SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Clarke*, 2014 NSSC 441

Date: 20141215
Docket: CRH 346068
Registry: Halifax

Between:

Her Majesty the Queen

v.

Bruce Elliott Clarke, R. Blois Colpitts and Daniel Frederick Potter

INTERLOCUTORY DECISION

Judge:	The Honourable Justice Coady
Heard:	December 8, 2014 in Halifax, Nova Scotia
Written Decision:	December 15, 2014
Counsel:	James Martin and Scott Millar, for the Federal Crown Barry Whynot, for Bruce Elliott Clarke Tyler Hodgson, for R. Blois Colpitts Daniel Potter, Self-Represented Edward Gores, Q.C., for Nova Scotia Securities Commission

By the Court:

[1] On March 17, 2011 the Crown preferred an indictment against Bruce Clarke, Blois Colpitts and Daniel Potter. The Crown alleges fraud by unlawfully affecting the public market price of shares of Knowledge House Incorporated (KHI) between 2000 and 2001. In 2009 the Nova Scotia Securities Commission (NSSC) conducted a regulatory proceeding that involved these defendants and others. The NSSC proceeding generated a considerable amount of documentation. Over the past year or more these defendants have advanced several applications seeking production of NSSC materials (2013 NSSC 386; 2014 NSSC 177; 2014 NSSC 314; 2014 NSSC 392. Much documentation has been provided to these defendants. The NSSC is withholding some documentation on the basis of privilege.

[2] On November 18, 2014 all three defendants filed an "*O'Connor*" application in relation to the withheld documentation. It has been decided that this application will be argued in January, 2015. A preliminary procedural issue emerged and that issue is the subject of this interlocutory ruling. The Crown and the NSSC argue that it will be more efficient to argue "likely relevance" in advance of assessing "privilege." The defendants argue for just the opposite approach.

[3] The *O'Connor* approach to production of third party records was fine-tuned by the Supreme Court of Canada in *R. v. McNeil*, [2009] 1 S.C.R. 66. The focus of the *McNeil* Court was on the relationship between third party record production and the Crown's first party record disclosure obligations pursuant to "*Stinchcombe*" principles. Justice Charron stated the background at paragraph 26:

> [26] In *O'Connor*, this Court was concerned with the manner in which the accused, who was charged with multiple sexual offences, could obtain production of the therapeutic records of the complainants from third party custodians. *O'Connor* has been overtaken by Parliament's subsequent enactment of the *Mills* regime contained in ss. 278.1 to 278.91 of the *Criminal Code* for the disclosure of records containing personal information of complainants and witnesses in sexual assault proceedings. In respect of any other criminal proceeding, however, the *O'Connor* application provides the accused with a mechanism for accessing third party records that fall beyond the reach of the *Stinchcombe* first party disclosure regime.

[4] The Supreme Court then stated the procedure to be followed on an *O'Connor* application. Justice Charron stated at paragraph 27:

> (1) The accused first obtains a *subpoena duces tecum* under ss. 698(1) and 700(1) of the *Criminal Code* and serves it on the third party record holder. The subpoena compels the person to whom it is directed to attend court with the targeted records or materials.
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> (2) The accused also brings an application, supported by appropriate affidavit evidence, showing that the records sought are likely to be relevant in his or her trial. Notice of the application is given to the prosecuting Crown, the person who is the subject of the records and any other person who may have a privacy interest in the records targeted for production.
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> (3) The *O'Connor* application is brought before the judge seized with the trial, although it may be heard before the trial commences. If production is unopposed, of course, the application for production becomes moot and there is no need for a hearing.

> (4) If the record holder or some other interested person advances a well-founded claim that the targeted documents are privileged, in all but the rarest cases where the accused's innocence is at stake, the existence of privilege will effectively bar the accused's application for production of the targeted documents, regardless of their relevance. Issues of privilege are therefore best resolved at the outset of the *O'Connor* process.
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> (5) Where privilege is not in question, the judge determines whether production should be compelled in accordance with the two-stage test established in *O'Connor*. At the first stage, if satisfied that the record is likely relevant to the proceeding against the accused, the judge may order production of the record for the court's inspection. At the next stage, with the records in hand, the judge determines whether, and to what extent, production should be ordered to the accused.

The issue in this application relates to the last sentence in step 4 which suggests issues of privilege are best resolved first.

[5] The Crown and the NSSC take the position that the sentence in question does not "mandate" a particular approach. This position is well stated at paragraph three of the Crown's December 3, 2014 written submissions:

> The Crown submits that the most efficient approach to the Applicants' request for production of the NSSC privileged emails is to decide whether the Applicants have met the likely relevance standard, and in doing so, to define the scope of that likely relevance. If the Applicants cannot establish likely relevance, then the issues of privilege need not be addressed. If likely relevance is established with respect to certain issues, then the Court will only need to assess the privilege issues with respect to that defined group of communications. This process will significantly reduce both time requirements and unnecessary burdens on third parties.

The Crown and the NSSC feel that the steps outlined in *McNeil* are able to be adjusted to meet the exigencies of the production application.

[6] The defendants take the position that Justice Charron's words are clear and mandate that the privilege analysis precedes the likely relevance analysis. The defendants argue that proceeding otherwise results in assessing the likely relevance of privileged documents and there is no authority to support that approach. The defendants find support for their position in the opening phrase of step five which states: "Where privilege is not in question, the judge determines whether production should be compelled in accordance with the two-stage test established in *O'Connor*."

[7] The Crown and the NSSC have identified two cases that support their position; *R. v. Basi*, 2009 BCSC 756 and *R. v. Sipes*, 2010 BCSC 1625. In *Basi* the production requests were extensive. Justice Bennett changed the order of the process identified in *McNeil* in order to provide structure and control over the *O'Connor* application. Essentially she determined that assessing likely relevance first avoided third parties producing a large volume of documents that may ultimately not meet the threshold test.

[8] Justice Bennett commented as follows at paragraphs 29 and 30 of *R. v. Basi*, *supra*:

> [29] Finally, it is necessary to depart from *O'Connor* in one important aspect. *O'Connor* was decided in the context of identifiable records, such as a complainant's counselling or medical records. *McNeil* was decided on the basis of identifiable police records. Here there are potentially

> thousands of records, and particularly e-mail, which could take a tremendous amount of time and effort to uncover. For example, the FOI request took, as I understand it, over a year to complete.
>
> [30] Therefore, while the application will be served on the third parties along with the supporting affidavits, *subpoenas duces tecum* will not be issued unless and until I am satisfied that the documents are likely relevant. I see no point in spending extensive government resources gathering documents that may never be ordered produced to the Court. The Speaker and Clerk are not obliged to participate at this time, save and except with respect to any documents that they personally hold, and they are not yet dismissed from the application.

[9] In *R. v. Sipes, supra*, Justice Smart determined that the nature of the application dictated that he consider likely relevance first. He stated at paragraph 38:

> [38] In my view, the procedure outlined in *O'Connor* and *McNeil* was not intended to be a scientific formula that must be followed as a matter of rote. Rather, it was intended to permit a fair balancing of competing values and interests when an accused seeks records in the possession of third parties. When a variation in procedure will enhance this balancing exercise, it may be appropriate to do so. The usual *O'Connor* procedure may be adapted to fit the circumstances of the particular application provided the principles articulated in *O'Connor* are respected. This is what Bennett J. did in *Basi*.

I accept these cases as strong authority for the position of the Crown and the NSSC. The critical inquiry is whether this is one of those exceptional cases that warrant a variation from *O'Connor*.

[10] *R. v. Basi, supra,* involved the prosecution of former Ministerial assistants for corruption offences in relation to the sale of the freight division of BC Rail, a Crown corporation. Production requests involved a large volume of documents

held by a wide variety of third parties. One of the third parties argued that all documents in its possession were privileged.

[11] *R. v. Sipes, supra*, involved an application by the accused for penitentiary records of several Crown witnesses. These witnesses were inmates serving life sentences at various institutions who had entered immunity deals with the Crown in return for their evidence at a gang related murder trial. The Crown took the position that the *O'Connor* applications involved inaccurate and inflammatory statements and were intended to intimidate the inmates. While Justice Smart varied the approach in *O'Connor* he stated: "It will usually be in the best interest of the administration of justice that an *O'Connor* application proceed as outlined at para. 27 of *McNeil*."

[12] This application in no way approximates the complexity of the *Basi* and *Sipes* applications. The quantum of documents is manageable and there is only one record holder. Additionally there are structural differences between this application and the applications in *Basi* and *Sipes*.

[13] Mr. Colpitts quantified his search at paragraph 16 of his December 3, 2014 motion brief:

> 16. The documents that are subject to the default *O'Connor* application are as follows: (1) 1,331 emails from Scott Peacock, former Director of Enforcement, NSSC; (2) 143 sundry items; and (3) 406

> privileged documents contained on the hard drive inadvertently disclosed by and subsequently returned to the NSSC. Privilege tables have already been provided for the first two groups of documents.

Submissions at the hearing suggest that a number of these items will be released to the defendants without further process.

[14] The position of the Crown and the NSSC is rooted in efficiency. On the materials before me, I find it difficult to measure with any degree of precision how much each approach will yield in terms of efficiency.

[15] I find that there is nothing about this application that warrants moving away from the *O'Connor* approach as confirmed in *McNeil*. Privilege will be the first order of business.

Coady, J.