

CANADA

PROVINCE OF NEW BRUNSWICK

PROVINCIAL COURT

5

HER MAJESTY THE QUEEN

VS

10

SEARCH WARRANT HEARING

BEFORE THE HONOURABLE CHIEF JUDGE R. LESLIE JACKSON AT

SAINT JOHN, N.B. ON DECEMBER 16TH, 2011.

15

APPEARANCES:

PROSECUTION: P. WILBUR & J. HENHEFFER

INTERESTED PARTIES - W. TEED - G. MILLER -

CBC & BRUNSWICK NEWS - D. COLES

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PROVINCE OF NEW BRUNSWICK

DEPARTMENT OF JUSTICE

THE COURT: The Canadian Broadcasting Corporation, which was later joined by Brunswick News, and I'm going to refer to them as the media application, have applied for a variation of a sealing order made by Judge - sealing orders made by Judge McCarroll in respect of search warrants issued in relation to the Richard Oland homicide investigation. Now initially this application was in respect of one sealing order but later expanded to include all sealing orders issued in respect of all other search warrants issued by Judge McCarroll related to the said investigation.

The interested parties represented by Messers Miller and Teed applied for and by consent were granted standing in the application and participated in the hearing. The interested parties also request a variation of the sealing order and ask that any information in relation to the search warrant be released to them before it is released to the media applicants.

The Crown opposes both applications on the basis that the ends of justice would be subverted by the disclosure of any information relating to the warrant because of the grounds in 487.3(2)(a)(ii) and (iv).

That is that disclosure would compromise the nature and extent of an ongoing investigation and or would prejudice the interests of an innocent person or persons.

5 After hearing submissions yesterday, as you know, I decided to follow the proceeding somewhat like the Winnipeg Free Press case, and ordered that the crown would proceed in an in camera hearing in order to allow them to attempt to persuade me that the
10 disclosure would compromise the nature and extent of an ongoing investigation, or the other ground.

 It was in that hearing at which it was heard ex-
parte - or in camera, that I heard from a former
15 police officer, primary investigator in the Richard Oland homicide until his recent retirement. I reviewed the five - or the information to obtain in the five search warrants and one production order issued by Judge McCarroll at various times from July 13th to November 15th in relation to the homicide
20 investigation.

 From that hearing it is apparent that the crown's objection is based on two broad themes. Firstly the "Hallmark Evidence" as it was referred to, that is

evidence which is so unique to this case and not
widely known which if released would compromise the
continuing investigation, and secondly the privacy
concerns of numerous persons whose names, personal
5 information, and in some cases details of some of the
most intimate aspects of their lives are set out in
the I.T.O.'s. And when I refer to I.T.O.'s, just for
the record, that's Informations To Obtain.

If one were only dealing with the second issue
10 this would be a relatively easy task and the documents
could be redacted so as to protect innocent parties
and the rest of the information disseminated.

The allegation of compromise of an investigation
is a more difficult one. Although there are six
15 informations to obtain, each essentially builds on the
other and often in the case of the latter ones, only
add information obtained from previous warrants. The
first in time Information To Obtain is sworn July 13th,
2011, it runs for about 17 pages containing some 51
20 paragraphs, many with subparagraphs and sub-clauses,
that is - it's detailed.

The law is clear that a broad assertion by the
crown that disclosure would compromise the ongoing

investigation is insufficient. Justice Iacobucci in
Mentuck said:

5 "One required element is that the risk in
question be a serious one, or as Chief Justice
Lamer put it in Dagonais, a real and substantial
risk. That is it must be a risk to the reality
of which is well-grounded in the evidence, it
10 must also be a risk that poses a serious threat
to the proper administration of justice. In
other words, it is a serious danger sought to be
avoided that is required, not a substantial
benefit or advantage to the administration of
justice sought to be obtained."

15 Similarly in the Toronto Star, in Ontario,
Justice Fish pointed out that - they're talking at
this point about the onus and evidentiary grounds
necessary to rebut the presumptive right to access.

20 "The freedoms I have mentioned, though
fundamental, are by no means absolute. Under
certain conditions, public access to confidential
or sensitive information related to court
proceedings will endanger and not protect the
25 integrity of our system of justice. A temporary
shield will in some cases suffice; in others,
permanent protection is warranted."

Going on to paragraph 9;

30 "Even then the parties seeking to limit public
access to legal proceedings must rely on more
than a generalized assertion that publicity could
compromise investigative efficacy."

35 "Section 487.3(2) is of particular relevance to
this case" -

I'm still quoting from Toronto Star Limited v Ontario,
40 It's from Mr. Millers' brief at paragraph 27;

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"...is of particular relevance to this case. It contemplates a sealing order on the ground that the ends of justice would be subverted, in that the disclosure of the information would compromise the nature and extent of an ongoing investigation. That is what the crown argued here. It is doubtless a proper ground for a sealing order with respect to an information used to obtain a provincial warrant and not only to informations under the *Criminal Code*. In either case, however, the ground must not just be asserted in the abstract; it must be supported by particularized grounds related to the investigation that is said to be imperiled."

As Mr. Cole also agreed in his brief - his letter brief of December 14th, the evidence must be real, substantial and grounded in the evidence.

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Now in this case the Crown contends that there is evidence contained in these sealed materials related to the murder which would not have been made known to the public and which would be known uniquely to the person or persons who murdered Mr. Oland. In broad themes this includes details surrounding the finding of the body; its' condition; and evidence, if any, of trauma.

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It's clear from the evidence that I heard that this is still an active and ongoing investigation. It is not a "cold case" to use that term. It is also clear that some items which have been obtained have

been sent elsewhere to be dealt with, either forensic and or technical processing. The evidence satisfies me that the Saint John Police Force are proceeding diligently with the investigation.

5 In the course of this ongoing investigation, several people named in I.T.O.'s have been questioned by the police. These people are not necessarily persons of interest or suspects, but may be only witnesses involved perhaps peripherally. It is not
10 uncommon that these persons would be questioned on more than one occasion. That happened in this case in relation to a person or persons mentioned in the I.T.O. The witness or witnesses had been cooperative and the investigator believed he/she had established a
15 good rapport, however when asked to do a second interview the persons were very upset with the Saint John Police Department because they had been approached by another person or persons whom they supposed to be police and had been questioned. I want
20 to be very clear here, I'm not saying that anybody did anything wrong. I realize full well there is no propriety right in a witness, but the end result is up to that point cooperative witness or witnesses became

less so, and that's the allegation of compromising the investigation.

5 If all persons who are named in the I.T.O. were similarly approached and took offence as in the example above, there is no doubt in my view that the investigation would be compromised.

10 When I add this to the fact that I am satisfied that there is information in the I.T.O.'s which in some cases only the murderer or murderers would know, or other information which may be known by them or a small group of professionals who dealt with the situation, I'm satisfied that temporary continuation of the sealing order should be made, and I intend to order that the sealing orders continue for a period of 15 six months from today's date. My idea is that at that time the Crown may apply for an extension of the order, or if they do not the other parties may apply for an order to redact the information or to come back for redacting of that information.

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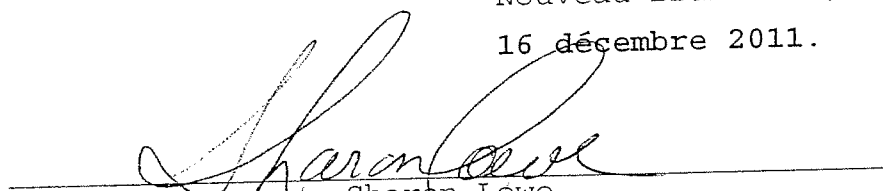
DISCUSSIONS WITH COUNSEL CONTINUES

CERTIFICATE

RECORDING OF EVIDENCE ACT

I, Sharon Lowe, of the City of Saint John, County of Saint John and Province of New Brunswick, certify that the sound recording tapes/ compact discs labelled: _____, December 16, 2011, initialed by me, are the record of the evidence, or a portion thereof, recorded on an audio/video recording apparatus pursuant to Section 3 of the *General Regulation - Recording of Evidence Act* at the court proceedings held on December 16, 2011, at the Provincial Court, Saint John, N.B., and that I was the person in charge of the audio/video recording apparatus at the time the evidence and proceedings were recorded.

DATED at Saint John, N.B. on
December 16, 2011



Sharon Lowe
Court Stenographer / Sténographe judiciaire

CERTIFICAT

LOI SUR L'ENREGISTREMENT DE LA PREUVE

Je, _____, de la _____ de _____, dans le comté de _____ et province du Nouveau-Brunswick, certifie que les bandes d'enregistrement sonores/disques compacts marqués _____, 16 décembre 2011 que j'ai paraphés, sont l'enregistrement des témoignages, ou d'une partie de ceux-ci selon le cas, enregistré à l'aide d'un appareil d'enregistrement sonore/vidéo en application de l'article 3 du *Règlement général - Loi sur l'enregistrement de la preuve* dans les instances tenues le 16 décembre 2011 à la _____, _____, au Nouveau-Brunswick, et que j'étais la personne préposée à l'appareil d'enregistrement sonore/vidéo lorsque les instances et les témoignages ont été enregistrés.

FAIT _____ à _____, _____ au Nouveau-Brunswick, le 16 décembre 2011.

CANADA
PROVINCE OF NEW BRUNSWICK

Her Majesty the Queen
and
SEARCH WARRANT HEARING -
DECEMBER 16, 2011
AFFIDAVIT

I, Sharon Lowe from
the City of Saint John, County
of Saint John and Province
of New Brunswick, make oath
and say as follows:

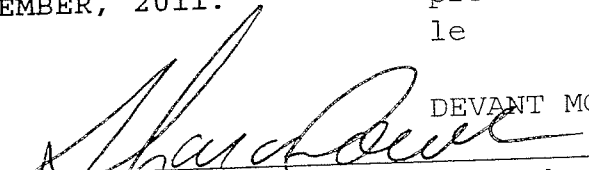
1. THAT I am a stenographer duly appointed or deemed to have been appointed under the Recording of Evidence Act.

2. THAT this transcript is a true and correct transcription of the record of these proceedings made under Section 2 and certified pursuant to Section 3 of the Act.

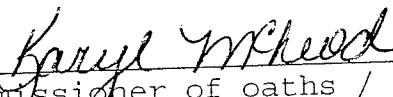
3. THAT a true copy of the certificate made pursuant to Section 3(1) of the Act and accompanying the record at the time of its transcription is appended hereto as Schedule "A" to this affidavit.

SWORN TO at the City of Saint John, in the Province of New Brunswick, this 16TH day of DECEMBER, 2011.

BEFORE ME:



Court Stenographer / Sténographe judiciaire



Commissioner of oaths / Commissaire aux serments

My commission expires on the / Ma commission se termine le :

CANADA
PROVINCE DU NOUVEAU-BRUNSWICK

et
AFFIDAVIT

Je, , de la
de , comté de
et province du
Nouveau-Brunswick, déclare
sous serment :


1. QUE je suis une sténographe judiciaire dûment nommée ou réputée avoir été nommée en application de la Loi sur l'enregistrement de la preuve.

2. QUE la présente transcription (page à) effectuée en application de l'article 2 et certifiée en vertu de l'article 3 de la Loi est bien une transcription fidèle de la cause ci-haut mentionnée.

3. QU'UNE copie conforme du certificat établi en application du paragraphe 3(1) de la Loi qui accompagnait le procès verbal est annexée et intitulée Annexe « A ».

ASSERMENTÉ devant moi, dans la de , dans la province du Nouveau-Brunswick le 20 .

DEVANT MOI :



KARYL M. MCLEOD
COMMISSIONER OF OATHS
My commission expires
December 31, 2012