R. v. Delorme, 2005 NWTSC 34 Date: 2005 04 05
Docket: S-1-CR 2004000034

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

-and-

GERALD DELORME

Applicant

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Heard at Yellowknife, NT: March 15, 2005

Reasons for Judgment filed: April 5, 2005

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Counsel for Her Majesty the Queen: Caroline Carrasco & Noel Sinclair
Counsel for Applicant (Delorme): Catherine Rhinelander
Counsel for Interested Party (Yukon): James Mahon
Counsel for Interested Party (Courtoreille): Hugh Latimer
Counsel for Interested Party (Tutin): James Brydon

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REASONS FOR JUDGMENT

[1] These reasons address an application for production of communications and documents subject to a privilege commonly referred to as one in furtherance of settlement negotiations or, in the criminal context, plea negotiations. The negotiations in this case involved not the accused, the applicant herein, but three other individuals who were formerly jointly charged with the accused.

[2] The accused, Gerald Delorme, is about to stand trial on a charge of first degree murder, allegedly committed on June 16, 2003, arising from the death of Justin Vo. Originally there were four individuals charged with first degree murder in the death of Vo: the accused plus Richard Tutin, Dale Courtoreille and Francis Yukon. All four individuals were arrested and charged on June 28, 2003. There then followed a sequence of events which resulted in Delorme alone facing trial.

[3] Tutin resolved the proceedings against him by entering a plea of guilty to a charge of being an accessory after the fact to murder. On April 1, 2004, he was sentenced to imprisonment for a period of 2 years less 1 day (in addition to presentencing custody of 9 months for which he was given credit for the equivalent of

18 months). The Crown has said that it intends to call Tutin as a witness at the accused's trial.

[4] Courtoreille also resolved the proceedings against him by entering a plea of guilty to a charge of being an accessory after the fact to murder. He too was sentenced on April 1, 2004. His sentence was imprisonment for 18 months (in addition to presentencing custody of 9 months for which he was given credit for the equivalent of 18 months). The Crown has indicated that it does not presently intend to call Courtoreille as a witness at the accused's trial.

[5] Yukon resolved the proceedings against him by entering a plea of guilty to a charge of manslaughter. He was sentenced on February 21, 2005, to imprisonment for 5 years (in addition to presentencing custody of approximately 19 months for which he was given credit for the equivalent of 3 years). The Crown has said that it is possible that Yukon will be called as a Crown witness at the accused's trial.

[6] The accused Delorme has now applied for production from the Crown of all communications and documents in the Crown's possession relating to the plea negotiations conducted with Tutin, Courtoreille, Yukon, and their respective counsel. The accused says that this is necessary so as to be able to make full answer and defence. The Crown resists production on the basis that these materials are subject to a plea negotiation privilege. The Crown concedes that the materials requested by the accused are relevant, in the broadest sense of that word, but asserts that the probative value of the materials is minimal and does not outweigh the prejudicial effect to the administration of justice in not respecting the plea negotiation process.

[7] Since this application implicates a privilege enjoyed by Tutin, Courtoreille and Yukon, counsel for all three appeared on the hearing of this application. All three opposed production of the materials sought.

[8] The parties appearing before me differed to some extent on the analysis of the privilege at issue here and they offered different tests to resolve the question of whether these materials should be produced. All of them, however, agreed that I should inspect the documents. I was therefore provided with the materials in the Crown's possession, under seal, for my inspection in private. This is the recognized and preferable method for resolving disputes over issues of privilege.

The Plea Negotiation Privilege:

[9] There are three types of privilege relating to litigation generally. Each of them, in my opinion, enjoy the status of a class privilege.

[10] The first is solicitor-client privilege. This has been described as the most notable example of a class privilege: *R. v. McClure*, [2001] 1 S.C.R. 445 (at para. 28). The privilege applies to all communications made within the framework of the solicitor-client relationship. It is not necessary that any litigation be in existence or even contemplated. The importance of this privilege is such that it is now recognized as a substantive rule and exceptions to it will be rare. As noted in *McClure* (at para. 35):

> ...solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.

[11] Solicitor-client privilege is not an issue on this application. Any communications disclosed by the lawyers for the three individuals to the Crown lost the privilege since, at the time, the Crown was a party adverse in interest.

[12] The second type of privilege is the litigation or work-product privilege. It attaches to communications and documents created for the purpose of existing or contemplated litigation. That must be the *dominant purpose* for the privilege to apply. The privilege precludes production of such material (as on discovery in a civil case) or its admission at trial. Litigation or work-product privilege has its roots in civil law but it also applies in the criminal law context: see, for example, *R. v. Swearengen* (2004), 68 O.R. (3d) 24 (S.C.J.).

[13] The third type of privilege is that which attaches to communications in furtherance of settlement. All admissions or communications in the course of negotiations toward a settlement are subject to a privilege and protected from disclosure and are not admissible in evidence. The privilege is held jointly by both sides to the negotiations. The notable exceptions to this privilege are when it is necessary to prove that a settlement was reached or if the communications contain threats or other illegal action.

[14] I said before that, in my opinion, all three types of privilege come within the category of a class privilege. They all come under the umbrella of the principle of confidentiality. They are all inextricably linked to the functioning of the justice system. They are all ones based on reasons of policy; they are all imposed irrespective of the usefulness or materiality of the information to the issues in the litigation; and, the exceptions to them are limited. They are not primarily subject to a balancing of competing interests on a case-by-case basis, although this is a consideration when examining exceptions to them. They fulfil the criteria for a class privilege outlined by Lamer C.J.C. in *R. v. Gruenke,* [1991] 3 S.C.R. 263 (at para 26):

> The parties have tended to distinguish between two categories: a "blanket", *prima facie*, common law, or "class" privilege on the one hand, and a "case-by-case" privilege on the other. The first four terms are used to refer to a privilege which was recognized at common law and one for which there is a *prima facie* presumption of inadmissibility (once it has been established that the relationship fits within the class) unless the party urging admission can show why the communications should not be privileged (i.e. why they should be admitted into evidence as an exception to the general rule). Such communications are excluded not because the evidence is not relevant, but rather because, there are overriding policy reasons to exclude this relevant evidence. Solicitor-client communications appear to fall within this first category...

[15] With respect to the settlement negotiation privilege, a class privilege has been recognized, at least in the civil context, because "it arises from settlement negotiations and protects the class of communications exchanged in the course of that worthwhile endeavour": per MacEachern C.J.B.C. in *Middelkamp v. Fraser Valley Real Estate Board* (1992), 96 D.L.R. (4th) 227 (B.C.C.A.), at p. 232. I fail to see why this classification would be any different for plea negotiation privilege in the criminal context. The authors of at least one Canadian text on evidence have referred to the privilege respecting settlement negotiations as a class privilege: Paciocco & Steusser, *The Law of Evidence* (3d ed., 2002), at p.182.

[16] The policy foundation for the privilege is the public interest in the settlement of litigation. This was noted, in the civil context, by the Supreme Court of Canada in *Kelvin Energy v. Lee*, [1992] 3 S.C.R. 235 (at para. 48):

> The Courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of

> trial of disputed issues, and it reduces the strain upon an already overburdened provincial Court system.

[17] Similar policy reasons have been cited in the criminal context. The recognition of plea bargains, and the deference shown to joint submissions on sentence, are but examples of the judicial policy encouraging settlements: see, for example, *R. v. Howell* (1995), 103 C.C.C. (3d) 302 (N.S.C.A.), at para. 100; *R. v. Cerasualo* (2001), 151 C.C.C. (3d) 445 (Ont. C.A.), at para. 9.

[18] The privilege helps to foster a climate of confidence that encourages a frank evaluation, by the parties to litigation, of the prospect of settlement without the fear that anything said will be used against their interest should there be no settlement. Without that confidence there would be little incentive to attempt settlement. It would in fact discourage such efforts and have the effect of promoting litigation.

[19] The privilege has been recognized by noted authors in both the civil and criminal context:

(a) Sopinka, Lederman & Bryant, *The Law of Evidence in Canada* (2d ed., 1999), at p. 807:

> s.14.201 It has long been recognized as a policy interest worth fostering that parties be encouraged to resolve their private disputes without recourse to litigation, or, if an action has been commenced, encouraged to effect a compromise without resort to trial.
>
> s. 14.202 With respect to persons facing criminal charges, there is a public interest in preserving the confidentiality of plea negotiations between such accused or their counsel, and the Crown. A privilege is necessary to encourage full and frank discussions with a view to coming to a resolution of the matter. There is a substantial saving by the public and a resulting benefit to the administration of justice - including victims and witnesses - in resolving such cases on a just basis.
>
> s.14.203 In furthering these objectives, the courts have protected from disclosure communications, whether written or oral, made with a view to reconciliation or settlement. In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming...

(b) *McCormick on Evidence* (4th ed., 1992), quoted in *R. v. Pabani* (1994), 89 C.C.C. (3d) 437 (Ont. C.A.), at p.443 (leave to appeal refused [1994] S.C.C.A. No. 294):

> ...the legitimacy of settling criminal cases by negotiations between prosecuting attorney and accused, whereby the latter pleads guilty in return for some leniency, has been generally recognized. Effective criminal law administration would be difficult if a large proportion of the charges were not disposed of by guilty pleas. Public policy accordingly encourages compromise, and as in civil cases, that policy is furthered by protecting from disclosure at trial not only the offer but also statements made during negotiations.

(c) Proulx & Layton, *Ethics and Canadian Criminal Law* (2001), quoted in *R. v. Legato* (2002), 172 C.C.C. (3d) 415 (Que. C.A.), at para. 78:

> Communications between defence counsel and prosecutor during plea discussions are confidential and privileged. Public policy encourages full and candid discussion between the parties, and what has been revealed during discussions is not admissible at trial.

[20] While the settlement negotiation privilege has a long history in civil litigation, there were aspects of it that attracted some controversy. Questions arose as to whether the privilege continued to apply once a settlement was achieved. Questions also arose as to whether the privilege applied via-à-vis third parties, whether involved in the same suit or in subsequent proceedings. These questions were all eventually answered in favour of maintaining a broad application of the privilege. It applied both to failed and to successful negotiations. It also precluded a stranger to the negotiations from obtaining disclosure of information relating to them: *Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737 (H.L.); *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, [1990] 4 W.W.R. 39 (Alta. Q.B.), affirmed [1990] 5 W.W.R. 377 (Alta. C.A.); *British Columbia Children's Hospital v. Air Products Canada Ltd.*, [2003] B.C.J. No. 591 (C.A.).

[21] These points are pertinent to the present application because (a) the plea negotiations resulted in a successful settlement in each case, the end result of which became matters of public record in open court; and (b) a "stranger" to those negotiations is attempting to obtain production of presumptively privileged information in what are now separate proceedings.

[22] There are some common recurring situations in which the privilege has arisen in the criminal law context.

[23] One is where either the Crown or the defence wish to hold the other side to something, said during failed settlement discussions. Examples of these are *R. v. Hainnu,* [1997] N.W.T.J. No. 76 (S.C.), and *R. v. Roberts*, [2001] A.J. No. 772 (Alta. Q.B.). In both cases the court held that it was improper to disclose discussions conducted on a "without prejudice" basis.

[24] A second type of situation, one that has assuredly been relegated to the past, was where the Crown attempted to use at trial information conveyed by defence counsel, during unsuccessful plea negotiations, as admissions by the accused. Sometimes this was accompanied by an intention to call defence counsel as a witness to testify to what his client said. These were the scenarios, with some variation, in *R. v. T.J.C.*, [1997] N.W.T.J. No. 141 (S.C.), *R. v. Lake,* [1997] O.J. No. 5447 (S.C.J.), and *R. v. Larocque,* [1998] O.J. No. 1496 (S.C.J.). In all cases the evidence was ruled inadmissible and the plea negotiations were held to be privileged.

[25] Another situation is where the accused in a criminal case seeks production of settlement documents in a related civil proceeding. Such was the situation in *R. v. Ross*, 1995 CarswellOnt 4590 (S.C.J.), where the accused, a former employee of a provincial institution, facing multiple sex assault charges, sought disclosure of documents used in settlement negotiations in a civil suit brought by the complainants against the province. The presiding judge, Salhany J., held that the documentation should be disclosed in the interest of the accused being able to make full answer and defence. In doing so, Salhany J. referred to the comment by the Lord Chief Justice of England in *R. v. Keane* (1994), 99 Crim. App. Rep. 1 (at p.9): "If the disputed material may prove the defendant's innocence or avoid a miscarriage of justice, then the balance comes down resoundingly in favour of disclosing it."

[26] The concern about the accused's ability to make full answer and defence was also central in two cases that were thought to be highly pertinent by counsel appearing on this application.

[27] The first is the pre-trial decision by Lesage J. in *R. v. Bernardo,* [1994] O.J. No. 1718 (S.C.J.). The accused, charged with murder, applied for production of the

Crown's files concerning its plea negotiations with Homolka, who had already plead guilty to manslaughter and been sentenced. She was described as the "principal" witness in Bernardo's upcoming trial. Lesage J. held that there was a recognized public interest privilege surrounding plea negotiations as between an accused and the Crown but the privilege does not apply as against a third party (such as Bernardo) when the accused in the plea negotiations (such as Homolka) will be a witness against the third party and the witness was no longer at risk of prejudice. Lesage J. ordered disclosure on the grounds that access to this information was necessary for Bernardo to be able to make full answer and defence. The material in the plea negotiations was viewed as relevant since it went to Homolka's motives for entering into the plea agreement and to her credibility. He also noted, however, that not all communications would necessarily have to be disclosed.

[28] In the present case, Delorme's counsel argued that production of the plea negotiation documents is necessary so that she will be able to examine the motives behind the plea agreements and cross-examine the Crown witnesses as to their credibility. She argued that there is no other way to learn if there was a *quid pro quo* for the witness' testimony. She submitted as well that no privilege should continue since the potential witnesses are no longer accused persons and therefore they are no longer at risk of prejudice.

[29] The second decision that counsel referred to is that of Schuler J., of this court, in *R. v. Sayers & Elanik*, 2003 NWTSC 58. In that case, one of two co-accused charged with murder sought disclosure of documents held by the Crown relating to an unsuccessful plea negotiation by her co-accused. The material was sought not for use against the co-accused but for preparation only so that the applicant may know what to expect from her co-accused. Schuler J. refused to order disclosure. She held that any connection between the failed plea negotiations and the one accused's ability to make full answer and defence was tenuous. Further, the interest in maintaining confidentiality outweighed the one accused's interest in the information so as to prepare her case. Schuler J. also noted the "chilling effect" on plea negotiations should one accused be automatically entitled to disclosure of information relating to negotiations by a co-accused.

[30] The key distinguishing feature between *Bernardo* and *Sayers & Elanik* is, of course, the fact that, in the first one, the party who negotiated the plea was no longer

at risk and had agreed to testify for the Crown, while, in the second, the party who failed in the plea negotiations was still very much at risk of prejudice.

[31] All counsel on this application agreed that there was a privilege although they may have disagreed as to its extent. No one discounted the importance of an accused's right to make full answer and defence. The debate was over the test that I should apply in reviewing the sealed documents to determine if the privilege should be set aside.

[32] I should emphasize that this application is about production only; it has nothing to do with issues of admissibility. In most cases, even if the privilege over plea negotiations can be set aside, the communications and documents are still largely inadmissible. In most cases, they amount to mere assertions by one party of the merits of that party's position. Such opinions are irrelevant. To the extent that such communications contain admissions, those admissions are usually hypothetical or conditional only, being put forward as the basis on which a settlement may be reached. They may be true or false and, in any event, such conditional admissions are also irrelevant. Any statements conveyed by counsel in such communications are either hearsay or not statements of the client. Furthermore, there may be things of a highly personal nature revealed in plea negotiations, perhaps simply to elicit sympathy from the other side. These too would ordinarily be irrelevant to the issues at a trial. But these are not the questions before me at this stage of the proceedings.

The Appropriate Test:

[33] The common theme in those cases where the plea negotiation privilege has been set aside is that of the accused's right to make full answer and defence. That right is a principle of fundamental justice. And, as noted in *McClure* (at para. 40): "Rules and privileges will yield to the Charter guarantee of a fair trial where they stand in the way of an innocent person establishing his or her innocence."

[34] Various tests were discussed by counsel on this application.

[35] Defence counsel relies primarily on the Crown's acknowledgement that the plea negotiation materials are relevant, and thus says that these materials are likely relevant to the credibility of each of the former accused persons, something that will be a central issue at this accused's trial. I think it can be safely said that, if any one of the

formerly accused persons are called to testify, their credibility will likely be a major point of contention.

[36] What defence counsel is seeking, it seems to me, is the application of a test similar to that used in assessing the Crown's disclosure obligations as defined by *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. The rule is that the Crown is under a duty to disclose all information, whether inculpatory or exculpatory, and whether the Crown intends to use it or not, except information that is beyond its control, clearly irrelevant or privileged. The test of relevance is measured according to the potential usefulness to the defence. Is there a "reasonable possibility" that the information will be useful in making full answer and defence? Admissibility is not an issue. Material may have only marginal value to the issues at trial but would still be relevant for purpose of fulfilling the disclosure obligation. The threshold requirement for disclosure is therefore very low.

[37] In my opinion, this test sets the bar at far too low a level. Almost anything relating to how a witness came to be a witness in the particular trial could be said to be potentially useful to the defence and therefore relevant. Furthermore, the *Stinchcombe* test itself recognizes an exception from disclosure for privileged information. When privilege is claimed, the claim must be analyzed by the reviewing judge to determine whether a privilege truly exists and whether it should be set aside in the interests of justice.

[38] Crown counsel submitted that an appropriate test would be the "innocence at stake" test used to determine if a claim to solicitor-client privilege should be set aside. This test, as set out in *McClure*, requires that the accused establish, as a threshold requirement, that the information sought from the solicitor-client communication is not available from any other source and that the accused is otherwise unable to raise a reasonable doubt as to his or her guilt. If that threshold is not met the privilege stands. If, however, the threshold test is satisfied, the reviewing judge then turns to a two-stage test. First, the accused has to demonstrate an evidentiary basis on which to conclude that a communication exists that could raise a reasonable doubt about guilt. Second, if such an evidentiary basis exists, the judge must examine the communication to determine whether, in fact, it is likely to raise a reasonable doubt as to guilt. If the judge is so satisfied, then the solicitor-client privilege must yield to the right to make full answer and defence.

[39] In my opinion, the innocence at stake test, as formulated in *McClure*, is too strict a test. It is meant to be strict in the context of solicitor-client privilege because of the central role that privilege plays in our system of justice and because of the expectation of every client that their communications with their solicitors will remain entirely confidential. In the case of plea negotiation privilege, however, that personal confidentiality has already been breached because of the fact that communications are taking place with the adverse party.

[40] The test is also inapplicable because of the requirement to show that the information is not available from any other source. Here, if one or more of the formerly accused persons testify, defence counsel will be able to cross-examine them as to the details of any plea bargain with the Crown. The facts that were admitted and led to each of their convictions are matters of public record. If any of them gave statements to persons in authority or other witnesses then those would, I expect, have already been disclosed by the Crown. So there are other sources of information.

[41] In addition, the Supreme Court's requirement that the communication be likely to raise a reasonable doubt as to guilt means that it must relate to an essential element of the offence. It cannot go merely to an ancillary issue such as the credibility of a witness: see Paciocco & Steusser, *op. cit.*, at p.194. In any event, no matter how high the bar has been set by *McClure*, the defence submitted no evidence in this case to support even the threshold test required by *McClure*.

[42] The innocence at stake exception does, nevertheless, provide a useful reference point for the purposes of the present case. The origin of the exception is, of course, the law relating to informer privilege. The rule prohibiting disclosure of the identity of a police informer is also a class privilege: see *McClure* (at para. 45). But one of the exceptions to that rule has been where the informer is a material witness to the crime. In such a case, the identity of the informer must be revealed: *R. v. Scott*, [1990] 3 S.C.R. 979 (at para. 38).

[43] A "material witness" is one who can give material evidence. Evidence is material if it is pertinent, germane or significant in proving or disproving the defendant's guilt: *R. v. Gill* (1987), 39 C.C.C. (3d) 506 (Man. C.A.), affirmed [1989] 1 S.C.R. 295. It seems to me beyond question that each of the three former accused

persons in this case would, if called as witnesses, come within the category of material witness. They have all admitted some involvement in the death of Justin Vo or the events immediately following. This does not mean that the evidence of any of these witnesses is indispensable or determinative; it merely means that it could be important and material to the issues in the case. In this respect, I agree with the observations of Steele J.A. in *R. v. Peddle* (1996), 111 C.C.C. (3d) 321 (Nfld. C.A.), when commenting on the material witness exception identified in *Scott* (at p. 329):

> ...It seems apparent, however, that the "material witness" Justice Cory had in mind in Scott, justifying a disclosure of an informer's identity, was an individual who had personal knowledge of the commission of the offence and possessed essential information needed to demonstrate the innocence of the accused. An attempt at a more precise definition may not be beneficial, and probably best left for refinement on the issues and facts of each case. The predicament may not always directly concern indispensable evidence from a material witness to the crime. The issue may also revolve around the accused's right to make full answer and defence or perhaps the right of an accused to a fair trial. All such cases will necessitate a balancing of the public interest in protecting the identity of informers against the interests of the accused.

[44] In my opinion an appropriate test for the production of plea negotiation information can be modelled on the common law test for disclosure of confidential third party records set out in *R. v. O'Connor*, [1995] 4 S.C.R. 411. The test there is not as broad as the Crown disclosure rules in *Stinchcombe* nor as stringent as the innocence at stake test in *McClure*. And I think that is appropriate where the person who was involved in the plea negotiations, if those negotiations resulted in a plea or the dropping of charges, then becomes a witness against an accused who is at jeopardy.

[45] In *O'Connor*, the person seeking the information must establish likely relevance. The test for relevance is a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify. The majority in *O'Connor* went on to note that "when we speak of relevance to an issue at trial, we are referring not only to evidence that may be probative to the material issues in the case (i.e. the unfolding of events) but also to evidence relating to the credibility of witnesses and to the reliability of other evidence in the case" (at para. 22).

[46] What this test requires, in the context of the plea negotiation privilege, is some basis for concluding that the protected information has some potential to provide the

accused with some added information not already or otherwise available to the defence or has some potential impeachment value. This in turn requires an examination of the specific items for which privilege is claimed. If the specific information or document is relevant and may be helpful to the defence, then the privilege should be set aside in the interests of a fair trial.

[47] I recognize that the *O'Connor* test was rejected in *McClure* (see para. 44). But the rejection was only partly because the test was not stringent enough. It was primarily because the *O'Connor* test is premised on an individual's privacy interest as opposed to the broader policy objectives underlying the administration of justice. As I said before, the fundamental importance of the solicitor-client privilege to those objectives justified the imposition of a stringent test. While the plea negotiation privilege is also based on policy reasons, it does not share the same fundamental position as does solicitor-client privilege. Thus I think there is justification for a less stringent test.

[48] It is the fair trial right of the accused that justifies setting aside the plea negotiation privilege when the prerequisites, as I set them out earlier, are met. It is that right that underpins the decisions in those cases, such as *Bernardo* and *Ross*, where the privilege was set aside. But nothing in those cases, nor anything I say here, can be interpreted to mean that the privilege does not apply in every criminal case.

Examination of Sealed Documents:

[49] On the hearing of this application the Crown filed a sealed packet containing documents relating to the plea negotiations with Tutin, Courtoreille and Yukon. The packet was accompanied by an inventory list itemizing the 33 documents in question. I reviewed each document in private keeping in mind the considerations I have already set out in these reasons.

[50] With respect to the documents relating to the plea negotiations with Tutin (items numbered 1 through 7), the primary consideration is that the Crown has declared its intention to call Tutin as a witness at the trial. I order that documents numbered 1 through 4 be produced to Delorme's counsel. These documents contain information not otherwise available to the accused and may be useful for the defence in examining Tutin's motivations for entering into the plea bargain and to test his credibility. There is one item, document number 4, that also raises an issue of work

product privilege but I have concluded that this should be disclosed because it relates a conversation with defence counsel pertaining to the plea.

[51] Of the remaining documents relating to Tutin, document number 5 need not be disclosed because it is of no value. It speaks only to matters of scheduling. The other two items, numbered 6 and 7, are drafts of an agreed statement of facts. In my opinion these are of no value as well. They are examples of the type of hypothetical or conditional admissions that are irrelevant and immaterial (this being one of the explanations in support of the privilege, as per Schiff, *Evidence in the Litigation Process* (4th ed. 1993), at p. 1509). The useful document is the statement of facts eventually agreed to by Tutin. That, however, is a matter of record and already available to the defence.

[52] The Crown has said that it does not intend to call Courtoreille as a witness. Therefore, the documents relating to his plea negotiations (items numbered 8 through 21), will remain privileged. There is nothing in them which, in my opinion, could compromise Delorme's ability to make full answer and defence. If, however, the situation changes and the Crown does decide to call Courtoreille as a witness, then defence counsel may renew this application.

[53] With respect to Yukon, the Crown states that it is possible that Yukon will be called as a witness. Considering the fact that he has admitted at least some role in the death by his plea of guilty to manslaughter, I think that this is at least a real possibility. In view of that, I order that those documents numbered 25, 27, 29, 32 and 33 be produced to Delorme's counsel. They provide additional material of potential value to the defence.

[54] Documents numbered 22, 23 and 24 need not be produced as they also raise work product privilege. They are memoranda to file prepared by Crown counsel for their reference. Document 26 is a letter containing legal opinions of Yukon's counsel conveyed to Crown counsel. Those opinions are irrelevant as far as Delorme is concerned and therefore the document need not be produced. Documents 28, 30 and 31 contain drafts of an agreed statement of facts. My comments above apply to these as well so they need not be produced *except for* the covering letter contained as part of document number 28. That letter is relevant to Yukon's eventual plea and potentially useful to the defence. So that letter is to be produced.

Conclusion:

[55] The documents provided for my inspection will remain sealed on the court file. They are not to be opened without an order of the court. While I have ordered some of them to be produced to defence counsel, they are still impressed with a privilege insofar as the rest of the world is concerned. They are not public documents and, unless any of them are entered as exhibits at the trial, they are not court records.

[56] If counsel require further directions, they may speak to me.

J.Z. Vertes
J.S.C.

Dated at Yellowknife, NT
this 5th day of April, 2005.

Counsel for Her Majesty the Queen: Caroline Carrasco & Noel Sinclair
Counsel for Applicant (Delorme): Catherine Rhinelander
Counsel for Interested Party (Yukon): James Mahon
Counsel for Interested Party (Courtoreille): Hugh Latimer
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