CITATION: R. v. Cabero et.al., 2016 ONSC 3844
COURT FILE NO.: 16-33/MO
DATE: 20160614

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N :	)	
	)	
HER MAJESTY THE QUEEN	)	*Philip Perlmutter*
	)	for the Crown
Respondent	)	
	)	
– and –	)	
	)	
JOSHUA CABERO, LESLIE NYZNIK, SAMEER KARA	)	*Michael Lacy*
	)	for the Applicants
Applicants	)	
	)	
- and –	)	
	)	
TORONTO STAR NEWSPAPER LTD. CTV, A DIVISION OF BELL MEDIA INC. POST MEDIA	)	*Iris Fischer*
	)	for the Respondent, Toronto Star
	)	Newspaper Ltd.
	)	
Respondents	)	*David José* and *Carlos Martins*
	)	for the Respondents, CTV and Post Media
	)	
	)	**HEARD:** May 25, 2016

McWATT J.:

REASONS FOR DECISION

Introduction

[1] The three applicants are police officers with the Toronto Police Service. In February 2015, they were each charged with sexual assault contrary to s. 272(1) (d) of the *Criminal Code*.

[2] In September 2015, Detective Daniel Hoffmeyer made an application for warrants to take bodily substances from each of the applicants for forensic DNA analysis and sought a sealing order over all of the contents of the Information to Obtain (ITO) he swore in support of the application.

[3] Detective Hoffmeyer's application for the DNA Warrants was granted, but the issuing Justice, Cole J., of the Ontario Court of Justice, did not grant the restrictive order originally sought by Detective Hoffmeyer, which would have sealed all of the information contained in the ITO. Instead, a Sealing Order dated September 11, 2015 provides that the original ITO and associated documents were to be sealed in the packet and that the Crown would provide a vetted copy of the documents to be available to the public (the Public ITO).

Request on this Application

[4] The applicants' Notice of Application seeks the following order:

1. An order varying the sealing order of Justice Cole dated September 11, 2015 pursuant to s.487.3 (4) of *Criminal Code* in respect of Informations to Obtain DNA warrants so as to prohibit the publication of information and evidence summarized by the affiant therein related to the criminal investigation of the applicants until such time as the jury is sequestered, the evidence is led into evidence at the trial, or the case otherwise comes to an end.

The Facts Leading up to this Hearing

[5] The applicants were released at a bail hearing and during that proceeding a publication ban was ordered pursuant to s. 517 of the *Criminal Code*.

[6] The applicants have elected to have their case heard by judge and jury with a preliminary inquiry. When the matter proceeds to a preliminary inquiry, they will apply for a mandatory *Criminal Code* publication ban.

[7] On September 24, 2015, dates for the preliminary inquiry were agreed upon by all parties and set for July 20-29, 2016.

[8] In January 2016, the Crown advised the applicants that it would be applying to the Attorney General for consent to lay a direct indictment against them. No direct indictment has yet been laid.

[9] Around the same time, the Crown filed a conflict motion seeking to remove counsel of record for the applicants, Cabero and Kara, on the basis of an alleged conflict of interest.

[10] On February 23, 2016, the Crown wrote to advise that the Attorney General was monitoring the conflict motion before deciding whether to consent to the direct indictment.

[11] The Crown filed the conflict motion in the Superior Court and the applicants have agreed that the Superior Court has concurrent jurisdiction with the preliminary inquiry justice to entertain the motion.

[12] In its application materials filed on the conflict motion, the-Crown included:

a. a detailed summary of the allegations;
b. the transcript of the complainant's video statement setting out, in detail, the sexual acts complained of; and
c. copies of numerous forensic reports and a summary of the conclusions the Crown hopes can be drawn from the DNA evidence.

[13] The conflict motion materials filed by the Crown were obtained by the media and the details were publicized in a news article. The Crown had not sought a publication ban on the complainant's allegations, but only sought a ban under *Criminal Code* s. 486.4 protecting the identity of the complainant.

[14] The applicants brought an application to preclude the publication of information and evidence filed by the Crown in support of the conflict of interest application. Justice Code made an interim order on April 18, 2016 for a publication ban pending notification to the media and full argument on the issue of the publication ban on April 21, 2016 before the conflict motion judge.

[15] On April 21, during argument by counsel about the issues on that motion, Crown counsel asked his Honour, J. MacDonald J., to expand the scope of any publication ban to include the contents of the Public ITO. The Crown suggested that the content of the ITO was different information from that contained in the conflict application (corrected reasons of Justice J. MacDonald J. dated April 28, 2016, at para. 4).

[16] His Honour refused to expand the scope of any publication ban and directed that a fresh motion with notice to the media be brought. That application is this one before me, which began with a set date on April 26, 2016, in Practice Court.

[17] On April 21, Justice MacDonald made, among other orders, two interim publication bans to remain in effect until the release of his reasons. The first related to the publication of the conflict materials. The second related to the publication of the ITO materials.

[18] Neither of the two orders barred media access to the information in issue.

[19] On April 28, Justice MacDonald granted the applicant's motion to ban publication of the materials in the conflict motion. He wrote (corrected reasons of April 28, 2016, at para. 26):

> An order will issue prohibiting publication of the information in issue, regardless of whether it is tendered at trial, until the jury retires to deliberate or the criminal charges in issues are withdrawn or dismissed, subject to further order of a court of competent jurisdiction.

[20] To date, Justice MacDonald has not delivered his decision on the removal of counsel for Mr. Cabero and Mr. Kara on the trial of the three officers.

[21] In the meantime, on April 26, 2016, on the set date in Practice Court, which brings the application before me, Justice Himel ordered a temporary blanket prohibition of the contents of the Public ITO pending this hearing.

Analysis

[22] The media respondents want access only to the Public ITO, the edited summary that Justice Cole endorsed on September 11, 2015, be available to the public and not the information which is subject to his Sealing Order of the same date.

[23] The applicants bear the onus of establishing that the permanent order they request in this application should be granted in accordance with Justice MacDonald's publication ban on the conflict motion in order:

(1) to preserve trial fairness, ensure there is no improper witness tainting and to prevent unwarranted stigmatization; and

(2) that without such an order, the publication ban issued with respect to the conflicts motion would be ineffectual as the media may take the position that they can publish the contents of the ITO which contains summaries of the same information and/or evidence filed on the conflicts motion.

[24] The applicants contend that varying the Sealing Order can be tailored to minimally impair the right of the public to be informed about the applicant's trial because the media is not denied access to the material - only to publishing the material.

[25] The Crown's position on this motion is the same as the applicant's position - that there should be a publication ban ordered in this application which mirrors that in the conflict application – for the sake of consistency. And, he points out, the media respondents acquiesced to the publication ban in the conflicts motion.

[26] The Crown also maintains that everything in the conflicts motion is in the ITO except the results of the DNA warrant; and the ITO is, in fact, more detailed than in the conflicts motion materials.

[27] The only evidence before me about the contents of and issues argued on the conflict motion is a copy of the ITO and the Crown's factum. I am told, by the applicants, in their materials, that the materials listed at paragraph 12, above, are also included in that motion. I am not aware, however, of all the material MacDonald J. banned from publication in his very comprehensive order.

[28] Clearly, the issues on a conflict of interest motion are different from the issue before me. Therefore, the materials will differ. The issue on this motion has been extensively reviewed by the Supreme Court of Canada.

[29] And for the following reasons, the application is dismissed.

[30] First, the applicants allege that without the publication ban on the Public ITO, the publication ban on the materials in the conflict motion is ineffectual as the same summaries, information and/or evidence is filed on the conflicts motion.

[31] I cannot accept that proposition as I have no evidence of what other information MacDonald J. found necessary to keep from the public that is part of the conflict motion. Without that evidence, I cannot determine whether the two motions deal with the same issues or whether the Public ITO is otherwise properly a public document, but has been included in a ban along with more prejudicial information tendered for the purpose of the conflict motion. I simply do not know, but note that the respondents did not contest the publication ban in that motion.

[32] Second, the Supreme Court has determined that warrant materials are presumptively open to the pubic once the warrant has been executed because it allows for accountability in the justice system and law enforcement (*A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175 at pages 186 and 188).

[33] These principles were later affirmed in *Toronto Star Newspaper Ltd. v. Ontario*, 2005 S.C.C. 41, S.C.R. 188. And, at paragraph 18 of that decision, Justice Fish, for the Court, noted the following:

> Once a search warrant is executed, the warrant and the information upon which it is issued must be made available to the public unless an applicant seeking a sealing order can demonstrate that public access would subvert the ends of justice: *Attorney General of Nova Scotia v. MacIntyre* ...

[34] The Crown has conceded that the *Dagenais/Mentuck* test as set out in *Toronto Star, ibid*, at para. 18, is the correct test on the motion and that the test must be met for the application to succeed.

[35] Court orders that limit freedom of expression and freedom of the press in relation to legal proceedings 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. (*Toronto Star, ibid at* para. 18).

[36] The risk sought to be prevented must be real, substantial, and "well grounded in evidence." (*R. v. Mentuck,* 3 S.C.R. 442, 2001 S.C.C. 76 at para. 34 and 39).

[37] Second, the applicants have failed to satisfy the onus on them by leading evidence to support the other grounds for their application.

[38] The applicants assert that the publication ban they seek is required "to preserve trial fairness, ensure that there is no improper witness tainting and to prevent unwarranted stigmatization".

[39] As well as relying on the fact that Macdonald J. granted a publication ban over the evidence filed on the conflict motion, the applicants are also relying on the related fact that a mandatory publication ban was imposed at their bail hearing under s. 517 of the Code and that they will request a mandatory publication ban at their preliminary inquiry under s. 539.

[40] I agree with the respondents that, while there may be some similarity between the contents of the ITO and the evidence adduced at the bail hearing and on the conflict motion (and, perhaps, to be adduced at a preliminary inquiry), the fact that statutory or court-ordered restrictions on the public's access to information have been imposed in discrete hearings or motions is not sufficient to warrant a publication ban over a presumptively open document relied on in an entirely different process. As I have said, the media did not oppose a publication ban on the conflict motion evidence on the basis that it was necessary to prevent a serious risk to the administration of justice. That evidence contained detailed particulars of the evidence including a transcript of the complainant's video statement to police, a transcript of a witness's video statement and reports from the Centre of Forensic Sciences and summaries of the evidence.

[41] The ITO contains the grounds on which Detective Hoffmeyer relied in his application to obtain the DNA Warrants. The public has a presumptive right to know what those grounds are, as was recognized in the Sealing Order Justice Cole issued. The restriction on freedom of expression and of the press that is being sought by the applicants must be based on more than

mere conjecture and an assertion that some of what is contained in the ITO is similar to the evidence put before the court at the bail hearing or at the preliminary hearing.

[42] In *R. v. CTVglobemedia Publishing Inc.*, 2007 CanLii 13706, the Crown and accused in that case argued that ordering a discretionary publication ban over four production orders prior to a preliminary hearing would be a "logical extension" of ss. 517 and 539 of the *Criminal Code*. Because no evidentiary foundation in support of the discretionary publication ban had been established, the court dismissed the application.

[43] In *Re Thibault*, 2009 QCCS 572, the Quebec Superior Court rejected a similar argument, which decision was upheld by the Court of Appeal. In that case, several search warrants were issued and executed as part of an investigation into contraband cigarettes and fraud. As a result of the investigation, 17 people were charged. A journalist sought access to the documentation produced in support of the issuance of the search warrant that had been executed at the residence of Mr. Thibault and learned that it had been sealed under section 487.3 of the Code. She brought an application to terminate the sealing order.

[44] One of the arguments put forward by Mr. Thibault in opposing the application was that a publication ban would be in place at his preliminary inquiry, when it occurred, and "to permit the publication of material filed in support of the search warrant would defeat the purpose of the subsequent [statutory] bans ... at later stages of the process." The court overturned the ban in spite of this argument. Brunton J. gave the following reasons:

> The hearing judge held that to permit the publication of the information which summarized the evidence which would be led at the preliminary inquiry would defeat the purpose of the statutory publication ban. At first blush, this reasoning is perfectly logical. Upon analysis however, it paints too wide a stroke. To adopt such a position would be to impose judicial publication bans in every file where investigative officials had been particularly thorough in the documents they presented in support of the issuance of search warrants (para. 40).

[45] The court emphasized the need for the party requesting the restriction to the open court principle to present a sufficient evidentiary foundation supporting an argument that the restriction is necessary to prevent a serious risk to the proper administration of justice and that there was a need for the court to canvass less restrictive alternatives to the publication ban that had been ordered by the justice of the peace.

[46] Brunton J. decided that the proper time to determine if any of the contents of the ITO at issue should be made subject to a publication ban, based on what was presented at the preliminary inquiry, was at the time of the preliminary inquiry.

[47] Similarly, in *R. v. Eurocopter Canada Ltd.*, (2003) 67 OR (3d) 763, 2003 CanLii at para. 79, Eurocopter objected to the unsealing of an ITO in part because the information contained in it was similar to evidence that might be tendered at a preliminary inquiry. Then J. ruled that a

theoretical possibility that there 'might' be a similarity in the evidence adduced at the preliminary hearing is insufficient to meet the high standard set out in *Mentuck.*

[48] Third, there is no evidence on this application that police officers charged with criminal conduct are in any worse position with respect to trial fairness than any other person so charged or that there is any greater danger of witness tainting in this case than in any other criminal proceeding.

[49] There is no evidence that the continuation of the Sealing Order now in place poses any serious risk to the applicants' fair trial rights in terms of jury selection. While there is some public interest in the investigation and prosecution of the applicants, there is no evidence that the amount of publicity their case has received is in any way extraordinary.

[50] Significant publicity and attaining a fair trial in such circumstances was addressed in *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy),* [1995] 2 SCR 97 at para. 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.

[51] In *Canadian Broadcasting Corporation v. HMQ*, 2013 CanLii 75897, Nordheimer J. refused to impose wide-ranging restrictions on the public's access to warrant application material. In so doing, he highlighted several factors that should be borne in mind when courts are faced with claims that pre-trial publicity poses a risk to jury impartiality. They include the fact that:

(1) prospective jurors are questioned about that publicity, "[p]eople either paid little or no attention to the matter in the first instance, or have only the vaguest recollections of the event when questioned about it through the challenge [for cause] process." (para. 41);

(2) even if such stories are available on the internet months after they are first published, members of the public are unlikely to access these until and unless they are told that they could be selected as a juror at the criminal trial and the details about the particular case

only become apparent at the initial stage of the actual jury selection process. (para. 43); and

(3) Judges caution prospective jurors at the earliest stage of the jury selection process against conducting any research about the case or persons involved in it and "we trust jurors to do their duty and follow the law in deciding a case." (paras. 44-45).

[52] The applicants have not led clear or compelling evidence that a complete publication ban over the contents of the Public ITO is necessary to protect against a serious risk to the administration of justice - or even that a serious risk exists.

[53] The respondents submit that a publication ban could have deleterious effects not only on freedom of expression and the public's right to know, but also on the administration of justice itself as the investigation and prosecution of police officers is clearly in the public interest. I agree.

[54] In *Canadian Broadcasting Corp. v. Canada*, 2007 CarswellOnt 9352, Nordheimer J. dealt with police officers in Toronto who resisted a media application to quash orders that restricted access to documents used to obtain search warrants and other orders relating to an investigation into several other police officers for alleged criminal conduct.

[55] His Honour ordered that allegations against police officers contained in the warrant application materials, as well as their names, ought to be made available to the public and the media despite the fact that they had not been charged. He found that their status as police officers did not result in their being accorded more rights than other members of society. The decision was upheld on appeal.

[56] In his decision, he cited *Phillips v. Vancouver Sun*, 2004 BCCA 14 as support for the order. In that case, the media were granted access to information used to obtain a search warrant against a Vancouver police officer who had been alleged to have committed a breach of public trust, but against whom no charges were laid. While the B.C. court recognized the serious impact revealing these allegations would have on the officer, it reversed the lower courts' orders to seal them.

[57] The open court principle requires that the public be given meaningful access to the grounds relied on by the Toronto Police Service when applying for the DNA warrants. Justice Cole recognized this when granting the Sealing Order the applicants now seek to vary. Any salutary effect of a complete publication ban on the applicants' trial fairness rights is outweighed by the deleterious effects such a restriction would have on the media's right to publish the contents of the Public ITO, and on the public's right to know the contents of it. As Justice Fish remarked in *Toronto Star, supra* at para. 1, "the administration of justice thrives on exposure to light - and withers under a cloud of secrecy."

[58] Finally, the applicants cite the case of *R. v. Vice Media Canada Inc.*, [2016] O.J. No. 1597 as support for their application. MacDonell J., of this court, allowed a variation of a sealing order to permit access by the applicants to the content of an ITO for a warrant to seize documents and data communications from a Vice reporter, Ben Makuch. The communications contained evidence of terrorist activity.

[59] His Honour ordered a variation of the sealing order to allow the media applicants access to a copy of a redacted ITO, which redactions were necessary to prevent disclosure of information that was subject to national security claims, information that could disclose the identity of a person named in the ITO and any references to the ongoing investigation.

[60] However, His Honour ordered that publication of the details of the redacted ITO was prohibited until, Farah Shiram, the person being investigated by way of the warrant, was discharged after a preliminary inquiry or, if he is ordered to stand trial, the trial has ended, or the proceedings against him are otherwise brought to an end.

[61] One of the many differences between this case and that one is the target of the warrant had not yet been arrested and the investigation was ongoing. His Honour ordered that if Farah Shiram was not arrested within two years from the date of the order, the need for a publication ban could once again be addressed – a recognition of the ultimate need for public access to the warrant.

[62] The facts of *Vice Media Canada* are quite different from the application before me and, as a result, the case does not assist me in accepting the applicants' position on this motion. The application before me is far more clear cut and is ruled by the principles I have set out.

Conclusion

[63] As a result, the motion is dismissed.

McWATT J.

RELEASED: June 14, 2016

CITATION: R. v. Cabero, 2016 ONSC 3844
COURT FILE NO.: 16-33/MO
DATE: 20160614

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

Respondent

– and –

JOSHUA CABERO, LESLIE NYZNIK, SAMEER KARA

Applicants

- and –

TORONTO STAR NEWSPAPER LTD. CTV, A DIVISION OF BELL MEDIA INC. POST MEDIA

Respondents

REASONS FOR DECISION

McWATT J.

RELEASED: June 14, 2016