CITATION: *Postmedia Network Inc. v. Her Majesty the Queen*, 2017 ONSC 1433
COURT FILE NO.: 141/16
DATE: 2017-03-17

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
POSTMEDIA NETWORK INC. Applicant	Brendan J. Hughes, for the Applicant
– and –	
HER MAJESTY THE QUEEN Respondent	Peter Scrutton, for the Crown
	Brad Burgess, for the Accused Elizabeth Wettlaufer
	HEARD: February 27, 2017 at Woodstock

HEENEY R.S.J.:

[1] This is an application pursuant to s. 487.3(4) of the Criminal Code for an order lifting the sealing order made by Paull J. of the Ontario Court of Justice on October 26, 2016, with respect to Information to Obtain a Production Order package 2911-16-153 ("the ITO"). The ITO was filed in support of search warrants and production orders relating to a police investigation into Elizabeth Wettlaufer ("the accused"). She has been charged with eight counts of first-degree murder with respect to the deaths of eight nursing home residents in Woodstock and London, Ontario. She also faces four additional counts of attempted murder and two counts of aggravated assault.

[2] The Crown opposes the request, and counsel for the accused supports the position of the Crown.

[3] It should be noted that the original sealing order was varied on consent by my order dated December 16, 2016, whereby a redacted version of the ITO was to be filed by the Crown, and form part of the court file accessible to members of the public. That order has since been carried out. The Crown proposes a further variation of the sealing order, whereby a complete, un-redacted copy of the ITO will be placed in the file once the trial has ended or proceedings are otherwise complete, subject only to the edits that delete home and email addresses that were not otherwise in evidence at trial.

[4] Counsel proceeded with this application in accordance with the procedure suggested by Juriansz J.A. in *R. v. Canadian Broadcasting Corp.*, 2008 ONCA 390 at para. 51:

> Where a sealing order is imposed and an application to unseal warrant materials is commenced, some of the further problems encountered in this case can be avoided by the application judge taking firmer control of how the parties - primarily the Crown - proceed on the application. For example, at the outset, the judge should require the Crown to identify the grounds upon which it opposes allowing access to the specific portions of the warrant materials. The Crown should set out its position in an organized format, such as the table prepared by the Crown and incorporated in Nordheimer J.'s reasons in *Toronto Star*. This document should be provided to the other parties to allow them to make effective submissions. The Crown should provide an unedited copy of the warrant materials to the court, with the edited information identified by highlighting or otherwise, to clearly indicate what portions it seeks to have sealed.

[5] I was provided with an un-redacted version of the ITO for purposes of this application, with the redactions highlighted, which I have reviewed. An un-redacted version has also been placed in a sealed envelope and marked as Exhibit A, for purposes of appellate review, if any. The Crown has set out a table in its factum which references the page where each redaction appears, and the reason claimed for the redaction. In almost all cases, the reason given is "Incriminating information". In eleven instances, the reason was "Privacy of third party", relating to things such as municipal and email addresses and medical conditions.

[6] At the outset of argument, Mr. Hughes, for the Applicant, pointed out that he was compelled to speculate as to what was in the redactions, which limited his ability to make meaningful submissions. I inquired whether he might wish to be provided with an opportunity to read the redacted portions of the ITO, on his undertaking to the court not to share that information with anyone, so that he would be aware of precisely what information the Crown sought to exclude from the public record and why. He indicated that he did not wish to make such a request, and the matter was not pursued. However, it seems to me that this would be a worthwhile procedure to adopt in cases of this nature, since it would put counsel in a position where they might be able to consent to certain redactions, and could then focus their submissions on those redactions that are contentious. While it was suggested that this might require an *in camera* hearing, that is not necessarily the case. If counsel and the court had un-redacted documents before them, argument could proceed by identifying the passages in question by page and line number, without the need to disclose the content. The court could be closed from time to time if the occasion arose where counsel could not make submissions without referring to the details of the redactions. This approach was followed by Durno J. in *R. v. CTV*, 2013 ONSC 5779 (herein referred to as "*Esseghaier*"), and is described by him at paras. 6 - 7 in that decision.

[7] While a great deal of caselaw was filed and referred to during argument, the law is not really in dispute, except with respect to one evidentiary issue which I will discuss below. While I have considered the many authorities filed by both counsel, it is not necessary to refer to most of them. The applicable principles are the same in all cases, while the

results are determined by the specific facts of each case. Those principles are very helpfully set out in detail by Durno J. in *Esseghaier*, and there is no need to repeat his very thorough analysis. Instead, I will simply highlight the key points to be considered.

[8] To begin with, we operate under an open courts principle, where all proceedings are presumptively open to public scrutiny. With respect to a search warrant, that presumption is not applicable to the ITO that was filed to obtain the warrant before the search warrant is executed, but following execution the ITO must be accessible to the public, and to the media who are the eyes and ears of the public, unless it is sealed by a court order pursuant to s. 487.3(1). On an application pursuant to s. 487.3(4) to unseal the ITO, the party seeking to uphold the sealing order (the Crown, in this case) has the onus of proving that this continued limitation on freedom of expression and freedom of the press is justified, in accordance with the *Dagenais-Mentuk* test. The test is outlined at para. 17 of *Esseghaier*:

> The test provides that a discretionary publication ban can only be granted when the following criteria are established on a balance of probabilities:
>
> • such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk; and
>
> • 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.

[9] While the test was originally framed with respect to a publication ban, it is equally applicable to the sealing of a court document, since the effect is equivalent and impacts upon the same protected rights. Furthermore, the Applicant seeks to unseal the ITO precisely so that its contents can be published.

[10] It is a two part test. The Crown must first prove that continuation of the order is necessary to prevent a serious risk to the proper administration of justice. If it does so, the court will then address the balancing exercise described in the second part of the test.

[11] Where fair trial rights are offered as justification for the sealing order, the nature of the risk to the proper administration of justice is described in paras. 26 - 27 of *Esseghaier*:

> The risk must be a serious one, a real and substantial risk. 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 - a serious danger that is sought to be avoided, not a substantial benefit or advantage to the administration of justice sought to be obtained. *Mentuck*, at para. 34. The questions is whether the ban is necessary in order to protect the proper administration of justice, not specifically to protect the fair trial rights of the accused although those fair trial rights are a part of the proper administration of justice. *Mentuck*, at para. 40. Before issuing a publication ban, the judge must have a convincing evidentiary basis for issuing the ban. *Mentuck*, at para. 39.

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

[12] These passages raise the evidentiary issue that I referred to above. The risk must be "well grounded in the evidence". The Applicant argues that the Crown has filed nothing on this motion beyond a boilerplate affidavit by Rosanne McCarthy, a legal assistant at Crown Law Office Criminal, to which the ITO is attached as an exhibit. It is submitted that this affidavit contains no evidence that is capable of satisfying the first branch of the test.

[13] The Crown argues that it is the ITO itself (which is in evidence as an exhibit to the affidavit) that provides the necessary evidence. The serious risk to the proper administration of justice – the fair trial rights of the accused, in this case – is self-evident from reading the redacted portions of the ITO.

[14] In *McDonell c. Flahiff*, 123 C.C.C. (3d) 79 (Q.C.A.), the Quebec Court of Appeal, concluded that the risk to the fair trial rights of the accused can be inferred from the content of the ITO itself. Rothman J.C.A., speaking for the court, said this, at paras. 32 – 33:

> It is true that appellants did not lead any specific evidence at the hearing before Judge Bonin to establish that the search warrant documents would prejudice their trial.
>
> But the judge did have before him the affidavit of Daniel Chartrand, an R.C.M.P. officer, outlining in detail the information that had been related to him by Paul Larue. Lame's present circumstances, his role in the offences charged against appellants and his allegations as to appellants' acts were all described in the affidavit. It is perfectly plain that Larue's evidence, if accepted, would be highly prejudicial. And at this stage, of course, appellants have no way of challenging it or cross-examining him.

[15] *Flahiff* was relied upon by the Ontario Court of Appeal in *Ottawa Citizen Group Inc., v. Canada (Attorney General)*, [2005] O.J. No. 2209 (C.A.), where reference was made, at para. 57, to the "excellent reasons" of Rothman J.A. Fish J., speaking for the Supreme Court of Canada in *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 at para. 34, commented that *Flahiff* was a case in which "the test was effectively and reasonably applied". In *Esseghaier*, at para. 98, Durno J. agreed with Ross J. in *R. v. Hennessey*, [2008] A.J. No. 1563, in concluding that "direct evidence of a serious risk is not required where the circumstantial evidence is sufficient to persuade the court to draw an inference

of that risk." I agree with that conclusion. While direct evidence of risk is to be preferred, there are clearly some situations where the risk of prejudice is so obvious from a simple reading of the document that nothing further is required.

[16] In *Esseghaier*, at para. 100, Durno J. provided the following summary as to the type of situations where serious risks to the fair trial rights of the accused were found to exist:

> From the cases filed and submissions, the following non-exhaustive list contains some of the areas upon which serious risks have been found:
>
> Where the ITO contains:
>
> (i) evidence that is presumptively inadmissible (i.e. confessions, other disreputable conduct, outstanding charges, criminal records, and hearsay (*Flihoff*))
>
> (ii) evidence that appears to be inadmissible (whether some evidence was admissible was considered by Then J. in *Eurocopter*),
>
> (iii) evidence the admissibility and quality of which are live issues (*Hennessy*) including evidence of witnesses who would require a *Vetrovic* warning (*Flihoff*), and
>
> (iv) cases with sustained pre-trial publicity such that impressions may be created in the minds of jurors that will not easily be dispelled. (*Dagenais*)

[17] With regard to the first category, confessions, Mr. Hughes generally concedes that the *Dagenais-Mentuk* test would be met, and a real risk to the fair trial rights of an accused would exist. A confession is presumptively inadmissible unless and until voluntariness is proven beyond a reasonable doubt. They are frequently the subject of *Charter* motions that result in their ultimate exclusion from evidence, which would only render pre-trial publication even more prejudicial. It is the type of evidence that could create impressions in the minds of potential jurors that are difficult or impossible to dispel.

[18] However, Mr. Hughes tempered his concession by submitting that if the ITO contained a confession, the fair trial risks would be ameliorated by the fact that similar information is already "out there". Reports were published in October, 2016, that the accused had texted an acquaintance saying "I am responsible for the deaths of eight people". In *Toronto Star Newspapers Ltd. v. Ontario*, [2014] O.J. No. 1566 (S.C.J.), Nordheimer J. dealt with a request to unseal an ITO relating to the activities of Mayor Rob Ford and Alexander Lisi. One of his reasons for lifting the ban was that the thrust of the information was already in the public domain, and it was not clear that further publication would greatly increase the level of harm.

[19] That decision and others involving the same investigation are distinguishable on their facts. First, they involved comparatively minor drug charges as well as a charge of extortion against Mr. Lisi, as opposed to charges of first degree murder that have been brought against the accused. Secondly, the primary focus of the material sought to be released, and the person who would presumably suffer the most from its publication, was

not Mr. Lisi, but was instead Rob Ford, who had not been accused of any criminal offence and was not a party to that application.

[20] In any event, as Feldman J.A., speaking for the majority in *R. v. Ahmad [Toronto Star Newspapers Ltd. v. Canada]*, 2009 ONCA 59, varied [2010] 1 S.C.R. 721, observed at para. 223, "… there is an enormous difference, both in fact and in public perception, between information that is spoken outside court and information revealed in court proceedings." I am not persuaded that the reports already in the public domain would ameliorate the significant prejudice that would flow from revealing information of this nature.

[21] Evidence of the results of DNA evidence is another area where Mr. Hughes concedes the test would be met.

[22] As to the redactions based on protecting the privacy rights of individuals referred to in the ITO, Mr. Hughes takes no issue. In Schedule A to these reasons, I list redactions that I have concluded are not justified, and it includes a very few that fall into this category, where not just the home or email addresses were redacted but also the identity of the individual involved. There is no justification for deleting the identity of persons involved in the investigation.

[23] As to the redactions falling under the category of "Incriminating information", it is impossible to discuss them in detail in these reasons without expressly or impliedly revealing the nature of the information itself. Of necessity, therefore, my reasons can be conclusory only. I do conclude that redacting much of that information is necessary in order to prevent a serious risk to the proper administration of justice. Reasonable alternative measures will not alleviate that risk. It is conceded that this case has attracted, and will continue to attract, a great deal of media attention. Such attention is national in scope, so that a change of venue would not alleviate the risk because publication of this information would not be confined to the locality where the incidents allegedly occurred. While a challenge for cause is often offered as a viable alternative measure, the nature of the information in this case is such that a challenge for cause will not suffice to ensure that the fair trial rights of the accused are protected. To borrow the words of Durno J. quoted above, "the effect of publicity will be to leave potential jurors so irreparably prejudiced or to so impair the presumption of innocence that a fair trial is impossible."

[24] As to the second part of the *Dagenais-Mentuk* test, sealing this information will protect the right of the accused to a trial by an impartial jury, based solely upon the evidence adduced at trial, uninfluenced by exposure to highly prejudicial information in advance of trial. While there is undoubtedly a deleterious impact on freedom of the press, and on the right of the public to be fully informed, the ITO will be sealed only on a temporary basis. I agree with the Crown that the order should be varied to provide for a complete, un-redacted version of the ITO to be filed in the court file immediately upon the conclusion of the trial or proceedings are otherwise complete. In the meantime, the redacted version, as amended by Schedule A, will be open to public scrutiny.

[25] I have carefully reviewed the un-redacted ITO, and considered each proposed redaction as against the test outlined above. In Schedule A, I have directed that some redactions be reversed, while preserving the redaction of highly prejudicial information. For example, all sources of prejudicial information have been revealed, even where the information itself has been redacted. It would, therefore, be open to the press to make their own inquiries if they chose to do so. Other redactions have been reversed where the information did not fall within the highly prejudicial category discussed above.

[26] I am satisfied that the salutary effects of continuing the sealing order outweigh the deleterious effects on the rights and interests of the parties and the public. Public access to the ITO, redacted in accordance with this order, will impair the rights of the public and the media as minimally as is necessary to protect the fair trial rights of the accused. After the trial, the public will have unfettered access to the entire document.

[27] Accordingly, the application to lift the sealing order is dismissed. The order of Paull J. dated October 26, 2016, as varied by my order of December 16, 2016, shall continue, subject to variation as follows:

a) A further redacted ITO shall be filed in the court file, accessible to the media and the public, that conforms with the amendments outlined in Schedule A to these reasons;

b) An un-redacted version of the ITO shall be filed in the court file immediately upon the conclusion of the trial or when proceedings are otherwise complete, subject only to the edits that delete home and email addresses that were not otherwise in evidence at trial.

"T. A. Heeney R.S.J."

T. A. Heeney R.S.J.

Released: March 17, 2017

SCHEDULE A

Page of ITO	Redacted passages in italics to be un-redacted
16	Paragraph 1, line 2: "… *checked herself* into the Centre for Addiction…"
17	Paragraph 5, line 4: "…*checked herself* into a CAMH…"
	Paragraph 7, line 3: "*Detective ALBERGA had interviewed Beth WETTLAUFER*"
21	Paragraph 9: "witness statement of *Glen Hart*, which was written by *Hart*…"
23	Paragraph 12: "… *so that police could find out who 'Beverly' was*"
24	Paragraph 13, line 5: "*specifically the observation* …" to line 9: "…*never be looked at as a cause of death*" line 11: "*ADRIANO was found* …" to line 13: "… *exhibited those symptoms*" line 16: "*Dr. URBANKE confirmed* …" to line 18: "… *difficult to find*"
31	Paragraph 19: "*In April 2016* …" to "… *other staff members*"
32	All redactions.
33	Paragraph 24: "*I also asked in this briefing* …" to "… *mentioned in their report, which*"
34	Line 1: "*I hadn't read.*" Line 3: "*Dr. KHAN was interviewed on September 29th, 2016*"
54	Paragraph 29: all redactions. Paragraph 30: "…*Helen Crombez* indicating that *Helen Crombez*…"
55	Paragraph 30, line 1: "*Helen Crombez* …" to line 6: "… *at Caressant Care at the time*" line 16: "*D.C. OVERBAUGH also confirmed* …" to line 18: "…*within 7 days.*"
58	Paragraph 39: "*It was confirmed that Beth WETTLAUFER* …" to "… *at, or just prior to, the time of their deaths*"
59	Paragraph 42: all redactions, except the address in line 7. All redactions in the footnotes.
61 - 63	Paragraph 48: "*Records show that HORVATH*…" to "… *as the long acting insulin kicked in*" Paragraph 49: all redactions. Paragraph 52: all redactions.
66 – 67	Paragraph 60: all redactions.

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REASONS FOR JUDGMENT ON AN APPLICATION

HEENEY R.S.J.:

Released: March 17, 2017