NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Public Prosecution Service) v. FitzGerald Estate*, 2015 NSCA 38

Date: 20150422
Docket: CA 429620
Registry: Halifax

Between:

Her Majesty the Queen in right of Nova Scotia
(Public Prosecution Service)

Appellant

v.

The Estate of Gordon Howard FitzGerald represented by his Executrices, L. Allison Jones and Kathleen D. FitzGerald

Respondents

Judges:	The Honourable Justices M. Jill Hamilton, Joel E. Fichaud and Cindy A. Bourgeois
Appeal Heard:	February 2, 2015, in Halifax, Nova Scotia
Subject:	Freedom of information and protection of privacy
Summary:	In 1980, Mr. FitzGerald was convicted of having non-consensual sex with a female client. In 1980, the Court of Appeal dismissed his appeal. In 1981, the Supreme Court of Canada denied leave to appeal. In 1982 and 1983, the Federal Minister of Justice twice refused to intervene under the former "mercy" provision in the *Criminal Code*. In 2009, Mr. FitzGerald applied under the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5 ("*Act*") for disclosure of the file material of Nova Scotia's Public Prosecution Service ("PPS") that related to his criminal proceedings and mercy applications. He wished to make another application to the federal Minister of Justice for review under s. 696.1 of the *Criminal Code*. The PPS

provided much of the information but withheld or redacted some documents, citing prosecutorial discretion under s. 15(1)(f) and unreasonable invasion of third parties' privacy under s. 20 of the *Act.*
Mr. FitzGerald appealed to the Supreme Court of Nova Scotia under 41(1) of the *Act*. The judge of the Supreme Court ordered unredacted disclosure of many additional documents. The judge significantly restricted the PPS's claimed exemption based on prosecutorial discretion and determined that the documents were not an unreasonable invasion of third parties' personal privacy. The judge held the view that disclosure under the *Act* should resemble *Charter*-based *Stinchcombe* disclosure in a criminal proceeding. The PPS appealed. Mr. FitzGerald was deceased, and the executrices of his estate responded.

Issues: Did the judge commit an appealable error in his interpretation and application of ss. 15(1)(f) [prosecutorial discretion] and 20 [unreasonable invasion of a third party's personal privacy]?

Result: The Court of Appeal allowed the appeal. The judge erred in law in his interpretation of ss. 15(1)(f) and 20, and by equating disclosure under the *Act* to *Stinchcombe* disclosure, and committed palpable and overriding errors of fact as to the contents of the documents.

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Judges:	Hamilton, Fichaud and Bourgeois, JJ.A.
Appeal Heard:	February 2, 2015, in Halifax, Nova Scotia
Held:	Appeal allowed without costs, per reasons of the Court
Counsel:	Agnes E. MacNeil and Debbie L. Brown for the Appellant
	The Respondents L. Allison Jones and Kathleen D. FitzGerald in person

Reasons for judgment of the Court:

[1] This is an appeal from an order of the Honourable Justice Gregory Warner under the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5 ("*Act*"). Mr. Gordon H. FitzGerald requested documents possessed by the Province's Public Prosecution Service ("PPS"). The PPS released many of the documents, but redacted some and withheld others. Under s. 41 of the *Act*, Mr. FitzGerald appealed to the Supreme Court of Nova Scotia. Justice Warner directed the release of documents that had been either withheld or redacted (2014 NSSC 183). In this Court, the PPS challenges that decision.

[2] Mr. FitzGerald passed away in May of 2014. His Estate, represented by his wife and daughter, actively contested the appeal, and submitted that this Court should uphold Justice Warner's decision.

[3] The submissions focused on whether the material may be withheld or redacted either as information used in the exercise of prosecutorial discretion or as personal information that would unreasonably invade the personal privacy of a third party.

1. Background

[4] The motions judge succinctly set out the factual background, spanning over 35 years:

> [2] Gordon H. Fitzgerald was charged with having sex without consent (rape) with a client in his law office on March 29, 1979. After a three-day preliminary in October 1979, in which 15 witnesses testified, and a five-day trial, commencing May 12, 1980, during which 12 crown witnesses and 15 defence witnesses testified, he was convicted. He was sentenced to five years imprisonment. He was released on parole after serving 10 months on September 17, 1981.
>
> [3] His appeal to the Nova Scotia Court of Appeal was dismissed on December 14, 1980. Leave to appeal to the Supreme Court of Canada was dismissed on April 6, 1981.
>
> [4] On June 2, 1981, Welsford G. MacArthur, Q.C., filed an application pursuant to then s. 617 of the *Criminal Code* for "the mercy of the Crown" on the basis that the appellant's conviction was a miscarriage of justice.
>
> [5] Mr. MacArthur filed several statutory declarations, documents and written submissions respecting the Appellant's alibi evidence and the complainant's

> credibility. The Federal Minister of Justice forwarded these materials to the Nova Scotia Department of Attorney General (Public Prosecution Service ("PPS")) and the Halifax Police Department on August 25, 1981, asking them to examine the materials and to respond to the application. The Department of the Attorney General responded.
>
> [6] On January 25, 1982, the Federal Minister of Justice declined to intervene or grant mercy.
>
> [7] On May 1982, Mr. MacArthur met with, and provided documents to, the Nova Scotia Deputy Attorney General for the purpose of having the complainant (victim) of the rape charged with perjury. On June 25, 1982, the Department of Attorney General determined that it would not do so.
>
> [8] About January 1983, Mr. MacArthur met with the new Federal Minister of Justice who agreed to review the mercy application for a second time.
>
> [9] In February 1983, the Nova Scotia Department of Attorney General received Mr. MacArthur's new submissions to the Federal Minister of Justice. On July 12, 1983, the Federal Justice Minister again declined to intervene or grant mercy.
>
> [10] In 2009, the Appellant filed applications under the *Act* with PPS for disclosure of its two files in respect of the criminal prosecution and mercy application. He received some disclosure.
>
> [11] On April 13, 2012, he filed another request under the *Act* for more disclosure. On June 12, 2012, more disclosure was provided but some was withheld. Mr. Fitzgerald appealed the withholding of information pursuant to s. 32(3) of the *Act* to the Nova Scotia Supreme Court. That appeal was eventually withdrawn. Instead Mr. Fitzgerald filed a request for a review by the FOIPOP review officer, first on August 17, 2012, and again on November 15, 2012.
>
> [12] The FOIPOP review officer conducted a review. This included many communications between her, the PPS and the Appellant. On September 20, 2013, the review officer released a report prepared pursuant to s. 39(1) of the *Act* recommending that PPS disclose the documents that PPS had not disclosed.
>
> [13] In its October 23, 2013, response, PPS did not accept the review officer's recommendation (s. 40 of the *Act*).

[5] Section 40 of the *Act* directs the head of the public body to either accept or decline the recommendations of the review officer. In Mr. FitzGerald's case, the PPS declined to follow the recommendations and instead maintained the PPS's view that many documents should be withheld or redacted.

[6] Under s. 41, Mr. FitzGerald appealed. Section 41(1) permits an appeal to the Supreme Court from a decision of the head of a public body respecting the

release, withholding or redaction of public records. Justice Warner heard the matter over three days in March and April, 2014 and issued a decision on May 15, 2014.

[7] Section 5(1) of the *Act* gives a "right of access to any record in the custody or under the control of a public body upon complying with Section 6". The PPS is a public body with custody or control of the documents in issue. The Respondents have followed the "procedure for obtaining access" in s. 6.

[8] Section 5(2) says that the right of access does not extend to information exempted by the *Act*, "but if that information can reasonably be severed from the record an applicant has the right of access to the remainder of the record". Similarly, s. 42(6) confirms that the Court "shall not order the head of the public body to give the applicant access to" an exempted record.

[9] The exemptions claimed by the PPS involved prosecutorial discretion, as provided by s. 15(1)(f), and the protection of third party personal information, governed by s. 20.

[10] The motions judge approached his task by organizing the matter into several parts. He dealt with a preliminary motion brought by the PPS to strike portions of the affidavit evidence filed on behalf of Mr. FitzGerald. His rulings in relation thereto are not challenged on appeal. The judge then determined that the matter before him ought to be heard on a *de novo* basis. That determination also is not challenged.

[11] Pursuant to ss. 42(1)(b) and 42(3) of the *Act*, the judge undertook, *in camera*, a full review of all documents redacted and withheld. The appropriateness of that approach was not challenged.

[12] The motions judge then turned to consider whether it would be an unreasonable invasion of any third party's privacy to release personal information which was redacted or withheld pursuant to s. 20. He ultimately concluded that none of the documents withheld or redacted fell within this exemption, and he ordered disclosure.

[13] Lastly, the motions judge considered whether the materials redacted or withheld fell within s. 15(1)(f) of the *Act*. He concluded that the PPS's claim under s. 15(1)(f) was much too broad. Although some of the withheld and

redacted documents fell within that exemption, the judge concluded that many did not, and he ordered their release.

[14] Later we will discuss the judge's analysis of ss. 20 and 15(1)(f).

[15] The PPS appealed to the Court of Appeal. This Court was given access to the withheld and redacted material. The Respondents were provided with the documents released by the PPS in redacted form.

2. Issues

[16] The PPS's Notice of Appeal and submissions raised the issues:

(1) Did the hearing judge err in his interpretation and application of s. 15(1)(f) of the *Act*?

(2) Did the hearing judge err in his interpretation and application of s. 20 of the *Act* in concluding that the release of third parties' personal information was not an unreasonable invasion of their personal privacy?

(3) Did the hearing judge err in his application of *Charter* principles relating to disclosure under the *Act*?

[17] We will discuss the second and third issues together.

3. Standard of Review

[18] This Court has long recognized that the standard of review for decisions arising under the *Act* is the same as in other civil matters (*O'Connor v. Nova Scotia (Priorities and Planning Secretariat),* 2001 NSCA 132). In *Cummings v. Belfast Mini-Mills Ltd.,* 2011 NSCA 56, Justice Farrar set out that standard:

> [14] The law on the standard of review was exhaustively considered by Saunders, J.A. in **McPhee v. Gwynne-Timothy**, 2005 NSCA 80. Those standards are:
>
> 1. For findings of fact and inferences drawn from facts, there must be a palpable and overriding error to warrant overturning a trial judge. An error is said to be palpable if it is clear or obvious. An error is overriding if, in the context of the whole case, it is so serious as to be determinative when assessing the balance of probabilities with respect to that particular factual issue. A high degree of deference is paid to a trial judge's findings (**McPhee**, **supra**, ¶ 32).

2. On questions of law the standard of review is one of correctness, the trial judge must be right (**McPhee**, **supra**, ¶ 33).

3. Findings of mixed law and fact are said to fall along a "spectrum of particularity". They involve applying a legal standard to a given set of facts and are to be reviewed according to the palpable and overriding error standard unless the alleged error of law can be isolated from the mixed question of law and fact. Where that occurs the isolated legal principle will attract a correctness standard (**McPhee**, **supra**, ¶ 33).

4. First Issue: Section 15(1)(f) - Prosecutorial Discretion

[19] Section 15(1)(f) states:

> **15 (1)** The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> **…**
>
> (f) reveal any information relating to or used in the exercise of prosecutorial discretion;

[20] The motions judge characterized the PPS's position with respect to s. 15(1)(f):

> [107] [The affidavit tendered by the PPS] essentially opines that everything in the Crown's file can be reasonably expected to reveal information related to or used in the exercise of prosecutorial discretion, and should therefore be exempt from disclosure pursuant to s. 15(1)(f) of the *Act*. Counsel for PPS reiterated in her oral submissions that this is PPS's position.

[21] The judge considered the meaning of "prosecutorial discretion" as used in s. 15(1)(f):

> [111] Prosecutorial discretion is not defined in the *Act*. PPS refers the Court to paras 20 and 21 in *Cummings* [*Cummings v. Nova Scotia (Public Prosecution Service*)], 2011 NSSC 38], a decision based on a FOIPOP application for the Crown's file by an accused in respect of two charges: one in which she was found not criminally responsible and a second which was withdrawn and therefore dismissed. Justice Wright accepted the definition in the BC FOIPOP legislation. In his view, this definition was consistent with the comments at paras 46 and 47 in *Krieger v Law Society of Alberta*, 2002 SCC 65.
>
> [112] *Krieger* was not a decision respecting FOIPOP legislation. It dealt with a Crown prosecutor's challenge to the jurisdiction of the Provincial Bar Society to

review his conduct in a case. In *Krieger*, the complaint involved the Crown's failure to disclose relevant exculpatory evidence to an accused.

[113] The Supreme Court confirmed the Law Society's jurisdiction to review the prosecutor's conduct. The Court held that conduct involving the exercise of prosecutorial discretion would not be reviewable, except in cases of flagrant impropriety. It articulated what did and did not constitute the exercise of prosecutorial discretion. The Court held that the prosecutor's conduct in *Krieger* did not constitute the exercise of prosecutorial discretion.

[114] Paragraphs 42 to 47 of *Krieger* describes what the exercise of prosecutorial discretion does and does not encompass as:

> D. Prosecutorial Discretion
>
> 42 In making independent decisions on prosecutions, the Attorney General and his agents exercise what is known as prosecutorial discretion. This discretion is generally exercised directly by agents, the Crown attorneys, as it is uncommon for a single prosecution to attract the Attorney General's personal attention.
>
> 43 "Prosecutorial discretion" is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence.
>
> 44 L'Heureux-Dubé J., in quoting David Vanek's work, "Prosecutorial Discretion" (1987-88), 30 Crim. L.Q. 219, at p. 219, said that "[p]rosecutorial discretion refers to the discretion exercised by the Attorney-General in matters within his authority in relation to the prosecution of criminal offences" (*Power*, supra, at p. 622).
>
> 45 As discussed above, these powers emanate from the office holder's role as legal advisor of and officer to the Crown. In our theory of government, it is the sovereign who holds the power to prosecute his or her subjects. A decision of the Attorney General, or of his or her agents, within the authority delegated to him or her by the sovereign is not subject to interference by other arms of government. An exercise of prosecutorial discretion will, therefore, be treated with deference by the courts and by other members of the executive, as well as statutory bodies like provincial law societies.
>
> 46 Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the *Criminal Code*, R.S.C. 1985, c. C-46, ss.

> 579 and 579.1; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether: *R. v. Osborne* (1975), 25 C.C.C. (2d) 405 (N.B.C.A.); and (e) the discretion to take control of a private prosecution: *R. v. Osiowy* (1989), 50 C.C.C. (3d) 189 (Sask. C.A.). While there are other discretionary decisions, these are the core of the delegated sovereign authority peculiar to the office of the Attorney General.
>
> 47 Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum.

[22] The motions judge disagreed with the PPS's argument that everything in its file could reasonably be expected to reveal information relating to or used in the exercise of prosecutorial discretion. Rather, referring to *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, he found that materials which indicated the steps taken in the investigation of an offence and which related to the preparation and conduct of litigation were not exempt from disclosure by virtue of s. 15(1)(f):

> [115] From *Krieger*, it is clear that prosecutorial discretion does not include every Crown action in the conduct of a criminal prosecution.
>
> [116] The Crown's submission that virtually all, if not all, of the criminal prosecution file relates to or is used in the exercise of prosecutorial discretion is not the law as described in *Krieger. The fact that the entire contents of the prosecution file may influence whether the Crown proceeds with a charge or what charges, or whether it stays a charge, or discontinues a prosecution, or determines what position to take with respect to sentence, does not protect from disclosure under s. 15(1)(f) the steps taken in the investigation of the offence, the preparation for trial, the conduct of the trial, the preparation for appeal and the conduct of the appeal.*
>
> [Emphasis added]

[23] He also found that material prepared for and provided to the PPS by Mr. FitzGerald's counsel and material that reflected the steps the PPS took in the

conduct of the proceedings to the extent they did not reflect its thought processes, were not exempt from disclosure under s. 15(1)(f):

> [122] Other documents redacted or withheld pursuant to s. 15(1)(f) were documents prepared for and provided to PPS by the Appellant's counsel, or were documents that reflected steps taken by PPS in the conduct of the proceeding and do not reflect the thought processes of PPS during the proceedings. PPS's claim for exemption from disclosing those documents is denied.

[24] Therefore, it appears the judge ordered disclosure of materials pursuant to s. 15(1)(f) on the basis they either (1) indicated the steps taken in the investigation of the offence, or (2) related to the preparation for and the conduct of litigation, except to the extent they reflected the thought processes of the PPS, or (3) were prepared for and provided to the PPS by Mr. FitzGerald's counsel.

[25] The question is whether he erred in doing so.

[26] We need only consider the material the judge ordered to be provided without redaction. As there is no cross-appeal, we need not consider the material that he ordered remain redacted or withheld.

[27] The judge identified the documents to be disclosed or provided without redaction by tab number in Appendix A to his reasons. We will identify them using the same tab numbers.

Analysis

[28] Section 15(1)(f) is to be interpreted according to the principles enunciated by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27:

> 21. Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

…

22. I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

[29] The stated purpose and objectives of the *Act* are set out in s. 2:

> **2.** The purpose of this Act is
>
> (a) to ensure that public bodies are fully accountable to the public by
>
> (i) *giving the public a right of access to records*,
>
> (ii) *giving individuals a right of access to, and a right to correction of, personal information about themselves*,
>
> (iii) *specifying limited exceptions to the rights of access*,
>
> (iv) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
>
> (v) providing for an independent review of decisions made pursuant to this Act; and
>
> (b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to
>
> (i) facilitate informed public participation in policy formulation,
>
> (ii) ensure fairness in government decision-making,
>
> (iii) permit the airing and reconciliation of divergent views;
>
> (c) to protect the privacy of individuals with respect to personal information about themselves held by public bodies and to provide individuals with a right of access to that information.
>
> [Emphasis added]

[30] This section indicates the purposes of the *Act* include giving the public the right of access to records and giving individuals access to personal information about themselves. It also indicates that the right to access information is subject to limited exceptions.

[31] Section 4(2)(i) provides that the *Act* does "not apply to … a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed".

[32] Section 4(3)(e) provides that the *Act* "does not … restrict disclosure of information for the purpose of a prosecution".

[33] Section 5 expressly confers on all persons a right of access to any record in the custody or under the control of a public body, except information exempted from disclosure pursuant to the *Act*.

[34] Section15(1)(f) is one of the exemptions referred to in ss. 2 and 5:

> **15 (1)** The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> …
>
> (f) reveal any information relating to or used in the exercise of prosecutorial discretion;

[35] By creating an exception to disclosure for information that could reasonably be expected to reveal information relating to or used in the exercise of prosecutorial discretion, the Legislature has ensured that the PPS's reasons for exercising prosecutorial discretion in a certain way are not subjected to interference.

[36] The phrase "prosecutorial discretion" is not defined in the *Act* as it is in its counterpart legislation in British Columbia. In *Cummings v. Nova Scotia (Public Prosecution Service)*, 2011 NSSC 38, Wright, J., refers to the British Columbia legislation:

> [20] The phrase "exercise of prosecutorial discretion" is not defined in our Act. That phrase is defined, however, in the counterpart legislation in British Columbia in the following terms:
>
> > "exercise of prosecutorial discretion" means the exercise by Crown counsel, or by a special prosecutor, of a duty or power under the Crown Counsel Act, including the duty or power
> >
> > (a) to approve or not to approve a prosecution,
> >
> > (b) to stay a proceeding;
> >
> > (c) to prepare for a hearing or trial,
> >
> > (d) to conduct a hearing or trial,
> >
> > (e) to take a position on sentence, and
> >
> > (f) to initiate an appeal;

> [21] In my view, this phrase should be similarly interpreted as it is used in our Act. Moreover, it is consistent with the comments of the Supreme Court of Canada in *Krieger v. Law Society of Alberta*, 2002 SCC 65 …

[37] In *Krieger*, para. 43, the Supreme Court of Canada described the phrase "prosecutorial discretion" as a term of art. A statutory term of art generally is presumed to be used in its correct legal sense: Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed (Markham: Butterworths, 2002), page 47.

[38] As the motions judge recognized, the Court in *Krieger* makes it clear that not all prosecutors' decisions fall within the term "prosecutorial discretion". *Krieger* outlines what decisions are included in the phrase:

> 46 Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 579 and 579.1; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether: *R. v. Osborne* (1975), 25 C.C.C. (2d) 405 (N.B.C.A.); and (e) the discretion to take control of a private prosecution: *R. v. Osiowy* (1989), 50 C.C.C. (3d) 189 (Sask. C.A.). While there are other discretionary decisions, these are the core of the delegated sovereign authority peculiar to the office of the Attorney General.
>
> 47 Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to <u>whether</u> a prosecution should be brought, continued or ceased, and <u>what</u> the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum.
>
> [Emphasis in original]

[39] Contrary to the conclusion of Justice Wright in *Cummings*, and in accordance with Justice Warner's decision, we are satisfied the effect of the lack of a definition of prosecutorial discretion in the *Act*, together with the meaning of the term prosecutorial discretion set out in *Krieger*, is that decisions concerning the

preparation for, or conduct of litigation are not decisions within the ambit of prosecutorial discretion for purposes of s. 15(1)(f).

[40] The PPS is authorized under s. 15(1)(f) to withhold information in its files, if the disclosure of that information could reasonably be expected to reveal any information "relating to or used" by the PPS in making decisions regarding the nature and extent of a prosecution and its participation in it. It cannot withhold information "relating to or used" by it in making decisions solely with respect to tactics or conduct before the court.

[41] The motions judge correctly concluded that information concerning decisions relating to the preparation for or conduct of litigation are not decisions invoking prosecutorial discretion for the purpose of s. 15(1)(f). But the judge erred in the application of that standard.

[42] First, he erred in law when he found that information that otherwise qualified for exemption under s. 15(1)(f), was not exempt if it was prepared for and provided to the PPS by Mr. FitzGerald's counsel. Nothing in s. 15(1)(f) suggests that the source of the information or the fact it was prepared at someone's request, is relevant to the PPS's authority to withhold information under this section.

[43] Second, he made several palpable and overriding errors of fact.

[44] These include his finding that information relating to the steps taken by the police in the investigation of the offence was not exempt under s. 15(1)(f). This material would have been used by the PPS in deciding whether to commence or continue a prosecution, which clearly is a discretionary decision involving the exercise of prosecutorial discretion. The wording of s. 15(1)(f) specifically provides that information "relating to or used in" the exercise of prosecutorial discretion may be withheld. Thus the judge erred in ordering disclosure of the withheld statements and documents at Tabs 3, 4, 7, 8, 9, 10, 50 and 100 of the Criminal File that were generated as part of the original police investigation.

[45] The judge also made a palpable and overriding error by ordering the disclosure of the redacted portions of the documents at Tabs 57 of the Criminal File and 7 of the Mercy File, and the withheld statements and documents at Tabs 101, 102, 103, 104, 105 and 107 of the Criminal File. These redactions, and withheld statements and documents, are notes and summaries that the evidence shows would have been prepared by the PPS at various stages of the trial, appeal and mercy application processes and used for two purposes: to analyze the case to

see if the evidence, in light of the law, justified commencing or continuing a prosecution and to serve as aids in the conduct of a trial or appeal. The first purpose engages discretionary decision-making within the prosecutorial discretion defined in *Krieger*. Therefore these statements and documents are governed by the exemption in s. 15(1)(f).

[46] The judge made a further palpable and overriding error when he ordered the disclosure of the withheld letter at Tab 40 of the Mercy File relating to the Federal prosecutor's assessment of the evidence and the strength of the case against the respondent. The evidence shows that this letter was used in connection with determining whether a new trial should be ordered, bringing it within s. 15(1)(f).

[47] The judge also ordered that the redacted portions of the documents at Tabs 3, 12 and 88 of the Mercy File be disclosed on the basis they were not exempt under s. 20. Some of those redactions were claimed on the basis of s. 15(1)(f), not s. 20. We are satisfied the judge made a palpable and overriding error. The evidence shows those extracts would have been used by the PPS to determine if a prosecution should be commenced or continued.

[48] To summarize, further to s. 15(1)(f), the PPS is *not* required to disclose:

(1) The redacted portions of Tabs 3, 12 and 88 of the Mercy File for which the s. 15(1)(f) exemption was claimed,

(2) The redacted portion of Tab 57 of the Criminal File and Tab 7 of the Mercy File,

(3) The material at Tabs 3, 4, 7, 8, 9, 10, 50, 100, 101, 102, 103, 104, 105 and 107 of the Criminal File, and

(4) The material at Tab 40 of the Mercy File.

5. Second and Third Issues: Section 20 - Third Parties' Privacy

[49] We will consider the second and third issues together. The second is the PPS's submission under s. 20 of the *Act*. The third, involving the judge's use of the *Charter of Rights*, relates to the analysis of s. 20.

[50] Section 20 says:

20 (1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

(2) In determining pursuant to subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Nova Scotia or a public body to public scrutiny;

(b) the disclosure is likely to promote public health and safety or to promote the protection of the environment;

(c) the personal information is relevant to a fair determination of the applicant's rights;

(d) the disclosure will assist in researching the claims, disputes or grievances of aboriginal people;

(e) the third party will be exposed unfairly to financial or other harm;

(f) the personal information has been supplied in confidence;

(g) the personal information is likely to be inaccurate or unreliable; and

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

(a) the personal information relates to a medical, dental, psychiatric, psychological or other health-care history, diagnosis, condition, treatment or evaluation;

(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(c) the personal information relates to eligibility for income assistance or social-service benefits or to the determination of benefit levels;

(d) the personal information relates to employment or educational history;

(e) the personal information was obtained on a tax return or gathered for the purpose of collecting a tax;

(f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations;

(h) the personal information indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations; or

(i) the personal information consists of the third party's name together with the third party's address or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(a) the third party has, in writing, consented to or requested the disclosure;

(b) there are compelling circumstances affecting anyone's health or safety;

(c) an enactment authorizes the disclosure;

(d) the disclosure is for a research or statistical purpose and is in accordance with Section 29 or 30;

(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;

(f) the disclosure reveals financial and other similar details of a contract to supply goods or services to a public body;

(g) the information is about expenses incurred by the third party while travelling at the expense of a public body;

(h) the disclosure reveals details of a licence, permit or other similar discretionary benefit granted to the third party by a public body, not including personal information supplied in support of the request for the benefit; or

(i) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, not including personal information that is supplied in support of the request for the benefit or is referred to in clause (c) of subsection (3).

(5) On refusing, pursuant to this Section, to disclose personal information supplied in confidence about an applicant, the head of the public body shall give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.

> **(6)** The head of the public body may allow the third party to prepare the summary of personal information pursuant to subsection (5).

[51] Section 20(1) directs the head of the public body to "refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy". The fluctuating presumptions of s. 20 embody the balance signalled by the *Act*'s title between freedom of information and protection of privacy.

[52] Justice Cromwell's reasons in *Nova Scotia (Health) v. Dickie*, 1999 NSCA 62, paras. 16-17, summarized by Justice Moir in *House (Re)*, [2000] N.S.J. No. 473 (S.C.), para. 6, have set out the correct analytical approach to s. 20.

[53] If the record includes no "personal information", s. 20 does not preclude access. If a third party's "personal information" is recorded, it is necessary to determine whether its disclosure would be an "unreasonable invasion of the third party's personal privacy".

[54] Section 3(1)(i) defines "personal information":

> **3 (1)** (i) "personal information" means recorded information about an identifiable individual, including:
>
> (i) the individual's name, address or telephone number,
>
> (ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,
>
> (iii) the individual's age, sex, sexual orientation, marital status or family status,
>
> (iv) an identifying number, symbol or other particular assigned to the individual,
>
> (v) the individual's fingerprints, blood type or inheritable characteristics,
>
> (vi) information about the individual's health-care history, including a physical or mental disability,
>
> (vii) information about the individual's educational, financial, criminal or employment history,
>
> (viii) anyone else's opinions about the individual, and
>
> (ix) the individual's personal views or opinions, except if they are about someone else;

[55] In *Dickie*, Justice Cromwell explained that whether the document records "personal information" is a threshold issue which precedes the exercise to determine whether disclosure would be an unreasonable invasion of the third party's personal privacy:

> [34] Of course, the fact that information is personal information within the meaning of the Act does not mean that it is exempted from disclosure. It seems to me, however, that the breadth of the definition of such information, coupled with the detailed provisions relating to when it should or should not be disclosed suggest that the courts should not cut down the breadth of the definition by restrictive interpretation. In general, the balance between privacy and access under this legislative scheme is to be established at the stage of considering whether such information should or should not be disclosed. The breadth, clarity and simplicity of the definition is consistent with the statutory scheme which is encapsulated in section 27(a): A public body may disclose personal information only in accordance with the Act.
>
> [35] As noted, the judge said that a record containing the name of an identifiable individual should not be considered personal information under the Act because "…it would be totally contrary to the spirit of this legislation to refuse to respond to an inquiry for the name of the employee occupying a specific job function by responding that it could not release the name … because it was personal information". This amounts to attempting to do the balancing required under the Act and with respect to which there are detailed provisions, by reading into the Act limitations of the clear, broad and simple definition it provides of personal information.
>
> [36] In my view, the correct way of analyzing the issue is to apply the definition of personal information as it appears in the Statute and then consider the question of disclosure under the other provisions of the Act. Generally speaking, disclosure will be denied where the release of personal information is an unreasonable invasion of a third party's personal privacy. …
>
> [Justice Cromwell's underlining]

[56] We will turn to the next step. Pertinent to this appeal is s. 20(4)(c) which deems that "a disclosure of personal information is not an unreasonable invasion of a third person's personal privacy if … an enactment authorizes the disclosure". This is a non-rebuttable conclusion.

[57] Section 20(3) lists categories that are "presumed to be an unreasonable invasion of a third party's personal privacy". Relevant here is s. 20(3)(b):

> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

Unlike s. 20(4), s. 20(3) lists rebuttable presumptions. That is apparent from the opening words of s. 20(2):

> In determining pursuant to subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether …

[58] If s. 20(4) is not engaged, the court balances any rebuttable presumption under s. 20(3) and the factors under s. 20(2), to determine whether disclosure would be an unreasonable invasion of a third party's privacy. Later (para. 85) we will quote the factors in s. 20(2) that pertain to this appeal.

[59] Finally, and sometimes neglected, s. 20(5) says that, upon refusing to disclose personal information under s. 20, the head of the public body "shall give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information".

[60] In this appeal, three aspects of this analytical framework, and the motions judge's application of it, are in issue. First, do the records contain particulars of "personal information" under ss. 20(1) and 3(1)(i)? Second, to the extent there is personal information, does "an enactment authorize the disclosure" under s. 20(4)(c), deeming the disclosure to be "not unreasonable"? Third, if the answer to the second question is No, then would disclosure be an "unreasonable invasion of a third party's personal privacy" under ss. 20(3) and 20(2)?

[61] We will address these in turn.

First - Personal Information

[62] The motions judge said:

> [72] For the most part, PPS's claims for exemption under s. 20(3)(b) relate to redaction of the name of the third party, or the withholding of the documents of a third party, on the basis that the document contains the name of the third party and their observations (facts) about the Appellant.

> [73] The Court has a problem with this submission. The documents redacted and withheld based on s. 20(3)(b) are not about the third party but about the Appellant and his involvement in the crime for which he was convicted, based upon their evidence. They are not opinion about an individual, they are statements of fact about the Appellant. To the extent that they may be the third party's personal views or opinions as defined in s. 3(1)(i)(ix), they are not personal information because they are about the Appellant, and therefore not personal information.
>
> [74] For the most part, the only third party personal information is the name of the victim and other trial witnesses. One exception is the note of the doctor, upon whom the victim attended shortly after the sexual assault, which note contains some of the evidence given by the examining doctor at the trial. That note is not the type of record that would have been or is now protected from disclosure under ss. 278.1 to 278.91 [*sic* 278.9] of the *Criminal Code*, as discussed in *R. v. Mills*, [1999] 3 SCR 668.
>
> [75] Of the documents redacted solely on the basis that they contain the name of a witness or the victim and their "opinion" (factual evidence) about the Appellant, the only portion of the document that may be subject to redaction, pursuant to s. 20(3)(b) on the *House* analysis, could be the name of the witness or the victim.

[63] The judge's reasons did not further elaborate on whether any specific passages or particular redactions in the individual documents involved "personal information" of a third party.

[64] The judge's reasons attached an appendix that listed the documents to be disclosed "without redaction". The subsequent Order directed the PPS to release those documents without redaction. That list included two documents from the Criminal File and 25 documents from the Mercy File, from which the PPS had redacted third parties' personal information under s. 20, and several documents withheld by the PPS on the basis of s. 20 because the third parties' personal information could not be reasonably severed.

[65] We have examined these documents that were listed in the judge's appendix and Order. This Court's reasons cannot quote the pertinent passages from the documents without disclosing the personal information. The records include more than merely the third parties' names. They include other "personal information", as defined by s. 3(1)(i), namely age, address, family status, identifying particulars and information concerning health care history. Critically, the records explicitly include other persons' "opinions about the individual" under s. 3(1)(i)(viii) – *i.e.* opinions about the *third party*, not just about Mr. FitzGerald. These opinions

relate to sensitive and reputational personal matters, whose disclosure clearly would be distressing. A number of these documents have redacted only the third parties' names. But, if the names were not redacted, then the disclosed "opinions about the individual" would connect to identified third parties.

[66] Insofar as the judge found that, with one exception, the records he ordered to be disclosed included only names and opinions about Mr. FitzGerald, the judge palpably erred in fact. As we will discuss (para. 89), the error affected the outcome and was "overriding" under the standard of review.

[67] It appears that the motions judge also reasoned that extracts of "personal information" relinquished that status because the extracts appeared in documents that generally were "about [Mr. FitzGerald] and his involvement in the crime for which he was convicted". In other words, the documents' connection to Mr. FitzGerald's prosecution subsumed the extracts' connection to the third party's privacy. Insofar as the judge adopted that reasoning, he misinterpreted "personal information" in s. 3(1)(i) and its place in the test under s. 20. By trumping the third party's privacy interest with Mr. FitzGerald's disclosure interest at the threshold definitional stage, the judge engaged in a premature balancing exercise contrary to the principles set out in *Dickie*, paras. 34-36.

Second - Enactment Authorizes Disclosure

[68] The motions judge said:

> [84] This Court has difficulty with PPS's submission that an enactment does not authorize disclosure of the evidence tendered at a criminal trial against the Appellant or submitted by PPS in response to the Appellant's mercy applications made pursuant to the Criminal Code. While the entitlement to disclosure of the Crown's case before the *Charter* was based on the common law, that common law became a right recognized and protected by the *Charter*.
>
> [85] While the Crown's proceeding against the Appellant may have ended more than 30 years ago, the Appellant's intention to obtain through his FOIPOP application "new matters of significance" that were not "previously considered" to found an application pursuant to s. 696.1 of the *Criminal Code*, is a statutory right.
>
> …
>
> [92] Based on this Court's review of the documents redacted or withheld on the basis of s. 20(3)(b), only one withheld document contains a statement by a third party which appears never to have been acted upon by the PPS in the criminal

> proceeding nor disclosed to the Appellant. That document identifies a person who did not testify. …
>
> [93] For all other documents, for which exception is claimed on the basis on [*sic*] an unreasonable invasion of personal privacy of a third party, the third parties testified at trial. There is no basis to find (nor was it submitted) that the disclosure of their statements would not have been necessary under the common law, later codified in the *Charter*, as part of the prosecution of the Appellant.
>
> [94] Said differently, with the exception of one document, which did not form part of the evidence of trial, and which appears relevant to the PPS's decision to continue the prosecution, the statements were required by law, now codified, to be disclosed in the criminal proceeding.

[69] The judge treated s. 20(4)(c) - whether "an enactment authorizes the disclosure" – as transposing *Charter*-sourced *Stinchcombe* disclosure into the *Freedom of Information and Protection of Privacy Act*. If Mr. FitzGerald were prosecuted today, then his fair trial would require disclosure according to principles that stem from ss. 7 and 11(d) of the *Charter*. The judge reasoned that the request by Mr. FitzGerald for a further ministerial review, under s. 696.1 of the *Criminal Code,* engages a right to disclosure equivalent to an accused's right in an active prosecution. Since Mr. FitzGerald's death, the request is continued by his executrices. So the *Charter* – an "enactment" – would authorize the disclosure. Then s. 20(4)(c) would deem the disclosure to be "not an unreasonable invasion of a third party's personal privacy", and the PPS's objection under s. 20 would fail.

[70] We respectfully disagree. Clearly the *Charter* is an "enactment". But the *Charter* does not authorize or direct *Stinchcombe* disclosure today by the provincial PPS to Mr. FitzGerald's executrices for their request to the federal Minister under s. 696.1.

[71] *Stinchcombe* disclosure has common law antecedents. But it is rooted in the right, guaranteed by s. 11(d) of the *Charter*, of a person "charged with an offence" to a "fair" trial that includes a full answer and defence. That right rests in the context of the broader right, guaranteed by s. 7, not to be deprived of "life, liberty and security of the person" except in accordance with the principles of fundamental justice. The scope of disclosure has been adjusted for sexual assault prosecutions by specific provisions, including s. 278.5, of the *Criminal* Code. The right to disclosure survives, with modification, into the appeal from the trial verdict. *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. *R. v. Mills*, [1999] 3 S.C.R. 668. *R. v. McNeil*, [2009] 1 S.C.R. 66, paras. 17-25. *R. v. Quesnelle*, [2014] 2 S.C.R. 390.

[72] Generally, a deceased person's conviction may not be appealed. The filing of a Notice of Appeal is a personal right, and is the root of the appellate court's jurisdiction. In exceptional cases, the appellate court may exercise a discretion to entertain an appeal administered by the deceased offender's personal representatives. *R. v. Smith*, [2004] 1 S.C.R. 385, per Binnie, J. for the Court.

[73] Section 696.1(1) of the *Criminal Code*, on the other hand, permits an application for ministerial review to be made "on behalf of a person who has been convicted". In *Smith*, para. 25, Justice Binnie contemplated that a personal representative could seek, or at least continue, a ministerial review under s. 696.1, but he distinguished the subject of that process from the "fair trial rights" of a living appellant in an active prosecution or appeal.

[74] In *Thatcher v. Canada (Attorney General)*, [1997] 1 F.C. 289, Justice Rothstein, then of the Federal Court, elaborated on this distinction between an active prosecution (or appeal) and a request for ministerial review:

> 9 … Except in so far as the Charter requires, proceedings under section 690 are not the subject of legal rights. An application for mercy is made after a convicted person has exhausted his legal rights. Therefore, although the Minister is under a duty of fairness under the Charter, the duty must be considered with regard to the fact that there is no continuing *lis* between the Crown and the applicant.
>
> …
>
> 12 An adverse decision by the Minister in exercising his discretion under section 690 can result in the continuation of a lengthy, if not lifetime, incarceration of a convicted person. This deprivation of liberty is what engages the applicant's rights under section 7 of the Charter, and requires that the Minister act fairly in exercising his discretion. However, it is important to remember, even in the context of the Charter, that the applicant is asking for mercy. In this respect, there is no *lis* between the applicant and the Minister, and the applicant has already had the full benefit of the Charter in the antecedent judicial proceedings leading to the conviction.

[75] Justice Rothstein considered the former s. 690 of the *Criminal Code*. In 2002, Parliament enacted s. 696.1 to replace the former s. 690. In *Bilodeau v. Canada (Ministre de la Justice)*, 2009 QCCA 746, the Quebec Court of Appeal described the effect of the new provision:

> 25. … the statutory amendments in 2002 did not alter, in its essence, the nature of ministerial authority as it has been codified since 1892. The scope of this

> authority is outside the traditional sphere of criminal law in that it begins after legal remedies are exhausted. It is a discretionary power which has historically been considered as one of the forms of exercise of the royal prerogative of mercy. [translation – see *Bilodeau v. Canada (Minister of Justice)*, [2011] F.C.J. No. 1096 (F.C.), para. 69]

[76] Further to an application under s. 696.1, the federal Minister has the power to collect evidence. Section 696.2(2) gives to the Minister the powers of a commissioner under the *Inquiries Act*, R.S.C. 1985, c. I-11. These include requiring witnesses to give evidence and produce documents.

[77] In *Thatcher*, Justice Rothstein explained the federal Minister's duty to disclose information that the Minister obtained in his investigation:

> 13 Having regard to the nature of proceedings under section 690 and the consequences to the individual, I am of the view that the content of the Minister's duty of fairness under section 690 is less than that applicable to judicial proceedings. In exercising his discretion under section 690, the Minister must act in good faith and conduct a meaningful review, provided that the application is not frivolous or vexatious. The convicted person should have a reasonable opportunity to state his case. However, proceedings under section 690 do not constitute an appeal on the merits. There is no general right of disclosure to everything considered by the Minister or his officials.
>
> 14 Serious applications will usually arise from some new matter indicating it is likely that there has been a miscarriage of justice. To the extent that the Minister's investigation discovers new relevant information, the convicted person should have adequate disclosure of that new information. The manner in which the Minister discloses the new relevant information - be it actual documents or only the gist of the information obtained by the Minister – will depend on the circumstances of each case, having regard to the right of a convicted person to have a reasonable opportunity to state his case.
>
> 15 Exceptionally, as a result of new information that is substantial and would provide a reasonable basis for a finding of miscarriage of justice, the Minister may find it necessary to consider material in police or prosecution files. In such a case, the material, or at least the gist of the material the Minister or his officials review, if not already known by the applicant, would have to be disclosed to him. But there is no general obligation on the Minister to review police and prosecution files or to disclose those files merely because of a request by a convicted person.

[78] We will leave s. 696.1 for the moment. Sections 4(2)(i) and 4(3)(e) of the *Act* state that "this Act does not apply to … a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed", but the "Act does not … restrict disclosure of information for the purpose of a prosecution". Section 20(3)(b), to be discussed further below, presumes a disclosure of personal information to be an unreasonable invasion of a third party's privacy if that information was compiled for a criminal investigation, "except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation". These provisions express the Legislature's intent that the disclosure which accompanies a criminal proceeding should remain a feature of that proceeding, and not be replicated by the *Freedom of Information and Protection of Privacy Act*.

[79] From a similar perspective, the courts in other jurisdictions have declined to shuttle *Stinchcombe* disclosure into freedom of information legislation:

(1) In *Blank v. Canada (Minister of the Environment)*, 2001 FCA 374, Justice Sharlow said:

> [9] The appellants assert that the Minister's untimely and inadequate response to the requests for information is motivated by a desire to limit the appellants to the disclosure provided in the criminal proceedings, which as indicated above the appellants also consider to be inadequate. The thrust of the appellants' complaint, as I understand it, is that any material that should have been disclosed in the course of the criminal proceedings under the *Stinchcombe* principles, and has not been disclosed to date, should now be disclosed in response to their request under the *Access to Information Act* [R.S.C. 1985, c. A-1].
>
> [10] There is no evidence that the Minister's response to the appellants' requests for information is improperly motivated, but in any event it would be wrong in principle to use *Stinchcombe* as the appellants would wish. The foundation of the right to disclosure recognized in *Stinchcombe* is the right of a person accused of a criminal offence to a fair hearing and to make full answer and defence (Sopinka, Lederman, Bryant, *The Law of Evidence in Canada*, 2nd ed. 1999, Butterworths Canada Ltd. at § 15.30). This right to disclosure is one of the rights now guaranteed by section 7 of the *Charter of Rights and Freedoms* as a principle of fundamental justice.
>
> [11] The disclosure right recognized in *Stinchcombe* is critically important to persons facing a criminal trial, but it is a right that must be administered by courts having jurisdiction in criminal proceedings. To try to apply the *Stinchcombe* rules in the context of proceedings under the *Access to Information Act* would be to invite the Information Commissioner, and ultimately this Court, to try to anticipate decisions that ought to be made, or

> to review decisions that have already been made, by a criminal court. In this case, for example, a Manitoba trial judge has already ruled on certain motions relating to *Stinchcombe* disclosures.
>
> [12] I conclude that in determining whether the appropriate disclosures have been made under the *Access to Information Act*, the Court should consider only the *Act* and the jurisprudence guiding its interpretation and application. Laws requiring disclosure in other legal proceedings cannot narrow or broaden the scope of disclosure required by the *Access to Information Act*.

(2) In *Evenson v. Saskatchewan (Minister of Justice),* 2013 SKQB 296, Justice Gabrielson said:

> **23.** … even though in this case there has not been a judge's ruling in respect to the disclosure provided in the criminal proceedings, that does not mean that in other proceedings there could not be a conflict between the disclosure provided pursuant to the principles set out in *R. v. Stinchcombe* and the disclosure sought under the *Act*. They are two separate processes and for two separate purposes. Accordingly, in my opinion, a court should consider only the *Act* [the *Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01] and the jurisprudence guiding its interpretation and not narrow or broaden the scope of disclosure required by the *Act* based upon the procedure found in other processes such as the *Stinchcombe* disclosure process.

(3) Similarly, in *Doe v. Hale* (2006), 214 O.A.C. 79 (Div. Ct.), Justice Epstein said:

> [31] I agree with the respondents' submissions that the Crown's *Stinchcombe* obligations arise only in the context of a criminal prosecution to permit an accused to make full answer and defence. In fact, in *Blank v. Canada (Minister of Environment)*, 2001 FCA 374 (CanLII), [2001] F.C.J. No. 1844 (F.C.A.), the Federal Court of Appeal specifically rejected the application of *Stinchcombe* obligations in the access to information context. …

[80] Applying the principles to the circumstances of this appeal:

(1) Mr. FitzGerald was convicted in 1980. In 1981, his appeal was dismissed and his application for leave to appeal denied. That ended the trial and appeal processes. Mr. FitzGerald, now deceased, is not "charged with an offence", the triggering words in s. 11 of the *Charter*. His executrices' application for ministerial review under s. 696.1 of the *Criminal*

Code would not be a trial, an appeal from a trial verdict, or a *lis* of any sort. Consequently, there remain today no operating trial rights, such as full answer and defence, under s. 11(d).

(2) Whatever disclosure obligation attaches to the federal Minister's duty of fairness in a post-trial (and post-appeal) s. 696.1 review, as discussed in *Thatcher*, may be *Charter*-sourced only insofar as the offender's life, liberty or security of the person remains in play. The federal Minister is not a party to this appeal, and we make no comment on the scope of any such obligation.

(3) Mr. FitzGerald completed his sentence long ago, and is now deceased. There is no current prejudice to his life, liberty and security of the person. His executrices have no life, liberty or security of the person stake of their own in the outcome of a review under s. 696.1.

(4) Any disclosure obligation, whatever its scope and source, of the federal Minister in a s. 696.1 review attaches to information possessed or obtained by the federal Minister. It does not embrace the provincial PPS for other materials possessed by the PPS. The provincial PPS's responsibility is to respond appropriately to a request for information from the federal Minister.

[81] Section 20(4)(c) does not incorporate *Stinchcombe*'s protocol. In our respectful view, the judge's conclusion that, under s. 20(4)(c) of the *Act*, the *Charter* "authorizes the disclosure" of the contested documents erred in law.

Third - Unreasonable Invasion of Privacy

[82] The next step is to weigh the factors under ss. 20(2) and (3) and determine whether access would be an unreasonable invasion of a third person's privacy.

[83] As noted earlier, s. 20(3)(b) establishes a rebuttable presumption that disclosure of third parties' personal information compiled in a criminal investigation would be an unreasonable invasion of the third parties' personal privacy, "except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation". The motions judge agreed, as do we, that disclosure is not necessary for the prosecution or continued investigation. The judge said:

> [95] In the event that I am in error in finding that all but one document in the PPS file, for which exemption is claimed based on s. 20 of the *Act*, is either not personal information (except for the name of the third party), or, in the case of witnesses who have not been found and not given written consent to disclosure, is required by the Charter to [be] disclosed to the Appellant, then I agree with PPS that the purpose for which they were compiled was in respect [of] a violation of the law and disclosure is not necessary for prosecution or continued investigation. The remaining personal information (that is, the name of the witnesses and victim) is presumed to be an unreasonable invasion of that third party's personal privacy.

[84] This means there is a presumption, in this case, that disclosure would unreasonably invade the third parties' personal privacy. The presumption is rebuttable according to the criteria in s. 20(2).

[85] Section 20(2)'s criteria that pertain to this appeal are whether (a) the information "is relevant to a fair determination of the applicant's rights", (b) the third party will be "exposed unfairly to financial or other harm", (c) the information "has been supplied in confidence", (d) the information "is likely to be inaccurate or unreliable", and (e) disclosure "may unfairly damage the reputation of any person referred to in the record".

[86] Section 45(3) of the *Act*, under the heading "Burden of proof", states:

> **45 (3)** At a review or appeal into a decision to give an applicant access to all or part of a record containing information that relates to a third party,
>
> (a) in the case of personal information, the burden is on the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy; and
>
> (b) in any other case, the burden is on the third party to prove that the applicant has no right of access to the record or part.

This appeal concerns "personal information". So the Respondents, Mr. FitzGerald or his executrices, had the burden.

[87] Citing the factors in s. 20(2), the motions judge held that disclosure would not unreasonably invade a third party's personal privacy:

> [98] … The statements and evidence could not have been given with an expectation of confidentiality. Their evidence was the subject matter of a public process. Many of the statements of witnesses and documents were provided to PPS by the Appellant's various counsels.

> [99] There is no basis for finding that the personal information is inaccurate or unreliable. There is no basis for finding that the reputation of any third party would be damaged at this point. The Court was not directed to any sensitive personal information, relevant to the prosecution, which might now cause harm to the victim, or a witness, or to their reputation. There is no basis for finding that any third party witness would be unfairly exposed to financial or other harm.
>
> …
>
> [101] The Appellant seeks disclosure for the purpose of obtaining new material of significance that might justify an application pursuant to s. 696.1 of the *Criminal Code*. … It is a relevant consideration of some significance that the Appellant seeks disclosure of the PPS file related to the investigation and prosecution of <u>him</u> [motions judge's underlining], and the response to his initial application for mercy of the Crown, to enable him to seek a fair determination of his rights pursuant to s. 696.1 of the *Criminal Code*.
>
> [102] It is also a valid consideration that the disclosure of the victim's name may cause her name to be reintroduced to the public more than 35 years after the trial.
>
> [103] The witnesses' evidence and statements was not such that disclosure at this time would cause any of them distress, harm or loss of reputation. Furthermore, most of them could not be found when PPS attempted to notify them of the Appellant's application.
>
> [104] Disclosure of all the documents redacted or withheld on the basis of s. 20 of the *Act*, with the exception of document number 6 in the mercy file, would not constitute an unreasonable invasion of any third party's personal privacy.

[88] In our respectful view, the judge erred.

[89] As mentioned earlier (paras. 62, 65-67), the judge said that, with one exception, the only particulars of third party "personal information" were names, that the documents contain no opinion concerning a third party, only of Mr. FitzGerald, and that the documents "are about" Mr. FitzGerald, no one else. This innocuous characterization is not supported by the documents. The records contain various items of third parties' personal information and, in particular, opinions about third parties that are reputational and potentially distressing in the context of a sexual assault proceeding that involved sensitive and deeply personal matters. The judge's comments to the contrary in paras. 99 and 103 of his decision are mistaken. The judge's error affected his analysis of the criteria in s. 20(2), meaning the palpable factual error was overriding.

[90] Though the motions judge cited the presumption under s. 20(3)(c), he gave it no noticeable impact in the balancing exercise. This Court noted a similar error in *Dickie*, para. 55. Section 20(3)(c) is a fulcrum for the Legislature's balance of

freedom of information against protection of privacy in the context of a prosecution. The *Act* contemplates that, after the criminal investigation and prosecution ends, the third party is entitled presumptively to the comfort that public access to his or her personal information is over. The judge countenanced the opposite construction – *i.e.* that passage of time heightens the justification for disclosure. He said (paras. 99, 102) that there is no basis for a finding of harm from disclosure "at this point", as it is "more than 35 years after the trial".

[91] The motions judge said (para. 98) that the information "could not have been given with an expectation of confidentiality" because "their evidence was the subject matter of a public process". In *Mills*, Justices McLachlin (as she then was) and Iacobucci for the majority (paras. 107-8) rejected an equivalent submission in the context of a sexual offence prosecution, saying:

> 108 This argument erroneously equates Crown possession or control with a total loss of any reasonable expectation of privacy. Privacy is not an all or nothing right. It does not follow from the fact that the Crown has possession of the records that any reasonable expectation of privacy disappears. Privacy interests in modern society include the reasonable expectation that private information will remain confidential to the persons to whom and restricted to the purposes for which it was divulged, …

To similar effect: *Quesnelle*, paras. 2, 29, 34-43. The third parties provided information to police and prosecutors for the limited purpose of Mr. FitzGerald's prosecution. That prosecution accompanied the associated protections of publication bans and rules of evidence. The prosecution has ended and the associated protections are spent. The judge's presumed characterization of the witnesses' perpetual and unfettered waiver of a privacy expectation is not the law.

[92] The judge misapplied the burden of proof. The party seeking the personal information has the burden under s. 45(3)(a), especially given the presumption of unreasonable invasion of privacy under s. 20(3)(c). Yet the judge's reasons treat the absence of evidence as justifying disclosure. The judge said (para. 99) "[t]here is no basis for finding" the information would be unreliable, "[t]here is no basis for finding that the reputation of any third party would be damaged", "[t]he Court was not directed to any sensitive personal information", "[t]here is no basis for finding that any third party witness would be unfairly exposed …". The judge (para. 103) cited the fact that "most of them [the third party witnesses] could not be found" as support for his view that disclosure would not cause them distress. It is an error of

law to treat the absence of evidence as satisfying a burden of proof to overcome a statutory presumption.

[93] The criterion cited by the judge to support disclosure was s. 20(2)(c) - that "the personal information is relevant to a fair determination of the applicant's rights". The judge said (para. 101) it was "of some significance" that the disclosure would "enable him to seek a fair determination of his rights pursuant to s. 696.1 of the *Criminal Code*". Yet, earlier the judge's reasons say:

> [26] The Court's observation from its review of the redacted and/or withheld documents is that they would not likely assist the Appellant in establishing the grounds for a miscarriage of justice pursuant to s. 696.1 of the *Criminal Code*. They do not appear to support the submissions and allegations of a miscarriage of justice in the affidavits of Ms. Jones, Mr. Fitzgerald, and Mr. Clare, and the attached documents.

The proponent of disclosure has the burden of proof to overcome the legal presumption of an unreasonable invasion of privacy. The motions judge determined that the burden was met, based on a criterion to which the judge expressly declined to ascribe any meaningful weight. The judge's comments on the balancing did not mention his earlier finding that "the redacted and/or withheld documents …would not likely assist the Appellant" and "do not appear to support [Mr. FitzGerald's] submissions and allegations".

[94] The judge reasoned from the premise that the *FOIPOP* request equated to a *Stinchcombe* application. So the gravity of *Charter* values weighted any criterion that would support disclosure. As discussed, the premise was mistaken.

Summary

[95] We would allow the appeal and overturn the motions judge's rulings on the PPS's objections under s. 20. All the documents that the PPS redacted or withheld based on s. 20 should remain redacted or withheld.

6. Conclusion

[96] We allow the appeal without costs. We will vary the Order of the Supreme Court as follows:

(1) all the documents withheld or redacted by the PPS further to s. 20 shall remain withheld or redacted;

(2) the following documents withheld or redacted by the PPS further to s. 15(1)(f) shall remain withheld or redacted - the redacted portions of Tabs 3, 7, 12, 40 and 88 of the Mercy File, the redacted portion of Tab 57 of the Criminal File, and the material at Tabs 3, 4, 7, 8, 9, 10, 50, 100, 101, 102, 103, 104, 105 and 107 of the Criminal File.

Hamilton, J.A.

Fichaud, J.A.

Bourgeois, J.A.