

COURT OF APPEAL FOR ONTARIO

CITATION: York (Regional Municipality) v. McGuigan, 2018 ONCA 1062

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MacFarland, Watt and Paciocco JJ.A.

BETWEEN

The Regional Municipality of York

Applicant (Respondent)

and

James McGuigan

Respondent (Appellant)

Adam Little, for the appellant

Chris Bendick, for the respondent

Heard: May 17, 2018

On appeal from the order in lieu of *certiorari* entered on January 18, 2017 by Justice Susan E. Healey of the Superior Court of Justice, with reasons reported at 2017 ONSC 436, 136 O.R. (3d) 149, quashing the disclosure order granted by Her Worship Justice of the Peace Rhonda Shousterman, dated September 13, 2016.

Watt and Paciocco JJ.A.:

OVERVIEW

[1] The charge James McGuigan faces is mundane. His alleged offence is speeding – driving 75 kilometres per hour in a 60 kilometre per hour zone. The \$52.50 fine he faces if convicted will not break him. Yet his case has taken on

importance. It has become a test case about disclosure obligations in speeding prosecutions under the *Provincial Offences Act*, R.S.O. 1990, c. P.33 ("POA"). It also raises issues about the availability of *certiorari* review from disclosure orders made in provincial offence prosecutions. The appeal is now being carried by the Ontario Paralegal Association ("OPA"), but Mr. McGuigan remains the appellant.¹

[2] It all began when the appellant contested his speeding ticket. The paralegal agent he hired asked the office of the Director of Prosecutions for the Regional Municipality of York (the "prosecutor") for disclosure of the "testing and operating procedures" from the user manual for the device used by the traffic officer to measure the speed of his vehicle. The prosecutor refused to furnish the appellant's agent with photocopies of the pages that the appellant was requesting.

[3] The justice of the peace presiding at the appellant's trial ordered the prosecutor to make the disclosure. The prosecutor obtained an order in lieu of *certiorari* ("*certiorari* order")² quashing the disclosure order. This is an appeal from the *certiorari* order.

[4] We conclude that the application judge erred in granting the *certiorari* order. Even if the justice of the peace had been wrong to order disclosure, the error would

¹ The prosecutor announced at the appeal hearing that it would be withdrawing the charge against the appellant at the close of the hearing.

² The writ of *certiorari* is no longer issued. We use the phrase the "*certiorari* order" as shorthand for the more cumbersome "order in lieu of *certiorari*".

not have been jurisdictional in nature. Subsection 140(1) of the POA confines *certiorari* orders in POA matters to situations where an applicant would be entitled to such relief at common law, and for parties to a proceeding, *certiorari* orders are confined to jurisdictional errors. Moreover, *certiorari* should not have been granted in the course of ongoing proceedings. Nor was there a substantial wrong or miscarriage of justice to address, a prerequisite to *certiorari* under POA, s. 141(4).

[5] This would be enough to allow the appeal but, in the interest of providing guidance and given the extensive argument before us, we choose to deal with the grounds of appeal relating to the correctness of the application judge's decision. In our view, contrary to the application judge's decision, the justice of the peace did not err in making the disclosure order. Where a prosecutor is relying on a speed measuring device to prosecute an offence, it must, on request, disclose the testing and operating procedures set out in the user manual for that device. It is up to the prosecutor to hand such information over on request. The person charged need not bring an application or obtain a court order. This is first party disclosure, not third party disclosure.

[6] The charging police force has a corresponding duty to furnish the pertinent passages from the user manual to the prosecutor to enable the prosecutor to discharge its first party disclosure obligations.

[7] This is not a crushing administrative task. The disclosure at issue here is not case specific information. The disclosure obligation can therefore be discharged by the prosecutor posting the relevant content from the user manual online and providing the ticketed driver with the required URL.

[8] We would therefore allow the appeal, set aside the *certiorari* order, and reinstate the disclosure order made by the presiding justice of the peace. To be clear, we consider both our decision that the *certiorari* order was improper, and our conclusion that the disclosure in this case was required first party disclosure, to be alternative and equally important grounds for allowing the appeal: *R. v. Warner*, [1961] S.C.R. 144, at pp. 151-52, and see *Commissioners of Taxation for the State of New South Wales v. Palmer*, [1907] A.C. 179 (P.C.), at p. 184, and *Jacobs v. London City Council*, [1950] A.C. 361 (H.L.), at pp. 369-70.

THE BACKGROUND FACTS

[9] On November 6, 2015, a York Regional Police officer charged the appellant with speeding, contrary to *Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 128. The officer had measured the speed of the appellant's vehicle with a Genesis Handheld Directional traffic radar device ("GHD") that the York Regional Police force owned.

[10] The appellant decided to fight his charge. He hired a paralegal agent, Thomas Thoma, to defend him. Soon after, Mr. Thoma made a written request to

the prosecutor on the appellant's behalf for disclosure of the "testing and operating procedures" for the GHD.

[11] Such disclosure requests are common. There are more than 40,000 speeding tickets issued in York Region each year, leading to thousands of requests for the disclosure of pages from user manuals for the speed measuring devices that police officers use.

[12] Several years ago, because of the administrative weight of complying with such disclosure requests, the prosecutor's office took two steps to stem the number of disclosure requests it had to respond to.

[13] First, it provided copies of the user manuals for speed measuring devices to paralegal agents appearing regularly in traffic court. Prior to the appellant's prosecution, Mr. Thoma had received a copy of the 2008 GHD user manual.

[14] Second, the prosecutor's office collected user manuals for all speed measuring devices. It provided notice on its standard form disclosure cover page that these user manuals could be viewed in the prosecutor's office.

[15] By the time the appellant sought disclosure, this court's decision in *R. v. Jackson*, 2015 ONCA 832, 128 O.R. (3d) 161, leave to appeal to S.C.C. refused, [2016] S.C.C.A. No. 38, had been released. The prosecutor read the *Jackson* case as confirming that it need not disclose excerpts from user manuals. It took the position that those who want them must bring third party records applications to

obtain court orders for production from the third party record holder, in this case the York Regional Police.

[16] The prosecutor therefore declined Mr. Thoma's request for disclosure of the testing and operating procedures for the GHD. Instead, Mr. Thoma was told that "[f]ull manuals on all speed measuring devices can be viewed at the Prosecutor's Office." At the time, the prosecutor's office held a copy of the 2010 GHD user manual.

[17] Mr. Thoma chose not to go to the prosecutor's office to view the GHD user manual or to rely on his own copy of the 2008 GHD user manual. Instead, he made two further written requests on the appellant's behalf to the prosecutor's office for disclosure of the GHD user manual, both of which were ignored.

[18] At the commencement of the appellant's trial, Mr. Thoma brought an oral motion to stay the proceedings for non-disclosure. No evidence was presented about whether the officer that issued the ticket used or referenced the user manual the day the appellant was charged. Mr. Thoma's request was based on the claim that if the prosecutor was relying on a device, the officer's compliance with the manufacturer's testing and operating procedures is relevant to the reliability of the result. Hence, the pertinent passages from the user manual are relevant. He argued that since the user manual was in the possession of the prosecutor, the prosecutor had to disclose it.

[19] Mr. Thoma also argued that the fact that he had previously been given his own copy of the 2008 GHD user manual could not satisfy the prosecutor's disclosure obligations to the appellant. He said that it is the appellant's right to disclosure that is at issue, and therefore the delivery to the paralegal agent "five years before" of a user manual cannot suffice, even if it had not been out of date. Nor would an invitation to visit the prosecutor's office to inspect the user manual suffice. He claimed that the appellant had a right to disclosure of a photocopy of the relevant passages.

[20] In response, the prosecutor told the presiding justice of the peace that the prosecutor's office was no longer disclosing photocopies of the few pages from the relevant user manual containing the testing and operating procedures. The prosecutor explained that providing this disclosure was burdensome. It took the position that the user manuals are police property and are therefore third party records. It argued that if the appellant wanted copies of pages from the user manual he should bring a third party record application to obtain production of those pages from the York Regional Police.

[21] The presiding justice of the peace ruled that the appellant had the right to the disclosure that he claimed. She ordered disclosure of the testing information but denied the stay of proceedings the appellant had sought, adjourning the trial instead.

[22] The prosecutor decided to take a stand and get a direct ruling it could use to stem similar requests. It brought a *certiorari* application to the Superior Court, seeking to quash the justice of the peace's decision.

[23] The appellant chose not to participate personally in the *certiorari* proceeding. The OPA was given leave to intervene. By intervening it could assist in providing the application judge with full argument, including by relaying the arguments the appellant would have made.

[24] The OPA argued that the application judge should not consider the *certiorari* application, and if she was to consider the application, she should deny it as the justice of the peace had committed no error.

[25] The OPA's first objection to the *certiorari* application was that the prosecutor had not served the York Regional Police – the party it claimed to be the third party record holder – with the *certiorari* application. The application judge disagreed, holding that it was appropriate to proceed without the participation of the York Regional Police since the York Regional Police had a right to appeal the *certiorari* decision under *Criminal Code*, R.S.C. 1985, c. C-46, s. 784(1) if it was dissatisfied with the outcome.³

³ The issue was not pursued on appeal.

[26] Second, the OPA questioned whether *certiorari* was the correct procedure for challenging the disclosure order, given the prosecutor's right of appeal. The application judge rejected this objection. She ruled that an order to make disclosure finally disposes of a legal right, making *certiorari* available to the Crown for both errors of jurisdiction and errors of law on the face of the record.

[27] The application judge therefore heard the application. She ruled in favour of the prosecutor. She found that the justice of the peace made a legal error on the face of the record in holding that the user manual was subject to first party disclosure, and she quashed the disclosure order.

[28] In coming to this conclusion, the application judge examined the two principal factors offered in *Jackson* at para. 91 for determining whether access to information is to be obtained through first party disclosure, or by third party production orders, specifically, "the nature of the information sought" and "who is in possession or control of that information."

[29] In her view, the nature of the information sought – the user manuals – fell outside of the first party disclosure regime because user manuals are not "fruits of the investigation". Specifically, they were "not ... a consequence of the investigation of Mr. McGuigan", as they were not "created, produced or even located during the investigation of [Mr. McGuigan] and his alleged offences."

[30] The application judge agreed with the justice of the peace that the user manual was in the possession of the prosecutor's office, but she said:

[U]nless the document can properly be characterized as "fruits of the investigation", there is no obligation on the prosecutor's office to provide it as part of routine disclosure in speeding offences. This is so even if there is a reasonable possibility that the disclosure sought may assist Mr. McGuigan in the exercise of his right to make full answer and defence.

[31] After holding that the user manuals were not subject to first party disclosure, the application judge dismissed the concern expressed by the OPA that if user manuals were to be treated as third party disclosure, courts would be inundated with complex third party records applications under the *O'Connor* regime that would delay proceedings. She said:

This submission disregards the fact that ... the disclosure sought is readily available for review at the prosecutor's office. There is no impediment to an accused making full answer and defence. From a practical point of view, an *O'Connor* application is not needed....

Also, from a practical point of view, the [York Regional Police] is not likely to change its practice of providing a copy of the manual to the prosecutor's office, so as not to be inundated with *O'Connor* applications solely to obtain the portions pertaining to the testing procedures.

[32] At the commencement of the appeal hearing, this panel was presented with a copy of a letter from the York Regional Police service to the Director of Prosecutions for the Regional Municipality of York. It said, in material part:

Having regard to the Court of Appeal's decision in *R. v. Jackson*, 2015 ONCA 832 as well as the appeal that your office recently argued ... in *Region of York v. McGuigan*, 2017 ONSC 436, it has become apparent that these manuals should not be subject to first party disclosure. As such, I would kindly request that your office return all copies of these manuals to York Regional Police at your earliest convenience.

ISSUES

[33] During this appeal, the appellant brought procedural challenges to the *certiorari* order. He recognizes that it is appropriate for third parties subject to production orders to obtain *certiorari* relief to quash those orders where there have been errors of law on the face of the record. He questions whether it is appropriate, however, for the prosecutor, a party, to obtain *certiorari* to quash a first party disclosure order.

[34] The appellant also relied before us on two provisions from the POA, ss. 141(3) and (4), that the prosecutor failed to draw to the application judge's attention, and that the application judge failed to consider.

[35] The appellant maintains that s. 141(3), a privative clause, deprived the application judge of the jurisdiction to grant *certiorari* from an appealable order made in a POA trial. The appellant argues that the disclosure order was appealable and therefore should not have been the subject of a *certiorari* order.

[36] The appellant also argues that s. 141(4) required the application judge to deny a *certiorari* order unless she made a finding that a substantial wrong or

miscarriage of justice occurred. He says she erred by issuing a *certiorari* order without making such a finding.

[37] The appellant also challenges the correctness of the order itself. He says that the application judge erred by concluding that relevant user manual excerpts are not caught by first party disclosure obligations.

[38] Finally, the appellant contends that the application judge erred by finding his ability to view the 2010 GHD user manual in the prosecutor's office constituted disclosure.

[39] The prosecutor argues that not only was this sufficient disclosure, so too was the provision to Mr. Thoma of the 2008 GHD user manual.

[40] The issues on appeal can therefore be stated as follows:

1. Did the application judge err in granting a *certiorari* order without a jurisdictional error, contrary to POA, s. 140(1)?
2. Did the application judge err in failing to consider the privative clause in POA, s. 141(3)?
3. Did the application judge err in granting *certiorari* without considering whether a substantial wrong or miscarriage of justice had occurred, as required by POA, s. 141(4)?

4. Did the application judge err in finding that user manual directions for the testing and operation of a speed measuring device relied on by the prosecutor are not subject to first party disclosure?
5. If user manual excerpts pertaining to testing and operation are subject to first party disclosure, was disclosure adequately made by the prior delivery of a user manual to the appellant's representative, or by making the user manual available for viewing?

ANALYSIS – THE AVAILABILITY OF *CERTIORARI*

[41] The appellant challenges the availability of *certiorari* to quash the disclosure order made by the justice of the peace at the outset of the appellant's trial. The challenge is grounded on the decision by the application judge to grant *certiorari* in the absence of a jurisdictional error, and the alleged failure of the application judge to consider and give effect to two provisions of the POA which limit the availability of *certiorari* to quash convictions, orders, and rulings:

- i. the privative clause in s. 141(3); and
- ii. the proviso in s. 141(4).

A. THE GOVERNING PRINCIPLES

[42] The principles that control our decision on the availability of *certiorari* to quash the order of the justice of the peace include both statutory provisions and common law limitations that apply.

[43] We begin with the common law.

(1) *Certiorari* as a Common Law Remedy

[44] At common law, *certiorari* is one of several extraordinary remedies issued by the superior court to superintend the process of courts of limited jurisdiction, ensuring that those courts do exercise their jurisdiction but do not exceed its limits. In more modern times, the extraordinary remedies involve the issuance of orders in lieu of the old prerogative writs. These remedies are discretionary. They do not issue as of right: *R. v. Arcand* (2004), 73 O.R. (3d) 758 (C.A.), at para. 13; *R. v. Johnson* (1991), 3 O.R. (3d) 49 (C.A.), at p. 53; and *R. v. 1353837 Ontario Inc.* (2005), 74 O.R. (3d) 401 (C.A.), at para. 19.

[45] Where a party to a proceeding seeks *certiorari*, *certiorari* lies only for jurisdictional errors, which include denials of natural justice or procedural fairness: *R. v. Awashish*, 2018 SCC 45, at paras. 20, 23; and *1353837 Ontario Inc.*, at para. 13.

[46] In addition to the limitations inherent in *certiorari* as a discretionary remedy confined to jurisdictional errors, further impediments limit its availability when what an applicant seeks is an order quashing a pre-trial ruling: *1353837 Ontario Inc.*, at paras. 14-20.

[47] Faced with an adverse pre-trial ruling said to involve jurisdictional error, a party should generally await final disposition of the proceeding and, if adverse,

appeal that disposition, asserting error in the pre-trial ruling as a ground of appeal. Depending upon the applicable rights of appeal, it may not be necessary for the appellant to demonstrate jurisdictional error or perhaps even legal error on appeal.

[48] As a general rule, we do not permit appeals from rulings on pre-trial or in-trial applications until proceedings have concluded with an adjudication on the merits. The same is true, generally at least, where the review mechanism invoked is *certiorari*. The reasons are familiar:

- i. to maintain the integrity of the trial process;
- ii. to avoid fragmentation or delay in the proceedings;
- iii. to allow for the development of a full record for appeal; and
- iv. to ensure the efficacy of the appeal process.

See, *Awashish*, at para. 10; *1353837 Ontario Inc.*, at paras. 21-23; *Johnson*, at pp. 53-54; and *Arcand*, at paras. 13-14. A party may nevertheless seek an order in lieu of *certiorari in limine litis* in exceptional circumstances, for example when a pre-trial ruling denies that party procedural fairness in a court of limited jurisdiction. But even in those circumstances, the superior court retains the discretion to deny the prerogative relief: *1353837 Ontario Inc.*, at para. 20.

[49] The policy considerations which underpin the general prohibitions we have just described apply equally to proceedings under the POA: *1353837 Ontario Inc.*, at para. 23; and *Arcand*, at para. 14.

[50] It is uncontroversial that, under the POA, applications for *certiorari* are rarely granted. The reasons are two-fold. First, most erroneous pre-trial or in-trial rulings are errors made within jurisdiction. Errors of law made in the exercise of jurisdiction do not become jurisdictional error just because one of the parties confers this characterization upon them. On *certiorari* review, the issue is not the correctness of the ruling, but rather the authority to make it. Second, the extraordinary remedies are discretionary. That they do not issue as of right is a principle confirmed by the inclusion of s. 141(4) in the POA, as explained below.

(2) The Statutory Provisions

[51] Subsection 140(1) of the POA preserves the availability of *certiorari* “in respect of matters arising under this Act”:

140 (1) On application, the Superior Court of Justice may by order grant any relief in respect of matters arising under this Act that the applicant would be entitled to in an application for an order in the nature of mandamus, prohibition or certiorari. R.S.O. 1990, c. P.33, s. 140 (1); 2000, c. 26, Sched. A, s. 13 (5).

[52] The permissive “may” in s. 140(1) confirms the discretionary nature of the extraordinary remedies listed in the subsection. None issue as of right. The language of the subsection also makes it clear that although the extraordinary remedies, including *certiorari*, are available “in respect of matters arising under this Act”, their reach is no more expansive than it is in other contexts. Said somewhat differently, the relief available on *certiorari* under s. 140(1) is co-extensive with the relief available on *certiorari* otherwise.

[53] Subsection 140(1) tells us only part of the story about the availability of *certiorari* in respect of matters arising under the POA. Two provisions circumscribe the plenary language of s. 140(1).

[54] First, the privative clause in s. 141(3):

(3) No application shall be made to quash a conviction, order or ruling from which an appeal is provided by this Act, whether subject to leave or otherwise. R.S.O. 1990, c. P.33, s. 141 (3).

[55] Subsection 141(3) contains mandatory language – the imperative “shall”, not the permissive “may”. The subsection proscribes the use of *certiorari* to quash a conviction, order, or ruling where the POA provides a right of appeal from the conviction, order, or ruling, even if leave to appeal is required.

[56] In proceedings commenced by a certificate of offence under Part I or Part II of the POA, s. 135(1) of the Act confers a right of appeal from:

- i. an acquittal;
- ii. a conviction; or
- iii. a sentence.

The right of appeal is conferred on the defendant, the prosecutor, or the Attorney General by way of intervention. The appeal is to a judge of the Ontario Court of Justice. Leave to appeal is not required: POA, s. 135(1).

[57] Together, ss. 135(1) and 141(3) of the POA limit the availability of *certiorari* and provide a right of appeal instead. However, while s. 135(1) only provides a

right of appeal for “an acquittal, conviction or sentence”, s. 141(3) makes *certiorari* unavailable for any “conviction, order or ruling” that can be appealed. Because both provisions refer to convictions, convictions cannot be challenged by way of *certiorari*. *Certiorari* is also unavailable for an acquittal or a sentence, but seemingly no other orders or rulings.

[58] Subsection 141(4) imposes a second limitation on the availability of *certiorari* as a review mechanism. The subsection provides:

(4) On an application for relief in the nature of *certiorari*, the Superior Court of Justice shall not grant relief unless the court finds that a substantial wrong or miscarriage of justice has occurred, and the court may amend or validate any decision already made, with effect from such time and on such terms as the court considers proper. R.S.O. 1990, c. P.33, s. 141 (4); 2000, c. 26, Sched. A, s. 13 (5).

[59] In mandatory language, s. 141(4) limits *certiorari* relief to cases in which the reviewing court finds that a substantial wrong or miscarriage of justice has occurred. The subsection also invests the reviewing court with broad discretionary powers to amend or validate any decision already made, with effect from any time and on any terms the reviewing court considers proper.

[60] A final point concerns the authority of a justice of the peace sitting as a provincial offences court to make a disclosure order. As under Part III of the POA, a justice of the peace sitting as a provincial offences court under Part I or Part II of the Act is entitled to determine questions of relevance, materiality and admissibility of evidence and has the authority to grant or refuse to make disclosure orders:

York (Municipality) v. Irwin, 2017 ONCA 906, 68 M.P.L.R. (5th) 179, at para. 7; and 1353837 *Ontario Inc.*, at para. 18.

B. THE PRINCIPLES APPLIED

[61] For a variety of reasons, although POA, s. 141(3) is not contravened here, we are satisfied that the application judge erred in concluding that the extraordinary remedy of *certiorari* was available in the circumstances of this case to quash the disclosure order made by the justice of the peace.

[62] To be fair to the application judge, we are not at all satisfied that the parties or the intervener who appeared before her properly apprised her of the several common law and statutory limitations that curtailed the availability of *certiorari* in this case.

[63] We begin with a proposition that we regard as well-settled: the justice of the peace, sitting as a provincial offences court, had the jurisdiction to determine disclosure issues and to grant or deny disclosure orders. It follows, in our view, that the justice of the peace had the jurisdiction to determine whether the disclosure sought fell within the first party or third party disclosure regime. The jurisdiction of the justice of the peace to determine these disclosure issues was not dependent upon the correctness of her decision. She might be right. She might be wrong. Jurisdiction and the correct exercise of it are not the same thing.

[64] *Certiorari* is an extraordinary remedy, which issues from the superior court to ensure that courts of limited authority, such as the provincial offences court, do not exceed their limited jurisdiction. Provided courts of limited jurisdiction do not exceed the scope of their authority, *certiorari* is not available to the parties to a proceeding to control the manner in which the authority is exercised. As indicated, POA, s. 140(1) imports this limitation so that it applies “under this Act”.

[65] The prosecutor argues, to the contrary, that since POA, s. 141(2.1) allows orders to be obtained requiring trials to proceed pending an application for a *certiorari* order, the POA contemplates parties bringing interlocutory applications for *certiorari* orders to quash non-jurisdictional errors. We disagree. Subsection 141(2.1) of the POA says nothing about when interlocutory applications are proper. It signals no more than what it says – where interlocutory applications for relief in the nature of *mandamus*, prohibition or *certiorari* are brought, the superior court may order that the trial continue in the meantime.

[66] Second, the application judge does not appear to have been apprised or to have appreciated that the extraordinary remedy of *certiorari* should be granted only rarely under the POA. For the most part, erroneous pre-trial rulings, such as those relating to disclosure, are errors of law within jurisdiction, at least where the errors do not have a fundamentally important impact on the fairness of the proceedings. Errors within jurisdiction are appealable at the end of the trial as part of an appeal from acquittal, conviction, or sentence.

[67] Third, the application judge appears not to have been mindful of the firmly established principle that, absent exceptional circumstances, a superior court ought not to exercise extraordinary remedy jurisdiction where the application is brought in the course of ongoing proceedings. This principle, which sets its face against *in limine litis* applications, is rooted in sound policy considerations. Avoidance of delay and fragmentation of the trial process. Determination of issues on an inadequate record. Expenditure of judicial time and effort on issues which may not have arisen had the trial process been left to run its course.

[68] Fourth, the application judge failed to consider the injunction against relief on *certiorari* imposed by s. 141(4) of the POA. The remedy is only available where the order under review has caused a substantial wrong or miscarriage of justice. The disclosure order made here falls well short of the standard required to overcome the bar put in place by s. 141(4).

[69] These reasons are sufficient to set aside the application judge's decision and to reinstate the disclosure order made by the justice of the peace. But we prefer not to rest our decision on this ground alone after hearing full argument on the substantive question from the parties and an intervener on an issue of significance in the prosecution of speeding offences across the province.

ANALYSIS – DISCLOSURE

A. THE GOVERNING PRINCIPLES

[70] To be eligible for disclosure, information and material must be relevant. There are different modes of achieving disclosure, and the relevance inquiry operates in modestly different ways between them. What is common to each disclosure mechanism is that if the information or material lacks logical relevance, no right of disclosure will exist.

[71] There are two general categories of disclosure.

[72] “First party disclosure” refers to information or material the Crown is obliged, on request, to deliver to the defendant without the need for an application to the court. Material will be subject to first party disclosure only if it is “in the possession or control of the prosecuting Crown”: *R. v. Gubbins*, 2018 SCC 44, at para. 33.

[73] If the accused wishes to compel the production of information that does not qualify for first party disclosure, it must bring a successful “third party disclosure” application, resulting in an order to have the third party produce the information. Mechanistically, this is achieved by serving notice on the third party record holder along with a subpoena requiring the target information to be brought to court so that it will be within the control of the court if production is ordered after a third party records hearing.

[74] In *Gubbins*, Rowe J. discussed two ways that information can become subject to first party disclosure, thereby avoiding the need, delay, expense and formality of a third party record application, namely (1) as the “fruits of the investigation”, or (2) as “obviously relevant” information: at para. 33. They are the disclosure mechanisms most directly at issue here.

(1) The Fruits of the Investigation

[75] The most familiar first party disclosure mechanism, developed in *R. v. Stinchcombe*, [1991] 1 S.C.R. 326, relates to the “fruits of the investigation”. Pursuant to *Stinchcombe*, the prosecuting Crown is obliged, on request, to disclose all relevant information in its possession or control relating to the investigation against a defendant.

[76] As explained in *Jackson*, at paras. 93, 95, the “fruits of the investigation” “posits a relationship between the subject-matter sought and the investigation that leads to the charges against an accused”. “This information is generated or acquired during or as a result of the specific investigation into the charges against the accused”: *Gubbins*, at para. 22.

[77] It does not matter whether the Crown intends to rely on the fruits of the investigation at trial. The disclosure obligation includes “not only information related to those matters the Crown intends to adduce in evidence against the accused, but also any information in respect of which there is a reasonable

possibility that it may assist the accused in the exercise of the right to make full answer and defence”: *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, at para. 17.

[78] Still, the disclosure obligation does not encompass all things that fall into the fruits of the investigation basket. It does not extend to information in the Crown’s possession that is clearly irrelevant, privileged, or the disclosure of which is otherwise governed by law: *McNeil*, at para. 18.

[79] Even though this first party disclosure obligation is confined to information possessed by the prosecutor, it cannot be defeated by leaving the fruits of the investigation in the hands of the investigating police force. As Charron J. explained in *McNeil*, at para. 14:

The necessary corollary to the Crown’s disclosure duty under *Stinchcombe* is the obligation of police (or other investigating state authority) to disclose to the Crown all material pertaining to its investigation of the accused. For the purposes of fulfilling this corollary obligation, the investigating police force, although distinct and independent from the Crown at law, is not a third party. Rather, it acts on the same first party footing as the Crown.

[80] She further explained, at para. 18, that the Crown has limited, reviewable discretion relating to the disclosure it makes: “The Crown retains discretion as to the manner and timing of disclosure where the circumstances are such that disclosure in the usual course may result in harm to anyone or prejudice to the public interest.”

(2) Obviously Relevant Information possessed by the Investigating Police Force

[81] *McNeil* dealt with the disclosure of police disciplinary records. Justice Charron held for the court, at para. 53, that “where the disciplinary information is relevant, it should form part of the first party disclosure package”. She based this conclusion on the obligation of the investigating police force to participate in the disclosure process by ensuring that the Crown has all relevant information in its possession, including information relevant to the credibility of witnesses.

[82] Since relevant disciplinary information is not typically found in the investigative file for the charges the accused is facing, Charron J. did not impose an unrealistic obligation on the investigating police force to scour all of its other records for potentially relevant information. She provided a more workable standard. She said, at para. 59, that “[w]here the information is obviously relevant to the accused’s case, it should form part of the first party disclosure package to the Crown *without prompting*” (emphasis in the original).

[83] Although *McNeil* dealt with police disciplinary records, this disclosure obligation applies to all obviously relevant information or material possessed by the investigating police force, not just obviously relevant police discipline information. This follows not only as a matter of principle. It finds support in

direction provided by Karakatsanis J., for the court, in *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 12:

In *R. v. McNeil* ... [t]his Court ... recognized that police have a duty to disclose, without prompting, “all material pertaining to the investigation of the accused” as well as other information “obviously relevant to the accused’s case”. [Citations omitted.]

[84] The phrase “obviously relevant” “represents a comment on the obvious nature of the relevance of the record in the case”: *Jackson*, at para. 125; see also *Gubbins*, at para. 23. It does not describe a higher degree of relevance, since there is no such thing. Relevance exists if evidence has some logical tendency to make a material proposition more or less likely: *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600, at para. 47. The term “probative value” is used to describe how compelling the relevant inference is. *McNeil* called for “obviously relevant” information, not obviously probative information.⁴ As Rowe J. explained in *Gubbins*, at para. 23, “this phrase simply describes information that is not within the investigative file, but that would nonetheless be required to be disclosed under

⁴ If a *Charter* remedy is sought because of non-disclosure, the probative value of non-disclosed information takes on importance because a *Charter* remedy depends on showing that there was a reasonable possibility that the failure to disclose affected the outcome at trial or the overall fairness of the trial process: *R. v. Taillefer*, *R. v. Duguay*, 2003 SCC 70, [2003] 3 S.C.R. 307, at para. 71. Probative value also features large in third party records applications. Here, we are speaking solely of first party disclosure obligations and of requests to obtain first party disclosure.

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."

[85] In context, the "without prompting" reference means that there should be no need for the accused to bring a third party record application to secure obviously relevant information in the hands of the investigating police force. Once the investigating police force supplies the information to the Crown, it "should be turned over to the defence in compliance with the Crown's *Stinchcombe* obligation of disclosure": *McNeil*, at para. 58.

[86] This is so notwithstanding that the information "may not fall fairly within the ordinary sweep of 'fruits of the investigation'": *Jackson*, at para. 116. Information that is "'obviously relevant' to the defence case may need to be rustled up by the police, provided to the Crown and disclosed to the defence": *Jackson*, at para. 116. Provided, of course, that the obviously relevant information is not privileged or subject to statutory disclosure regimes.

(3) Other Relevant Information in Possession of the Prosecuting Crown

[87] There is a third way in which information can become subject to first party disclosure obligations, namely, where it is relevant and comes into the possession of the prosecuting Crown.

[88] In *McNeil*, Charron J. recognized as much. She was addressing cases where the Crown is put on notice of the existence of other relevant information in

the hands of other Crown agencies or departments, including the investigating police force. She said that in such cases the prosecuting Crown has a duty to inquire about that relevant information and to obtain it if reasonably feasible to do so: *McNeil*, at para. 49.

[89] This obligation was described by Karakatsanis J. in *Quesnelle*, at para. 12, this way:

In *R. v. McNeil* ... this Court recognized that the Crown cannot merely be a passive recipient of disclosure material. Instead, the Crown has a duty to make reasonable inquiries when put on notice of material in the hands of police or other Crown entities that is potentially relevant to the prosecution or the defence.

[90] As this passage makes plain, this obligation exists because the Crown is not an ordinary litigant, but a minister of justice, “duty-bound to seek justice, not convictions, and to avoid wrongful convictions, in the prosecutions of all offences”: *Quesnelle*, at para. 18. It owes this duty as an officer of the court unless the notice it receives appears unfounded: *McNeil*, at para. 49.

[91] The prosecuting Crown’s duty to request relevant information from other Crown agents does not undermine the separation of the Crown and other Crown agents. The other Crown agents are not under an enforceable, reciprocal legal duty to hand over information that the Crown inquires about and asks for that is not the fruits of the investigation or obviously relevant. Quoting *R. v. Arsenault*

(1994), 153 N.B.R. (2d) 81 (C.A.), at para. 15, Charron J. made plain in *McNeil*, at para. 49, that if the Crown is denied access after making a good faith effort to secure such information it is to advise the defence that the request was denied. The accused's remedy is not against the Crown. Instead, it should pursue a third party record application.

[92] It follows from the *McNeil* decision that if the Crown receives the information it requested, it is to act as gate-keeper. If the information is relevant and not privileged or covered by a statutory disclosure regime, the Crown must make first party disclosure of that information to the defence.

(4) The Manner of Disclosure

[93] Ordinarily, disclosure is achieved by providing photographs, photocopies or electronic copies of documents or things capable of reproduction: *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions*, the Hon. G. Arthur Martin, Chair (Ontario: Queen's Printer, 1993), at pp. 234-35, 470-72, recommendation 41.12 (the "Martin Report"). This is arguably what Sopinka J. envisaged in *Stinchcombe* when he spoke, at p. 338, of "[p]roduction to the defence". Yet some things, such as pornographic images of children, should not be copied. Other information may be too sensitive to lose control over. In these exceptional cases, where it is in the interests of justice to do

so, inspection by the defence may have to do: *R. v. Blencowe* (1997), 35 O.R. (3d) 536 (Gen. Div.), at p. 44.

[94] The Crown therefore has discretion as to the manner in which disclosure is made. That discretion is not unbridled. The first principle is that disclosure must be meaningful, in the sense that it is adequate to enable the accused to make full answer and defence: *R. v. Pan*, 2014 ONSC 4645, 2014 CanLII 74050, at paras. 72-75. This requires that disclosure must be accessible. The disclosed information must be capable of identification and the disclosure must enable proper trial preparation: *R. v. Dunn* (2009), 251 C.C.C. (3d) 384 (Ont. S.C.). To enable full answer and defence, the accused must also have the means to access the disclosed information in court, as needed.

(5) First Party Disclosure under the *Provincial Offences Act*

[95] The prosecutor conceded before us that first party disclosure obligations apply to POA prosecutions. Although the *Stinchcombe* obligation was created in an indictable offence prosecution, the prosecutor was correct to make the concession it did. It is non-contentious that full-blown *Stinchcombe* obligations apply in the summary prosecution of criminal offences. Similarly, although this court has not ruled directly on the question⁵, the obligation to make first party

⁵ In *1353837 Ontario Inc.*, a justice of the peace denied cross-examination sought in aid of a *Stinchcombe* disclosure application. A *certiorari* application was brought and granted on the basis that this was a jurisdictional error. This court allowed the appeal, setting aside the *certiorari* order. The appeal proceeded

disclosure in POA prosecutions appears to be non-controversial: *Bruce (County) v. Kramer* (2007), 31 M.P.L.R. (4th) 79 (Ont. S.C.); and *Ontario (Ministry of the Environment) v. Sault Ste. Marie (City)* (2007), 34 C.E.L.R. (3d) 123 (Ont. S.C.). It does not matter whether the defendant's life, liberty or security of the person is at risk. The obligation on the Crown to make first party disclosure is supported by ss. 7 and 11(d) of the *Charter*, but does not depend on the *Charter*. *Stinchcombe* rested largely on the common law right to make full answer and defence, which is provided for in POA, s. 46(2).

[96] There is Ontario Court of Justice authority that while *Stinchcombe* disclosure applies, it should be "simple and brief" given the distinction recognized in POA, s. 2 between POA and criminal matters. In other words, disclosure obligations should be less extensive and comprehensive in POA matters than they are in criminal cases. The leading decision is *Durham (Regional Municipality) v. Driscoll-Rogers*, 2008 ONCJ 581. The prosecutor asked us to bear this in mind, given that this case involves a Part I prosecution of a speeding violation. The prosecutor did not provide any specific guidance on what that should mean for the disclosure obligations that apply.

on consensus that *Stinchcombe* disclosure obligations applied. In *Ontario v. 974649 Ontario Inc.* (1998), 42 O.R. (3d) 354 (C.A.), and *R. v. Ul-Rashid*, 2014 ONCA 896, 70 M.V.R. (6th) 181, the Crown conceded before this court that it had failed to make proper *Stinchcombe* disclosure.

[97] We do not need to resolve whether the nature and intensity of disclosure obligations differ between criminal cases and POA traffic prosecutions to resolve this appeal, and choose not to do so in the absence of full argument.⁶ We explain below that the information sought to be disclosed was obviously relevant, and capable of easy disclosure. In our view, even if the low end nature of this prosecution promotes limits on the disclosure obligations that apply, those limits would not apply here.

B. WAS THE MATERIAL SOUGHT RELEVANT?

[98] The prosecutor argued in this case that the application judge did not err in denying first party disclosure to the appellant because the user manual excerpts the appellant seeks are not relevant, and absent relevance, no right of disclosure can exist.

[99] We disagree. In our view, a manufacturer's testing and operating procedures for a speed measuring device are relevant and must be disclosed. By presenting the results obtained by a speed measuring device, the prosecutor is necessarily representing that those results are a reliable measure of vehicle speed. Evidence

⁶ It should be pointed out, however, that we do not read the Martin Report the same way it was read in *Durham*. *Durham* interpreted the Martin Report's reference to "simple and brief" disclosure as saying that disclosure can be less comprehensive in POA matters, than in criminal cases. In fact, the Martin Report's recommendation 36 is that "the nature and extent of disclosure should not vary based on whether the charge was prosecuted by way of indictment, summary conviction procedure, or prosecuted under the *Provincial Offences Act*". When the Martin Report referred to disclosure in POA matters being "simple and brief", the Committee was doing no more than predicting what full disclosure is apt to look like in simple prosecutions.

that has a logical tendency to cast doubt on that claim is therefore relevant. The question is whether information about the manufacturer's testing and operating procedures is relevant in challenging the prosecutor's necessary and implicit claim that the speed measurement is reliable.

[100] In our view, this cannot reasonably be contested. Testing and operating procedures are provided precisely so that users can accomplish what the device is designed to accomplish, in this case, to provide an accurate measure of speed. If testing and operating procedures are not complied with, it may cast doubt on the integrity of the results. Naturally, compliance with testing and operating procedures cannot be determined unless those testing and operating procedures are known. Hence, the relevance for disclosure and production purposes of the manufacturer's testing and operating procedures for a speed measuring device that is relied on in the prosecution of a case.

[101] Not surprisingly, evidence about compliance with manufacturer's testing and operating procedures for speed measuring devices has been used on numerous occasions both to undercut and support a prosecution that depends on the accuracy of a speed measurement: see, for example, *R. v. Kololgi*, [2009] O.J. No. 5742 (C.J.); *R. v. Tran* (17 February 2005), Toronto (Ont. C.J.); *R. v. Siu* (2 November 2000), Cambridge File No. 44619990061543 (Ont. C.J.); *R. v. Dischiavi* (15 December 2017), Brampton Cert. No. 6379534B (Ont. C.J.); *R. v. Barnes* (12 August 2011), Kitchener File No. 4461 999 3078166A 00 (Ont. C.J.); *R. v. Hofland*,

2011 ONCJ 40; *R. v. Puncher*, 2007 ONCJ 274; *R. v. Sidhu* (27 October 2011), Kenora File No. 4650446A (Ont. C.J.); *R. v. Asgharzadeh* (4 July 2001), Whitby File No. 2860 999 00 63650776 (Ont. C.J.); and *R. v. He* (20 June 2002), Whitby File No. 2860 999 00 65107447 (Ont. C.J.).

[102] In support of its argument that testing and operating procedures for speed measuring devices are irrelevant, the prosecutor relied primarily on the decisions in *R. v. Bigioni*, [1988] O.J. No. 2220 (C.A.), and *R. v. Chair*, 2015 ONCA 868. These decisions recognize that a *prima facie* case of speeding will be made out if the officer testifies that he was qualified to use the speed measuring device, tested the device, and that it measured the defendant's speed accurately. A *prima facie* case does not require proof of how the machine was tested, or whether testing complied with the manufacturer's standards. The prosecutor contends that this makes the manufacturer's user manual irrelevant.

[103] We are not persuaded. These cases do not demonstrate the irrelevance of the manufacturer's testing and operating procedures for a speed measuring device. A case is a "*prima facie*" case precisely because it is not conclusive. It is subject to rebuttal by relevant evidence.

[104] The presiding justice of the peace recognized as much in *Bigioni*. After finding a *prima facie* case he said, "if anybody wants to challenge the officer as to how [the speed measuring device] was tested, if the method was done correctly,

then that is their prerogative”: *R. v. Bigioni*, [1986] O.J. No. 2753 (Prov. Off. Ct.), at para. 88.

[105] The prosecutor also argues that *Jackson* and *Gubbins* establish that the user manual excerpts sought in this case are irrelevant. In our view, they do not do so because those cases are different from the one before us. Mr. Jackson and Mr. Gubbins sought disclosure of historical records relating to the performance of an approved instrument on other occasions. Yet the material issue in those cases was how the approved instrument performed when Mr. Jackson’s and Mr. Gubbins’s blood alcohol levels were being measured, not how the approved instrument performed on other occasions. Expert evidence confirmed that the historical data could tell nothing of that. In contrast, the user manual excerpts sought in this case describe how the speed measuring device was to be used when the speed of the appellant’s vehicle was being measured.

[106] Nor do we accept that because expert evidence was required by *Gubbins*, at para. 57, to demonstrate the relevance of the historical records of “approved instruments” for measuring blood alcohol content, expert evidence is also required to establish relevance in this case. *Gubbins* accepts that expert evidence is required to show the relevance of historical data because the link between the past performance of an instrument and its present functionality cannot be made by persons of ordinary experience. In contrast, it takes no expertise to recognize that the failure to test or operate a speed measuring device as it is designed to be

tested and operated has a logical tendency to impact on the reliability of the result obtained.

[107] The instructive analogy is not with the information about the historical functioning of approved instruments for measuring blood alcohol content. Rather, the instructive analogy is with proper operation of approved instruments for measuring blood alcohol content at the time they are being used to obtain the sample in issue. Even though the readings approved instruments generate are presumed by statute to be accurate by *Criminal Code*, s. 258(1)(c), that presumption can be rebutted by showing that the approved instrument was “operated improperly”, in other words, not in compliance with testing and operating procedures.⁷ Not surprisingly, cross-examination of qualified technicians about their compliance with testing and operating procedures is commonplace in blood alcohol cases, without expert evidence about the significance of a failure to comply.

⁷ This “approved instrument” analogy is not undermined by the fact that testing and operating procedures are defined, not directly by the manufacturer, but by the Alcohol Test Committee of the Canadian Society of Forensic Science. There is overlap between Alcohol Test Committee and manufacturer standards, since, to be approved, instruments must be manufactured to comply with Alcohol Test Committee standards: “Canadian Society of Forensic Science Alcohol Test Committee Recommended Operational Procedures”, Effective 2016 September 29, online: www.csfs.ca/wp-content/uploads/2016/05/2016-09-29-Operational-Procedures.pdf. Moreover, the Alcohol Test Committee relies directly on compliance with manufacturers’ testing and operating procedures: “Canadian Society of Forensic Science Alcohol Test Committee Recommended Operational Procedures”, Effective 2016 September 29, at I. Approved Instruments, para. 3 and II. Approved Screening Devices, para. 8.

[108] Finally, the prosecutor argues that speed measuring devices have internal controls which cause the devices to self-check when the Test button is pressed, and that this makes the testing and operating procedures irrelevant. We do not agree with this argument, either.

[109] First, the prosecutor's argument does not describe, with precision, the evidence that was before the application judge. The 2008 GHD user manual supplied to the application judge did require only that the Test button be pressed, but the evidence before her was that the 2010 GHD user manual requires operators to self-test the device prior to enforcement and at the conclusion of the officer's tour of duty. The application judge was also alerted that the affiant who presented this information was unaware whether the GHD user manual had been updated after 2010.

[110] More importantly, even presuming the 2010 information to be accurate, how is a person charged to know, without access to the testing and operating procedures, that the operator is supposed to press a test button prior to enforcement and again at the end of the officer's tour of duty? It may be that compliance with testing and operating procedures is a simple matter likely to be complied with by operators, but relevance for disclosure purposes is not to be determined by whether information is apt to be decisive in a case. It is to be determined by logical relevance alone, and, in our view, compliance with the

manufacturer's testing and operating procedures is logically relevant information, making those testing and operating procedures relevant for disclosure purposes.

C. WAS THE THIRD PARTY RECORD HOLDING WRONG?

[111] Did the application judge err in finding that user manual procedures for the testing and operation of a speed measuring device relied on by the prosecutor are not subject to first party disclosure? In our view, she did err in this regard.

[112] The application judge held that the user manual excerpts containing the testing and operating procedures were not the "fruits of the investigation" and therefore were not subject to first party disclosure under the authority in *Stinchcombe*. The prosecutor agreed, arguing that the user manual excerpts were not the fruits of the investigation and therefore not subject to first party disclosure. It also argued that the testing and operating procedures were not subject to *Stinchcombe* disclosure because they were not in the hands of the prosecuting Crown.

[113] We will return to the prosecutor's latter point shortly. Since *Gubbins* has been released, the appellant agrees with the prosecutor on the former point, conceding that the testing and operating procedures are not the fruits of the investigation. To qualify as the fruits of the investigation, information must be "generated or acquired during or as a result of the specific investigation into the charges against the accused": *Gubbins*, at para. 22. The appellant does not

contend that the relevant user manual excerpts were generated or acquired during or as a result of the investigation into the charges against the appellant.

[114] The application judge was therefore correct in finding that user manual excerpts of the testing and operating procedures are not the “fruits of the investigation”. She erred, however, in failing to recognize that the testing and operating procedures qualified for first party disclosure through the second branch described in *Gubbins*, as “obviously relevant” information. While not in the investigative file, this information was so inextricably linked to the speed measuring device used by the charging officer to identify the appellant’s alleged offence that it was “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”: *Gubbins*, at para. 23.

[115] In argument before us, the prosecutor tried to draw an untenable line to limit its first party disclosure obligations. It acknowledged that if there was evidence that the traffic officer actually consulted the user manual that day, the user manual would have played a role in the acquisition of the speed measurement and would have qualified for first party disclosure, but that absent such evidence, the user manual cannot be found to have played such a role. This is tantamount to arguing that a user manual that the manufacturer intends to be followed is subject to *Stinchcombe* disclosure only if that user manual has been followed. That would be a perverse result. The fact that the device that created the evidence of recorded

speed was designed to be used according to instructions links those instructions to the evidence, making those instructions subject to first party disclosure.

[116] There is a general principle at play that can be put this way. Information that plays a central role in the integrity of evidence gathered by a prosecutor in an investigation is obviously relevant and therefore subject to first party disclosure even though that information was not itself created, produced or located during the investigation.

[117] For this reason, since the inception of first party disclosure, *Stinchcombe* disclosure has routinely been made of a proposed expert witness's *curriculum vitae* even though the *curriculum vitae* has not been created, produced or located during the investigation.

[118] Certification documents for qualified technicians and evaluating officers also qualify for *Stinchcombe* disclosure on the same basis.

[119] Where a search warrant affiant makes claims about the reliability on other occasions of a confidential informant, information about the track record and prior relationship of the confidential informant may have to be disclosed, subject to informer privilege: *R. v. Bennett*, 2017 ONCA 780, 396 C.R.R. (2d) 306. This would be so whether that track record information was consulted during the investigation or not.

[120] Given the importance assigned by the law of evidence to the criminal records of material witnesses, they too must be disclosed on request, even though they are not created or produced during the investigation, and may be located during the investigation only because of the disclosure request: *R. v. Fiddler*, 2012 ONSC 2539, 258 C.R.R. (2d) 193, at paras. 44-46; *R. v. Kassam*, 2016 ONSC 6961, at para. 32; and see *McNeil*, at para. 54.

[121] *McNeil* now gives us the analytical tools needed to explain these longstanding disclosure practices, even though none of these things are the fruits of the investigation. Such information qualifies for first party disclosure because it is “obviously relevant”.

[122] In the same way, the manufacturer’s testing and operating procedures linked to a speed measuring device are central to the integrity of the reading secured by a traffic officer using that speed measuring device. They are therefore obviously relevant and subject to first party disclosure.

[123] As the result, even if the prosecuting Crown was not in possession of the user manual excerpts, as the prosecutor argued before us, the investigating police force was under a correlative obligation to furnish this information to the prosecutor so the prosecutor could fulfil its disclosure obligation to the appellant.

[124] As it happens, the prosecuting Crown was already in possession of the material that was the subject of the disclosure request. The prosecutor argued

before us that this was not shown to be so because it does not know whether the 2010 GHD user manual it held at the time was the latest edition when the appellant was seeking disclosure. No evidence was presented to confirm this claim. More importantly, the prosecutor invited the appellant to review the user manual it possessed in preparation for his trial, and argued in this court that the opportunity to review this manual satisfied the *Stinchcombe* disclosure obligation. The prosecutor cannot have it both ways. On the evidence, the application judge was correct in finding that the prosecutor possessed the user manual containing the excerpts the appellant sought.

[125] Naturally, the fact that the prosecutor had already secured this obviously relevant information before the appellant made his request does not defeat the appellant's right of access pursuant to *McNeil*. As we have explained, *McNeil* recognizes that even where a prosecutor obtains information that is simply relevant to the prosecution of a case, let alone obviously relevant, the Crown must make first party disclosure of that information to the defence. The prosecutor's possession in this case of the user manual excerpts simply saved the investigating police force the need to gather and deliver this information to the prosecutor for disclosure to the appellant.

[126] The application judge therefore erred. The user manual excerpts containing the testing and operating procedures were subject to first party disclosure obligations.

D. WAS THE FIRST PARTY DISCLOSURE OBLIGATION SATISFIED?

[127] Given that the user manual excerpts pertaining to testing and operating the device are subject to first party disclosure, was disclosure adequately made by the prior delivery of a user manual to the appellant's agent, or by making the user manual available for viewing? The answer to both questions is no. Neither of these mechanisms satisfied the prosecutor's disclosure obligation.

(1) Prior delivery of the 2008 GHD user manual was not sufficient

[128] The prior delivery of the user manual to the appellant's agent is insufficient to fulfill the prosecutor's disclosure obligation, even leaving aside that, on the evidence, the version of the GHD user manual provided to the appellant's agent was out of date. The prosecutor's disclosure obligation was owed to the appellant. That disclosure obligation cannot be discharged by disclosure on another occasion to another party. At the time the appellant's agent received the 2008 copy of the GHD user manual he was not the appellant's agent.

[129] The implication of the prosecutor's argument that the agent's prior possession of the user manual gave the appellant access to the relevant information is to transfer to the appellant's agent the prosecutor's obligation to furnish the relevant information to the appellant for use in his case. This is not appropriate.

(2) Inspection instead of production as not sufficient

[130] Nor was the prosecutor's invitation to view the user manual at the prosecutor's office sufficient. The first principle governing the manner of disclosure is that it be meaningful, in the sense that it be adequate to make full answer and defence. Disclosure of user manual instructions will be meaningful where the defendant can capture a precise record of the information. It will be meaningful if the information can be captured to be shared in consulting and preparing an expert witness, if necessary. And it will be meaningful if the defendant has access to a copy of that information during trial so that it can be used during the cross-examination of the traffic officer, or as an exhibit, if appropriate. This is not a case where the interests of justice require inspection instead of production.

(3) Website Disclosure

[131] Subject to one proviso, meaningful disclosure of relevant information from the user manual can be made simply and inexpensively. The prosecutor may post the relevant contents on its website, and then provide the URL to the specific webpage to defendants requesting disclosure. This form of disclosure is possible because the information is not case specific. It is general information suitable for a general mode of delivery.

[132] There is a proviso that must apply to generalized website disclosure such as this. If the prosecutor chooses to make disclosure in this way, but then contests

the authenticity of a printout that can be verified to have come from its website, it will not have provided meaningful disclosure. The defendant should be in no worse position for having printed the document from a website, than it would have been in had the prosecutor provided a hard copy.

CONCLUSION

[133] We would therefore allow the appeal, set aside the order of *certiorari*, and reinstate the disclosure order.

Released: *rw* DEC 21 2018

David ... *JA*

J.A.

I agree. Justice ... *JA*