CITATION: CANADIAN BROADCASTING CORPORATION AND OTHERS v. HMQ, 2013 ONSC #6983
COURT FILE NO.: M 261/13
M 263/13
M 264/13
DATE: 20131113

ONTARIO

SUPERIOR COURT OF JUSTICE
Toronto Region

B E T W E E N:	
CANADIAN BROADCASTING CORPORATION & SUN MEDIA CORPORATION Applicants	*I. MacKinnon*, for the applicants
- and -	
HER MAJESTY THE QUEEN, ALEXANDER LISI & JAMSHED BAHRAMI Respondents	*T. Andreopoulos*, for the respondent, Her Majesty the Queen *S. Weinstein*, for the respondent, Alexander Lisi
A N D B E T W E E N:	
TORONTO STAR NEWSPAPERS LIMITED Applicant	*R. Gilliland*, for the applicant
- and -	
HER MAJESTY THE QUEEN,	*T. Andreopoulos*, for the respondent, Her

ALEXANDER LISI & JAMSHED BAHRAMI	)	Majesty the Queen
	)	
	)	*S. Weinstein,* for the respondent, Alexander Lisi
Respondents	)	
	)	
A N D B E T W E E N:	)	
	)	
CTV, A DIVISION OF BELL MEDIA INC., THE GLOBE AND MAIL, SHAW TELEVISION LIMITED PARTNERSHIP & POSTMEDIA NETWORK INC.	)	*P. Jacobsen,* for the applicants
	)	
Applicants	)	
	)	
- and -	)	
	)	
HER MAJESTY THE QUEEN, ALEXANDER LISI & JAMSHED BAHRAMI	)	*T. Andreopoulos,* for the respondent, Her Majesty the Queen
	)	
	)	*S. Weinstein,* for the respondent, Alexander Lisi
Respondents	)	
	)	
	)	**HEARD:** written submissions

NORDHEIMER J.:

[1] While the stated foundation for the remedies sought differ slightly between these applications, in the end result what all of the applicants seek is access to additional information found in an Information to Obtain ("ITO"). The ITO had earlier been sworn by an officer in support of an application for a search warrant under section 487 of the *Criminal Code* that was, on October 2, 2013, ordered sealed by Justice Cole of the Ontario Court of Justice pursuant to s. 487.3. The ITO in question is almost 500 pages long. It includes extensive reference to a lengthy investigation undertaken by the Toronto Police Service. Also included within the ITO are references to non-consensual intercepted private communications that the police obtained

further to judicial authorizations granted under Part VI of the *Criminal Code* in relation to an earlier and related investigation known as Project Traveller.

[2] In response to the applications, the Crown provided an edited version of the ITO. The edits to the ITO were helpfully divided into four categories: (i) edits made to protect information relating to innocent third parties; (ii) edits relating to any references to the non-consensual intercepted private communications; (iii) edits relating to investigative techniques and (iv) edits relating to confidential informants. The applicants do not take any issue with the fourth category and the edits in the third category were resolved between counsel. That leaves the first two categories to be dealt with. It was agreed that the process would begin with the first category of edits, the so-called innocent third party edits. The parties' submissions, and these reasons, therefore relate only to that first category. The second category remains to be dealt with at a later date.[1]

[3] Even after all of these edits, there was still a large amount of information remaining in the ITO that the Crown did not seek to continue to protect subject only to certain preliminary issues that I ruled upon at the time and to which I will make further reference in a moment. As a consequence, on October 30, 2013, I ordered that the unedited portions of the ITO be released to the public.

Preliminary issues

[4] Prior to dealing with the first category, I should record the preliminary rulings that I made respecting these applications and provide my reasons for those rulings. As I have mentioned, on an earlier hearing, the applicants sought the immediate release of those portions of the ITO that the Crown had not edited. Crown counsel raised an issue whether innocent third parties mentioned in the ITO should be given notice of these applications and an opportunity to be heard. Also, the respondent Lisi sought to make submissions on whether some information not edited by the Crown ought to have been edited under the innocent third parties category. I declined to provide notice to the innocent third parties and I declined to allow counsel for Mr.

[1] Consideration of the second category of edits was deferred in part to await my decision in the companion Project Traveller proceedings regarding the application of s. 193 of the *Criminal Code* to that ITO insofar as it also refers to non-consensual intercepted private communications. My decision in that regard was released on November 5, 2013.

Lisi to make submissions on additional edits that he contended ought to have been made. At the end of the argument, I gave brief oral reasons as follows:

> I see no principled basis for providing notice to any of the persons who are mentioned in the ITO. To do so would, in my view, open up a Pandora's box of issues and would greatly lengthen a process that should, given the nature of the interests involved, be completed as expeditiously as possible.
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> I am also not satisfied that it is appropriate to provide the accused, Lisi, with an opportunity to argue that some material not redacted by the Crown should have been redacted when the foundation for those particular redactions are themselves the subject of a challenge and do not fall within any of the recognized and pressing bases for non-publication such as confidential informant privilege or witness safety. It is the Crown's duty to redact the document and, in my view, the accused must, for these present purposes, take the ITO as he receives it.
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> I conclude therefore that those portions of the ITO that are currently unredacted should be released to the applicants, and all other media organizations, forthwith. A copy of the unredacted ITO as provided to the media organizations should also be placed in the court file.

[5] I only wish to add some brief observations to those oral reasons. The procedural problems, on the issue of giving notice to innocent third parties, are significant. The Crown advised that there were approximately 70 such persons mentioned in the ITO. That does not surprise me. On wiretap authorizations, for example, that can run many hundreds of pages, a great many people may be mentioned. Some are mentioned substantively and some are mentioned just in passing.

[6] At this point, the identity of those persons is unknown and may never be known depending on the results of any application for access to the material. The first thing that happens, of course, if notice is given to these individuals is that their identities and presence in the material is immediately revealed. The object of protecting these individuals from what some will assert is unnecessary publicity is right away undercut by the very process that is supposed to address that protection.

[7] Another practical problem is finding all of these people, giving them a period of adequate notice, allowing for counsel to be retained and instructed and then a hearing held. The issue of public access to these documents carries with it an inherent degree of immediacy. The prospect

of giving all of these people notice, along with all of the associated steps that flow from doing so, would likely add many weeks of delay in getting the substantive issues addressed.

[8] Yet another practical problem would arise from the need to provide each of these individuals with the ITO in order that they could make informed submissions on the issue of what, if anything, should be edited. At the moment, access to the ITO is very tightly controlled. Allowing, in this case, 70 people to have access to the ITO (which would have to be in an unedited form at least regarding the information relating to those individuals) would greatly compromise the current confidentiality of the ITO.

[9] It is generally accepted that the obligation to edit any material used to obtain a judicial authorization falls to the Crown as prosecutor. Indeed, in the case of wiretap packets, s. 187(4) of the *Criminal Code* expressly directs the prosecutor to edit any document for the purpose of deleting any material that the prosecutor believes "would be prejudicial to the public interest". Include within that category of prejudicial material is "prejudice to the interests of innocent persons". A similarly worded provision is contained within s. 487.3 as the basis for a sealing order with respect to search warrants.

[10] I concluded, therefore, that the obligation to make edits, on any of the recognized bases upon which such edits are properly made, rests solely on the Crown. Any edits made are subject to challenge down the road either by an accused person or by any other person who has a legitimate and recognized right of access to the material. The editing process, however, remains the responsibility of the Crown. I see no reason to expand that process in a manner that would permit accused persons or third parties a right to review and add to those edits.

[11] Having said that, I allow for the possibility that there might be that rare and exceptional case where a compelling argument could be made to permit the involvement of such additional parties in the editing process. No such compelling case was made out here. Establishing a rule that such a process should generally be followed carries with it too many impediments to expeditiously addressing the issue of access and gives rise to too many risks of improper or inadvertent disclosure occurring.

[12] The same points are generally true regarding the request of Mr. Lisi to add to the edited material. At that time, Mr. Lisi did not seek to expand the edits based on fair trial rights or any other basis personal to him as an accused person.[2] Rather, he sought to add to the innocent third parties edits. I did not see any reason why Mr. Lisi should be given standing to argue in favour of additional edits on that basis. That issue is entirely one within the purview of the Crown.

[13] It is for these reasons that I declined to give notice to the third parties and declined to permit the accused to participate in the initial editing process.

The innocent persons edits

[14] I now turn to the main issue raised on this aspect of these applications. In the edited ITO, there were a large number of edits made by the Crown that fell into the innocent persons category. These edits were identified by red boxes being placed around the material that the Crown said should continue to be withheld from public access on this basis. Accordingly, I will refer to them as the "red boxed" edits.

[15] Before proceeding, I should record one other event that has occurred and that impacts on the issues raised here to some extent. As the result of the very recent discovery by the police of a video involving the Mayor of Toronto, Mr. Lisi has now been charged with extortion in addition to the drug charges that he is facing and to which the search warrants were directed. While counsel for Mr. Lisi did not originally intend to make any submissions on the red boxed edits, as a consequence of this new charge, counsel for Mr. Lisi has identified some portions of the red boxed edits that he now wishes to make submissions on because he asserts that the public release of those portions could infringe Mr. Lisi's fair trial rights on the extortion charge. Consequently, all counsel have, quite fairly, agreed to isolate those portions identified by counsel for Mr. Lisi for the purpose of making separate submissions on that point. In addition, on the consent of all parties, I granted an order on November 8, 2013 permitting the Attorney General of Ontario to intervene in these applications since the Attorney General of Ontario is the prosecutor for the extortion offence. The drug offences are being prosecuted by the Public Prosecution Service of Canada.

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[2] As a result of recent developments, Mr. Lisi's position has changed in one specific respect that I will address shortly. That change in position does not affect this issue, however.

[16] Turning then to the issue at hand, s. 487.3(1) of the *Criminal Code* permits a judge or justice who issues a search warrant to make an order "prohibiting access to and the disclosure of any information relating to the warrant". Such an order is commonly referred to as a "sealing order". The section directs the court issuing a sealing order to consider four specific factors set out in s. 487.3(2). Section 487.3(2) reads as follows:

> 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
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> (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.

[17] The Crown bears the onus of having to satisfy the court that the existing sealing order should be maintained. The presumption is that, once a search warrant is executed, the material filed in support of obtaining the search warrant is to be made accessible to the public. As the Supreme Court of Canada said in *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188 per Fish J. at para. 18:

> Once a search warrant is executed, the warrant and the information upon which it is issued must be made available to the public unless an applicant seeking a sealing order can demonstrate that public access would subvert the ends of justice: [citation omitted]

[18] In deciding that issue, it is established (and accepted by all parties here) that the *Dagenais/Mentuck* test is to be applied. That test was recently re-stated in *Toronto Star* where Fish J. said, at paras. 26-27:

> The *Dagenais* test was reaffirmed but somewhat reformulated in *Mentuck*, where the Crown sought a ban on publication of the names and identities of undercover

> officers and on the investigative techniques they had used. The Court held in that case that discretionary action to limit freedom of expression in relation to judicial proceedings encompasses a broad variety of interests and that a publication ban should only be ordered when:
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> (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. [para. 32]
>
> Iacobucci J., writing for the Court, noted that the "risk" in the first prong of the analysis 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" (para. 34). [original emphasis]

[19] The basis that the Crown submits for maintaining the red boxed edits is that the release of the information in the red boxes would harm innocent persons. The Crown adds to that submission that the information in the red boxes relating to these innocent persons was not essential to the basis for obtaining the search warrant. Specifically in its submissions, the Crown said, at para. 3:

> The information, the Crown submits, is completely irrelevant and unrelated to the focus of the drug investigation in respect of which the search warrants were sought and is easily capable of being severed from the ITO at no expense to the public interest.

[20] There are two principal difficulties with that combined submission. First, the "non-essential narrative" submission is fundamentally problematic because, if the narrative was truly non-essential, it ought not to have been included in the ITO. What a proper ITO requires are the "material" facts necessary to satisfy the test for the issuance of a search warrant informed by the requirement to make "full, fair and frank disclosure".[3] It must therefore be assumed that if material was included in the ITO, the police officer who swore the ITO considered that the included material was necessary to achieve either or both of those purposes. While I am aware that there is a tendency towards being overly inclusive in affidavits used to obtain judicial

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[3] see, for example, *R. v. Araujo*, [2000] 2 S.C.R. 992 at para. 46.

authorizations, I do not believe that it is proper on an after the fact application such as this one to start parsing out what is or is not "essential" and thus attempt to restrict public access to portions of an ITO on that basis.

[21] The fact is that all of this information was placed before the authorizing judge and it is all part of the court record for this proceeding. All of this material is presumed to have informed the authorizing judge's decision to grant the search warrant. Also, the nature of the application here is entirely different from an after the fact review of the ITO as part of a challenge to the issuance of the warrant. Very different interests are at stake. In the situation of a challenge, it is open to the Crown to submit that some portion of the ITO, that may turn out to erroneous or misleading, was not essential to the foundation for the warrant and therefore can be disregarded by the reviewing judge in terms of whether the warrant should be validated. That is an entirely different exercise than is engaged here.

[22] In my view, when it comes to the issue of public access to the material, it is not open to the Crown to attempt to maintain secrecy over portions of that material on the basis that it was unnecessary to the process in the first place. That would become a much too easy way of maintaining secrecy over material filed for a judicial authorization and would greatly diminish the recognized interest that the public has in access to this material. In that regard, I repeat the observation made in *Ottawa Citizen Group Inc. v. Canada (Attorney General)* (2005), 75 O.R. (3d) 590 (C.A.) where MacPherson J.A. said, at para. 65:

> 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.

[23] In addition, just because some material may not be "essential" does not mean that it did not play some role in the authorizing judge's decision. I would add one other observation on this point. An approach that clearly establishes that all material filed in an ITO is going to eventually become public may carry with it a secondary benefit in that it may cause affiants to pause and more fully consider what material they should include in an ITO.

[24] The second difficulty relates to the Crown's blanket assertion that the lives and reputations of innocent persons will be harmed if the red boxed edits are revealed. The Crown has not filed any evidence that direct harm will be caused to any person nor has the Crown specified the precise nature of that harm. While the absence of direct evidence may not be fatal to an assertion that harm may result, a generalized assertion of harm is likely to be much less persuasive in the *Dagenais/Mentuck* analysis than would an evidentiary record that detailed actual and specific harm.

[25] Much of what is in the red boxed edits are references to police interviews with persons connected to the Mayor. In that regard, it should be remembered that the investigation that was undertaken by the police, and that lead to the revelation of the drug offences involving Mr. Lisi and Mr. Bahrami, was an investigation into allegations surrounding the Mayor. It was not an investigation into the activities of Mr. Lisi and Mr. Bahrami. Consequently, it is not surprising that the bulk of the information garnered as a result of the investigation relates to the activities of the Mayor.

[26] Further, as the applicants correctly point out, the identities of the persons who were interviewed by the police are already publicly known. When they were interviewed by the police, each of these persons knew or ought to have known that the information that they gave to the police might eventually become public. Certainly, there is nothing in the material filed that reveals, or even suggests, that any promises of confidentiality were made to any of these individuals.

[27] Nevertheless, I appreciate that some information provided to the police might prove to be of some embarrassment to other people given that frank opinions were offered on relationships, motivations, and other matters but that type of embarrassment is not of a level of significance that it would normally be sufficient to trump the principle of openness. The same point applies to various speculative theories that were offered by some of these people regarding the activities of other persons. In considering the issue of harm to persons mentioned in the ITO, it seems to me that we have to operate on two basic assumptions. One is that the media will be responsible in what they choose to report and the other is that members of the public reading about this information will appreciate that it is untested and unconfirmed. In some instances, the

information may amount to nothing more than backyard gossip and should be treated as such. As I observed in *R. v. Kelly [Canadian Broadcasting Corp. v. Canada]*, [2007] O.J. No. 5436 (S.C.J.); aff'd. [2008] O.J. No. 1484. (C.A.); leave to appeal denied [2008] S.C.C.A. No. 305, at para. 33:

> Further, I do not accept that these officers are completely devoid of avenues to respond to any such consequences. They have the right to speak out and defend themselves, if they wish to do so. They also have the right to remain silent and rely on the fairness and good sense of the public who may read anything said about them. Presumably the vast majority of readers of any publication of this information will consider anything said about these officers in the context of where the information emanates, that is, from the untested, and to date unproven, allegations of a police agent made as part of an investigation that did not lead to any charges against these officers.

[28] In addition, possible harm to innocent persons is only one of the factors set out in s. 487.3(2) that is to be considered in deciding whether information used to obtain a search should be subject to a sealing order. The very nature of the *Dagenais/Mentuck* test, as reflected in s. 487.3(2), requires a balancing of all of the factors mentioned in the section as well as the nature of the case itself. As was observed in *Phillips v. Vancouver Sun*, [2004] B.C.J. No. 14 (C.A.) by Prowse J.A., at para. 82:

> Further, under s. 487.3, prejudice to the innocent is but one of several factors the court must take into consideration in determining whether a sealing order should be granted or varied. 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.

[29] That said, I accept that there are some appropriate and necessary exceptions to the public's right to know. I see no reason why personal identifiers such as dates of birth, telephone numbers, licence plate numbers, FPS numbers[4] and the like need to be made public. None of that type of information is necessary to evaluate what lead to the granting of the search warrants. Public access to the material filed is given so that the public can understand what has gone on in the court proceeding, not for the possible purpose of tracking people down. Also, in this day

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[4] Fingerprint system numbers

where identity theft is a real and substantial risk, it is even more important that the privacy of such personal identifiers be maintained. In fairness, I should add, on this point, that it is not clear to me that the applicants are seeking access to that information.

[30] The other exception I would permit is regarding certain references made in the ITO to events involving the Mayor's wife who apparently had some personal issues during the course of the time covered by the ITO. I do not see any reason at this stage why her personal circumstances need to be made public. They appear only to have been included to place the Mayor at a particular place and/or with respect to contacts at a particular time but the underlying reasons for the inclusion of those details regarding the Mayor's wife seem to be of no moment whatsoever to the investigation. In that narrow instance, it seems to me that the specific incidence of potential personal embarrassment is sufficiently great, and its assistance to the public's necessary knowledge relating to the search warrants sufficiently low, to justify maintaining the ban on access to those few items. However, since this specific issue was not addressed by any of the parties in their submissions, I am prepared to hear further submissions on this one point, if the parties have need to do so.

[31] In the end result, the Crown has failed to meet either prong of the *Dagenais/Mentuck* test in relation to the red boxed edits. There is no serious risk posed to the administration of justice arising from giving public access to this material. Further, the negative impact on the public's right to know and the impact on the *Charter* protected right of expression would greatly exceed any beneficial effects of maintaining the sealing order. There is, consequently, no proper foundation for continuing the sealing order as it relates to that material, subject to the following three exceptions:

(i) the personal identifiers;

(ii) the specific portions dealing directly with the Mayor's wife;

(iii) the specific portions identified by counsel for Mr. Lisi and that are to be the subject of separate submissions regarding Mr. Lisi's fair trial rights.

[32] If there are any issues regarding the precise application of my conclusions to the red boxed edits, I may be spoken to.

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NORDHEIMER J.

Released: November 13, 2013

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REASONS FOR DECISION

NORDHEIMER J.

RELEASED: