NOVA SCOTIA COURT OF APPEAL

Citation: ***R. v. Farler***, 2005 NSCA105

Date: 20050706
Docket: CAC 232410
Registry: Halifax

Between:

Timothy Charles Farler

Appellant

v.

Her Majesty the Queen

Respondent

Editorial Notice
A phone number has been removed from this electronic version of the judgment.

Restriction on publication: Pursuant to s. 486(3) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46

Judge: The Honourable Justice Jamie W. S. Saunders

Application Heard: June 16, 2005, in Halifax, Nova Scotia, in Chambers

Held: Several applications brought by the appellant were refused as being beyond the jurisdiction of a single judge sitting in chambers, but remitted to a panel for full consideration and determination at a hearing in September, with several specific directions given to the parties concerning matters to be completed in the interim, and ordering the appellant to surrender himself into custody twenty-four (24) hours before the hearing.

Counsel: Timothy Charles Farler, self-represented appellant
Daniel A. McRury, for the respondent

Publication Ban: Pursuant to s. 486(3) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46

Publishers of this case please take note that Section 486(3) of the **Criminal Code** applies and may require editing of this judgment or its heading before publication. The subsection provides:

> (3) **Order restricting publication** - Subject to subsection (4) where an accused is charged with
>
> > (a) an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272, 273, 346 or 347,
> >
> > (b) an offence under section 144, 145, 149, 156, 245 or 246 of the **Criminal Code**, chapter C-34 of the of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or
> >
> > (c) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the **Criminal Code**, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988,
>
> the presiding judge or justice may make an order directing that the identity of the complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way.

Decision:

Proceedings Leading Up To This Appearance In Chambers

[1] The parties appeared before me in chambers on June 16, 2005 seeking directions. I reserved decision so that I could give further consideration to the record, the case law to which I was referred, and the very unusual circumstances described by the appellant in his submission.

[2] I note at the outset that there is a publication ban in effect, which continues in force until the disposition of Mr. Farler's appeal, unless otherwise ordered by this court.

[3] This is a "prisoner appeal" (**Civil Procedure Rule** 65.01(1)(l)). The appellant ("Farler") was in custody when, on September 28, 2004, he filed his notice of appeal.

[4] Farler appeals both his conviction and sentence.

[5] Owing to difficulties in arranging the timely preparation of a complete transcript from the appellant's trial and sentence hearing, extensions in filing dates were sought by the Crown and granted by the Registrar. Pertinent dates, as last revised are:

Appeal Book to be filed by:	May 13, 2005
Appellant's Factum to be filed by:	July 18, 2005
Respondent's Factum to be filed by:	August 15, 2005
Date for the Appeal from Conviction & Sentence (all day):	September 19, 2005

[6] At his trial and sentencing, Farler was represented by counsel. Since that time he has acted on his own behalf. When he appeared before me in chambers on June 16, he declared an intention to represent himself at his appeal.

[7] Since his conviction and sentence Farler, acting alone, has secured his release, upon terms, pending his appeal, and has sought and obtained a variation of those conditions in subsequent applications to chambers. After questioning the appellant, I am satisfied that he has a keen grasp of all of the evidence in his case; is well aware of the legal principles that apply to the issues that arise both with respect to his intended application(s) and his appeal; is already familiar with, or can quickly acquire a suitable level of understanding of the leading jurisprudence (to which I will make reference later in these reasons); and is knowledgeable and articulate enough to make appropriate submissions in these proceedings.

[8] A particular term of his release on bail is that he shall surrender himself into the custody of the keeper of the Central Nova Scotia Correctional Facility, Dartmouth, N.S., twenty-four (24) hours prior to the commencement of his appeal, which appeal is scheduled to be heard, as noted earlier, on September 19, 2005.

[9] A further explicit term of Farler's bail is that his release is conditional upon the hearing of the appeal proceeding on the date scheduled, and in the event the hearing is for any reason adjourned, the matter of his release shall be reviewed by the court in chambers.

[10] To lend context to the matters placed before me for consideration, as well as my disposition of the application, I will briefly summarize some of the material facts.

Background

[11] After electing trial by judge and jury Farler was tried in December, 2003 on a 13 count Indictment charging a variety of sex offences including gross indecency, buggery, and sexual assault. Farler was convicted on 12 of the 13 counts.

[12] On September 17, 2004 Farler was sentenced by the presiding judge, Kennedy, C.J.S.C. to six months on each count, to be served consecutively, for a total of six years' imprisonment.

[13] In his notice of appeal filed September 28, 2004, Farler asks that his conviction be quashed or his sentence reduced on a variety of grounds which, for the purposes of this decision, may be briefly characterized as:

(i) no evidence to support the convictions;

(ii) errors in admitting similar fact or other prejudicial evidence;

(iii) incomplete, or tardy, or total non-disclosure by the Crown;

(iv) violating a variety of the appellant's **Charter** rights including his right to a fair trial; and

(v) denying the appellant the opportunity to say anything before imposing sentence, contrary to s. 726 of the **Criminal Code**.

[14] By notice of application filed June 6, 2005, Farler asked to be heard for what he described in his notice as:

> . . . a motion by the Appellant to have the disputed disclosure issues of March 17th, 2005 and a new item concerning a new investigation by the RCMP into the actions of RCMP Corporal [P.L.] resolved.

[15] The thrust of the appellant's request is somewhat amplified by his letter to the Registrar, also filed June 6, 2005, from which I quote in part:

> A new item has arisen since the last Chambers hearing which has been discussed with the Crown and I wish to ask the Court for a resolution. This item being a new RCMP investigation into the actions of a Corporal [P.L.].

and now quoting from a portion of his written brief to the court (at page 3):

> **New development**
>
> Thursday, May 19, 2005, I was contacted by Sergeant Gil Dares, Internal Services Investigator, RCMP, "H" Division (902) [...] in regards to an investigation being conducted into the actions or lack of action taken by Corporal [P.L.] in the alleged reporting by [R.T.] of abuse.

> This investigation included questions in regard to a possible sexual relationship between Corporal [P.L.] and [B.T.].
>
> The nature of this investigation of Corporal [P.L.] directly affects the credibility of the complainant [R.T.] and this investigation should have been conducted in April of 2000. I request that this information be provided to me.
>
> This information was asked of the Crown on May 20, 2005. The Crown indicated that this request should be brought to the Court to be dealt with.

[16] In essence, the appellant seeks further disclosure from the Crown of material he considers relevant. The Crown resists the application. Before considering the several specific items for which Farler seeks production, I observe generally that the Crown's opposition is based on the submission that: the material is not relevant and need not be disclosed; the material is protected by privilege and ought not be disclosed; the material is not and has never been in the possession of the Public Prosecution Service or the police and therefore is "not disclosable"; or, if some of the sought-after material does exist, and is deemed relevant, then such material affects the privacy or other interests of third parties, who ought to be given notice of any application for disclosure.

The Law

[17] The parties reported that their appearance before me was a continuation of a process first begun before Bateman, J.A. in chambers on March 17, 2005. At that time Farler sought disclosure of 30 specific "items" identified as [1] to [24] and [A] to [F], more particularly described in Appendix "A" to his notice of application filed March 14, 2005. Justice Bateman gave the parties certain directions concerning the appellant's demands, with leave to the appellant to renew his application - should that be necessary - after he had completed further discussions with the Crown.

[18] When the parties appeared before me on June 16, as part of that process first begun in March, they reported that of the original 30 "items," 21 had been disclosed to the appellant or otherwise resolved to his satisfaction, leaving only 9 to be considered.

[19] A lengthy hearing then ensued wherein both the appellant and counsel for the respondent had an opportunity to make detailed submissions.

[20] During the course of argument it seemed to me that much of the “material” (and I will use that word to describe, collectively, the various “items” sought by the appellant) referred to in their submissions would - if deemed relevant - raise issues, or trigger procedures, that could only be decided by this Court, and not by me sitting alone as a single judge in chambers. I will say more about that below. When I initially raised my concerns, the parties said they were content “to leave it to my discretion.” Of course no amount of discretion can create jurisdiction, where it does not lie.

[21] Ours is a statutory court. We derive our authority and jurisdiction from the **Constitution Act**, 1867, as amended, the **Judicature Act**, R.S. c. 240, as well as our Rules of Court, or any federal, provincial, or municipal statute as may pertain to the particular matter or proceeding before the court.

[22] This is a criminal appeal. **Civil Procedure Rule** 65 applies. In particular it will be considered as a “prisoner appeal” (**CPR** 65.01(1)(l)), with whatever statutory or procedural appurtenances as may prevail.

> (l) "prisoner appeal" means an appeal by a person who at the time the notice of appeal is given is in custody and not represented by counsel;

[23] One of these is **CPR** 65.04 which provides:

> This Rule shall apply to appeals under Part XXI and section 839 of the Code.

[24] Our **Civil Procedure Rules** are very specific in both defining, and then describing, what this “Court” or a “judge” thereof is empowered to do. For example, **CPR** 62 addresses in considerable detail all that is to be done by way of perfecting and disposing of an appeal in a civil case. Similar directions, expectations and obligations are mandated in **CPR** 65 for perfecting and disposing of an appeal in a criminal case.

[25] **CPR** 65.16**,** for example, provides that a single judge of the court may set a matter down for appeal and give such directions as may be appropriate with

respect to it (see **CPR** 65.16(1)**)**. However, only "the court" may consider the merits of the appeal and decide the appeal (see for example **CPR** 65.16(6)). In my view the information sought by the appellant goes to the merits of his appeal and therefore any decision concerning their ultimate production for the purposes of his appeal hearing, must be decided by a panel of the court.

[26] After carefully considering the record, the submissions, the leading jurisprudence, and the law which grounds my statutory jurisdiction, I conclude that I have no authority sitting as a single judge of this Court in chambers, to decide the issues raised by Farler's present application.

[27] There is nothing in the **Constitution**, the **Judicature Act**, the **Criminal Code**, the **Civil Procedure Rules**, custom, or precedent, that would grant me, as a single judge sitting alone, the authority to order the kind of production or relief now claimed by the appellant.

[28] On the contrary, it seems clear to me that such jurisdiction would only lie with a panel or panels of this Court assigned to determine the merits of Farler's appeal, or such other preliminary matters as may be required before such a determination can be made.

[29] In these reasons I will be deliberately circumspect in my description of the "material" sought by the appellant or the submissions he made in chambers to support their production, and brief in my comments pertaining to them, so as not to prejudge, nor appear to prejudge, the merits - if any - of Farler's requests.

[30] In my opinion, certain of the appellant's demands have nothing to do with information now or ever in the hands of the Crown, such that Crown disclosure and the principles enunciated by the Supreme Court of Canada in **R. v. Stinchcombe** (1991), 3 S.C.R. 326, do <u>not</u> arise.

[31] Rather, in certain instances, what the appellant is really applying to have produced, relates to either or both, records of other individuals some of whom may be strangers to this case, such that privacy and other interests would be implicated, thus triggering the type of procedures mandated by the Supreme Court in **R. v. O'Connor** (1996), 103 C.C.C. (3d) 1 (S.C.C.), or are more properly characterized as an attempt to put fresh evidence before this court, thus invoking procedures

adopted by the Court in **Palmer v. The Queen**, [1980] 1 S.C.R. 759; **R. v. G.D.B.**, [2000] 1 S.C.R. 520; and **R. v. Lévesque**, [2000] 2 S.C.R. 487. See as well **R. v. Wolkins** [2005] NSCA 2; **R. v. Gingras** (1992), 71 C.C.C. (3d) 53 (Alta. C.A.); and **R. v. Khan**, [2004] O.J. No. 3811 (Ont. Sup. Ct.).

[32] In view of the steps that will now have to be taken to address the appellant's various demands, it will be impossible to proceed with the appeal as presently scheduled for September 19, 2005. I raised that possibility with the parties when they appeared in chambers. Such a prospect was conceded by the appellant as reasonably necessary to attempt to secure the information he considers relevant and important to the presentation of his appeal.

[33] By these reasons I will direct that the hearing set for a full day on Monday, September 19, 2005, commencing at 10:00 a.m. will not be devoted to Farler's appeal, but rather to permit a panel of this court to consider and dispose of such **Stinchcombe**, **O'Connor,** and **Palmer** applications as may be necessary.

[34] In these reasons I will also give specific directions as to the steps that must be completed for those applications to be heard on September 19.

[35] The terms of Farler's release on bail pending his appeal remain in full force and effect, including the direction that he shall surrender himself into the custody of the keeper of the Central Nova Scotia Correctional Facility in Dartmouth, Nova Scotia, twenty-four (24) hours prior to the commencement of the hearing, which will take place before a panel of this court on Monday, September 19, 2005.

[36] When the parties appeared before me in chambers on June 16 they advised that of the thirty original "items" "sought" by the appellant, twenty-one had been produced or otherwise resolved to the appellant's satisfaction, leaving nine remaining items to be addressed. To assist the parties and for the purposes of clarification I now list those nine (using the same numbering and lettering identifiers used by the parties when they first appeared before Bateman, J.A., on March 16, 2005, and reappeared before me, that is numbers 1 to 7, and letters A to C) and three "new items," making a total of twelve:

(1) **1. [D] Cst. [P.L's] service record when he served at the RCMP Cole Harbour Detachment.**

(2) **2. [F] The final report cards for [B.T.'s] Grade 10 years ending June 1985 and June 1986 and missing fax pages sent to the Crown on December 1, 2003.**

(3) **1. [3] Operation Hope file for [R.G.T.].**

(4) **2.[5] Information (RMV) system Client, License and Vehicle information for [J.M.P.], between the dates of January 4, 1983 to December 12, 1988.**

(5) **3.[9] Cover letter to Crown, Anne-Marie Simmons, re: appropriate charges 2001-08-28, and response.**

(6) **4. [19] The complete 1987-88 Military Police investigation file of Petty Officer Second/First Class Timothy Charles Farler.**

(7) **5.[A] Dartmouth, Atlantic Children Guidance Centre, record for [R.T.] (1987) seen by Brian Crawford, Dr. Holt and Terry Tinglay.**

(8) **6. [B] Cole Harbour RCMP reports for 238 Cow Bay Road during the period of March 1985 to December 1992.**

(9) **7. [C] Cole Harbour RCMP reports for 425 Cow Bay Road during the period of March 1985 to December 1992.**

(10) **A. 1. Transcript of a forty-five minute conversation between [R.T.] and Cst. Cater of the British Columbia Coquitlam Detachment of the RCMP of August 24, 2000.**

(11) **B. 2. Information pertaining to [R.T.'s] application to the Criminal Injuries Compensation Board in Nova Scotia made prior to October 8, 2000.**

(12) **C. New development - Internal RCMP investigation looking into the actions of Cpl. (as he is now) [P.L.].**

[37] These then are the twelve "items" to be addressed by the appellant, and counsel for the Crown in their submissions to the panel at the hearing on Monday, September 19. It may be that certain of these twelve items have already been resolved between the parties since the time of their last chambers appearance, in which case counsel for the Crown should advise the Registrar without delay. No new "item" will be added to the list, except as might be ordered by a judge of this court in chambers, upon proper notice, or as may be otherwise ordered by the panel hearing the matter on September 19.

[38] As appellant, Farler was to have filed his factum on or before July 18, 2005, with the responding Crown's factum due August 15, 2005. Those deadlines will now be revised to accommodate this change in procedure as reflected in these reasons.

[39] The appellant will have until Tuesday, July 26, at 4:00 p.m. local time to file with the Registrar and with the respondent (the required number of copies pursuant to the **Rules**):

(i) a duly sworn affidavit setting out in detail the basis for the appellant's belief as to why the information sought by the appellant is likely to be relevant to the issues on appeal; and

(ii) his factum, together with all case authorities and references, supporting his application that the information he seeks, ought to be produced for the purposes of his appeal on the basis of any or all of the Crown's duty to disclose (**Stinchcombe**), production of third party records (**O'Connor**), and fresh evidence (**Palmer**).

[40] The respondent will have until 4:00 p.m., local time, on Friday, August 19, 2005 to file its factum and supporting material in response to the appellant's application(s).

[41] Of the twelve "items" referred to above from which the parties reported that some were still extant, it is my view - quite apart from the issue of relevance - that at the very least:

(3) **1. [3] Operation Hope file for [R.G.T.].**

(4) **2.[5] Information (RMV) system Client, License and Vehicle information for [J.M.P.], between the dates of January 4, 1983 to December 12, 1988.**

(7) **5.[A] Dartmouth, Atlantic Children Guidance Centre, record for [R.T.] (1987) seen by Brian Crawford, Dr. Holt and Terry Tinglay.**

(11) **B.2. Information pertaining to [R.T.'s] application to the Criminal Injuries Compensation Board in Nova Scotia made prior to October 8, 2000.**

(12) **C. New development - Internal RCMP investigation looking into the actions of Cpl. (as he is now) [P.L.].**

raise privacy and other interests of original complainants, or virtual strangers to the prosecution. They are: [R.G.T.]; [J.M.P.]; and RCMP Cpl. [P.L.]. These individuals should be given notice of the appellant's application so that they personally, or through counsel, may have their interests represented at the hearing on September 19.

[42] This is problematic since by the terms of Farler's release pending his appeal he is prohibited from having any contact or communication, directly or indirectly, with a host of individuals including [R.T.]; their places of residence, employment, and education.

[43] So as not to compromise those restrictions, I direct that there be substituted service arranged through the office of the respondent, such that the Crown will use best efforts to notify without delay the said [R.G.T.]; [J.M.P.]; and RCMP Cpl. [P.L.], of the intended **O'Connor** application to be heard by a panel of this court on September 19, 2005.

[44] Should any of the individuals notified by the Crown as directed in ¶ 43, supra, wish to appear at the hearing, he is obliged to make that intention known to

the Registrar forthwith so that the chair of the panel may be informed, and any preliminary arrangements thought appropriate to facilitate appearances and submissions at the September 19 hearing, may be made.

[45] If, during the course of its preparations for the hearing on September 19, the Crown becomes aware of the names of additional individuals whose privacy or other interests might be affected by the scope of the hearing, and who might therefore require notice thereof, Crown counsel should apply for directions, upon notice, to the judge presiding in chambers without delay.

[46] The principles and procedures approved by the Supreme Court of Canada in **Palmer**, **Stinchcombe**, and **O'Connor** for application by a trial judge in any given case, may be adapted by the panel at the hearing to suit the circumstances, as deemed appropriate.

[47] It is hoped that these directions will assist the panel conducting the hearing in its determination of the relevance of the information sought by the appellant to the issues on appeal, including the appellant's fair trial interests, and facilitate the panel's ultimate disposition as to whether any such material or information ought to be produced for the purposes of Farler's eventual appeal.

[48] Fixing a date for Farler's appeal will likely await the panel's determination after the hearing, and those arrangements may be made by the panel, or thereafter by a judge of this court in chambers, upon proper application.

[49] Should the parties require any further directions, they may apply to any judge of this court in chambers, in the normal course, upon proper notice.

[50] In any event, the chair of the panel hearing the matter on September 19, or her or his designate, may take charge of managing the file and deciding whether to arrange for a pre-hearing conference in telephone chambers, or giving such other or further directions as may be necessary.

Saunders, J.A.