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File No: 170775
Registry: Victoria

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

HAROLD MAGNUS BACKER

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE BROOKS

Counsel for the Crown:	John Neal
Counsel for the Defendant:	Joven Narwal
Counsel for the Applicants Canadian Broadcasting Corporation, Times-Colonist, CTV and CHEK Television:	Daniel Burnett, Q.C.
Place of Hearing:	Victoria, B.C.
Date of Hearing:	February 19, 2018
Date of Judgment:	April 9, 2018

INTRODUCTION

[1] This is an application by several media organizations for access to and copies of materials filed by the defence on September 27, 2017. The application is opposed by the accused and by Crown.

[2] It is clear that the nature of the document sought by the media is a significant part of the context and analysis required to determine if it ought to be released. Accordingly, I will commence by describing the document in issue.

MATERIALS SOUGHT

[3] The document in question is 12 pages in length. The document says under the style of cause: "CHARTER NOTICE: NOTICE OF APPLICATION AND CONSTITUTIONAL QUESTION" (the "Notice"). There is then a reference to the *Constitutional Question Act* and to the *Canadian Charter of Rights and Freedoms* (the "*Charter"*) as contained in the *Constitution Act*. The balance of the document sets out the warrants and orders which are to be challenged at the hearing of the matter. With respect to each warrant and order, the application sets out the argument to be made (in very brief form), the names of the officers required for that *voir dire* and the authorities relied on. From reviewing the document as a whole it is clear that it is intended as an aid to the case management of this particular information. Indeed, I understand that the document was used for that purpose at an earlier pre-trial conference before Regional Administrative Judge Rogers. Finally, it was emphasized in submissions, the document was drafted at a time that disclosure was not complete. As such, it is subject to additions, deletions and amendments as counsel may determine.

[4] In summary, the document is a detailed Notice serving more than one function. It is a Notice as required by the *Constitutional Question Act*. It is a Notice of a series of *Charter* applications as required by several authorities although not by any rules of this court. It is also, and perhaps primarily, intended to assist the court in managing the expeditious hearing of the matter. Of course, none of those functions requires that the Notice be filed with the court but it has been so filed. Having been filed, it is for this court to determine media access to this document under its control.

[5] It is now necessary to turn to the test that I am to apply in determining access.

THE LAW

[6] The test to be applied in an application such as this was summarized in *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 at paragraph 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.* [emphasis in original]

[7] What *Toronto Star* added to that test was that it was to be applied to all discretionary court orders (e.g. sealing orders, search warrants, etc.) that limit freedom of the press in relation to legal proceedings. I would note that it was not suggested that this test would not apply to the Notice in this case.

[8] The applicants submit that the effect of denying access to the document would be the same as a publication ban. Accordingly, it is important to bear in mind the test for ordering a publication ban from paragraph 32 of *R. v. Mentuck*, 2001 SCC 76:

> 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.

[9] It can be seen from this test that there is both a discretion to be exercised and a necessary balancing of interests. That being the case it is not surprising, as the cases submitted by all counsel attest, that different results occur depending on the particular material to which access is sought. I have taken all the authorities referred to by counsel into account while at the same time recognizing the factual uniqueness of the case before me. None are directly on point.

PROVINCIAL COURT RULES AND THIS APPLICATION

[10] Crown counsel placed particular reliance on the "Policies Regarding Public and Media Access in the Provincial Court of British Columbia" as they appear on the Provincial Court website. It was submitted that great weight ought to be placed on these policies as their content makes clear that they were drafted with all the principles relied on by the applicants in mind.

[11] The policies in issue in this application are those contained in "Access to Court Records". Within that policy is a table which lists the documents which may be in issue, i.e. exhibits, criminal records, etc., and what access policy applies. From that table I conclude that "Applications for Orders" comes closest to describing the document in

issue here. For “Applications for Orders” the access policy is “Access restricted to Crown counsel, defence counsel and accused until after application is heard. Wire-tap applications are completely restricted (s. 187 *Criminal Code*)”. Based on this policy and a literal reading of it, the Crown submits that the Notice in this case ought not to be disclosed until after the application is heard.

[12] I disagree that the policy has that effect.

[13] To explain that conclusion, I must consider the proper interpretation of the policy. To read it literally leaves only two possible interpretations. The first is that “until after the application is heard” means after the application has been completed. Using that interpretation, the Crown submission would lead to an absurd result. Any member of the public who attended the hearing of the application and wanted to be informed about the proceedings unfolding before them would not be entitled to see the document being used as the basis of the applications. They would only be entitled to see that document when the applications were concluded and the document was no use to them. Such a result would make a mockery of the principle of openness on which all the court policies are based.

[14] The second possible interpretation of “until after the application is heard” means after the hearing of the application is commenced. Although it is not necessary that I decide this point, it would seem that this interpretation fits with the intention of the policy. Yet, using this interpretation leads to the same absurd result. This document lists multiple applications. Is it to be the case that access may only be granted at the commencement of each application? Access to court documents ought not to be an

endurance test. Therefore, I conclude that a literal reading of the policy does not assist in how it ought to be applied in this case.

[15] Rather than reading the policy and applying it mechanically, it is, in my view, more helpful to look at its intention. Looking at the entire policy, it contains directions to managers or court administrators on responding to requests. Many of the access policies suggest contact be made with the Court Registry. Some of the documents referred to are ones that are not regularly seen by a judge but are seen by Court Registry staff: for example, surety applications and affidavits of justification. These details of the access policy suggest that it is primarily directed to Court Registry staff in order that they apply a consistent standard in dealing with requests from the press and the public. I do not interpret the policy to go any further than that. If that is correct then it follows that the proper interpretation of the policy is that it must be subject to the decision of a judge of the court. Of course, any judge is entitled to look to the policy for any assistance it may provide in the particular circumstances before the court. But the policy does not dictate the result. Put another way, the policy may illuminate that discretionary decision but it does not curtail it.

[16] This conclusion is not, in my view, contradicted in any way by the decision of Low J. in *R v. Zehaf-Bibeau*, 2014 BCPC 253. In that case, the issue was the release of a recording of actual court proceedings. That application engaged different court policies than the one under consideration here. After review of the applicable law and a detailed summary of the court policies, Low J. concluded (at paragraph 38) that the policy accurately reflected the law and specifically referred to the discretion that was to remain

with the court. Accordingly, it was held that the policy did not direct the decision but rather the discretion remained with the court.

APPLICATION OF THE TEST

[17] I must now apply the test as previously set out. In short I must determine what, if any, risk there is to the administration of justice and I must balance the salutary and deleterious effects of granting access of the media to the document. In that regard, several arguments were made.

[18] Defence counsel emphasized that the document was a preliminary one. As an application it may be amended, changed or even abandoned. As a case management tool it can have no interest, vital or otherwise, to the public. As such, the defence submits, it cannot be said that there is a significant public interest in granting access.

[19] I candidly concede that the document, being a legal notice, contains very little that could impact the ‘interests of the public’. The fact that the document is subject to amendment makes it even less so. In my view, the status of the document as preliminary does not overcome the presumption of ‘openness’. Indeed, one reason for the openness of court proceedings is to satisfy the public interest that nothing of importance is being hidden from them. To that extent, access to this document would advance the ‘interests of the public’.

[20] The defence submission also focused on the deleterious effect of granting this application. Their first argument was that this matter may eventually be tried before a jury. At the present time, the election entered by the defence is for a trial by provincial

court judge. However, the defence has the right to re-elect and have this trial before a jury, an option which the defence is still considering. If that re-election is made, the defence argues, the ability to have a fair trial is jeopardized by access being given to the document in question. Potential jurors will have access to or knowledge of a document about which they would know nothing in the usual jury trial.

[21] With the greatest of respect, I find that the risk to a fair trial by the release of this document is both conjectural and minimal. Bearing in mind that a re-election is only a possibility, it is still the case that the trial of this matter after a preliminary hearing would be approximately one year away. Even assuming that the document in question garnered significant attention, that attention will have completely dissipated by the time of trial.

[22] However, in the internet age, documents can be preserved to be unearthed at a time closer to trial. The possibility of that occurring with this document does not, in my view, pose a realistic risk to a fair trial. First, jurors can be challenged for cause (s. 638(1)(b) of the *Criminal Code*) if there is concern that media attention has impacted their impartiality. Second, if selected, jurors take an oath that they will 'fairly try' the accused which must include not relying on what can be found on the internet. Also, when the accused is placed in charge of the jury, they are instructed to 'harken to the evidence' thereby making it clear that extra-judicial information is not to be taken into account. Third, it has traditionally been the practice of trial judges to instruct jurors at the commencement of the case that they are to base their decision solely on the evidence in the courtroom and to put out of their minds anything they may have read about the case. Furthermore, jurors are commonly instructed that they are not to

conduct any investigations or research themselves into the case before them. These safeguards have frequently been considered more than sufficient to ensure a fair trial for an accused even in the most high profile cases. I am satisfied that all these safeguards make the risk to the fair trial interests of the accused, should he re-elect, negligible.

[23] Second, the defence submitted that the document being publicized may adversely impact the witnesses at the trial. In support of that concern, defence counsel relied on *R. v. Panghali,* [2011] B.C.J. No. 698. In that case, media access was sought during the course of the trial to a video of a person attending a convenience store. The identification of that person as the accused was in dispute. It was in that context that the court ruled that the media not be given access to the video exhibit. Clearly, the concern in that case was the possible tainting of the identification evidence. With respect, there is no similarity whatsoever between that factual context and this one.

[24] The document in issue here lists witnesses who would be required to give evidence as to alleged *Charter* breaches. They are all police officers. It is well understood that police officers, as they investigate, make notes and reports of their actions. Their recollections and evidence are grounded in those notes and reports. This is a very far cry from the impressionable memory of a person trying to identify someone in a video. The prospect of the witnesses listed in this document being influenced by being able to read it is beyond speculative.

[25] Defence counsel also raises another issue with respect to the witnesses listed in the document. He submits that the witnesses have privacy interests that must be taken

into account. Those privacy interests would be negatively impacted if the document is released given that there are 'allegations against police officers'.

[26] I accept that privacy interests of others are relevant. Indeed I accept that those interests may, as they were in *Panghali*, have a critical impact on the ultimate decision. But that is not this case. Submissions that police have breached the *Charter* are common place in our courts. Some of those submissions are accepted and some are not. They are part and parcel of what police officers respond to as part of their job. Although I doubt that any joy is taken in an allegation of breach of a *Charter* right, I am unable to conclude that there is any significant negative impact on the privacy rights of the witnesses named in the document.

[27] Finally, defence counsel and Crown counsel join in submitting that granting access to this document will have a chilling effect on the preparation of such documents. Such documents serve a very valuable function in case management. They assist the Crown in understanding and responding to defence applications. They assist in the efficient allocation of valuable court time. They also assist, I am sure, the defence in clarifying their thinking in the effective conduct of their case. All of these benefits, the defence submits, would be thrown away if access were granted to this document. The administration of justice would suffer as a result.

[28] I confess to considerable sympathy for this submission. The document reflects careful and diligent work by defence counsel in mapping out the efficient management of this case. This kind of work is to be actively encouraged not discouraged.

[29] Having said that, I am not of the view that a chilling effect need occur. The court is only involved in considering this question because this document was filed with the Court Registry. If it were not the court would have no supervisory jurisdiction over it. I have already expressed my own view as to whether the document needed to have been filed at all. In those circumstances, any chilling effect is unnecessary.

[30] Finally, defence counsel submitted that the media application was premature and need not be ruled on at this time. I have borne in mind that timeliness of media access is based on the public's right to information and not on the media's desire for 'fresh news': *Panghali* at paragraph 75. However, I am also cognizant that media access granted on the eve of a trial would generate more heat than light. I say this particularly given the prospect of re-election identified by defence counsel. Taking into account all the circumstances, if there is such a thing as a preferred time for release of this document that time is now.

CONCLUSION

[31] Balancing the interests of the public, the accused and the administration of justice as I must, I have concluded that the application must succeed. The applicants are entitled to access to the document in question and, at their expense, to a copy of that document.

A. Brooks, PCJ