PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Fashoranti, 2022 NSPC 36

Date: 20220929
Docket: 8518181, 8518183, 8518189
Registry: Amherst, NS

Between:

His Majesty the King

v.

Tim Fashoranti

Restriction on Publication: Names of the alleged victims and any information which might tend to identify them

DECISION ON APPLICATION FOR DISCLOSURE

Judge: The Honourable Judge A. Bégin

Decision: September 29, 2022

Charges: Section 271 x 3

Counsel: Mr. Edward J. MacNeill, Provincial Crown Attorney
Mr. Stanley MacDonald, K.C., Defence Attorney

By the Court:

[1] Is it an abuse of process for a lawyer who was previously in private practice, but is now a Crown Attorney, to be involved in, and possibly guide, the police to proceed with criminal prosecutions against an individual for the very same matter that they had previously acted against that individual through civil litigation while in private practice?

[2] Counsel for Dr. Fashoranti is seeking disclosure of all correspondence between the Crown Attorney's office and the police relating to three sexual assault complaints against Dr. Fashoranti to determine how much involvement Mary Ellen Nurse ("Ms. Nurse") had with these matters considering her previous civil litigation involvement against Dr. Fashoranti.

[3] The disclosure application is being made for information and materials that are relevant to Dr. Fashoranti's application for a stay of proceedings, scheduled for December 13-14, 2022. Dr. Fashoranti's request for a stay of proceedings will 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.

[4] This Court is deeply appreciative to counsel for their well-researched briefs, from which this Court has 'borrowed heavily' in preparing its decision.

A brief timeline of this matter:

[5] An initial complaint was made in 2004 by K.T. regarding a sexual assault by Dr. Fashoranti. A police investigation is conducted, and the file is reviewed with Bruce Baxter, the Crown Attorney for Cumberland County at that time, and a decision is made by the Crown Attorney's office to not prosecute Dr. Fashoranti. Dr. Fashoranti is advised by the Chief of the Springhill Police on February 11, 2004, that they would not be proceeding with charges against him regarding K.T.

[6] Ms. Nurse, while in private practice in May 2006, wrote a formal letter to the Springhill Police Department advising that she represented K.T. as it related to a sexual assault by Dr. Fashoranti against K.T.

[7] A follow-up letter was sent to the Springhill Police Department by Ms. Nurse on July 24, 2006, inquiring what steps had been taken by the police against Dr. Fashoranti.

[8] Subsequent to 2006 Ms. Nurse leaves private practice to join the Crown Attorney's office in Cumberland County. Springhill is part of Cumberland County.

[9] In an Affidavit dated June 13, 2022, in response to this Application, Ms. Nurse stated as follows:

> *"5. I have not provided legal advice to the police on whether or when to lay charges against [Dr. Fashoranti] for the K.T. allegation.*
>
> *6. I have provided police with pre-charge legal advice in connection with the allegations against V.C. and A.B…"*

[10] There is an obvious distinction between how the interaction with the police is characterized by Ms. Nurse in the two paragraphs. Paragraph 5 does not exclude "pre-charge legal advice" to the police on the K.T. matter. Ms. Nurse did not testify to explain this very important difference in her Affidavit.

[11] On November 11, 2020, an Information alleging sexual assault by Dr. Fashoranti against H.D. is laid. Ms. Nurse is the Crown Attorney prosecuting this matter against Dr. Fashoranti.

[12] There is a Police Supplementary Occurrence Report dated February 26, 2021, that indicates that K.T. had contacted "the Amherst Crown" regarding the 2004 allegation, and that the matter was referred to the police by the Crown. Counsel for Dr. Fashoranti legitimately question whether "the Amherst Crown" referred to in this police report was Ms. Nurse as Ms. Nurse was prosecuting Dr. Fashoranti on the H.D. matter at that time.

[13] There is a Police Supplementary Occurrence Report dated April 15, 2021, that states that "A Court file will be prepared…and disclosure will be provided to the

provincial Crown's office." The Affidavit of Ms. Nurse dated June 13, 2022, does not exclude Ms. Nurse as the Crown in question.

[14] There is a Police Supplementary Occurrence Report dated April 22, 2021, that states, "…will forward the related files for A.B. and V.C. to Crown for review before forwarding the K.T. file. Any charges stemming from these files will proceed simultaneously…" The Affidavit of Ms. Nurse dated June 13, 2022, does not exclude Ms. Nurse as the Crown in question, especially considering how in her Affidavit Ms. Nurse states at paragraph 4:

> *"4. I previously had carriage of the above noted V.C. and A.B. matters, but have never had carriage of the K.T. matter. I have since relinquished carriage of both the V.C. and A.B. matters…"*

The Affidavit by Ms. Nurse is silent as to when she "relinquished carriage" of the two associated files.

[15] There is a Police Supplementary Occurrence Report dated June 15, 2021, that states, "File reviewed, last comment is matter was forwarded to Crown for opinion. Writer is aware that there was direction given on the file, will need to obtain same."

[16] There is a second Police Supplementary Occurrence Report dated June 15, 2021, that states, "Crown review on file, charges supported on this matter (sexual assault x2). Crown had some requests as per below…"

[17] Defence counsel legitimately submits that the police reports "indicate the reasonable possibility that Mary Ellen Nurse referred the K.T. matter to the police in her capacity as a Crown prosecutor, while she was prosecuting the H.D. matter [against Dr. Fashoranti]. She may also have given advice to the police during their 'reinvestigation' or offered her opinion with respect to laying a charge of sexual assault against Dr. Fashoranti."

[18] The Affidavit by Ms. Nurse does not negate this possibility due to the very specific wording of the Affidavit.

[19] An Information alleging sexual assault by Dr. Fashoranti against K.T. is laid on August 4, 2021, for an incident date of January 4, 2004. The charge relates to the exact same 2004 incident on which Ms. Nurse represented K.T. in 2006 and wrote the noted letters to the Springhill Police.

[20] There are also separate Informations sworn against Dr. Fashoranti that same date alleging a sexual assault on V.C. for an offence date between January 1, 1998, and December 31, 2002, and for a sexual assault on A.B. for an offence date between January 1, 2003 and August 31, 2003.

Threshold Test for Disclosure

The Defence Perspective:

[21] In ***R. v. Piccirilli,*** **2014 SCC 16** para 31, the Supreme Court of Canada explained that cases involving an abuse of process generally fall into two categories:

> *1) where state conduct compromises the fairness of an accused's trial (the "main" category); and*
>
> *2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the "residual" category).*

[22] The main category of abuse of process deals with state conduct that compromises the fairness of an accused's trial. "[T]he question is whether the accused's right to a fair trial has been prejudiced and whether that prejudice will be carried forward through the conduct of the trial; in other words, the concern is whether there is *ongoing* unfairness to the accused" (*R. v. Piccirilli,* para 34). In dealing with that concern, the remedial focus is on whether the accused's right to a fair trial can be restored.

[23] Under the residual category, "the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system" (*R. v. Piccirilli,* para 35). The remedial focus is not on the individual accused, but rather "on whether an

alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward (para 39).

[24] In ***R. v. O'Connor*, [1995] 4 SCR 411 (SCC)** para 73, Justice L'Heureux-Dubé described the residual category as follows:

> *This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the Charter, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.*

[25] Defence counsel also refers to ***R. v. Regan* 2002 SCC 12.**

[26] Defence counsel alleges that the post-investigation, pre-charge delay involved with the K.T. matter constitutes an abuse of process, in breach of his section 7 *Charter* right, which compromised his right to make full answer and defence and his right to a fair trial. Furthermore, Dr. Fashoranti alleges that the decision to prosecute, after an experienced Crown prosecutor had already reviewed the evidence and decided not to prosecute, was unfair and contrary to fundamental principles of justice.

[27] Justice Warner discussed pre-charge delay as an abuse of process in ***R. v. Joudrey*, 2010 NSSC 230**. The analysis is contextual and focuses on the delay

caused by the conduct of state actors. Justice Warner summarized his review of the law at para 93 of ***Joudrey***:

> *93. I conclude that pre-charge delay may found a Section 7 breach where the delay is so unreasonable as to constitute a traditional abuse of process, and where the consequences of the delay cause serious prejudice to the accused's right to a fair trial and to make full answer and defence, regardless of whether the state actors carried out the investigation with an improper motive.*

[28] Defence counsel alleges that during the 17-year delay (2004-2021) for Dr. Fashoranti that:

> *1. the police lost the video recording of K.T.'s original statement,*
>
> *2. that a witness for the defence, a nurse who was present during some of the interactions between K.T. and Dr. Fashoranti, is now deceased.*
>
> *3. that because Dr. Fashoranti had been advised by the police in 2004 that no charges would be laid against him, he made no efforts to protect his interests, such as detailing his memory of the events, preserving records, or contacting potential witnesses (**R. v. Dowd (1997), 120 CCC (3d) 360 (NBCA))***

[29] Defence counsel states that the lack of any new evidence from a new statement by K.T. raises the question as to what motivated the police to reopen the file and lay a charge in the face of a previous decision not to prosecute. They submit that that question is entirely relevant on an abuse of process analysis, where the Court must consider the entire context surrounding the decisions by the state actors (***R. v. Joudrey***).

[30] **Defence counsel submits that while an improper motive is certainly a relevant factor, they need not prove an improper motive to establish an abuse of process (*Joudrey*).** In ***R. v. M. (M.L.)* (1994), 160 AR 383 (ABQB)**, the Court found it was an abuse of process for the Crown to reverse its previous decision not to prosecute charges of indecent assault and gross indecency after a seven-year delay when there had been no new evidence and the accused faced greater penalties than before. There was no allegation that the Crown acted improperly or neglectfully. The Court wrote at para 38 of *R. v. M. (M.L.)*:

> ***It is not the Crown's obligation to always be right. But it is the Crown's obligation to always be fair.*** *When there has been a thorough investigation and an informed and careful decision by the Crown not to prosecute, and even a review of that decision with the same result, it offends that duty of fairness to review yet again, now more than six years later, and to prosecute. …*

[31] Defence counsel submits that in some circumstances it is open to the Court to infer an oblique or ulterior motive on the part of the prosecution for determining to lay a charge on a certain date. In ***R. v. P. (L.J.)* (1989), 7 WCB (2d) 725 (OntDistCt)**, the complainant went to the police in 1983, but "the decision was then made not to charge the accused." The matter sat dormant for four years until "for some unexplained reason, the complaint came to the attention of another police officer who determined to charge the accused in respect of it and to include it with five other offences in the same information." The Court found that the officer

"obviously determined to cast a wide net to catch the accused in all of the six unrelated sexual offences", with an oblique motive. Due to material prejudice to the accused because of the delay, the Court stayed the charge. Defence counsel is suggesting that the police officers may have decided to "cast a wide net" to catch Dr. Fashoranti in an unrelated sexual allegation without any new evidence.

[32] As previously noted, Defence counsel submits that the evidence strongly indicates the reasonable possibility that Ms. Nurse referred the K.T. matter to the police in her capacity as a Crown prosecutor, while she was prosecuting the H.D. matter, and that she may also have given advice to the police during their "reinvestigation," or offered her opinion with respect to laying a charge of sexual assault, against Dr. Fashoranti.

[33] This is a legitimate concern for this Court considering the evidence that is on the record before this Court as part of the Application.

[34] Defence counsel submits that based on the principles of fairness and fundamental justice, the Crown has a duty to maintain objectivity throughout every stage of the process, including the decision to prosecute (***R. v. Regan***). As explained in ***R. v. Regan***, the seminal concept of the Crown as "Minister of Justice" was explained in ***R. v. Boucher,*** **[1955] SCR 16 (SCC):**

> *It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility.*

[35] In ***R. v. J. (G.P.)*, 2001 MBCA 18** the Manitoba Court of Appeal expressed concerns with counsel appearing for the Crown on appeal after having previously represented the complainant during her cross-examination at trial and during a s.278.3 application:

> *52. It is counsel's appearance as counsel for the Crown on the appeal that is troubling to me. In my view, her appearance ignores the unique role of counsel for the Crown in the criminal justice system and raises serious conflict of interest concerns.*
>
> *53. In R. v. Boucher (1954), [1955] S.C.R. 16 (S.C.C.), Taschereau J. had this to say of the position and duty of counsel for the Crown (at p. 21):*
>
> *[Translation] The position held by counsel for the Crown is not that of a lawyer in civil litigation. His functions are quasi-judicial. His duty is not so much to obtain a conviction as to assist the judge and jury in ensuring that the fullest possible justice is done. His conduct before the Court must always be characterized by moderation and impartiality. He will have properly performed his duty and will be beyond all reproach if, eschewing any appeal to passion, and employing a dignified manner suited to his function, he presents the evidence to the jury without going beyond what it discloses.*
>
> *…*
>
> *55. It goes without saying that Crown counsel at trial could not accept a retainer from a complainant or a witness in the proceedings. Conflicts would abound! It is enough to mention the discretion Crown counsel enjoys in relation to the prosecution of a criminal offence. That responsibility is incompatible with the*

> *interests of a witness, particularly a complainant, when production of his or her record is sought by the accused in a s. 278.3 application. The duty of a prosecutor to produce to the accused all relevant information, both favourable and unfavourable, collides with the retainer of counsel representing a witness or a complainant in a s. 278.3 application - to oppose the production of his or her client's record.*
>
> *56. It is not an answer to say that in this case counsel's retainer by the complainant ended when the trial judge ordered the production of her counselling records. A lawyer's absolute duty of confidentiality survives the termination of his or her retainer. More specific to the circumstances in this case, however, is the confidence of the public in the integrity of the profession and in the administration of the criminal justice system. There is, in my view, an appearance of impropriety in counsel's role as Crown counsel on the appeal.*
>
> *57. The complainant alleged that the accused had committed serious sexual offences against her. Counsel represented the complainant during her cross-examination at trial, and in the subsequent proceedings on the accused's s. 278.3 application. The accused sought production of the complainant's counselling records in furtherance of his right to make full answer and defence. Counsel opposed the production of her client's records. Then she appeared as counsel on the Crown's appeal against the accused's acquittal.*
>
> *58. There is, in my view, flowing from counsel's latter role the likely perception both in the eyes of the accused and in those of the informed and reasonable person, that the Crown and the complainant share a common purpose in seeking the conviction of the accused. That may well be the purpose of the complainant, but it is no part of the public duty of a prosecutor exercising his quasi-judicial functions.*

[36] Defence counsel submits that having previously represented K.T. on a civil claim of sexual assault against Dr. Fashoranti, that Ms. Nurse was in a clear conflict of interest with respect to the Crown prosecution of her allegation. Further investigation/disclosure of the requested correspondence could alleviate these concerns.

[37] Ms. Nurse's previous representation of K.T. raises serious concerns for Defence counsel about her impartiality and objectivity in prosecuting any sexual assault matter against Dr. Fashoranti. Rather than distancing herself, Ms. Nurse prosecuted both the T.H. matter in 2010 and the H.D. matter in 2020.

[38] Defence counsel alleges an abuse of process under the residual category with respect to both the V.C. and A.B. allegations, in breach of his section 7 *Charter* right, based on "state conduct that is offensive to societal notions of fair play and decency, which would be harmful to the integrity of the justice system should the matters proceed to trial."

[39] Defence counsel submits that the extent of Ms. Nurse's involvement in the K.T., V.C., and A.B. matters is relevant to the defence application for a stay of proceedings and therefore Dr. Fashoranti's defence. This includes any involvement in the investigations, file reviews, and decisions to prosecute, all correspondence between Ms. Nurse and the police and other Crown attorneys with respect to those matters, and all written materials in the possession of the Crown or police in this regard.

[40] Defence counsel submits that the evidence on this application for disclosure not only supports the reasonable possibility that Ms. Nurse referred the K.T. matter

to the police in her role as a Crown prosecutor, with the authority conferred by that position, but it also supports the reasonable possibility that Ms. Nurse was involved in the review of all the files, for K.T., V.C and A.B.

[41] This Court agrees that a review of the documents that form part of this Application strongly support this possibility. Disclosure of the requested documents to the Court for review would either confirm or negate the possibility of Ms. Nurse acting improperly.

[42] It appears likely that Ms. Nurse was the Crown contact for the police for all matters relating to Dr. Fashoranti given her carriage of the H.D. matter, and her possible referral of the K.T. matter. The V.C. and A.B. files were initially investigated by the police in the context of the H.D. matter and were only later separated into distinct files.

Defence Response to the Claim of Privilege by the Crown

[43] The Crown has refused to disclose the requested materials on the basis that they are privileged. Where the Crown refuses to disclose evidence for reasons of privilege, the burden is on the Crown to justify its refusal by showing that the

information is privileged on the balance of probabilities (***R. v. Gubbins; R. v. Ahmad***).

[44] In ***R. v. Stinchcombe***, Justice Sopinka wrote:

> *21. The discretion of Crown counsel is, however, reviewable by the trial judge. Counsel for the defence can initiate a review when an issue arises with respect to the exercise of the Crown's discretion. On a review the Crown must justify its refusal to disclose. Inasmuch as disclosure of all relevant information is the general rule, the Crown must bring itself within an exception to that rule.*
>
> *22. The trial judge on a review should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege. The trial judge might also, in certain circumstances, conclude that the recognition of an existing privilege does not constitute a reasonable limit on the constitutional right to make full answer and defence and thus require disclosure in spite of the law of privilege.*

Solicitor-Client Privilege

[45] Solicitor-client privilege arises from a "communication between a lawyer and the client where the latter seeks lawful legal advice" (***R. v. McClure*, 2001 SCC 14**). It is a class privilege that can only be waived by the client, which is of fundamental importance to the justice system because it protects the “full, free and frank communication between those who need legal advice and those who are best able to

provide it" (***Blank v Canada (Department of Justice)*, 2006 SCC 39**; ***R. v. McClure***).

[46] Not everything done by a Crown attorney will attract solicitor-client privilege. Whether or not solicitor-client privilege applies to a communication "depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered" (***R. v. Shirose*, [1999] 1 SCR 565 (SCC)**).

[47] In ***R. v. McClure***, Justice Major wrote for the Court:

> *In order for the communication to be privileged, it must arise from communication between a lawyer and the client where the latter seeks lawful legal advice. Wigmore, supra, sets out a statement of the broad rule, at p. 554:*
>
> *Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.*

[48] Defence counsel submits that due to the nature of the required relationship, the only possible claims of solicitor-client privilege in this case are with respect to the following requests:

> .....
>
> *(b) Whether Ms. Nurse was the Crown Attorney who provided an opinion with respect to the reinvestigation and prosecution of the K.T. and A.B allegations; and*
>
> *(c) Whether Ms. Nurse was the Crown Attorney who provided an opinion with respect to the V.C. investigation and prosecution.*

[49] The defence request for copies of all correspondence between the Crown and the police in relation to the investigation and prosecution of the K.T., A.B., and V.C. allegations specifically *excluded* correspondence regarding the provision of legal advice or requests for legal advice. If the communication was not made for the purpose of legal advice, then it will not be covered by solicitor-client privilege.

[50] **Defence counsel notes that, "charging decisions made by Crown counsel are not covered by solicitor-client privilege, because they are not made within any solicitor-client relationship" (*British Columbia (Attorney General) v. British Columbia (Police Complaints Commissioner)*, 2009 BCCA 337** where at paras 101 & 105-106, the British Columbia Court of Appeal stated:

> *101. In examining relevant information and documents and deciding whether or not to approve a prosecution, Crown counsel is neither a client of another lawyer, nor a solicitor advising more senior officers in the Criminal Justice Branch. He or she is an officer of the Crown, independently exercising prosecutorial discretion. While he or she may well consult with and obtain information from others, he or she does not take legal advice from them.*
>
> *…*
>
> *105. Solicitor-client privilege is designed primarily as a means to ensure that clients are not reluctant to obtain legal advice, or reticent in discussing their situations with their solicitors. It is a means to foster the proper taking and giving of legal advice. These considerations are not germane to the situation of Crown counsel in charge approval decisions.*

> *106. We do not suggest that the charge approval system can properly function in the glare of publicity, or that a high level of confidentiality is unnecessary for it to be carried out effectively. As we have already noted, the independence of the Crown requires that the charge approval process is not generally subject to review by the Courts or by other bodies. The necessary confidentiality, however, is provided by Crown immunity, which is tailored to the needs of prosecutorial independence, and not by solicitor-client privilege.*

[51] Defence counsel submits that when the police in this case asked the Crown to review the files, they were not requesting legal advice, but rather they were asking whether the Crown would prosecute. The Crown decision to prosecute was a "charge approval", as in ***British Columbia (Attorney General) v. British Columbia (Police Complaints Commissioner),*** and not legal advice to the police about the exercise of their lawful authority, as in ***R. v. Shirose.***

[52] Defence counsel submits that prosecutorial discretion will not be shielded from review by Crown immunity where the defence establishes a "tenable allegation" of an abuse of process (see ***R. v. N.(D.),*** **2004 NLCA 44,** ***R. v. Durette*** **(1992), 72 CCC (3d) 421 (ONCA),** ***R. v. Klippenstein*****, 2019 MBCA 13,** ***R. v. Ahmad*** **(2008), 77 WCB (2d) 804 (ONSC),** ***R. v. T.G.*****, 2017 ONSC 1314**).

[53] Further, Defence counsel submits that Crown requests for the police to interview certain witnesses or gather evidence are not within the scope of providing legal advice and will not be covered by solicitor-client privilege as the Crown is not then providing advice to the police about the lawful exercise of

their authority, but rather giving direction on the conduct of the investigation, which goes to the decision on whether to prosecute and forms part of the facts of the investigation against the accused.

Litigation Privilege

[54] Litigation privilege protects "documents and communications whose dominant purpose is preparation for litigation" (***Lizotte c. Aviva Cie d'assurance du Canada,* 2016 SCC 52**). It is a class privilege meant to facilitate the adversarial process, which "means that any document that meets the conditions for the application of litigation privilege will be protected by an immunity from disclosure unless the case is one to which one of the exceptions to that privilege applies."

[55] ***Lizotte*** (supra) differentiated litigation privilege from solicitor-client privilege at para 22:

> *• The purpose of solicitor-client privilege is to protect a relationship, while that of litigation privilege is to ensure the efficacy of the adversarial process;*
>
> *• Solicitor-client privilege is permanent, whereas litigation privilege is temporary and lapses when the litigation ends;*
>
> *• Litigation privilege applies to unrepresented parties, even where there is no need to protect access to legal services;*
>
> *• Litigation privilege applies to non-confidential documents; and*
>
> *• Litigation privilege is not directed at communications between solicitors and clients as such.*

[56] The test for whether litigation privilege applies to a document has two requirements, which are assessed at the time the document was created, as explained in ***Hatch Ltd v. Factory Mutual Insurance Co*, 2015 NSCA 60** at para 13:

> *13. The motions judge correctly noted that she had to determine whether the document or material was produced for the dominant purpose of litigation. She also had to decide whether there was a reasonable prospect for litigation at that time. She correctly noted these are fact-based inquiries to be determined by examining the circumstances of each case. I adopt what I consider to be a succinct statement of the test for litigation privilege as enunciated in* ***Raj v. Khosravi, 2015 BCCA 49 (B.C. C.A.)****:*
>
> > *[20]* ***In summary, to succeed in a claim of litigation privilege over a document the person seeking to invoke the privilege has the onus of establishing that: (i) litigation was "in reasonable prospect" when the document was produced; and (ii) that the "dominant purpose" of the document was to obtain legal advice or was to conduct or aid in the conduct of the litigation.***

[57] In ***McKay v. Home Depot of Canada Inc*, 2022 NSSC 73** Justice Campbell noted at paras 24-25:

> *24. Litigation privilege is asserted in the context of actual litigation. So, when it is claimed there is litigation that has by then been commenced. With the benefit of hindsight any document can be said to have been created in anticipation of that eventuality. The document over which litigation privilege is asserted must be created in anticipation of litigation. Litigation need not be a certainty. But there must be a definite prospect of litigation.* ***Ford Motor Co. of Canada v. Laconia Holdings Ltd., [1991] N.S.J. No. 206****. It is not enough that litigation is possible or suspected. And it is not enough that it actually, eventually, takes place.*
>
> *25. The document must have as its "dominant purpose" obtaining legal advice or aiding in the conduct of litigation. The phrase "dominant purpose" suggests that a document may have more than one purpose. A document may be created as part of the process of objectively determining facts that will guide a course of action. It may be that a customer's claim, for example, has merit and should be addressed or resolved through a negotiated compromise. A document may be*

> *created as part of the effort to prepare to defend against that customer's legal claim. One document may be created for both those purposes. The fact driven inquiry is which of those purposes is the dominant one.*

[58] Defence counsel submits that there is frequently a distinction between an initial investigatory stage, where it is determined whether litigation ought to be expected or not, and the actual preparation of litigation (***Moseley v. Spray Lakes Sawmills (1980) Ltd*., 1996 ABCA 141**). In civil litigation, the investigatory stage often involves the investigation of an accident or a dispute, for example.

[59] Defence counsel submits that in criminal cases, the investigatory stage involves the initial police investigation and the decision on whether to lay a charge, which may include a Crown review where it is determined whether or not to prosecute the matter. Prior to that point, there is no definite prospect of criminal litigation. This Court accepts this proposition, otherwise <u>all</u> police matters with any Crown involvement would be exempt/privileged.

[60] In ***Blank***, Justice Fish wrote at para 60:

> *60. I see no reason to depart from the dominant purpose test. Though it provides narrower protection than would a substantial purpose test, the dominant purpose standard appears to me consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure. ...*

[61] Defence counsel submits that their request for the noted disclosure of copies of all correspondence between the Crown and police in relation to the investigation of the three allegations is not covered by litigation privilege because they involve requests for facts related to the investigations, not for "notes that involve thought processes or considerations of counsel in the preparation of his/her case" (*R. v. Papasotiriou-Lanteigne*, 2016 ONSC 6145).

[62] Defence counsel submits that litigation privilege, or work product privilege, does not shield factual information from disclosure (***R. v. Papasotiriou-Lanteigne***) as noted by Justice Nordheimer at paras 32-33:

> *32. I note that the position of Crown counsel, in this respect, may be different from that of civil counsel. The scope for the application of work product privilege (or litigation privilege as it is also often described) to material in the hands of the Crown is arguably narrower. This point was made in* ***Hudson Bay Mining & Smelting Co. v. Cummings, [2006] M.J. No. 304 (Man. C.A.)*** *where Steel J.A. said, at para. 62:*
>
> > *As mentioned previously, in the civil context, information or communications may be privileged or immune from disclosure where the dominant purpose of the communication is its use in actual, contemplated or anticipated litigation. In the criminal process, Crown counsel's role is different from the role of counsel for a party to civil litigation.* ***Documents in a Crown brief are generally not subject to litigation or work product privilege. What is privileged are notes that involve thought processes or considerations of counsel in the preparation of his/her case.***

> *33. The bottom line is that factual information provided by the Deputy Attorney General in the course of any interviews, undertaken for the purpose of preparing his affidavit, must be disclosed to the accused. To hold otherwise, would be fundamentally inconsistent with the obligations of disclosure that rest on the Crown, that is, the obligation to disclose all relevant information in its possession:* ***R. v. Stinchcombe, [1991] 3 S.C.R. 326 (S.C.C.)****.*

Abuse of Process Exception to Litigation Privilege

[63] Defence counsel also draws the Court's attention to the recognized exceptions to litigation privilege that include "the claimant party's abuse of process or similar blameworthy conduct" (***Lizotte***). In ***Blank*** Justice Fish wrote at paras 44 and 45:

> ***44. The litigation privilege would not in any event protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct. It is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day.***
>
> *45. Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a prima facie showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed.* ***Whether privilege is claimed in the originating or in related litigation, the Court may review the materials to determine whether their disclosure should be ordered on this ground.***

[64] Defence counsel submits that having established "a tenable allegation of *mala fides* on the part of the Crown ... supportable by the record before the Court", they are entitled to ask the Court to review any materials protected by litigation privilege

to determine whether disclosure of those materials should be ordered on the basis of the abuse of process exception (***R. v. N.(D.)***).

[65] Litigation privilege will yield to a *prima facie* showing of misconduct on the part of the state (***Blank***). In ***R. v. Ahmad*** Justice Dawson at para 97 said, "I see this standard as meaningfully higher than the one I determined applied to establish threshold relevance for disclosure purposes earlier in these reasons… The air of reality to the claim of abuse of process - the tenable allegation - is quite different than a *prima facie* showing of actionable misconduct."

[66] Defence counsel submits that a *prima facie* showing requires evidence that is sufficient to establish a fact or raise a presumption unless disproved or rebutted. A *prima facie* showing of misconduct in this case will be established where there is enough evidence to allow the Court to infer the existence of state misconduct. "A *prima facie* showing of actionable misconduct is a significantly lower standard than proof on a balance of probabilities" (***R. v. Martin*, 2008 CarswellOnt 2366, [2008] O.J. No. 1596 (ONSC)**).

[67] Defence counsel submits that if any of the requested documents show the involvement of Ms. Nurse in the investigation, review, or prosecution of the K.T., A.B., or V.C. allegations, then a *prima facie* case of misconduct will have been

established, given the clear conflict of interest that arises from Ms. Nurse's previous representation of K.T. against Dr. Fashoranti, along with the potential harm to the integrity of the justice system. As such, litigation privilege would not apply, and the relevant documents should be disclosed to the Court for review so that the Defence can determine the full extent of Ms. Nurse's involvement, and any alleged abuse of process.

Threshold for Disclosure

[68] Defence counsel also submits that the threshold for disclosure is that there must be a "tenable allegation" and that this is not the same as a *prima facie* case of abuse of process. They submit that a tenable allegation equates to stating that there must be an "air of reality" to the allegation (***R. v. N.D.* 2004 NLCA 44, *R. v. Ahmad* (2008) 77 WCB (2d) 804 (ONSC)**)

[69] It is not required to establish the allegation as fact in the absence of other evidence, it must simply show an air of reality. Are the requested documents in the possession of the Crown relevant, and disclosable, due to a tenable allegation of Crown propriety?

[70] Understandably, Defence counsel submits that it is not possible for them to argue the final merits of their Application until such time as the requested documents are disclosed as the requested documents would confirm what is now simply a 'tenable allegation' based on the history of these matters, and the documents disclosed to date.

[71] Defence counsel submits that since the Crown is not asserting litigation privilege that the following questions should guide this Court's decision making for this application:

> *1. Does a "tenable allegation" of impropriety exist, such that the Court may embark on a review of prosecutorial discretion and order disclosure or review documents to determine whether privilege exists?*
>
> *2. Are the requested documents relevant to the alleged abuse of process?*
>
> *3. Does solicitor-client privilege apply to the requested documents?*

Crown Response to Defence Application

[72] The Crown responds to the Defence application along the following basis:

> *1. Communications between Ms. Nurse and police in relation to the A.B. and V.C. matters are clearly "advice" which is protected by solicitor-client privilege;*
>
> *2. Complaints of Crown misconduct made by defence in this case do not rise to the level of "tenable allegations" that might support a review of Crown discretion, but are based on mere suspicion and conjecture;*
>
> *3. A challenge to the Crown's exercise of discretion is not a basis to seek disclosure of communications covered by solicitor-client privilege;*

> *4. There is no argument or evidence that the Crown or police engaged in illegal acts in this case that might trigger the "future crimes" exception to solicitor-client privilege;*
>
> *5. There is no argument or evidence that the requested information, if not disclosed, would deprive the accused from the ability to defend himself or risk a wrongful conviction that might trigger the "innocence at stake" exception to solicitor-client privilege, nor is access to privileged communications the only means by which defence may pursue an abuse of process claim;*
>
> *This is not an "exceptional" or "rare" case in which the solicitor-client privilege attaching to Crown communications with police ought to give way to either to a demand for disclosure from Defence or a review of same by the Court.*

The Crown Argument and Case Law:

[73] Crown counsel submits that the directives outlined in the *Nova Scotia Public Prosecution Service Crown Attorney Manual* recognize the complementary but distinct roles played by police and the Crown in the context of pre-charge advice. That is, the role of the Crown attorney at the pre-charge stage is advisory in nature and not directive. Police officers exercise their discretion in conducting investigations and laying charges entirely independent of Crown counsel.

[74] Crown submits that in Nova Scotia, prosecutors <u>generally</u> do not become involved in prosecutions prior to the initiation of a prosecution by the Informant, usually a police officer. In <u>most cases</u>, a determination that "reasonable grounds" exist for the laying of a charge is made independently of any assessment of the evidence by a prosecutor.

[75] **This Court's concerns with this submission is that the Affidavit by Ms. Nurse, along with the documents filed in support of their Application by the Defence, appear to remove this case from the "generally" and "most cases" as to how a Crown should conduct themselves.**

[76] Crown submits that while police officers may seek advice from Crown counsel, the police are not bound to follow the advice. The prosecutor may offer an opinion as to whether or not the available evidence as described by the investigator is capable of providing reasonable grounds for a belief that a suspect has committed an offence. However, it is the belief of the investigator, and not the prosecutor, that is crucial to the laying of an Information. It is the investigator who decides whether or not charges are to be laid.

[77] Crown submits that the usual decision to be made by a prosecutor in Nova Scotia is whether to continue or to terminate proceedings. What if the documents on record for this Application suggest otherwise?

[78] The fact that one Crown attorney provides an opinion that may be contrary to those provided by another Crown in the past does not justify an inquisition into Crown motives. In ***R. v. Devine*y, 1990 CarswellOnt 849 (Ont. G.D.)**, the accused sought an order staying a charge of manslaughter. He argued that the prosecution

was motivated by societal pressures and despite a previous Crown opinion that reasonable grounds did not exist to lay the charge. The Court found no wrongdoing on the part of the officer who laid the charge or the prosecutor who handled the case. The Court described the role of police and Crown in the charging process as it exists in Ontario (at para. 12):

> *In most provinces the police are bound to accept the advice of the prosecutor and lay the charge. In Ontario, the Attorneys General has taken the position that the decision to lay the charge rests entirely in the hands of the police officer and his role is to provide the police officer with advice. The Attorney General reserves his right under the Criminal Code to prefer indictments directly or to direct Crown Attorneys to swear out informations, but, by and large, the role of the Attorney General in these circumstances in this province has been restricted to giving advice to the police. It is left up to the investigating officers to decide whether or not he has reasonable and probable grounds for laying a charge, and that is the heart of the problem which is before me today.*

[79] The Crown emphasizes that, like Ontario, Nova Scotia is not one of "most provinces" where police are bound to accept the advice of the prosecutor with respect to laying a charge. The Court also rejected the defence argument that proceeding with the charge in the face of contrary opinions amounted to an abuse of process or provided a basis to ascribe to the Crown improper motive in the exercise of discretion (at para. 30, *et. seq*.):

> *Based on the facts of this case, there were strong differences of opinion as to whether the charge before this Court should have been laid. Mr. Meinhardt thought not, Mr. Martin, a very experienced Crown Attorney, thought that while there may have technically been evidence of reasonable and probable grounds*

> *for laying of the charges, the officer would be acquitted, and therefore, he should not be put through the trial. Mr. Wiley's opinion I have already dealt with.*
>
> *On the other hand, the opinion of Mr. Hunt, Mr. Then and Mr. Trafford was that there were reasonable and probable grounds which would sustain not only this charge but other charges.*
>
> *Differences of opinion between lawyers is something that society has lived with for years and will continue to live with. While no doubt there are strong opinions on this case as to what should have been done, I can find no reason to question the motives that led those who have suggested this charge be laid to be attacked.*
>
> *Does this constitute an abuse of process? I think not. Quite frankly, the evidence that has come before me would indicate that a very careful and considered review of this matter was undertaken by experienced Law Officers, and while some of them differed as to the outcome, a very serious situation was handled in a very careful and conscientious manner, and that surely is not abuse of process, nor can it, in my view, in any way constitute a breach of Section 7 of the Charter.*

[80] Defence counsel would dispute that based on the evidence on file that the matters relating to Dr. Fashoranti were handled in a "very careful and conscientious manner," and this Court would agree.

A Note on What Constitutes Advice

[81] The Federal Court of Canada in ***Buffalo v. Canada*** **[1995] 1995 CarswellNat 675 (Fed. C.A.)** discussed what is considered "advice" (para. 8):

> *The legal advice privilege protects all communications, written or oral, between a solicitor and a client that are directly related to the seeking, formulating or giving of legal advice; it is not necessary that the communication specifically request or offer advice, as long as it can be placed within the continuum of communication in which the solicitor tenders advice; it is not confined to telling the client the law and it includes advice as to what should be done in the relevant legal context.*

[82] The Crown submits that so long as the communication between Crown and police relates to the seeking and giving of legal advice, it is subject to privilege. That remains so where the Crown directs or assists the course of the police investigation. The police can, for example, seek legal advice from the Crown concerning the adequacy of grounds to obtain a warrant or whether to take further steps in an investigation (***R. v. Belcourt,* 2012 BCSC 234**, at para. 16).

Abuse of Process Issue

[83] Crown counsel relies on the case of ***R. v. Durette*, 1992 CarswellOnt 1152 (Ont. C.A.).** The defence sought to cross examine Crown counsel as to why they exercised their discretion to prefer indictments against the accused, made in the context of a stay application for undue delay. The request was denied. **Without some basis *on the record* for suspecting the Crown's course of conduct, further inquiry was not justified.** The Court stated (at para. 39):

> *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.***

[84] Crown then refers to examples of the ordinary meaning of the term *tenable* which include "capable of being held, maintained or defended" and "capable of being held, maintained, or defended, as against attack or dispute" and "(of a theory, an opinion, etc.) easy to defend against attack or criticism."

[85] Crown counsel then states that the ordinary use of the term “tenable” contemplates something more than mere assertion or conjecture.

[86] Crown counsel submits that in the present case the Defence claim of a "tenable allegation" of abuse of process is wholly dependent on information it *suspects* may be contained in the requested disclosure, but for which they do not have proof. The Defence, having put forward a *mere* allegation without proof on the record (which falls short of a *tenable* allegation) is engaged in a classic "fishing expedition" wherein they are hoping to *find* the proof of abuse of process that is more properly a prerequisite.

[87] Crown counsel also relies on the Ontario Court of Appeal in ***Durette*** (at para. 41):

> *…the allegation of improper or arbitrary motives cannot be an irresponsible allegation made solely for the purpose of initiating a “fishing expedition” in the hope that something of value will accrue to the defence. In this case, even at the appellate level and with the benefit of hindsight, the defence made no allegation of impropriety on the part of the Crown. Defence counsel could show nothing to*

> *indicate that the improper motives might have played a part in the Crown's decision. There was merely a suggestion, not fully developed, that the Crown was seeking some unspecified tactical advantage by proceeding in the way that it did. The decision as to how to prefer the two indictments, however, equally could have stemmed from a perfectly good faith motive. The mere fact that the Crown made a decision does not, without more, form a basis for an allegation of bad faith. Nor does it require a trial judge to allow an evidentiary hearing to inquire into why the discretion was not exercised differently.*

[88] Crown counsel submits that the defence allegations rise no further than an assertion of suspicion or apprehension of Crown misconduct.

[89] The difficulty for the Crown with this argument is that it is in effect an impossible circular argument for the Defence to counter: Defence cannot prove it beyond their strong suspicions based on the strong factual foundation they have laid out in their disclosure Application until such time as they get to see the requested documents to confirm their strong suspicions. Until such time it simply remains strong suspicions based on a strong factual foundation, and the Crown controls the documents that could confirm their beliefs/suspicions supported by a strong factual foundation.

[90] It is this Court's view the Defence has produced a "tenable allegation" of Crown misconduct based on the documents filed in support of the Defence Application. The Defence has moved beyond a 'fishing expedition' and it seeks the disclosure of the requested documents to confirm, or negate, improper Crown behaviour.

[91] In ***R. v. Shirose*, 1999 CarswellOnt 498**, the Supreme Court of Canada confirmed that a stay of proceedings based on abuse of process is only **appropriate in the clearest of cases where the conviction of an accused would violate the community's sense of justice and decency.**

[92] In ***Shirose (supra)*** the RCMP officer testified that he believed the reverse sting operation was lawful, relying on the advice received from the Crown. Solicitor-client privilege was waived by police by placing the officer's good faith in issue, calling into question the legal advice obtained by the Crown. As the RCMP made an issue of the legal advice it received in response to the stay of proceedings application, the accused was entitled to have the bottom line of that advice corroborated. The only way to resolve the issue of good faith was to order the disclosure of the advice, but only as to the legality of the reverse-sting operation.

[93] Crown counsel points out that in the present case that neither the police nor the Crown have waived solicitor-client privilege.

Innocence at Stake Exception

[94] While Defence Counsel did not raise the "innocence at stake" exception in the present case, the Crown felt it prudent to address it.

[95] In ***R. v. McClure*, 2001 SCC 14, (S.C.C.)** the accused was charged with sexual offences. The complainant read about the accused's arrest and gave a statement to police alleging incidents of sexual touching. He also commenced a civil action. The trial judge ordered production of the complainant's civil file. On appeal, the Court dealt with the issue of whether the solicitor-client privilege of a third person should yield to permit an accused to make full answer and defence to a criminal charge.

[96] The Court in ***McClure (supra)*** affirmed that solicitor-client privilege is the most notable example of a "class privilege" warranting a *prima facie* presumption of inadmissibility. It commands a unique status within the legal system. While solicitor-client privilege is not absolute, it must be as close to absolute as possible to ensue public confidence and retain relevance. In *rare* circumstances, it will be subordinated to an individual's right to make full answer and defence. The occasions when the solicitor-client privilege must yield are rare and the test to be met is a stringent one, such as where core issues going to the guilt of the accused are involved and there is a genuine risk of a wrongful conviction.

[97] Crown counsel submits that before the "innocence at stake" test can be considered, the accused must show that the information in the solicitor-client file is

not available from any other source and he is otherwise unable to raise a reasonable doubt as to his guilt in any other way.

[98] This Court finds that the documents sought are not otherwise available to the Defence, but through this Application.

[99] Absent foundational support for bad faith, the Crown's exercise of prosecutorial discretion cannot provide the basis for disclosure of Crown files. In ***R. v. Wilder***, 2001 BCSC 1629 (B.C.S.C.), the accused was charged with numerous tax-related fraud offences under the *Criminal Code*.

[100] The accused in ***Wilder (supra)*** challenged the Crown decision to proceed with *Criminal Code* charges instead of charges under the *Income Tax Act*. She sought disclosure of the Crown files containing information related to the decision to proceed under the *Criminal Code*, on the basis that the entire prosecution was motivated by bad faith on the part of the Crown and Revenue Canada. She claimed that certain witnesses were coerced by Crown representatives to fabricate a story and that a former Crown counsel engaged in improper conduct. The Crown took the position that the requested information was protected by solicitor-client privilege.

[101] The Court found there was no evidence to support the claim of improper conduct on the part of former Crown counsel, and ultimately dismissed the

disclosure application. The Court cited with approval (at para. 32) the following comments of Justice L'Heureux-Dube in the SCC decision of ***R. v. Power*** **(1994), 89 C.C.C. (3d) 41**, on the topic of prosecutorial discretion:

> *In our system, a judge does not have the authority to tell prosecutors which crimes to prosecute or when to prosecute them.*

[102] The Court in ***Wilder (supra)*** negatived the significance of decisions made by former Crowns on whether an exploration of the subsequent exercise of Crown discretion is warranted (at para. 34, *et. seq.*):

> *I agree with the Crown's submission that in the case at bar, the Crown has done nothing inappropriate in charging Mr. Wilder with Criminal Code fraud rather than with offences under the Income Tax Act. Consequently, this exercise of discretion cannot provide a foundation for an order of production of Crown legal files.*

[103] In ***R. v. Murrin*** **(February 16, 1999), Doc. Vancouver CC971114 (B.C. S.C.)**, the accused sought production of Crown files with regard to charge approval considerations and decisions of various Crown counsel (at page 2 and 3). Initially, senior prosecutors decided not charge Mr. Murrin with murder. Later, a lawyer for the Crown approved a charge of first-degree murder (see paragraph 16).

> *Like Mr. Wilder, counsel for Mr. Murrin was concerned with the charging standard in British Columbia and its application (see paragraphs 17 and 18). At paragraph 36, Henderson J. noted that no case had been cited which supported an accused's entitlement to any charge approval decision. He observed that defence counsel wanted to 'look into the mind' of the Crown and concluded that he was not entitled to do so (at paragraphs 32 and 45).*

> *As noted above, extracts of Power are set out in Murrin . These appear at pages 15 and 16 of the latter decision and the Crown here relies on those passages to support its position that Mr. Wilder is not entitled to the documents relating to legal prosecutorial considerations, as such decisions are not reviewable in the absence of bad faith (at paragraph 38). They note that he has failed to establish any bad faith.*
>
> ***I also agree with Crown counsel that Mr. Wilder has failed to establish that the Crown's legal advice files and work product are relevant to any real and legitimate issue arising in these proceedings. On this basis alone, Mr. Wilder's application for production fails.***
>
> *In addition, I agree that solicitor/client privilege does apply to the material sought and for the reasons set out in Power, supra, and referred to in Murrin, supra, that privilege ought to be maintained.*
>
> ***In my view, this is not one of those extraordinary situations where the evidence-gathering agency has acted illegally. There is no foundation here for the extraordinary step of ordering production of privileged material.*** *In my view, the "innocence at stake" exception does not even have to be considered by me on this application.*

[104] The Crown submits that Defence counsel in the present case similarly want to "look into the minds" of former Crown Attorney Bruce Baxter and Ms. Nurse to explore the basis of Crown discretion, and that they are not entitled to do so.

[105] In our case there is some evidence to support an initial claim of improper conduct by the Crown.

[106] Too much emphasis in this Application is being placed by the Crown on the advice of former Crown Bruce Baxter, versus the troubling, and concerning, involvement, generally and specifically, by Ms. Nurse in any matters relating to Dr. Fashoranti.

[107] In ***R. v. N. (D.)*, 2004 NLCA 44, (Nfld. C.A.)** the Crown directed stay of proceedings in a sexual assault case. The accused sought to overturn the stay of proceeding in favour of an acquittal, challenging the reasons why the Crown exercised its discretion in they way it did and arguing that the entry of a stay amounted to an abuse of process. While the Crown provided general policy information with respect to entry of stays of proceedings, it would not discuss the exercise of that discretion in any particular case. The applications judge refused to review the Crown discretion absent ***proof*** the Crown's actions were "flagrantly improper". Having failed to meet that burden, the defence application to review the Crown conduct was dismissed.

[108] The Court of Appeal addressed what, if any, threshold indication of impropriety must be established before the Court will embark on an evidentiary hearing to determine whether an abuse of process has been established. The Court adopted the "tenable allegation" threshold from *Durette*, that is to say the Court is not to embark on a review of prosecutorial discretion unless the accused first provides a threshold showing of impropriety on the part of the Crown or, at the very least, makes a tenable allegation of such impropriety coupled with an offer of proof.

In that case, the accused failed to meet that burden. At best, the accused merely made bald assertions of systemic bad faith in the entry of stays of proceeding, that were challenged by the Crown, without evidence or material to support the assertions.

[109] The Court emphasized the importance of putting the applicant's burden at the forefront of any application to review Crown discretion (at para. 33):

> *Absent a threshold showing of impropriety having been established, the effect of placing the Crown in a position where it will have to give reasons, in order to avoid the Court drawing an adverse inference, would be to reverse the onus as it presently exists. Instead of the applicant having to establish a threshold showing of impropriety, to warrant the Court embarking on a review of prosecutorial discretion, the Crown would be required to establish that its discretion was exercised for reasons that were proper.*

[110] In ***R. v. Polo*, 2005 ABQB 250 (Alta. Q.B.)**, the accused was charged with drug offence. He sought disclosure of documents in possession of the Crown in support of his application for a stay of proceedings based on prosecutorial misconduct and delay. The accused also issued a subpoena to compel the testimony of a Crown prosecutor previously responsible for the conduct of the prosecution. The Crown claimed solicitor-client privilege over the requested information.

[111] Relying on the previous decisions of the SCC (including ***Shirose*** and ***McClure (supra)***) the Court accepted that the law is now clear that, while solicitor-

client privilege is not absolute, it is nearly so. The importance of solicitor-client privilege and the exceptional nature of circumstances justifying interfering with that privilege were emphasized.

[112] The Court reasoned that if prosecutorial misconduct is to be considered an exception to solicitor-client privilege, that misconduct would have to be so significant as strike at the very notion of the presumption of innocence and deprive the accused from the ability to defend himself (innocence at stake), thus creating a very real risk of wrongful conviction. It would not be sufficient for the accused to suffer some disadvantage, slight, impropriety or loss opportunity (at para. 22):

> *For example, if the police planted evidence or coerced a statement implicating the accused, either of which might lead to a wrongful conviction, then that may be the kind of misconduct which would justify a finding that the process has been so badly abused that a stay of proceedings is the only alternative. However, even in those starkly offensive circumstances, the* ***McClure*** *threshold and the stages of the test promulgated by Major, J. in that decision must be satisfied before the solicitor client privilege which may attach to the communications relating to the misconduct must be set aside.*

[113] The Court was not satisfied that any of the accused's complainants, even at their highest, suggest a potential for wrongful conviction. If the circumstances constituted prosecutorial misconduct, they were not sufficient to constitute the kind of abuse that was necessary to set aside solicitor-client privilege.

[114] As to the standard by which the Crown must establish solicitor-client privilege, the Court rejected the ***balance of probabilities*** test in favor a less onerous *prima facie* test. If the Crown does not voluntarily allow the Court to review its materials, the Court has no authority to examine the materials unless the accused shows the materials could raise a reasonable doubt as to his guilt (the ***McClure*** "innocence at stake" test). If the Crown had to establish privilege on a balance of probabilities, it would be practically impossible to do so without disclosing the very material over which privilege is claimed. The onus on the Crown must be something less, that there is a ***prima facie*** case for the claim of solicitor-client privilege. The Court explained (at para. 31):

> *In short, if the Crown must prove privilege on a balance of probabilities an accused could force the Crown to disclose the privilege material by simply asserting an exception to the sanctity of the privilege. That is a result which is inconsistent with the importance of the privilege. Therefore, it appears to me that the appropriate solution is to impose a burden upon the Crown which is more commensurate to the sanctity of solicitor-client privilege. As a result, the Crown need only establish a prima facie justification for a claim of solicitor-client privilege in an application to set aside that privilege.*

[115] Crown counsel submits that the Court further accepted that given the Crown's widely accepted obligation to act responsibly and dispassionately in the conduct of a prosecution, it is appropriate for the Court to rely on the Crown's assertion of privilege as it provides the Court a reasonable assurance of trustworthiness.

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

[117] Even in cases where the accused is able to put forth a tenable allegation of abuse of process, consideration must still be given to claims of solicitor-client privilege. Such was the case in the Ont. S.C.J. decision in ***R. v. Ahmad*** **2008 CarswellOnt 9529**. In that case, the accused sought disclosure of the materials sent by the Crown to the Deputy Attorney General seeking consent for a direct indictment. The Crown opposed the request for disclosure on the basis that the information was subject to solicitor-client privilege.

[118] The Ont. S.C.J. agreed with the Crown that simply filing an application alleging an abuse of process is not enough to trigger additional disclosure obligations on the part of the Crown. **The accused must demonstrate both a legal and factual basis for the request, which demonstration must be rooted in the record, or be established by an offer of *proof*. When properly applied, the standard will permit the judge to screen out unmeritorious applications.**

[119] The accused in ***Ahmad*** met that burden. The abuse of process allegation was based on evidence that the Crown *had violated* an undertaking when it preferred a direct indictment. Although it was a close call, there was a "tenable allegation" of a

s. 7 violation, as it was common ground that there was an agreement between the Crown and the accused that the preliminary inquiry would proceed to its conclusion. This concrete evidence went beyond mere conjecture or suspicion.

[120] Notwithstanding the "tenable allegation" had been established, the Court in ***Ahmad*** went on to address the Crown's claim of solicitor-client privilege over the requested information. The Court accepted the contents of the recommendation package was "advice" which was subject to solicitor-client privilege. Once the Court determined that solicitor-client privilege attached to the information, the innocence at stake exception described in ***Brown*** is the only one that could apply in that case, and that exception was considered and specifically rejected. There was no basis upon which to set the privilege aside, and the application for disclosure was dismissed.

[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.

[122] In ***R. v. B. (K.),*** **2014 NSPC 23, (N.S.P.C.)** the accused young person was charged with making and distributing child pornography. The female complainant

and her mother reported to police that she had been sexually assaulted. The incident was investigated but charges for sexual assault were not laid. The complainant took her own life.

[123] The case generated significant public and political scrutiny. There were what the Court described as "many public demands for justice" and calls for public accountability for the handling of the case, ultimately leading to an independent review.

[124] Defence counsel argued that the Crown's decision to prosecute was an abuse of process in response to political and public pressure which resulted in an improper exercise of prosecutorial discretion. Defence counsel sought to review documents that would permit them to investigate why charges were laid, and in particular whether the decision was motivated by public or political pressure. The Crown argued the information was protected by solicitor-client privilege.

[125] Judge Campbell applied the test set out by the Supreme Court of Canada in ***R. v. Solosky*****, [1980] 1 S.C.R. 821, that in order for communication to come under the protection of solicitor-client privilege, the Crown must satisfy three elements on a balance of probabilities; namely, the communication has to be**

between a lawyer and a client, the communication must involve seeking or giving legal advice and the advice must have been intended to be confidential.

[126] Judge Campbell rejected a narrow or nuanced interpretation of what is covered by solicitor-client privilege in favor of the broad scope set out in ***Solosky (supra)*** (at para. 27):

> *The privilege applies as long as the communication falls "within the usual and ordinary scope of the professional relationship". That does not mean that only letters of opinion and notes from meetings in which legal advice was given are privileged. It attaches to all communications within the scope of the relationship in which information is exchanged in confidence for the purpose of obtaining of giving legal advice.*
>
> *(and at para. 28, citing **Buffalo v. Canada, [1995] 2 F.C. 762 (Fed. C.A.)**:*
>
> *The privilege extends to communications that are within the framework of that relationship that directly relate to "the seeking, formulating or giving of legal advice". The communication itself does not have to request or offer the advice but must be "placed within the continuum in which the solicitor tenders advice". For example, statements about the evidence in a matter might not contain a direct request for legal advice but are made in the context and within the scope of seeking or offering that advice.*

[127] Judge Campbell concluded his comments by noting (at para. 29) that "Exceptions to the privilege are rare. It is only set aside in the most unusual of circumstances". He accepted the Crown had shown on a balance of probabilities that communications between the Crown and police were subject to solicitor-client privilege and need not be disclosed.

Decision:

[128] This is a clear case where the actions of the Crown, through Ms. Nurse, if they are as alleged by the Defence, would violate the community's sense of justice and decency, and would undermine the integrity of the justice system (***Piccirilli***).

[129] There is a tenable allegation of Crown misconduct and a possible abuse of process that requires further investigation/disclosure of the requested documents (***R. v. N.(D.)***, ***Blank***, ***Ahmad***, ***Martin***). The allegation surpasses the ***McClure (supra)*** threshold test.

[130] Contrary to claims by the Crown, this is a case with circumstances that are rare and exceptional in nature (***Shirose***, ***McClure***,) and with what can be considered to be the most unusual of circumstances (***R. v. B.(K.)***).

[131] Ms. Nurse's involvement in matters relating to Dr. Fashoranti, and in particular the K.T. matter, is of initial concern to this Court and requires further investigation/disclosure of the requested documents to ensure that the Crown behaviour was based on "moderation and impartiality." (***R. v. J.(G.P.)***)

[132] There is a factual basis placed on the record by the Defence, and the Affidavit by Ms. Nurse does not negate any concerns by the Defence, and by the Court.

[133] Further, there is a potential abuse of process arising for the 17-year delay that requires further investigation/disclosure of the requested documents (***Joudrey***).

[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***) in the upcoming Application.

[135] The documents being requested form part of the investigatory stage and do not attract litigation privilege (***Moseley***, ***Blank***, ***Papasotiriou-Lanteigne***, ***Stinchcombe***). The charging decisions made by Crown counsel are not covered by solicitor-client privilege, because they were not made within any solicitor-client relationship" **((*British Columbia (Attorney General) v. British Columbia (Police Complaints Commissioner)*)**.

[136] There is no privilege attached to the requested documents due to the strong tenable allegation, based on the evidence on record before the Court, of improper conduct by the Crown (***Murrin***, ***Ahmad***).

[137] Allegations of abuse of process pierce any claims of privilege (***Lizotte***, ***Blank***) and disclosure should be ordered so that the Court can confirm, or negate, any allegations of blameworthy Crown conduct (***Blank***).

[138] I am ordering the disclosure of all correspondence between the Crown Attorney's office and the police relating to the three sexual assault complaints against Dr. Fashoranti, as requested by the Defence, to this Court for review by 4:00p.m. October 21, 2022.

Alain Bégin, JPC