

The court released its judgment in this matter to counsel, the appellant and the trial judge only, on November 20, 2014 after an *in camera* hearing. The court has received submissions from counsel who reviewed the unredacted judgment. The court has determined that the attached redacted version of the reasons should be released to the public. The full reasons along with the rest of the Court of Appeal file remain under seal.

The court further orders that the unredacted reasons may be provided to Crown counsel engaged in or supervising the prosecution of the appellant. Crown counsel may provide the unredacted version to the officer in charge of the investigation.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. X.Y., 2014 ONCA 826

DATE: 20141120

DOCKET: C56505 and M44145

Doherty, Feldman and Simmons JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

X.Y.

Appellant

Joseph Di Luca and Erin Dann, for the appellant

Susan Magotiaux, for the respondent

Heard: November 12, 2014

On appeal from the order [date redacted] of a judge [name of judge redacted] of the Superior Court of Justice.

**By the Court:**

[1] This interlocutory appeal is brought pursuant to s. 37.1 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. The s. 37 proceeding was brought by the Crown in the course of pre-trial motions in a trial at which the appellant and others were charged with various offences. The trial is adjourned pending the outcome of this appeal.

[2] The trial judge was faced with a fluid and very unusual situation. His carefully crafted response to that situation included orders under s. 37(4) and 37(6) of the *Canada Evidence Act* and an order governing the conduct of part of the trial [description of trial redacted] made under s. 37.3 of the *Canada Evidence Act*. This appeal purports to challenge all facets of the trial judge's orders although s. 37.1 of the *Canada Evidence Act*, which creates the right of appeal, does not provide for an appeal from an order made under s. 37.3.

[Paragraphs 3-7 have been redacted.]

[8] We are in substantial agreement with the position advanced by the Crown. [One sentence redacted.] Evidentiary rulings are properly made by trial judges under the rules governing the admissibility of evidence in a criminal trial. Section 37 orders target disclosure of specific information and are more appropriately sought in the criminal trial context, after an evidentiary ruling is made by the trial judge and the ruling contemplates the disclosure of certain information during testimony. If the Crown takes the position that the ruling would result in the disclosure of information protected by the confidential informant privilege, that Crown may seek a s. 37 order: see *R. v. Pilotte*, [2002] 163 C.C.C. (3d) 225 at para. 41-44; leave to appeal to S.C.C. refused, 170 C.C.C. (3d) vi.

[9] We recognize that only the Crown can institute a proceeding under s. 37 of the *Canada Evidence Act*. [One sentence redacted.] The Crown in exercising its

power to invoke s. 37 proceeding, is under a legal obligation to do all in its power to avoid revealing the identity of a confidential informant: *R. v. Named Person B*, [2013] 1 S.C.R. 405 at para. 140, per Cromwell J. in dissent but not on this point. This obligation may necessitate the initiation of a s. 37 proceeding by the Crown even if the evidentiary ruling is favourable to the Crown's position at trial.

[Paragraphs 10-23 have been redacted.]

[24] The appeal is dismissed. The matter is remitted to the trial court for the continuation of the trial.

[25] The entire appeal file in this court is currently under seal. Most of the oral argument on the appeal was heard *in camera*. It may be that publication of these reasons in the normal course would compromise the identity of a confidential informant. Consequently these reasons will be released at this time only to the trial judge and to the parties on the terms and conditions discussed at oral argument. After the parties have had an opportunity to review the reasons, they may arrange a conference call with the president of the panel to determine what steps, if any, should be taken in respect of the further release of these reasons.

Released: November 20, 2014 ("D.D.")

"Doherty J.A."

"K. Feldman J.A."

"Janet Simmons J.A."