

NOVA SCOTIA COURT OF APPEAL

**Citation: *Mercier v. Nova Scotia (Attorney General)*,
2012 NSCA 51**

Date: 20120511

Docket: CA 362099

Registry: Halifax

Between:

Roger Edouard Mercier

Applicant/Appellant

v.

Attorney General of Nova Scotia and
Arthur Theuerkauf

Respondents

Judge: The Honourable Justice M. Jill Hamilton

Motion Heard: May 3, 2012, in Halifax, Nova Scotia, in Chambers

Held: Motion dismissed without costs.

Counsel: Applicant/Appellant in person
Duane Eddy, for the named respondents, as well as Nova
Scotia's Freedom of Information and Protection of
Privacy Review Officer; the Nova Scotia Public
Prosecution Service; the Police Complaints Commission;
and, Police Complaints Commissioner, Ms. Nadine
Cooper Mont

Decision:

[1] Mr. Mercier made basically the same motion now before me, in front of Justice J. E. Fichaud on March 1, 2012, on an *ex parte* basis. His motion was dismissed, without prejudice to his ability to re-commence the motion inter partes, on appropriate notice, which he has now done.

[2] The facts are set out in Justice Fichaud's decision (2012 NSCA 25):

[1] Mr. Mercier was charged with two counts of violating s. 811 of the *Criminal Code*. On October 27, 2010, the charges were brought before a judge of the Provincial Court. The Crown offered no evidence and the judge dismissed the charges. Mr. Mercier then sued the Attorney General of Nova Scotia and the Crown's counsel, Mr. Theuerkauf, for damages. The defendants applied under Rule 13.03 for summary judgment on the pleadings to dismiss Mr. Mercier's action. On December 11, 2011, Justice Coughlan of the Supreme Court of Nova Scotia granted that motion. The transcript of the judge's oral reasons says:

There is not [sic] basis in law for a claim against Mr. Theuerkauf but when he determined convictions were unlikely, made arrangements to have the charges dismissed at an early date. The claim against him is totally without merit. Likewise, there is no claim against the Attorney General of Nova Scotia. The motion is granted.

[2] On November 14, 2011, Mr. Mercier appealed Justice Coughlan's ruling to the Court of Appeal. On February 16, 2012, Justice Oland in chambers scheduled the appeal hearing for September 17, 2012. Mr. Mercier said that he intended to move to add fresh evidence to the record.

[3] On February 27, 2012, Mr. Mercier filed an *ex parte* motion in chambers, requesting orders that: (1) Nova Scotia's Freedom of Information and Protection of Privacy Review Office turn over documents from the Public Prosecution Service; (2) the Public Prosecution Service turn over documents; (3) the Police Complaints Commission and Police Complaints Commissioner, Ms. Nadine Cooper Mont, turn over documents, including documents from the Minister of Justice; (4) the Halifax Regional Police turn over documents; and (5) the documents that are turned over be sealed. Mr. Mercier gave no notice of this motion to the respondents, or to the parties who would be ordered to turn over the information.

[4] In support of the motion, Mr. Mercier filed his affidavit sworn on February 27, 2012. Mr. Mercier appeared in chambers on March 1, and made submissions in support of his motion. I asked Mr. Mercier to address why the motion could not proceed after notice to the respondents and affected parties.

[5] Mr. Mercier's affidavit says that, in the elevator after the conclusion of the chambers hearing on February 16, 2012, the respondents' counsel said: "It's Okay, there is lots of time to forget before the appeal in September." Primarily from this source, Mr. Mercier asks me to infer that (1) an order is needed to preserve the documentary evidence that is the subject of this motion and (2) that order must be given *ex parte*.

[6] I disagree that there is any basis for an *ex parte* motion. I am not satisfied that there is any risk to the survival of the documents in the possession of the Freedom of Information and Protection of Privacy Review Office, the Public Prosecution Service, the Police Complaints Commission or its Commissioner, the Minister of Justice or the Halifax Regional Police.

[3] Mr. Mercier made it clear before me that he wants the documents he is seeking: (1) produced to the Court of Appeal as his fresh evidence; (2) sealed; (3) not made available even to the parties; (4) considered by the panel hearing his appeal in reaching its decision; and (5) then destroyed.

[4] I am not prepared to grant Mr. Mercier's motion. Even if it was otherwise appropriate to order the production of the documents Mr. Mercier is seeking, which I am not convinced it is, I would not do so given the use he proposes be made of these documents. It would not be fair to either party to have his motion for fresh evidence and the merits of his appeal decided on the basis of documents not available to them. Natural justice requires that the parties be informed of, and have the opportunity to make representations on, all evidence the Court will consider in reaching its decision.

[5] For these reason, I dismiss Mr. Mercier's motion without costs.

Hamilton, J.A.