SUPREME COURT OF NOVA SCOTIA
Citation: *National Bank Financial Ltd. v. Potter*, 2012 NSSC 90

Date: 20120302
Docket: Hfx No 174293
Hfx No 206439
Hfx No 208293
Hfx No 246337
SH No 216059
Registry: Halifax

Between:

National Bank Financial Ltd.

Plaintiff and
Defendant by Counterclaim

v.

Daniel Frederick Potter, Gramm & Company Incorporated, Starr's Point Capital Incorporated, 2532230 Nova Scotia Limited, 3020828 Nova Scotia Limited, Ronald D. Richter, Solutioninc Limited, John Francis Sullivan and Linda Fate Sullivan, Calvin W. Wadden, Craig Anthony Dunham, Douglas George Rudolph, Gerald B. McInnis and Janine M. McInnis, Lowell R. Weir, Blackwood Holdings Incorporated and Staffing Strategists International Inc.

Defendants and
Plaintiffs by Counterclaim

- and -

Daniel Potter, Starr's Point Capital Incorporated, Fiona Imrie, Gramm & Company Incorporated, 2532230 Nova Scotia Limited, 3020828 Nova Scotia Limited, Ronald Richter, Donald Snow, Meg Research.com Limited, 3027748 Nova Scotia Limited, Calvin Wadden, Raymond Courtney, Bernard Schelew, Blois Colpitts, Stewart McKelvey Stirling Scales, Bruce Clarke, 2317540 Nova Scotia Limited, Knowledge House Inc., The Estate of the Late Michael Barthe, as represented by

his Executrix Barbara Barthe, Lutz Ristow, Derek Banks and Plastics Maritime Ltd.

Third Parties

- and -

The Halifax Herald Limited, Canadian Broadcasting Corporation, and allNovaScotia.com

Interveners

And Between:

Daniel Potter, Knowledge House Inc., and Starr's Point Capital Incorporated

Plaintiffs by Counterclaim

v.

National Bank Financial Ltd., National Bank of Canada, Real Raymond, Jean Turmel, Michel LaBonte, Lorie Haber, Guy Roby, Eric Hicks, Barry Morse, David Mack and Bruce Clarke

Defendants by Counterclaim

And Between:

Calvin Wadden, 3019620 Nova Scotia Ltd. and Andrea Wadden

Plaintiffs
Defendants by Counterclaim

v.

BMO Nesbitt Burns

Defendant
Plaintiff by Counterclaim

Judge:	The Honourable Justice Gregory M. Warner
Heard:	February 24, in Halifax, Nova Scotia
Oral Decision:	February 24, 2012
Written Decision:	March 2, 2012
Counsel:	Mark T. Knox, for Bruce Clarke Nancy G. Rubin, for the Interveners, The Halifax Herald Limited and Canadian Broadcasting Corporation AllNovaScotia.com, unrepresented David Coles, Q.C., for NBFL and NBC, watching brief Sean MacDonald, for the Defendants and Plaintiffs by Counterclaim, watching brief

By the Court:

Overview

[1] This is a motion by a non-party, Bruce Clarke, for a Confidentiality Order, pursuant to Rule 85 of the *Civil Procedure Rules* (*CPR*) and s 37 of the *Judicature Act*, RSNS 1989, c 240. Mr. Clarke was ordered to appear as a witness in these civil proceedings (five related actions being heard together). He asserts that testifying in open court will infringe on his right to a fair trial in an ongoing related criminal proceeding.

[2] The motion is opposed by The Halifax Herald Limited ("Herald"), the Canadian Broadcasting Corporation ("CBC"), and allNovaScotia.com ("allNS").

[3] At the end of the hearing, I gave an oral decision dismissing this motion. I advised the parties that I would be providing written reasons without changing my analysis. What follows are those reasons.

Background

[4] The relevant factual background in this litigation is set out in other published decisions.

[5] For this motion, it is enough to say that Mr. Clarke was a former employee of the Plaintiff and Defendant by Counterclaim, National Bank Financial Ltd. ("NBFL"), at the relevant time in this case. Prior to his termination, Mr. Clarke was an investment advisor in NBFL's Halifax branch office.

[6] It is alleged by the Defendants and Plaintiffs by Counterclaim ("Dunlop Plaintiffs") that Mr. Clarke participated in a market manipulation scheme to artificially elevate the stock price of Knowledge House Inc. ("KHI"), which at the time was a publicly traded company on the Toronto Stock Exchange. The Dunlop Plaintiffs further allege that the collapse of this scheme led to a collapse in the KHI stock. Between the spring of 2000 and the fall of 2001, KHI went from a total market valuation of over $100 million to a market valuation of essentially $0. The Dunlop Plaintiffs submit that NBFL should be responsible for their losses

associated with the collapse of KHI, either by vicarious liability for wrongdoing of Mr. Clarke or because NBFL failed to adequately supervise Mr. Clarke.

[7] Following the collapse of KHI, NBFL terminated Mr. Clarke. NBFL then sued Mr. Clarke for conspiracy, and Mr. Clarke counterclaimed for wrongful dismissal. Both of these actions were settled, so Mr. Clarke is no longer a party to this proceeding.

[8] On May 13, 2004, the Nova Scotia Securities Commission ("Commission") approved a settlement agreement between Mr. Clarke and the Commission. This agreement proceeded on the basis of agreed upon facts. Pursuant to the agreement, Mr. Clarke admitted to assisting an unidentified "Insider Group" with an arrangement to jointly maintain the price of KHI stock. Mr. Clarke further admitted that since this arrangement was never disclosed to the public it violated the *Securities Act*, RSNS 1989, c 418.

[9] By indictment dated March 17, 2011, the Public Prosecution Service of Canada charged Mr. Clarke, Daniel Potter and Blois Colpitts, on a five count direct indictment. At the relevant times, Mr. Potter was the CEO of KHI, and Mr. Colpitts was both a Director of and legal counsel to KHI. Both were once parties to these proceedings - Potter as a plaintiff and defendant, and Colpitts as a defendant. Because of settlement agreements, neither are now parties.

[10] The three co-accused are charged on one indictment with: 1) conspiracy to commit fraud (in violation of ss 465(1)(c) and 380(1)(a) of the *Criminal Code of Canada* (*CCC*)), 2) fraud affecting the public market (in violation of s 380(2) of the *CCC*, and 3) three counts of fraud (in violation of s 380(1)(a) of the *CCC*).

[11] The criminal proceeding is being case managed. Substantial crown disclosure has been provided, but no trial date has been set. Several pretrial motions, Charter and non-Charter, are anticipated. The Crown suggests that the trial will take 4 or 5 months. It will likely be some time before the trial commences.

[12] Because the criminal charges are pursuant to a direct indictment, the accused are presumed to have elected trial by judge and jury, but they have the right to re-

elect to trial by judge alone so long as that re-election is not opposed by any of the accused. No such election has yet been made.

[13] On February 13, 2012, this Court ordered Mr. Clarke to appear to testify in these proceedings. The Dunlop Plaintiffs' request for the Order was contested and this court determined, based on the pleadings and history of these proceedings, that Mr. Clarke likely has relevant evidence that would not be otherwise available. Mr. Clarke and Counsel for Mr. Clarke appeared on February 20th, and requested a short period of time to consider the case law relevant to Mr. Clarke's potential testimony, as well as the possibility of seeking a Confidentiality Order. This request was granted and a new Order issued for Mr. Clarke to appear to testify on Monday, February 27, 2012.

[14] On February 21, 2012, Mr. Clarke filed a Notice of Motion seeking a Confidentiality Order pursuant to *CPR* 85.04. Specifically, Mr. Clarke seeks a Confidentiality Order:

1) excluding the public from the courtroom during his testimony;

2) prohibiting the disclosure of his identity or any information that might disclose his identity; and

3) blocking access to the court recording.

[15] Mr. Clarke gave the appropriate notice of his motion to the media.

[16] Counsel for Mr. Clarke filed a brief and his own short affidavit on behalf of his client. Mr. Clarke did not provide an affidavit. The factual evidence most germane to this motion is contained in paragraphs 8-10:

> (8) I expect one (or more) of the Plaintiffs in these proceedings will be a witness for the prosecution in the criminal trial.
>
> (9) If Mr. Clarke is obligated to give evidence for a party in this trial, I am concerned about the ability of a

> prospective juror in the criminal trial to learn of, hear of, or read about Mr. Clarke's evidence.
>
> (10) If Mr. Clarke is obligated to give evidence for a party in this trial, I am concerned that the prosecution, prosecution witnesses, and/or investigators may gain – intentionally or unintentionally – an advantage should Mr. Clarke's evidence be published, broadcast or made known to the public.

Issues

[17] This motion raises the following issues:

1) Has Mr. Clarke established that part or all of the Confidentiality Order requested are necessary to prevent a real and substantial risk to his fair trial rights in his criminal trial, and that there are not reasonable, alternative measures to prevent the risk?

2) Do the positive effects of the Confidentiality Order outweigh the deleterious effects on the rights and interests of the parties and the public?

Position of the Parties

[18] Mr. Clarke submits that if he is compelled to testify in open court, his right to a fair trial in the related criminal proceeding will be infringed, because the prospective jury pool will be tainted and the prosecution may be able to glean and use his testimony to their advantage. Mr. Clarke also impliedly submits that parties to this proceeding may hear his testimony, and adapt their testimony in his subsequent criminal trial to Mr. Clarke's detriment. Mr. Clarke argues that the test for a Confidentiality Order has been met, and that nothing less than a closure of court is warranted.

[19] The Herald and CBC submit that the onus is on Mr. Clarke to establish that a Confidentiality Order is necessary to prevent a serious risk to his right to a fair trial. The Herald and CBC contend that the evidence presented by Mr. Clarke fails to discharge this onus. In the alternative, the Herald and CBC argue that there are

reasonable alternative measures that obviate the need for a Confidentiality Order. The Herald and CBC further argue that a balancing of Mr. Clarke's right to a fair trial against the public's right to open court favours the latter.

[20] AllNS's written submission simply cites *Dagenais*, *infra*, the open court principle, and the Charter 2(b) right of the press. AllNS did not appear to make oral submissions at the hearing.

Relevant Civil Procedure Rules and Legislation

[21] Confidentiality Orders are governed by *CPR 85*. The relevant parts read:

> **85.01 - Scope of Rule 85**
>
> (1) This Rule recognizes the need for the court's records to be open to the public, and provides exceptionally for a record to be kept confidential.
>
> (2) The provisions for confidentiality in Part 13 - Family Proceedings, which are to protect a child, prevail over this Rule.
>
> (3) Court records must be made accessible to the public, directly and through the media, in accordance with this Rule.
>
> (4) A court record may be made the subject of an order for confidentiality, in accordance with this Rule.
>
> …
>
> **85.04 - Order for confidentiality**
>
> (1) A judge may order that a court record be kept confidential only if the judge is satisfied that it is in accordance with law to do so, including the freedom of the press and other media under section 2 of the Canadian

> Charter of Rights and Freedoms and the open courts principle.
>
> (2) An order that provides for any of the following is an example of an order for confidentiality:
>
> (a) sealing a court document or an exhibit in a proceeding;
>
> (b) requiring the prothonotary to block access to a recording of all or part of a proceeding;
>
> (c) banning publication of part or all of a proceeding;
>
> (d) permitting a party, or a person who is referred to in a court document but is not a party, to be identified by a pseudonym, including in a heading.
>
> (3) A judge who is satisfied that it is in accordance with law to make an order excluding the public from a courtroom, under Section 37 of the *Judicature Act*, may make an order for confidentiality to aid the purpose of the exclusion.
>
> …

[22] Section 37 of the *Judicature Act* reads:

> Where a judge of the Supreme Court at any proceeding deems it to be in the interest of public morals, the maintenance of order or the proper administration of justice, he may order that the public be excluded from the court.

Law & Analysis

First Issue:

Has Mr. Clarke established that part or all of the Confidentiality Order requested are necessary to prevent a real and substantial risk to his fair trial rights in his criminal trial, and that there are not reasonable, alternative measures to prevent the risk?

History of the open court principle and test for a confidentiality order

[23] "The openness principle is at least as old as the common law" (Paul Schabas, "What Happens at a Bail Hearing Anyway? The Supreme Court's Troubling Retreat from the Openness Principle in *Toronto Star v. Canada*" (2011) 54 Sup Ct L Rev (2d) 197 at 199).

[24] In both pre-Charter and early post-Charter cases, the Supreme Court of Canada recognized the fundamental importance of open courts to public life in Canada and the inclusion of the principle of open courts as a component of freedom of expression (*Nova Scotia (Attorney General) v MacIntyre*, [1982] 1 SCR 175; *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 [*Edmonton Journal*]). In *Edmonton Journal*, at 1139-1140, Cory J, writing for the majority, stated:

> [M]embers of the public have a right to information pertaining to public institutions and particularly the courts. ... It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.

[25] The Supreme Court of Canada continued this line of reasoning in *Canadian Broadcasting Corp v New Brunswick*, [1996] 3 SCR 480. There, a unanimous Court held, at para 23:

> That the right of the public to information relating to court proceedings, and the corollary right to put forward opinions pertaining to the courts, depend on the freedom of the press to transmit this information is fundamental to an understanding of the importance of that freedom. The full and fair discussion of public institutions, which is vital to any democracy, is the *raison d'être* of the s. 2(*b*) guarantees. Debate in the public domain is predicated on an informed public, which is in turn reliant upon a free and vigorous press. The public's entitlement to be informed imposes on the media the responsibility to inform fairly and accurately. This responsibility is especially grave given that the freedom of the press is, and must be, largely unfettered.

[26] The importance of the open court principle was recently reiterated by the Nova Scotia Court of Appeal in *AB v Bragg Communications Inc*, 2011 NSCA 26 at para 44, leave to appeal to SCC granted, 34240 (October, 13 2011) [*Bragg*], where Saunders JA, writing for a unanimous court, stated: "open, unrestricted public access to the court's proceedings and records [is] to be the rule, and any limitation thereof, the exception." This presumption of openness is also reflected in *CPR 85.01(1).*

[27] An equally important tenet of our legal system is the principle against self-incrimination, and the right to a fair trial. Both are protected by the Charter and find their genesis in common law cases just as ancient as the open court principle. "Courts in Canada traditionally have not hesitated to use publication bans as a means of protecting the accused's right to a fair trial" (Kent Roach & David Schneiderman, "Freedom of Expression in Canada" in Gerald-A. Beaudoin & Errol Mendes, eds, *Canadian Charter of Rights and Freedoms*, 4th ed (Markham, ON : LexisNexis Butterworths, 2005) 259 at 297). However, such use can bring the right to a fair trial in conflict with the open court principle.

[28] In *Toronto Star Newspapers Ltd v Canada*, 2010 SCC 21 at para 1, Deschamps J, writing for an eight member majority, held:

> Upholding the rights of Canadian citizens by fostering trial fairness and safeguarding liberty interests is central to the criminal justice process. At the same time, access to the courts is central to a democratic society; it is a means to protect against arbitrary state action. Access to the courts is grounded in freedom of expression. Trial fairness and liberty interests must not clash with freedom of expression. They can be reconciled.

[29] The Supreme Court of Canada's initial test for reconciling these competing interests was developed in the seminal decision of *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 [*Dagenais*]. In *Dagenais*, the four accused, former or present members of a Catholic religious order charged with physical and sexual abuse offences, sought an injunction to prevent the CBC from broadcasting a mini-series that depicted fictional accounts of physical and sexual abuse by Catholic priests, and a publication ban. The trial judge granted the injunction. The Ontario Court of Appeal affirmed the decision, but limited the injunction to Ontario and one television station in Montreal.

[30] In overturning the publication ban, the Supreme Court of Canada, recognized that the common law test had to be reformulated to take into consideration the competing constitutional rights that were raised. Lamer CJC, writing for the majority, proposed the following test:

> A publication ban should only be ordered when:
>
> (a) Such a ban is <u>necessary</u> in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban (*Dagenais* at 878).

[31] For greater clarity, Lamer CJC further held:

> As the rule itself states, the objective of a publication ban authorized under the rule is to prevent real and substantial risks of trial unfairness — publication bans are not available as protection against remote and speculative dangers (*Dagenais* at 880).

[32] Lamer CJC also identified a number of alternatives that could protect an accused's right to a fair trial while at the same time minimizing the need for a publication ban with the concomitant impact on the public's freedom of expression rights:

[33] In *R v Mentuck*, 2001 SCC 76 at para 32, the Supreme Court of Canada, in a unanimous decision, reformulated the test in *Dagenais* as follows:

> 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.

[34] In *Bragg*, the Court of Appeal held that the onus for meeting this test was on the party seeking a Confidentiality Order.

Evidentiary issues

[35] The Herald and the CBC complain that the affidavit by Mr. Clarke's counsel is speculative and not confined to the facts. In particular, the Herald and the CBC argue, citing *CPR* 39.04 and *Waverley (Village Commissioners) v Nova Scotia (Minister of Municipal Affairs)* (1993), 123 NSR (2d) 46 (SC) [*Waverley*], that paragraphs 9 and 10 of the affidavit must be struck. The Herald and the CBC also cite *Vernon v British Columbia (Housing & Social Development, Liquor Distribution Branch)*, 2010 BCSC 1688 at para 22, where the Court held: "The adjournment and publication ban applications both require a proper evidentiary foundation. Statements of counsel alone are not sufficient."

[36] I agree with the Herald and the CBC. The paragraphs in the affidavit respecting possible jury contamination, witnesses altering testimony, and prosecutorial advantage are speculative and vague. It is speculative to assume that the criminal proceedings will be determined by a jury. Even if a criminal trial does proceed by judge and jury, no evidence, other than a bald allegation of "concern", is proffered to support the conclusion that a potential jury would be contaminated by publicity; for example, there is no analysis of what publicity has already transpired in this case or of the public's interest in the case. The affidavit does not explain how or why witnesses from this trial would alter their testimony in subsequent criminal proceedings; for example, the affidavit does not cite "will say" or "can say" statements disclosed by the Crown to support this submission. The affidavit does not explain what "prosecutorial advantage" would be gained given the constitutional protections for use and derivative use that exist.

[37] Based on the authority of *Waverley*, paragraphs 8-10 of counsel's affidavit should be struck. This conclusion is not determinative of the motion. As will be seen below, even if I refused to strike these paragraphs, and proceeded on the basis of the affidavit as it was filed, I would still find that the motion should be dismissed.

Tainting of the jury pool

[38] It is not enough to merely speculate that the jury pool may be contaminated. Per the *Dagenais/Mentuck* test, there must be some evidence of a "serious risk" that the jury pool will be contaminated. Mr. Clarke provides no explanation for why the jury pool will be contaminated, let alone evidence to establish a "serious risk."

[39] On at least two occasions, the Supreme Court of Canada has commented on the ability of jurors to properly deal with publicity surrounding a case.

[40] In *Dagenais* at 884, Lamer CJC stated:

> To begin, I doubt that jurors are always adversely influenced by publications. There is no data available on this issue. However, common sense dictates that in some cases jurors may be adversely affected. Assuming this, I nevertheless believe that jurors are capable of following instructions from trial judges and ignoring information not presented to them in the course of the criminal proceedings.

[41] In *Phillips v Nova Scotia (Commissioner, Public Inquiries Act)*, [1995] 2 SCR 97, at paras 130-134, Cory J noted:

> 130. Further, the examination of the effects of publicity cannot be undertaken in isolation. The alleged partiality of jurors can only be measured in the context of the highly developed system of safeguards which have evolved in order to prevent just such a problem. Only when these safeguards are inadequate to guarantee impartiality will s.11(*d*) be breached. This simple determination requires the resolu- tion of two difficult questions. First, what is an impartial juror? Second, when do the safeguards of the jury system prevent juror prejudice?
>
> 131. The difficulties inherent in defining an impartial jury were pointed out by Newton N. Minow and Fred H. Cate in "Who is an Impartial Juror in an Age of Mass Media?" (1991), 40 American Univ. L. Rev. 631. The authors note (at pp. 637-38) that in the early days of the jury system, jurors were required to be familiar with the facts and parties to a case in order to be eligible to serve. An accused was literally "judged by his peers". Juries and

trials became more sophisticated, and it was no longer seen as necessary that individual jurors be familiar with the case. As concern for the individual rights of the accused developed, it became preferable for jurors to be objective, and this was facilitated if they had no previous knowledge of the facts. However, even before the days of television and mass media coverage, this ideal was criticized by the American writer Mark Twain, as quoted in Minow and Cate, supra, at p. 634:

> [when juries were first used] news could not travel fast, and hence [one] could easily find a jury of honest, intelligent men who had not heard of the case they were called to try — but in our day of telegraph and newspapers [this] plan compels us to swear in juries composed of fools and rascals, because the system rigidly excludes honest men and men of brains.

132 The objective of finding twelve jurors who know nothing of the facts of a highly-publicized case is, today, patently unrealistic. Just as clearly, impartiality cannot be equated with ignorance of all the facts of the case. A definition of an impartial juror today must take into account not only all our present methods of communication and news reporting techniques, but also the heightened protection of individual rights which has existed in this country since the introduction of the *Charter* in 1982. It comes down to this: in order to hold a fair trial it must be possible to find jurors who, although familiar with the case, are able to discard any previously formed opinions and to embark upon their duties armed with both an assumption that the accused is innocent until proven otherwise, and a willingness to determine liability based solely on the evidence presented at trial.

133. I am of the view that this objective is readily attainable in the vast majority of criminal trials even in the face of a great deal of publicity. The jury system is a cornerstone of our democratic society. The presence of a jury has for centuries been the hallmark of a fair trial. I cannot accept the contention that increasing mass media attention to a particular case has made this vital institution either obsolete or unworkable. There is no doubt that extensive publicity can prompt discussion, speculation, and the formation of preliminary opinions in the minds of potential jurors. However, the strength of the jury has always been the faith accorded to the good will and good sense of the individual jurors in any given case. The confidence in the ability of jurors to accomplish their tasks has been put in this way in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, at p. 761:

> Today's jurors are intelligent and conscientious, anxious to perform their duties as jurors in the best possible manner. They are not likely to be forgetful of instructions. The following passage from *R. v. Lane and Ross* (1969), 6 C.R.N.S. 273 (Ont. S.C.), at p. 279, approved in *R. v. Corbett*, [1988] 1 S.C.R. 670, at p. 695, is apposite:
>
> > The danger of a miscarriage of justice clearly exists and must be taken into account but, on the other hand, I do not feel that, in deciding a question of this kind, one must proceed on the assumption that jurors are morons, completely devoid of intelligence and totally incapable of understanding a rule of evidence of this type or of acting in accordance with it. If such were the case there would be no justification at all for the existence of juries .... [Emphasis in original.]

> 134. The solemnity of the juror's oath, the existence of procedures such as change of venue and challenge for cause, and the careful attention which jurors pay to the instructions of a judge all help to ensure that jurors will carry out their duties impartially. In rare cases, sufficient proof that these safeguards are not likely to prevent juror bias may warrant some form of relief being granted under s. 24(1) of the *Charter*. The relief may take many forms. It may be the enjoining of hearings at a public inquiry, a publication ban on some of the evidence given at the inquiry, a staying of the criminal charges, or the imposition of additional protections for the defence at the stage of jury selection: see, as an early example, *R. v. Kray* (1969), 53 Cr. App. R. 412 (C.A.), referred to with approval in *R. v. Hubbert* (1975), 29 C.C.C. (2d) 279 [31 C.R.N.S. 27], affirmed [1977] 2 S.C.R. 267. As this court has held in the past, this type of relief will not be granted on the basis of speculation alone. Normally the time for assessing whether or not an accused's fair trial rights have been so impaired that s. 24(1) relief is required will be at the time of jury selection: *R. v. Vermette*, supra; *R. v. Sherratt*, [1991] 1 S.C.R. 509.

[42] There is already significant publicity in this case over several years that identifies Mr. Clarke as one of the key players. There have been a number of media reports. There is also a publicized settlement agreement wherein Mr. Clarke admits to some level of wrongdoing. The agreed upon statement of facts in that agreement may not be caught by s 13 of the *Charter* since, on the reasoning of *R v Baksh* (2005), 199 CCC (3d) 201 (Ont Sup Ct J), Mr. Clarke was not “testifying directly or indirectly” in that agreement. In these circumstances, it is also hard to understand the need to proceed by way of a pseudonym (See eg *Cahuzac v Wisniowski*, 2010 NSSC 258). In any event, the test is not publicity, but rather a “serious risk” of jury contamination. That, in my view, has not been established

[43] There is simply not enough evidence presented on this motion to discharge the onus on Mr. Clarke that the jurors in a possible jury trial that may be held at

some distant time in the future (at least not in the immediate future) would be tainted by Mr. Clarke's evidence in this litigation, or that the existing safeguards for culling and instructing jurors are not reasonable alternative protections; nor is there non-speculative evidence that the possibility of evidence in the criminal proceeding from one or more of the plaintiffs in this litigation would be changed by his evidence (presumably any such evidence has been disclosed by the Crown before now).

Protections against use and subsequent use of compelled testimony

[44] There does exist a real and substantial issue, on the facts before the court, as to whether Mr. Clarke's evidence in this litigation could incriminate him in the related criminal proceeding, and as to what use the Crown may make of his evidence and any documents that may be put to Mr. Clarke in this litigation. The important factual matrix in this case is that the evidence is the compelled evidence of an accused.

[45] It is helpful to review the surrounding circumstances of this motion, particularly the impact of the common law and constitutional protection for the principle against self-incrimination.

[46] "At common law, no witness, whether a party or otherwise, was compellable to answer any question, the tendency of which was to expose the witness to any criminal charge, penalty or forfeiture of property, or to any ecclesiastical punishment or censure" (Alan W Bryant, Sidney N Lederman & Michelle K Fuerst, *Law of Evidence in Canada*, 3d ed (Markham, ON: Lexis Nexis, 2009) §8.191).

[47] The common law privilege against self-incrimination was abrogated by federal and provincial evidence statutes. These statutes compel a witness to answer self-incriminating questions in a civil proceeding, but provide protection from the use of those answers in subsequent criminal proceedings where the witness objects to the question.

[48] Section 5 of the *Canada Evidence Act*, RSC 1985, c C-5 reads:

> (1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.
>
> (2) Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence.

[49] Section 59 of the Nova Scotia *Evidence Act*, RSNS 1989, c 154 reads:

> (1) A witness shall not be excused from answering any question or producing any document upon the ground that the answer or the document may tend to criminate him or any other person, or may tend to establish his liability to a civil proceeding at the instance of the Crown, or of any person or to a prosecution under any Act of the Legislature.
>
> (2) If, with respect to any question, a witness objects to answer upon any of the grounds set out in subsection (1), and if, but for this Section or any Act of Canada, he would have been excused from answering the question, then, although the witness is by reason of this Section or by reason of any Act of Canada compelled to answer, the answer so given shall not be used or receivable in evidence

> against him in any civil proceeding or in any proceeding under any Act of the Legislature.

[50] Before the *Charter*, a witness was required to both know that his/her testimony was incriminating and object to the question at the time his/her answer was given, in order to later rely on the protections outlined in the evidence statutes. These requirements became moot upon proclamation of the *Charter*. It broadened the protection against the subsequent use of self-incriminating statements.

[51] Section 13 of the *Charter* reads:

> A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

[52] In a long line of cases, the Supreme Court of Canada grappled with whether the protection in s 13 of the *Charter* applied only to subsequent use for incrimination purposes or whether it also applied to subsequent use for impeachment purposes. See Sopinka, *supra*, §8.181 to 8.267, and David Paciocco & Lee Stuesser, *The Law of Evidence*, 6th ed (Toronto: Irwin, 2011) 288-301.

[53] In *R v Noel*, 2002 SCC 67 at para 4, [2002] 3 SCR 433 [*Noel*], Arbour J, writing for an eight member majority, held:

> When an accused testifies at trial, he cannot be cross-examined on the basis of a prior testimony unless the trial judge is satisfied that there is no realistic danger that his prior testimony could be used to incriminate him. The danger of incrimination will vary with the nature of the prior evidence and the circumstances of the case including the efficacy of an adequate instruction to the jury. When, as here, the prior evidence was highly incriminating, no limiting instruction to the jury could overcome the danger of incrimination and the cross-examination should not be permitted.

[54] In *R v Henry*, 2005 SCC 76, [2005] 3 SCR 609 [*Henry*] the Court went further and removed any distinction between use for impeachment purposes and use for incrimination purposes. Binnie J, writing for a unanimous court, stated, at para 50:

> I would go further. Even though s. 13 talks of precluding the use of prior evidence "to incriminate that witness", and thus implicitly leaves the door open to its use for purposes other than incrimination such as impeachment of credibility (as *Kuldip* accepted), experience has demonstrated the difficulty in practice of working with that distinction. If, as *Noël* held, and as Arthur Martin J.A. observed in *Kuldip*, the distinction is unrealistic in the context of s. 5(2) of the *Canada Evidence Act*, it must equally be unrealistic in the context of s. 13 of the *Charter*. Accordingly, by parity of reasoning, I conclude that the prior *compelled* evidence should, under s. 13 as under s. 5(2), be treated as inadmissible in evidence against the accused, even for the ostensible purpose of challenging his or her credibility, and be restricted (in the words of s. 13 itself) to "a prosecution for perjury or for the giving of contradictory evidence".

[55] However, Binnie J drew a distinction between compelled testimony and voluntary testimony—self-incriminating statements of the latter form are *not* protected by s 13 of the *Charter* from subsequent use.

[56] In *R v Nedelcu*, 2011 ONCA 143, leave to appeal to SCC granted, 34228 (May, 2 2011), the Ontario Court of Appeal applied *Henry* in the civil context. A civil action was brought against the accused. At a subsequent criminal trial, the prosecution sought to use his discovery testimony for the purposes of impeachment. The Court of Appeal held that the accused was compelled to attend the discovery; therefore, on the basis of *Henry*, s 13 of the *Charter* protected the accused from subsequent use of his discovery testimony at his criminal trial.

[57] The hearing of the *Nedelcu* appeal by the Supreme Court is scheduled for March 16th, 2012. I have read the facta filed by the Crown and respondent. The Crown submits that evidence in a civil proceedings is not compelled, and further that the reasoning of the court in *Henry* respecting the principled foundation for protecting an accused from any use by the Crown of his/her prior compelled evidence is flawed, because it permits an accused to lie with immunity. Said differently, the protection against subsequent use, even if there is an exception for a subsequent charge of perjury, is too great a *quid-pro-quo* to be given in exchange for compelled testimony where it allows a witness to lie with virtual impunity.

[58] In this case, both Mr. Clarke's discovery testimony and trial testimony would be compelled testimony because both proceeded on the basis of a court order; Mr. Clarke did not voluntarily appear to be discovered. Moreover, for the purposes of this motion, my assessment is that *Noel* and *Henry* rest on a principled and practical foundation that should withstand the appeal. In any event, the decision on this motion must be based on the law as it is currently.

[59] Beyond the direct use of a witness's testimony in a subsequent criminal proceeding, there is also the issue of derivative use. In *R v S(RJ)*, [1995] 1 SCR 451 at 561, the Supreme Court of Canada held that the principle against self-incrimination was a principle of fundamental justice inherent in s 7 of the *Charter* and that, accordingly, the principle against self-incrimination in the *Charter* protected against the derivative use of a compellable witness's testimony:

> I think that derivative evidence which could not have been obtained, or the significance of which could not have been appreciated, but for the testimony of a witness, ought generally to be excluded under s. 7 of the *Charter* in the interests of trial fairness. Such evidence, although not *created* by the accused and thus not self-incriminatory by definition, is self-incriminatory nonetheless because the evidence could not otherwise have become part of the Crown's case. To this extent, the witness must be protected against assisting the Crown in creating a case to meet.

[60] Protections against use and derivative use do not mean that some information will not flow to the prosecution. In *Hollinger Inc v The Ravelston Corp Ltd*, 2008 ONCA 207 at para 89, Juriansz JA, writing in dissent, but in remarks that were accepted by the majority, stated:

> Any civil litigant involving related criminal proceedings, even those taking place in Canada, would be concerned that information filed by another party in the civil proceeding might assist the prosecution in the criminal case. Recognizing such a bald unformulated concern as sufficient reason to seal a civil court file would significantly erode the open court principle and frustrate the public interest in the prosecution of a crime. The open availability of information fosters the goal of criminal and civil proceedings to ascertain the truth. The fact that probative evidence becomes available to the prosecution does not, in itself, render a criminal trial unfair.

[61] This is to be contrasted with cases where information may be passed from the civil context and used in the criminal context because of differences in transnational approaches to the principle against self-incrimination. For example, in *Catalyst Fund General Partner I Inc v Hollinger Inc* (2005), 255 DLR (4th) 233 (Ont Sup Ct J), corporate officers under investigation by a court-appointed inspector in Canada were also facing related parallel regulatory and criminal investigations in the United States. In balancing the appropriate procedural protections to be provided to these corporate officers in Canada, Campbell J considered the fact that the United States approach to the principle against self-incrimination is vastly different than in Canada, and permits the subsequent use of all compelled testimony.

[62] The Supreme Court of Canada has stated that international human rights law is of use in *Charter* interpretation (See eg *United States v Burns*, [2001] 1 SCR 283; See also John H Currie, "International Law in the jurisprudence of the McLachlin Court" in David A Wright & Adam M Dodek, eds, *Public Law at the McLachlin Court* (Toronto:Irwin, 2011) 391). It is informative that international case law on this topic (other than in the United States) appears to coincide with *Henry*. In *Saunders v United Kingdom* [GC], No 19187/91, [1996] ECHR 65, the European Court of Human Rights sitting as a Grand Chamber found (16-4) that the admission of prior compelled testimony in a subsequent criminal proceeding

violated the accused's right against self-incrimination under the *European Convention on Human Rights*. In that case, the applicant was a director of a corporation under investigation for market manipulation. Financial investigators, working in conjunction with the Crown prosecution service, compelled the director to answer questions. The director gave testimony to the investigators both before and after he was charged criminally. The trial judge held that only the testimony given after the director was charged should be excluded. The European Court of Human Rights disagreed and found that the compelled testimony before the financial investigators was inadmissible in a subsequent criminal proceeding.

[63] It goes without saying that I am not the trial judge in Mr. Clarke's criminal proceeding. The trial judge in that proceeding will have ultimate control over what evidence is admissible or inadmissible. However, I find, based on the foregoing, that there are significant and robust protections barring the use or derivative use of Mr. Clarke's testimony in this proceeding in a subsequent criminal proceeding. Therefore, the Confidentiality Order requested is not necessary to protect against any alleged prosecutorial advantage.

Second Issue:

Do the positive effects of the Confidentiality Order outweigh the deleterious effects on the rights and interests of the parties and the public?

[64] I accept the submissions of the Herald and the CBC on the deleterious effects the Confidentiality Order would have on the public. But for my belief in the soundness of the Supreme Court's decision in *Henry*, and the protection it provides Mr. Clarke, the balancing of the open court principle and section 2(b) of the Charter against Mr. Clarke's competing Charter-protected right against self-incrimination would likely have resulted in a different result in the balancing exercise. In the circumstances, I find that the established deleterious effects outweigh the speculative positive effects of the Confidentiality Order.

Conclusion

[65] The evidence proffered by Mr. Clarke fails to establish that a Confidentiality Order is necessary or that there is a serious risk refusing such would impact his right to a fair trial. The common law and the *Charter* protect Mr. Clarke from

subsequent use and derivative use of any testimony Mr. Clarke gives in this litigation pursuant to this court's Order; this protection significantly diminishes any prosecutorial advantage that might be gained from listening to his testimony in open court. Given the amount of publicity already in this trial, including a settlement agreement that may be admissible at the criminal proceeding, it cannot be said that hearing Mr. Clarke testify in open court will have a serious risk of tainting the jury pool. Further, there is insufficient evidence to establish a real and substantial risk that witnesses in this testimony will alter their evidence in subsequent criminal proceedings after hearing Mr. Clarke testify. In respect of the second step of the *Dagenais/Mentuck* test, I find that the deleterious effects of the Confidentiality Order requested would outweigh the speculative positive effects of granting such an order. Therefore, this motion is dismissed.

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Warner, J.