Crown as a result of the Crown obtaining this document from the RCMP in order to disclose it to defence counsel, the occurrence reports themselves are in the hands of the RCMP who are a third party and are therefore subject to the O'Connor disclosure regime.

[38] Crown counsel further points out that, while the criminal convictions show evidence of wrongdoing on the part of Ms. Schinkel, it is not clearly the case where there is a stay or charges have been withdrawn.

Analysis and Conclusion

[39] I have been provided with, or otherwise referred to, the following cases:

By Defence

- ***R.*** v. ***McNeil***, 2009 SCC 3
- ***R.*** v. ***Quesnelle***, 2014 SCC 46
- ***R.*** v. ***Stinchcombe***, [1991] 3 S.C.R 326
- ***R.*** v. ***Dixon***, [1998] 1 S.C.R 244
- ***R.*** v. ***O'Connor***, [1995] 4 S.C.R 411
- ***R.*** v. ***Chaplin***, [1995] 1 S.C.R 727
- ***R.*** v. ***Bottineau*** (2005), 32 C.R. (6th) 70 (Ont. S.C.)
- ***R.*** v. ***M.D.***, [2015] O.J. No. 2150 (Ont. C.J.)
- ***R.*** v. ***Murphy***, 2015 YKSC 31
- ***R.*** v. ***Murphy***, 2015 YKSC 48
- ***R.*** v. ***Murphy***, 2015 YKSC 49
- ***R.*** v. ***Drummond***, 2017 YKTC 11

By Crown

- ***R.*** v. ***Elkins***, 2017 BCSC 245
- ***R.*** v. ***Groves***, 2011 BCSC 946
- ***R.*** v. ***Jackson***, 2015 ONCA 832
- ***R.*** v. ***Vader***, 2016 ABQB 228.
- ***R.*** v. ***Vallentgoed***, 2016 ABCA 358, leave to appeal granted, [2017] S.C.C.A. No. 27
- ***R.*** v. ***Lavallee***, 2012 SKQB 543

Additional cases

- ***R.*** v. ***V.P.***, 2016 ABPC 174
- ***R.*** v. ***Blanchard***, 2016 ABQB 630
- ***R.*** v. ***Gebrekirstos***, 2013 ONCJ 265
- ***R.*** v. ***Musse***, 2012 ONSC 6097

[40] From my review of these cases, and the various approaches taken within them, I consider the law, fairly succinctly stated, to be as follows.

[41] There are three regimes governing disclosure in criminal cases:

- The ***Stinchcombe*** first-party disclosure regime, of which ***McNeil*** disclosure is a subset;
- The ***O'Connor*** third-party disclosure regime; and
- The ***Mills*** statutory regime under s. 278.3.

[42] I note that in ***Gebrekirstos***, Paciocco refers to five disclosure regimes. He separates out the ***McNeil*** regime from ***Stinchcombe*** as a separate regime and the ***Quesnelle*** regime in relation to police occurrence reports in sexual offence and related prosecutions from the ***Mills*** regime.

[43] For the purposes of this decision I will not discuss the statutory regime under s. 278.3. The case of ***Quesnelle*** has done so already and I do not consider a review of the 278.3 regime to be necessary.

[44] The ***Stinchombe*** regime requires disclosure on a first-party basis of the fruits of the investigation or of information that is relevant, such as findings of misconduct in regard to officers involved in the investigation, as per ***McNeil***.

[45] Also, if in their course of the investigation into the offence itself, the police obtain information about a witness, such as prior acts of discreditable conduct or acts of violence involving the witness, this information is disclosable as first-party disclosure under ***Stinchcombe*** as fruits of the investigation.

[46] Crown also has an obligation upon request by defence counsel, to disclose occurrence summaries of a Crown witness that are <u>not clearly irrelevant</u> to issues identified by the defence. These could, for example, show discreditable conduct of the

witness that may be relevant to the weight given to the testimony of the witness, show where the witness has made false or misleading reports, or reveal that the witness has been involved in incidents of violence that may demonstrate a propensity for violence. In order to protect third-party privacy interests, these occurrence summaries should be redacted.

[47] In my opinion, the disclosure of occurrence summaries is a first-party disclosure obligation within the regime that has developed under ***Stinchcombe***.

[48] As stated in ***Quesnelle*** in para 17, '…occurrence reports that raise legitimate questions about the credibility of a complainant or a witness, or some other issue at trial, will be treated as relevant".

[49] As stated by Paccioco J. In ***Gebrekirstos*** at para. 19, "Information is relevant where there is a reasonable possibility it will assist in making full answer and defence, including an issue of credibility".

[50] In saying this, I note that in regard to an allegation of discreditable conduct, there is a difference between discreditable conduct that has been proven, such as where a conviction has been recorded, and an allegation of discreditable conduct, where nothing has been proven, only alleged. The extent to which discreditable conduct can form the basis for a determination of relevance of an occurrence summary to an issue at trial, will vary accordingly.

[51] It is often said by Crown counsel in opposing defence counsel disclosure requests, that counsel is simply embarking on a "fishing expedition". Well there are

fishing expeditions that involve simply throwing a hook and line into an unknown body of water and fishing expeditions where sufficient exploratory work or past experience increase the likelihood of catching fish. Not all fishing expeditions are the same. In order for an accused to make full answer and defence there needs to be a starting point and often the information that would provide such a starting point is within the possession of the Crown.

[52] In my opinion, requiring, upon request by counsel for an accused, accompanied with sufficient information as to the purpose for the request, Crown counsel to obtain occurrence summaries in regard to a Crown witness' prior involvements with police, and to review these occurrence summaries for relevance, will in fact further not only the right of an accused to make full answer and defence but will also expedite the trial process.

[53] Further, in cases where the occurrence summaries contain clearly relevant information, such as where there is a clear indication that the witness made a false report to the police, the Crown, under their positive obligation to seek out and obtain relevant information, should do so. As stated in para. 49 of ***McNeil***,

> ... Crown counsel who is put on notice of the existence of relevant information cannot simply disregard the matter. Unless the notice appears unfounded, Crown counsel will not be able to fully assess the merits of the case and fulfill its duty as an officer of the court without inquiring further and obtaining the information if it is reasonably feasible to do so. …

[54] Upon obtaining such relevant information, Crown counsel has an obligation to disclose it to defence. This is fulfilling the "bridging the gap" principle set out in ***McNeil***. I consider the "bridging the gap" principle to apply to relevant evidence only, however, and not to evidence that may possibly be relevant.

[55] With respect to occurrence summaries received by the defence that contain information that is not clearly irrelevant or only possibly relevant to the right of an accused to make full answer and defence, the correct way to pursue further information is through an ***O'Connor*** application. In this manner the privacy interests of individuals are protected and the disclosure process is streamlined to highlight relevance. The result is that the trial process is not expanded beyond what is necessary to allow an accused to make full answer and defence.

[56] Under the first stage of the ***O'Connor*** regime, "…the accused has the onus to satisfy the Court that the documents are "likely relevant" to the proceeding". (***Groves*** para. 12) At this stage the court has the obligation to "…to play a meaningful role in screening applications for 'speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming request'".

[57] Once likely relevance has been established, under the second stage of the ***O'Connor*** regime, the court balances the competing interests at stake, such as:

- The extent to which the record is necessary for the accused to make full answer and defence;
- The probative value of the record; and
- The nature and extent of the reasonable expectation of privacy vested in that record. (***Groves***, at para. 18)

[58] Within the trial process, the credibility of a witness and the reliability of that witness' evidence is almost invariably an issue. This is not necessarily the case in regard to every witness, but becomes an issue with respect to a particular witness at some point within almost every trial.

[59] The issues related to the credibility of a witness should not form the basis for requiring disclosure obligations beyond what is necessary to allow for full answer and defence to be made.

[60] I agree with the following comment in ***Groves*** in para. 35:

> The cases are consistent in establishing that the credibility of a Crown witness generally is not sufficient to establish likely relevance to an issue at trial. Any other approach would result in very practical floodgates concerns. The likely relevant threshold has been imposed for good reason. The applicant is seeking to compel a third party to produce records where doing so may impose a significant burden. There is also the concern that trials not become side-tracked, delayed, or unnecessarily protracted by applications that are, in reality, grounded in speculation or wishful thinking that something will be found that may be of some assistance to the defence. As Charron J. stated in *McNeil*, at para. 29:
>
> > …The importance of preventing unnecessary applications for production from consuming scarce judicial resources cannot be overstated; however, the undue protraction of criminal proceedings remains a pressing concern, more than a decade after *O'Connor*.

[61] This quote from Charron J. in ***McNeil*** stated is even more so apt today, in light of the recent decisions of the Supreme Court of Canada in ***Jordan*** and ***Cody***.

[62] In summary, the bottom line is that the defence is not entitled, as of right under the first-party disclosure regime, to obtain material, not forming part of the fruits of the investigation, that is not clearly relevant.

[63] If the information is part of the fruits of the investigation, then it is first-party disclosure under the ***Stinchcombe*** regime, regardless of the degree and extent to which it may be relevant to the right of an accused to make full answer and defence.

[64] If the information is not gathered as part of the fruits of the investigation, and not otherwise clearly relevant, but only not clearly irrelevant or possibly relevant, then the information is only disclosable under the ***O'Connor*** regime or, in the case of certain specified offences, under the s. 278.3 statutory regime.

[65] The process for obtaining disclosure in regard to a Crown witness should be as follows:

1. Defence makes a request to the Crown for disclosure of occurrence summaries that pertain to a Crown witness. The request should identify for the Crown the issues for which the disclosure is sought in order to allow the Crown to screen out clearly irrelevant occurrence summaries.

2. Crown counsel should request the occurrence summaries from the investigating agency, and review them for relevance. Any occurrence summaries that are not clearly irrelevant should be disclosed to the defence. Crown counsel is able to redact these occurrence summaries in accordance with privacy interests.

3. Any occurrence summary that, in the Crown's view is relevant, in that "there is a reasonable possibility it will assist in making full answer and defence", should result in occurrence reports from these files being obtained from the investigating agency and disclosed to the defence.

4. For any occurrence summaries that the Crown has redacted on the basis that they are clearly irrelevant, defence counsel has the option of bringing an application for a judge to review the redacted/undisclosed occurrence summaries in order to obtain a judicial assessment of the Crown's determination of irrelevance.

5. For any occurrence summaries that the Crown has disclosed on the basis that they are not clearly irrelevant, defence counsel has the option to bring a ***Stinchcombe*** application on the basis that a particular occurrence summary is relevant and not just possibly relevant or not clearly irrelevant.

6. For occurrence summaries that defence counsel concedes, or the court finds, to be only possibly relevant, or not clearly irrelevant and thus not disclosable under the first-party disclosure regime, defense counsel has the option of making an ***O'Connor*** application.

Application to the Occurrence Summaries in this case

[66] With respect to the above-listed occurrence summaries for which defence counsel has requested occurrence reports, I find that Item 18 is subject to the first-party disclosure regime as it is relevant to the credibility of Ms. Schinkel. It discloses information that the RCMP had concerns that Ms. Schinkel may have falsely accused a third party of having committed a criminal offence. The occurrence reports to be disclosed should, however, have any information that would identify third-party individuals redacted.

[67] I am unsure what counsel for Ms. Koyczan's position is in regard to Item #8, as in her most recent application she does not list it as an Item for which she wishes further disclosure. I would have otherwise included Item #8 as, like Item # 18, the occurrence summary provides information that Ms. Schinkel provided information to the RCMP in regard to an individual being responsible for an incident that appears to have been untrue.

[68] I would also include Item #4 as part of the first-party disclosure regime as it involves direct RCMP evidence of combative behaviour on the part of Ms. Schinkel when they were dealing with her, which is some evidence of discreditable conduct. This said, however, all information in regard to the third-party who initiated the complaint should be redacted.

[69] The remainder of the items are subject to the ***O'Connor*** disclosure regime and will only be subject to disclosure pursuant to a proper ***O'Connor*** application with notice to those individuals whose privacy interests are at stake. The incidents in which Ms.

Schinkel was alleged to have assaulted or threatened individuals are allegations only that involve third-party complainants. As stated in ***V.P.*** in para. 8:

> The privacy expectation when a call is made to the police by a citizen, is that police will use the information for the investigation and potential prosecution of a particular crime. There is no expectation that information obtained will be disseminated to private citizens or other parties where the Occurrence Report is unrelated [to] the charges before the Court.

[70] Where the discreditable conduct is alleged only, and not proven, and involves the privacy interests of witnesses and complainants, the ***O'Connor*** regime provides the preferable means of seeking further disclosure.

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COZENS T.C.J.