IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Darling*,
2018 BCSC 1327

Date: 20180803

Docket: 36905-2

Registry: Port Alberni

Regina

v.

Larry Sinclair Darling

Publication Ban: Any information that could identify an undercover operator or confidential informant shall not be published in any document or broadcast or transmitted in any way. This publication ban applies indefinitely unless otherwise ordered. These reasons for judgment comply with the publication ban.

Before: The Honourable Mr. Justice Thompson

Oral Reasons for Judgment on Media Application

Counsel for the Crown (appearing on this application only):	L. Ruzicka
	D. McLaughlin
Counsel for Mr. Darling:	K. McCullough
Counsel for The Vancouver Sun and CHEK TV:	S. Dawson
Counsel for the Attorney General of Canada, on behalf of the RCMP:	J. Gibb-Carsley
Counsel for Mr. Kidd:	T. Boyar
	S. Arrandale
Counsel for S/Sgt Mainman:	A. Srivastava

Place and Date of Hearing:	Nanaimo, B.C. July 24, 2018
Place and Date of Judgment:	Nanaimo, B.C. August 3, 2018

[1] The Vancouver Sun (the "Newspaper") requests access to three documents in the court record in this matter, a murder prosecution recently stayed by the Crown.

Background

[2] Kristy Morrey died in Port Alberni on 20 August 2006. The RCMP investigated and considered her death a homicide. At the time, Larry Darling was cleared as a suspect. Years later, the RCMP revived the investigation; in 2013, it was overseen by S/Sgt Laura Livingstone but S/Sgt Greg Mainman assumed the team commander position during her secondment to another post from October 2014 to January 2016.

[3] Under S/Sgt Mainman's supervision, the RCMP conducted "E-Nacreous", a Mr. Big operation targeting Mr. Darling. This undercover operation comprised 109 scenarios between February and September 2015, and culminated in Mr. Darling being charged with first-degree murder on 11 September 2015. Mr. Darling made his first appearance in this Court in September 2016.

[4] *Voir dires* began as scheduled in August 2017, in advance of the trial by judge and jury that was expected to begin in January 2018. The *voir dires* were declared to address the admissibility of a series of statements made by Mr. Darling — the lynch pin of the Crown's case was a statement made by Mr. Darling to the "crime boss" near the end of the Mr. Big operation. In *R. v. Hart*, 2014 SCC 52, the Supreme Court of Canada ruled that "crime boss" statements such as the one made by Mr. Darling are presumptively inadmissible because Mr. Big operations can produce false confessions and wrongful convictions. However, *Hart* also decided that if the Mr. Big operation in question is not an abuse of process, a "crime boss" statement will be admitted into evidence if the statement is shown by the Crown to have sufficient threshold reliability.

[5] At the outset of the *voir dires*, I ordered a ban on publication of the evidence and arguments on *voir dire* proceedings, pursuant to s. 486(1) of the *Criminal Code* and the inherent jurisdiction of the court — the point of this ban was to prevent prospective jurors from hearing about evidence that might be ruled inadmissible. I also made an order banning the publication of any information that could identify undercover police officers, pursuant to s. 486.5(1). The *voir dire* publication ban ended with the stay of proceedings, but the s. 486.5(1) ban remains in place.

[6] On 18 October 2017, in the midst of the *voir dires*, both Mr. Darling and the Attorney General indicated their consent to trial by judge alone pursuant to s. 473(1) of the *Criminal Code*.

[7] On 31 October 2017, I granted a Crown application for an adjournment — the prosecutor who conducted the case to that point had taken ill and was not expected to return to the case, and newly appointed counsel needed time to familiarize themselves with a complicated matter.

[8] Counsel for Mr. Darling wrote a series of letters that acquainted the new prosecutors with the disclosure issues that had hobbled progress of the *voir dires*: there had been repeated instances of the RCMP not providing the Crown with important information. The Crown responded to these letters by inviting a formal application for further disclosure. An application came on for hearing in December 2017, and it resulted in a sweeping set of disclosure orders: *R. v. Darling*, 2017 BCSC 2439. In that 22 December 2017 ruling, I expressed my opinion that the failure on the part of the Crown to properly fulfil

its disclosure obligations was rooted in its acquiescence in the RCMP's control of decisions about relevance and privilege (para. 11).

[9] I held a series of seven conferences in open court to try to get the case re-started: 9 January 2018, 2 February 2018, 20 February 2018, 27 March 2018, 17 April 2018, 2 May 2018 and 9 May 2018. However, over this period, serious and extraordinary complications arose that blocked resumption of the *voir dires*. The three documents sought by the Newspaper provide detail about these complications.

[10] In May 2018, a two-day hearing was held on the matter of disclosure of information that might reveal a confidential source. A ban on publication of that hearing was ordered at its outset — this ban remains in place. In any event, that hearing was taken *in camera* soon after it began.

[11] On 13 June 2018, the Crown directed a stay of proceedings. In the days following, in response to inquiries, Mr. McLaughlin communicated with the media about why the charge against Mr. Darling was stayed. He did this in his role as Communications Counsel for the BC Prosecution Service. Mr. McLaughlin's email explains that the stay was directed because the Crown's charge approval standard could no longer be met after unspecified further information was received by the prosecutors with conduct of the file:

The BC Prosecution Service directed a stay of proceedings of the [charge] against Larry Sinclair Darling on June 13, 2018. The BC Prosecution Service decided to stay the [charge] in this case after further information was received by the prosecutors with conduct of the file. After reviewing this information and the rest of the file materials the prosecutors concluded the charge approval standard could no longer be met. In these circumstances a stay of proceedings is the appropriate course of action. This conclusion was affirmed by senior Crown Counsel in the Prosecution Service and was subsequently conveyed to the investigators and representatives of the family of the victim.

After providing a detailed description of the BC Prosecution Service's charge assessment guidelines that require a substantial likelihood of conviction and that it be in the public interest to proceed with a prosecution, the email concludes as follows:

This test applies at all stages of the prosecution. If, at any point, the prosecutor concludes that the evidentiary standard is no longer met or that a prosecution is no longer required in the public interest a prosecution cannot proceed. In this case the prosecutor concluded the evidentiary test was no longer met and directed the stay of proceedings.

[12] The Newspaper requests access to three documents:

1. A four-page letter of 28 March 2018 from Crown counsel to defence counsel. This letter concerns S/Sgt Mainman and it attaches a six-page report of S/Sgt Livingstone. Counsel provided this document to the Court in advance of the 17 April 2018 conference. It was referred to during that conference — which was held in open court.

2. A 23-page notice of application for a judicial stay of proceedings (the "stay application"), filed by defence counsel on 25 April 2018.

3. A four-page letter of 1 May 2018 from Crown counsel to defence counsel. This letter addresses a meeting between a member of Ms. Morrey's family and Mr. Kidd, Deputy Regional Crown Counsel. Counsel provided this document to the Court in advance of the 2 May 2018 conference — the letters concerning S/Sgt Mainman and Mr. Kidd were discussed in open court at that conference.

[13] The Newspaper's position is that it is entitled to access to these three documents, subject only to redaction of any information that could lead to the identification of a confidential informant. Only a portion of one paragraph of the 140-paragraph stay application contains such information.

[14] The RCMP opposes the Newspaper's application. Mr. Darling supports the application. The provincial Crown, generally speaking, takes no position other than to suggest redactions to one document to protect the privacy interests of family members of the deceased. Mr. Kidd urges redaction of his name from the document with which he is associated. S/Sgt Mainman opposes the Newspaper accessing the documents with which he is associated — at least in their current form.

Further Description of the Documents Sought

The Letter Concerning S/Sgt Mainman (28 March 2018)

[15] This is a letter to Mr. Darling's counsel, Mr. McCullough, from Crown counsel Mr. Fitzsimmons, who assumed the leadership of this prosecution after previous counsel fell ill. The main subjects of the letter, with its attached report from S/Sgt Livingstone, are the production of an accordion folder of emails by S/Sgt Mainman after he had repeatedly asserted that he had no further material to disclose, and whether or not S/Sgt Mainman became aware of these emails before swearing an affidavit called for by the 22 December 2017 disclosure order.

[16] The letter informs Mr. McCullough that S/Sgt Mainman was now the subject of internal RCMP investigations, and of Mr. Fitzsimmons' impression that "their inquiries are broader than simply with respect to production of the emails." The letter reports that there are differences of opinion within the Crown office and differences of opinion within the RCMP over whether S/Sgt Mainman had sworn a false affidavit.

[17] The letter goes on to say the Crown has "concerns regarding S/Sgt Mainman" and may not call him on the *Hart voir dire* if necessary evidence can be obtained from other witnesses. Mr. Fitzsimmons made it clear, however, that it was not the Crown's intention to shield S/Sgt Mainman from cross-examination and that he would be made available for that purpose.

The Stay Application (25 April 2018)

[18] The stay application authored by Mr. Darling's counsel is a form of pleading. It contains a blend of facts and argument. The document details Mr. Darling's position that a fair trial is impossible because of the combination of (1) profound failures by the police in the disclosure process; and (2) police deception outside of permissible bounds. While the courts permit the police to deceive suspects in the course of investigations as a necessary part of their mandate to solve crimes — up to and including constructing sham criminal organizations and weaving suspects into them — the stay application argues that the police have deceived the Crown and the Court.

[19] This lengthy document begins by reciting some basic background about the case, and S/Sgt Mainman's evidence given during the *voir dires* that as the investigation's team commander he was "responsible, accountable and [has] total control of the investigation, both the investigational aspects as well as resources and finances" and that he was attuned to the *Hart* requirements for Mr. Big operations.

[20] The stay application goes on to refer to disclosure failures surrounding a "prop memo" used to deceive Mr. Darling during the Mr. Big operation. Further, it contends that S/Sgt Mainman gave false evidence in connection with the prop memo.

[21] The stay application contains a "Conclusion" section that is a convenient high-level summary of its contents:

Fundamentally, the first stage of the disclosure process requires that there be meaningful retention by police of material so it can be provided to [Crown]. This necessarily relies on the good faith of the police. All other stages of the process have built in checks and balances and a means of review. This makes the criminal trial process critically vulnerable to police malfeasance as it relates to disclosure. The Applicant will argue that in this case the defence has established that the police have engaged in obstruction of disclosure and the Court cannot be satisfied that disclosure will ever be satisfactorily completed.

The Applicant will argue that it has now been established that [S/Sgt] Mainman, the Team Commander, has misled the defence and the Court with respect to disclosure. Beyond this, he has now taken the step of hiring independent counsel, which causes further irreparable damage.

It is the Applicant's position that each of the disclosure issues in this trial demonstrate the degree of police bad faith in this matter. From the outset of the investigation, the police have failed to preserve relevant evidence, their emails, despite an explicit instruction in the investigation's business rules to do so. Following, and in part, resulting from this, there were numerous instances of non-disclosure which served to obscure key aspects of the investigation from the scrutiny of the defence and the Court. Moreover, in many instances, the police have misled the defence, the Court, and even the Crown.

The Applicant will argue that each of the disclosure problems in this matter to date are manifestations of the police bad faith in disclosure. Each of these problems has, at its root, misleading behaviour that undermines the Crown's *Stinchcombe* obligations, and demonstrate a pattern of disregard for the Applicant's rights, and tunnel vision on the part of the investigation.

The Letter Concerning Mr. Kidd (1 May 2018)

[22] This letter from Mr. Fitzsimmons to Mr. McCullough recounts that Mr. Fitzsimmons was approached by Mary Tilley, one of Ms. Morrey's aunts, on 19 April 2018 and that Ms. Tilley also telephoned him on 25 April 2018. Mr. Fitzsimmons reported as follows:

Mary [Tilley] advised that after the police finished their investigation at the residence of Kristy Morrey, in 2006, the family cleaned Kristy's belongings out of the residence. Those belongings were taken to the home of Kristy's mother, Shirley Morrey. Those belongings remained there until the death of Shirley Morrey on December 23, 2016 at which time they were moved to the home of Mary, the aunt of Kristy.

Among those belongings were writings of Kristy's, which were not found by the RCMP during their search of the residence. They had never been turned over to the RCMP. These writings included a document, authored by Kristy in June of 2006 articulating the dynamic of the relationship between Kristy and Larry Darling at that time. You will recall that Kristy was killed in August of 2006. My view then, and now, is that the document is relevant…. I advised Mary that I would arrange for Cpl. Ben Savard to recover the document from her.

Mary went on to advise me that she had raised the existence of this document with a "previous prosecutor". She advised that the "other prosecutor" had not seemed interested in receipt of the document and told Mary not to tell him about it because "if he knew about it he would have to disclose it."

Upon returning to Campbell River, still on the 19th of April, I contacted the RCMP, specifically Cpl. Ben Savard. I advised him of the document in question and described its relevance and that we needed to

obtain it and determine what it actually consisted of. I also advised that we needed to know why we were receiving this document now, instead of some time ago.

On Monday April 23, 2018, I called Ben Savard to get an update. He advised that he had spoken to Mary Tilley and that she now asserts that the document has been lost. She is looking for it.

On Tuesday April 24, 2018, I spoke to Ben Savard again. I was advised that Mary now asserts that the document has been destroyed. The RCMP had determined that someone without a connection to the investigation should travel to Port Alberni to take a statement from Mary and from her sister, who was also aware of the document and its contents. I was advised that Sgt Hayes the NCO I/C of the Historical Homicide Section would undertake this task.

On Wednesday April 25, 2018, Mary Tilley phoned me…. She advised that the prosecutor she met with was David Kidd. When she met him, she had the document and two copies of it with her. She offered [it] to him and he said "don't give it to me; it will just fuel the fire with McCullough". She left with the documents still in her possession. She can no longer find the documents. She remembers speaking to her sister about them and discussing burning them. She does not recall the actual act of burning the documents, but cannot now find them.

On Thursday April 26, 2018 I was advised by Cpl Ben Savard that the statements had been taken from Mary and her sister. I was advised that it revealed that the meeting between David Kidd and Mary Tilley occurred after Gordon Baines ended his involvement in the file. This would make it sometime after the end of October, 2017. The involvement of the undersigned in this matter began shortly after the involvement of Mr. Baines ceased. I have never been advised of the existence of this document prior to being advised of it by Mary Tilley on April 19, 2018.

[23] Mr. Fitzsimmons is a senior prosecutor. From the time he took over this prosecution, he was put in a series of difficult positions. From what I observed, he consistently chose to respond with unvarnished candour.

Legal Framework

[24] The analytical approach to applications for access to court records was first described in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835. The test was articulated by Chief Justice Lamer at page 878:

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.

[Emphasis in original.]

[25] The Supreme Court of Canada revisited the *Dagenais* framework in *R. v. Mentuck*, [2001] 3 S.C.R. 442, and decided that it was necessary to make it applicable to a broader set of circumstances. Justice Iacobucci wrote at para. 32:

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.

[26] The *Dagenais/Mentuck* test was also subjected to close consideration by Justice Fish when he wrote for the Court in *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41. In *R. v. Fry*, 2008 BCSC 1485 at para. 11, rev'd on other grounds 2010 BCCA 169, Mr. Justice Pitfield provided a useful summary of the principles enunciated by Fish J. in *Toronto Star*:

1. There is a rebuttable presumption that judicial proceedings are open and public: *Toronto Star*, para. 14.
2. Section 2(b) of the *Charter* guarantees freedom of communication and freedom of expression, fundamental freedoms which depend for their vitality on public access to information of public interest including access to that which goes on in the courts: *Toronto Star*, para. 2.
3. If public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice then a temporary or permanent denial of access may be warranted: *Toronto Star*, para. 3.

4. The circumstances in which access may be denied are limited:

> 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 the justice or unduly impair its proper administration: *Toronto Star*, para. 4.

5. The *Dagenais/Mentuck* test is applicable at every stage of the judicial process but must be applied in a flexible and contextual manner: *Toronto Star*, para. 8.

6. A limitation on access should only be ordered when the salutary effects of the order outweigh its negative impact on the freedom of expression of those affected by the ban. As stated in *Dagenais* and modified in *Mentuck*, restrictions on access 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*, para. 26.

7. Finally, the *Dagenais/Mentuck* test should not be applied mechanistically:

> Regard must always be had to the circumstances in which a sealing order is sought by the Crown, or by others with a real and demonstrated interest in delaying public disclosure. The test, though applicable at all stages, is a flexible and contextual one. Courts have thus tailored it to fit a variety of discretionary actions, such as confidentiality orders, judicial investigative hearings, and Crown initiated applications for publication bans: *Toronto Star*, para. 3.

[27] In *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3 at para. 13, the Supreme Court of Canada reaffirmed that the *Dagenais/Mentuck* approach applies to all discretionary decisions that affect the openness of proceedings. At para. 12, the Court also confirmed that the public's ability to inspect trial exhibits is a "corollary to the open court principle," and cited with approval the judgment of Dickson J. (as he then was) in *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175 at 189:

Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose.

This Court's Access Policy

[28] It is common ground that each document sought by the applicant forms part of the "court record" as defined in the Court Record Access Policy published on the Court's website. Section 1.3 of the Policy expressly encompasses documents filed or sent to the court by the parties.

[29] Section 1.4 of the Policy affirms the court's supervisory jurisdiction over the court record and its responsibility to ensure that access to it respects applicable laws, rights, and interests:

The court has jurisdiction over the court record, and the responsibility to ensure that access to the court record respects the applicable laws, and the constitutional and other rights and interests involved. For this reason, the court establishes the general guidelines governing access, and judges of the court determine issues concerning access in individual cases where more specific direction is necessary.

[30] The Court has recently established guidelines that it expects will often provide the media with expedited access to exhibits, notices of application and affidavits, but this case is plainly one that requires "specific direction" under s. 1.4 of the Court's policy, and the 24 July 2018 hearing was convened to determine the issues concerning access.

The RCMP Position

[31] The RCMP's primary position is that the Newspaper ought not to have access to any part of the court record for the time being because s. 579(2) of the *Criminal Code* provides that the proceedings could be recommenced within one year of the entry of the stay of proceedings. In this context they say that disclosure of any part of the court record presents a "serious and substantial risk to the integrity of the ongoing investigation of the homicide of Ms. Morrey and compromise [of] the right to fair trial should

this matter proceed." The RCMP stresses the requirement to apply the *Dagenais/Mentuck* test flexibly and by paying close attention to context.

[32] In the alternative, the RCMP submits that redactions to the stay application are necessary to protect information including identification of an undercover operator, the name of a third party, and any information related to holdback evidence.

[33] As noted above, the Crown, generally speaking, takes no position. However, Ms. Ruzicka submits that the Court ought to take account of the RCMP's evidence about the state of the ongoing investigation, and that if the documents are ordered released the Crown supports the RCMP's position on necessary redactions.

[34] In support of its primary argument, the RCMP relies on an affidavit of S/Sgt Livingstone that was placed in an envelope. I adjourned the hearing to privately review the affidavit in my chambers, and thereafter ruled that it ought to be disclosed to all counsel appearing on the application.

[35] In this affidavit, S/Sgt Livingstone advises that the RCMP have a continuing duty to investigate Ms. Morrey's death as they do to investigate all alleged crimes within their jurisdiction, and that members of the investigative team have met with the Morrey family and told them that the investigation will continue. She says that Mr. Darling is the only suspect at this time. She deposes that the stay occurred recently and the RCMP will be formulating and renewing investigative plans, including identifying other possible avenues of inquiry. She asserts:

11. Because of this, it remains necessary to control what investigative information enters the public sphere so that police can continue to effectively assess and evaluate how new information or potential avenues of inquiry may incriminate or eliminate Mr. Darling's involvement in Ms. Morrey's death.

12. Publication of the Materials or information contained within the Court file that was tendered in the *voir dire* will compromise the ability of the police to continue its investigation because, as set out below, if known to the public, the integrity of the evidence is compromised.

. . .

15. Specifically, with respect to the MORREY investigation, the *voir dire*, which was subject to a publication ban, had not concluded before the Stay was directed by the Crown. There was not a determination with respect to the reliability or admissibility of Mr. Darling's warned statement or Crime Boss confessions. It is my belief that the holdback evidence and other corroborating evidence would be integral to that analysis. Because the investigation remains open, the holdback remains a vital part of the MORREY Investigation and a crucial tool in order for investigators to conduct a thorough and fair investigation.

[36] S/Sgt Livingstone deposes that although the stay application speaks of the holdback evidence only in general terms, even this begins to erode the "overall integrity of that evidence". In that same vein, the stay application's reference to an unidentified DNA profile on the deceased's body is characterized by S/Sgt Livingstone as "sensitive investigative information" which, if released, would compromise the investigation.

[37] S/Sgt Livingstone expresses concern that the references to Mr. Darling's statements to police in the stay application and during evidence in the *voir dire* might, if publicized, pose a safety risk for Mr. Darling.

[38] In another affidavit, S/Sgt Livingstone outlines why it is important to protect the identities of undercover operators from disclosure. This affidavit also expresses S/Sgt Livingstone's opinion that there ought to be redactions in relation to a third party's name, because, based on her knowledge of the investigation, release of his name would have "serious and negative consequences" for that individual.

[39] In support of its primary submission, the RCMP rely on Mr. Justice Ehrcke's judgment in *R. v. Tang*, 2015 BCSC 2047. In the midst of jury deliberations, a media outlet sought release of recordings of Mr. Tang's interactions with undercover officers, and his interview by police following his arrest. The application was opposed by Mr. Tang, the Crown, and the RCMP, because the exhibits were likely to be used in a subsequent trial on a different indictment. Ehrcke J. held that the evidentiary value of the exhibits sought was not yet spent, and to allow broadcast of the exhibits would invite the public to form opinions on their evidentiary significance before the jury trial on the other indictment (paras. 20-21). At paras. 22-25, the judge reasoned that this would seriously compromise the fairness of the upcoming trial, adopting the reasoning of Holmes J. (as she then was) in *R. v. Terezakis*, 2006 BCSC 721.

[40] The *Tang* and *Terezakis* cases must be distinguished on their facts. In these cases, the judges concluded that there were charges that were likely to proceed. For reasons that I will outline, the circumstances suggest recommencement of the case against Mr. Darling is very unlikely. In other words, in Mr. Darling's case an "upcoming trial" is not in prospect, as was the case is both *Tang* and *Terezakis*.

[41] Speaking generally, recommencement of cases after the Crown has directed a stay of proceedings are rare. However, my conclusion that a recommencement is very unlikely is principally rooted in what I know of this case. First, the Crown's consistent position is that its case hinged on the outcome of the *Hart voir dire*, and that its holdback evidence was important to the reliability aspect of the *Hart* analysis. With respect to holdback evidence, Mr. Fitzsimmons said this at the 27 March 2018 conference:

> I can tell you that the shape of this case has changed considerably since Mr. Baines [the lawyer who previously had contact of the matter for the Crown] made his opening.
> . . .
> My friend is correct: the holdback material was not in a safe and only in the knowledge of a small number of people that signed the document. In fact, it was loaded to the investigative computer system in Port Alberni. The number of people that knew of it was significant. So, the Crown is not in a position to say that only four people knew these things or ten people knew these things.

As the very late-arriving disclosure has revealed, it may not be accurate to speak of "holdback" evidence because it has become apparent that the evidence was not, as it turns out, properly held back. It seems to me that the Crown would be on its heels in a *Hart* argument because of the police treatment of the "holdback" evidence.

[42] Second, the Crown has asserted that the case in its present state does not meet the charge approval standard. I have nothing but generalities about the RCMP's plan to carry on their investigation. It is naked speculation to suggest that evidence might emerge that would cause the Crown to conclude that there is a substantial likelihood of conviction. Further, the matters outlined in the documents sought

by the Newspaper surely constitute significant impediments to this case going ahead now or in the future.

[43] Third, Mr. Darling was charged nearly three years ago. It is a fairly complex case, but the time has already come where arguments could be made about infringement of Mr. Darling's *Charter* right to be tried within a reasonable time.

[44] In a sense, the RCMP are trying to shut the stable door after the horse has bolted. The three documents sought have been already been discussed in some detail (other than informer privilege information) during conferences in open court. The ban which might arguably have encompassed these conferences has expired — in fact, the reason for the ban disappeared when the parties agreed to proceed by judge alone. However, I understand the reality that granting access to the documents sought by the Newspaper is likely to distribute the information much more widely than a discussion of their contents during court conferences the media did not attend (but were not barred from).

[45] I pause to acknowledge that the Crown's decision whether to use its authority under s. 579(2) to recommence proceedings would be an exercise of prosecutorial discretion. Canadian courts have repeatedly affirmed that prosecutorial discretion is a necessary part of a properly functioning criminal justice system. See, for example, *R. v. Anderson*, 2014 SCC 41 at para. 37. It is the prosecution's decision whether to recommence, not the Court's.

[46] However, the first stage of the *Dagenais/Mentuck* test requires a determination of whether there is a serious risk. In the unusual circumstances of the present case, measuring the risk requires an analysis of the likelihood of a trial — which reduces to an analysis of the likelihood that new evidence will emerge or that present impediments to continuing the prosecution might be removed, and the likelihood that the Crown will exercise its discretion to recommence. It is not trenching on Crown prerogative to weigh the likelihood of the exercise of its discretion to recommence in circumstances where it is impossible for the Court to reach a conclusion without addressing that subject. In other words, it cannot be that the public's right of access can be deferred for a year by simply pointing to s. 579(2) and the doctrine of prosecutorial discretion.

[47] In the result, on the first stage of the *Dagenais/Mentuck* analysis, I am not persuaded that a ban on access to these materials is necessary in order to prevent a serious risk to the proper administration of justice. The evidence and arguments relied upon by the RCMP are not cogent or convincing. They amount, at most, to generalized assertions of possible disadvantage. I am not persuaded that disclosure of the material sought will in any way impair whatever investigation the RCMP might plan, or that disclosure would put trial fairness at risk (especially considering that in the very unlikely event that a trial occurs it would presumably be conducted by judge alone, pursuant to the agreement in place between the parties).

[48] Still addressing the RCMP's primary argument and turning to the second part of the *Dagenais/Mentuck* test, there is, therefore, little of substance to be weighed against the deleterious effects of restricting access. Disclosure of this material will not, as Fish J. put it in *Toronto Star* at para. 4, "subvert the ends of justice or unduly impair its proper administration."

[49] The *Dagenais/Mentuck* framework establishes a rebuttable presumption that judicial proceedings are open and public. Access will be restricted only if it is shown to be both necessary and proportional. The RCMP have not carried their burden of persuasion on either score.

[50] With reference to the alternative submission seeking the redaction of the third party information at para. 125 of the stay application, I agree with the Newspaper that the evidence of S/Sgt Livingstone "consists merely of generalized assertions of possible consequences" and "does not describe how or why the release 'would have serious and negative consequences'," and that non-specific evidence like this cannot be sufficient to displace the presumption of openness. There is an absence of sufficiently convincing evidence to support the redaction sought.

[51] It is unnecessary to address the other alternative RCMP submissions. All parties agree that the informer privilege information ought to be redacted, and at the present time the Newspaper is not pressing their application for disclosure in relation to the undercover operators.

Mr. Kidd's Position

[52] There is no affidavit from Mr. Kidd, but the submission made on his behalf is that it is apparent on the face of the letter concerning Mr. Kidd that it contains serious allegations that are bound to irreparably damage his professional reputation. Now that the charges are stayed, Mr. Kidd submits that he will not have the opportunity to address these allegations in court.

[53] Mr. Kidd does not object to the release of the letter that refers to him, but he seeks an order that his name be redacted and that there be a publication ban with respect to information that could reveal his identity. He submits that allowing publication of the letter but banning information that could reveal his identity strikes an appropriate balance of interests. He suggests that the letter be altered so as to refer to him as "a senior prosecutor" rather than by name.

[54] Mr. Kidd submits that the courts have repeatedly affirmed that an individual's professional reputation is an important interest deserving protection when applying the *Dagenais/Mentuck* framework. He argues that the common theme emerging from these cases is that courts order publication bans where disclosure of unproven allegations will cause irreparable reputational harm. He cites *B.G. v. British Columbia*, 2002 BCSC 1417, rev'd on other grounds, 2004 BCCA 345; *Fontaine v. Canada (Attorney General)*, 2013 BCSC 1955; and *Re Canadian Broadcasting Corporation*, 2005 NLTD 126.

[55] Mr. Kidd occupies a senior office in the BC Prosecution Service. The office of Deputy Regional Crown Counsel is a public office of leadership and considerable responsibility. Ms. Tilley has told Mr. Fitzsimmons that she met with Mr. Kidd. If this meeting took place and the discussions at the meeting included potentially important evidence not previously disclosed, as reported, then Mr. Kidd was executing critical responsibilities of his public office — responsibilities that bear on the Crown's special role to ensure that the trial process is fair, that evidence is disclosed, and the integrity of the criminal justice process is maintained. I think these considerations distinguish the case from those cited by his counsel.

[56] Citing the Court of Appeal's decision in *B.G. v. British Columbia*, at para. 26, Mr. Kidd argues that his name is a mere "sliver of information" and that a ban on publishing information that could lead to disclosure of his identity only minimally impairs the public interest in open court proceedings. Given his important role, I do not think that in these circumstances Mr. Kidd's name is properly characterized as a sliver of information. Moreover, it would be misleading the public to identify Mr. Kidd as "a prosecutor" or as "a senior prosecutor" — he, in fact, is in a leadership position and part of his role is to supervise both senior and junior prosecutors. And, other alternative quasi-identifiers are not practical. A publication restriction that mandates description of Mr. Kidd as "a Deputy Regional Crown Counsel" would be unfair to other occupants of that office in the BC Prosecution Service. Describing him as "the Deputy Regional Crown Counsel in Nanaimo" would effectively identify him.

[57] In my opinion, the salutary effects of avoiding harm to Mr. Kidd's professional reputation do not outweigh the deleterious effects of shrouding in secrecy the name and position of the person in the BC Prosecution Service that Ms. Tilley says she met with and brought evidence to.

S/Sgt Mainman's Position

[58] S/Sgt Mainman adopts the submissions made on behalf of Mr. Kidd. He, too, seeks to avoid harm to his reputation from the publication of serious allegations bearing on his integrity.

[59] S/Sgt Mainman has not filed an affidavit, but he submits through counsel that two of the documents sought by the Newspaper allege misconduct and perhaps criminal wrongdoing on his part. He submits that if the stay application is published in its current form then it will impair the orderly unfolding of any proceedings brought against him. He submits that this case is ripe for the use of a reasonable alternative measure; he urges the preparation of a judicial summary of the stay application that would provide a great deal of information to the public, yet protect S/Sgt Mainman and other officers from unfair reputational harm.

[60] Like Mr. Kidd, S/Sgt Mainman was in a position of important public responsibility at all material times. As the Morrey investigation team commander, S/Sgt Mainman bore ultimate responsibility for ensuring that all appropriate material was collected and retained for eventual disclosure, and seeing to it that this information was passed on to the Crown in a timely way. S/Sgt Mainman oversaw the centrepiece of the investigation: the Mr. Big undercover operation that spanned many months and involved many undercover operators. In its planning and execution, the operation surely involved significant police resources and the expenditure of a significant amount of public money.

[61] In opposing any restrictions on publication in relation to S/Sgt Mainman, the Newspaper points to the substantial resources devoted to the Mr. Big operation, the significant disclosure issues culminating in the 22 December 2017 order, S/Sgt Mainman's accountability for the investigation as team commander, public resources devoted to a long *voir dire*, the Crown's concern about S/Sgt Mainman's credibility and reluctance to call him as a witness on the *Hart voir dire*, the ongoing inquiries into S/Sgt Mainman's conduct, and the direction of a stay of proceedings before Mr. Darling's application for a judicial stay could be heard.

[62] I agree that the public ought not to be shielded from being able to learn about what may have led to the Crown's decision to direct a stay of proceedings, and that public servants ought not to be shielded from scrutiny in a case such as this. At the 17 April 2018 conference, Crown counsel advised that S/Sgt Mainman had been locked out of his office, and that his devices were in the process of being searched. The public are entitled to hear of such matters and to obtain information about and debate the circumstances surrounding the Crown's decision to direct a stay. I accept that the salutary effects of avoiding harm to S/Sgt Mainman's reputation as well as avoiding impact on any possible proceedings against him are outweighed by the deleterious effects of restricting publication of his name and the allegations made against him.

Other Privacy Submissions

[63] The Crown submits that information identifying Ms. Morrey's aunts ought to be redacted from the letter concerning Mr. Kidd. In my opinion, the public ought to have access to all of the available details surrounding the meeting that Ms. Tilley said she had with Mr. Kidd. If Ms. Morrey's aunts have a privacy interest of sufficient degree to be considered for protection, it is very much outweighed in this

case by the public interest in openness because of their alleged role in the handling of new evidence that may have been destroyed.

Order

[64] The Newspaper's application for access to the three documents is granted, subject to redaction of para. 106(a) of the stay application for confidential informer privilege, and redaction of the name of the undercover operator at paras. 30, 31, and 112 of the stay application. By order made on 10 July 2018, the three documents with these redactions were provided to Mr. Dawson in advance of the hearing, subject to a publication ban, to allow him to make submissions. This ban is lifted.

[65] With respect to the undercover operator redactions, the parties agreed — in the interests of completing the 24 July 2018 hearing — to adjourn generally any consideration of whether to lift or restrict the existing ban on publication of information that could reveal the identity of undercover operators.

"Thompson J."