NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Fashoranti*, 2023 NSCA 78

Date: 20231102
Docket: CAC 518618
Registry: Halifax

Between:

His Majesty the King

Appellant

v.

Oluwarottini (Tim) Fashoranti

Respondent

Restriction on Publication: Section 486.4 of the *Criminal Code of Canada*

Judge:	The Honourable Justice Anne S. Derrick
Appeal Heard:	September 26, 2023, in Halifax, Nova Scotia
Subject:	**Criminal law. Disclosure order. Crown-requested stay of proceedings. Functional Appeal. Solicitor-client privilege.**
Summary:	After a contested hearing, the trial judge ordered the Crown to produce communications between police officers and Crown prosecutors to be vetted by him for solicitor-client privilege. Crown counsel refused to comply and indicated an appeal might be pursued. He asked for a judicial stay to be imposed. The trial judge imposed the stay. The Crown then appealed the disclosure order.
Issues:	(1) Is there a viable route to appeal an interlocutory ruling in a criminal proceeding where a judicial stay has been imposed at the prosecution's request? (2) Is the Crown appeal of the trial judge's ruling on the disclosure application a valid appeal?

(3) Is the judge's disclosure decision good law?

Result: The appeal is dismissed. There is a route of appeal for the Crown from interlocutory, i.e., mid-trial, rulings in criminal trials where a judicial stay has been entered at the request of the prosecution. This is known as a "functional appeal". A functional appeal is an extraordinary procedure. There are criteria that must be satisfied for an appeal to qualify as a functional appeal from a Crown-requested stay of proceedings and not amount to an abuse of process. The Crown appeal in this case failed to satisfy the onerous requirements for a functional appeal. The trial judge's disclosure decision was fundamentally flawed and of no precedential value.

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Restriction on Publication: Section 486.4 of the *Criminal Code of Canada*

Judges:	Farrar, Van den Eynden, Derrick, JJ.A.
Appeal Heard:	September 26, 2023, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Derrick, J.A.; Farrar and Van den Eynden, JJ.A. concurring.
Counsel:	Mark A. Scott, K.C., for the appellant Stanley W. MacDonald, K.C., for the respondent

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Reasons for judgment:

Introduction

[1] On September 29, 2022, Judge Alain Bégin of the Provincial Court of Nova Scotia granted a defence disclosure application and ordered the Crown, prosecuting Dr. Fashoranti for sexual assault, to produce pre-charge communications between Crown prosecutors and police officers for him to vet for solicitor-client privilege. All communications not covered by privilege would then be disclosed to the defence.

[2] Crown counsel (not counsel on the appeal) had vigorously opposed the application. He responded to the judge's decision by indicating an appeal might be pursued and asking for a judicial stay to be imposed. The judge obliged by entering a stay.

[3] By Notice of Appeal filed October 24, 2022, the Crown seeks to appeal the trial judge's disclosure order.

[4] This appeal concerns three questions: (1) Is there a viable route to appeal an interlocutory ruling in a criminal proceeding where a judicial stay has been imposed at the prosecution's request? (2) Is the Crown appeal from the trial judge's interlocutory ruling in this case a valid appeal? And (3) Is the judge's disclosure decision good law?

[5] The conclusion I have reached is that there is a route of appeal from interlocutory rulings in criminal trials where a judicial stay has been entered at the request of the prosecution but that this appeal cannot succeed. It does not satisfy the essential characteristics for an interlocutory criminal appeal in the nature of a "functional" appeal. I will discuss what constitutes a "functional" appeal.

[6] I have also concluded the trial judge's disclosure decision is fundamentally flawed and of no precedential value.

Background Facts of the Disclosure Application

[7] On August 4, 2021, Dr. Fashoranti was charged on three separate Informations with the sexual assaults of complainants K.T., V.C. and A.B.

[8] The police had investigated the K.T. complaint against Dr. Fashoranti 17 years earlier. It had been reviewed by a Crown prosecutor in the Amherst office and a decision was made not to charge. Dr. Fashoranti was advised accordingly.

[9] At the time of the K.T. complaint in 2006, Mary Ellen Nurse, then a lawyer in private practice, was representing K.T. for an intended civil action against Dr. Fashoranti. She had written twice to the police to ask about the status of their criminal investigation.

[10] A.B.'s complaint dated from an office visit with Dr. Fashoranti in 2003. She provided a statement in 2020 to an RCMP officer. He concluded the incident did not qualify as a sexual assault.

[11] V.C.'s name was supplied to police by H.D. H.D.'s complaint against Dr. Fashoranti had led to a charge of sexual assault that proceeded to trial. Mary Ellen Nurse, now a senior Crown prosecutor, conducted the prosecution. She invited an acquittal when she received information she disclosed to defence counsel which undermined H.D.'s credibility.

[12] Counsel representing Dr. Fashoranti on the August 2021 Informations believed that during the H.D. prosecution, Ms. Nurse was providing advice to the RCMP regarding the K.T., A.B. and V.C. complaints.

[13] Defence counsel believed Ms. Nurse may have intentionally or unintentionally influenced the K.T., A.B., and V.C. investigations. He claimed there was a tenable basis, given Ms. Nurse's previous involvement as K.T.'s lawyer, for a finding of impropriety. He sought disclosure of all non-privileged correspondence between the police and Crown about the K.T., A.B. and V.C. matters. He said the correspondence was relevant to his application for a stay of proceedings based on abuse of process. He wanted to know if the Crown involved with the police investigations was Mary Ellen Nurse.

[14] In defence counsel's brief on the disclosure application, he said the intended motion for a stay of proceedings would be "based, in part, on an alleged abuse of process involving pre-charge delay and improper Crown motive and conduct in the exercise of its prosecutorial discretion". In the submission of defence counsel the disclosure being sought,

> …will shed more light on the level of prosecutorial involvement in the pre-charge stage of the investigations, who assessed the files and made the decisions to prosecute, and whether Crown objectivity was maintained throughout the process.

[15] Defence counsel noted the Crown had refused to disclose the correspondence on the basis the information was privileged. He argued that the communications between the Crown and the police on the three files were not protected by solicitor-client privilege. He said emails already provided in Crown disclosure showed the police had not been seeking legal advice in communications with the Crown but direction with respect to the investigations.

[16] The disclosure application was heard on June 20, 2022. The Crown produced an affidavit sworn by Ms. Nurse on June 13, 2022 in which she stated that she had "not provided legal advice to police on whether or when to lay charges against the accused for the [K.T.] allegation". She said she had provided police "with pre-charge legal advice in connection with the allegations brought by [V.C.] and [A.B.]. She said in all three cases, the decisions "whether and when to charge the accused" were made by police.

[17] Dr. Fashoranti argued Ms. Nurse's affidavit did not settle the question of whether she had provided pre-charge advice to the police on the K.T. matter or had any involvement in it.

[18] Ms. Nurse did not handle the prosecutions of the K.T., A.B. and V.C. allegations. She appeared only once in relation to the charges, at Dr. Fashoranti's arraignment on October 4, 2021. She told the court she was in a direct conflict on the K.T. matter and could not speak to it. Crown attorney Jody McNeil assumed conduct of all three prosecutions and appeared for the Crown on December 20, 2021. At the next court appearance on January 31, 2022, Dr. Fashoranti elected to be tried in Provincial Court and entered not guilty pleas.

The Crown's Request for a Judicial Stay

[19] Judge Bégin concluded his disclosure decision by ordering the Crown to provide the correspondence between its office and the police on the K.T., V.C. and A.B. matters to him for review by October 21, 2022 at 4 p.m.

[20] On October 11, 2022, Crown counsel and counsel for Dr. Fashoranti appeared before the judge. Crown counsel advised:

> …the Crown considered that decision very carefully, and so after giving it due consideration the Crown is not going to be in a position to comply with the order. So what we're going to do is we're going to ask the court, or invite the court to enter judicial stays on each of the three single count Informations, Your Honour.

[21] Unsurprisingly, defence counsel did not object.

[22] The trial judge emphasized the impact of a judicial stay. He noted it was different from a Crown stay of proceedings and would bring an end to the prosecution:

> Yeah. So it's much more difficult, i.e., it'll never happen again. They won't be revived. The Crown can't revive 'em, 'cause they're asking me to enter a stay, not for them to, to stay 'em.

[23] Crown counsel confirmed they were looking for a judicial stay to be entered and indicated they wanted to preserve the potential for an appeal:

> So, yes, Your Honour. We are asking the court to, to enter stays on it. So this is not a, not a situation where the Crown is staying it. We are inviting the court to stay it…I would be candid with the court and leave open potentially the possibility of an appeal, which is something the Crown is considering. But, but we are asking the court to enter the stays.

[24] Defence counsel responded at this point to ensure he understood what the Crown was seeking:

> Your Honour, I, do I understand correctly what the Crown is saying is that the Crown is inviting the court to stay the proceedings, meaning that the Crown is not planning to call any further evidence in light of the ruling that Your Honour made? I just want to confirm that.

[25] Crown counsel was explicit in answering defence counsel's query:

> Well, the Crown is not going to comply with the order, and as such, the only course of action I would suggest to the court is to, is to grant your remedy, Mr. MacDonald, which is a stay of proceedings.

[26] Judge Bégin proceeded in accordance with the Crown's request and stayed each Information. He concluded by asking: "I believe that brings them all to an end. Is that correct?". Crown counsel replied: "That's correct".

Interlocutory/Mid-trial Appeals in Criminal Cases

[27] An appeal is a creation of statute (*R. v. Meltzer*, [1989] 1 S.C.R. 1764, at para. 16; *R. v. Hoyes*, 2021 NSCA 33, at para. 11). In criminal matters, they are governed by the *Criminal Code*. There is no authority for an appeal from a trial judge's interlocutory decision.

[28] However, as held by the Supreme Court of Canada in *R. v. Mills*, [1986] 1 S.C.R. 863:

> [88] …decisions effectively terminating the proceedings are not, as such, really interlocutory. Such is the case, for example, of a stay of proceedings which has the effect of discontinuing or permanently suspending the proceedings.

[29] A judicially entered stay of proceedings which effectively brings the proceedings to a final conclusion "is tantamount to a judgment or verdict of acquittal and subject to appeal by the Crown pursuant to s. 605(1)(a)" (now s. 676(1)(c) of the *Criminal Code*) (*R. v. Jewitt*, [1985] 2 S.C.R. 128 at para. 51).

[30] The question that arises is whether there is an appeal route for the Crown in circumstances as occurred here? Or does such an appeal constitute an abuse of process? The respondent argues the Crown, having requested the judicial stay, cannot now appeal from the trial judge's disclosure order and doing so amounts to an abuse of process.

The "Functional Appeal"

[31] Courts in Ontario, New Brunswick and British Columbia have expressly recognized a limited route of appeal from a Crown-requested judicial stay of proceedings following an unfavourable interlocutory ruling. This has become known as a "functional appeal". It is profitable to review several cases where it has been accepted as a legitimate procedure, albeit an extraordinary one.

R. v. Rutigliano, 2013 ONSC 6675 and *R. v. Rutigliano*, 2015 ONCA 452

[32] In *R. v. Rutigliano* a Crown appeal of a stay of proceedings it had requested was allowed. The appeal was from a trial court order for production of solicitor-client privileged communications between police investigators and prosecutors. The first issue addressed by the Ontario Court of Appeal was whether the appeal itself was an abuse of process, as argued by Rutigliano.

[33] In order to put the appeal court decision in *Rutigliano* in context, I will first discuss what happened in the court below.

[34] The defence in *Rutigliano* had sought a stay of proceedings based on an alleged abuse of process relating to wiretap evidence collected by police investigators. The defence claimed that police investigators, relying on unsupportable suspicions, had contrived an investigation against Sergeant Rutigliano with the intent of securing evidence to expose him as a "dirty" cop tied to organized crime.

[35] After hearing evidence in the abuse of process motion, Justice Casey Hill of the Ontario Superior Court of Justice ordered production to the court of solicitor-client communications between police investigators and Crown counsel who advised them during the investigation. He described the context from which his ruling emerged:

> [5] During the testimony of OPP Detective Sergeant Gregus, a serious issue arose, and was likely to arise in the evidence of upcoming police witnesses, relating to solicitor-client privilege in particular respecting Crown counsel advice to the OPP which may or may not have been instrumental in the way police mishandled presumptively privileged solicitor calls intercepted during the operation of four Part VI [*Criminal*] *Code* orders of this court.
>
> [6] Following argument, the court released its ruling (2013 ONSC 6589) on October 22nd. That ruling ordered produced to the court, for its review, solicitor-client communications relating to identified subject matter. That review, it was anticipated, could lead to disclosure to the defence.

[36] The judge found the evidence from the abuse of process application indicated "a substantial demonstration of state misconduct tending toward the inference of an undermining of the integrity of the judicial system (*R. v. Rutigliano*, 2013 ONSC 6589 at para. 164). He held the accused had "on balance, established that the relevant solicitor-client communications believed to exist could, in a material way, establish an abuse of process" (para. 168).

[37] Justice Hill indicated that disclosure to the defence "will only be warranted where, after review, the court is satisfied that the communications are likely to substantiate proof of the existence of abuse of process" (para. 169).

[38] Crown counsel lost no time in responding to the judge's ruling. On October 24, 2013 Crown counsel advised he was seeking a judicial stay of proceedings on the Indictment against Sergeant Rutigliano. He gave detailed reasons for the

request. He introduced them by explaining that, in practical terms, reviewing the privileged materials for production to the court would consume significant time and prosecutorial resources. If the court subsequently ordered disclosure to defence, the Crown would require a lengthy adjournment before they would be in a position to comply with the order. The prosecutor then drilled down to the request for the stay:

> Accordingly, rather than spending considerable prosecutorial resources finding, reviewing and producing all of the privileged information for the second stage review, and then waiting to the precise moment that the Court makes an order disclosing that material to the defence, and then rising at that time to request that the Court impose a judicial stay, the Crown respectfully makes the request now that a judicial stay be entered.
>
> **In doing so, the Crown is acting solely to prevent irreparable harm being caused to a legally recognized interest worthy of protection: that is the solicitor-client privilege that existed and exists between the OPP [Ontario Provincial Police] investigators and the Crown counsel who provided them advice during the investigation.**[1]
>
> [Emphasis added]

[39] Justice Hill acknowledged the Crown's options:

> [8] Rather than requesting an adjournment to seek leave to appeal the court's judgment of October 22nd, or expeditious compliance with that production order, or directing a stay pursuant to s. 579 of the *Code*, the Attorney General of Ontario requests this court to exercise its discretion to enter a stay of proceedings.

[40] After noting that defence counsel were in agreement, Justice Hill entered the stay:

> [10] In light of the Attorney General's request based on what it believes is in the public interest, taken in the context of the protracted character of the ongoing pre-trial motions and the overall delay in this case, the court terminated the proceedings by entering a judicial stay.

[41] Crown counsel's explicit assertion of solicitor-client privilege before Justice Hill was critical to the appeal court's dismissal of Rutigliano's appeal-as-an-abuse-of-process argument. The Court distinguished the *Rutigliano* judicial stay from the

[1] 2013 ONSC 6675 at para. 7.

stay that underpinned the appeal in the formative case of *United States of America v. Fafalios*, 2012 ONCA 365:

> [32] The respondents submit that the Crown's appeal should be dismissed as an abuse of the court's process. In their submission, the Crown made a pragmatic decision to ask for a judicial stay of the proceedings to avoid having the court rule on whether disclosure to the parties should be ordered. They say refusing to comply with the motion judge's order and short-circuiting the disclosure process by way of an interlocutory appeal amounts to an abuse of process.
>
> [33] In making this submission, they primarily rely on *United States of America v. Fafalios*, 2012 ONCA 365, 110 O.R. (3d) 641. In *Fafalios*, an extradition judge made a disclosure order. The Crown partially complied with that order. The extradition judge then made a second order, requiring, among other things, the disclosure of communications between police and Crown counsel. The Crown objected on the ground of relevance, but did not assert solicitor-client privilege. The Crown indicated it was not prepared to make further disclosure and invited the court to either grant a discharge or stay proceedings. The court granted a discharge and the Crown appealed. On appeal, the Crown argued for the first time that compliance with the disclosure order would infringe solicitor-client privilege and harm international relations.
>
> [34] This court recognized in *Fafalios* that a prosecutor confronted with an interlocutory order to which it objects has two options. It can either continue with the proceedings and appeal after the case is terminated, or, where there is no reasonable alternative, bring the proceedings to a halt and appeal the interlocutory ruling: *Fafalios*, at para. 42. There may be no reasonable alternative other than to pursue a functional appeal of an interlocutory order where (1) the effect of the interlocutory ruling is to leave the Crown without a case or (2) "compliance with the interlocutory order raises a reasonable prospect of harm to an interest the court deems worthy of protection": *Fafalios*, at para. 44.
>
> [35] In the circumstances, this court concluded that the Crown's appeal amounted to an abuse of process. The Crown had failed to object to the disclosure orders before the extradition judge on the basis of privilege or harm to international relations. Having failed to do so, it was an abuse of process to raise those issues on appeal.
>
> [36] This case is different. The Crown asserted solicitor-client privilege before the motion judge. The focus of his ruling was solicitor-client privilege. While the motion judge ordered that the relevant materials be disclosed to himself and not yet to the parties, the Crown acknowledged that it was inevitable that the court would order disclosure of the officers' notes recording the legal advice from the Crowns. Rather than spending time finding, reviewing and producing all privileged information, it requested a judicial stay to prevent the disclosure of privileged solicitor-client communications. Counsel for the respondents agreed that the court make the requested order.

> [37] I see no abuse of process in the manner in which the Crown terminated the proceedings before the motion judge or brought this appeal. I accept that, in the circumstances of this case, there was a reasonable prospect that continuing with the proceeding would have resulted in an abrogation of solicitor-client privilege, which is an interest worthy of legal protection. The fact that the Crown might have instead sought leave to appeal directly to the Supreme Court of Canada from the interlocutory ruling does not render its actions here an abuse of process.

[42] The Court of Appeal proceeded to examine the merits of Justice Hill's order for production of the solicitor-client protected communications and concluded he had ruled prematurely:

> [55] a judge should allow a *McClure* application[2] only *if* and *when* the judge is of the view that the accused will be unable to raise a reasonable doubt without the evidence protected by privilege.

[43] The Court allowed the Crown appeal and ordered the matter remitted back to the trial court to finish hearing the abuse of process motion.

R. v. Tingley, 2015 NBCA 51

[44] A different result was reached by the New Brunswick Court of Appeal in *R. v. Tingley* after the prosecution opted to call no evidence against four accused charged in the same multi-count Information. This followed the trial judge's adverse ruling on motions brought by the Crown—a recusal motion and an alternative request for advance limitation on the cross-examination of witnesses. In the words of the Court of Appeal, as a result of the Crown calling no further evidence, "a large and costly prosecution came to a screeching halt" with the trial judge being obligated to acquit the accused (*Tingley*, para. 1).

[45] The Crown had immediately filed a Notice of Appeal from the acquittals, asking for them to be set aside and a new trial ordered. The Court of Appeal refused to entertain the appeal.

[46] The trial had sagged under the weight of lengthy and complex motions focused on the conduct of the police and/or prosecution. The Court of Appeal

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[2] The Court was referring here to the second stage of the application process established by *R. v. McClure*, 2001 SCC 14 at which the trial judge, satisfied there is an evidentiary basis to conclude a communication exists that could raise a reasonable doubt as to the accused's guilt, examines the communication to determine whether, in fact, it is likely to raise a reasonable doubt as to the guilt of the accused.

criticized the management of the trial and detailed the interminable pre-trial proceedings that eventually led to its collapse. The Court concluded:

> [6] This is one case where a strict threshold determination might have avoided weeks, if not months, of pre-trial hearings. Nevertheless, I reach the conclusion that this case is not one that gives rise to the Attorney General's ability to abandon the prosecution by calling no evidence in order to immediately gain a right of appeal against these rulings - a right that would be denied to the defence by application of the general rule against interlocutory appeals in criminal matters. In my view, it is on this narrow basis that the appeal must fail.

[47] In its discussion of the options available to the Crown for challenging an adverse mid-trial ruling, the Court referenced the Ontario Court of Appeal decision in *Fafalios*:

> [114] While there can be no appeal against interlocutory orders unless specifically authorized by statute, this does not mean that the Attorney General is left without remedy. There are options. These were recently explained in *United States of America v. Fafalios*, 2012 ONCA 365, [2012] O.J. No. 2394 (QL):
>
> > [...] It has two options. It can continue with the proceeding and, depending on the result and the effect of the ruling on that result, launch an appeal in which the adverse ruling is challenged. Or it can do what the Crown did here; it can bring the proceedings to a halt and launch an appeal challenging the correctness of the interlocutory order.
> >
> > However, this second option is strictly limited to cases where the Crown can clearly demonstrate that it had no reasonable alternative. If the record does not support such a finding, allowing the Crown to argue its appeal from the interlocutory order would amount to an abuse of process.
> >
> > [paras. 42-43]
>
> [Emphasis added]
>
> [115] The second option constitutes a functional appeal of an interlocutory order. Bringing the proceedings to a halt can be accomplished by a stay or, as the Crown did here, by calling no evidence: *R. v. Scott*, [1990] 3 S.C.R. 979, [1990] S.C.J. No. 132 (QL).
>
> [116] In *Fafalios*, Epstein J.A. explains two circumstances that have been recognized as giving the prosecution no choice but to fold and appeal: "a) that the effect of the interlocutory ruling is to exclude evidence sufficiently important to the prosecution that the Crown is unable to continue; or b) that compliance with the interlocutory order raises a reasonable prospect of harm to an interest the court deems worthy of protection" (para. 44).

[48] In *Tingley* the Court of Appeal quoted *Fafalios* for the proposition that the onus on the Crown to show the absolute necessity of a direct appeal from an adverse interlocutory ruling is "formidable due to the exceptional nature of the procedure that essentially circumvents the rule against a direct appeal from an interlocutory order" (para. 121).

[49] As the Ontario Court of Appeal had done in *Rutigliano*, the Court of Appeal in *Tingley* scrutinized the Crown's reasons for bringing the prosecution to an end after the trial judge's adverse ruling:

> [123] To repeat, the Attorney General argues this is not an attempt to circumvent the rule against interlocutory appeals for two reasons: (1) the Crown ended the prosecution to protect a privilege; and (2) the rule against interlocutory appeals is not applicable because the judge's decision was not one that fell within his constitutional jurisdiction. In my view, both contentions are unfounded on the record before us.
>
> [124] *First*: the protection of privilege. Applying *Fafalios* and the cases mentioned therein, had the record established that aborting this prosecution was for the purpose of protecting a privilege, I would have found there was no abuse of process. In that case, there would be no question of this Court exercising its rarely-to-be-used residual discretionary power. The appeal would have been heard on its merits.
>
> [125] **However, the record does not disclose the prosecution folded in order to protect a privilege.**
>
> [Emphasis added]

[50] The Court went on to note that privilege—that is, solicitor-client privilege—was not raised by the prosecution. The Court found the circumstances of the case,

> [130] …clearly demonstrate that, whatever the prosecution's motivation for requesting the judge to recuse himself from the matter, it was not to protect privilege. Privilege was adequately protected throughout.

[51] In *Tingley*, the Crown was found to have failed to demonstrate,

> [141] …any appropriate justification for the action taken, the effect of which provided the Attorney General with an advantage not available to the accused.

[52] It is unnecessary to further unpack the reasoning in *Tingley* as it is not relevant for the purpose of deciding this appeal. *Tingley* is of note in my analysis because it recognizes the potential for a "functional" appeal where a judicial stay has been entered at the Crown's request.

[53] The New Brunswick Court of Appeal allowed a functional appeal in *R. v. Lui*, 2022 NBCA 28, applying the reasoning in *Tingley* and *Fafalios*.

R. v. Creswell, 2000 BCCA 583

[54] The trial judge in *R. v. Creswell* ordered production of legal opinions relied on by police in the course of an undercover operation. The Crown raised privilege which the judge held had been waived. The Crown declined to comply with the order and invited a judicial stay in order to test the ruling by way of an appeal. The Court of Appeal held there was no other way for the Crown to challenge the production ruling than to seek a stay so it could proceed with an appeal. It was "a practical resolution of the problem which arose". The Court accepted that had the Crown:

> [12]…disclosed the opinions and carried on with the hearing, the privilege attached to the documents would be lost and the issue on the appeal rendered academic".

Does This Appeal Qualify as A Functional Appeal?

[55] This Court has not yet entertained a "functional" appeal. However in *R. v. Herritt*, 2019 NSCA 92 the Court recognized the potential for advancing one, citing *Fafalios*:

> [66] It is beyond dispute that sometimes the outcome of a *Charter* motion or admissibility decision can be dispositive. **If against the Crown, it must decide if it will soldier on with what is left of its case or offer no further evidence and later advance an appeal** (see: *R. v. Banas* (1982), 65 C.C.C. (2d) 224 (Ont. C.A.) at paras. 13-14; *United States v. Fafalios*, 2012 ONCA 365 at paras. 44, 46-48; *R. v. Wilcox*, 2001 NSCA 45; *R. v. Power*, [1994] 1 S.C.R. 601).
>
> [Emphasis added]

[56] I would endorse the functional appeal route for the Crown in appropriate circumstances, such as those found in *Rutigliano*. The "formidable" onus on the Crown contemplated by *Fafalios* should apply given the exceptional nature of the procedure. The Crown must be able to show no reasonable alternative, making an appeal of a trial judge's interlocutory ruling absolutely necessary. I agree with the conclusion in *Fafalios* that:

> [45] …except where the Crown can demonstrate that it really had no other reasonable option, it will generally be considered an abuse for the Crown to

> appeal from an order that it agreed to, much less one that it invited the court to make.

[57] For the purposes of this appeal I confine my analysis to the circumstances that led to the Crown's appeal—an adverse mid-trial ruling by the trial judge relating to communications the Crown argued were subject to solicitor-client privilege. I would adopt the *Fafalios* standard for justifying a functional appeal: that "compliance with the interlocutory order raises a reasonable prospect of harm to an interest the court deems worthy of protection" (para. 44).

[58] I would find this case has failed to meet the requirements for a functional appeal as set out above.

[59] That is not to say the Crown in this case could not have satisfied the onerous standard for a functional appeal. It simply did not do so.

[60] To reiterate the reasons given for the Crown's request for a stay, Crown counsel told the trial judge,

> …the Crown considered that decision very carefully, and so after giving it due consideration the Crown is not going to be in a position to comply with the order. So what we're going to do is we're going to ask the court, or invite the court to enter judicial stays on each of the three single count Informations, Your Honour.

[61] In paragraphs 20 to 26 of these reasons I set out the entirety of the exchange that occurred between the Crown, the trial judge and defence counsel following the judge's order. Crown counsel indicated the potential of an appeal of the order but that was the extent of his explanation for seeking the judicial stay. We otherwise know the Crown's non-compliance with the order emerged from the context of a failed attempt to shield certain communications it believed to be protected from disclosure by solicitor-client privilege. But in contrast to the statements made by the Crown in *Rutigliano*, Crown counsel here said nothing to elaborate upon its reasons for requesting a stay of the proceedings.

[62] I have concluded the extraordinary procedure of a functional appeal should not be permitted on the basis that it could be inferred the Crown wanted the stay so it could pursue an appeal in order to safeguard solicitor-client privilege. The Crown's reasons must be more explicitly articulated.

[63] There is an additional problem with the Crown's request for the stay. The defence was pursuing an abuse of process application, to be heard in December

2021. The remedy being sought was a stay of proceedings. Defence counsel wanted the disputed disclosure to support the prospective application. As I noted in paragraph 25 of these reasons, in seeking the judicial stay after the unfavourable disclosure ruling, the Crown stated:

> Well, the Crown is not going to comply with the order, and as such, the only course of action I would suggest to the court is to, **is to grant your remedy, Mr. MacDonald, which is a stay of proceedings**.
>
> [Emphasis added]

[64] This response to defence counsel's request for clarification of the Crown's judicial stay request suggests acquiescence by the Crown to the abuse of process being alleged by the accused. It is a reasonable interpretation of Crown counsel's statement that the refusal to produce the ordered disclosure amounted to an abuse of process and justified the entry of the stay of proceedings. It is another nail in the coffin of this appeal qualifying as a functional appeal of the trial judge's ruling.

[65] In summary, the following standards apply for a functional appeal from a stay of proceedings entered at the request of the Crown:

- A functional appeal is an extraordinary procedure.
- The Crown must show it had no reasonable alternative than to seek a stay of proceedings in order to advance an appeal of an unfavourable mid-trial ruling.
- The Crown must indicate that compliance with the order raises a reasonable prospect of harm to an interest the Court deems worthy of protection or that the effect of the ruling is the exclusion of evidence sufficiently important to the prosecution that the Crown is unable to continue.
- As noted in *Fafalios*, legally recognized interests worthy of protection include violation of privilege or disclosure of the identity of a confidential informant.
- A reasonable prospect of harm can be established where the Crown demonstrates that compliance with the ruling would cause irreparable harm to the administration of justice. This can be made out by the Crown showing that compliance will require "an inordinate expenditure of prosecutorial and judicial resources" (*Fafalios*, at para. 50).

- The Crown must explicitly articulate its reasons for seeking the judicial stay.

- The Crown can bring a functional appeal without the necessity of first seeking leave to appeal from the mid-trial ruling directly to the Supreme Court of Canada.

[66] In conclusion, I find the Crown has failed to satisfy the onerous requirements for a functional appeal. I would dismiss the appeal.

The Disclosure Decision

[67] The dismissal of the Crown's appeal does not obviate the need to address the disclosure ruling made by Judge Bégin (*R. v. Fashoranti*, 2022 NSPC 36). A number of legal principles were not applied in the judge's analysis which strips it of value as a precedent.

[68] I will not be undertaking an analysis of the judge's reasons. My focus will be on the legal test for ordering disclosure in support of an application for abuse of process where solicitor-client privilege has been asserted by the Crown.

[69] The trial judge either did not address or did not address correctly the legal principles that should have governed his analysis:

- The Crown is presumed to act in good faith and with objectivity (*R. v. D. (W.R.)*, [1994] 5 W.W.R. 305 (MBCA) at para. 14; aff'd [1995] 1 SCR 758).

- The bar for finding that a prosecutor's conduct was motivated by improper considerations and bad faith is very high (*R. v. Cawthorne*, 2016 SCC 32 at para. 29).

- Allegations of Crown impropriety are to be examined through the lens of presumed good faith and objectivity and on the whole of the record. The trial judge failed to do this. In response to the Crown's submission that it had established a *prima facie* justification for a claim of solicitor-client privilege and, in doing so, was acting in good faith, the trial judge said:

> [116] So, are we to simply rely on a "trust me" response by the Crown to the Application by the Defence? Absolutely not.

- The trial judge ignored evidence of Crown objectivity. Crown Attorney Nurse moved for an acquittal of Dr. Fashoranti in the H.D. prosecution when she learned of information that undermined H.D.'s credibility. Also, Ms. Nurse declared her conflict on the K.T. case at the first court appearance in the matter—Dr. Fashoranti's arraignment—and declined on that basis to have anything to do with it. These facts undermine the description by the trial judge of "the troubling, and concerning, involvement, generally and specifically, by Ms. Nurse in any matters relating to Dr. Fashoranti" (para. 106).

- To displace the presumption of good faith and objectivity, the defence must establish "a tenable allegation" of bad faith coupled with an offer of proof. As noted by the Crown in submissions to the trial judge, the Ontario Court of Appeal in *R. v. Durette*, [1992] O.J. No. 1044 held:

> [37] …In order to ask the court to delve into the circumstances surrounding the exercise of the Crown's discretion, or to inquire into the motivation of the Crown officers responsible for advising the Attorney General, the accused bears the burden of making a tenable allegation of *mala fides* on the part of the Crown. Such an allegation must be supportable by the record before the court, or if the record is lacking or insufficient, by an offer of proof. Without such an allegation, the court is entitled to assume what is inherent in the process, that the Crown exercised its discretion properly, and not for improper or arbitrary motives.

- A "tenable allegation" is an allegation with an "air or reality", in the sense there is "some realistic possibility that the allegations can be substantiated" (*R. v. Larosa*, [2002] O.J. No. 3219 (ONCA) at para. 78).

- What will not be sufficient is an allegation made "for the purpose of initiating a 'fishing expedition' in the hope that something of value will accrue to the defence" (*Durette* at para. 39).

- Determining a disclosure application brought in support of an abuse of process motion requires consideration of whether a disclosure order could support the remedy being sought, namely, a stay of proceedings (*Larosa*, at paras. 76-77). The suitability of lesser remedies must be assessed. (*R. v. Babos*, 2014 SCC 16 at para. 39). A stay of proceedings is granted only if no other remedy "is reasonably capable of removing" the prejudice to the

> accused (*R. v. Regan*, 2002 SCC 12 at para. 54). In this case, all the files were assigned to another Crown attorney. There was no assessment by the trial judge of the significance of the file transfer on the allegations of lack of objectivity. In *Regan*, the Supreme Court of Canada held that the trial judge should have found the replacement of Crown counsel in the prosecution of the accused was a satisfactory alternative remedy to a stay of proceedings (at para. 108).

[70] As for the issue of whether police/Crown communications are protected by solicitor-client privilege, the trial judge's reasons were inconsistent and ultimately incorrect. In his discussion about the decision of the Ontario Superior Court of Justice in *R. v. Ahmad*, [2008] O.J. No. 5915, the judge here said:

> [121] The communications between the RCMP and counsel in the employ of the Minister of Justice are properly the subject of a general solicitor-client privilege. Police are entitled to obtain legal advice as to the scope of lawful police procedure and are generally entitled to claim privilege over that advice.

[71] He subsequently contradicted himself, concluding his reasons by saying that no privilege attached to the sought-after police/Crown communications. This statement followed his conclusion that "charging decisions made by Crown counsel" do not come under the protection of solicitor-client privilege "because they were not made within any solicitor-client relationship".[3] He reached this conclusion by adopting the defence submission that drew on *British Columbia (Attorney General) v. British Columbia (Police Complaints Commissioner)*, 2009 BCCA 337.

[72] The finding in *British Columbia (Attorney General)* by the British Columbia Court of Appeal that there is no solicitor-client privilege in prosecutorial charging decisions has no application in Nova Scotia. In Nova Scotia, the police and Crown have "complementary but distinct roles" described in detail in the 1990 Report of the Royal Commission on the Donald Marshall Prosecution. The Crown in Nova Scotia does not make charging decisions. The Nova Scotia Public Prosecution Service (PPS) operates according to the principles discussed by the Royal Commission: the police have complete responsibility for investigating offences and deciding whether to lay charges. In the course of executing this role, should the police need guidance on points of law or evidence they can consult with the Crown

[3] The trial judge was quoting in para. 135 of his decision from para. 102 of *British Columbia (Attorney General) v. British Columbia (Police Complaints Commissioner)*.

before initiating proceedings (Nova Scotia Public Prosecution Service "Providing Advice to the Police" Director of Public Prosecutions Directive, at page 3).[4]

[73] As the PPS Policy states: "If a charge has not yet been laid, the Crown can give only legal advice" (page 7).

[74] It is incontrovertible that legal advice sought by police from Crown prosecutors in connection with criminal investigations is protected by solicitor-client privilege (*R. v. Shirose*, [1999] 1 SCR 565). As stated in *Shirose*:

> [49] The solicitor-client privilege is based on the functional needs of the administration of justice. The legal system, complicated as it is, calls for professional expertise. Access to justice is compromised where legal advice is unavailable…

[75] The trial judge's flawed analysis of the disclosure application led him to conclude that:

> [134] The withholding of the requested documents would impair Dr. Fashoranti's ability to advance his claim of abuse of process by the Crown (*Stinchcombe*)[5] in the upcoming Application.
>
> [Emphasis in original]

[76] At the end of his reasons the trial judge made a broad and unqualified statement:

> [137] Allegations of abuse of process pierce any claims of privilege and disclosure should be ordered so that the Court can confirm, or negate, any allegations of blameworthy Crown conduct.
>
> [Citations omitted]

[77] In support the trial judge cited the decisions in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 and *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52. These cases deal with litigation privilege, not solicitor-client privilege, in the context of allegations of abuse of process (*Blank*, at para. 44; *Lizotte*, at para. 41).

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[4] This policy document was filed by the appellant Crown in its Book of Authorities for this appeal.

[5] The trial judge was citing *R. v. Stinchcombe*, [1993] 3 S.C.R. 326 which established the Crown's legal duty to disclose all relevant information to the defence. *Stinchcombe* held that the Crown obligation to disclose is not absolute and noted the Crown has a duty to respect the law of privilege which may exclude information from disclosure (at paras. 20; 22).

[78] Although he may have thought it was implied by his case references, the trial judge's statement does not recognize the distinctly different nature of solicitor-client versus litigation privilege, their conceptual and policy-driven differences, and their different legal consequences (*Blank*, at paras. 26-28; 33).

Conclusion

[79] The trial judge ordered the production of police/Crown communications in this case without a proper application of the law. His analysis is not to be followed nor his decision applied.

Disposition

[80] I would dismiss the Crown's appeal.

Derrick, J.A.

Concurred in:

Farrar, J.A.

Van den Eynden, J.A.