Citation:

Date
File No: 195321-1
Registry: Surrey

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

IN THE MATTER OF
Application to Unseal a Warrant

BETWEEN:

REGINA

RESPONDENT

AND:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

APPLICANT

AND:

POSTMEDIA NETWORK INC. d.b.a. THE VANCOUVER SUN
POSTMEDIA NETWORK INC. d.b.a. THE NATIONAL POST
And
THE CANADIAN BROADCASTING CORPORATION

APPLICANTS

RULING ON APPLICATION OF THE HONOURABLE JUDGE P. D. GULBRANSEN

Counsel for the Crown:	L. Bantourakis (for Federal Crown)
Counsel for Applicants:	M. Bozic (for BC Civil Liberties Association)
	S. Dawson (for Media Applicants)
	M. McCubbin (for G. Wakefield)
	R. Reid (for Cpl. Brown)
	G. R. Cameron (For Cpl. Brown's Wife)
Place for Hearing:	Surrey, B.C.
Date of Hearing:	October 16, 2012
Date of Judgment:	October 29, 2012

INTRODUCTION

[1] The applicants seek variation of an order restricting access to materials filed by the RCMP to obtain a search warrant. The warrant authorized a search for evidence which could reveal the identity of the person who had allegedly committed the offence of defamatory libel – against an RCMP officer. The respondent has agreed to make more complete disclosure but proposes to edit the material to protect the interests of innocent persons and to preserve the integrity of an ongoing police investigation.

[2] The circumstances of this application are somewhat unusual. The target of the search does not oppose the details of the investigation into him being made public. The ongoing investigation which the respondent seeks to protect is not the actual investigation into the alleged offence of defamatory libel. As well, much of the evidence in the Information to Obtain Search Warrant (ITO) summarizes interviews with persons who have no connection at all to the alleged offence.

THREE INVESTIGATIONS IN ONE DOCUMENT

[3] The ITO refers to three separate police investigations – two by the RCMP and one by the New Westminster Police Department. While the issue in this application is how much editing of the ITO the court should approve, it is necessary to provide a brief overview of the three investigations to understand the process which the court must follow in deciding this application.

[4] The police officer who swore the Information to Obtain sought to obtain a warrant to search the residence of Grant Wakefield. To justify issuing the warrant, the officer

was required to disclose, in the ITO, evidence which showed that there were reasonable grounds to believe that the crime of defamatory libel had been committed; that the things that the police wanted to seize – two computers, an iPad, and an iPhone – were in Mr. Wakefield's residence, and that those things would afford evidence of the commission of that crime.

[5] Because an officer must make full frank and fair disclosure of the evidence in an application for a warrant, the officer in this case included evidence related to all three investigations.

[6] The first is an investigation by the Coquitlam RCMP into the personal life of Cpl. James Brown. That investigation sought to determine whether disciplinary proceedings should be taken against Cpl. Brown. It was prompted by information provided to the Coquitlam RCMP by Mr. Wakefield about Cpl. Brown's apparent involvement with a website that was accessed by persons interested in bondage domination sadism and masochism (BDSM).

[7] The second is an investigation by the RCMP E Division Serious Crime Unit into the alleged crime of defamatory libel. That investigation was prompted by comments posted by someone to a website and in an e-mail as well as comments posted to Twitter. The comments made some serious allegations of immoral or illegal activity by Cpl. Brown. The person who made the comments seemed to have some knowledge of the disciplinary investigation by the Coquitlam RCMP concerning Cpl. Brown. The ITO

asserts that many of these comments were untrue. Mr. Wakefield is the main suspect in the alleged crime.

[8] The third is an investigation by the New Westminster Police Department Into an allegation by Mr. Wakefield that he received a threat to cause him death or bodily harm. The person who made the alleged threat seemed to have some knowledge of Mr. Wakefield's involvement in giving information to the Port Coquitlam RCMP about Cpl. Brown.

WHY WAS MORE THAN ONE INVESTIGATION DISCLOSED?

[9] In the ITO, the affiant states that she believed it was necessary to include details about the disciplinary investigation because the person who made the defamatory comments appeared to be referring to some of the things that occurred or that were discovered in that investigation and had made false statements about those matters.

[10] The officer was also obligated to include information about the New Westminster Police investigation because it was through the New Westminster Police that the E Division Serious Crime investigators discovered that Mr. Wakefield had two computers, an iPad and an iPhone, in his residence. The New Westminster Police officers had observed these items when they went to Mr. Wakefield's residence in response to his complaint about being threatened.

ISSUE TO BE DECIDED

[11] In any event, as I have stated above, the central issue in this application is whether the respondent has established that the Information to Obtain a Search Warrant should be edited in the manner suggested by the respondent. That decision must be governed by the rules set out in the *Criminal Code* which delineate the circumstances which must exist before a court can restrict public access to the material used by a police officer to obtain a search warrant.

[12] The respondent has provided me with an unedited copy of the Information to Obtain Search Warrant and has underlined those portions it wishes to redact. As well, the respondent has filed two affidavits sworn by Sgt. Amarjit (David) Chauhan of the E Division Major Crime Unit. These affidavits explain why the respondent seeks to redact various parts of the ITO.

RELEVANT LEGAL PRINCIPLES

[13] The parties agree that the legal principles governing this application are well established. The issuance of a search warrant is a judicial act. Like other court proceedings, documentary evidence used to obtain a search warrant is open to public scrutiny. There are circumstances where public access may be prohibited or restricted, but only in circumstances where it is necessary "to protect social values of super ordinate importance." *AG (Nova Scotia) v. McIntyre* (1982), 1SCR 175 at page 186.

[14] It is presumed that the public has the right to access the records. The burden of proof that access should be restricted or denied is on "the person who would deny the exercise of the right." *AG v. McIntyre*, supra, at page 189.

[15] Section 487.3 of the *Criminal Code* sets out the criteria which the justice who issues a warrant must apply when asked to prohibit access to information relating to the warrant. Such an order may only be granted if the ends of justice would be subverted in specifically identified circumstances and the reason or reasons outweigh in importance the access to the information.

[16] In *R. v. Mentuck* 2001 35 SCR 442, the Supreme Court of Canada crafted the following test to be applied when the court considers an application for a publication ban. This is equally applicable to an application seeking to prohibit or restrict access to search warrant materials. The court stated: at p 462:

> ...a publication ban should only be ordered when: (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk; and (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects of the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[17] A reasonable alternative measure to completely prohibiting access, when considering search warrants, would, for example, be the editing of the materials by blacking out those portions which a court decides should not be made available to the public.

CIRCUMSTANCES

[18] My discussion of the circumstances is based solely on the contents of the ITO. I emphasize that I am not making any findings of fact nor am I making any comment upon the propriety of the police investigations or the strength of the evidence in any of the investigations. A search warrant is an investigative tool which is granted on an *ex parte* application. The contents of any Information to Obtain may contain everything from strong, compelling evidence to evidence which is purely speculative and even contradictory. No charges have been sworn in either investigation of criminal misconduct. My assessment of the circumstances, therefore, is limited to considering the context in which this application is made.

[19] The search was conducted on August 18, 2012, at the residence of Grant Wakefield. The officers seized 2 computers, an IPad and an iPhone, on the basis that it was probable that the person who had made defamatory comments about Cpl. James Brown had used one or more of those devices to create and send the comments.

[20] Several months earlier, in March 2012, Mr. Wakefield had provided the Coquitlam RCMP with information about the personal activities of Cpl. Brown. This information included an account that Mr. Wakefield said was given to him by a young woman who told him that she met with Cpl. Brown over lunch. She said that she had come into contact with him through an on-line dating service. She told Mr. Wakefield that Cpl. Brown discussed with her certain sexual fantasies and told her of various internet sites where he could be contacted. After looking at some of those sites himself,

Mr. Wakefield sent to the RCMP in Coquitlam some photographs of Cpl. Brown, which he obtained from a website which caters to people who are interested in "bondage, dominance, sadism and masochism" (BDSM). It appears that he gained access to Cpl. Brown's site by a subterfuge and once invited onto his site, obtained the photos.

[21] The receipt of this information caused the RCMP to investigate Cpl. Brown's work and personal life in a Code of Conduct Investigation to determine whether disciplinary proceedings should be taken against Cpl. Brown.

[22] In July of 2012, photographs of Cpl. Brown in what could be described as sadomasochistic poses were published in a newspaper and shown on television. It turned out that the man appearing in some of the more extreme photographs was not Cpl. Brown. Nonetheless, the existence of these controversial pictures of an RCMP officer attracted considerable public attention.

[23] After the existence of these photographs was made public, a person posted an article on a website discussing Cpl. Brown's case, criticizing the media for misidentifying him in the photos. Someone else, apparently using a pseudonym, posted a comment about the article. That comment contained many negative allegations about Brown. The author of the comment subsequently sent an e-mail to the author of the article. The e-mail contained similar allegations against Cpl. Brown. Around the same time someone posted similarly negative comments on Twitter. These comments are what the RCMP investigators say amount to defamatory libel.

[24] The officers who investigated this matter discovered that the comments posted on the website and the" follow up" e-mail were sent from an IPO address belonging to Mr. Wakefield.

[25] On July 9, 2012, Mr. Wakefield reported to the New Westminster Police that he had been threatened in a text message. That message appeared to be from someone who knew about his communications with the Coquitlam RCMP concerning Cpl. Brown.

CONFIDENTIAL INFORMANT

[26] The ITO refers to the person who gave the Coquitlam RCMP the information about Cpl. Brown's activities, as "Informant A". The affiant states that the officer who spoke to this person understood that the person was providing the information in confidence. The officer believed that this person was therefore a confidential informant. It turns out, that this person was Mr. Wakefield.

[27] Mr. Wakefield has filed an affidavit in which he waives informer privilege. (He states that he was really a police agent not an informer). Until Mr. Wakefield filed an affidavit setting out his position, the respondent had proposed to redact anything in the ITO which could identify him as the "informer". Now that Mr. Wakefield has waived any privilege, there is no need to hear any argument as to whether the privilege existed in the first place.

INNOCENT PERSONS

[28] The ITO refers extensively to interviews that investigators conducted with eight persons during the investigation of Cpl. Brown's personal activities. These were: the young woman who Wakefield said told him about a lunchtime meeting with Brown; the man who was in the photographs published in the media and who was incorrectly identified as Brown; a photographer and a model who participated in making photographs of Brown in various BDSM poses; three female acquaintances of Brown and a person who conducted a website catering to persons interested in BDSM. In addition, one of them referred in passing to the names of his or her family members and friends.

[29] The woman whom Wakefield identified as the person who told him about the lunch meeting with Brown, denied that she took part in such a meeting or that she even knew Brown. The three female acquaintances merely talked about their friendship with Brown. The proprietor of the website assisted the police in their investigation of the alleged defamatory comments.

[30] The ITO also refers to Cpl. Brown's wife and his children. They have no connection whatsoever to this investigation. The applicants agree that the ITO should be edited to remove any reference to them.

[31] Sgt. Chauhan states in his affidavit that he has spoken to some of these persons. They told him that they would be severely prejudiced in their personal lives if their names and identities became public. He has not been able to speak to all of them.

[32] It is unnecessary to canvas the views of all of these persons. Their activities or relationship to Cpl. Brown are not relevant either to the investigation into the alleged defamatory libel or to the ongoing New Westminster Police investigation. The involvement of some of the witnesses in the BDSM community is not unlawful but not surprisingly, something they would likely wish to keep private. From the very nature of this activity, I infer that it is reasonable for them to fear that public exposure will cause prejudice such as embarrassment, condemnation by friends and family or possible loss of employment.

[33] The woman who Wakefield said told him about a meeting with Brown should not be identified because she denies being involved at all with Cpl. Brown. Most of the details of what Wakefield claims that she said will not be redacted. Thus, readers of the ITO can still assess what Wakefield said in the context of the rest of the information in the ITO.

[34] Barring access to the names or other identifying features would not affect the ability of any member of the public to understand the ITO or the investigation that the police are pursuing. Access to information about their names or other information that would identify them would significantly prejudice their privacy interests. That prejudice far outweighs the importance of access to it by the public.

THE "ONGOING INVESTIGATION"

[35] The ITO indicates that the New Westminster Police are investigating a complaint by Mr. Wakefield that he was the subject of a threat to cause him death or bodily harm.

Sgt. Chauhan's affidavits provide the respondents' reasons for seeking to have details of this investigation (that is, those details which are included in the ITO) kept from public access. These reasons are not clear – both because they are somewhat convoluted and because they assert that the investigation may be adversely affected but do not point to any evidence which supports that assertion.

[36] In paragraph 35 of his first affidavit, Sgt. Chauhan states that members of the New Westminster police have told him: "that disclosure of any of the details of this investigation would compromise the nature and extent of this ongoing investigation, reveal the identity of a confidential source of law enforcement information and harm the effectiveness of the investigative techniques and procedures." (Now that Mr. Wakefield has waived any potential informer privilege, the concern of revealing the identity of a confidential source of information no longer exists.)

[37] Neither Sgt. Chauhan nor the officers from the New Westminster Police to whom he has spoken refer to any specific evidence to justify these claims. There is no reference whatsoever in the ITO about any investigative techniques and procedures that could be made less effective. The police went to Mr. Wakefield's home, interviewed him and his wife; looked at and made a record of the allegedly threatening message and have since then tried to find out who had sent it. These are standard police procedures. They have all been completed. How could their effectiveness be compromised?

[38] As well, the assertion that the nature and extent of the investigation would be compromised is not supported by the evidence. The investigation, while probably very difficult because it may be impossible to find out who sent the text message, concerns a limited and discrete set of circumstances. The extent of the investigation is relatively narrow and unlikely to broaden. The nature of the investigation is also straightforward and not particularly complicated.

[39] My point is that the affidavits filed by Sgt. Chauhan do not specifically identify anything about the investigation that can justify the asserted effects on the investigation. Neither can I identify anything in the depiction of the investigation that would permit me to infer, from the nature of the investigation itself, that the investigation would be affected in the manner that has been asserted.

[40] The second reason provided by Sgt. Chauhan is not at all clear. In paragraph 35 of his first affidavit, he states that:

> "... specific concerns arise as the investigation in question arises from a complaint of criminal wrongdoing made against a police officer by a member of the public. Where a complaint of criminal wrongdoing has been made against a police officer, the investigation must be treated with the utmost importance and integrity. In order to achieve this, safeguards are implemented to ensure that information with respect to the ongoing investigation is not improperly accessed or tampered with by individuals having access to police databases or other police information. In this case, the NWPD PRIME file has been "privatized," meaning that only a handful of individuals have access to it and access to information with respect to this investigation is limited even within the NWPD. The NWPD advise me, and I believe, that public disclosure of the vetted information in these paragraphs would frustrate the safeguards currently in place and thereby compromise the integrity of the investigation."

[41] I paraphrase that as follows. An investigation of a criminal accusation against a police officer requires that access to the fruits of the investigation be restricted to a small number of investigators. That prevents improper access to it and prevents tampering with that information. If the information in the ITO concerning the investigation is disclosed to the public, that will frustrate the effect of the careful restrictions to the investigative file that the police have put in place.

[42] First of all, there is no suggestion that if the information about the investigation is made public that any member of the public would be able to tamper with the information now in the hands of the New Westminster Police. Secondly, certain information about the New Westminster file has already been disclosed to the Coquitlam RCMP. This increases the number of people who know about the investigation, seemingly in contrast to the intention to restrict access to only a small number of officers.

[43] In any event, this argument begs the question. That is, it assumes that access to the information about the investigation as set out in the ITO, will have some deleterious effect on the investigation. Why is that the case? As I have already pointed out above, there is no evidence that public access to this information will compromise the nature and extent of the investigation or that it will compromise the effectiveness of police investigative techniques,

[44] I find therefore that the respondent has not established that access to the information about the investigation by the New Westminster Police would subvert the ends of justice. As well, I find that the grounds upon which the respondent depends to

justify prohibiting public access do not outweigh the importance of access to the information.

CONCLUSION

[45] The references in the ITO to the New Westminster Police investigation must be disclosed. They appear in paragraphs 13, 21, 63-67 and 115-121, 134 and 132(c). As requested by Mr. Wakefield, some personal information about him will be redacted. ~~In particular, paragraph 42 must be redacted completely as well as paragraph 2 in appendix A.~~

notation verified orally by July Oct 29, 2012.

[46] I also approve the redactions as suggested by the respondent regarding the innocent persons including Cpl. Brown's wife and children.

The Honourable Judge P. D. Gulbransen
Provincial Court of British Columbia