CITATION: Postmedia Network Inc. v. Merrifield, 2015 ONSC 2847
NEWMARKET COURT FILE NO.: CV-15-122320-00
DATE: 20150430

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
POSTMEDIA NETWORK INC., MACLEAN'S CANADIAN BROADCASTING CORPORATION and TORONTO STAR NEWSPAPERS LIMITED Applicants	Brian MacLeod Rogers, for the Applicants
– and –	
PETER MERRIFIELD, THE ATTORNEY GENERAL OF CANADA, INSPECTOR JAMES JAGOE, SUPERINTENDENT MARK PROULX, ASSISTANT COMMISSIONER MICHEL SEGUIN, CHIEF SUPERINTENDENT NORMAN MAZZEROLLE and SUPERINTENDANT MARTIN VANDOREN Respondents	Laura Young, for the Respondent, Peter Merrifeild Sean Gaudet and Barney Brucker, for the Respondents, The Attorney General of Canada, Inspector James Jagoe, Superintendent Mark Proulx, Assistant Commissioner Michel Sequin, Chief Superintendent Norman Mazzerolle and Superintendent Martin Vandoren
	HEARD: April 17, 2015

Newmarket Court File No.: CV-07-333733PD2

AND IN THE MATTER OF

BETWEEN:	
PETER MERRIFIELD Plaintiff	Laura Young, for the Applicant
– and –	
THE ATTORNEY GENERAL OF CANADA, INSPECTOR JAMES JAGOE, SUPERINTENDENT MARK PROULX, ASSISTANT COMMISSIONER MICHEL SEGUIN, CHIEF SUPERINTENDENT NORMAN MAZZEROLLE and SUPERINTENDANT MARTIN VANDOREN Defendants	Sean Gaudet and Barney Brucker, for the Defendants

RULING ON APPLICATION

VALLEE J.

[1] The trial of this action began on November 17, 2014 and proceeded through the fall sittings. It could not be completed by the end of the sittings. Accordingly, it was adjourned to the spring sittings and will resume on May 19, 2015.

[2] An issue arose with respect to certain evidence. After the fall sittings concluded, I heard several motions and released the related decisions. The motions were heard in camera. The subject of the motions and the materials filed related to information which, if released, could create safety and security issues. At the request of the parties all of the documents relating to the motions, the decisions and the record were sealed.

[3] The applicants bring this application for:

a. A declaration that their rights under s. 2(b) of the *Canadian Charter of Rights and Freedoms* have been infringed by my orders made on December 4, 2014 which excluded the public, including reporters for the applicants from the trial proceedings and sealed all court records relating to the matters heard.

b. An order setting aside the December 4th orders.

c. An order directing that all records including transcripts, affidavits and exhibits relating to the hearing held on December 4, 2014 and any other related proceedings which may have been taken place, be made available to the applicants immediately.

[4] The Attorney General opposes the motion on the grounds that the court may not have discretion to provide the documents requested. Sergeant Merrifield's position is that if any of the documents can be provided beyond a closed courtroom, they should be. He wishes to see that a balancing take place if it is appropriate.

Issue

Can the December 4, 2014 sealing order be set aside so that the transcripts, affidavits and exhibits or parts of them, relating to the hearing held on that date, and any other related proceedings can be made available to the applicants?

Applicable Law

[5] Section 2(b) of the *Charter* provides protection for freedom of expression. It provides protection for the principle of openness for all court proceedings. Freedom of expression includes the right of the public and the media to attend court and gather information about court proceedings. The information may include exhibits and court documents. This ensures that the public can be informed about the proceedings and that the courts are subject to public scrutiny and criticism.

[6] In *Re Vancouver Sun*, 2004 S.C.C. 43, two people were charged with several criminal offences relating to an aircraft explosion. The Crown brought an *ex parte* application for an order that a potential criminal witness attend a judicial investigative hearing. The court granted the order subject to certain conditions. One of them was that the hearing was to be conducted in camera without notice to the accuseds, press or public. On appeal, the Supreme Court noted that the existence of informer privilege had been established and commented on how the judge could carry on the proceedings without violating the privilege and disclosing any information that might tend to reveal the confidential informant's identity while at the same time protecting and promoting the values of the open court principle. The court stated as follows:

> [51] In determining the proper way of protecting informer privilege and realizing the open court principle, the judge must concern himself or herself with minimal intrusion. He or she may allow submissions from individuals or organizations other than the Attorney General and the informer at this point. ...restricted disclosure will of course be necessary to protect the privileged information but the protection of the open court principle demands that all information necessary to ensure that meaningful submissions, which can be disclosed without breaching the privilege, ought to be disclosed. Therefore, standing may be given at this stage to individuals or organizations who will make

> submissions regarding the importance of ensuring that the informer privilege not be overextended and the way in which that can be accomplished in the context of the case.
>
> [55] ...the guiding rule at this stage should always remain the following:
> The judge must accommodate the open court principle to as great an extent as possible without risking a breaching of the informer privilege. This rule is meant to protect informer privilege absolutely while minimally impairing the open court principle.
>
> [57] It is impossible to determine in the abstract how the two principles will be met; judges must use their judgment in following the guidelines set out above, ensure that the identity of an informer is always protected, and attempt to promote the open courts within that framework.
>
> [61] This is a fact-sensitive determination that will depend on the particulars of each case.

Applicants' Position

[7] The applicants state that this case concerns a claim made by an active RCMP officer against his employer and a number of senior officers. The plaintiff claims that misconduct, harassment and mismanagement by the defendants affected his career and health. This gives rise to considerable concerns about the RCMP, its operations in management. These claims are resisted by the defendants. The case has attracted ongoing media coverage. The applicants rely on the legal principles set out above and state that this court should set aside the sealing order to the extent possible under the law. The court must balance the public interest at stake. The applicants want to provide media coverage of this case. This is consistent with s. 2(a) of the *Charter* which guarantees freedom of expression. The media has a sincere interest in the case. The record should enable the media to inform the public about these issues and enable them to scrutinize the judicial process and the operations of the RCMP. The press must be guaranteed access to the courts to gather information. This is necessary to maintain the independence and impartiality of the courts.

[8] If the proceedings that were held in camera were to determine whether informer privilege applies, and if it has been determined that informer privilege does apply, at this stage, a clarity can be brought to the circumstances. The court must accommodate the open court principle to as great as extent as possible without risking a breach of informer privilege.

[9] In *Vancouver Sun*, the court stated that once the existence of a confidential informer privilege has been established, the court has to carry on with the proceedings without violating that privilege while at the same time protecting and promoting the values of an open court principle. The matter should proceed with minimal intrusion. Nevertheless, the court must be careful with respect to information given to the media for a motion. No

identifying information can be given under any circumstances. The applicants urge the court to find a way to make available to counsel information that would assist in determining what has occurred subject to the requirements to protect the confidential informant's identity. If some information can be disclosed without violating a confidential informer privilege, it ought to be disclosed. There may be some material that can be provided which does not disclose a confidential informer's privilege. This should be made available.

Analysis

[10] I agree with the applicants' position that proceedings should be held in open court except in extraordinary circumstances. The press must be guaranteed access to court proceedings to gather information. This is necessary to maintain independence and impartiality of the courts. Access to the record should enable the media to inform the public about important issues that are before the courts. The media ought to be able to scrutinize the judicial process and, in this case, the operations of the RCMP. These principles are hallmarks of our free and democratic society.

[11] In some situations the court does not have the discretion to permit public access to certain types of information contained in court documents and the related proceedings. Court documents and transcripts containing certain types of information must be protected from disclosure. In these situations, the court has no discretion in this regard.

[12] I have reviewed the motion materials which were filed regarding the December proceedings, as well as my order dated December 4, 2014, and documents with respect to related proceedings, to consider whether portions of these documents and portions of the record could be disclosed to the applicants. All of the information in those materials and the order relates to a subject matter which must be protected from disclosure. Because the subject matter must be protected, I am not at liberty to describe the nature of the subject matter or why it must be protected. Disclosure of redacted versions of the materials and the order would be meaningless because all of the text in the materials and the order would have to be redacted.

[13] Accordingly, I conclude that the sealing order dated December 4, 2014 cannot be set aside. The application is denied.

Costs

[14] If the parties wish to request costs, the Attorney General shall serve and file written submissions not to exceed three pages in length with 1.5 line spacing excluding of the Bill of Costs within three weeks of the release date of this decision. The applicant may file similar responding submissions within two weeks of service of the Attorney General's submissions. The plaintiff may also file similar responding submissions within this timeframe.

[15] In addition to filing these submissions at the court office, they shall be provided to my judicial assistant at the following email address: Nicole.Anderson@ontario.ca. If no

submissions are filed within that time period, I will assume that there are no issues with respect to costs.

VALLEE J.

Released: April 30, 2015