SUPREME COURT OF YUKON

Citation: *R. v. Grenier*, 2018 YKSC 5

Date: 20180202
S.C. No. 17-01500
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

FRANCOIS GRENIER

Publication of information has been prohibited by court order pursuant to s. 648(1) of the *Criminal Code.* This order lapsed as of February 27, 2018.

Before Mr. Justice L.F. Gower

Appearances:

Keith Parkkari — Counsel for the Crown
Jennifer Cunningham — Counsel for the Accused

RULING
(Disclosure of Occurrence Summaries)

INTRODUCTION

[1] This is an application for disclosure of occurrence summaries in the possession of the RCMP, where the complainant, Tammy Meeres, was found to have acted in a violent manner and/or was found to have been not credible or unreliable, by either lying to or misleading the police. Ms. Meeres is the main witness for the Crown in a prosecution against the accused, Francois Grenier, on charges of aggravated assault, kidnapping, break and enter, and mischief, which allegedly occurred in Watson Lake, Yukon on November 24, 2016.

[2] Ms. Meeres alleges that she was assaulted by the accused at his home. She further alleges that after she returned to her home, the accused broke into her house, dragged her back to his house, and assaulted her again. She then called 911 to report the assault and went to the Watson Lake Hospital, where she was treated for serious injuries.

[3] Mr. Grenier's counsel says that self-defence will be raised at trial, and therefore any prior acts of violence by the complainant may be relevant. Defence counsel also says that a number of specific issues will likely be raised going to the credibility of Ms. Meeres.

[4] The trial is scheduled to commence in Watson Lake on February 26, 2018 before a judge and a jury.

[5] Counsel originally requested the sought-after disclosure in early December 2016, prior to the preliminary inquiry which was held on May 4, 2017. On February 13, 2017, the Crown wrote to defence counsel declining to provide the disclosure on the basis that the material did not form part of the "fruits of the investigation" and indicating that the accused was required to bring an application for the disclosure under the regime established by *R. v. O'Connor*, [1995] 4 S.C.R. 411 ("*O'Connor*").

[6] A pre-trial conference was held on December 5, 2017, at which defence counsel asserted that the disclosure she was seeking was producible under the regime established by *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 ("*Stinchcombe*"). The Crown disagreed, again stating that the accused would have to bring an *O'Connor* application to obtain the disclosure.

[7] Defence counsel made a written application for the disclosure on January 11, 2018, and the application was heard on January 29th.

ISSUE

[8] The issue on this application is whether the sought after occurrence summaries are producible as so-called "first party" disclosure under the *Stinchcombe* regime, or whether they are producible as "third party" disclosure under the *O'Connor* regime.

ANALYSIS

[9] Much of the law in this area was set out by me in *R. v. Murphy*, 2015 YKSC 31, ("*Murphy*") at paras. 6 through 20. For the sake of brevity, I will not repeat that legal summary here. It is sufficient to say that if the Crown is in possession of information which might possibly be relevant to the accused in making full answer and defence, then it has an obligation to disclose that information to the defence, absent any argument that the information is privileged or that there is otherwise a legal reason to refuse or delay disclosure. If the Crown refuses to disclose any particular information, then it bears the onus of justifying that non-disclosure. This is what is referred to as the first party disclosure under the *Stinchcombe* regime. With third party disclosure under the *O'Connor* regime, the sought after information is in the hands of a third party, which may be another Crown entity, such as a police force. Indeed, subject to the caveats set out in *R. v. McNeil,* 2009 SCC 3 ("*McNeil*", discussed below), it may even be the same police force which has investigated the accused for the offence being prosecuted. In such cases, *O'Connor* requires the accused to apply to a court, on notice to the Crown, the entity holding the information, and any third parties whose privacy interests may be affected by the disclosure of information. The accused must also serve a *subpoena*

duces tecum upon the entity holding the information, so that the information is brought before the court for review by the presiding judge. If the judge determines that the information is "likely relevant", then he or she goes on to determine how and in what manner the information will be disclosed to the accused, with due regard for any privacy interests affected.

[10] Defence counsel's principal argument on this application is that her open-ended request for the occurrence summaries, in which she admits that she does not know if any in fact exist, triggered a duty on the Crown to request the summaries from the RCMP and, if any are produced, to vet them for relevance and privacy interests. Defence counsel submits that this duty arises from the case of *McNeil*, which I referenced above.

[11] In *McNeil*, the Supreme Court was dealing with an accused who sought production of police disciplinary and criminal investigation documents in the hands of the investigating police force. Thus, the Court revisited the two-stage procedure originating from *O'Connor*. However, the Court also went on to discuss "bridging the gap" between first party disclosure and third party production. In particular, *McNeil* held that information about misconduct by a police officer, in a drug investigation context, who was also involved in a drug investigation of the accused, should form part of the first party disclosure package provided by the investigating police force to the Crown (para. 53).

[12] At paras. 53 and 54, Charron J., speaking for the Court, held that an accused has no right to automatic disclosure of every aspect of a police officer's employment history, or to police disciplinary matters with no realistic bearing on the case against him

or her. However, where the disciplinary information is relevant, in the sense that the findings of police misconduct may have a bearing on the case against the accused, it should form part of the first party disclosure package provided to the accused.

[13] Charron J. then continued:

> 59 I agree that it is "neither efficient nor justified" to leave the entire question of access to police misconduct records to be determined in the context of the *O'Connor* regime for third party production. Indeed, as discussed earlier, the disclosure of relevant material, whether it be for or against an accused, is part of the police corollary duty to participate in the disclosure process. Where the information is obviously relevant to the accused's case, it should form part of the first party disclosure package to the Crown *without prompting*... (my underlining; italics in original)

[14] The type of misconduct evidence which would be “obviously relevant” was touched on earlier by Charron J.:

> 15 As I will explain, records relating to findings of serious misconduct by police officers involved in the investigation against the accused properly fall within the scope of the "first party" disclosure package due to the Crown, where the police misconduct is either related to the investigation, or the finding of misconduct could reasonably impact on the case against the accused. The Crown, in turn, must provide disclosure to the accused in accordance with its obligations under *Stinchcombe*. Production of disciplinary records and criminal investigation files in the possession of the police that do not fall within the scope of this first party disclosure package is governed by the *O'Connor* regime for third party production. (my emphasis)

[15] It is important to remember that *McNeil* began with a recognition that “Crown entities”, other than the prosecuting Crown, are “third parties” under the *O’Connor* production regime. This would include police forces. Specifically, Charron J. stated:

> 13 … The notion that all state authorities constitute a single indivisible Crown entity for the purposes of disclosure finds no support in law and, moreover, is unworkable in practice.

> Accordingly, Crown entities other than the prosecuting Crown are third parties under the *O'Connor* production regime. As I will explain, however, this does not relieve the prosecuting Crown from its obligation to make reasonable inquiries of other Crown entities and other third parties, in appropriate cases, with respect to records and information in their possession that may be relevant to the case being prosecuted. The Crown and the defence in a criminal proceeding are not adverse in interest for the purpose of discovering relevant information that may be of benefit to an accused. (my emphasis)

[16] Thus, when Crown counsel is put on notice as to the existence of relevant information, they cannot simply disregard the matter, unless the notice appears unfounded. Rather, the notice triggers the duty to make inquiries of the appropriate police force about that relevant information. For example, in *McNeil*, the relevant information known to exist was that pertaining to the discipline and criminal conduct of the investigator who was the Crown's main witness against the accused. Another example of relevant information known to exist was the past perjury of a Crown witness in *R. v. Ahluwalia*, (2000), 138 OAC 154, at paras. 71 – 72, referred to with approval in *McNeil* at para. 50. Charron J.A. put it this way:

> 49 The Crown is not an ordinary litigant. As a minister of justice, the Crown's undivided loyalty is to the proper administration of justice. As such, 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… (my emphasis)

[17] In other words, if the Crown is put on notice that information exists which is relevant to the investigation against the accused, then they have a duty to confirm with the appropriate Crown agency, usually a police force, whether the information exists. If

it does, and if it is potentially relevant, then it is to be disclosed to the accused as if it were part of the original package of first party *Stinchcombe* disclosure, even though it does not technically form part of the fruits of the investigation.

[18] However, I do not interpret *McNeil* in the manner suggested by defence counsel in the case at bar. She seems to argue that a mere request for information, which may or may not exist, and which may or may not be relevant, is sufficient to trigger the duty of the Crown to make inquiries of the appropriate Crown agency (i.e. police force).

[19] It is important to stress here once again that the police are a Crown entity which is considered to be a third party under the *O'Connor* production regime. This was confirmed by the Supreme Court in *R. v. Quesnelle*, 2014 SCC 46 ("*Quesnelle*"):

> 11 The Crown has a broad duty to disclose relevant evidence and information to persons charged with criminal offences. *Stinchcombe*, at pp. 336-40, provides that the Crown is obliged to disclose all relevant, non-privileged information in its possession or control so as to allow the accused to make full answer and defence. For purposes of this "first party" disclosure, "the Crown" does not refer to all Crown entities, federal and provincial: "the Crown" is the prosecuting Crown. **All other Crown entities, including police, are "third parties"**. With the exception of the police duty to supply the Crown with the fruits of the investigation, records in the hands of third parties, including other Crown entities, are generally **not** subject to the *Stinchcombe* disclosure rules. (my emphasis)

[20] The Ontario Court of Appeal in *R. v. Jackson*, 2015 ONCA 832, also confirmed that the police are ordinarily considered to be third parties when the defence is seeking information which does not form part of the fruits of the investigation:

> [80] For the purposes of first party or *Stinchcombe* disclosure, the term "the Crown" refers to the prosecuting Crown only, not to all Crown entities, federal and provincial. **All other Crown entities, including the police, are third parties**: *Quesnelle*, at para. 11; *McNeil*, at para. 22. Apart

> from the police duty to supply the prosecuting Crown with the fruits of the investigation, records in the hands of third parties, including the police and other Crown entities, are generally *not* subject to the *Stinchcombe* disclosure rules: *Quesnelle*, at para. 11; *McNeil*, at para. 25. (my underlining; italics in original)

[21] Fisher J., as she then was, in *R. v. Groves*, 2011 BCSC 946 ("*Groves*"), at para. 10, also confirmed that applications for the production of criminal investigation files and other information involving third parties are usually governed by the procedures set out in *O'Connor*. An exception may arise where the Crown is put on notice of information that is in some way relevant to the investigation against the accused, such as was the case in *McNeil*:

> 10 Other than for sexual offences, applications for the production of criminal investigation files and other information involving third parties are usually governed by the procedure set out in *O'Connor*. It is only in certain circumstances, where the third party information is in some way related to the accused's case, that information about third party misconduct should form part of the police disclosure to the Crown. *McNeil* involved information about misconduct by the Crown's main police witness that was obviously relevant to and impacted the case against the accused. (my emphasis)

[22] *Groves* was referred to with approval in *R. v. Elkins*, 2017 BCSC 245, where Sewell J., after reviewing *Stinchcombe*, *McNeil*, *O'Connor*, *Quesnelle*, and other cases pertaining to the duty of disclosure, concluded that the "law is therefore well settled that information in police databases must be accessed pursuant to an *O'Connor* application" (para. 28), unless a *McNeil* situation arises. However, it is again my view that a *McNeil* exception will only arise when the Crown has notice of material which actually exists in the hands of the police and which is obviously, or even potentially, relevant to the accused's case. Karakatsanis J. said as much for the Supreme Court in *Quesnelle*, as

follows:

> 12 In *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, this Court recognized that the Crown cannot merely be a passive recipient of disclosure material. Instead, the Crown has a duty to make reasonable inquiries when put on notice of material **in the hands of police** or other Crown entities that is **potentially relevant** to the prosecution or the defence. This Court also recognized that police have a duty to disclose, without prompting, "all material pertaining to its investigation of the accused" (para. 14) as well as other information "obviously relevant to the accused's case" (para. 59). (my emphasis)

[23] The Supreme Court, in *R. v. Chaplin*, [1995] 1 S.C.R. 727 ("*Chaplin*"), earlier made a distinction between the procedure when the existence of information is established (such as was the case in *McNeil*) and that where the existence of the information is disputed. In *Chaplin*, the issue was whether an accused facing trial was entitled to know if he or she had been named as a primary or secondary target in any wiretap authorizations unrelated to the investigation of the current criminal charge (para. 1). The accused admitted that they had no proof that there had been any wiretap authorizations or that there was derivative evidence obtained from any such authorizations relevant to the charges (para. 9). Thus, the Court distinguished between the situation where the existence of information is established and that where its existence is disputed. In the former instance, the *Stinchcombe* standard applies, such that the Crown must justify nondisclosure by demonstrating either that the information sought is beyond its control, or that it is clearly irrelevant or privileged (para. 25). However, where the existence of material is disputed, or I would argue unknown, the accused must establish a basis for the belief that such material exists (para.30).

Otherwise, the request is purely speculative and amounts to nothing more than a fishing expedition (para. 32): see also *Murphy*, cited above, at para. 9.

[24] Sopinka J. described this problem in *Chaplin* in the following terms:

> 32 Apart from its practical necessity in advancing the debate to which I refer above, the requirement that the defence provide **a basis for its demand** for further production serves to preclude speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming disclosure requests. In cases involving wiretaps, such as this appeal, this is particularly important. Fishing expeditions and conjecture must be separated from legitimate requests for disclosure. …(my emphasis)

[25] In *Groves*, cited above, Fisher J. referred to 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 (para. 35). She then went on to quote Charron J. at para. 29 of *McNeil*, as follows:

> … 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*.

CONCLUSION

[26] The defence application for disclosure of the occurrence summaries, if any exist, as potentially first party disclosure under the *Stinchcombe* regime is dismissed. The defence ought to have proceeded with an application for that material as third party disclosure under the *O'Connor* regime.

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GOWER J.