IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Nuttall,*
2016 BCSC 73

Date: 20160111
Docket: 26392
Registry: Vancouver

Regina

v.

John Stuart Nuttall and Amanda Marie Korody

Restriction on Publication: Pursuant to ss. 486.5(1) and 486.5(9) of the *Criminal Code* there shall be no publication, broadcast or transmission in any way of any information that could identify any undercover police officers including any pseudonyms used by the undercover police officers involved in the investigation of the Accused. This publication ban applies until further order of the Court. These reasons for judgment comply with this publication ban.

Before: The Honourable Madam Justice Bruce

Oral Ruling on Media Application re *In Camera* Proceedings

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Counsel for the Accused, Amanda Marie Korody:	Mark R. Jetté Scott Wright
Counsel for CSIS:	Helen Park Courtenay N. Landsiedel
Counsel for the Canadian Broadcasting Corporation, The Canadian Press, The Globe and Mail, The Vancouver Sun, Global Television and CKNW Radio by teleconference:	Daniel W. Burnett, Q.C.
Place and Date of Trial/Hearing:	Vancouver, B.C. January 7, 2016
Place and Date of Judgment:	Vancouver, B.C. January 11, 2016

[1] **THE COURT:** The court ordered that the application brought by the defendants for production of records held by CSIS be held *in camera*. This order was made subject to an application by the media to vary or set aside that order on two days' notice due to the failure to notify the media of the CSIS application to hold the hearing. While it would have been preferable to have adjourned the CSIS application to permit the media to respond, I believed it was necessary to continue with the application in this manner to prevent further delay of the trial.

[2] Subsequent to the *in camera* proceedings, the court issued a ruling in regard to the defendants' application and imposed a ban on its publication pending an application by the media to vary or set aside the order.

[3] The media applicants filed a motion seeking an order setting aside the *in camera* proceedings and permitting the release of the audiotapes of the hearing and an order removing the ban on publication regarding the court's ruling. In the alternative, the media applicants sought release of a transcript of the proceedings and the ruling with only those edits necessary to preserve privacy interests.

[4] CSIS sought an adjournment of this application to permit it to obtain a transcript of the ruling and a further 15 days to consider whether it would appeal this ruling. The applicants opposed any adjournment. Apart from the inappropriateness of such a lengthy delay, particularly when one considers the importance of a timely reporting of events of interest to the public, I refused CSIS' application because whether the hearing was properly held *in camera* is a distinct and separate issue from the question of whether there is to be an appeal of the ruling.

[5] CSIS did not require a transcript of the ruling to argue its case for preserving the privacy of the *O'Connor* hearing. Moreover, whether or not CSIS chose to appeal the ruling (if that remedy is available to CSIS) is not a relevant concern in a hearing to determine whether the ban on publication should be continued.

The Test to be Applied

[6] The applicants and CSIS agree that the *Dagenais*/*Mentuck* test applies to the question of whether the proceedings should have been held *in camera* and to

whether the ban on publication covering the ruling should be maintained. Their argument is based on an underlying assumption that the court has the discretion to hold the hearing *in camera* and impose a publication ban.

[7] The Crown argues that the court is bound by a statutory mandate to hold the proceedings *in camera* or, at the very least, to ban publication of any information that might reveal the identity of the subject of the defendants' application.

[8] The Crown's argument is based on the application of s. 18.1 of the *CSIS Act*, R.S.C., 1985 c. C-23, to this hearing. Acknowledging that the Federal Court held that this provision was not retrospective, the Crown argues that it is a prospective application of the section because the hearing is being held after the enactment of this provision in April 2015.

[9] I find this is an untenable application of s. 18.1. In *Canada (Attorney General) v. Almalki et al.*, 2015 FC 1278, Justice Mosley held that s. 18.1 of the *CSIS Act* did not apply to information obtained from human sources prior to its enactment because it created substantive rights for human sources and could have a substantive impact on permissible disclosure in the proceedings before him. Pre-existing human sources could continue to be protected by s. 38 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5

[10] In *Nuttall and Korody v. Attorney General of Canada*, 2015 FC 1398, wherein the defence sought disclosure of the subject matter of the application before me, Justice Kane followed the *Almalki* decision and concluded that s. 18.1 did not apply. At para. 45, Justice Kane says:

> [45] The result that section 18.1 does not apply in these circumstances, given that the relationship which may involve a human source relates to information dating back to before the enactment of the provision means that the applicants should pursue an application in the British Columbia Supreme Court which may lead to further proceedings in this Court.

[11] Accordingly, based on these authorities, it would be unreasonable for the court to rule that it was subject to any statutory mandate contained in s. 18.1 of the

CSIS Act. Despite the fact that this hearing postdates its enactment, the information sought to be protected originated long before April 2015.

[12] Alternatively, the Crown argues that the court should accord an evidentiary privilege to human source information similar to that which protects police informants. In *Canada (Citizenship and Immigration) v. Harkat*, [2014] 2 S.C.R. 33, the Supreme Court of Canada held that human sources are not governed by a class privilege. While the Court also recognized that there are special considerations at play when the court considers the appropriateness of opening up a human source to public scrutiny, its findings do not compel a different test than the one articulated in the *Dagenais*/*Mentuck* decisions. Nor does the judgment compel a reversal of the onus of proof mandated by that test.

[13] Accordingly, I find that the test to be applied is described in *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 at paras. 26-27:

> 26 The *Dagenais* test was reaffirmed but somewhat reformulated in *Mentuck*, where the Crown sought a ban on publication of the names and identities of undercover officers and on the investigative techniques they had used. The Court held in that case that discretionary action to limit freedom of expression in relation to judicial proceedings encompasses a broad variety of interests and that 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. [para. 32]
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> 27 Iacobucci J., writing for the Court, noted that the "risk" in the first prong of the analysis must be *real*, *substantial*, and *well grounded in the evidence*: "it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained" (para. 34).

[14] The concern of CSIS and the Crown in this application is the disclosure of the identity of the human source and any information that may lead to the identification of that individual. Their position is that this privacy interest cannot be protected by a

ban on publication or a redaction of material from the transcript of the proceedings and the ruling.

[15] There is a heavy onus on a party who asserts that the fundamental principles of an open court should be displaced. As the Supreme Court of Canada said in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 at para. 71:

> 71 The burden of displacing the general rule of openness lies on the party making the application. As in *Dagenais*, *supra*, the applicant bears the burden of proving: that the particular order is necessary, in terms of relating to the proper administration of justice; that the order is as limited as possible; and, that the salutary effects of the order are proportionate to its deleterious effects. In relation to the proportionality issue, if the order is sought to protect a constitutional right, this must be considered.

[16] There is no doubt that the privacy interests surrounding human source information kept by CSIS are substantial and critical. Identification of this information could jeopardize the safety and well-being of a human source and their family members. If human source information was routinely disclosed, CSIS could not perform its essential function in our society of protecting our national security interests. This is not a case where disclosure could just embarrass someone or cause them unwanted media attention. Disclosure could put their lives in peril.

[17] Notwithstanding the pressing need to protect human sources, the fundamental principle of open court demands that the court conclude that no measures short of *in camera* proceedings are capable of preserving the privacy interests at stake before imposing such an order. While the salutary effects of *in camera* proceedings are proportionate to the potentially harmful effects of disclosure, I find there is scope for a more limited order than was originally imposed.

[18] Because the proceedings were heard *in camera*, the court is in a position to review the transcript and determine whether anything contained therein could jeopardize the safety interests of a possible human source. The transcript and the ruling can be edited or redacted prior to publication to ensure the privacy concerns are met. This is not a case where the nature of the evidence to be led or the submissions of counsel are unknown or will be aired in a public courtroom.

[19] Moreover, editing out the material that could identify the human source deals with the concern raised by CSIS regarding its possible application to the Federal Court under s. 38 of the *Canada Evidence Act*. While the decision to bring such an application may alert the public to the fact that the subject of the *O'Connor* disclosure proceeding was a human source, nothing in the public domain will reveal the identity of that person or what information that person may have given to CSIS.

[20] I have reviewed the ruling made on January 6, 2016, and conclude that, with careful redactions, the privacy concerns raised by the Crown and CSIS can be addressed. I have also reviewed a transcript of the *in camera* hearing and conclude that the redactions can address these privacy concerns, as well.

[21] Accordingly, I set aside my ruling that the hearing be held *in camera* on January 4, 2016, and order that a redacted version of the transcript will be released to the media applicants. Further, I set aside the ban on publication with respect to my ruling on January 6, 2016, and order that a redacted version of the ruling be released to the media applicants.

[22] Prior to the release of the transcript and the ruling, CSIS, the Crown, and the defence will have an opportunity to review a draft of the redacted versions and make submissions concerning their sufficiency. I anticipate that you will have a draft ruling and a transcript sometime this afternoon. Accordingly, I will consider written submissions filed through the registry on or before 4:00 p.m., January 12, 2016, anticipating that you will have 24 hours to review the material.

[23] The original transcript and ruling will be sealed in the court file for the purpose of any appeal filed by the parties. The sealing order shall remain in place in regard to the written materials filed by the parties on the *O'Connor* application. Of course, the parties, for the purposes of appeal and their records, will have access to the original transcript, as well as the ruling.

"Bruce J."