ONTARIO COURT OF JUSTICE

DATE: 2017 12 04
COURT FILE No.: Bracebridge

B E T W E E N :

CANADIAN BROADCAST CORPORATION and THE WALRUS FOUNDATION

— AND —

HER MAJESTY THE QUEEN

— AND —

DAVID LAAN, PAUL LAAN, WALTER LAAN and RON ALLEN

Before Justice Cecile Applegate
Heard on October 20, 2017
Reasons for Judgment released on December 4, 2017

J. Safayeni ..... counsel for the Applicants - CBC and The Walrus Foundation
L. Jeanes ..... counsel for the Crown
J. Manishen ..... counsel for the Respondents - Laans and Allen

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APPLEGATE J.:

Introduction

[1] In 1998, the police obtained seven search warrants with respect to an investigation into the disappearance of Joan Lawrence. Sealing orders were issued for each of these warrants. The applicants seek to have these sealing orders terminated.

[2] On June 6, 2017, the sealing orders were varied to allow redacted versions of the seven Informations to Obtain ("ITOs") the search warrants to be prepared. The unredacted ITOs remained sealed, but copies were provided to counsel subject to a non-disclosure undertaking in order to prepare for this application. Further, notice of these proceedings were given to Walter Laan, David Laan, Paul Laan and Ron Allen, all of whom were granted standing to submit their position on the application.

Facts

Police Investigation

[3] In November of 1998, a police investigation commenced into the disappearance of four seniors including Joan Lawrence. The Lawrence investigation resulted in over 50 witnesses being interviewed. At the time, the Laans owned several properties in the Huntsville area which housed elderly persons. Reports of poor living conditions in these "retirement homes" led the police to investigate this issue as well. The four missing seniors, including Ms. Lawrence, resided on the Laan properties. Ms. Lawrence lived in an 8' x 10' garden shed with approximately 30 cats. Ron Allen, the uncle of the Laans, also lived on the property along with other individuals.

[4] Ultimately, the police suspected that Ms. Lawrence had been murdered and seven search warrants were obtained in 1998 and 1999, with the details contained in each ITO building on the previous one as more information was obtained. The sealing orders for the initial 4 ITOs identified "persons unknown" as being responsible for the murder of Ms. Lawrence, while the latter ones identified David Laan and Ron Allen as having committed first degree murder of Joan Lawrence. According to the sealing orders, search warrants were obtained to search for evidence at the properties, dwelling houses, outbuildings and abandoned vehicles owned by the Laans, to obtain subscriber information for particular telephone numbers from Bell Canada, to acquire banking records of joint accounts held by Joan Lawrence and David Laan, and to search for evidence in Siding Lake which adjoins the Laan property.

[5] It is conceded that items were seized as a result of some, but not all, of the search warrants. Given the duplication contained in the ITOs, the parties agreed to make their submissions by referencing the redactions in the seventh ITO which contained the most information. No criminal charges have ever been laid with respect to the disappearance of Ms. Lawrence or the substandard condition of the "retirement homes".

Media Attention

[6] Ms. Lawrence's case has been the subject of media attention. In addition to press releases issued by the police requesting the public's assistance in 1998 and 1999, this matter has attracted the following media attention:

- Toronto Sun article [2001] "4 Seniors Vanish Up North. Cops Fear 'Foul Play' in Mysterious Disappearances": The article referenced Walter Laan's family as being under suspicion and quoted him as saying "police were trying to put the murder charge on us";
- Vision TV "Mystery in Muskoka" [2006];
- CTV *W5* "Mystery of Muskoka [2007];
- CBC *The Fifth Estate* "Murder in Cottage Country [broadcast Sept 15, 2017];

- Article at *thewalrus.ca* "Cottage Country Murder" [Sept 15, 2017];
- Article at *cbc.ca* "Muskoka Mystery" [Sept 15, 2017]; and
- Article from *Fifth Estate* "Muskoka mystery: Family linked to disappearance of seniors fights release of police documents – Members of Laan family oppose release of information to the public" [October 13, 2017]

[7] In addition, there have been references about this matter on various web sites, blogs, Twitter, Facebook, and other social media sites from 2015 onwards, some of which include re-posting earlier articles.

[8] The Laans and Mr. Allen have consistently been reported as being connected to the disappearance of Ms. Lawrence in the media. In fact, the applicants argue that the information contained in many of the redactions is already publicly available information.

[9] The Crown and the respondents submit that the applicants have not been objective nor unbiased in their reporting of this matter and that the manner in which the media has used the materials to date places significant risks on trial fairness.

Position of the Parties

[10] The Crown argues that if the redactions were unsealed it would: (1) compromise the nature and extent of an ongoing investigation; (2) prejudice the interests of an innocent person and (3) impact on privacy rights of individuals where sensitive or highly personal information would be disclosed. The sealing orders are necessary to prevent a serious risk to the administration of justice, there are no reasonably alternative measures and the salutary effects of the sealing orders outweigh the deleterious effects on the rights and interests of the parties and the public. The Crown submits that the redacted information relates to Ms. Lawrence who deserves some semblance of privacy. Further, there is evidence, such as the statements of Al Marshall, which would not be admissible in court as he is now deceased and that evidence is now incapable of being challenged. The Crown further argues that releasing the redacted information would raise the ire of this small community leading to potential jurors being irreparably prejudiced. The Crown agrees that the Laans and Mr. Allen ought to be considered innocent persons and that the presumption of innocence applies to them. And, the Crown submits that releasing the information would put their reputation and well-being at risk, including being the subjects of vigilantism.

[11] The respondents join with the Crown in asking that the redactions remain sealed. They argue that I need to assess this case in the context of an open murder case. Further, I ought to accept that there is evidence of an ongoing police investigation and that it is not for the media to say that there is no real risk to the investigation if the redactions are unsealed. They submit that we have to allow for the potential that there may be a trial in this matter and unsealing would impact the fair trial rights of the respondents or others charged in this case. In addition, much of the evidence contained in the redactions would be inadmissible at trial as it consists of statements

made to persons in authority and hearsay. Also, some of the content of the ITO is sufficiently emotionally inflammatory that it could lead to an emotional rise in potential jurors. The respondents further argue that the applicant is downplaying the media interest and that, when one considers the permanency of social media and the internet, media coverage becomes sustained. And, in this case, the risks to trial fairness can be inferred given the sensational manner in which the media has used the materials to date. The respondents argue that they have not been charged and are presumed innocent and, as such, they are innocent persons under s. 487.3(2)(a)(iv). The release of information would impact on their right to privacy and reputation. Lastly, if the court accepts that there is a serious risk to the administration of justice, the respondents submit that one reasonable option available to the court would be to review the sealing order every few years to see if anything has changed.

[12] The applicants characterize the degree of media coverage as modest and the degree of public reaction to it as being minimal. In particular, there is no evidence of any inflamed or vitriolic reaction to the Laans or Mr. Allen. The applicants remind me that the material is "presumptively public" and there is a high burden on the Crown and respondents to show why this presumption should be displaced. The reasons presented to justify the sealing order are extremely speculative given that no one has been charged, the type of charge is unknown, and there is no trial date anticipated at this stage. Further, much of the prejudicial content of the redactions is already public. In addition, the Laans and Mr. Allen should not be considered innocent persons under s. 487.3(2)(a)(iv) as this term is used to protect those acquitted, those where decisions have been made not to lay charges and those who were the subjects of search warrants where nothing was found. The applicants agree that the personal identifiers for the other witnesses can remain sealed, but not their personal statements. Even if the court finds that there is a serious risk to the proper administration of justice, the applicants submit that the benefits of the sealing order are limited while the deleterious effects on the right of the public to know are significant such that the sealing orders should be terminated.

Legal Principles

[13] Section 487.3 of the *Criminal Code* is the governing section on sealing orders for search warrants:

> (1) On application made at the time an application is made for a warrant under this or any other Act of Parliament, an order under any of sections 487.013 to 487.018 or an authorization under section 529 or 529.4, or at a later time, a justice, a judge of a superior court of criminal jurisdiction or a judge of the Court of Quebec may make an order prohibiting access to, and the disclosure of, any information relating to the warrant, order or authorization on the ground that
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> > (a) the ends of justice would be subverted by the disclosure for one of the reasons referred to in subsection (2) or the information might be used for an improper purpose; and
> >
> > (b) the reason referred to in paragraph (a) outweighs in importance the access to the information.
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> (2) For the purposes of paragraph (1)(a), an order may be made under subsection (1) on the ground that the ends of justice would be subverted by the disclosure

(a) if disclosure of the information would

(i) compromise the identity of a confidential informant,

(ii) compromise the nature and extent of an ongoing investigation,

(iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used, or

(iv) prejudice the interests of an innocent person; and

(b) for any other sufficient reason.

(3) Where an order is made under subsection (1), all documents relating to the application shall, subject to any terms and conditions that the justice or judge considers desirable in the circumstances, including, without limiting the generality of the foregoing, any term or condition concerning the duration of the prohibition, partial disclosure of a document, deletion of any information or the occurrence of a condition, be placed in a packet and sealed by the justice or judge immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in any other place that the justice or judge may authorize and shall not be dealt with except in accordance with the terms and conditions specified in the order or as varied under subsection (4).

(4) An application to terminate the order or vary any of its terms and conditions may be made to the justice or judge who made the order or a judge of the court before which any proceedings arising out of the investigation in relation to which the warrant or production order was obtained may be held.

[14] The *Dagenais/Mentuck* test applies to "all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings" and applies to sealing orders: *Vancouver Sun (Re)* [2004] 2 SCR 332, ¶31; *Ottawa Citizen Group v. Canada (A-G),* [2005] O.J. No. 2209 (C.A.), ¶ 29, *Toronto Star v. Ontario,* [2005] 2 SCR 188, ¶ 7.

[15] The test states that a sealing order or a publication ban should only be ordered when (*R. v. Mentuck,* [2001] 3 SCR 442, ¶ 32):

(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably 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 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.

[16] "The *Dagenais/Mentuck* test, though applicable at every stage of the judicial process, was from the outset meant to be applied in a flexible and contextual manner. A serious risk to the administration of justice at the investigative stage, for example, will often involve considerations that have become irrelevant by the time of the trial. On the other hand, the perceived risk may be more difficult to demonstrate in a concrete manner at that early stage. Where a sealing order is at that stage solicited for a brief period only, this factor may well invite caution in opting for full and immediate disclosure": *Toronto Star [2005 SCC]*, ¶ 8.

[17] "What should be sought is maximum accountability and accessibility but not to the extent of harming the innocent or of impairing the efficiency of the search warrant as

a weapon in society's never-ending fight against crime": *Nova Scotia (A-G) v. MacIntyre*, [1982] 1 SCR 175, p. 7.

[18] The *Dagenais/Mentuck* test requires the Crown to first prove that continuing the sealing orders is necessary to prevent a serious risk to the administration of justice. This risk must be "*real, substantial* and *well-grounded in the evidence*: 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": *Mentuck,* ¶ 34; *Toronto Star [2005 – SCC],* ¶ 27; *R. v. CTV ("Esseghaier"),* 2013 ONSC 5779, ¶ 26.

[19] Under the first branch of the *Dagenais/Mentuck* test, a court must consider reasonably alternative measures. In an effort to strike a balance between press freedom/open courts and protection of the innocent, some courts have permitted the press to have access to the information contained in the search warrant but prohibited the press from publishing some or all of that information until the completion of the proceedings: *R. v. Vice Media Canada Inc.,* 2017 ONCA 231; *R. c. Flahiff,* (1998) 123 CCC (3d) 79 (QCA)*; Ottawa Citizen.*

[20] Once a serious risk to the proper administration risk has been identified and there are no reasonable alternative measures to prevent the risk, the *Dagenais/Mentuck* test requires a "balancing between the salutary and deleterious effects of any order that would impinge on freedom of the press". As stated by MacPherson, J.A., "[t]he word 'balancing' conjures images of neutrality or even-handedness. In my view, this image is misplaced. Because of the centrality of free press and open courts in Canadian society and in the Canadian constitution, there is almost a presumption against any form of secrecy in all aspects of court proceedings in Canada": *Ottawa Citizen*, ¶ 65.

Freedom of the Press and Open Court Principle

[21] "The starting point for the s. 487.3 and Mentuck analysis is this fundamental point – Canada is a nation with a profound attachment to a free press and to open courts": *Ottawa Citizen,* ¶ 50.

[22] The open court principle "is not to be lightly interfered with". Any party attempting to obtain a sealing order "must be subject to close scrutiny and meet rigorous standard": *Vancouver Sun,* ¶ 26, *R. v. Toronto Star Newspapers Ltd.,* [2003] O.J. No. 4006 (C.A.) , ¶ 19.

[23] "It is precisely because the presumption that courts should be open and reporting of their proceedings should be uncensored is so strong and so highly valued in our society that the judge must have a convincing evidentiary basis for issuing a ban. Effective investigation and evidence gathering, while important in its own right, should not be regarded as weakening the strong presumptive public interest...in a transparent court system and in generally unrestricted free speech on matters of public importance as the administration of justice": *Mentuck,* ¶ 39.

[24] Justice Rosenberg (in dissent) made the following comments regarding the timing of reporting newsworthy items: "Freedom of the press encompasses not just the freedom to decide what to report but also the timing of the reporting. If, by the time the trial is finished, what transpired at a bail hearing is no longer deemed newsworthy, the Canadian public as consumers of the news are the poorer for it. Immediacy is the essence of news: *Dagenais* at p. 929". And further, "[t]he open court principle would be slender if it did not apply to documents that had not been tested as to their factual probity. Similarly, the open court principle and the right of freedom of expression would be weak if the media could only report on information after it had been fully tested and contested at a full trial": *R. v. Ahmad [Toronto Star Newspapers Ltd v. Canada],* 2009 ONCA 59, ¶¶ 127, 131.

[25] The open court principle is not absolute. "There are circumstances in which the public's right to know will take a back seat to other concerns...". As stated by Nordheimer, J. in *CBC v. Canada,* 2013 ONSC 7309, these will be a rare or exceptional circumstances. "It requires a finding that public access to the material will result in a serious interference with the administration of justice": ¶ 29.

Risk to Fair trial Rights

[26] Trial fairness is a concept that can be interpreted in different ways and includes, among other things: (a) pretrial publicity and potential jury bias; (b) protecting the fundamental rights of the accused; and (c) the public's right to be confident that justice has been done: *Toronto Star Newspapers Ltd v. Canada,* 2010 SCC 21, ¶ 22 (citations omitted).

[27] "[T]he question is whether the ban is necessary in order to protect the proper administration of justice, not specifically to protect the fair trial rights of the accused although those fair trial rights are part of the proper administration of justice": *Mentuck,* ¶ 40; *Esseghaier,* ¶ 26; and *R. v. Postmedia Network Inc. ("Wettlaufer"),* 2017 ONSC 1433, ¶ 11.

[28] "What must be shown is a high probability that the effect of publicity will be to leave potential jurors so irreparably prejudiced or to so impair the presumption of innocence that a fair trial is impossible. That conclusion does not necessarily flow from proof that there has been or will be a great deal of publicity about the ITOs. Evidence of the probable effects is required. Accused persons enjoy the right to a fair trial, not the right to be free from excessive adverse publicity before his or her trial. Negative publicity alone does not preclude a fair trial. While the nexus between publicity and its lasting effects is not susceptible of scientific proof, the focus must be on that link, not the mere existence of publicity. Any alleged impartiality of jurors can only be measured in the context of the safeguards that have evolved in order to prevent such problems: *Phillips v. Nova Scotia (Commissioner, Public Inquiries Act),* (1995), 98 CCC (3d) 20 (SCC), ¶ 128-130; *Esseghaier,* ¶ 27; *Wettlaufer,* ¶ 11.

[29] As stated in *Flahiff,* risks to the fair trial rights of an accused can be inferred from the contents of the ITOs themselves. "Direct evidence of a serious risk is not required

where the circumstantial evidence is sufficient to persuade the court to draw an inference of that risk": *Esseghaier,* ¶ 98; *Wettlaufer,* ¶ 15.

[30] Serious risks to the fair trial rights of an accused have been found to exist where the ITO contains the following information [*Esseghaier,* ¶100 – citations omitted]:

- Presumptively inadmissible evidence (ie. confessions, other disreputable conduct, outstanding charges, criminal records, and hearsay);
- Apparently inadmissible evidence; and
- Evidence where the admissibility and quality are live issues (ie. from witnesses who would require a *Vetrovec* warning).

[31] ITOs are often reviewed by judges during pretrial applications, but are generally not admissible before juries. "Accordingly, hearsay and police officers' conclusions opinions and impressions drawn would not be heard by the jury. Were the contents of the ITOs to be published they contain this type of information, information the jurors will never hear at trial": *Esseghaier,* ¶ 113.

[32] In *R. v. CBC,* 2008 ONCA 397, Justice Juriansz commented that "the fact that information might be inadmissible at trial is not necessarily a sufficient ground for imposing a sealing order": ¶ 45.

[33] In some cases, bans have been lifted where the thrust of the information is already in the public domain. In such cases, further publication may not greatly increase the level of harm: *Toronto Star Newspapers Ltd v. Ontario,* [2014] O.J. No. 1566 (SCJ).

[34] However, in *Ahmad,* Justice Feldman observed that "...there is an enormous difference, both in fact and in public perception, between information that is spoken outside court and information revealed in court proceedings": ¶ 223.

[35] Cases where "the effect of publicity would be to leave potential jurors so irreparably prejudiced or to impair the presumption of innocence that a fair trial is impossible" have included *Wettlaufer* (first-degree murder of eight nursing home residents), *Esseghaier* (terrorist plot attack to derail a train), and *R. v. N.Y.,* [2008] O.J. No. 1217 (SCJ) [allegations of terrorist activities involving attacks on politicians and public buildings]. In each of those cases, the media attention was significant and included national and international coverage. As such, other reasonable alternative measures, such as challenges for cause or a change of venue, would not have alleviated the risks to a fair trial.

[36] The impact of pretrial publicity on jurors was reviewed by Chief Justice Lamer in *R. v. Dagenais,* [1994] SCJ No 104 where he stated that "...common sense dictates that in some cases jurors may be adversely affected. Assuming this, I nevertheless believe that jurors are capable of following instructions from trial judges and ignoring information not presented to them in the course of the criminal proceedings": ¶ 87.

[37] However, the Court went on to say that in the case of sustained pretrial publicity concerning matters that will be the subject of the trial, impressions may be left in the minds of the jurors that cannot be dispelled. In those cases, pre-trial publicity may pose a threat to the right to a fair trial: *Dagenais,* ¶ 88.

[38] Finally, the Court also commented on the fact that restricting the flow of information was becoming more difficult in "this global electronic age" which raised concerns about the "efficacy of publication bans": *Dagenais,* ¶ 89-90. Following up on this notion, Justice Rosenberg stated "in other words, the court cannot always rely upon the fact that time will have passed from when the information was first published and that this passage of time will lessen any prejudicial effects of the information": *Ahmad,* ¶ 106.

Analysis

[39] Bearing these legal principles in mind and applying the *Dagenais/Mentuck* test to our case, I find that the following factors are important considerations when applying the test in a "flexible and contextual manner":

- The police investigation into this matter commenced almost 20 years ago and the information that is the subject of the sealing orders is information that was obtained from witnesses in 1998 and 1999;
- Ms. Lawrence and the other missing seniors have never been found and the cause of their disappearance remains unsolved;
- There have never been any charges laid in this matter and, as a result, there is no contemplated trial date;
- Over the past 20 years, this matter has had some intermittent media attention. This is not a situation where there has been sustained media publicity; and
- Since 1999, there has been suspicion that the Laans (more particularly David Laan and Ron Allen) have knowledge about the details pertaining to the disappearance of Ms. Lawrence. This fact has consistently been reported in the media coverage to date;

Step #1 of *Dagenais/Mentuck* test: Are the sealing orders necessary in order to prevent a serious risk to the administration of justice?

Risk of compromising the nature and extent of an ongoing investigation

[40] "... a party seeking to limit public access to legal proceedings must rely on more than a generalized assertion that publicity could compromise investigative efficacy. If such a generalized assertion were sufficient to support a sealing order, the presumption

would favour secrecy rather than openness, a plainly unacceptable result": *Toronto Star [2005 SCC],* ¶ 9.

[41] When a Crown argues that disclosure of information would compromise an ongoing investigation, "[t]he grounds must not just be asserted in the abstract; it must be supported by particularized grounds related to the investigation that is said to be imperilled": *Toronto Star [2005 SCC],* ¶ 23.

[42] The Crown relies on the affidavit of Inspector Robert J. Matthews as their evidentiary foundation for the argument that the sealing orders are required to avoid compromising an ongoing investigation. The affidavit states that the case is being actively investigated and that the police are concerned about compromising the extent and the nature of this ongoing investigation. The police also want the continuance of the sealing orders to protect the interests of innocent persons including witnesses, the Laans, and Mr. Allen. Lastly, the police seek to have particular redactions maintained in order to conceal "hold back" evidence which would be used to assess the credibility and reliability of any further witnesses who may come forward.

[43] Inspector Matthews was never examined regarding the contents of his affidavit. His general assertion that there is an ongoing investigation is not particularized. No details have been provided about any leads, witnesses that police are currently interviewing, new investigative strategies being pursued or other steps taken. Understandably, in most cases, the police may not want to disclose such details to the public in order to preserve the integrity of an investigation. However, in this case, the Crown seeks to intrude on the freedom of the press and it has a significant legal and evidentiary burden to meet in order to do so. That burden is subject to close scrutiny and must meet rigorous standards. When one considers that this police investigation commenced nearly 20 years ago, that no one has been charged and that the police never close "cold cases" until they are solved, it is difficult to imagine what active steps are being taken in a purported on-going investigation unless those steps are specifically articulated. Further, had they been articulated, some of the police and Crown concerns regarding the disclosure of this information could have been alleviated by sealing the details on the application as was other information in Inspector Matthews' affidavit.

[44] In assessing the hold back information contained in Inspector Matthews' affidavit, I find that some of that information has already been made public (*para 13a – Affidavit of Inspector Robert J. Matthews)* which diminishes its value as hold back information. While there may be a tactical advantage to have the police retain the balance of the information to test the credibility or reliability of future witnesses coming forward, "access to court documents cannot be denied solely for the purpose of giving law enforcement officers an investigative advantage": *Mentuck,* ¶ 34, *Toronto Star [2005 – SCC],* ¶ 39.

[45] I find that the Crown and the respondents have not shown a serious and specific risk to the integrity of the criminal investigation should the sealing orders be terminated.

Risk of prejudice to innocent persons

[46] For the purposes of this application, the applicants consent to the sealing orders remaining in effect with respect to the names and personal identifiers, but not the statements, of the witnesses identified at paragraph 15 of Inspector Matthews' affidavit. This does not include the Laans or Ron Allen, nor do the applicants concede that the Laans or Ron Allen ought to be considered innocent persons.

[47] Innocent persons have been specifically held to include the following (*Ottawa Citizen,* ¶ 35; *Esseghaier,* ¶ 141):

- Third parties whose premises have been searched and nothing is found. However, "if the warrant is executed and something is seized, other considerations come to bear": *MacIntyre*;

- A person whose murder conviction was set aside and a judicial acquittal entered due to *Charter* violations: *Vickery v. Nova Scotia Supreme Court (Prothonotary),* [1991] 1 SCR 671; and

- A person who was never charged with an offence, despite the fact that materials were seized in the course of a search: *Phillips v. Vancouver Sun* (2004), 238 DLR (4th) 167 (BCCA); *Ottawa Citizen.*

[48] Without specifically saying so, other courts appear to have identified certain individuals as "innocent persons" in the following circumstances:

- A person who was not charged with an offence, but was the subject of a search warrant: *R. v. O'Brien,* [2007] O.J. No. 3894 (SCJ); *R. v. Globe and Mail Inc.,* 2017 ONSC 2407;

- A person about to be charged with an offence who was the subject of an intercepted private communication: *National Post Co. v. Canada (Attorney General),* [2003] O.J. No. 2238 (SCJ);

[49] In these circumstances, I find that the Laans and Ron Allen are innocent persons for the purpose of s. 487.3(2)(a)(iv). They have not been charged with any offences nor has any charging decision been made one way or the other. They were, and may still be, suspects in the disappearance of Ms. Lawrence. They are presumed innocent.

[50] "The protection of the innocent does not always prevail over the public's right to know. In every case, the pertinent rights and interests must be weighed and balanced": *R. v. CBC*, 2008 ONCA 397, ¶ 42.

[51] "The extent of the prejudice an innocent person may suffer if access is granted may vary substantially depending on such things as the nature and extent of the investigation, the nature of the charges laid, if any, the nature and extent of the publicity surrounding the case, the extent to which the search warrant material may reveal personal, confidential or intimate matters only peripherally related to the investigation or charge, and various other factors": *Phillips*, ¶ 82.

[52] "The interest jeopardized must, however, have a public component. Purely personal interests cannot justify non-publication or sealing orders. Thus, the personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test [citations omitted]": *H.(M.E.) v. Williams*, 2012 ONCA 35, ¶ 25.

[53] The Crown and respondents argue that innocent persons include Ms. Lawrence, the Laans and Ron Allen, as well as other witnesses. The interests that are prejudiced by unsealing the ITOs include: (a) the lives and reputations of innocent persons being harmed and (b) the inability to have a fair trial should charges be laid given the nature of the information that will be made public and the manner in which the media will make it public. No direct evidence was tendered with respect to the manner in which lives and reputations would be damaged. I am being asked, however, to infer such damage from the contents of the ITOs and the sensationalized manner in which the media has used the available information to date.

[54] With respect to the nature of the information to be released in the context of a situation where charges have not been laid, I adopt the following comments made by Justice Ratushny in *O'Brien*, ¶¶ 25, 27, 28 and 30:

> **25** Notwithstanding *Flahiff* and *Ottawa Citizen*, the analysis in the circumstances of the present case turns, in my view, on the lack of the "convincing evidentiary basis" required by the *Mentuck* test before a publication publication ban can be allowed to displace the presumption against any form of secrecy at this pre-trial stage of these proceedings. I recognize that a convincing evidentiary basis for a publication ban, especially in a pre-trial context can be a difficult burden to meet, but that is as it should be in our open court system....
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> **27** In contrast to circumstances in *Flahiff*, no charges have been laid and neither does the information in the Redactions appear more highly prejudicial than the other information already disclosed in the Search Warrant Documents. While many of the Redactions are clearly based on layers of hearsay and as such are unreliable, they, together with certain conclusory opinions expressed in other Redactions, are included in the Information to Obtain the Search Warrant in order to give the Justice of the Peace full and frank disclosure of the grounds for the officer's belief, rightly or wrongly, that a criminal offence had taken place. In this context, it could be that exposure to public scrutiny of this rumour mill of hearsay allegations could cause their downfall so that the public eye on this stage of the process could operate to benefit rather than prejudice the proper administration of justice and fair trial rights.
>
> **28** Furthermore, should charges ever be laid and should a jury trial ever occur, that potential jurors would remember details contained in the Redactions and be irreparably prejudiced or improperly influenced by the disclosure of this information that might at the time of trial amount to inadmissible hearsay and opinion evidence that the reasonably available alternative measures of change of venue applications, jury selection questions, rules of evidence and jury instructions could not overcome, is speculative at best....
>
> **30** In summary and referring to the *Dagenais/Mentuck* test, a continued publication ban on the information in the Redactions in my view is not "necessary in order to prevent a serious risk to the proper administration of justice" because reasonably alternative

> measures will prevent the risk. As a consequence, the deleterious effects of the continuance of the publication ban outweigh its salutary effects on the rights and interests of the parties and the public. More than speculation as to possible anticipated risks to the proper administration of justice arising out of public access to the search warrant stage of this judicial proceeding is required to displace the open court principle so important to the functioning of our democracy.

[55] As in *O'Brien,* it is unclear how much pretrial publicity this case will garner if charges are ever laid. It is also unclear at this stage what types of charges would be laid and against whom. I understand that there is the potential for murder charges to be laid, and I agree that those charges, along with allegations of mistreatment of the elderly, are serious charges that have the possibility of causing a heightened reaction in members of the public.

[56] It is clear that the redactions do not reflect well on the Laans or Ron Allen. Having said that, the publicity to date has also not reflected well on the Laans or Ron Allen and I am not convinced that the additional material, given the nature of the material that is already in the public forum, will significantly add to those negative public impressions.

[57] In addition to the legal principles previously outlined, I agree with Justice Phillips in *Globe and Mail Inc.*, that there are several factors to bear in mind when cases may be the subject of intense and sustained media. These include:

- "Just because publicity has been extensive and effective enough to put the entire populace in the know about the background to a criminal charge, it does not follow that that same populace cannot produce a jury willing and able to put aside any preconceptions and decide the case on its merits" : ¶ 22;

- "The optimal juror is an informed citizen. No one should want a trial decided by a group of ignoramuses. People should follow current events and know what is going on in their communities. This can include learning about events that might be crimes, just as it can mean following any police investigation into those matters. It should be normal that if it becomes necessary to empanel a jury, the panel will have heard about the events giving rise to the allegation, and indeed know something of the basis for the charge. The question is not whether they have read or heard things about the allegation before the court, but rather whether they will likely be able to set aside that knowledge and decide the case solely on the evidence presented in the trial" : ¶ 23; and

- Relying on *Dagenais,* "our law has considerable faith in the ability of jurors to set aside any knowledge they might have about an allegation and decide the case on the evidence put before them within the confines of a trial" : ¶ 24

[58] The Crown and respondents argue that, if the ITOs are unsealed, presumptively inadmissible evidence will be disseminated to the potential jury pool. For example, such inadmissible evidence would include hearsay evidence, statements taken from suspects without their *Charter* rights being given, statements from individuals who have passed away and can no longer be cross-examined, and opinions from police officers.

[59] In my view, the arguments regarding admissibility are not clear cut. As time goes on, the witnesses interviewed some 20 years ago will age or pass away. If charges are laid in the future and if a trial occurs, this may lead to unique applications being brought such as hearsay statements being tendered under the principled exception to hearsay. In addition, the statements attributed to suspects are also not clear cut as having violated their *Charter* rights and being presumptively inadmissible. There may be voluntariness *voir dires* on admissibility, issues as to whether the parties were considered suspects at the time police spoke with them and issues as to who initiated contact with the police. While this type of evidence was deemed to have a significant risk to fair trial rights in *Esseghaier* and *Wettlaufer*, those situations involved much different circumstances. In our case, no charges have been laid, there is no imminent trial date and the pretrial publicity to date is nowhere near the sustained level it was in those cases nor can we predict whether it will be if charges are laid.

[60] With respect to the affiant's opinions in the ITO, I adopt the comments of Justice Phillips, *Globe and Mail Inc.*, ¶ 29:

> **29** The existence of the affiant's opinion in the ITO is benign and of no consequence. While the affiant does opine that an offence has been committed, that opinion is no different from what is proffered in every ITO on every subject. In my view, the public understands that the police can have an opinion when they see fit to investigate. I also believe the public understands that a search warrant is just an investigative step. As such, the opinions in an ITO would be understood to be drawn from a body of information that falls short of reasonable and probable grounds to even make an arrest, let alone proof beyond reasonable doubt of criminal culpability. Surely police opinion is taken with a healthy grain of salt by any reasonably informed member of the public. In every trial, the police obviously have an opinion about what happened. As an example, one might consider that an arrest is an expression of opinion: the peace officer is demonstrating subjective belief that the arrestee has committed an offence. No one would suggest that a potential juror would be unduly swayed by that sort of demonstrated opinion. In this case, the officer articulates what he makes of the communications in question. His observations are unremarkable. I conclude that the public would see them for what they are such that they carry no real risk of prejudicial effect. Frankly, if it is thought that the public puts such stock in opinion proffered by the police like this that they cannot thereafter be impartial we should get rid of the jury system.

[61] The Crown and respondents argue that the manner in which the media has been reporting matters to date is sensationalized and unfair. Without commenting on the nature or quality of the media coverage, I agree with the observations of Justice Nordheimer in *R. v. Kelly (CBC v Canada)* [2007], O.J. No. 5346, ¶ 29-30:

> **29** It is a reality that some media outlets, or some individuals, may choose to publish information in an irresponsible manner. That reality is a consequence, likely an unavoidable one, of having a free and unregulated press. The foundational importance of a free and unregulated press is well-known as are some of the effects associated with it. For example, in Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480 Mr. Justice La Forest noted, at para. 23:
>
> > "Debate in the public domain is predicated on an informed public, which is in turn reliant upon a free and vigorous press. The public's entitlement to be informed imposes on the

> media the responsibility to inform fairly and accurately. This responsibility is especially grave given that the freedom of the press is, and must be, largely unfettered." [emphasis added]
>
> **30** The courts do not have the ability to pre-clear who receives public information in their possession in order to be satisfied that the persons receiving the information will use it in a responsible manner. Even if such a process could be devised, that process would seem fundamentally inconsistent with the nature of the right of freedom of expression in that it would suggest that some should be more free than others to receive information upon which to base their expression. In any event, if the possibility of misuse of information were to become the defining point in the Dagenais/Mentuck balance, then the balance would be tipped in favour of secrecy in a myriad of different situations with the result that non-disclosure orders would quickly become the norm, rather than the exception to the norm.

[62] Furthermore, the Court of Appeal made it clear in *Canadian Broadcasting Corp. v. R.*, 2010 ONCA 726, that "...absent any finding of potential harm or injury to a legally protected interest, there is nothing in the law that permits a judge to impose his or opinion about what does not need to be broadcast to the general public": ¶ 50.

[63] The Crown also submits that the redacted contents of the ITOs contains personal information which, if disclosed, would significantly intrude on the privacy rights of innocent persons. This includes information pertaining to their mental state, health issues and various other details. I accept that in some cases, courts have imposed sealing orders or publication bans in situations where personal, confidential or intimate matters only peripherally related to the investigation or charge would be revealed. In this case, the applicants have consented to the sealing orders remaining in effect with respect to the names and personal identifiers of the innocent persons identified at para. 15 of Inspector Matthews' affidavit. This will alleviate some or all of the prejudice occasioned by the intrusion on their privacy rights. This concession does not apply to the evidence of Joan Lawrence and Al Marshall. Their evidence, however, is significantly connected to the investigation. Mr. Marshall is now deceased and Ms. Lawrence's whereabouts are unknown. With the exception of one redaction to remain sealed because that confidential information is unrelated to the investigation (see below), I find that their evidence, despite the perceived intrusion on their privacy, ought to be disclosed. That is, the Crown has not established a serious risk to the proper administration of justice such that a sealing order is required in these circumstances.

[64] Finally, as pointed out by Justice Nordheimer, witnesses or innocent persons who are interviewed by police know, or ought to know, that the information they give to the police might become public. No promises of confidentiality appear to have been given to witnesses in our case. And, further, with respect to the media coverage, innocent persons are not defenseless. They can choose to speak out and defend themselves or remain silent and "rely on the fairness and good sense of the public" who may absorb information in the context of a case where no charges have been laid and any allegations made by police remain untested and unproven to date: *R. v. CBC,* 2013 ONSC 6983, ¶¶ 26-27.

[65] The Crown and the respondent must show "a high probability that the effect of publicity will be to leave potential jurors so irreparably prejudiced or to so impair the

presumption of innocence that a fair trial is impossible". The Crown and the respondents have not discharged their burden in this regard.

[66] Even if there were a high probability that the publicity would prejudice potential jurors or present a risk to fair trial rights, I find that other reasonable alternatives such as strong jury instructions, challenges for cause and *voir dires* during jury selection, sequestering the jurors, a change of venue, the rules of evidence and potential publication bans made at the time someone is charged would address any potential prejudice.

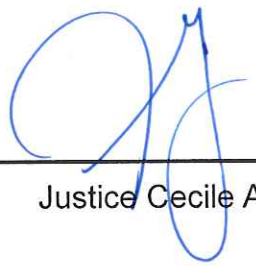
Conclusion

[67] The Crown and the respondents have failed to meet the *Dagenais/Mentuck* test with respect to keeping the redacted information sealed. Such an order is not required to prevent a serious risk to the administration of justice. In addition, the negative impact on the public's right to know, the freedom of the press and the open court principle greatly exceeds any beneficial effects of maintaining the sealing orders.

[68] There will, however, be certain exceptions to this order. In particular, the following information will remain sealed (reference is being made solely to ITO #7 with the understanding that the same information will remain sealed if it is contained in the previous ITOs):

- Personal identifiers such as dates of births, addresses, telephone numbers, FPS numbers, bank account numbers, licence plate numbers, and VINs;
- On consent of the applicants, the names and personal identifiers of the witnesses listed at paragraph 15 of Inspector Matthews' affidavit;
- ITO #7 - Page 24, vi – these details are significantly personal and intrusive details completely unrelated to the investigation; and
- ITO #7 – page 77, paragraph 59 – the entire second sentence shall continue to be redacted for the reasons stated at paragraph 16 of Inspector Matthews' affidavit.

Released: December 4, 2017



Justice Cecile Applegate