NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. James,*** 2006 NSCA 57

Date: 20060511
Docket: CAC 206002
CAC 206003
Registry: Halifax

Between:

Wayne A. James and Neil W. Smith

Appellants

v.

Her Majesty the Queen

Respondent

Judges: Cromwell, Hamilton and Fichaud, JJ.A.

Application Heard: April 6, 2006, in Halifax, Nova Scotia

Held: Application dismissed per reasons of Cromwell, J.A.; Hamilton and Fichaud, JJ.A. concurring.

Counsel: Jim O'Neil, for the applicant-appellant, Neil A. Smith
Donald Murray, Q.C., for the appellant, Wayne A. James
James A. Gumpert, Q.C., for the respondent, Her Majesty the Queen
Jake Harms for the Attorney General of Canada
Patrick Duncan, Q.C., for witnesses in the Witness Protection Program

Reasons for judgment:

I. INTRODUCTION:

[1] Mr. Smith is appealing his conviction for first degree murder. For the purposes of his appeal, he applies for disclosure of material relating to a civil action in the Federal Court. The circumstances are unusual to say the least.

[2] At Mr. Smith's trial, Paul Derry was an important Crown witness. He had been a participant in the killing and became a paid police informant. He was enrolled in the witness protection program. It appears from the material that he has sued the federal Crown in a Federal Court civil action and that the action relates to a dispute with the administrators of the program. For obvious reasons, the Federal Court file is subject to a broad confidentiality order.

[3] Mr. Smith wants to know what this civil action is about and, if there is material relevant to his appeal, he wants to have it.

[4] The questions raised by the application are these:

1. How is this material potentially relevant to the appeal?
2. Does the Federal Court confidentiality order prevent this Court from making any disclosure order in this case?
3. If so, should this Court express any view about the order it would make but for the confidentiality order?
4. If so:
    (a) What legal principles would this Court apply to the disclosure or production of this material?
    (b) Is the material in relation to the action which is in the possession of the RCMP or its legal counsel subject to disclosure?
    (c) If not, what threshold for production would apply and has it been met?

[5] In my view, it would not be appropriate for this Court to make any order in relation to the material sought as it is all subject to the Federal Court confidentiality order. However, I am also of the view that a few comments about

the potential relevance of this material to the criminal appeal and the thresholds for disclosure and production from third parties may be of some use in the event the applicant pursues an application in the Federal Court to vary the confidentiality order.

II. FACTS :

A. The Application:

[6] The applicant seeks "all material in the possession or control of the Crown relating to a proceedings in the Federal Court of Canada between Paul Derry and the RCMP, subject to editing to protect the current name and location of any person in the Witness Protection Program, and any other information required not to be disclosed under the provisions of the *Witness Protection Program Act*."

[7] Through this application, Mr. Smith wants to learn what is going on between Paul Derry and the RCMP. As we shall see, this is more than idle curiosity.

B. The Trial:

[8] Mr. Smith stands convicted of a most serious crime. An important Crown witness at his trial – Mr. Derry – is one whose evidence must be regarded with the utmost caution. Mr. Derry was an unsavory witness, an accomplice and a paid police informant. He told the police that in exchange for a deal, he would give them anything they wanted. In exchange for his co-operation with the police and his testimony, he received immunity from prosecution, money and witness protection.

[9] The background, in brief, is this.

[10] Sean Simmons was killed in an apartment complex in North Dartmouth on October 3rd, 2000. He was shot in the head. The applicant, Mr. Smith, along with his co-appellant Mr. James, were jointly charged with unlawfully conspiring with Messrs. Kelsie and Gareau (separately indicted co-conspirators) to murder Mr. Simmons and with his first degree murder.

[11] The Crown at trial outlined his case as follows. The appellant, Mr. James, and Mr. Derry were in the drug business together. The drugs were supplied by Mr.

Smith and the Hell's Angels. The Crown alleged that there was animosity between Smith and the Hells Angels on the one hand and Mr. Simmons on the other. Kelsie is related to James and Gareau is a close friend of Derry whose wife is Ms. Potts.

[12] The Crown alleged that Derry, James and Smith met some weeks before Simmons' death. At this meeting, the Crown alleged, Smith put in motion the events that ultimately led to Simmons' murder.

[13] On the day of the murder, Derry, James, Potts and Kelsie drove to Dartmouth. They met Gareau at a muffler shop close to the North Dartmouth apartment complex where Simmons resided. Gareau and Kelsie walked to that residence while James, Potts and Derry waited in the car around the corner. While they were waiting, Simmons was shot. When Kelsie returned to the car, James and Kelsie gave Potts and Derry the gun that had been used to shoot Simmons and clothing that Kelsie had been wearing when Simmons was shot. These items, according to the Crown, were ultimately recovered.

[14] As Crown counsel put it in his opening: "Derry is right in the middle of all this. ... He acted as a police agent. ... He collected evidence, he worked with the police, he recovered exhibits, and ... there are wiretaps compiled by Mr. Derry, he wore recording devices, there were recording devices on his telephone lines. ..."

[15] The dangers inherent in accepting Mr. Derry's evidence were explained to the jury by the trial judge. He told them that both Potts and Derry were looked upon as accomplices in the killing of Simmons and that Mr. Derry had served as a police agent. The judge noted that both Ms. Potts and Mr. Derry had admitted to a series of criminal convictions, many of which involved offences of dishonesty. Both had also admitted, he noted, that they had lived by committing fraud and dealing drugs. The judge went on to point out that these two witnesses had been very involved in the offences before the Court. Mr. Derry, by his own admission, actively participated in the search for Sean Simmons before he was killed. According to their own evidence, Mr. Derry and Ms. Potts provided the weapon used, drove others to the scene of the offence and disposed of the evidence afterwards. The judge reminded the jury that, in assisting the police, Mr. Derry had been looking to make money and to obtain immunity for himself and Ms. Potts. He also pointed out that Ms. Potts and Mr. Derry had been given immunity from prosecution in return for co-operating with the police. Mr. Derry had been

paid $500.00 a week for working as a police agent and he and Ms. Potts had been provided with an apartment. Mr. Derry's drug debt was paid off. Both he and Ms. Potts were relocated and entered into the Witness Protection Program.

C. Witness Protection:

[16] It will be helpful to set out a brief account of the witness protection legislation.

[17] The **Witness Protection Program Act**, S.C. 1996 c. 15, as am., establishes a program to facilitate the protection of witnesses administered by the Commissioner of the RCMP. (s. 4) In order to be admitted to the program, a person must enter into an agreement with the Commissioner which sets out the obligations of both parties. (s. 6(1)(c.)) The **Act** deems certain terms to be included in the agreement. One is an obligation on the part of the Commissioner to take reasonable steps to provide the protection. Another is an obligation on the part of the protectee to give information or evidence in the proceeding to which the agreement relates and to refrain from activities that constitute offences under federal law: (s. 8). The Commissioner may terminate the protection if he has evidence that the protectee has made a material misrepresentation or has deliberately committed a material contravention of the agreement: (s. 9).

[18] Needless to say, the **Act** contains provisions relating to the protection of the protectee's identity. Section 11(1) prohibits the knowing disclosure of information about the location or a change of identity of a protectee. The Commissioner, however, is entitled to disclose this information in the circumstances referred to in s. 11(3)(d) including if the disclosure "... is essential to establish the innocence of a person." Section 21 of the **Act** makes it an offence to knowingly disclose, directly or indirectly, information about the location or a change of identity of a protectee, subject to the exceptions set out in the **Act**.

D. The Federal Court Action and Confidentiality Order:

[19] The provincial Crown advised the appellants that it has some material relating to the Federal Court civil action, namely, a letter from the Federal Department of Justice to the RCMP dated March 9, 2004 and a confidentiality

order and a statement of claim in the action. The Crown has also advised that it cannot disclose this information by virtue of the Federal Court confidentiality order. The background, as it appears in the record, is this.

[20] The Provincial Crown, during preparation for the trial of Mr. Gareau, became aware of a statement of claim filed by Mr. Derry in the Federal Court. The Crown requested a duly vetted copy of this document from the RCMP. This was apparently forwarded to the Crown by the RCMP. The Crown then noticed that the statement of claim referred to a confidentiality order made by the Federal Court relating to the statement of claim and other filed materials. The correspondence indicates that the order is dated December 4, 2003.

[21] The Crown in the Gareau matter disclosed to Mr. Gareau's counsel the following:

> We wish to bring to your attention a disclosure issue which has presented itself.
> Paul Derry has commenced an Action by way of a Statement of Claim against the R.C.M.P. in the Federal Court. It is our understanding that this Statement of Claim has been filed relatively recently. Mr. Derry himself first brought the matter to our attention.
> The Statement of Claim is governed by a Confidentiality Order out of the Federal Court which prohibits disclosure of its contents, among other things.
> Pursuant to our disclosure obligations, we are advising you of these facts and the existence of this material.
> Thank you for your cooperation.
>
> (Emphasis added)

[22] Mr. Gumpert, the Crown on the Smith and James appeal, brought this letter to the attention of counsel in this matter, writing in part as follows:

> I am required by our disclosure obligations to bring to your attention a disclosure issue which has been passed on to me. I understand from Mr. Peter Craig, Senior Crown Attorney, that to the best of his recollection Paul Derry's intention to possibly sue the RCMP was evidenced in the initial disclosure materials, on Mr. Derry's cross-examination on this point at the preliminary inquiry and at Mr. Kelsie's trial and Mr. Smith and Mr. James' trial.

> I am enclosing a letter dated October 25, 2004 from Mr. Craig to Mr. Gareau's counsel, Chris Manning, advising of a statement of claim against the RCMP. The statement of claim had been filed relatively recently prior to October 25. I am informed that it was also filed after the conclusion of the trials of Messrs. Kelsie, Smith and James.
> I am informed that the statement of claim is governed by a Confidentiality Order out of the Federal Court which prohibits disclosure of its contents, among other things. I am informed that we therefore may not disclose anything more than its existence. This limitation on disclosure has been approved by Adrian C. Reid, Q.C., Deputy Director of Public Prosecutions in the absence of the Chief Crown Attorney (Appeals Branch), Kenneth W.F. Fiske, Q.C. (who is non medical leave).
> Pursuant to our disclosure obligations we are advising of these facts and the existence of this material.
>
> (Emphasis added)

[23] We have been provided with a vetted copy of the Federal Court confidentiality order which, the record indicates, is dated December 4, 2003. This order imposes the conditions of confidentiality provided for under **Rules** 151 and 152 of the **Federal Court Rules**, subject to certain exceptions which are not immediately relevant. The order therefore imposes the following restrictions on access to material filed in the action:

> 152(2) Unless otherwise ordered by the Court,
> (a) only a solicitor of record, or a solicitor assisting in the proceeding, who is not a party is entitled to have access to confidential material;
> (b) confidential material shall be given to a solicitor of record for a party only if the solicitor gives a written undertaking to the Court that he or she will
>
> > (i) not disclose its content except to solicitors assisting in the proceeding or to the Court in the course of argument,
> > (ii) not permit it to be reproduced in whole or in part, and
> > (iii) destroy the material and any notes on its content and file a certificate of their destruction or deliver the material and notes as ordered by the Court, when the material and notes are no longer required for the proceeding or the solicitor ceases to be solicitor of record;

> (c) only one copy of any confidential material shall be given to the solicitor of record for each party; and
> (d) no confidential material or any information derived therefrom shall be disclosed to the public.

[24] Mr. Gumpert, in my view quite properly, takes the position that, by virtue of the order, he cannot disclose the material in his possession about the Federal Court action. The order, of course, also applies to the contents of the Federal Court file and to the material relating to the action in the possession of the RCMP and its legal counsel in the litigation.

[25] I think it is apparent that, but for that order (and, of course, subject to other concerns about privilege, etc.), the Provincial Crown would disclose the contents of the document as part of its ongoing disclosure obligations pending appeal. In saying this, I do not mean to suggest that the Crown in any way concedes that the relevant threshold for disclosure pending appeal has been met. I simply point out that it seems clear from the correspondence that, but for the confidentiality order, the Crown would have disclosed even though recognizing that it might not be required by a Court to do so.

[26] I would also note that, but for the confidentiality order, counsel for the applicant, in common with all other members of the public, could gain access to the contents of the Federal Court file in this matter.

E. The Potential Relevance of the Material Sought to the Appeal:

[27] I will discuss later in my reasons the principles governing disclosure and third-party production in criminal appeals. Those principles are shaped by two main considerations. First, the principles reflect that an appeal is not a new trial. To prevent it from becoming one (and for other good reasons) there are fairly strict limits as to what may be advanced as new evidence on appeal. Second, the principles relating to disclosure and production recognize the importance of the full rights of appeal accorded to convicted persons in order to avoid unjust convictions. In short, the principles governing disclosure and production on appeal are about the relevance of the material sought assessed in light of the proper limits of appellate review. It will be helpful, therefore, to discuss how the material sought is or may be relevant to the appeal.

[28] In my view, three factors combine to show that the material sought is potentially relevant to the appeal. The first factor is the close links among Mr. Derry's law suit, the witness immunity agreement and Mr. Derry's testimony at trial. The second is the importance of his evidence at trial. The third is that he was a witness whose evidence must be viewed with the utmost caution. I will explain.

[29] We know virtually nothing about the subject of the Federal Court action. However, it is a reasonable inference from the record that it relates to the witness protection agreement entered into by Mr. Derry and his apparent dissatisfaction with the performance of it by the authorities. It is probable, therefore, that there is a direct link between the subject-matter of the civil action and the agreement that led to Mr. Derry testifying for the Crown at the trial in this case.

[30] We know that to be enrolled in the witness protection program, Mr. Derry would have entered into an agreement under the **Act**. We know as well that the agreement he must have entered into arose out of the offences which are the subject of this appeal. While perhaps, strictly speaking, not part of the investigation of these offences, the witness protection arrangements were part and parcel of the Crown's case presented at trial. There was an explicit *quid pro quo* arrangement in relation to Mr. Derry's testimony that implicated the two appellants in this matter. He admitted at trial telling the police that "You want to make a deal in the long run, I'll bring my fucking lawyer in, we'll get it all on fucking paper, and I'll give you fucking anything you want." He also told the police: "Find out what you guys are going to give me, and I'll find out what I'm going to give you."

[31] In other words, it was pursuant to this agreement that Mr. Derry's trial evidence in this case was obtained and it was this evidence, at least in part, to which the agreement related.

[32] We also know from reading the **Witness Protection Program Act** that a protection agreement is deemed to include an obligation on the part of the protectee to give the information or participate as required in relation to the prosecution to which the protection provided relates and to refrain from activities that constitute an offence against an Act of Parliament: (s. 8(b)(i) and (iv)). The statute also provides that the Commissioner of the RCMP may terminate the protection provided to a protectee if the Commissioner has evidence that there has been a material misrepresentation or a failure to disclose information relevant to

the admission of the protectee to the Program or a deliberate and material contravention of the obligations of the protectee under the agreement.

[33] We know that Mr. Derry's evidence was important to the Crown's case. That means that anything which was not known at the time of the trial that would significantly affect the assessment of his evidence is potentially important evidence.

[34] We also know that there are many reasons to treat Mr. Derry's evidence with the utmost caution. He was a drug dealer, fraud artist, a participant in the murder and a paid police informant who received immunity from prosecution. This, coupled with the importance of his evidence, counsels the Court to be especially vigilant for a miscarriage of justice.

III. ANALYSIS:

A. <u>The Material Sought and the Application</u>:

[35] Although this is not reflected in the notice of application, it became clear during submissions that the material sought falls into three categories:

1. Material in relation to the Federal Court action that is in the possession of the provincial Crown;

2. Material filed with the Federal Court in the action; and

3. Material in relation to the Federal Court action, other than that filed with the Federal Court, which is in the possession of the RCMP or its legal counsel.

[36] Although the application is framed in terms of seeking disclosure, the respondents and the source protection witnesses all recognize that the material sought may also engage the principles relating to production of third party records. As both the disclosure and the production aspects have been argued, I will deal with both.

B. <u>Impact of the Federal Court Confidentiality Order</u>:

[37] The first issue concerns the impact of the Federal Court confidentiality order on this application. The respondent, along with counsel for the RCMP and the source witnesses, submit that we cannot and should not make any order that is inconsistent with the Federal Court order. I agree that we should not do so.

[38] In my view, it would be wrong for us to order disclosure or production of any of the material sought in the face of the confidentiality order issued by the Federal Court. I accept the position advanced by the provincial Crown that an order of this Court ought not to put the Crown in the position of having to chose which order – that of the Federal Court or of this Court – it ought to obey.

[39] It might be argued that disclosure of the information in the possession of the provincial Crown would not technically breach the Federal Court order given that the information has been provided to the Crown already. I would not accept such an approach. I agree with Mr. Gumpert's submission that any release by him of this material would at least be a violation of the spirit and intent of the Federal Court order and that the Crown ought not be compelled to take such a course of action. It would be strangely ironic for the Court, which expects the Crown to behave as a minister of justice, to order the Crown to sail so close to the wind.

[40] I do not need to decide this issue on jurisdictional grounds - that is, to decide whether we have the authority to make the order sought. I am persuaded that we ought not to make it even if we could.

C. <u>The Role of This Court:</u>

[41] The next question is whether there is any further role for this Court given that we should not make any disclosure or production order because of the Federal Court confidentiality order.

[42] The confidentiality order may rest on a number of possible bases. One may be the witness protection concerns, focussed on not disclosing the identity or the location of a protectee. Determination of whether any information about the action may be released without revealing that information is entirely a matter for the Federal Court. The **Act** prohibits revelation of that information and entrusts the Commissioner of the RCMP with discretion to reveal information in particular circumstances.

[43] The applicant's request would be largely met if it were possible to provide him with information about the claims and defences advanced in the action without jeopardizing witness protection concerns. This Court has nothing to contribute to the resolution of the question of whether that can be done other than to indicate, as I have done, that the applicant has good reason in the context of this criminal appeal to want to know what the civil action is about.

[44] The confidentiality order may also rest on other concerns, the resolution of which may call for a balancing of the potential importance of the material to the criminal appeal with issues of privacy and privilege. Assuming the witness protection concerns can be met by vetting, this Court, as the Court seized with the criminal appeal, has something to contribute to that balancing process. One approach, mooted by counsel for the source witnesses before us, would be that copies of the Federal Court file, vetted to remove any concerns about the location and identity of protectees or former protectees could be released to this Court, but not to the applicant, and this Court, in turn, could hold appropriate hearings to address any other concerns about disclosure. Of course, any variation of the Federal Court order is for the Federal Court to consider.

[45] In short, the question is not so much whether the material in the Federal Court file is subject to disclosure or should be ordered produced as information in the hands of a third party, but whether the reasons the material has been ordered to be kept confidential and the applicant's legitimate interests in seeing it may be accommodated. To the extent that this issue turns mainly on the protection of the witnesses, this Court has little if anything to contribute to its determination. To the extent that it turns on a balancing of interests in the context of this criminal appeal, it may be that this Court has a role to play.

[46] This Court is ultimately responsible for the just disposition of this murder appeal. This Court, given that it has the appeal before it, is likely better placed to do any required balancing of the interests of the appellants in disclosure with claims of privilege or privacy. This Court regularly exercises appellate jurisdiction in criminal matters and works on a regular basis with the legal principles relating to disclosure and production of records in the context of criminal appeals. We have the full trial record before us as well as full submissions from the parties, including the provincial Crown which is the respondent, not only on this application but on the appeal.

[47] It seems to me that it would be more consistent with our responsibilities to the parties to the criminal appeal and with the fact that this Court is conversant with both the record and the relevant principles for us to do more than simply send the applicant to the Federal Court.

[48] While recognizing that we must not interfere in any way with the exercise of judicial discretion by the Federal Court, it seems to me that it could be helpful for us to express some tentative views on whether, from the perspective of the ususal rules of disclosure and production in criminal appeals, this material would be ordered disclosed or produced but for the Federal Court confidentiality order. Of course, any views we express on that subject would in no way resolve the issues in relation to confidentiality that must be resolved by the Federal Court in relation to its own order. But, as I have said, our doing so may prove of assistance to that Court in considering the various matters which it will no doubt have to consider if asked to vary or discharge its order.

[49] I, therefore, propose to set out my views on what this Court would do but for the existence of the Federal Court order.

D. Material in the Possession or Control of the Provincial Crown and Material Filed with the Federal Court:

[50] The first two types of material – the documents relating to the Federal Court civil action which have come into the possession of the provincial Crown and material filed with the Federal Court – may be considered together.

[51] It is admittedly somewhat artificial to deal with disclosure principles in relation to material that, but for the confidentiality order, would be public. But it may be of some help to set out the threshold for disclosure of the material in the possession of the provincial Crown and provide an opinion on whether the material sought which is in the Crown's possession has been shown to meet that threshold.

[52] As I shall discuss, the threshold is whether there is some reasonable possibility that the material sought could be of assistance to the applicant in prosecuting his appeal. In my view, that threshold has been met in relation to

material that would inform the applicant about the claims and defences advanced in the civil action.

[53] It does not appear to be controversial that the Crown's disclosure obligations continue through the appellate process: **R. v. Trotta** (2004), 23 C.R. (6th) 261 (Ont. C.A.); application for leave to appeal granted [2005] S.C.C.A. No. 287. However, the legal bases for imposing those obligations on appeal are quite different than those applicable at trial. On appeal, the duty of disclosure rests on making effective the broad rights of appeal which in turn seek to protect against wrongful convictions: **Trotta** at para. 24. It follows, as Doherty, J.A. said in **Trotta** at para. 25, that the "... Crown's disclosure obligation on appeal must extend to any information in the possession of the Crown that there is a reasonable possibility may assist the accused in the prosecution of his or her appeal."

[54] The applicant says, in effect, that evidence about Mr. Derry's law suit in relation to the witness protection program may yield further information about his improper or illegal actions and about his unsavoury nature. Thus, the purpose of application is to attempt to obtain evidence that could be used to show that Derry's evidence ought not to have been accepted by the jury and/or that there has been a miscarriage of justice. The production sought is a preliminary step towards a future fresh evidence application. The material sought will only assist in the prosecution of the appeal if it results in evidence that would be admissible as fresh evidence on appeal. However, where, as here, the applicant unavoidably has limited knowledge of what the material contains, the Court should bear that in mind when determining whether the applicant has shown the necessary link between the material sought and possible fresh evidence on appeal: **Trotta**, para. 26.

[55] Where proposed fresh evidence is directed to factual issues which were decided at trial, such as the credibility of a witness as in this case, the evidence will only be admitted if, considered in its totality along with the trial evidence, it could reasonably be expected to have affected the verdict: **R. v. Palmer**, [1980] 1 S.C.R. 759; **Trotta, supra** at para. 29. It will also generally have to meet the "due diligence" requirement, although that may be relaxed in the interests of justice: **R. v. G.D.B.**, [2000] 1 S.C.R. 520 at paras. 17 - 21

[56] It seems the material sought would likely clear the due diligence requirement in relation to fresh evidence. The Federal Court law suit was apparently instituted after the applicant's trial and there is, in the material before us, no suggestion that

what is sought could have been obtained before or during trial with the exercise of due diligence.

[57] Is there some reasonable possibility that this material contains or could lead to evidence that could reasonably be expected to affect the verdict?

[58] It seems to me there is some reasonable possibility that it could. I have already described how the material in relation to this civil action could be relevant to the issues on appeal. In my view, (and, of course, assuming that all issues of witness protection, privilege and so forth have been resolved), any material in the possession or control of the provincial Crown in relation to the civil action and material in the Federal Court file which would inform the applicant about the claims and defences advanced in the civil action meet the threshold for disclosure on appeal.

D. Material in the Possession of the RCMP or its Legal Counsel:

[59] In my view, the material in the possession of the RCMP or its legal counsel in relation to this civil action do not fall within the Crown's disclosure obligations. It is clear from the record in this Court that the RCMP was not the investigating police force. While material in the possession or control of the investigating police force is generally taken to be within the possession or control of the Crown for disclosure purposes, the material sought here is not within the possession of the investigating police force: see the helpful summary of the principles by Watt, J. in **R. v. Bottineau** (2005), 32 C.R. (6th) 70; O.J. No. 4034 (Q.L.) (Ont. S. Ct. J.) at para. 51 and the cases cited there. It follows that any material in relation to the Federal Court action which has not been provided to the investigating police force or to the provincial Crown is not subject to disclosure principles. (I need not consider the issues in relation to whether, to be subject to the disclosure obligation, the material must be "fruits of the investigation.")

[60] The applicant's remedy, if any, therefore, lies in the principles applying to the production of records from non-parties.

[61] There is authority for the view that the principles of **R. v. O'Connor** , [1995] 4 S.C.R. 411 apply to production of third party records subject to statutory privilege: **R. v. Dunbar**, [2003] B.C.J. No. 2767 (Q.L.) (C.A.). In my view, it makes sense to apply those principles here. Briefly, **O'Connor** sets out a two-step process. At the first step, the issue is whether the material should be produced to the Court for review. If it is, the question of whether it should be disclosed to the applicant is addressed at the second step.

[62] The first question, therefore, is whether the applicant has met the threshold for production to the Court. At trial, this threshold is defined as "likely relevance", that is, there must be a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify: see **O'Connor** at para. 22. This threshold was purposively set somewhat higher than that for disclosure at trial because while the Crown should take a broad view of what it is required to disclose, production from third parties should only be ordered where the material sought is shown to be relevant to the proceedings in question: paras. 22 - 24.

[63] **O'Connor** held that the likely relevance threshold, which applies at the first of the two-step procedure in the trial context, is a "significant burden" but not an "onerous one" and that it might be satisfied by oral submissions by counsel: see paras. 24 and 18. It was, said the majority in **O'Connor**, "... simply a requirement to prevent the defence from engaging in 'speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming' requests for production": para. 24

[64] Where the **O'Connor** principles are applied on appeal in relation to production from third parties which is directed to a factual issue decided at trial, this likely relevance threshold must be recast to take account of the difference between the trial and the appellate contexts. The "likely relevance" threshold should be understood to mean that there is some reasonable possibility that the material sought could assist in the prosecution of the appeal. In other words, in relation to material sought which is directed to factual issues decided at trial, the test for disclosure on appeal and the test for production to the Court from third parties governed by the **O'Connor** principles are the same.

[65] The " some reasonable possibility" threshold, as with the "likely relevance" threshold that applies at trial, is designed to weed out the speculative, fanciful,

disruptive, unmeritorious, obstructive and time-consuming requests for production. But on appeal, this must be assessed but in light of the proper scope and limits of appellate review.

[66] In my view, the material sought meets the threshold at the first step for production to the Court for review. However, I would not order such production at this time even if I could. As I see it, all the applicant needs at this stage is to know what Mr. Derry's law suit is about. That he can determine from a much less onerous order than one requiring production of everything in the possession of the RCMP or its counsel in relation to this litigation. While there is, in my view, a reasonable possibility that information about this civil action could provide or lead to important evidence for this appeal, it is also entirely possible that the civil action has nothing to do with Mr. Derry's evidence in this case. All I would order, if I could, would be the production of the pleadings (assuming pleadings are completed) or a summary of the claims and defences advanced in the action, subject of course to ensuring that all witness protection concerns are addressed and leaving it open to the parties to advance claims of privilege or other reasons that the material should not be produced to the applicant following review by the Court. Even without the Federal Court confidentiality order, I would dismiss the application for third-production beyond that, without prejudice to it being renewed in the event the applicant learns more about the nature of the Federal Court proceedings and can show that additional production is justified.

IV. DISPOSITION:

[67] In my view, in light of the Federal Court confidentiality order, it would be inappropriate for this Court to make any order for disclosure or production. If the applicant wishes to pursue this material, he should do so in the Federal Court.

[68] The application is therefore dismissed.

Cromwell, J.A.

Concurred in

Hamilton, J.A.

Fichaud, J.A.