# Court of Queen's Bench of Alberta

**Citation: R v Fischer, 2020 ABQB 67**

**Date:** 20200127
**Docket:** 180431256Q1
**Registry:** Edmonton

Between:

**Her Majesty the Queen**

- and -

**Tyler Fischer, Skylar McGilvery, Sterling McGilvery, Cougar Fafard**

Accused

## Restriction on Publication

**Witness Identity** – See the *Criminal Code*, section 486.31.
By Court Order, the identity of the witness C.P. must not be disclosed in the course of these proceedings.
**NOTE:** This judgment is intended to comply with the identification ban.

**Identification Ban** – See the *Criminal Code*, section 486.7.
By Court Order, information that may identify the witness may not be published, broadcast, or transmitted in any way.
**NOTE:** This judgment is intended to comply with the identification ban.

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**Reasons for Decision**
**of the**
**Honourable Mr. Justice L.R.A. Ackerl**

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## I. Overview

[1] The four Accused are charged with the first degree murder of Kevin Yellowbird. A Crown witness, C.P., was accepted into emergency protection with the Witness Protection Program (WPP). Ultimately, she refused formal program entry but received limited assistance under an alternate aid arrangement (AAA) administered by the RCMP. This arrangement falls within WWP ambit.

[2] Collectively, the Accused seek disclosure of related documents. They argue, based upon s 7 of the *Canadian Charter of Rights and Freedoms*, that disclosure is necessary for full answer and defence. In particular, they submit such records bear directly upon Ms. P.'s witness credibility and reliability.

[3] As observed in ***R v Gubbins***, 2018 SCC 44 at para 29:

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

[4] The defence contends the requested records are first party disclosure and, as such, disclosable pursuant to ***R v Stinchcombe***, [1991] SCJ No 83.

[5] In response, the Crown does not contest (at this time), that WPP records are not disclosable. However, the Crown argues the records are third party documents. Accordingly, disclosure is governed by ***R v O'Connor***, [1995] SCJ No 98.

[6] This application is limited to determining the proper approach for disclosure of these particular WPP records. Are they first or third party records?

## II. Background

[7] The purpose, objectives and operation of the WPP are described in the December 20, 2019 Affidavit of the RCMP Regional Non-Commissioned Officer then having oversight of Western Canada WPP matters:

> 3. The WPP was created in 1996 when the Witness Protection Program Act S.C. 1996, c. 15 (WPPA) came into effect. The objective of this federal statutory program is to protect witnesses whose safety is at risk and who meet the criteria for admission to the Program.
>
> 4. The WPP is administered by dedicated witness protection units in various locations across Canada. The WPP employs police officers with

specialized training as Witness Protection (WP) coordinators and handlers to provide protective services.

5. Witness protection programs have developed out of a need to more effectively deal with serious offences, organized crime, and terrorism. Investigations of serious offences and organized crime groups are difficult for law enforcement due to the secrecy involved. Witnesses to crimes by organized crime groups often face the risk of serious bodily harm or death as an act of retaliation for assisting an investigation and testifying in court. As such, witness protection programs were developed to provide protection from such retaliation.

6. The primary objective of the WPP is to safeguard witnesses in cases of serious threats which cannot be reasonably addressed by other protective measures.

7. The WPP must operate covertly to protect a witness's location, change of identity, or any information about the means and methods by which a witness in the WPP is protected, including the identity and role of persons who directly or indirectty assist in providing protection. This information is prohibited from disclosure in order to protect the safety of witnesses and the integrity of the WPP.

8. Witnesses will cooperate when a credible process exists that ensures their safety. This cooperation is critical for all law enforcement to successfully combat serious and organized crime, and ultimately restore and maintain public confidence in the administration of justice.

9. The WPP provides protection to witnesses which may include relocation, accommodation, change of identity, counselling and financial support in order to ensure the security of a person and to facilitate the person's re-establishment and self-sufficiency.

10. The WPP is separate and distinct from all RCMP operations that perform investigative functions. The purpose of the separation between the WPP and the RCMP's investigative function is to prevent conflicts of interest and maintain independence from investigations while focusing on the needs of protected persons.

11. Accordingly, Federal Witness Protection unit contacts with witnesses are not conducted to gather or discuss evidence. The role of the WP coordinators and handlers is to provide safety and security to witnesses and they play no role in the investigation.

12. The protection of witnesses under the WPPA is administered independently from investigative interests and includes the Program's interactions with protected persons, persons receiving emergency protection, and individuals receiving alternate methods of protection.

[8] Ms. P.'s involvement with the WPP is described in Affidavit paras 13-18:

> 13. On November 1, 2017, the RCMP Edmonton Major Crime unit (EMCU) requested the Federal Witness Protection Program consider admitting Ms. P. into the program.
>
> 14. On November 15, 2017, WP coordinators interviewed Ms. P. to assess her suitability to enter the WPP.
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> 15. The WPP was solely responsible for decisions regarding protective measures to be provided to Ms. P. EMCU had no involvement in assessing whether such measures should be provided. Based on my review of the file, Ms. P. did not at any time ask to receive protective measures in exchange for providing evidence concerning this or any RCMP investigation. Ms. P. also was not offered protective measures in exchange for evidence. On January 9, 2018, EMCU made arrests for the murder of Kevin Yellowbird and Ms. P.'s identity as a cooperating witness was disclosed. On the same date, Ms. P. entered Emergency Protection with the WPP.
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> 16. On January 10, 2018, Ms. P. refused to be considered for formal entry into the WPP.
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> 17. On February 23, 2018, Ms. P. was offered limited assistance under a formal alternate aid arrangement (AAA) providing for alternate methods of protection separate from the statutory protection the RCMP provides to witnesses admitted to the WPP.
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> 18. On September 1, 2018, the final financial disbursement was made to Ms. P. on the AAA, hence ending the arrangement between Ms. P. and the WPP.

[9] The Affiant was made available for cross-examination during this *voir dire*. By consent, and pursuant to *Criminal Code* s 486.31, he testified under the pseudonym Staff Sergeant John Doe. This witness stated:

> a) Information involving WPP involvement with Ms. P. is completely contained in an electronic database accessible only by WPP coordinators and handler(s).
>
> b) This database does not contain information provided by the police agency (EMCU) investigating the alleged offence.
>
> c) Documents exist concerning a WPP agreement, threat assessment, file notes about protective witness measures, investigating police WPP placement request, witness financial renumeration and (if any) basis for Ms. P.'s refusal for WPP placement.
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> d) On January 9, 2018, Ms. P. was entered into emergency protection with the WPP. That admission did not constitute formal entry into the WPP.
>
> e) Subsequently, Ms. P. was enrolled in the AAA program which is administered within the WPP umbrella. An identified threat against Ms. P.'s safety existed at the time she entered the AAA program.

f) The AAA program operates when witnesses are unwilling to enter the voluntary WPP program and an identified safety concern exists. A signed arrangement formally confirmed her program entry.

g) AAA programs typically last less than six months and are rarely renewed. Her termination in the program (as with all participants) was not connected to Court appearance dates.

h) Ms. P. did not receive financial compensation as an AAA participant. She did receive funding for certain expenses such as housing. Such funding was for a limited time period.

i) The Affiant, as a general observation, agreed access to AAA funding may improve the witness' quality of life.

## III. The Legal Test for Determining the Disclosure Regime

[10] In ***R v Gubbins***, the Court articulated the analysis for determining whether the ***Stinchcombe*** or ***O'Connor*** disclosure regimes apply. At para 33, the Court stated:

> Based on the previous discussion of disclosure regimes, to determine which regime is applicable, one should consider: (1) Is the information that is sought in the possession or control of the prosecuting Crown? and (2) Is the nature of the information sought such that the police or another Crown entity in possession or control of the information ought to have supplied it to the prosecuting Crown? This will be the case if the information can be qualified as being part of the fruits of the investigation or obviously relevant. An affirmative answer to either of these questions will call for the application of the first party disclosure regime.1 Otherwise, the third party disclosure regime applies. For the reasons that follow, the maintenance records are subject to third party disclosure.

[11] In ***R v Jennings***, 2018 ABQB 105, Shelley J addressed the appropriate disclosure regime for disclosing WWP records. That decision accounted for the ***Gubbins*** analysis. It also helpfully summarized and applied the impact of the Supreme Court of Canada's decisions in ***R v Stinchcombe*** and ***R v Quesnelle***, 2014 SCC 46.

[12] Shelley J noted at paras 17, 20 and 18:

> [17] In ***McNeil***, the Supreme Court went on to hold that it is not only the investigative file that the police must give the Crown, but also "all material pertaining to the investigation of the accused." (at para 52). The question at issue there was whether this obligation extended to police disciplinary files. The Court concluded that, while there is no need to provide the complete employment records of all investigating officers, information about serious misconduct by police officers "related to the investigation, or [where] the finding of misconduct could reasonably impact on the case against the accused" must be provided to the Crown for disclosure purposes (at para 15). Then it is up to the Crown to act as a gatekeeper to determine whether the material should be disclosed, noting "The officer may have played a peripheral role in the investigation, or the misconduct in question may have no realistic bearing on the credibility or reliability of the officer's evidence." (at para 59).

...

[20] ***McNeil*** described two categories of first party information that the police authorities were required to provide to the Crown: "fruits of the investigation" and police information about police officers related to the investigation that could reasonably impact on the case against the accused and which was relevant to the credibility or reliability of the evidence. It went on to describe the Crown's duty to "bridge" the gap between first party and third party disclosure when the Crown becomes aware of relevant information, saying (at paras 49, citing ***R v Arsenault*** (1994), 153 NBR (2d) 81 (CA), and 50):

> Crown counsel have a duty to make reasonable inquiries of other Crown agencies or departments that could reasonably be considered to be in possession of evidence. Counsel cannot be excused for any failure to make reasonable inquiries when to the knowledge of the prosecutor or the police there has been another Crown agency involved in the investigation...
>
> The same duty to inquire applies when the Crown is informed of potentially relevant evidence pertaining to the credibility or reliability of the witnesses in a case.

...

[18] In ***R v Quesnelle***, 2014 SCC 46 (SCC), the Supreme Court summarized the jurisprudence to date (at para 11):

> ***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. (emphasis added)

## IV. Analysis

### Is this Information in the Possession or Control of the Prosecuting Crown?

[13] It is undisputed that the requested records are not in the possession or control of the prosecuting Crown. I agree. The records are entirely contained within the RCMP WPP database with access restricted to designated WPP staff.

**Is the Nature of this Information Such That it Should Have Been Supplied to the Prosecuting Crown**

[14] This issue requires two separate inquiries. Namely, were the records "fruits of the investigation" or, are they "obviously relevant". An affirmative response to either question classifies the records as first party documents disclosable pursuant to ***R v Stinchcombe***.

**Is the Information Part of the "Fruits of the Investigation"?**

[15] In ***R v Gubbins*** (para 22) the Court defined "fruits of the investigation" as referencing:

> ... [police] investigative files, as opposed to operational records or background information. This information is generated or acquired during or as a result of the specific investigation into the charges against the accused. Such information is necessarily captured by first party/Stinchcombe disclosure, as it likely includes relevant, non-privileged information related to the matters the Crown intends to adduce in evidence against an accused, as well as any information in respect of which there is a reasonable possibility that it may assist an accused in the exercise of the right to make full answer and defence. The information may relate to the unfolding of the narrative of material events, to the credibility of witnesses or the reliability of evidence that may form part of the case to meet.
>
> In its normal, natural everyday sense, the phrase "fruits of the investigation" posits a relationship between the subject matter sought and the investigation that leads to the charges against an accused.

[16] The Accused argue WPP records were acquired as "a result of this" police investigation. I disagree. WPP policy expressly recognizes that witness contact is not purposed "to gather or discuss evidence". The records lack an evidentiary link to police investigation of the underlying charges. I find, the requested records are operational documents compiled solely for WPP purposes which are expressly "separate and distinct from all RCMP operations that perform investigative functions".

[17] Accordingly, while pre-dating the Accused's arrest, these records do not constitute fruits of the investigation. They were not gathered during the police investigation and had no impact upon the resulting charges. Moreover, they are entirely removed (for legislated policy reasons) from the police investigative role.

**Is the Information Obviously Relevant?**

[18] As stated in ***R v Gubbins*** (para 23):

> ... The phrase "obviously relevant" should not be taken as indicating a new standard or degree of relevance ... Rather, this phrase simply describes information that is not within the investigative file, but that would nonetheless be required to be disclosed under Stinchcombe because it relates to the accused's ability to meet the Crown's case, raise a defence, or otherwise consider the conduct of the defence. ...

[19] At para 18 the Court summarized disclosure duties and purposes previously articulated in ***Stinchcombe*** and ***R v Dixon***, [1998] 1 SCR 244:

> In *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, this Court held that the Crown has a duty to disclose all relevant, non-privileged information in its possession or control, whether inculpatory or exculpatory. This is referred to as first party disclosure. The Crown's duty to disclose corresponds to the accused's constitutional right to the disclosure of all material which meets the Stinchcombe standard: *R. v. Dixon*, [1998] 1 S.C.R. 244, at para. 22. The purpose of disclosure is to protect the accused's Charter right to full answer and defence, which will be impaired where there is a "reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence": *ibid*.

[20] As noted in ***R v Gubbins***, police have a duty to disclose "all material pertaining to its investigation of the accused: ***McNeil,*** at paras 23 and 52. That obligation extends beyond the fruits of the investigation where such information is "obviously relevant to the accused's case": ***McNeil***, at para 59.

[21] In ***R v McNeil***, 2009 SCC 3 at paras 36-39 the Court recognized that true relevance must be contextually assessed. The nature of the requested record is not necessarily determinative. Although advanced in the context of determining whether production should occur in an O'Connor application, this approach also informs a determination of relevance in this application. Accordingly, I disagree with RCMP counsel that generally, WPP records are not, by their nature, obviously relevant. Rather, this determination demands a contextual analysis involving the case against these Accused.

[22] In this case, Ms. P. allegedly provided the vehicle used to transport the victim to the crime scene. She allegedly was also present in the immediate vicinity with the accused persons and the victim when the alleged murder occurred. Subsequently, she actively assisted police in locating and confirming the Accused's residences.

[23] Under the circumstances, Ms. P. is a material, and indeed, significant Crown witness. She is integrally connected to both the police investigation and the prosecution case. It is properly anticipated the credibility and reliability of her evidence will meaningfully impact the trial outcome and lifestyle quality.

[24] Evidence adduced on this application revealed Ms. P. received funding under the AAA regime. Staff Sergeant Doe also recognized that program funding may improve the lifestyle quality of a program participant. Such funding was ongoing during her preliminary inquiry testimony and concluded shortly thereafter. These records may have a significant impact upon Ms. P.'s credibility and reliability as a trial witness. Most obviously, they may inform her motivation to testify in this case.

[25] Although unnecessary to my conclusion, I note evidence was adduced on ***R v Jennings*** (para 9) that a psychological assessment of the WPP applicant was conducted as a screening program measure and to determine suitability as a police agent. If such an assessment occurred in this case, I agree with Shelley J's statement that results regarding witness "behaviours, tendencies and motivation to testify are directly relevant to ... credibility and reliability."

[26] I find the requested records are akin to the disciplinary records requested in ***R v McNeil***. I also adopt the conclusion of Shelley J in ***R v Jennings***, 2018 ABQB 105 at para 36:

> ... the Crown's bridging obligation to make reasonable inquiries of other Crown agencies or departments under ***McNeil*** was triggered; as Crown counsel reasonably should have considered that WPP was in possession of evidence pertaining to the credibility or reliability of the witness[es].

## V. Decision

[27] The requested information is properly characterized as first party records. It is disclosable pursuant to ***R v Stinchcombe***.

[28] Accordingly, the WPP must, in a timely fashion, provide its records to the Crown to assess relevance and any required redaction before production to the Accused.

Heard on the 15th day of January, 2020.
**Dated** at the City of Edmonton, Alberta this 27th day of January, 2020.

**L.R.A. Ackerl**
**J.C.Q.B.A.**

**Appearances:**

Lawrence Van Dyke
Special Prosecutions
for the Crown

Cam Regehr
Department of Justice Canada
for the Department of Justice

Walter Raponi
Raponi Rideout Tarrabain
for Tyler Fischer

Graham Johnson
Dawson, Duckett, Garcia & Johnson
for Skylar McGilvery

Anwar Jarrah
Attia Reeves
for Sterling McGilvery

Nicole Sissons
for Cougar Fafard