COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Vice Media Canada Inc., 2017 ONCA 231
DATE: 20170322
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Hoy A.C.J.O., Doherty and Miller JJ.A.

BETWEEN

Her Majesty the Queen

Respondent (Respondent)

and

Vice Media Canada Inc. and Ben Makuch

Applicants (Appellants)

and

The Attorney General of Ontario, the British Columbia Civil Liberties Association, the Canadian Civil Liberties Association, Canadian Journalists for Free Expression, Canadian Broadcasting Corporation, Ad Idem/Canadian Media Lawyers Association, Canadian Association of Journalists, Canadian Media Guild/Communication Workers of America (Canada), Reporters Without Borders/Reporters Sans Frontières, Aboriginal Peoples Television Network, Centre for Free Expression

Interveners

Iain A.C. MacKinnon, for the appellants

Brian G. Puddington and Sarah Shaikh, for the respondent

Susan Magotiaux, for the intervener, the Attorney General of Ontario

Andrew W. MacDonald, for the intervener, the British Columbia Civil Liberties Association

Brian N. Radnoff and Christopher T. Shorey, for the intervener, the Canadian Civil Liberties Association

Justin Safayeni, for the intervener, Coalition of media and journalist organizations

Heard: February 6, 2017

On appeal from the order of Justice Ian A. MacDonnell of the Superior Court of Justice, dated March 29, 2016, with reasons reported at 2016 ONSC 1961.

Doherty J.A.:

I

OVERVIEW

[1] A free and vigorous press is essential to the proper functioning of a democracy. The protection of society from serious criminal activity is equally important to the maintenance of a functioning democracy. Those fundamental societal concerns can come into conflict. When they do, it falls to the court to resolve those conflicts. In this case, claims based on the freedom of the press and those based on effective law enforcement collide at two points.

[2] The first collision occurred when the police obtained an *ex parte* production order requiring the appellants, Vice Media Canada Inc. ("Vice") and an employee, Mr. Ben Makuch ("Mr. Makuch"), to produce to the police material created or used in the course of searching out and reporting on the news. The appellants argue that the production order undermines their role as the eyes and ears of the community by effectively conscripting them into the ranks of law enforcement. The

police respond that they need the information referred to in the production order to effectively investigate serious crimes.

[3] The second collision occurred when the appellants attempted to gain access to the information on which the police relied to obtain the production order. Once again, the appellants argue that, to properly perform their function within our democracy, the press must have access to information on which the police rely to obtain coercive court orders. Once again, the police respond that for the press to access that information would compromise the proper and effective investigation of serious crimes.

[4] The application judge rejected the appellants' application to quash the production order. He largely accepted the appellants' submission that the order sealing the material on which the police relied to obtain the production order should be set aside, directing that most of the material should be unsealed and available to the press for examination. However, the application judge also made some of the unredacted information subject to a temporary non-publication order, thereby preventing the press from disseminating that information to the public.

[5] The appellants appeal all three aspects of the application judge's order. They are supported in some of their submissions by three interveners.[1] The

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[1] The interveners, the British Columbia Civil Liberties Association ("BCCLA") and the Coalition of media and journalist organizations made submissions relating to the production order. The intervener, the

respondent supports all aspects of the order made by the application judge. The Attorney General for Ontario intervenes to make submissions on the law governing production orders.

[6] For the reasons that follow, I would: dismiss the appeal from the refusal to quash the production order; allow the appeal as it relates to the sealing order, in part; and, subject to the parties agreeing on modifications to the non-publication order, dismiss the appeal from that order.

II

FACTUAL BACKGROUND

[7] Between June and October 2014, Mr. Makuch wrote and Vice published three articles about the involvement of Farah Shirdon ("Shirdon") with the terrorist group, the Islamic State of Iraq and Syria ("ISIS"), in the Middle East. The articles were based in large measure on communications between Mr. Makuch and Shirdon through Kik Messenger, a text messaging service.

[8] Shirdon, who had lived in Calgary and was believed to have left Canada in March 2014 to join ISIS, was under investigation for several terrorism-related offences. He was subsequently charged with six offences, but remains at large.

Canadian Civil Liberties Association ("CCLA") made submissions relating to the sealing order and the non-publication order.

[9] In the articles written by Mr. Makuch, Shirdon purported to confirm that he was a combatant with ISIS. He made specific threats against Canada.

[10] On February 13, 2015, the police sought a production order under s. 487.014 of the *Criminal Code*, R.S.C., 1985, c. C-46, directing Vice Media and Mr. Makuch to produce documents and data relating to their communications with Shirdon.[2] An order issued directing production among other things of:

> Paper printouts, screen captures or any other computer records of all communications between Makuch or any employee of Vice Media Canada Inc., Vice Studio Canada Inc., and Shirdon, aka Abu Usamah over Kik [M]essenger.

[11] The issuing judge also directed that all information relating to the application for the production order, including the affidavit sworn in support of the application, should be held under seal pending further court order.

[12] After receiving the production order, Vice examined its records and advised the police that the only materials in its possession covered by the production order were some instant messenger chats between Mr. Makuch and Shirdon, and screen captures of the Kik Messenger chats. As I understand it, the screen captures are digital photograph files of certain conversations between Mr. Makuch and Shirdon. Vice and Mr. Makuch did not produce the material covered by the production order,

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[2] I will refer to the relevant sections by their present numbering.

but instead brought an application to quash or set aside that order and an application to unseal the record relied on to obtain the order.

III

THE APPEAL

A: Jurisdiction

[13] Before the application judge, the appellants sought prerogative writ relief in the nature of *certiorari*, quashing the production order and directing the unsealing of the material that was before the issuing judge. The appellants also sought orders under the *Criminal Code* setting aside the sealing order (s. 487.3(4)) and revoking or varying the production order (s. 487.0193(4)).

[14] An order granting or refusing prerogative writ relief by way of *mandamus*, *certiorari* or prohibition is appealable to this court under s. 784(1). The *Criminal Code* does not provide for appeals from orders under s. 487.3(4) or s. 487.0193(4).

[15] None of the parties raised this court's jurisdiction. At the outset of oral argument, the court inquired as to its jurisdiction to entertain appeals from the orders made pursuant to the *Criminal Code* provisions.

[16] Mr. MacKinnon, counsel for the appellants, referred the court to *R. v. Ciarniello* (2006), 81 O.R. (3d) 561 (C.A.), leave to appeal refused, [2006] S.C.C.A. No. 424. In that case, the court observed that s. 784(1) provides for an appeal "from a decision granting or refusing the relief sought in proceedings by way of

mandamus, *certiorari* or prohibition". In holding that the right of appeal extended to the refusal of "inextricably linked" relief sought in the proceeding (at para. 25), even relief broader than that available by way of prerogative writ, Sharpe J.A. observed, at para. 24:

> We must respect the principle relied upon by the Crown that this court has no jurisdiction to entertain an appeal that is not authorized by statute. However, that principle does not require us to interpret the appeal rights that Parliament has given in an unduly restrictive or technical manner. It is in the interests of the fair and efficient administration of justice that all appeals relating to the same issue and arising out of the same proceeding be brought before the same court at the same time.

[17] I would apply *Ciarniello* here. The language of s. 784(1) is broad enough to encompass appeals from all of the orders made by the application judge.

B: The Standard of Review

[18] The appellants and interveners make submissions, with respect to the standards of review applicable both on the application and in this court.

[19] The application judge was asked to quash or revoke the production order, either in the exercise of his supervisory prerogative writ powers, or under his statutory powers granted by s. 487.0193. Under the statute, the application judge could revoke the production order only if the order was unreasonable in the circumstances (s. 487.0193(4)(a)), or if it sought the production of a document that was privileged or otherwise protected from disclosure by law (s. 487.0193(4)(b)).

The application judge had no authority under the statute to make his own assessment of the merits of the initial request. Apart from the power to set aside orders that called for production of privileged or other protected documents, the review allowed by the statute contemplates a deferential reasonableness standard of review.

[20] The scope of review contemplated by prerogative writ review of search warrants and similar investigative tools is well-settled. The reviewing court will quash the order only if, having regard to the record before the issuing judge, as augmented by evidence before the reviewing judge, no judge acting reasonably could have concluded that the order should be made: *R. v. Garofoli*, [1990] 2 S.C.R. 1421, at p. 1452; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 40; *R. v. Sadikov*, 2014 ONCA 72, 305 C.C.C. (3d) 421, at paras. 83-84; and *R. v. Nero,* 2016 ONCA 160, 334 C.C.C. (3d) 148, at para. 71. The "*Garofoli*" standard of review has been applied on motions brought by the media to quash a search warrant: see *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, at para. 80.

[21] The appellants and the interveners argue for a more interventionist standard of review by the application judge in cases in which the media is the target of the warrant or the production order. In support of this contention, they point to the added complexities in assessing whether the order directed at the media should issue, the important constitutional rights at stake, and the *ex parte* nature of the initial application.

[22] None of these arguments is persuasive. While no doubt additional considerations come into play with a media target, I do not see how they make a reasonableness assessment more difficult, or less appropriate. I agree, if the media is the subject of an order, important constitutional rights are at stake and negative effects may flow from improvidently granting the order. The rights at stake when the warrant targets the media cannot, however, be characterized as more worthy of judicial protection than the s. 8 rights routinely engaged on motions to quash search warrants executed at homes and other locations where privacy interests are extremely high.

[23] Finally, the *ex parte* nature of the initial proceeding is common to all applications for warrants and production orders. The negative impact of the *ex parte* proceeding is countered by the media's right to move to revoke the warrant or production order before they turn the material over to the police: s. 487.0193(1). The media is entitled to place additional material before the reviewing judge to be considered in determining whether the warrant or production order should have issued. Practically speaking, the more significant the material placed before the reviewing judge, the more the review will take on the appearance of a *de novo* assessment of the merits. Under the established procedures, the media has a full opportunity to put forward its case against the production order before the police access the material.

[24] There are at least three good reasons for applying the *Garofoli* standard to all motions to quash warrants and similar documents. First, the warrant or production order is a presumptively valid court order. A review of that order, proceeding as a *de novo* examination of the order's merits, would be inconsistent with the existence of a valid order. Second, the *Garofoli* standard of review is consistent with the standard of review selected by Parliament in providing a statutory road to review production orders under s. 487.0193(4). If the *Garofoli* standard were rejected in favour of a more interventionist standard, as proposed, the statutory reasonableness standard would become irrelevant except in those rare cases where the initial order was made by a Superior Court, thereby rendering prerogative writ relief unavailable.

[25] Third, and most important, the nature of the decision made by the issuing justice invites a deferential standard of review. The issuing justice must weigh the evidence offered in the supporting material, consider what inferences should be drawn from that material and, if satisfied that the preconditions to the warrant or production order exist, decide whether, in all of the circumstances, he or she should exercise a discretion in favour of granting the warrant or production order.

[26] Appellate courts have long recognized that decisions which rest on the weighing of evidence and the exercise of discretion are not readily amenable to a correctness standard of review. Realistically speaking, there is often no "right" or "wrong" answer to such questions. Appellate review under the guise of the

correctness standard simply becomes a redoing of the function performed at first instance. That "redo" adds time and expense, but little else to the process.

[27] The standard of review applicable in this court needs little comment. To the extent that the appellant challenges the standard of review used by the application judge or argues that the application judge misapplied or failed to apply applicable legal principles, this court reviews on a correctness standard: see *Canadian Broadcasting Corp. v. Manitoba (Attorney General)*, 2009 MBCA 122, 250 C.C.C. (3d) 61, at paras. 21-23. However, when the appellant quarrels with factual determinations made by the application judge, or the application of the correct legal test to the circumstances before the application judge, the appellant must demonstrate clear and palpable error, or an unreasonable assessment.

C: Should the Production Order Have Been Set Aside?

[28] A production order under s. 487.014 of the *Criminal Code* is a means by which the police can obtain documents, including electronic documents, from individuals who are not under investigation. The section empowers the justice or judge to make a production order if satisfied, by the information placed before her, that there are reasonable grounds to believe that: (i) an offence has been or will be committed; (ii) the document or data is in the person's possession or control; and (iii) it will afford evidence of the commission of the named offence. If those three conditions exist, the justice or judge can exercise her discretion in favour of

granting the production order. She may, however, decline to make the order even if those conditions exist. In deciding whether to exercise her discretion in favour of making the production order, she will have regard to the impact of that order on the constitutionally protected rights of the target of the order and the public. The more significant the negative impact, the more cogent must be the grounds for seeking the order: see *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421, at p. 444.

[29] In light of *Lessard* and its companion case, *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459 ("*CBC v. New Brunswick*"), when a proposed production order targets the media, the court must exercise its discretion with care, to avoid compromising – if the police were to compel the media's information too easily – the unique and important role the media plays in society. In *CBC v. New Brunswick*, Cory J., for the majority, said, at pp. 475-76:

> The constitutional protection of freedom of expression afforded by s. 2(b) of the *Charter* does not, however, import any new or additional requirements for the issuance of search warrants. What it does is provide a backdrop against which the reasonableness of the search may be evaluated. It requires that careful consideration be given not only to whether a warrant should issue but also to the conditions which might properly be imposed upon any search of media premises.

[30] Cory J. proceeded to list several factors to be considered in assessing the reasonableness of a search targeting information in the possession of the media.

His approach and those factors were referred to with approval in *R. v. National Post*, at paras. 31-33, 79.

[31] Much of the argument on the appeal focused on the factors outlined in *Lessard*, *CBC v. New Brunswick*, and *R. v. National Post*. The appellants argue that the application judge failed to properly consider and weigh the respective factors. Those interveners supporting the appellants argue that the factors should be "restructured", to more properly reflect the importance of freedom of the press in contemporary society, by more strictly limiting the state's ability to compel production of information from the media.

[32] I am not convinced that there is any need to restructure the factors identified in the controlling case law. When the state exercises its powers to search and seize, reasonableness is the constitutional litmus test. The place to be searched and the nature of the material to be seized are important considerations in that reasonableness assessment. The *Lessard* factors recognize the significance of those considerations. They also recognize that the ultimate assessment is of necessity a fact-specific one. Any attempt to exhaustively enumerate all relevant factors, or to define them narrowly, is doomed to fail. In my view, the present approach provides adequate room for a proper balancing of the important competing interests which must be considered in a case in which the state seeks to compel production of material from the media.

[33] The application judge correctly identified his function in reviewing the production order (at paras. 11-13). He expressly recognized that special considerations arose when a media outlet was the target of the production order (at para. 13). He considered at length, at paras. 27-54, the factors identified in *Lessard* and *CBC v. New Brunswick*. He identified and addressed the following considerations:

- the material sought (screen captures of the conversations between Mr. Makuch and Shirdon) provided the best and most reliable evidence of what Shirdon said. These statements could provide direct evidence against Shirdon on the outstanding charges;
- the same quality of evidence was not available from any other source, including Mr. Makuch's testimony or the records kept by the service provider (Kik Messenger);
- Shirdon was not a confidential source of Mr. Makuch's. In speaking with Mr. Makuch, Shirdon was anxious to broadcast his views to the world. He wanted those views disseminated;
- the substance of much of the information sought had already been placed in the public domain by Mr. Makuch's articles; and
- the material could provide important and highly reliable evidence to support very serious criminal charges.

[34] After a careful consideration of the entirety of the record before him, the application judge concluded, at para. 47:

> I am satisfied that the ITO set forth a basis upon which, after taking into account the special position of the media, the authorizing justice *could* have determined that the balance between the interests of law enforcement and the media's right to freedom of expression favoured making the production order. [Emphasis in original.]

[35] The reasons of the application judge reveal no misapprehension of the evidence, no failure to consider factors relevant to his assessment, or any other form of extractable legal error. It was reasonable, on this record, to find the balancing of the competing interests favoured making the production order.

[36] I will specifically refer to two arguments made by the appellants. First, they submitted that any production order targeting the media necessarily has a "chilling effect" on the media's ability to perform its role. The appellants argue that potential sources who know that the government can and will seize records of their communications with journalists will necessarily be more reluctant to provide information to journalists. Inevitably, that reluctance will result in less information of public importance being available through the media. The appellants maintain that this "chilling effect" exists even if a specific production order seeks information that is largely in the public domain and was not provided to the media under any promise, implied or otherwise, of confidentiality. They argue that the application

judge ignored the inevitable "chilling effect" of the production order on the media's ability to inform the public on matters of public importance.

[37] The application judge did not specifically use the phrase "chilling effect". He did, however, refer to the specific factors which, in the circumstances of this case, impacted significantly on any "chilling effect". He referred to the absence of any requests for confidentiality from the sources, noting that the source was anxious to tell the world about his beliefs and conduct. The application judge also referred to Mr. Makuch having published much of the material sought in three articles predating the request for the production order.

[38] The application judge was clearly alive to the concerns about the negative impact of requiring the media to produce material for the police. I have no doubt the application judge appreciated, as part of that concern, the potential "chilling effect". He implicitly addressed that concern as it existed on the facts of this case by identifying factors that tended to significantly reduce the potential "chilling effect".

[39] The appellants' second argument relates to the potential probative value of the material sought by the production order. As I understand this argument, the appellants argue that the reviewing judge must consider whether the prosecution actually needs the evidence sought to support the prosecution or, alternatively, whether the Crown has enough evidence to make its case without that material.

This "necessity" requirement is distinct from considerations of whether the information is available from sources other than the media. The "alternative source" factor is well-recognized in *Lessard* and its companion case: *Lessard*, at p. 445; and *CBC v. New Brunswick*, at p. 481.

[40] I would reject the argument that the Crown must show that the material sought is essential to the prosecution. As the Attorney General of Ontario points out, when production orders or search warrants are issued, often there is no prosecution underway and the investigation is very much in its formative stage. No one could accurately assess what the Crown does or does not need to prove its case at trial.

[41] More significantly, in my mind, this submission improperly blurs the line between judge and prosecutor by assigning judges the job of deciding whether the prosecution has sufficient evidence to prove its case without access to the information in the hands of the media. To suggest that a judge can foreclose police access to relevant evidence otherwise producible in law, because the judge thinks the prosecution does not need the evidence to prove its case, is to seriously confuse the role of those who investigate and prosecute crime with the role of those who adjudicate the cases brought by the prosecution against individuals.

IV

THE SEALING AND NON-PUBLICATION ORDERS

A: The Sealing Order

[42] The judge who granted the production order made a sealing order under s. 487.3(1) in respect of all material related to the application for the production order, including the affidavit filed by the police officer in support of the application. Before the application judge, the Crown conceded that parts of the affidavit could be made public, but argued that other parts of the affidavit should be redacted before the affidavit was made available to the public. The Crown justified some of the redactions on grounds of national security. The appellants did not challenge the redactions made on that ground.

[43] The Crown attempted to justify other redactions under the terms of ss. 487.3(2)(a)(ii) and (iv). Section 487.3(2)(a)(ii) allows for a sealing order if disclosure of the information would subvert the ends of justice by compromising the nature and extent of an ongoing investigation. Section 487.3(2)(a)(iv) provides for a sealing order if disclosure of information would subvert the ends of justice by prejudicing the interests of an innocent person.

[44] The application judge correctly identified the applicable legal principles. To obtain a sealing order, a party must satisfy the two-part *Dagenais-Mentuck* test. First, the party must show that the sealing order is necessary to prevent a serious

risk to the proper administration of justice because alternative, less intrusive, measures cannot prevent that risk. Second, the party must demonstrate that the benefits of the sealing order outweigh its negative impact on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice: see *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at para. 26.

[45] In addition to national security redactions, the application judge concluded that the Crown could justify only two relatively minor redactions. One, a partial redaction of para. 34 of the affidavit, was warranted to preserve the anonymity of an individual who had provided information to the affiant. The other, a redaction of paras. 63(b) and 63(c), was justified on the ground that disclosing future investigative steps would compromise the police investigation.

[46] In my view, the application judge's reasons, at para. 74, for redacting the identity of the person referred to in para. 34 of the affidavit provide a reasonable basis upon which the application judge could determine that, on an application of the legal principles he identified, the redaction was appropriate. There is no basis upon which this court can interfere with that assessment.

[47] I reach a different conclusion in relation to paras. 63(b) and (c), under the heading "Investigative Plan". They set out the steps which the affiant indicates the

police may take to follow up on any information generated by the production order sought.

[48] The steps described in paras. 63(b) and (c) are obvious. They come down to the assertion that the police will follow up on any leads generated by the information they obtain through the production order. For example, the affiant indicates that the police will interview individuals who are identified in that material.

[49] I would think that anyone aware of the execution of the production order, a public fact, would assume that the police would follow up on any pertinent information revealed to them using normal investigative tools such as interviews with identified persons. It cannot be said that public exposure of a self-evident planned course of investigation presents a serious risk to the proper administration of justice necessitating the redaction of that information from the affidavit.

[50] There was no basis in the evidence before the application judge for the redaction of paras. 63(b) and (c). The contents of those paragraphs should be available for public perusal.

B: The Non-Publication Order

[51] After holding that only very limited redactions from the affidavit should be made, the application judge turned to whether he should make a non-publication order in respect of any of the unredacted portions of the material. The application judge recognized that any non-publication order must be justified under the two-

part *Dagenais-Mentuck* test, summarized above at para. 44, referred to in *Toronto Star Newspapers Ltd. v. Ontario*. He accepted that a non-publication order could, in some circumstances, provide a less intrusive alternative to a sealing order, while still preventing the potential risk to the proper administration of justice posed by dissemination of the material in issue. In short, the application judge understood that a non-publication order was a viable alternative, in some circumstances, to a full sealing order or an order closing a courtroom to the public (at paras. 99-120): see *Ottawa Citizen Group Inc. v. R.* (2005), 75 O.R. (3d) 590 (C.A.), addendum (2005), 75 O.R. (3d) 607 (C.A.); and *R. v. Flahiff* (1998), 123 C.C.C. (3d) 79 (Que. C.A.).

[52] I agree with the application judge's analysis and, in particular, his rejection of *Canadian Broadcasting Corp. v. Canada*, 2013 ONSC 7309, at paras. 58-65. To the extent that *Canadian Broadcasting Corp. v. Canada* holds that a properly tailored non-publication order cannot provide a reasonable alternative measure to a sealing order, the case is wrongly decided. An order that limits publication of certain information for a fixed time period, while permitting full access to the material or the relevant proceeding, has a less deleterious effect on the open court principle, and associated individual rights, than does an order that effectively locks the courtroom door to the media and the public. The application judge explained the significant difference, at para. 126:

> Second, what is contemplated is not an absolute ban on the publication of the search warrant materials. The media can still publish the identity of the target of the investigation, the nature of the materials sought by the production order, the date on which the application was made and the order was issued, the nature of the materials sought, and some portions of the ITO.

I would add that the media are also free to comment on and, if deemed appropriate, criticize the nature and scope of any non-publication order made.

[53] In accepting that a non-publication order can provide an effective and constitutional alternative to a sealing order or an order excluding the public from a courtroom, I do not mean to suggest that a non-publication order should merely be available for the asking. A non-publication order involves a significant intrusion upon the open court principle and must be justified by the party seeking it. The application judge indicated, at para. 120:

> That is not to say that it [a non-publication order] will be a reasonable alternative in every case – whether it will be so will be a case-specific determination that will require consideration of the second branch of the *Dagenais/Mentuck* test.

[54] Applying the *Dagenais/Mentuck* test, the application judge concluded that the fair trial rights of Shirdon outweighed the negative impact on the open court principle and the media's right to access court proceedings occasioned by a temporary publication ban on some of the contents of the affidavit. The application judge listed, by way of a schedule to his reasons, the various parts of the affidavit which were subject to the non-publication ban. He directed that the ban would

remain in place until the proceedings against Shirdon were terminated. He further ordered that if Shirdon had not been arrested within two years, the continued need for the ban should be reassessed.

[55] I accept the application judge's description of Shirdon's fair trial rights and the negative impact that publishing some of the information in the affidavit, before trial, could have on those rights (at paras. 75-98). However, the application judge did not specifically indicate how publication of each part of the affidavit subject to the non-publication order would negatively impact on Shirdon's fair trial rights.

[56] Some parts of the affidavit that are subject to the non-publication ban refer to potential evidence, or what the affiant alleges is evidence, against Shirdon on the charges outstanding against him. Other parts of the affidavit contain the affiant's opinion as to what inferences or conclusions could be drawn from certain evidence. The potential negative impact of these parts of the affidavit on Shirdon's fair trial rights is clear without further articulation. There are, however, parts of the affidavit subject to the non-publication order that do not fit into these categories.

[57] On my review of the affidavit, several of the sections subject to the non-publication order appear to refer to background information that is readily available to and known to the public, or to information that is revealed in parts of the affidavit that are not subject to a non-publication order. For example, see the Investigator's

Comments after paras. 27(k), 28(c), 30(e), 32(k), 35, 35(e), 35(i)(iv), 35(i)(vi), 60(k) of the affidavit.[3]

[58] Other parts of the affidavit refer to the contents of Mr. Makuch's articles, published on June 23, October 1, and October 7, and a Skype interview with Shirdon on September 23 (at paras. 44-52 of the affidavit). It is not clear to me why the affiant's summary of those articles found in paras. 60(i) and (j) is subject to a non-publication order.

[59] The parties did not make submissions directed at specific parts of the affidavit subject to the non-publication order. The submissions were put on the broad basis that there should or should not have been a non-publication order made. I would not vary the application judge's order without submissions addressing the specific parts of the affidavit which may, on the principles as enunciated by the application judge, not be properly the subject of a non-publication order.

[60] I see two possibilities. It may be that the respondent and the appellants can agree on what parts of the affidavit should no longer be subject to a non-publication order. If so, the parties could prepare a proposed order for this court reflecting that agreement. Alternatively, if the parties cannot reach a consensus, the appellants

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[3] These portions of the affidavit are presently subject to the non-publication order and are not available to the public. The parties and the interveners, however, do have access to these portions of the affidavit. The same is true of the parts of the affidavit referred to in para. 59 of these reasons.

could bring an application under s. 487.3(4) in the Superior Court to vary the non-publication order made by the application judge.

V

CONCLUSION

[61] I would dismiss the appeal as it relates to the production order made by the application judge. I would vary the sealing/redaction order made by the application judge in the manner set out above. With respect to the non-publication order, and subject to the parties agreeing on a variation of that order, I would dismiss the appeal, but direct that the appellants, if so advised, may seek a variation of the non-publication order in the Superior Court.

Released: MAR 2 2 2017

Doherty J.A.

I agree Alexandra Hoy A.C.J.O.

I agree Gillese J.A.