Case Name:
R. v. Jalili

Between
Her Majesty the Queen, and
Shaun Jalili

[2018] O.J. No. 5702

2018 ONSC 6408

Court File Nos.: 2/18, 3/18

Ontario Superior Court of Justice

S.A.Q. Akhtar J.

Heard: September 14, 2018.
Judgment: October 30, 2018.

(188 paras.)

Counsel:

D. Carbonneau, for the Crown, appellant, respondent on cross-appeal.

P. Brauti and D. Negandhi, for the respondent, appellant on cross-appeal.

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1 S.A.Q. AKHTAR J.:-- On appeal from the stay entered on 8 December 2017 by Justice Vincenzo Rondinelli of the Ontario Court of Justice and the cross-appeal from the dismissal of an application for costs by Justice Vincenzo Rondinelli on 8 December 2017.

I. FACTUAL BACKGROUND AND OVERVIEW

Introduction

2 The respondent, (the appellant on the cross-appeal) was charged with six counts of criminal

harassment, two counts of distributing intimate images, and two counts of obstructing justice. The Crown amended the information and chose to proceed summarily on the criminal harassment and distribution of intimate image charges along with additional harassing telecommunications charges.

3 The respondent's trial commenced on 4 December 2017. The defence brought a motion on the first day of trial alleging the Crown had failed to fulfil its disclosure obligations pursuant to *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. Four days later the trial judge stayed the charges, finding that the Crown had failed to make full disclosure and that the respondent had suffered prejudice. The trial judge decided that a stay of proceedings was the only available remedy. Following the stay, the trial judge dismissed the respondent's application for costs against the Crown.

4 The Crown appeals on the basis that the trial judge committed a series of errors in imposing the stay. Accordingly, the Crown asks that I lift the stay and remit the matter to the Ontario Court of Justice for a new trial. The respondent, cross-appeals the trial judge's dismissal of his costs motion and asks me to dismiss the Crown's appeal.

5 For the following reasons, I find that the judge committed several errors in staying the charges. These errors resulted in a decision that was clearly wrong and amounted to an injustice. Accordingly, the Crown appeal must succeed.

The Allegations

6 The Crown alleged that the respondent and the complainant had been friends for several years. In September 2016, the respondent began phoning the complainant and attending her home uninvited. When the complainant told the respondent that she wanted no further contact, he did not take it well. He contacted the complainant's boyfriend and twice went to the complainant's home, knocking loudly on her door.

7 On 5 September 2016, the respondent called the complainant approximately 20 times whilst concealing his phone number. Fearful, the complainant reported the events to the police. When the respondent refused to attend the police station, a warrant in the first instance was taken out for his arrest.

8 That same day, the respondent sent three images to the complainant's boyfriend showing the complainant in a state of undress ("the intimate pictures"). The respondent then sent the boyfriend a text suggesting that the boyfriend "tell [the complainant] to retract the charges or its gonna get ugly and I didn't want that".

9 On 6 September 2016, the respondent called the complainant using her friend's number to deceive her into answering his call. Shortly thereafter, the respondent sent the intimate pictures to the complainant's roommate accompanied by the same threatening text message which he had sent to the complainant's boyfriend. Finally, the respondent called the complainant's mother who was in hospital after suffering a stroke.

10 On 7 September 2016, the respondent turned himself in to police, was arrested, and charged.

The Disclosure Issue

The Request for a "Statement"

11 The Crown provided initial disclosure to the defence on 5 October 2016. The materials listed Detective Jessica McInnis as the case manager. Det. McInnis took formal statements from the complainant, her boyfriend, and the complainant's sister.

12 At a judicial pre-trial held on 28 February 2017, before Libman J. of the Ontario Court of Justice, defence counsel, Mr. Brauti, advised the Crown that he had received information that the complainant did not want to proceed further with the case and was not afraid of the respondent. Det. McInnis responded that it was her understanding that the complainant wanted the matter to proceed. Det. McInnis' exact words, as well as the action she was expected to take as a result, are the subject of dispute.

13 Shortly afterwards, the defence asked the Crown to re-canvass the matter with the complainant to attempt to resolve the case. The Crown reiterated its understanding that the complainant wanted the matter to proceed.

14 The defence followed up by requesting disclosure of notes detailing Det. McInnis' contact with the complainant when she indicated her interest in continuing the prosecution. This subject ("the willingness information") became the focus of the stay application before the trial judge.

15 Further complications developed. In March 2017, Det. McInnis contacted the Crown. She advised that she had received information that someone might be attempting to pressure the complainant into withdrawing the allegations. The police conducted a further investigation to determine whether someone had attempted to obstruct justice. In addition, the complainant's confusion about whether she could speak to defence counsel about the allegations became an issue. These matters, however, were resolved and played no part in the ultimate stay application.

16 Det. McInnis was unable to contact the complainant during much of the 2017 spring and summer months. Det. McInnis was able to contact the complainant through e-mails dated 29-30 June 2017 where the complainant indicated that she was under great stress and was concerned that her boyfriend would "work against" her. Defence received the substance of this information over the summer. The emails were provided on 18 November 2017.

The Emergence of Possible Conflict

17 On 13 June 2017, Mr. Brauti revealed that his firm had a solicitor-client relationship with Det. McInnis. He informed the assigned Crown, Mr. Schreiter, that he needed another judicial pre-trial to address whether Det. McInnis "may now be a witness in these proceedings". He added that if "[He]

knew Det. McInnis was going to become a live issue in the case, [he] may have refused to take the matter on".

The Disclosure of Emails and the Willsay

18 After receiving several requests in the preceding months for the willingness information, the Crown provided a will-say (Willsay # 1) and additional notes on 3 August 2017. Willsay # 1 stated that Det. McInnis had frequent contact with the complainant throughout the investigation and that the complainant reported that someone attempted to bribe her to have the charges withdrawn. Det. McInnis also indicated that despite several requests, the complainant failed to attend the station to provide more information.

19 On 23 August 2017, the defence repeated its request for Det. McInnis' complainant conversation notes, adding that "if she does not have notes, please indicate why the notes do not exist and provide a will-say from McInnis regarding her conversations with the complainant".

20 Between 14-20 November 2017, the Crown provided a series of email exchanges between Det. McInnis and the complainant. The emails, dated 30 June 2017 to 9 November 2017, included police attempts to contact the complainant and her apologies for failing to respond. The emails also included messages expressing the complainant's fear of the respondent, her reluctance to attend court, regret at having notified the police of the allegations, and despair of the court process.

The Events at Trial

Day 1: 4 December 2017

21 On 4 December 2017, Mr. Brauti's co-counsel, Mr. Thorning, asked the trial judge to exclude Det. McInnis from the courtroom. Despite the Crown's objection, the judge acceded to the request.

22 Mr. Thorning then complained that the conversations related to the "frequent contact" described in Willsay # 1 had not been reduced to writing and disclosed to the defence. Mr. Thorning submitted that these items constituted first party disclosure under *Stinchcombe* and declared that the notes were essential to determining whether his firm might be in a position of conflict. He did not, however, explain how the notes would determine the conflict issue.

23 The Crown argued that the defence request was merely a fishing expedition and that the prior contacts were not disclosable under *Stinchcombe*.

24 The judge disagreed, identifying the prior contacts between Det. McInnis and the complainant as the "fruits of the investigation" and a matter of first party disclosure.

25 Accordingly, the judge ordered the Crown to make inquiries on two issues: first, did Det. McInnis make any notes of the prior contacts with the complainant and second, if she recalled anything further about Willsay # 1's contents. Mr. Schreiter complied, and provided a second

will-say from Det. McInnis (Willsay # 2). In addition, Det. McInnis gave the Crown a further 25 emails containing conversations with the complainant ("the December disclosure"). Willsay # 2 also disclosed that Det. McInnis had encountered the respondent while she was performing paid duties at an event.

26 Mr. Thorning objected to this new information. He referred to a paragraph in Willsay # 2 stating that Det. McInnis had encountered the respondent when working overtime. He added that Willsay # 2 was also silent on another important *Stinchcombe* issue: the willingness information. He asked the judge to order Det. McInnis to produce a third will-say detailing the willingness information and also impart the particulars of any contact Det. McInnis had with the accused. The Crown opposed this request.

27 After hearing submissions, the judge adjourned matters for the day to consider "the disclosure aspect of things and whether any order is necessary".

Day 2: 5 December 2017

28 On 5 December 2017, the judge ruled that Det. McInnis' failure to record all interactions with the complainant had breached the respondent's rights under the *Charter of Rights and Freedoms*. The judge found this failure impacted the respondent's ability to make full answer and defence and raised an additional concern that there may be a conflict of interest issue which could impact the respondent's right to counsel of choice ("Ruling # 1").

29 As a result, the judge acceded to Mr. Thorning's request for the Crown to obtain a third will-say from Det. McInnis and produce it to the defence. That will-say was to outline: (a) the substance of Det. McInnis' conversations with the complainant, in particular any conversations dealing with the willingness information, and (b) her recollection of her interaction with the respondent in September 2016.

30 The Crown complied with the judge's order, creating and providing a third will-say (Willsay # 3) to the defence. Det. McInnis repeated her assertion that she had frequent contact with the complainant throughout the investigation, including phone conversations. Those conversations concerned the court process, the respondent's arrest, and the respondent's bail conditions. Det. McInnis added that the complainant told her that she did not wish to attend court, but would do so if needed, and wanted the respondent to be held responsible for his actions. Det. McInnis also recounted the details of her encounter with the respondent during a paid duty event where she queried his possession of a mobile phone contrary to his release conditions. Once he explained the reason for the phone, his employment, Det. McInnis concluded that he was not in breach of his bail conditions.

31 Once more, the defence objected. Mr. Brauti protested that Det. McInnis had not addressed how she learned that the complainant was "very eager" to proceed. After some discussion about whether the Crown properly relayed the judge's order to Det. McInnis, the judge ordered the Crown

to restate the order to determine whether she could add anything to Willsay # 3. The Crown did so and returned to the courtroom to inform the judge that Det. McInnis had, in response to his query, pointed to three emails but added that she had no further or better recollection than what was already provided.

32 The defence asked the court to adjourn early so that they could make "litigation decisions over the evening". Mr. Brauti added that they "may now need Det. McInnis in the box which means that [they] need to get off the record." The judge agreed that this position "sounds reasonable in terms of what's happened today."

Day 3: 6 December 2017

33 The next day the defence filed a motion asking the court to stay the proceedings. Further, they applied for a costs order against the Crown. The stay application focused on the lack of disclosure of the willingness information. Mr. Brauti submitted that this information was "critical" in deciding the potential conflict issue. Mr. Brauti submitted that he now knew that the disclosure he had long requested was that Det. McInnis did "not recall". He submitted that the respondent was prejudiced by being forced to incur the costs of the disclosure motion brought on the first day of trial and, in addition, having new counsel appear at trial. Mr. Brauti also argued that if the defence had to remove themselves from the record, new trial dates would have to be set which the judge could assume would constitute an anticipatory breach of s. 11(b) of the *Charter*.

34 Mr. Schreiter, in response, argued that any late disclosure did not prejudice the respondent or impair his right to full answer and defence. He submitted that if the defence believed there was a conflict, that position arose at the February pre-trial when the defence queried Det. McInnis' willingness information. Therefore, the defence should have acted much earlier to resolve the issue. The same logic applied to the disclosure motion: if the defence felt that the Crown had failed to comply with its *Stinchcombe* obligations, it was incumbent upon them to make that argument well in advance of the trial.

35 After hearing argument, the judge adjourned the matter for two days to consider the application.

Day 4: 8 December 2017

36 On 8 December 2017, the trial judge provided an oral ruling staying the matter ("the stay ruling"). He found that the Crown's failure to provide disclosure caused prejudice to the respondent because new counsel were required and any new date for trial would contravene the respondent's s. 11(b) *Charter* rights. The judge found that "the tranche of disclosure provided to the defence showed that disclosure was not complete and could have easily have been disclosed many months ago".

37 Moreover, in the judge's view the disclosure sought - the interactions between Det. McInnis

and the complainant and Det. McInnis and the respondent - "squarely fell under the Crown's first party disclosure" and were the "fruits of the investigation".

38 The judge found the defence to be diligent in pursuing disclosure. The judge identified the disclosure as required to assist in assessing any potential conflict of interest and future *Charter* applications although he did not identify what those were. Although the judge accepted the fact that there was an inference for possible conflict from earlier disclosure, the conflict "crystallised" when the further disclosure was made at trial. In the judge's view, full disclosure had to be made to consider the issue in advance of the trial.

39 The trial judge concluded his reasons in the following way:

> The summary conviction case before me, unfortunately, has lost its way, primarily due to the complacency towards disclosure obligations. And again, I hasten to add that it is more difficult to envision disclosure obligations more rudimentary than in this case, yet this disclosure issue occupied much judicial pre-trial consideration. The disclosure issue exhausted the entire five days that had been set for trial, and further trial dates in this matter would place strain on our already overburdened criminal justice system.

40 However, the judge summarily dismissed the costs motion finding that the Crown had not acted in a manner that constituted a marked and unacceptable departure from the reasonable standards expected from the prosecution.

II. ISSUES

1. Did the Crown breach its disclosure obligations?

2. Did the trial judge correctly apply the stay of proceedings test to the disclosure issues?

3. Should the conflict of interest issue raised by the defence factor into a decision to stay proceedings?

4. Did any other grounds justify a stay of proceedings?

41 After addressing these issues I will comment on the grounds of appeal advanced by the Crown which are not addressed in the issues, and I will remark on the conduct of the trial.

III. LEGAL PRINCIPLES

The Test for a Stay of Proceedings

42 In *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, the Supreme Court of Canada acknowledged that a stay of proceedings is the most drastic remedy that a court can order. The court, at para. 31, identified two categories of cases where a stay of proceedings would be justified:

> (1) where state conduct compromises the fairness of a trial ("the main category") and
>
> (2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process ("the residual category")

43 At para. 32, the court outlined the test to be used to determine whether to impose a stay. The test consists of three requirements:

> (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome;
>
> (2) There must be no alternative remedy capable of redressing the prejudice; and
>
> (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against the interest that society has in having a final decision on the merits.

44 The lack of alternative remedy requirement under the second part of the test followed *R. v. O'Connor*, [1995] 4 S.C.R. 411, at p. 466, where the court stated that a stay of proceedings in non-disclosure cases "is a last resort, to be taken when all other acceptable avenues of protecting the accused's right to full answer and defence are exhausted." The court concluded, at p. 468:

> Where life, liberty or security of the person is engaged in a judicial proceeding, and it is proved on a balance of probabilities that the Crown's failure to make proper disclosure to the defence has impaired the accused's ability to make full answer and defence, a violation of s. 7 will have been made out. In such circumstances, the court must fashion a just and appropriate remedy, pursuant to s. 24(1). Although the remedy for such a violation will typically be a disclosure order and adjournment, there may be some extreme cases where the prejudice to the accused's ability to make full answer and defence or to the integrity of the justice system is irremediable. In those "clearest of cases", a stay of proceedings

will be appropriate.

The Standard of Appellate Review

45 The standard of appellate review of a decision to grant a stay must respect the fact that the decision to grant a stay is discretionary and should only be interfered with if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice: *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at paras. 117-18; *R. v. Carosella*, [1997] 1 S.C.R. 80, at para. 48.

IV. THE BASIS FOR THE STAY

46 In this case, the trial judge stayed the prosecution on the main *Babos* ground: fairness of the trial. He provided seven reasons as the basis for staying the charges:

1. Timely disclosure had not been made;

2. The type of disclosure sought fell squarely within the Crown's *Stinchcombe* obligations as part of the fruits of the investigation;

3. Defence counsel was diligent in pursuing disclosure;

4. The sought after disclosure was required to assist in assessing any potential conflict and the new disclosure might form the basis of potential *Charter* applications;

5. A fair trial also included safeguarding the respondent's ability to retain financial resources. In this case, the respondent was forced to retain new counsel to advance or evaluate further *Charter* applications as well as conduct the trial;

6. It had become clear that the respondent's counsel of choice could no longer proceed as Det. McInnis' conduct might be involved in a *Charter* application or at trial; and

7. Whilst it was not possible to make findings with respect to an anticipatory breach of s. 11(b) of the *Charter*, the "*Jordan* clock" was a relevant factor to consider.

V. DID THE CROWN BREACH ITS DISCLOSURE OBLIGATIONS?

47 The disclosure issue was the basis for both Ruling # 1 and the Stay Ruling. The trial judge found that the Crown's failure to provide notes of all conversations between Det. McInnis and the complainant breached the respondent's disclosure rights.

48 For the following reasons, I find that the respondent's disclosure rights were not breached.

Disclosing Det. McInnis' Notes of her Interactions with the Complainant

49 The disclosure requests in this case became somewhat of a moving target. At the outset of the trial, Mr. Thorning brought the disclosure motion to obtain the "frequent contact" with the complainant referred to by Det. McInnis in Willsay # 1. According to Mr. Thorning, Det. McInnis was under an obligation to reduce any contact with the complainant to writing and, if she had not, efforts had to be made to do so later. The trial judge appeared to agree with this submission.

50 It is trite law that the Crown can only disclose what it possesses: *R. v. Girimonte* (1997), 37 O.R. (3d) 617 (C.A.), at p. 630; *R. v. Stinchcombe* [1995] 1 S.C.R. 754 (*Stinchcombe No. 2*).

51 In this case, there were no police notes of the contact between Det. McInnis and the complainant. However, Mr. Thorning took the position that there should have been and, in their absence, the Crown was required to produce a summary. He told the court "I think *Stinchcombe* does stand for the proposition that if, if there's been contact with the Crown's main witness here by the police that, that the police officers, and I think that the *Police Services Act* says this, but police officers are required to take notes, and if they don't take notes then there should be a summary of those contacts provided to the defence". The judge responded: "I'm with you [on] all that, Mr. Thorning."

52 The difficulty with Mr. Thorning's position is that it is wrong: there is nothing in *Stinchcombe* that imposes such an obligation.

53 The test for disclosure can be found at p. 339 of *Stinchcombe* which states that the Crown need not produce "what is clearly irrelevant". Communications between the officer in charge dealing with attendance at court, scheduling interviews, and explaining court procedure are therefore not disclosable because they have nothing to do with investigating the allegations.

54 In *R. v. Flis* (2006), 205 C.C.C. (3d) 384 (Ont. C.A.), the Court of Appeal considered a defence request to disclose notes made by police during two pre-charge meetings that the victim and his family attended with the police and the Crown. The Crown argued that the notes were not disclosable as they did not involve discussions of the evidence and were not investigative in nature. The Court of Appeal agreed, stating that the Crown had no obligation to disclose irrelevant notes.

55 Mr. Thorning's position that it was incumbent on the police to record every interaction with the complainant as part of disclosure, is also incorrect.

56 In *R. v. Machado*, 2010 ONSC 277, 92 M.V.R. (5th) 58, at para. 121, Durno J. commented that "[w]hile officers' notes are provided as part of disclosure, there is no law that I am aware of that an officer must record everything he or she did or saw in their notebook to comply with the Crown's disclosure obligation." See also: *R. v. Whitton*, 2016 BCSC 1799, at para. 40; *R. v. Antoniak*, [2007] O.J. No. 4816, at paras. 24-25.

57 Regrettably, the judge appeared to adopt Mr. Thorning's submissions on this point without turning his mind to these principles.

58 Finally, the trial judge described the interactions between Det. McInnis and the complainant as "the fruits of the investigation".

59 It cannot be disputed that any items falling within this description must be disclosed as first party Stinchcombe disclosure: *R. v. McNeil*, at paras. 22-24. In *R. v. Jackson*, 2015 ONCA 832, at paras. 92-93, the court described "fruits of the investigation" in the following way:

> The descriptive "fruits of the investigation" accurately captures the subject-matter of first party/ *Stinchcombe* disclosure. The term embraces 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. It refers to information acquired by means and in consequence of that investigation.

60 In addition to the fruits of the investigation, the Crown is required to provide information that is "obviously relevant to the accused's case": *McNeil*, at para. 59; *Jackson*, at para. 124-5.

61 It is hard to understand how the judge could conclude that the prior interactions between Det. McInnis and the complainant were the "fruits of the investigation" when he did not know what they were let alone whether they were relevant.

62 However, as previously stated, the judge, from the outset, took the view that the defence was automatically entitled to Det. McInnis' interactions with the complainant without ever addressing the question of relevance. Once the judge proceeded down this path - an unnecessary, time consuming sidetrack - the trial never recovered.

The Fishing Expedition -- The Defence's Failure to Meet their Burden

63 The Crown did not breach its disclosure obligations because the defence failed to meet its burden to show that the notes met the *Flis* requirements. If Mr. Thorning was seeking further information regarding the contact between Det. McInnis and the complainant, it was incumbent on him "to meet the burden of demonstrating a reasonable possibility that the material could be used in meeting the Crown's case or advancing a defence or otherwise making a decision which could affect the conduct of the defence": *Flis*, at paras. 112-13.

64 However, at trial, Mr. Thorning conceded that he did not know what information might be contained in the notes. He claimed that there was "some good information, valuable information that may arise from these contacts". Later on, he added that if the officer "had contacts with the complainant and doesn't remember, the reason why she doesn't remember is a relevant factor to some future application that may or may not be brought". At no point, did Mr. Thorning ever specifically define the "future application". Nor did the judge ever ask.

65 In *R. v. Chaplin*, [1995] 1 S.C.R. 727, the court indicated that once the Crown asserted that it had made full disclosure, it could not be required to justify non-disclosure of material of which it was unaware or claimed did not exist. The court added, at para. 30, that:

> The existence of the disputed material must be sufficiently identified not only to reveal its nature but also to enable the presiding judge to determine that it may meet the test with respect to material which the Crown is obliged to produce as set out above in the passages which I have quoted from *Stinchcombe* and *Egger*, supra.

66 The court made clear that fishing expeditions and conjecture must be separated from legitimate disclosure requests.

67 Here, the Crown indicated that it was unaware of any notes of conversations between Det. McInnis and the complainant, and further, disputed the conversations' relevance. At that point, in accordance with *Chaplin*, the defence had the burden to demonstrate the existence of potentially relevant further material. In this case, Mr. Thorning could not identify the relevance of the conversations between the complainant and Det. McInnis because he did not know what it was. In his view it "may or may not" have been relevant. This is the very essence of fishing expeditions proscribed in *Chaplin* and *Girimonte*, at p. 623.

VI. DID THE TRIAL JUDGE CORRECTLY APPLY THE STAY OF PROCEEDINGS TEST TO THE DISCLOSURE ISSUES?

68 The trial judge erred in failing to assess the relevance and materiality of Det. McInnis' interactions with the complainant; and the prejudice to the respondent.

The Failure to Assess Relevance and Materiality

69 As I have already noted, the judge made no inquiry as to the relevance of the conversations to the respondent's ability to make full answer and defence because he erred by finding that all conversations between Det. McInnis needed to be recorded and disclosed irrespective of their nature.

70 The judge's failure to inquire about evidence led to a complete absence of scrutiny with respect to the materials provided to the defence.

71 By the first day of trial, the defence possessed multiple emails sent between Det. McInnis, the complainant, and her boyfriend: the alleged intimate images recipient. In response to Mr. Thorning's submissions, and the trial judge's directions, the Crown provided Willsay # 2 and the second batch of emails.

72 In the stay ruling, the judge found that late provision of Willsay # 2 and the emails constituted lack of timely disclosure which impacted overall trial fairness. The judge found that the defence required the disclosure to determine whether a conflict of interest existed and if new counsel needed to be retained. In addition, the new disclosure may have been used to form "the basis of potential *Charter* applications that had not been previously contemplated". It should be noted that the defence made no complaint that the November disclosure's timing impacted the respondent's ability to make full answer and defence.

73 Despite making the observations described above, the trial judge made no reference as to how Willsay # 2, Willsay # 3, and the second batch of emails had the effect that he attributed to them. For example, what were the *Charter* applications that arose out of the material? How were the defence in any worse position than they were prior to the provision of the second batch of emails?

74 In *Stinchcombe*, the court, at pp. 340-341, commented that in the case of disclosure disputes, it would be appropriate for the trial judge to inspect the documents and statements which formed the subject matter of the dispute. Here, what was described as "late disclosure" - the second batch of emails - was provided to the trial judge as part of the stay motion.

75 In *O'Connor*, at p. 464, the court set out the manner in which a trial judge should assess an allegation of a Charter breach for non-disclosure:

> Where the accused seeks to establish that the non-disclosure by the Crown violates s. 7 of the *Charter*, he or she must establish that the impugned non-disclosure has, on the balance of probabilities, prejudiced or had an adverse effect on his or her ability to make full answer and defence. It goes without saying that such a determination requires reasonable inquiry into the materiality of the non-disclosed information. Where the information is found to be immaterial to the accused's ability to make full answer and defence, there cannot

> possibly be a violation of the *Charter* in this respect. [emphasis added]

76 Similarly in *R. v. Spackman*, 2012 ONCA 905, 300 O.A.C. 14, at para. 137, the court commented:

> First, a failure to disclose, as well delayed or late disclosure, without more, does not violate the right of an accused to a fair trial. As a general rule, an accused must go further to show actual prejudice to his or her right to make full answer and defence: *Bjelland*, at para. 21; *O'Connor*, at para. 74. Absent an infringement of the right to make full answer and defence, no infringement of either s. 7 or s. 11(d) of the *Charter* has occurred, thus the critical condition precedent to the operation of s. 24(1) as an exclusionary mechanism remains unsatisfied and access to the remedy s. 24(1) provides is unavailable. [emphasis added]

77 Here, the trial judge did not analyse any of the materials which the judge described as constituting "late disclosure". There was nothing in the judge's reasons explaining how the late provision of this information or the failure of Det. McInnis to record all interactions with the complainant impacted trial fairness or the respondent's ability to make full answer and defence, as stated in Ruling # 1.

78 If there had been such an analysis, the judge might have noted that there were 25 emails that had been provided, and not "40", as he described in his judgment. Of those 25 emails, 8 had been previously disclosed, 15 dealt with court process and were clearly irrelevant, whilst the remaining 2 emails - as Mr. Brauti candidly concedes on this appeal - were of "marginal relevance".

79 This material could not, in any way, have irreparably harmed the respondent's ability to make full answer and defence and accordingly could not be the basis for a breach of the respondent's disclosure rights.

80 Accordingly, I find that the judge erred in finding this to be the case in both Ruling # 1 and the Stay Ruling.

The Investigative Purpose of the Defence Request

81 I also find that the judge erred by confusing the issues of conflict and full answer and defence.

82 In *R. v. Darwish*, 2010 ONCA 124, 100 O.R. (3d) 579, leave to appeal refused, 2010 SCCA No. 124, at paras. 29-30, the court remarked:

> An accused does not have a freestanding constitutional right to an adequate investigation of the charges against him or her: *R. v. Barnes*, 2009 ONCA 432, at para. 1. Inadequacies in an investigation may lead to the ultimate failure of the prosecution, to a specific breach of a Charter right or to a civil remedy. Those

> inadequacies do not, however, in-and-of-themselves constitute a denial of the right to make full answer and defence.
>
> An accused also does not have a constitutional right to direct the conduct of the criminal investigation of which he or she is the target. As Hill J. put it in *R. v. West*, [2001] O.J. No. 3406 (S.C.), at para. 75, the defence cannot, through a disguised-disclosure demand, "conscript the police to undertake investigatory work for the accused".

83 See also: *Spackman*, at para. 108; and *R. v. Schmidt*, 2001 BCCA 3, 151 C.C.C. (3d) 74, at para. 19.

84 When the Crown objected to creating Willsay # 3 on this basis, the trial judge dismissed the argument stating that the case was "very different" from *Darwish*, adding that "[t]he request being made is not to pursue some sort of investigation. It is a request that falls squarely within the four corners of *Stinchcombe*". However, later, in his reasons for judgment, the trial judge appeared to acknowledge that "most of the forceful disclosure requests [were] made for this exact purpose [the conflict], to consider the issue in advance of the trial".

85 With respect, the request was exactly as the Crown described: a defence request for information to investigate whether it had a conflict in the proceedings. This was the position Mr. Brauti actually set out in his submissions for the stay application, and repeated, on this appeal. The communications were not required for the respondent to make full answer and defence to the charges that he faced but, by their own admission, to assist the defence in determining whether they were in a position of conflict.

The Prejudice to the Respondent

86 It is also worth noting that Mr. Brauti's application for a stay arose because, in his words, Det. McInnis indicated that she had no recollection of the willingness information.

87 With respect, that was not Det. McInnis' position. When asked, pursuant to a judge's order to outline any conversations that she had with the complainant about her willingness to proceed, Det. McInnis referred to three emails and her evidence in Willsay # 3. She added that she had no further or better recollection to what was already provided in Willsay # 3.

88 The emails indicated a willingness to co-operate with the police and a wish that the matter would end.

89 Willsays # 2 and # 3 indicated that Det. McInnis had phone conversations and email exchanges with the complainant. The phone conversations were about court process and the email exchanges were disclosed. Both Willsays made clear that the victim advised Det. McInnis that she

did not wish to attend court but would if required and that she wanted the respondent to be held accountable for his actions.

90 By directing counsel and the court to this evidence, Det. McInnis answered the defence inquiry as to why she thought the complainant was willing to proceed.

91 Contrary to Mr. Brauti's submission, Det. McInnis' response to the judge's order on 5 December 2017, that she had "no further recollection" did not amount to "I don't recall" details about the willingness information. Det. McInnis simply stated that she had nothing further to add to the disclosure already made.

92 At this stage, the defence not only had full disclosure of the evidence against the respondent, they had Det. McInnis' own evidence of the willingness information and why she believed that the complainant was willing to proceed. Moreover, they had ample evidence of the complainant's state of mind with respect to the proceedings with the provision of the emails in November.

93 The trial judge ruled that the respondent had established that his right to full disclosure was breached without ever alluding to this evidence and the impact it had on the right to make full answer and defence.

94 The judge also erred in his approach to finding prejudice resulting from the alleged late disclosure. Whilst he correctly noted that the respondent "must show actual prejudice to his ability to make full answer and defence in order to be entitled to a remedy", (see: *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at para. 21) the respondent did not adduce evidence to demonstrate that prejudice. The respondent did not testify, there were no financial records filed, and there was nothing before the court about the respondent's personal circumstances. Instead, the trial judge simply relied upon defence counsel's submissions regarding the financial costs incurred in bringing the disclosure motion, retaining new counsel, and evaluating the viability of further *Charter* applications.

95 Applications for a stay must be based on clear evidence and not founded simply on the "speculation of counsel who chose not to call witnesses who were available": *R. v. Stinchcombe* (1994), 888 C.C.C. (3d) 57 (A.B.C.A.), at p. 569; *R. v. Grimes*, 1998 ABCA 9, 209 A.R. 360, at paras. 20-21.

Conclusion

96 For these reasons, I find that the judge erred in concluding that the respondent's right to full disclosure was breached, and in using this finding as a ground to stay the charges.

VII. SHOULD THE CONFLICT OF INTEREST ISSUE RAISED BY THE DEFENCE FACTOR INTO A DECISION TO STAY PROCEEDINGS?

97 On appeal, Mr. Brauti, concedes that the Crown was under no obligation to disclose all prior contacts between the complainant and Det. McInnis. However, he argues that the Crown's failure to disclose the willingness information was sufficient, by itself, to warrant the stay. He submits that the information was required to determine whether the defence was in a conflict of interest. Failure by the Crown to disclose the willingness information meant that the defence could only confirm that it was in a conflict at trial, and had to recuse itself from representing the respondent.

98 Due to the Crown's failure to disclose the willingness information, the respondent would be forced to hire new counsel at great expense and adjourn the trial, creating unwanted delay.

99 The trial judge was in error when he factored the conflict of interest issue into his decision to stay the charges against the respondent. The trial judge erred both in finding that there was a conflict of interest issue on the facts before him, and finding that a conflict of interest issue crystallised at trial. Contained within each of these two errors were minor errors that I will also address.

There was no Conflict of Interest

100 There are a number of issues with the trial judge's finding that there was a conflict. First, the defence and Crown's disagreement over whether Det. McInnis stated that the complainant was "eager" to proceed with the charges is not relevant to a conflict of interest issue. Second, the defence made multiple, changing submissions on the willingness information's relevance to a conflict of interest issue that did not identify any relevance. Lastly, examining the submissions myself, I am unable to find how the willingness information would be relevant to a conflict of interest issue, and further, that there was any conflict of interest issue at all. The trial judge erred in not examining the alleged conflict of interest issue because if he had, he would have found that there was no conflict of interest, in the record before him.

The Disagreement over Whether the Complainant was "Eager" to Proceed is Not Relevant to a Conflict Issue

101 The defence first stated that the conflict of interest stemmed from the need to clarify whether the complainant was "eager" to proceed with the charges. The defence claims to have learned this information from Det. McInnis at the judicial pre-trial. However, this information is not relevant because the Crown, not the complainant, ultimately decides whether to proceed with the charges.

102 The actual exchange between defence counsel and Det. McInnis which occurred at the judicial pre-trial on 28 February 2017 was never recorded and is the subject of some controversy. Mr. Brauti claims that during the pre-trial Det. McInnis told him that the complainant was "eager" to proceed.

103 Ms. Carbonneau, the Crown on appeal, disagrees. She submits that there is no record of Det. McInnis' exact words. Ms. Carbonneau argues that the only thing that can be agreed upon is that

that the officer indicated, in some way, that the complainant wished to proceed. At trial, Mr. Schreiter used the term "anxious to proceed" in describing the words that Det. McInnis might have used. Libman J.'s sparse judicial pre-trial notes make no mention of Det. McInnis' utterance or any consequence flowing from it.

104 It is also worth noting that the defence's description of the officer's utterance appears to vary when communicating with the Crown and the court.

105 For example, in an email requesting Det. McInnis' notes, dated 18 April 2017, Mr. Brauti used the phrase "very interested in proceeding to trial". In another email, dated 8 May 2017, Mr. Brauti used the same phrase. On the other hand, when making submissions to the court, Mr. Brauti used the terms "quite interested in proceeding" and "very eager to proceed". In her affidavit, sworn 5 November 2017, and used for the stay application, Ms. Negandhi, for the defence, stated that Det. McInnis said that "the complainant had expressed an interest in proceeding at trial". In Ms. Negandhi's email to the Crown dated, 28 February 2017, she used the phrase "would like to proceed".

106 Since there is no record of what Det. McInnis actually said, and neither side agrees on her specific words, I characterise Det. McInnis' sentiments in a more general way: she indicated the complainant was willing to proceed with the charges.

107 The complainant's willingness to proceed, whether "eager" or "anxious" or "very interested" or "quite interested" or "would like to" was clearly an irrelevant factor at trial. The decision to proceed with the charges vested with the Crown and not the complainant. Whether the complainant was "eager" is not relevant to a conflict of interest issue.

The Defence's Unsuccessful Attempts to Explain Why the Willingness Information is Relevant to a Conflict of Interest Issue

108 While the "eager" information was not relevant, the defence made additional submissions as to why the willingness information in general was relevant to a conflict of interest issue. However, the defence gave different reasons at different times, none of which were persuasive:

(1) On 28 February 2017, Ms. Negandhi wrote to the Crown about Det. McInnis' comments at the February judicial pre-trial. Ms. Negandhi expressed concern that Det. McInnis' comments did not accord with the defence view. However, she based her concern on the fact that the "process was not fully explained to the complainant in that she will be required to testify". Ms. Negandhi explained that the defence was concerned that there might be an adjournment and wanted the Crown to re-canvass the matter with the complainant. There was no mention of a conflict or any other reason for concern about Det. McInnis' comments.

(2) On 10 March 2017, Mr. Brauti wrote a lengthy email attempting to clarify the complainant's misconception that she was not allowed to speak to him. He referred to the willingness information as being "relevant as the motive for not wanting to proceed can be explored at trial". There was no mention of a potential conflict.

(3) On 13 June 2017, following a series of requests for the information, Mr. Brauti mentioned for the first time that his firm had acted for Det. McInnis and that the information given at the judicial pre-trial might affect his position as the respondent's counsel. He did not give any detailed reasons for how and why any conflict might exist.

(4) At trial, Mr. Thorning placed the judicial pre-trial circumstances within the requests for prior contacts between Det. McInnis and the complainant. He submitted that the willingness information automatically fell within the *Stinchcombe* parameters and should therefore be disclosed irrespective of content. However, he added that the willingness information might also be required to determine if a conflict existed. Again, there was no indication of what the conflict might be and how the willingness information impacted it.

(5) In submissions on the application for a stay, Mr. Brauti referenced a possible reason for relevance: the willingness information could lead to material for cross-examination where the defence could suggest to the complainant that she did not want to proceed and was telling Det. McInnis that she was "eager" to testify because she did not want to lose face. That, according to Mr. Brauti, "may have led to a conflict issue".

109 None of the defence's changing explanations offer concrete evidence of a conflict of interest which stems from the willingness information.

There was No Conflict of Interest Issue on the Facts

110 Even though the defence application to stay was founded on the existence of a conflict, and the judge found the conflict to be a factor in granting a stay, one issue that did not appear to be the subject of the discussion was: what was the conflict?

111 The defence, at trial, based their position on the "saving face" scenario, described above. However, I find it unclear how this scenario could lead to a potential conflict.

112 The conflict would only arise if the defence took an adversarial position towards Det.

McInnis or wished to challenge her credibility in some way.

113 In the scenario suggested by Mr. Brauti, if he wished to suggest to the complainant that she told Det. McInnis that she was willing to proceed only to save face, he was free to do so. It is unclear how that would raise any questions regarding Det. McInnis' veracity. If the complainant denied Det. McInnis' version of events, the officer would be a defence witness or more likely, her proposed evidence would be the subject of an agreed statement of facts. In other words, far from challenging Det. McInnis' veracity, the defence would ask the court to accept the truth of her statements.

114 If Mr. Brauti requested the willingness information based on the possibility that the complainant might provide a motive for testifying against the respondent, it is difficult to understand how this would create a conflict. If Det. McInnis indicated that the complainant said she was willing to proceed and nothing more that would be the end of the matter. Conversely, if Det. McInnis indicated that the complainant provided additional information helpful to the defence such as suggesting an underlying motive to falsely implicate the respondent Mr. Brauti could use this evidence when attacking the complainant's credibility. Again Det. McInnis would be a defence witness or, more likely, the Crown would agree to that fact at trial.

115 In either situation, the defence would be endorsing not challenging Det. McInnis' evidence.

116 Under *O'Connor*, the judge was required to assess the materiality of the alleged non-disclosure. In *R. v. Widdifield* (1995), 25 O.R. (3d) 161 (C.A.), Doherty J.A. explained how conflicts of interest should be approached. If the issue "is raised at trial, the court must be concerned with actual conflicts of interests and potential conflicts that may develop as the trial unfolds." (at p. 175). Counsel must only be removed for a realistic risk of conflict: *R. v. Kojder*, 2010 ONSC 2964, at para. 18.

117 This issue therefore demanded in depth scrutiny before evaluation. What was the conflict? How would the willingness information impact the conflict issue? Was there a realistic risk that the defence could no longer act for the respondent? What steps could be taken to resolve the conflict? The trial judge never raised these questions, nor did the defence answer them.

118 Instead, the trial judge found that the conflict had "crystallised when the further disclosure was made at trial". It is hard to understand how the judge reached this conclusion without identifying the conflict.

119 In fact, Mr. Brauti was far from definite in suggesting that the conflict was a reality during his submissions.

120 After receiving Willsay # 3 and Det. McInnis' comments that she had nothing further to add he argued that "we now know what the disclosure is: 'I don't recall'". He then added:

> Now in my submission that creates a litigation problem that, if the matter isn't stayed and the matter is going to proceed to a trial, or there is going to be a further motion and argument for some kind of abuse, then Detective McInnis may come into play both at the trial and in a further motion and we will not be able to be involved in that litigation for purposes of a conflict. [emphasis added]

121 These comments suggest that the defence could not identify a realistic risk of conflict. The submission referred to a motion that might have been brought for "some kind of abuse" requiring Det. McInnis to be a witness. Neither the defence nor the trial judge identified an allegation of abuse or Det. McInnis' role in that abuse.

The Trial Judge Erred in Ordering a Stay because the Conflict had "Crystallised" at Trial

122 In the stay application, Mr. Brauti informed the judge that now that the defence was aware that Det. McInnis had "no recollection" of the willingness information, the conflict had crystallised. If a stay was not granted, his firm would have to recuse itself and new counsel would have to be found because of the conflict.

123 The judge accepted Mr. Brauti's submissions, finding that although the conflict "may very well have been an available inference as it stood pre-trial", the conflict "had crystallised when the further disclosure [of the emails and will-says] was made at trial". He found that the failure to make full disclosure deprived the respondent of the right to decide whether a conflict existed in advance of the trial and prevented the respondent from retaining new counsel in time for the trial date. The trial judge concluded that:

> [I]t has become clear that Mr. Jalili's counsel of choice can no longer proceed with any next litigation step as the impugned conduct of the officer-in-charge may realistically be brought into question in some form of *Charter* application or at the trial stage itself.

124 The trial judge cited this as a factor, caused by the late disclosure, to warrant a stay of proceedings. He determined that fairness "dictates that Mr. Jalili should have full disclosure to make an informed decision" as to whether a conflict existed.

125 For the reasons set out below, I find that the judge's conclusion that the "conflict had crystallised" was an error. There was no basis for finding that the alleged "late disclosure" had caused the conflict to "crystallise". I will first explain why no conflict could have crystallised because there was no conflict issue to begin with, and then I will address the defence's mischaracterization of Det. McInnis' evidence which contributed to the crystallisation finding.

The Late Disclosure Did Not Cause the Conflict to Crystallise

126 It is difficult to fathom exactly how the defence came to the conclusion that a conflict existed

simply because of the alleged late disclosure. Throughout the preceding months they took the position that they needed the willingness information to decide if there was a conflict.

127 For example, on 23 August 2017, Mr. Brauti wrote to Mr. Schreiter asking for Det. McInnis' notes and made clear that "I specifically told you I would make any decisions regarding a conflict once I had this material and after having reviewed the material". In the same email he repeats that he is raising the willingness information issue for conflict of interest reasons. He ends by telling Mr. Schreiter that "the disclosure may cause me to reconsider my position on the conflict of interest issue".

128 In the stay submissions, when pressed by the trial judge on what would have happened if Det. McInnis had told the defence, from the outset, that she had no recollection of why she thought the complainant was willing to proceed, Mr. Brauti replied "we would have had to make a litigation decision and it very well may have, it may have led to a conflict issue where we got off the record." He added: "But you know, it, it, fundamentally depended on what the content was".

129 In the same submissions, Mr. Brauti referred the judge to email correspondence expressing his frustration that he was still awaiting the willingness information. He told the judge:

> I'm trying to, to, underscore how critical this [the willingness information] is, telling him there's some important litigation decisions. Because, depending on what this disclosure is, I'm now realizing, depending on what it is, it may create a conflict of interest. May. Now, [of] course depending [on] what it is, there might be no conflict of interest.

130 So I ask rhetorically, if the defence could not decide the issue of conflict before the trial, how could they do so at the stay application? How did the emails and will-say provided at trial cause the conflict to "crystallise" when they added very little to what had already been given to the defence?

131 In fact, according to the defence, the will-say and emails added nothing. The defence brought the stay application because the Crown had not provided the "critical" information required to make a decision about conflict. It was also the reason the trial judge stayed the charges. The defence submitted that they now know that the disclosure is an "I don't recall" answer: i.e. Det. McInnis could no longer provide the willingness information. If the defence needed the willingness information to determine conflict, how could they come to that decision if the Crown failed to provide it? In other words, the defence were in the same position when asking for a stay that they were in February 2017, when they first asked for disclosure.

132 There was nothing in the material provided at trial that materially affected the conflict position: the "late disclosure" did not "crystallise" the conflict. If there was a conflict at trial caused by Det. McInnis' judicial pre-trial comments, the conflict existed months earlier. Accordingly, if they felt it was necessary, the defence should have removed themselves from the record at that stage rather than waiting until the third day of the trial and warning the judge that they would have to do

so if the case was not stayed.

The Defence Mischaracterized Det. McInnis' Evidence, which led to the Crystallisation Finding in Error

133 According to Mr. Brauti, the conflict became a reality because Det. McInnis had no recollection of her conversations about the complainant's willingness to proceed. The judge accepted this as the basis for the "crystallisation" of the conflict.

134 I dealt with this issue earlier in these reasons: that was not Det. McInnis' answer. When asked to outline any conversations about the complainant's willingness to proceed she directed the court to three emails and Willsay # 3. She answered that she had no further or better recollection than already provided in Willsay # 3. In other words, her answer was not "I do not recall" but "there is nothing more to add". Det. McInnis did recall and directed the defence to "any conversations dealing with the complainant's willingness to proceed in this matter".

135 Put bluntly, the defence knew the answer to their question, namely the source of Det. McInnis' understanding that the complainant was willing to proceed.

136 The defence's determination that a conflict existed based on the perception that Det. McInnis did "not recall" the conversations was an error which fatally undermined their argument. It goes without saying that since the judge accepted this as the basis for the "crystallisation" of the conflict, the underpinning of his decision was based on a misconception and was an error.

Conclusion

137 Nowhere in his brief reasons staying the charges did the judge ever identify the conflict; how the will-says and emails provided at trial caused it to "crystallise"; or how the defence suddenly arrived at the conclusion that there was a conflict without the willingness information.

138 Nor was there any explanation of why or how "it had become clear [that] the respondent's counsel of choice could no longer proceed with any next litigation step", how the defence would impugn or bring into question Det. McInnis' conduct, or what *Charter* application the defence would bring during the trial that would focus on Det. McInnis' conduct. Indeed, it would have been strange that he could have done so, as the defence had never provided any details of that application.

139 Moreover, the trial judge did not correct or address the flaw in Mr. Brauti's foundational argument that Det. McInnis could "not recall" the willingness information.

140 Yet, somehow, in the absence of any the above analysis, and with almost a complete vacuum of the reasons for a conflict, the judge found this to be a factor in deciding that the matter was one of the "clearest of cases" requiring a stay. He erred in doing so.

141 If the trial judge wanted to consider the issue, he should have done so at the outset: the trial judge should have decided how and why a conflict existed, and whether it was possible that the conflict could be resolved or avoided. It is only in compelling circumstances that a conflict would lead to the removal of counsel: *R. v. Speid* (1983), 43 O.R. (2d) 596 (C.A.), at p. 598.

142 The judge did none of these things. If he had done so, and found that a resolution was impossible, then he could have granted an adjournment so that the respondent could find alternative counsel.

143 On the record before the trial judge, even the defence could not definitively identify the conflict let alone explain where it "crystallised".

144 Finally, as I have previously set out, a stay is a tool of last resort, to be used only when there is no other remedy capable of removing the prejudice caused to the respondent. Here, there were several alternatives, if the prejudice did exist. Some are discussed later in these reasons. The most obvious remedy would include granting the defence an adjournment so that new counsel could be retained.

145 If an adjournment was granted, that was not the fault of the Crown. The defence, at least by November if not much earlier, had more than sufficient information to decide whether they were in a conflict. If they still felt they were in a conflict caused by the strategy they wished to pursue and known only to them they should have acted earlier.

146 The Crown could hardly be held responsible for failing to foresee how the defence would run its case when they were never told why the willingness information was relevant or how Det. McInnis could play any type of material role in the trial. That role is still a mystery.

147 Any adjournment would have fallen at the feet of the defence and not the Crown.

148 For these reasons, I find that the trial judge erred in using the conflict issue as a factor in granting a stay of proceedings.

VIII. DID ANY OTHER GROUNDS JUSTIFY A STAY OF PROCEEDINGS?

149 Although I have already found that there was no breach of the respondent's disclosure rights, I must briefly comment on some of the remaining factors the trial judge used in his decision to stay the case.

Defence Diligence

150 The trial judge found that the defence had been diligent in its disclosure pursuit. Respectfully, I disagree.

151 Whilst I accept that the defence continued to write to the Crown requesting disclosure of the

willingness information that was hardly its complete obligation. In *Stinchcombe*, at p. 341, the court remarked that it was incumbent upon the defence to direct the trial judge's attention to any shortcomings in disclosure of which it was aware at the earliest opportunity. In *R. v. Dixon*, [1998] 1 S.C.R. 244, at p. 265, the court remarked that a "lack of due diligence is a significant factor in determining whether the Crown's non-disclosure affected the fairness of the trial process."

152 The defence was alive to the need to act expeditiously as evidenced by Mr. Brauti's email to the Crown on 18 April 2017, where he noted that he "may feel compelled to bring a disclosure motion in the near future" to obtain the information he required. In his e-mail to the Crown on 13 June 2017, he informed Mr. Schreiter that he would not have accepted the case had he known Det. McInnis was to become a "live issue". Nor was there anything preventing the defence from contacting Det. McInnis directly prior to trial to clarify any issues they felt arose from the judicial pre-trial.

153 It should also be remembered that the defence described the willingness information as "critical" and "key" in its requests to the Crown and submissions to the court. Yet, it took another six months, on 5 November 2017, to file the disclosure motion which had to be heard on the day that the trial was set to commence.

154 The governing protocol contained in r. 2.4(1)(b) of the *Criminal Rules of the Ontario Court of Justice*, SI/2012-30, stipulates that disclosure motions must be heard 60 days in advance of the trial. There is no explanation why that did not occur in this case. Nor did the judge ever address the issue or its corollary: an advanced date of hearing might well have provided the disclosure well in advance of the trial date and eliminated any potential prejudice.

155 For these reasons, I find that the defence did not act diligently in seeking disclosure.

The "*Jordan* Clock"

156 I also find the judge erred by using delay as a factor in granting a stay. The judge recognised in his reasons that he did not have a full record of the history of the case. This absence precluded any analysis pursuant to the anticipatory breach principles set out in *R. v. Auclair*, [2014] 1 S.C.R. 83, and a proper calculation of the presumptive limits. There was no basis, on the record before the trial judge, for concluding that the "*Jordan* Clock" would chime to signal unreasonable delay. Therefore, this could not be a factor in determining whether a stay was appropriate.

IX. THE REMAINING GROUNDS OF APPEAL ADVANCED BY THE CROWN

157 Having now dealt with the factors which the trial judge used in his decision to stay the case, I will now turn to the remaining grounds of appeal advanced by the Crown.

The Jurisdiction to Order the Third Willsay

158 Even though the Crown provided two will-says from Det. McInnis, the defence complained that this was not enough: they required a further will-say. The trial judge accordingly ordered Willsay # 3. He did so on the basis that there had been a breach of the respondent's s. 7 *Charter* rights. As I have already found, this was an error. For this reason alone, a further will-say should not have been ordered.

159 However, I also take issue with the judge's characterisation of *Stinchcombe* conferring jurisdiction on a trial court to order a will-say. The judge relied upon p. 344 of *Stinchcombe*, reproduced as follows:

> A special problem arises in respect to witness statements and is specifically raised in this case. There is virtually no disagreement that statements in the possession of the Crown obtained from witnesses it proposes to call should be produced. In some cases the statement will simply be recorded in notes taken by an investigator, usually a police officer. The notes or copies should be produced. If notes do not exist then a "will say" statement, summarizing the anticipated evidence of the witness, should be produced based on the information in the Crown's possession. [emphasis added]

160 There were two problems relating to the judge's reliance upon this passage.

161 First, the entire purpose of the will-say as described above is to ensure that the Crown cannot call a witness to advance its case without the defence knowing what that witness will say.

162 Det. McInnis was not a proposed Crown witness. At most, she would have been a defence witness although it has never been made clear why that would have been the case. The sentiments in *Stinchcombe*, therefore, did not apply to Det. McInnis and did not require the Crown to produce a will-say, unlike cases relied upon by the defence such as *R. v. England*, 2000 ABPC 153, 274 A.R. 111; and *R. v. Tran*, 2005 ABPC 244, 394 A.R. 252. It is noteworthy that these two cases are at odds with each other on the ultimate disposition of that issue. *R. v. Akinchets*, 2011 SKPC 88, 378 Sask. R. 282, distinguished *England* because the Crown would not be calling the officer in question to testify (at paras. 22-23).

163 In *Stinchcombe*, at p. 345, the court dealt with the evidence of witnesses not being called by the Crown:

> I am of the opinion that, subject to the discretion to which I have referred above, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses. Where statements are not in existence, other information such as notes should be produced, and, if there are no notes, then in addition to the name, address and occupation of the witness, all information in the possession of the prosecution relating to any relevant evidence that the person could give

should be supplied.

164 Here, all information in the Crown's possession had been supplied - including Willsay # 1 and Willsay # 2. I repeat that the information sought was not relevant. The judge therefore had no power to order a will-say.

165 Second, as I have already noted earlier in these reasons, the trial judge failed to correctly identify the purpose of the requested will-say which was to assist defence counsel in determining whether a conflict of interest existed rather than making full answer and defence to the charges. As such, it did not constitute disclosure and there was no obligation on the Crown to provide a further will-say.

166 Finally, I have some doubts that *Stinchcombe* was intended to confer power on judges to order a witness to produce a will-say on the basis of a defence complaint that an existing statement or will-say did not contain sufficient particulars. Such a practice could lead to a continuous revolving door of requests for further and better particulars of a witness's evidence. If a statement has omitted details, then it is more appropriate to highlight the issue and adduce the answers while cross-examining the witness.

167 There is also the risk that in ordering further will-says the judge is seen to be ordering the creation of evidence rather than disclosure.

168 Although I accept that some cases have taken this route, see, for example, *Tran*, and *R. v. McCormack*, [2009] O.J. No. 6517, I agree with the sentiments expressed by MacDonnell J. in *R. v. Khan*, 2010 ONSC 3818, 97 M.V.R. (5th) 35, at para. 13, where he explained that "the Crown's disclosure obligation does not extend to material that is not in its possession or control and does not require the Crown to bring evidence into existence." In my view, ordering further will-says is a practice best avoided.

X. THE CONDUCT OF THE TRIAL

169 I end these reasons with some comments about the manner in which this trial unfolded.

170 It is not without some irony that the trial judge, in staying the case, cited the comments in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, at para. 137, that "real change will require the efforts and coordination of all participants in the criminal justice system".

171 This case is an example of how efforts and coordination were noticeable only by their absence.

172 Although I have ruled that the information defence counsel sought was irrelevant, I cannot ignore the fact that it was clear the defence were seeking this information. It would have taken little exertion on the part of the Crown to clarify what the defence was seeking, confirm what was said at

the February judicial pre-trial, and ask Det. McInnis why she had made those comments. Whether or not these comments fell into the *Stinchcombe* framework, a response would have short circuited the disputes that followed. Instead, despite repeated requests, it was not until November 2017 that the Crown provided the November disclosure and Willsay # 1.

173 Moreover, I have already conveyed my view that the defence were far from diligent in seeking the information they would later describe as "critical". I would add that even during their correspondence with the Crown, it behove them to explain why the information was necessary and how it might cause a conflict. Had they done so, it may have been possible to fashion a solution to the problem, if one indeed existed, well in advance of the trial.

174 Regrettably, the defence did not offer such clarification. Indeed, the necessary cooperation and coordination were completely lacking on the day that the trial was due to commence. One instance encapsulates the nature of the trial. On 4 December 2017, the first day of trial, Mr. Schreiter helpfully proposed a way of streamlining matters by asking Det. McInnis about her prior conversations with the complainant. He suggested Mr. Thorning be present so that he could be vested with all of the information Det. McInnis provided without the possibility of ambiguity. Mr. Thorning refused to participate and demanded that the Crown obtain the information in writing and relay it to him. This type of behaviour - especially when the purpose of the exercise was to obtain information for the defence's benefit - does nothing to enhance the administration of justice. It has no place in a post-*Jordan* world.

175 Finally, in *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, the court explained the sea change wrought by *Jordan* in the role of the trial judge as case manager. At para. 37, the court remarked:

> We reiterate the important role trial judges play in curtailing unnecessary delay and "changing courtroom culture" (*Jordan*, at para. 114). As this Court observed in *Jordan*,
>
> the role of the courts in effecting real change involves implementing more efficient procedures, including scheduling practices. Trial courts may wish to review their case management regimes to ensure that they provide the tools for parties to collaborate and conduct cases efficiently. Trial judges should make reasonable efforts to control and manage the conduct of trials. Appellate courts must support these efforts by affording deference to case management choices made by courts below. All courts, including this Court, must be mindful of the impact of their decisions on the conduct of trials.

As advised in *Cody*, at para. 38:

> [T]rial judges should use their case management powers to minimize delay. For example, before permitting an application to proceed, a trial judge should

> consider whether it has a reasonable prospect of success. This may entail asking defence counsel to summarize the evidence it anticipates eliciting in the voir dire and, where that summary reveals no basis upon which the application could succeed, dismissing the application summarily.

176 The court added, at para. 39, that trial judges should be active in suggesting ways to improve efficiency in the conduct of legitimate applications.

177 Here the trial judge did the exact opposite. This case was a straightforward summary conviction trial. The trial was about to start and evidence was waiting to be heard.

178 In these circumstances, when the disclosure issue arose, it was incumbent upon the trial judge to ascertain the relevance of the requested disclosure and its impact on the trial.

179 If the defence advanced the issue of conflict as relevant the judge should have enquired what the conflict was, how any information from Det. McInnis would cause or resolve it, and decide how best to proceed with that information so that the trial was not jeopardised. This enquiry was even more urgent in light of the defence's failure to bring a disclosure motion before the trial date.

180 If, as now advanced, the defence sought the information to discover whether the complainant expressed an additional motive to incriminate the respondent to Det. McInnis when indicating her willingness to proceed, it would have been simple for the judge to direct counsel to speak to Det. McInnis outside the courtroom to obtain the information.

181 If Det. McInnis indicated that the complainant professed no such motive, that would be the end of the matter. If, however, she told the defence that the complainant did express words demonstrating motive and/or malice, this information would be of great benefit to the defence. As previously stated, it would be hard to see how a conflict would arise even if the complainant denied making those comments: the defence would not be attacking Det. McInnis' credibility in this case but advancing it. Det. McInnis need not have been a witness as the Crown would concede those comments.

182 In the alternative, the judge could have allowed the trial to proceed and observed how the complainant's testimony unfolded. It may well have become apparent that Det. McInnis' prior communications were no longer an issue. If the defence still felt a conflict existed after the complainant's evidence, they could argue the matter and identify why that was the case. Again, the judge would be in a much better position to resolve the issue, if there was one, having heard the evidence and how it affected the defence.

183 None of these, or any other alternative routes were even considered because the trial judge failed to conduct any form of enquiry, or identify the issues. Instead, he proceeded along the track that the defence were automatically entitled to the material they sought, consuming days of court time and erroneously staying the proceedings.

184 The Ontario Court of Justice deals with the vast majority of criminal cases in the province. After *Jordan*, it simply cannot afford the luxury of conducting cases in this manner.

XI. CONCLUSION

185 For the reasons set out above, I find that the trial judge erred in granting a stay under s. 24(1) of the *Charter of Rights and Freedoms*. In my view, the errors committed by the judge resulted in a decision that was so clearly wrong it resulted in an injustice.

186 The stay is lifted and a new trial is ordered before a different jurist.

187 Based on the foregoing, the cross-appeal relating to costs against the Crown is dismissed.

188 Having reviewed the record in this case, I would only comment that given the difficulties presented in the context of witnesses, it may well be prudent for the Crown to review the case to decide whether or not it still wishes to proceed. That, however, is a matter for the Crown to decide.

S.A.Q. AKHTAR J.