In the Provincial Court of Alberta

Citation: Edmonton Journal v. Canada (Justice), 2013 ABPC 356

Date: 20131218
Docket: 131339806Z1
Registry: Edmonton

Between:

Edmonton Journal, a Division of Postmedia Network Inc.

Applicant

- and -

Her Majesty the Queen in Right of Canada and Her Majesty the Queen in Right of Alberta

Respondents

Decision of the Honourable Judge J.L. Dixon

I. INTRODUCTION

[1] On October 20, 2013, the policing authority brought an *ex parte* application for a Production Order pursuant to Section 487.012 of the *Criminal Code of Canada*, R.S.C., 1985, c. C-46 ("*Criminal Code*") requiring the Applicant to produce specified documents and videos and for a Sealing Order sealing the file. The Orders were granted by this Court.

[2] The Applicant is applying to have access to the unredacted Information to Obtain ("ITO") on strict non-disclosure conditions to consider whether it will bring an application to amend or quash the Production Order. The Respondents oppose the application.

[3] This Court has been designated by the Assistant Chief Judge to hear this matter in accordance with paragraph 12 of the Practice Note related to Publication Bans (#2) effective February 1, 2005.

II. PRODUCTION ORDER CONSIDERATIONS INVOLVING A MEDIA ORGANIZATION

[4] Section 487.012 of the *Criminal Code* provides as follows:

> **487.012(1) Production order**
> A justice or judge may order a person, other than a person under investigation for an offence referred to in paragraph (3)(a),
>
> > (a) to produce documents, or copies of them certified by affidavit to be true copies, or to produce data; or
> > (b) to prepare a document based on documents or data already in existence and produce it.

[5] In this case the Applicant (and object of the Production Order) is a media outlet. In *Canadian Broadcasting Corp. v. Manitoba (Attorney General)*, 2009 CarswellMan 552, 2009 MBCA 122, [2010] 1 W.W.R. 389, 250 C.C.C. (3d) 61, 203 C.R.R. (2d) 285, 251 Man. R. (2d) 55, 478 W.A.C. 55 ("CBC") the Manitoba Court of Appeal found that the authorizing judge must consider factors additional to statutory factors prior to exercising her discretion to grant a Production Order:

> **33** How does the exercise of the authorizing judge's discretion differ when the targets are media outlets, and how then does that impact the task of the reviewing judge?
>
> **34** Where the targets of the search warrants are media outlets, the jurisprudence has developed certain factors which must be weighed and considered during the exercise of the authorizing judge's discretion. This is something that the reviewing judge must consider when applying the *Garofoli* test. When the targets of a search warrant are media outlets, the reviewing judge must apply a modified *Garofoli* test, modified in that some special factors must be considered in the exercise of the authorizing judge's discretion. The media are entitled to particularly careful consideration because of the importance of their role in a democratic society, whether production orders or search warrants are issued. ...

[6] The additional factors were articulated by Justice Cory on behalf of the majority in *Canadian Broadcasting Corporation v. Attorney General for New Brunswick; Canadian Association of Journalists (intervenor)*, 1991 CarswellNB 24, 9 C.R. (4th) 192, 130 N.R. 362, 119 N.B.R. (2d) 271, 300 A.P.R. 271, (sub nom. *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*) 85 D.L.R. (4th) 57, 67 C.C.C. (3d) 544, [1991] 3 S.C.R. 459, (sub nom. *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*) 7 C.R.R. (2d) 270, J.E. 91-1762, EYB 1991-67329. In that case a search warrant had been issued authorizing the seizure of a video tape made by the CBC of a demonstration in which property was destroyed. Justice Cory stated as follows:

> **29** ... Because of its intrusive nature, a warrant to search any premises must only be issued when a justice of the peace is satisfied that all the statutory requirements have

been met. In those situations where all the statutory prerequisites have been established, the justice of the peace should still consider all of the circumstances in determining whether to exercise his or her discretion to issue a warrant. It is not a step that can be taken lightly. This is particularly true when a warrant is sought to search the offices of a news media organization,where the consequences are likely to be disruptive of the media's role of gathering and publishing news.

30 The media have a vitally important role to play in a democratic society. It is the media that, by gathering and disseminating news, enable members of our society to make an informed assessment of the issues which may significantly affect their lives and well-being. The special significance of the work of the media was recognized by this court in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, [1990] 1 W.W.R. 577, 102 N.R. 321, 64 D.L.R. (4th) 577, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 41 C.P.C. (2d) 109, 45 C.R.R. 1, at pp. 1339-1340 [S.C.R.]. The importance of that role, and the manner in which it must be fulfilled, gives rise to special concerns when a warrant is sought to search media premises.

[7] Justice Cory discussed the difficult role of the Court in balancing the conflicting interests prior to issuing a judicial authorization involving a media organization. He rejected the argument of the Canadian Broadcasting Corporation that there were only two factors to be considered in deciding whether a search warrant of a media organization was appropriate (alternative sources of the information and urgency of the situation):

38 In my view, the assessment of the reasonableness of a search cannot be said to rest only upon these two factors. Rather, all factors should be evaluated in light of the particular factual situation presented. The factors which may be vital in assessing the reasonableness of one search may be irrelevant in another. Simply stated, it is impossible to isolate two factors from the numerous considerations which bear on assessment of the reasonableness of a search and label them as conditional prerequisites. The essential question can be put in this way: taking into account all the circumstances and viewing them fairly and objectively, can it be said that the search was a reasonable one?

39 It is the overall reasonableness of a search which is protected by s. 8 of the *Charter*. Certainly the potentially damaging effect of a search and seizure upon the freedom and the functioning of the press is highly relevant to the assessment of the reasonableness of the search. Yet neither s. 2(*b*) nor s. 8 of the *Charter* require that the two factors set out in *Pacific Press*, supra, must always be met in order for a search to be permissible and constitutionally valid. It is essential that flexibility in the balancing process be preserved so that all the factors relevant to the individual case may be taken into consideration and properly weighed.

[8] Ultimately, Justice Cory identified the following factors to be considered by the authorizing judge in an application for a search warrant against a media organization (paragraph 44):

(1) It is essential that all the requirements set out in s. 487(1)(*b*) of the *Criminal Code* for the issuance of a search warrant be met.

(2) Once the statutory conditions have been met, the justice of the peace should consider all of the circumstances in determining whether to exercise his or her discretion to issue a warrant.

(3) The justice of the peace should ensure that a balance is struck between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news gathering and news dissemination. It must be borne in mind that the media play a vital role in the functioning of a democratic society. Generally speaking, the news media will not be implicated in the crime under investigation. They are truly an innocent third party. This is a particularly important factor to be considered in attempting to strike an appropriate balance, including the consideration of imposing conditions on that warrant.

(4) The affidavit in support of the application must contain sufficient detail to enable the justice of the peace to properly exercise his or her discretion as to the issuance of a search warrant.

(5) Although it is not a constitutional requirement, the affidavit material should ordinarily disclose whether there are alternative sources from which the information may reasonably be obtained and, if there is an alternative source, that it has been investigated and all reasonable efforts to obtain the information have been exhausted.

(6) If the information sought has been disseminated by the media in whole or in part, this will be a factor which will favour the issuing of the search warrant.

(7) If a justice of the peace determines that a warrant should be issued for the search of media premises, consideration should then be given to the imposition of some conditions on its implementation, so that the media organization will not be unduly impeded in the publishing or dissemination of the news.

(8) If, subsequent to the issuing of a search warrant, it comes to light the authorities failed to disclose pertinent information that could well have affected the decision to issue the warrant, this may result in a finding that the warrant was invalid.

(9) Similarly, if the search itself is unreasonably conducted, this may render the search invalid.

[9] In principle, these factors apply equally to an application for a Production Order.

III. SPECIAL CONSIDERATIONS ARISING FROM THE SEALING ORDER

[10] This application is preliminary to a decision by the Applicant to challenge the Production Order. At this juncture the Applicant is seeking access to the ITO relied upon in the *ex parte*

application to enable it to consider whether to apply to quash the Production Order. The Applicant has offered to enter into confidentiality arrangements to permit one officer of the Applicant and counsel for the Applicant to review the ITO.

[11] The Respondents object to the release of the ITO at all. The Respondents provided the Applicant and the Court with a redacted copy of the ITO. The redacted copy was entirely blacked out with the exception of matters identifying the deponent of the ITO, the basis for belief the Applicant possessed the material and the Order sought. The basis of the redaction is that disclosure to the Applicant of the redacted material would "compromise the nature and extent of an ongoing investigation and prejudice the interests of an innocent person."

[12] The Respondent argues that the decision in *Canadian Broadcasting Corporation v. Manitoba (Attorney General)* and related authorities have no application in this case because this Production Order is sought in the context of an ongoing investigation and the Court has issued a Sealing Order.

[13] The Respondent relies on the decision of the Supreme Court of Canada in *Toronto Star Newspapers Ltd. v. Ontario*, 2005 CarswellOnt 2613, 2005 SCC 41, 197 C.C.C. (3d) 1, 253 D.L.R. (4th) 577, 29 C.R. (6th) 251, EYB 2005-92055, J.E. 2005-1234, 200 O.A.C. 348, 335 N.R. 201, 76 O.R. (3d) 320 (note), 132 C.R.R. (2d) 178, [2005] 2 S.C.R. 188 in support of its argument that no exception is appropriate to the Sealing Order. Justice Fish discussed the application of the *Dagenais/Mentuck* test to sealing orders:

> **1** In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy.
>
> **2** That lesson of history is enshrined in the *Canadian Charter of Rights and Freedoms*. Section 2(*b*) of the *Charter* guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.
>
> **3** The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.
>
> **4** Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice or unduly impair its proper administration.*
>
> **5** This criterion has come to be known as the *Dagenais/Mentuck* test, after the decisions of this Court in which the governing principles were established and refined.

> The issue in this case is whether that test, developed in the context of publication bans at the time of trial, applies as well at the pre-charge or "investigative stage" of criminal proceedings. More particularly, whether it applies to "sealing orders" concerning search warrants and the informations upon which their issuance was judicially authorized.

[14] Justice Fish specifically identified the need for particularized grounds to support a sealing order:

> **23** Section 487.3(2) is of particular relevance to this case. It contemplates a sealing order on the ground that the ends of justice would be subverted, in that disclosure of the information would compromise the nature and extent of an ongoing investigation. That is what the Crown argued here. It is doubtless a proper ground for a sealing order with respect to an information used to obtain a provincial warrant and not only to informations under the *Criminal Code*. In either case, however, the ground must not just be asserted in the abstract; it must be supported by particularized grounds related to the investigation that is said to be imperilled. And that, as we shall see, is what Doherty J.A. found to be lacking here.

[15] Ultimately, Justice Fish concluded that the test must be applied flexibly considering the circumstances of each case:

> **31** It hardly follows, however, that the *Dagenais/Mentuck* test should be applied mechanistically. Regard must always be had to the circumstances in which a sealing order is sought by the Crown, or by others with a real and demonstrated interest in delaying public disclosure. The test, though applicable at *all* stages, is a flexible and contextual one. Courts have thus tailored it to fit a variety of discretionary actions, such as confidentiality orders, judicial investigative hearings, and Crown-initiated applications for publication bans.

[16] The decision of Justice McKelvey in *Re: Winnipeg Free Press*, 2006 CarswellMan 85, 2006 MBQB 43, 200 Man. R. (2d) 196, 70 W.C.B. (2d) 54 is of little assistance in this analysis. In that case the media organization seeking access to the ITO which was sealed was not the object of the related search warrant.

[17] The Applicant argues the policing authority has already recognized the Applicant will be discrete and responsible in dealing with the confidentiality of the information in the ITO by its manner of dealing with the Applicant. Firstly, the policing authority is satisfied to proceed by way of Production Order rather than Search Warrant, relying on the Applicant to fully comply with the provisions of an Order of the Court. Secondly, the policing authority contacted a representative of the Applicant weeks in advance of the Production Order identifying the materials sought and confirming the materials were in the custody of the Applicant. Given the conduct of the policing authority the Applicant argues the confidentiality arrangements proposed will adequately address concerns regarding the ongoing investigation.

IV. CONCLUSION

[18] The Applicant is seeking a limited exception to the Sealing Order granted by this Court for the purpose of considering whether to bring an application to quash the Production Order requiring it to produce specified documents and videos. It brings this application given its special status as a media organization and the vitally important role media organizations play in a democracy.

[19] It is clear this Court must consider special factors in granting a Production Order against a media organization. An application of this nature raises important and conflicting principles both central to the effective administration of justice in a democracy: the need for effective policing techniques during the investigative phase of serious crimes and the right of public to be informed of actions of the state where appropriate. These special factors and considerations were not raised by the policing authority in its initial *ex parte* application.

[20] The administration of justice is always best served through fully illuminated and informed debate within the arena of the courtroom, particularly given the nature of the issues which will be raised, should the Applicant choose to challenge the Production Order.

[21] The *Degenais/Mentuck* test requires a flexible and contextual approach where sealing orders are sought. The position of the Respondents is neither flexible nor contextual. The proposed redaction leaves the information released to the Applicant meaningless in the context of the application being considered.

[22] This Court is satisfied the proposal by the Applicant is consistent with the guidance of the Supreme Court of Canada to apply a flexible and contextual approach. The proposal adequately deals with the concerns of the Respondents to maintain the integrity of its investigation while ensuring all relevant factors and considerations are adequately argued before this Court should an application to quash the Production Order be pursued.

[23] Accordingly, the application for access to the ITO is granted, subject to Counsel for the Applicant providing a form of Order consistent with the confidentiality proposal.

Heard on the 22nd day of November, 2013.
Dated at the City of Edmonton, Alberta this 18th day of December, 2013.

J.L. Dixon
A Judge of the Provincial Court of Alberta

Appearances:

Fred Kozak, Q.C., of Reynolds, Mirth, Richards & Farmer LLP
for the Applicant

Kanchana Fernando, of the Department of Justice Canada
for the Respondents