S/M/85/12

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF SAINT JOHN

Citation: Canadian Broadcasting Corporation et al v. Saint John Police Force et al 2013 NBQB 167

Date : May 17, 2013

BETWEEN:

CANADIAN BROADCASTING CORPORATION AND BRUNSWICK NEWS INC., PUBLISHER OF THE TELEGRAPH-JOURNAL

Applicants

- and -

THE INTERESTED PARTIES, THE ESTATE OF RICHARD OLAND AND FAMILY OF THE DECEASED, RICHARD OLAND,THE SAINT JOHN POLICE FORCE and THE ATTORNEY GENERAL OF NEW BRUNSWICK

Respondents

BEFORE:	Justice William T. Grant
HEARING HELD:	Saint John
DATE OF HEARING:	April 23, 2013
DATE OF DECISION:	May 17, 2013

APPEARANCES:
David G. Coles, Q.C. for the applicant
Gary A. Miller, Q.C., William H. Teed, Q.C. and James R. McConnell for The Interested Parties
John A. Henheffer for The Saint John Police Force and the Attorney General of New Brunswick

DECISION

GRANT, J

[1] This is an application for judicial review of a decision of a Judge of the Provincial Court, arising from an application by the applicants to unseal eight search warrants, one production order, the informations to obtain in support of each of those and the reports to a judge filed after they were executed.

BACKGROUND

[2] The search warrants are all related to the apparent homicide of Richard H. Oland whose body was found in his office in Saint John on July 7, 2011. To date no charge has been laid in relation to his death. In the course of their investigation the Saint John Police Force obtained the following warrants and orders from the Provincial Court:

a. Search Warrant of July 13, 2011, issued pursuant to section 487 of the Criminal Code of Canada;

b. General Warrant of July 13, 2011, issued pursuant to section 487.01 of the Criminal Code;

c. Search Warrant of July 20, 2011, issued pursuant to section 487 of the Criminal Code;

d. General Warrant of July 20, 2011, issued pursuant to section 487.01 of the Criminal code;

e. Production Order of July 25, 2011, issued pursuant to section 487.012 of the Criminal Code;

f. General Warrant of August 4, 2011, issued pursuant to section 487.01 of the Criminal Code;

g. Search Warrant of August 11, 2011, issued pursuant to section 487 of the Criminal Code;

h. Search Warrant of November 15, 2011, issued pursuant to section 487 of the Criminal Code; and

i. General Warrant of November 15, 2011, issued pursuant to section 487.01 of the Criminal Code.

[3] The warrants and orders were all accompanied by sealing orders pursuant to section 487.3(1) of the *Criminal Code of Canada*.

[4] On September 22, 2011 the applicants, the CBC and Brunswick News Inc. ("the Media") applied to the Provincial Court to set aside the sealing orders. The Saint John Police Force as represented by the Crown in Right of the Province of New Brunswick opposed the application as did the estate of Richard Oland, his family and the four persons who were the subjects of the search warrants, all of whom were given standing.

[5] On December 16, 2011 the Provincial Court Judge ordered the sealing orders to continue in effect for a further period of six months, after which they were to expire unless the Saint John Police Force applied for and received a further extension.

[6] On or about June 7, 2012 the Saint John Police Force applied for that extension. The respondents to the application were the Media, the four persons who were the subjects of the search warrants ("the targets") and the family and estate of the deceased. The hearing took place on June 15, 27, July 31, August 1, 3, 16 and 17, 2012. The Media opposed the application while the Crown, the estate, the family and the targets supported it.

[7] During the course of the hearing the Crown offered evidence in support of its position through the affidavit of Constable Stephen Davidson who was also made available for cross-examination on July 31, 2012. On that date the

Provincial Court Judge ordered that the hearing be *in camera* with only counsel present; he also ordered a ban on publication.

[8] During the course of that hearing the Crown advised the Court that the Saint John Police Force no longer sought to have all the evidence sealed and asked the Court to hold an *in camera ex-parte* hearing to hear from Constable Davidson what evidence the Saint John Police Force wanted to continue to be sealed and why. Redacted copies of the documents would then be provided to the lawyers for the family, the estate and the targets who would make submissions for further redactions, if any. After that the redacted documents would be provided to the Media's counsel who would make submissions concerning the redactions.

[9] During that process Constable Davidson was examined at an *in camera ex-parte* hearing before the Provincial Court Judge and cross-examined both in open court and *in camera*.

[10] Arguments were completed on August 17, 2012 and on September 28, 2012 the Provincial Court Judge released his decision in which he ordered the two warrants and all related materials issued on November 15, 2011 to remain sealed. He further ordered the sealing orders concerning the other seven warrants and related materials be varied by releasing public versions of the documents redacted in accordance with the following directives:

> **[A] The names of all persons referred to in the various documents, other than those who were the subject of a search warrant, and the substance of their involvement shall be made available to the public subject to the exception below as to hallmark evidence.**
>
> **[B] In the case of any named person who was the subject of a search warrant, the media shall have access to**

their names but shall be prohibited from publishing their names or any information by which they may be identified.

[C] All personal identity information such as residential addresses, bank account numbers and names of accounts, drivers licence numbers and telephone numbers shall be redacted.

[D] information relating to the physical position and condition of the deceased's body when found, as well as the condition of the deceased's office and the location of any of the deceased's personal effects upon discovery of the body, shall be redacted on the basis of it being hallmark evidence, that is, specifically detailed information which only the killer or killers would know.

[11] On November 29, 2012 the Media filed this application requesting the following relief:

> **On the hearing of this application, the applicant intends to apply for an order that the publication ban ordered in paragraph [B] on page 18 of the September 28, 2012 decision of ... (the) ... Judge in the matter of Saint John Police Force v. Canadian Broadcasting Corporation et al. 2012 NBPC 17 be quashed, and to apply for an Order quashing/lifting the publication ban and sealing order on the evidence given on the aforementioned Application by Constable Stephen Davidson, except to the extent such evidence is in respect to paragraphs [C] and [D] at page 18 of the Decision.**

Paragraph [B] ("paragraph 24[B]"), and consequently this application, concerns only the three persons who were the subjects of the search warrants listed at paragraphs 2(a) – (g) above ("the Interested Parties").

(A) BAN ON PUBLICATION OF NAMES

Standard of Review

[12] In the case of ***Dagenais v. Canadian Broadcasting Corp.*** [1994] 3 S.C.R. 835; [1994] S.C.J. No. 104 Lamer C.J.C. stated at para. 38:

> **Provincial superior courts have jurisdiction to hear applications for the extraordinary remedy of certiorari against provincial court judges for excesses of jurisdiction and for errors of law on the face of the record. As I will explain in Part C of these reasons, the common law rule governing the issuance of orders banning publication must be consistent with the principles of the Charter. Since the common law rule does not authorize publication bans that limit Charter rights in an unjustifiable manner, an order implementing such a publication ban is an error of law on the face of the record. Therefore, if a publication ban order is made by a provincial court judge, the media can apply to the superior court for certiorari and argue that the ban is not authorized by the common law rule. If this is the case, the ban will then constitute an error of law on the face of the record.**

The parties agree that the standard of review applicable to this matter is that of correctness and I so find.

SEALING ORDER

[13] While the term which the Media seeks to have quashed as set out in paragraph 24[B] of the decision of the Provincial Court Judge, *supra.*, has been referred to as a publication ban, in fact it is a sealing order under section 487.3 of the *Criminal Code.* Nonetheless, the law concerning publication bans is equally applicable to all discretionary orders that limit freedom of expression and freedom of the press which would include sealing orders under section 487.3: see ***Toronto Star Newspapers Ltd. v Ontario*** [2005] 2 S.C.R. 188 at paras. 5 & 7, per Fish J.

[14] The applicable provisions of section 487.3 read as follows:

> **487.3 (1) A judge or justice may, on application made at the time of issuing a warrant under this or any other Act of Parliament or a production order under section 487.012 or**

487.013, or of granting an authorization to enter a dwelling-house under section 529 or an authorization under section 529.4 or at any time thereafter, make an order prohibiting access to and the disclosure of any information relating to the warrant, production order or authorization on the ground that

> **(*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 ground referred to in paragraph (*a*) outweighs in importance the access to the information.**

(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.**

[15] In the case of ***R. v. Mentuck*** [2001] 3 S.C.R. 442; [2001] S.C.J. No. 73 Iacobucci J stated at para. 32:

> **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 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] He then elaborated on this test as follows:

34 I would add some general comments that should be kept in mind in applying the test. The first branch of the test contains several important elements that can be collapsed in the concept of "necessity", but that are worth pausing to enumerate. One required element is that the risk in question be a serious one, or, as Lamer C.J. put it at p. 878 in Dagenais, a "real and substantial" risk. That is, it must be a risk the reality of which is well-grounded in the evidence. It 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.

35 A second element is the meaning of "the proper administration of justice". I do not wish to restrict unduly the kind of dangers which may make a ban necessary, as discretion is an essential aspect of the common law rule in question. However, judges should be cautious in deciding what can be regarded as part of the administration of justice. Obviously the use of police operatives and informers is part of the administration of justice, as are such practices as witness protection programs. However, courts should not interpret that term so widely as to keep secret a vast amount of enforcement information the disclosure of which would be compatible with the public interest.

36 The third element I wish to mention was recognized by La Forest J. in *New Brunswick, supra*, at para. 69, when he formulated the three part test discussed above. La Forest J.'s second step is clearly intended to reflect the minimal impairment branch of the Oakes test, and the same component is present in the requirement at common law that lesser alternative measures not be able to prevent the risk. This aspect of the test for common law publication bans requires the judge not only to consider whether reasonable alternatives are available, but also to restrict

the order as far as possible without sacrificing the prevention of the risk.

37 It also bears repeating that the relevant rights and interests will be aligned differently in different cases, and the purposes and effects invoked by the parties must be taken into account in a case-specific manner. Where the accused is seeking the publication ban on the basis that his trial will be compromised, a judge would improperly apply the test if he relied on the right to a public trial to the disadvantage of the accused. This test exists to ground the exercise of discretion in a constitutionally sound manner, not to command the same result in every case. Trial judges must, at the outset, use their best judgment to determine which rights and interests are in conflict. In most cases this will not be overly onerous. The parties will frame their arguments in terms that make clear the interests they feel are threatened by the issuance or refusal of a publication ban and those they are ready to sacrifice in the face of the threat.

38 ...

39 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, which may go unargued by counsel more frequently as the number of applications for publication bans increases, in a transparent court system and in generally unrestricted speech on matters of such public importance as the administration of justice.

[17] The issue in this judicial review of the Provincial Court Judge's decision is whether or not he correctly applied the ***Mentuck*** test when he ordered the ban on publication of the names of the Interested Parties.

DECISION OF THE PROVINCIAL COURT JUDGE

[18] In his decision the Provincial Court Judge dealt with this issue by first considering the definition of "innocent person" as set out in the case of ***Ottawa***

Citizen Group Inc. v. Canada(Attorney General) [2005] O.J. No. 2209 (O.C.A.).

[19] He then stated at paras. 18-20:

> **[18] In Ottawa Citizen (Supra) the Court noted that there are two parts to the *Mentuck* test: (1) a serious risk to the proper administration of justice, and (2) reasonably alternative measures. MacPherson J.A. accepted the issuing Judges' analysis as to the first part of the test based on the fact that the searches were conducted in the context of international relations and national security as well as privacy and security of the person interests but parted company with them on the question of the appropriate order. On that point he said:**
>
> > **"[50] 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. The former is explicitly recognized in s. 2(b) of the *Charter*; the latter has been the centerpiece of many leading decisions of the Supreme Court of Canada.**
> >
> > **[51] Moreover, there is a direct connection between these two fundamental values...**
> >
> > **[54] The consequence of the importance of, and the relationship between, freedom of the press and open courts is obvious: "the open court principle, to put it mildly, is not to be lightly interfered with": see *Vancouver Sun* at para. 26. Accordingly, any attempt by a party to obtain a sealing order in relation to any aspect of a court proceeding, including the obtaining of a search warrant, "must be subject to close scrutiny and meet rigorous standards": see *Toronto Star* at para. 19 *per* Doherty J.A**
> >
> > **[55] However, although freedom of the press is "largely unfettered", it is not absolute. Press freedom, like all *Charter* rights, must be balanced**

with other important values in Canadian society. One such value is "the protection of the innocent": see *MacIntyre* at p. 187."

[19] The Order made in Ottawa Citizen (Supra) was that the media could have access to the documents so that they had full knowledge of the contents of the search warrant as well as the information on which it was obtained, but were prohibited from publishing the names of the subjects of the search, or any information that might disclose their names. The Court noted at paragraph 60:

> **"[60] If an order coupling access to, but non-publication of, the names were made, [the journalist] would learn the identities of the subjects of the search warrants. She could contact them, which is consistent with the news gathering role that is part of the constitutionally protected freedom of the press: see *Canadian Broadcasting Corporation* at para. 24. The press can contact any Canadian citizen in the investigation of a potential story." (Items in brackets added)**

and then continued at paragraph 63:

> **"[63] Does such an order properly respect the privacy interests of deemed "innocent persons" in Canada? In my view it does. The order is more intrusive than a sealing order; the press will be able to contact the "innocent persons". However, such an intrusion is, in my view, both normal and minor. It is normal because it is already the law in Canada that search warrants are available for public inspection: see *MacIntyre*. Moreover, the press is already free to contact any person in Canada. The intrusion is minor because the "innocent person" can decline to respond to the press inquiry, and can do so in the knowledge that his or her identity will not be published.**
>
> **[64] Moreover, I note that at the hearing before Dorval J., counsel for the only subject of the search**

warrants who made submissions, Michael Edelson representing A.A., pitched his submissions almost entirely in terms of "the stigmatization to name and reputation that would follow from publication" and "a certain stigma or stain attached to the name of the individual". This is precisely the risk that can be overcome by a non-publication order."

[20] Counsel for the Interested Parties have argued for the extension of the sealing order largely on the stigma or stain on the reputation of their client as innocent parties, however their names have already been widely reported in the media, as evidenced by the affidavits filed during the hearing which feature both the names and, in some cases, photographs of at least one of the Interested Parties. In such an instance one may wonder whether a non-publication order would achieve any purpose. In Ottawa Citizen (Supra) MacPherson J.A. concludes as follows:

> **"[65] In summary, the *Mentuck* test requires a balancing between the salutary and deleterious effects of any order that would impinge on freedom of the press. The test also commands a focus on "reasonably alternative measures". The word "balancing" conjures the image of neutrality or even-handedness. In my view, this image is misplaced. Because of the centrality of a 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. As stated by Dickson J. in *MacIntyre* at p. 185, "covertness is the exception, and openness the rule.**
>
> **[66] The presumption against secrecy applies, specifically, to sealing orders..."**

[20] Then after dealing with the issue of redacting the documents and finding that the two warrants issued on November 15, 2011 should remain sealed, he concluded as follows:

> **[23] I have not been persuaded that the privacy interests of the other Interested Parties require the continued sealing of the remaining warrants and associated documents, as in my view a less restrictive option is available. In the Ottawa Citizen (Supra), one of the subjects of the search warrants was Mahar** (sic) **Arar whose identity and indeed his situation was well known and had been widely publicized. Notwithstanding that the Ontario Court of Appeal allowed the media access to the entire warrant but issued a publication ban as to the identity of the subjects of the warrants. In my view a similar sort of order would be appropriate in this case.**

INTERESTED PARTIES' POSITION

[21] The Interested Parties submit that the Provincial Court Judge found that publication of their names would subvert the ends of justice in that it would prejudice the interests of them as innocent persons. They submit that he correctly followed the ***Ottawa Citizen*** decision after considering all the evidence and arguments of counsel and imposing what he felt was a "reasonably alternative measure". They cite the case of ***Toronto Star v. Canada*** [2006] O.J. No. 5448 as authority for a partial publication ban and note that the *Charter* affords protection to innocent persons by protecting individual and privacy rights under sections 7 and 8.

[22] They also cite the case of ***R. v. Globe and Mail*** [2011] A.J. 682 where the court stated at para. 15:

> **...Part of the presumption of innocence is not to have an innocent person subject to intense media scrutiny that may irreparably tarnish that person's reputation.**

[23] They also rely on ***Phillips v. Vancouver Sun*** 2004 BCCA 14 where the court stated:

> **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.

[24] They further submit that this is a case where they have already been subject to a great deal of media scrutiny and though their names have already been published prior to the Provincial Court Judge's order, "enough is enough" and as innocent persons they should be entitled to their privacy. They submit that there was ample evidence before the Judge to support his decision and for him to conclude that the risk of harm to them was real, substantial and well-grounded in the evidence.

[25] They further submit that the order banning publication of their names was a "reasonably alternative measure" which impairs the open court principle only minimally as acknowledged by the Judge in his decision at paragraph 24.

[26] Finally, the Interested Parties submit that the salutary effects of the publication ban outweigh its deleterious effects and it thus meets the standard required by the second branch of the ***Mentuck*** test.

CROWN'S POSITION

[27] The Crown essentially agrees with the submissions of the Interested Parties. They submit that the Provincial Court Judge applied the ***Mentuck*** test correctly and that there was ample evidence before him on which to base his findings and that he exercised his discretion judicially in the circumstances by making an order that was minimally intrusive on the rights to freedom of expression and the open court principle.

OTTAWA CITIZEN CASE

[28] In deciding to impose the publication ban the Provincial Court Judge relied on the case of ***Ottawa Citizen Group Inc. v. Canada (Attorney General)***, *supra*. In that case the Ottawa Citizen applied to the court to quash a sealing order relating to the names of persons who were the subjects of search warrants. The respondent opposed the application on the grounds of international relations and national security. The persons who were subject to the warrants had not been charged with offences although property had been seized in the execution of the warrants. The sealing order was made because disclosure might prejudice the interests of innocent persons.

[29] At first instance some of the records were unsealed but the sealing order remained in effect with respect to the names of the seven individuals whose premises had been searched. That order was appealed to the Superior Court of Justice where Aitken J. concluded that while the reviewing judge had not articulated her conclusions with respect to the balancing process she was satisfied, based on the record, that she had exercised her discretion judicially in light of the test in section 487.3 of the *Code* and that she had considered the appropriate sections of the *Charter*.

[30] On appeal the court held that although items were seized pursuant to the search warrants the subjects of the search warrants still came within the meaning of the term "innocent person" as used in section 487.3 of the *Criminal Code*. In doing so they relied on the case of ***Vickery v. Nova Scotia Supreme Court*** (Prothonotary), [1991] 1 S.C.R. 671 and ***Phillips v. Vancouver Sun*** (2004), 238 D.L.R. (4th) 167 (B.C.C.A.).

[31] The court then considered the first part of the ***Mentuck*** test and concluded that there are two branches to it: (1) a serious risk to the proper administration of justice and (2) reasonably alternative measures. MacPherson J.A. then concluded that the judges in the courts below did not commit any

jurisdictional error or error of law on the face of the record in concluding that access to the search warrants would prejudice the interests of the innocent "especially where, from the record, it appeared that the searches were conducted in a context of international relations and national security." He then concluded however that Dorval J. failed to consider the second branch of the first part of ***Mentuck,*** i.e. whether or not there were reasonable alternative measures available and that this failure was an error of law on the face of the record. He stated:

> **...it ignores both the "terms and conditions" language in section 487.3(3) of the Code, which invites consideration of tailored non-disclosure orders, and the explicit language in the first branch of the Mentuck test. ...failure to address the Code provision or a component of a test articulated by the Supreme Court of Canada should not be considered as a proper analysis and reasonable conclusion.**

[32] He then went on to consider an appropriate order. In doing so he considered the competing values at stake *viz.* freedom of the press and protection of the innocent and concluded that a sound basis for striking a balance between them was to make any publication ban as narrowly circumscribed as possible. After concluding that an order allowing access to the documents but banning publication of the names of the persons subject to the search warrants would be appropriate, MacPherson J.A. concluded:

> **64 ...counsel for the only subject of the search warrants who made submissions, Michael Edelson representing A.A., pitched his submissions almost entirely in terms of "the stigmatization to name and reputation that would follow from publication" and "a certain stigma or stain attached to the name of the individual". This is precisely the risk that can be overcome by a non-publication order.**
>
> **65 In summary, the Mentuck test requires a balancing between the salutary and deleterious effects of any order that would impinge on freedom of the press. The test also commands a focus on "reasonably alternative measures". The word "balancing" conjures the image of neutrality or**

even-handedness. In my view, this image is misplaced. Because of the centrality of a 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. As stated by Dickson J. in MacIntyre at p. 185, "covertness is the exception, and openness the rule."

66 The presumption against secrecy applies, specifically, to sealing orders. As expressed by Iacobucci and Arbour JJ. in Vancouver Sun at para. 50, "the present facts clearly illustrate the mischief that flows from a presumption of secrecy. Secrecy then becomes the norm, is applied across the board, and sealing orders follow as a matter of course". The courts need to be vigilant to guard against this progression. In this case, an order combining press access to the names of the subjects of the search warrants with a prohibition on publishing those names strikes a proper balance.

ANALYSIS AND DECISION

[33] As mentioned the Provincial Court Judge relied heavily on the approach used in the ***Ottawa Citizen*** decision. However, in doing so he did not conduct the required analysis as set out in the ***Mentuck*** case, *supra*. I don't find any error in his determination that the Interested Parties are "innocent persons". However, he then omitted the next step in the analysis which was to determine whether or not the evidence before him established that it was **necessary** to continue the sealing order with respect to the Interested Parties in order to protect them as innocent persons.

[34] He acknowledged that they based their submission on the stain and stigma to their reputations but he did not review the evidence to determine whether or not they had established that continuing the sealing order, even in a modified form, was necessary. Unless and until he made that finding, consideration of reasonably alternative measures was not necessary.

[35] It might be argued that by ordering the publication ban he impliedly made the finding that some form of sealing order was necessary to protect the Interested Parties. However such a conclusion would be at odds with his observation that because their names were already widely reported in the media "... one may wonder whether a non-publication order would achieve any purpose." Having said that, it was incumbent on the Judge, in my view, to explain what purpose he believed would be achieved by a non-publication order so as to explain how it met the threshold requirement of necessity under the ***Mentuck*** test. He didn't conduct that analysis, however; he left the question unanswered.

[36] Moreover, in my view, the Provincial Court Judge's reliance on the ***Ottawa Citizen*** case was misplaced because there were significant differences between the facts of that case and this one. In the ***Ottawa Citizen*** case much of the evidence remained subject to a sealing order pending an application in a parallel proceeding in the Federal Court. As such, releasing the names of the individuals involved in that case would have been prejudicial to them because they would not have been released in the context of the other search warrant information. In this case the Judge has ordered that, other than the hallmark evidence, the search warrant information be unsealed so there is context.

[37] Furthermore, in the ***Ottawa Citizen*** case the names of six of the seven individuals had not previously been published whereas in this case all of the names of the four individuals who were subjects of the search warrants have previously been widely reported in the media. In considering the issue of republication in ***Mentuck*** , Iacobucci J. stated at para. 45:

... the danger to the efficacy of the operation is not significantly increased by republication of the details of similar operations that have already been well-publicized in the past. It is the incremental

effect of the proposed ban, viewed in light of what has already been published before, that must be evaluated in this appeal. That is, in terms of the framework adopted above, republication of this information does not constitute a serious risk to the efficacy of police operations, and thus to that aspect of the proper administration of justice. ...

[38] Moreover, when he orders the publication ban at paragraph 23 of his decision the Provincial Court Judge appears to base his order on the premise that the facts of this case concerning republication are similar to those in the ***Ottawa Citizen*** case when he says that Maher Arar, whose situation had been widely publicized, was one of the subjects of the search warrants yet the Ontario Court of Appeal still banned publication of the names of all the subjects of the search warrants, including Mr. Arar. However, that is at variance with my reading of the facts of the ***Ottawa Citizen*** case where MacPherson J.A. stated at para. 7:

> **It is common ground that the search warrant records relate to searches executed at the residences of Abdullah Almalki and six other unnamed persons ...**

[39] As I understand that case, then, Maher Arar, who has become virtually a household name in Canada, was not one of those who was subject to the search warrants and therefore not one of those who was covered by the publication ban. It was Mr. Almalki whose name was prohibited from being re-published which considerably diminishes the usefulness of any comparison of the two cases on this issue.

[40] The issue of re-publication was also addressed in the case of ***R. v. Eurocopter Canada Ltd.*** [2003] O.J. No. 4238 where the court considered an application to vary a sealing order under section 487.3 of the *Criminal Code*. The defendant, Eurocopter, and Karlheinz Schreiber submitted that their

entitlement to protection of the innocent as well as their privacy rights and fair trial rights outweighed the strong presumption of public access to the courts. The case, which involved allegations concerning former Prime Minister Mulroney and former Newfoundland Premier Frank Moores, had attracted a great deal of publicity including excerpts in at least two published books and one television program, the Fifth Estate. In dismissing their submissions Then J. stated at para. 85:

> **...It is difficult to accept that a reiteration of "old news" augmented by the technical details of commercial transactions will significantly diminish Eurocopter's fair trial rights.**

[41] He further stated at para. 93:

> **...as has been noted previously, extensive publicity concerning the essential allegations affecting privacy and reputation are all in the public domain. In this context, there is much to be said for the argument advanced by the CBC that the revelations in the Information to Obtain, which at this stage are mere allegations, will not seriously affect either the privacy or reputation of either Eurocopter or Mr. Schreiber any more than has the publicity to date.**

[42] In the decision of the Provincial Court Judge there is no evaluation of the incremental effect of the proposed ban other than his statement at para. 20 of his decision that "...one may wonder whether a non-publication order would achieve any purpose." Far from supporting a ban that statement calls into question whether there would be any risk at all to the administration of justice in this case if continued publication were permitted, let alone a serious risk as required by the ***Mentuck*** test. I therefore find that the Provincial Court Judge made an error of law by failing to make the threshold determination that a sealing order was necessary based on the evidence in the record before him.

[43] With respect to the second branch of the ***Mentuck*** test, i.e. weighing the salutary effects of the publication ban versus its deleterious effects, the

Judge acknowledges the requirement to conduct this analysis when he quotes from paragraph 65 of the ***Ottawa Citizen*** decision. However, he then concludes his decision by ordering a publication ban without explaining what its salutary effects would be and why they outweigh its deleterious effects. An explanation of what purpose he believed the order would achieve would have gone some way to satisfy this requirement but, as noted earlier, that didn't happen. No further analysis under the second branch of the ***Mentuck*** test is to be found in his decision. I therefore find that the Provincial Court Judge also committed an error of law on the face of the record by omitting the second part of the ***Mentuck*** test.

[44] In summary, given the record before the Provincial Court Judge, his own findings and the requirements of the ***Mentuck*** test which he did not follow, I find that he committed an error of law on the face of the record by imposing a ban on the publication of the names of the Interested Parties.

THE APPROPRIATE REMEDY

[45] In ***Toronto Star Newspapers Ltd. v. Ontario*** [2005] 2 S.C.R. 188 the court stated at para. 9:

> **...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.**

[46] The evidence in this case that was before the Judge did not include any affidavit or other form of evidence from any of the Interested Parties particularizing the manner in which their reputations were being damaged. There was evidence in the form of an affidavit of lawyer James R. McConnell which includes five articles published in three media outlets between June 13,

2012 and July 23, 2012 as well as a television interview that aired on July 20, 2012 on a fourth. The Record also included copies of 25 articles published in the Telegraph Journal between July 8, 2011 and July 20, 2012 including an edited transcript of a press conference conducted by Police Chief Bill Reid. That is the only evidence that was before the Provincial Court Judge dealing with the publication of their names. Other than the fact that that evidence exists there was no evidence as to any effects that it had or would have on the Interested Parties.

[47] On the other hand it was also evident from the Record before the Judge that the names of the Interested Parties had already been published and that the execution of the warrants had been observed by and reported in the Media.

[48] In my view the position of the Interested Parties in this application was supported only by generalized assertions. There was no specific evidence that they suffered any damage or harm arising from the publication of their names and while intense media scrutiny is undoubtedly difficult for them to endure, the sensibility of individuals is not, as a general rule, a sufficient justification for a publication ban: see ***MacIntyre v Nova Scotia (Attorney General)*** [1982] 1 S.C.R. 175 at 185.

[49] Based on the record before the court in this application, then, I find that there is no serious threat to the proper administration of justice in this case that would support this publication ban in accordance with the ***Mentuck*** test. Moreover, the Provincial Court Judge tacitly acknowledges in his decision that there is no such evidentiary basis when he wonders whether a publication ban would achieve any purpose.

[50] The absence of a sufficient evidentiary basis to support the ban makes it unnecessary and therefore untenable: see ***Mentuck,*** *supra.*, at paras. 34 and 39. I therefore remove the decision of the Provincial Court Judge ordering a

publication ban on the names of the Interested Parties as set out in paragraph 24[B] of his decision into this Court and quash it.

(B) BAN ON PUBLICATION OF EVIDENCE

[51] With respect to the applicants' request to lift the bans on publication ordered by the Provincial Court Judge, during the course of the hearing the respondents raised a preliminary issue. They submit that it is not an appropriate form of relief for the Media to be seeking in this judicial review as the appropriate forum for the media to seek that relief is the Provincial Court. The bans were issued during the course of the hearing in that Court; there were various hearings some of them *ex-parte, in camera,* some of them *in camera* with some counsel present, others *in camera* with all counsel present and others in open court. They submit that it is not appropriate for the Media to come to this Court and ask for a judicial review of those orders since they were not challenged at the time they were made and the Provincial Court Judge has not been asked to vary or revoke them. They submit that there is therefore nothing for this Court to review. The Media submit that it would be a waste of judicial resources as well as time and money to send this matter back to the Provincial Court.

[52] In the case of ***Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*** [2011] 3 S.C.R. 654; [2011] S.C.J. No. 61 the court considered an appeal from a judicial review of an adjudicator's decision. The Privacy Commissioner had received complaints that the Teachers' Association had disclosed private information contrary to Alberta's *Personal Information Protection Act.* The *Act* provided that an inquiry must be completed within 90 days of the complaint being received unless the Commissioner notified the parties that he was extending the time period and provided an anticipated date for completion of the inquiry. The Commissioner

waited 22 months before extending the date for completing the inquiry and it was a further seven months before the adjudicator, who was delegated by the Commissioner to hear the case, issued an order finding that the Teachers' Association had contravened the *Act*.

[53] The Teachers' Association then applied for judicial review and in argument claimed for the first time that the Commissioner had lost jurisdiction due to his failure to extend the period for completion of the inquiry within 90 days of receiving the complaint as required by the *Act*. The reviewing judge accepted that argument and quashed the adjudicator's decision. A majority of the Court of Appeal upheld the reviewing judge's decision.

[54] When the case reached the Supreme Court Rothstein J outlined the law concerning the raising of an issue on judicial review that was not raised before the tribunal whose decision is being reviewed and while some of the reasons underlying the general rule are peculiarly applicable to the administrative law context, the general rule and some of the reasons therefor apply in this context as well. He stated at paragraphs 22-26:

> **22 The ATA sought judicial review of the adjudicator's decision. Without raising the point before the Commissioner or the adjudicator or even in the originating notice for judicial review, the ATA raised the timelines issue for the first time in argument. The ATA was indeed entitled to seek judicial review. However, it did not have a right to require the court to consider this issue. Just as a court has discretion to refuse to undertake judicial review where, for example, there is an adequate alternative remedy, it also has a discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so: see, e.g., *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, *per* Lamer C.J., at para. 30: "[T]he relief which a court may grant by way of judicial review is, in essence, discretionary. This [long-standing general] principle flows from the fact that the**

prerogative writs are extraordinary [and discretionary] remedies."

23 Generally, this discretion will not be exercised in favour of an applicant on judicial review where the issue could have been but was not raised before the tribunal (*Toussaint v. Canada Labour Relations Board* (1993), 160 N.R. 396 (F.C.A.), at para. 5, citing *Poirier v. Canada (Minister of [page671] Veterans Affairs)*, [1989] 3 F.C. 233 (C.A.), at p. 247; *Shubenacadie Indian Band v. Canada (Human Rights Commission)*, [1998] 2 F.C. 198 (T.D.), at paras. 40-43; *Legal Oil & Gas Ltd. v. Surface Rights Board*, 2001 ABCA 160, 303 A.R. 8, at para. 12; *United Nurses of Alberta, Local 160 v. Chinook Regional Health Authority*, 2002 ABCA 246, 317 A.R. 385, at para. 4).

24 There are a number of rationales justifying the general rule. One fundamental concern is that the legislature has entrusted the determination of the issue to the administrative tribunal (*Legal Oil & Gas Ltd.*, at paras. 12-13). As this Court explained in *Dunsmuir*, "[c]ourts ... must be sensitive ... to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures" (para. 27). Accordingly, courts should respect the legislative choice of the tribunal as the first instance decision maker by giving the tribunal the opportunity to deal with the issue first and to make its views known.

25 This is particularly true where the issue raised for the first time on judicial review relates to the tribunal's specialized functions or expertise. When it does, the Court should be especially careful not to overlook the loss of the benefit of the tribunal's views inherent in allowing the issue to be raised. (See *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at para. 89, *per* Abella J.)

26 Moreover, raising an issue for the first time on judicial review may unfairly prejudice the opposing party and may deny the court the adequate evidentiary record required to consider the issue (*Waters v. British Columbia (Director of Employment Standards)*, 2004 BCSC 1570, 40 C.L.R. (3d) 84, at paras. 31 and 37, citing *Alberta v.*

***Nilsson*, 2002 ABCA 283, 320 A.R. 88, at para. 172, and J. Sopinka and M. A. Gelowitz, *The Conduct of an Appeal* (2nd ed. 2000), at pp. 63-68; *[page672] A.C. Concrete Forming Ltd. v. Residential Low Rise Forming Contractors Assn. of Metropolitan Toronto and Vicinity*, 2009 ONCA 292, 306 D.L.R. (4th) 251, at para. 10 (*per* Gillese J.A.)).**

[55] In the instant case the publication bans issued during the course of the hearing were uncontested. That said it appears from the transcript that they were issued on the understanding that they would be revisited at some point in time, presumably once the Judge rendered his decision. That was not done, however. The status of those publication bans then has not changed since they came into effect.

[56] There can be no doubt that the Provincial Court Judge had the authority to make the orders banning publication when he did and for the reasons that he did. The Media asserts that those reasons no longer apply since he has issued his decision and unsealed most of the information and evidence used to obtain the warrants.

[57] That may be but in my view any variation or revocation of those orders of the Provincial Court Judge should be dealt with at first instance by him, not on judicial review. I say this for the following reasons: firstly, there is nothing for me to review at this time; secondly, and more importantly, the status of those publication bans should be considered by the Judge who issued them in the context in which they were issued and in the context of the evidence to which they apply. I said earlier that it appears from the transcript that they were meant to be revisited at some time but only he can say that with certainty. He was there and heard the evidence and knows the context intimately. He is therefore in the best position to make a fully informed decision as to whether or not they should be varied or revoked. Any attempt by this court to do so without

the benefit of a prior decision from the Judge who made the orders runs the risk of overlooking material considerations.

[58] In ***Canadian Pacific Ltd. v. Matsqui Indian Band,*** [1995] 1 S.C.R. 3 Lamer, C.J. stated at paragraph 30 that the "... relief which a court may grant by way of judicial review is, in essence, discretionary." For the foregoing reasons, then, I will exercise my discretion and decline to deal with the issue of whether and to what extent the publication bans ordered by the Provincial Court Judge respecting the evidence adduced at the hearing of the application before him should be varied or quashed.

DISPOSITION

[59] In summary, this application is allowed in part as follows:

(a) the ban on publication of the names of the three persons who were subjects of the search warrants as set out in paragraph 24[B] of the decision of the Provincial Court Judge is hereby quashed; and

(b) the application to lift the publication ban and sealing order on the evidence of Constable Davidson is dismissed without prejudice to the applicants' right to request that it be further reviewed by the Provincial Court Judge.

William T. Grant
Judge of the Court of Queen's Bench
of New Brunswick