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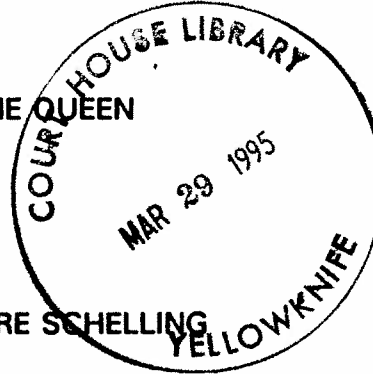
IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

JOSEPH MARCEL PIERRE SCHELLING



Respondent

Applicant

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Application for judicial stay of proceedings, and other relief, on the grounds of (a) lack of Crown disclosure, and (b) conflict of interest in Crown's office. Application for stay denied. Order granted, in part, re Crown disclosure. Request for costs denied.

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**REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.E. RICHARD**

Heard at Yellowknife, Northwest Territories  
September 29, 1994

Reasons filed: October 4, 1994

Counsel for Applicant: R.H. Davidson and V. Foldats  
 Counsel for Respondent: S.R. Creagh

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**REASONS FOR JUDGMENT**

1       The accused is charged with sexually assaulting the complainant in Yellowknife on March 18, 1994. He has elected trial by judge and jury in this court. The preliminary inquiry has yet to be held. The accused makes application in this court, through counsel, for various forms of relief, i.e., an order of prohibition directed to the Territorial Court, a judicial stay of proceedings, an order compelling Crown disclosure, and costs. This application was heard in Chambers on September 29, 1994. There is an order prohibiting publication or broadcasting of the evidence presented and submissions made on the application, and these reasons, pending final disposition of the charge against the accused.

2       The accused's application concerns two separate issues - firstly, Crown

disclosure, and secondly, an alleged conflict of interest in the offices of the Attorney General of Canada.

**CROWN DISCLOSURE:**

3

In 1991 the Supreme Court of Canada made a comprehensive statement of the Crown's obligation to disclose in R v. Stinchcombe 68 C.C.C. (3d) 1. Therein it was confirmed that there is a general duty on the part of the Crown to disclose all material it proposes to use at trial and especially all evidence which may assist the accused even if the Crown does not propose to adduce it. As to what should be disclosed, the Court stated that the general principle is that all relevant information must be disclosed subject to the reviewable discretion of the Crown. The Crown need not produce that which is clearly irrelevant. On any review by the trial judge of the exercise of the Crown's discretion, the guiding principle is that information ought not to be withheld from the accused if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence. The right of the accused to this disclosure is not itself a constitutional right - it is simply an adjunct of the accused's constitutional right to make full answer and defence. And the disclosure obligation on the Crown elaborated in the Stinchcombe decision is a continuous one, i.e., further disclosure must be made if and when additional information is received or becomes relevant.

Crown counsel on this application provided to the Court a copy of the present policy and guidelines of the office of the Attorney General of Canada with respect to pre-trial disclosure. Pertinent excerpts are as follows:

1. **Counsel appearing for the Attorney General of Canada in a criminal matter shall, on request, disclose to the accused, or counsel for the accused, the evidence on which the Crown intends to rely at trial as well as any evidence which may assist the accused, whether intended to be adduced or not. In all cases, whether a request has been received or not, Crown counsel shall disclose any evidence tending to show that the accused may not have committed the offence charged. This disclosure has two main purposes:**
  - (a) **to ensure that the accused knows the case to be met, and is able to make full answer and defence; and**
  - (b) **to encourage the resolution of facts in issue including, where appropriate, the entering of guilty pleas at an early stage in the proceedings.**

...
3. **On receiving a request, Crown counsel shall, as soon as reasonably practicable, provide disclosure in accordance with the principles outlined in paragraphs 1 and 2. In most cases, this will mean that the defence will be given at least the following:**
  - (a) **particulars of the circumstances surrounding the offence;**
  - (b) **copies of the text of all written statements concerning the offence which have been made by a person with relevant evidence to give; where the person has not provided a written statement, a copy or transcription of any notes that were taken by investigators when interviewing the witness; if there are no notes, a summary of the anticipated evidence of the witness;**
  - (c) **an appropriate opportunity to examine any electronically recorded statements of a witness to a person in authority;**
  - (d) **a copy of all written or recorded statements concerning the**

- offence which have been made by the accused to a person in authority; in the case of verbal statements, a verbatim account, where available, including any notes of the statement taken by investigators during the interview; if a verbatim account is not available, an account or description of the statement (whether the statement, in whatever form, is intended to be adduced or not);
- (e) particulars of the accused's criminal record;
  - (f) copies of all expert witness reports relating to the offence, except to the extent that they may contain privileged information;
  - (g) copies of all documents and photographs that Crown counsel intends to introduce into evidence during the case-in-chief for the prosecution, and an appropriate opportunity to inspect any case exhibits, whether Crown counsel intends to introduce them or not;
  - (h) a copy of any search warrant relied on by the Crown and, if intercepted private communications will be tendered, a copy of the judicial authorization or written consent under which the private communications were intercepted;
  - (i) a copy of the information or indictment;
  - (j) particulars of similar fact evidence that Crown counsel intends to rely on at trial;
  - (k) particulars of any procedures used outside court to identify the accused; and
  - (l) particulars of any other evidence on which Crown counsel intends to rely at trial, and any information known to Crown counsel which the defence may use to impeach the credibility of a Crown witness in respect of the facts in issue in the case.

5 In the present case defence counsel has requested from the Crown disclosure of certain documents and/or information in the possession of the Crown and/or police (the specifics of which I shall describe shortly). The Crown has declined to grant this disclosure on the grounds of non-relevance (and the Crown reserves the right to also refuse on the ground of privilege). Crown counsel confirms to the court, as an officer

of the Court, that in her view the requested documents (of which she has conducted an initial "mini-review") are not relevant to the pending charge against this accused. In my view, when an accused challenges the Crown's statement of no relevance, it is for the accused on an application such as the present one to "establish a reasonable possibility that the accused's right to make full answer and defence will be impaired". R v. Chaplin (1993) 145 A.R. 153 (Alta.C.A.).

6 Before describing the specific disclosure requests which have been denied by the Crown, I must first look at the facts and circumstances of the particular allegation against this accused. When reviewing the Crown's assertion of non-relevance, the court must consider and determine relevance in a factual context and not in a vacuum or theoretical scenario.

7 The following are the Crown allegations which led to this charge of sexual assault. The accused is a police officer and was on duty in Yellowknife on the evening in question. The complainant is an adult woman from the Dene community of Lutselk'e. On the evening in question she was drinking at a bar in Yellowknife and became intoxicated. At approximately 2.00 a.m., bar closing time, the accused was called to the bar to investigate an altercation. At one point shortly thereafter, the complainant entered the police vehicle driven by the accused, thinking she was getting a ride home. For the next while, the accused's supervisor and on-duty colleagues lost

radio contact with his vehicle. They became concerned and went looking for it. When other police members found the police vehicle at 3.00 a.m., both the accused and the complainant were in the vehicle.

8 The complainant says she was forced to perform oral sex. Police seized the accused's clothing pursuant to a search warrant. A D.N.A. expert will testify that the complainant's saliva was found on the crotch of the accused's clothing.

9 In a warned statement to police, the accused acknowledged that sexual activity occurred.

10 Those, then, are the circumstances of the charge, within which one must determine the relevance of the requested documentation/information.

11 Crown counsel says that she has examined the requested documentation/information in the context of the following possible "live" issues in these criminal proceedings:

- (a) consent
- (b) honest belief in consent
- (c) credibility of the complainant

- (d) validity of search warrant
- (e) validity of DNA evidence
- (f) admissibility of accused's statement.

Now, to the documentation/information requested by defence counsel. In the affidavit material filed on this application, the Court is provided with copies of correspondence between defence counsel and Crown counsel in recent months on the subject-matter of disclosure. In defence counsel's letters, and in his written brief filed on this application, there is an extensive list of requested documentation/information. At the time of the hearing of this application on September 29, counsel advised the court that the list had been considerably shortened. Some requests for disclosure have now been satisfied, others will be complied with in the near future. One specific matter, i.e., for an order compelling production of the complainant's medical records situate at Poundmaker Lodge in Alberta, was adjourned *sine die* at the request of defence counsel.

The focus of the remaining matters is that this complainant has also been a complainant in other sexual assault cases involving charges against men other than this accused.

Specifically, photostat copies of Informations sworn in 1991, attached as



exhibits to the accused's affidavit filed on this application, indicate the following:

- (1) On March 19, 1991 at Snowdrift (now Lutselk'e) one J.M. was charged with sexually assaulting the complainant in 1983 at Snowdrift. He elected trial by judge and jury. At the preliminary on September 4, 1991 the Crown offered no evidence and J.M. was discharged.
- (2) On March 19, 1991 one R.M. was charged with sexually assaulting the complainant in 1985 at Snowdrift. He elected trial by judge and jury. At the time set for the preliminary inquiry on September 5, 1991 the record indicates the charge was withdrawn by the Crown.
- (3) On September 4, 1991 one J.L. was charged with sexually assaulting the complainant in 1983 and in 1985 at Snowdrift. He elected trial by judge and jury. The record indicates that these two charges against J.L. were "discharged" at the time of the preliminary inquiry but no other information is provided.

Finally, there is yet another sexual assault file in which the complainant here

is the complainant there as well; however, this one is much more recent. In fact, the allegation is apparently of a sexual assault occurring in Yellowknife on March 17, 1994, i.e., the day on which the accused commenced the shift during which it is alleged he sexually assaulted the complainant.

16

The correspondence between counsel in recent months, entered in evidence on this application, indicates that it is the "contents of Crown files and police files" that is sought by defence counsel with respect to these other sexual assault charges. In defence counsel's written submissions filed on this application, these requests are worded as follows:

- (i) disclosure as to all other sexual assault related complaints made by the complainant against others and disposition of same;
- (ii) photostatic copies of all police investigation reports respecting other sexual assault related complaints made by the complainant as against others;
- (iii) the reason(s) why other sexual assault related complaints were not prosecuted to conclusion by the Crown;
- (iv) a photostatic copy of the Information together with all police reports and notes made by any police officer regarding the complainant's complaint that another person had sexually

assaulted her on or about March 16-18, 1994.

7 During oral argument defence counsel added one additional item to the list. Whereas earlier defence counsel had requested disclosure of the complainant's criminal record (Crown have indicated she has no criminal record) defence counsel now seeks disclosure of "any criminal charges against the complainant which were withdrawn, stayed, or resulted in an acquittal; whether any public mischief charges were laid; any internal documents or notes of discussions in that regard, and the results of these discussions." My notes indicate that Crown counsel did not specifically respond to, or address, this additional request during her oral submissions, and I am therefore unaware whether any such information or document exists in the possession or control of the Crown.

8 In summary, then, the defence wishes disclosure of the following items which the Crown have not heretofore provided and which the Crown says are not relevant to the within criminal proceedings:

- (1) all documentation and information in the possession of the Crown and police as to the circumstances of the sexual assault complaints made by this complainant against J.M., R.M. and J.L. in 1991 and of the disposition of those complaints.

- (2) all documentation and information in the possession of the Crown and police as to any criminal charges brought against this complainant which did not result in a conviction.
  
- (3) copies of the complainant's statements, police notes, police reports and the sworn information with respect to the complainant's allegation that she was sexually assaulted by another person (X) on or about March 16-18, 1994 at Yellowknife.

9 I will deal with this last item first, as in my view its relevancy is established by the proximity of time and place, and association with this accused. The affidavit evidence implies that it was a result of something stated by this accused to the police, during the course of the police investigation of the charge against himself, that led to the charge of the sexual assault against X. I would accordingly order that the Crown make disclosure to the defence of the documents described at item 3 above.

10 Item 2 appears to have as its focus the possibility that this complainant made false complaints in the past, and may have been subjected to pending or unsuccessful criminal charges in that connection. The Court is unable to determine relevance with regard to a theoretical possibility founded on conjecture. Chaplin, supra, at p. 159.

There is no evidence before me to give an air of reality to what amounts to speculation. On the evidence before me, item 2 is a pure fishing expedition. The accused has not established any reasonable possibility that his right to make full answer and defence will be impaired without this information.

21 Item 1 is somewhat more problematic. The defence says it will assert in these criminal proceedings that the Crown's main witness, the complainant, is a person who has a problem of alcohol abuse and with memory, i.e., in providing a consistent account of events. The defence wants to know if there is something in the unrelated 1991 files which will give the defence a foundation for its submission that this Crown witness has problems with her memory.

22 Also, the defence submits that it may want to advance any number of possible defence "theories". An example given during argument was the theory of the defence in R v. H.J.C. (1993) 87 C.C.C. (3d) 66 (Man.C.A.) wherein the defence theorized that the young complainant at the time of the alleged assault by her uncle was having a nightmare or "flashback" resulting in her believing that her uncle was committing an identical assault to that committed upon her by another relative some time earlier -- this theory being described as "transference" or "projection" in another case cited, R v. Blundon (1993) 84 C.C.C. (3d) 249 (Nfld.C.A.). Another possible theory which might be advanced is that this complainant has a pattern of fabricating false

allegations of sexual abuse against other men, a theory discussed in R v. Riley (1992) 11 O.R. (3d) 151 (Ont.C.A.).

23

In my respectful view, however, the defence has not established any foundation for these theories or any other theories that is related to the 1991 files. There is nothing to indicate that there is a reasonable possibility of anything in those 1991 files related to these theories, or any other defence theory. Those files are distinctly different from the context of the present criminal proceedings. The record indicates the complainant was in 1991 alleging sexual abuse by three men in her home community many years earlier.

24

It appears that the identity of the accused in the present case, as being the person seen with the complainant at the relevant time, is not in issue in the within criminal proceedings. Thus, it is unlikely to be seriously suggested that the complainant is confused about the identity of her alleged assailant.

25

Defence counsel submits that it is significant that these three charges of sexual assault in 1991, involving the same complainant, were unsuccessful. With respect, I disagree. I see no particular significance in the dismissals per se. Sexual assault charges, and other criminal charges, are dismissed by the courts of this jurisdiction virtually every week of the year, for valid and various reasons. It would be improper

to infer, without more, that the dismissals were because of false allegations by the complainant.

26 Finally, it is not enough to suggest that there may be something in the 1991 Crown or police files which will impact on the credibility of the complainant as a witness at the accused's trial. As was stated in R v. O'Connor (#2) B.C.C.A. May 16, 1994, invoking credibility "at large" is simply insufficient.

27 The accused has not established that there is a reasonable possibility that, without access to the 1991 Crown and police files, his right to make full answer and defence will be impaired.

28 For these reasons, I deny the accused's requests for disclosure of the documentation/information described as items 1 and 2 earlier in these written reasons.

29 My pre-trial decision herein on relevance does not, of course, bind the trial judge. As was stated in R v. O'Connor (#1) (1994) 89 C.C.C. (3d) 109 (B.C.C.A.) at p. 132 and R v. Mandeville [1993] N.W.T.R. 48 (N.W.T.S.C.) at p. 57, it is the trial judge who is ultimately called upon to make a discrete ruling on the issue of relevance as the evidence unfolds during the trial. The concept of relevance is that it is subject to the ebb and flow of the criminal proceedings.

CONFLICT OF INTEREST:

30 Two of the Snowdrift men who were charged in 1991 with sexually assaulting this same woman in Snowdrift in the mid-1980's retained as defence counsel in 1991 one Alan Regel, Barrister and Solicitor, of Yellowknife. At that time Mr. Regel was in the private practice of law, primarily engaged in criminal defence work. Today Mr. Regel is a full-time employee of the federal Department of Justice at its Regional Office in Yellowknife, primarily engaged in criminal prosecutions in the Northwest Territories on behalf of the Attorney General of Canada.

31 Ms. Shelagh R. Creagh, Barrister and Solicitor, member of the bar of Alberta and also of the bar of the Northwest Territories, who is general counsel employed by the federal Department of Justice at its Regional Office in Edmonton, Alberta, has been assigned by the Attorney General of Canada to prosecute the within criminal proceedings against the accused.

32 The accused's counsel raises the spectre of conflict of interest on the part of the Crown. Without saying so explicitly, the implication in defence counsel's submission is that it is Ms. Creagh who is in a position of conflict of interest, and that these criminal proceedings against the accused ought to be stayed so long as she (or presumably any other employee of the federal Department of Justice) has conduct of



the prosecution.

33 As I understand it, there are two specific arguments being advanced in support of this novel submission:

- (1) The complainant may perceive a conflict of interest inasmuch as the lawyer who three years ago defended individuals charged with sexually assaulting her is now in the employ of the same federal department as the lawyer assigned to prosecute the within criminal proceedings. This complainant may feel aggrieved if the within criminal proceedings result in an acquittal, and may successfully argue thereafter that the entire prosecution of the accused is voidable or void *ab initio* because of the alleged conflict.
  
- (2) The accused's perception is that the Crown's office will be reluctant to adhere to its usual policy of continuing only those prosecutions which have a reasonable prospect of resulting in a conviction but will instead prosecute the within case to the bitter end in any event lest anyone (including the complainant) think that Mr. Regel's presence in the employ of the Crown influenced

any decision to discontinue the prosecution. In short, he thinks the decision to prosecute him may be made for the wrong reasons.

34 I find no merit in either of these arguments. As to the former, no authority is cited for the proposition that a complainant can initiate a legal proceeding to set aside an accused's acquittal, on this ground or any other. It must be remembered that the complainant is not a "client" of the Crown --- she is a witness.

35 As to the latter argument, I note that in the accused's lengthy affidavit filed on the within application, he does not aver to any such perception. In any event the argument is founded on extended speculation and second guessing as to decisions being made within the inner sanctums of Ms. Creagh's office - decisions entirely within the purview of that office.

36 With all respect to these submissions (which curiously emanate from the accused, not the complainant), I see no conflict of interest, or the appearance of same, in Ms. Creagh prosecuting the within criminal proceedings.

37 I have been referred to the cases of MacDonald Estate v. Martin [1991] 1 W.W.R. 705 (S.C.C.) and R v. Doucet (1993) 86 C.C.C. (3d) 564 (Man.Q.B.)

(reversed on appeal April 12, 1994). The decision of the Supreme Court of Canada in MacDonald Estate is of assistance here, as it illuminates the competing values at play when a court is determining whether a disqualifying conflict of interest exists in a given case. Applying those principles to the present situation, I find no disqualifying conflict of interest.

38

The trial judge in Doucet found there was in that case a conflict of interest in the Crown's office in the province of Manitoba, and he stayed the criminal proceedings until such time as the Attorney General of Manitoba retained someone from outside the provincial department of justice to represent the Crown in the prosecution of Doucet. Quite apart from the fact that the trial judge was overruled by the Manitoba Court of Appeal, the facts in Doucet are distinctly different from the instant case.

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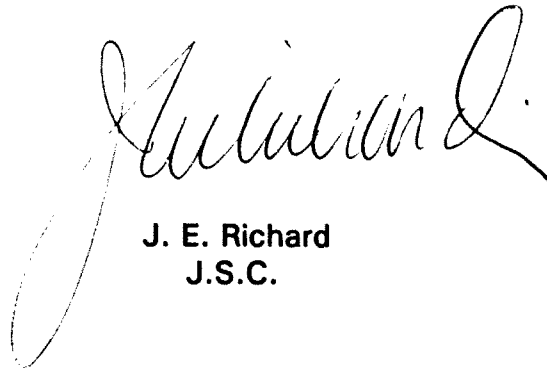
I have also been referred to various "legal ethics" opinions issued by the state bars of several of the United States of America; however I find that none of these are of assistance to the accused, as the factual circumstances of each of them are quite distinct from the present circumstances.

40

For the foregoing reasons, I find no conflict of interest as alleged.

**SUMMARY:**

41 No basis have been established on this application for the court to issue any order of prohibition directed against the Territorial Court or to grant a judicial stay of proceedings. An order will issue directing Crown disclosure to the extent stated in these reasons. The accused's request for costs is denied.

A handwritten signature in cursive script, appearing to read "J. E. Richard".

**J. E. Richard  
J.S.C.**

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