Proceedings taken in the Court of Queen's Bench of Alberta, Law Courts, Edmonton, Alberta

---

November 6, 2015	Morning Session
The Honourable	Court of Queen's Bench
Mr. Justice A. W. Germain	of Alberta
R. A. Finlayson	For the Crown
C. L. Bauman	For the Accused
M. J. Swartz	For the Accused
H. M. Flaherty	For Witness Protection Services
F. S. Kozak, Q.C.	For the Media Respondents
A. Pawlikowski-Brouiaka	Court Clerk
A. Hawkins, CSR(A)	Court Reporter

THE COURT CLERK: Order in court. All rise.

THE COURT: Good morning, ladies and gentlemen. Welcome. Please be seated.

MS. FLAHERTY: Good morning.

THE COURT: Mr. Kozak, first of all, I owe you an apology. I can understand how you, who did not attend the trial, might not understand the trial, but I have no similar excuse for myself. I did attend the trial, and I do apologize for leading you on a wild goose chase about Exhibit 7 not having been marked. The manner in which that occurred was that after the witness had left the witness stand, counsel made an application to have the exhibit marked by consent, and I marked it, and we immediately moved onto other things, so it had slipped my mind. I feel like a bit of a doofus, but I do want to apologize to you.

In any event, is there any further submissions of import that counsel want to make on the first ruling that I propose to give today, which is the issue about disclosure?

MS. FLAHERTY: No, My Lord.

MR. KOZAK: No.

Ruling (Voir Dire)(Disclosure)

THE COURT: Thank you.

I'm going to deal with this disclosure ruling in its entirety, including any further and other applications that may flow from the outcome of my disclosure ruling, and then clear the deck on that, and as a standalone, counsel, deal with the substantive issue that we have to deal with in the voir dire. So then you will know that some of the facts might be repeated. I'm going to set it up as two standalone judgments in the event of transcription for appellant review or precedent.

So, firstly, then, I'm obliged now to make a mid-trial ruling in a voir dire in R. v. Vincent James Shawyer, court file number 131380388Q2, on three matters not directly relating to the trial and this voir dire within the trial but which are nevertheless important in a social context.

One of these matters is an application by Mr. Shawyer to suppress the release to the media of small segments of his videotaped statement to Detective Curle on July 11th of 2012. The other two are requests by the witness protection service to suppress Exhibit 7 and a small portion of the oral testimony of two unidentified officers, identified only as Officer 'X' and 'Y' in the context of the public courtroom. That portion that is sought to be suppressed relates to the actual amount of compensation paid to Mr. Shawyer while under the witness protection program.

I have decided to deliver an oral judgment. I have several reasons for doing so. First, I am not making any new law, simply applying well-established principles from the Supreme Court of Canada and other appellant and superior courts across Canada. Second, the public, as represented by the media, are engaged in this trial in the here and the now, not in some future deferred date. Third, the legal principles that are involved in my decision-making were carefully and conscientiously argued by counsel who addressed me, so I received adequate tools and information to make my decision without further independent research. Last, the workload pressure and judicial shortages in the system do not allow me the luxury of a written decision. However, I recognize that my comments may be transcribed, either for precedent value or for appellant review, and in such case, I reserve the right, working with the court reporter, to make modest corrections of grammar, spelling, sentence structure, citation correction, and other cosmetic changes and slips of the lip. I will not, however, greatly amplify or expand my reasons, nor will I change my bottom line.

It is useful, even in a standalone application, to recite briefly some of the facts which give rise to the applications and which put them in their social and judicial balancing context.

Mr. Shawyer is facing trial for murder and arson. Before he was accused, or even a

suspect, he was perceived as a witness at some risk and was therefore taken under the wing of the police service to provide him some protection while they were formalizing and making their application on his behalf for long-term inclusion into either the federal or provincial witness protection program. His role as a witness in need of protection changed to one of a suspect and, subsequently, an indicted accused.

His trial started Monday, November 2nd with a voir dire to determine the admissibility of a statement which he gave to the lead investigator on July 11th of 2012. In the voir dire about the admissibility of Mr. Shawyer's statements, witnesses from the protection program attended and gave evidence. Under the various legislation that governs the operation of these protection programs, a publication ban on the evidence given by two officers, identified as Officer 'X' and Officer 'Y' was granted but subject to further application. The media and the witness protection service reserved the right to attend and to hear the evidence of Officer 'X' and 'Y' and make further application. At the conclusion of their evidence, it was agreed that the evidence of Officer 'X' and 'Y' was given in a discreet and question-specific manner, such that there were few, if any, leakages about the witness protection program or these officers and their participation in it. However, Officer 'Y' revealed that the accused in this case, while under the protection of a police agency, was paid a sum of money per week to cover his basic needs. The media feels that this is newsworthy and requests the entire release of the voir dire evidence of officers 'X' and 'Y'. Counsel for the witness protection program feels that the reference to the actual amounts is insight into the methodologies used by the program and ought not to be released into the public domain. This is the first issue requiring a decision.

The second issue that requires a ruling is whether a document, which ultimately became Exhibit 7 in the voir dire and which relates to a memorandum of understanding between Mr. Shawyer and the witness protection service, which was signed on June 19th, 2012, should be suppressed from release to the media. Learned counsel for the media requests public access to this document. The witness protection program opposes the release of this document.

The third issue requiring a ruling arises from the statement given by Mr. Shawyer on July 11, 2012. In that interview, Mr. Shawyer spent some time deflecting blame for the criminal activity onto others. One of these, identified as "Fred" occasionally in the statement, has never been charged apparently, so the media has agreed that they will not release commentary from the accused placing blame on "Fred", in all of his various names. The other individual, identified as one Mr. Gardiner, who plead guilty before one of my colleagues. Counsel previously agreed that the entire video statement would be releasable under certain conditions. The first of these is that the earlier court orders relating to a publication ban, in the interest of protecting the witness protection program

and its participants, would remain in effect, the result of which would be that certain elements of the statements which identify locations and gave the first two names of two individuals would not be further released and the publication ban would apply to that information.

The second, which the media agreed to, was that a timestamp title bar at the bottom of the video would not be rebroadcast. Those issues are no longer in dispute. The sole dispute is whether the applicant, the accused, has succeeded in obtaining the extraordinary discretional remedy of prohibiting some of which became an exhibit in the courts from further rebroadcast by the media. That remaining segment is the portion of a video in which the accused is casting blame on a former co-accused, Mr. Gardiner.

I put on the record the position of the parties as I understand it. My short summary cannot do justice to their excellent presentations before the Court and I thank them for that. The position of the witness protection program is that the witness protection program at Supreme Court Statutes of Canada 1996 chapter 15 and the Alberta *Witness Security Act*, chapter W-12.5 have the combined effect of prohibiting the further release of material that shows the identity of protected witnesses or their handlers, the location of the residences, and the means and methods of the operation of a program. The program submits that both the document, which was sealed, and the evidence concerning monetary payments made to the witness fall within the definition of information and documentation that is, by the legislation, statutorily prohibited from distribution. The position of the respondent media is that these are factually driven decisions that require evidence and that no evidence was forthcoming. Further, on a common-sense basis, none of the information meets any exclusionary test of the open-court principle.

On the third issue, it is the position of counsel for Mr. Shawyer that his client expressed in the videotapes, which became evidence in the voir dire and thus evidence in this application, that his client was fearful from other potential co-participants in this murder and arson. Second, counsel for Mr. Shawyer invites me to take judicial notice of the reality that there is a culture of silence in the prison environment and that individuals identified as informants are often dealt with harshly.

We also know in a common-sense way that from time to time, there are serious injuries and deaths in the prison system, and while we accept that the security and protection of the inmates is foremost on the minds and job description of prison guards, incidents can occur.

Learned counsel for the media, Mr. Kozak, points out that while there is a public safety administration of justice exception to the open-transparent court concept, it must be clearly established and narrowly defined. Further, it must be proven on appropriate

evidence. The default setting is that of an open court, so the burden of showing an exception rests on the applicant for privacy and that editing of material presented to the public should not lightly occur.

I turn now to put on the record my legal analysis.

Once a document is marked as an exhibit in a trial or portion of a trial conducted in open court, that exhibit is open to the public as represented by the media without restriction or qualification, unless the applicant to restrict or limit access can achieve the high standard set by the Supreme Court of Canada in a series of cases. *Dagenais v. CBC*, [1994] 3 S.C.R. 835 and *R. v. Mentuck*, [2001] 3 S.C.R. 442. These cases have been shortened in judicial shorthand to be the *Dagenais-Mentuck* test. The subject matter of the items sought to be suppressed by the applicants is either evidence given in an open court hearing or an exhibit marked in that same hearing. The foundational starting point is that this evidence should be disclosed pursuant to the principle of an open court and limited only where necessary for a fair trial or for other statutory reasons.

It is important that the witness protection program continue to be safe and participants within it protected, to the extent possible by the courts. The federal and provincial legislation that sets up these programs encourages discretion and the protection of confidentiality. The public policy reason preventing disclosure of many aspects of these programs is compelling but not absolute. If the method utilized in protecting people become widely known, it would be increasingly difficult for the program to operate. In addition, the *Criminal Code* contains a wide definition in section 2 of various ways in which an individual can be a justice system participant, and the *Criminal Code* itself provides tools for the judges to protect the integrity of the system and those participants within it. However, the witness protection program simply cannot assert that all and everything is confidential and protected. It is an *in terrorem* argument that learned counsel for the system presents in this case. How in anybody's wildest imagination revealing that this individual, Mr. Shawyer, received a certain sum of money per week, for a few weeks, to provide for his necessities of life while he was under protection, could defeat the principles of the program is beyond articulation.

My colleague, Justice Veit, in a case which predated changes to the federal legislation observed that while identified rent amounts could perhaps lead to a certain conclusion about the whereabouts of the witness or the lavishness of the accommodation, this would not apply to other things such as spending money. Given the wide range that spending money can be utilized for, including, by example, cigarettes, alcohol, prescriptions, and other necessities of life, a certain amount of money would provide little, if any, insight into where a witness was located, nor is it realistic to characterize that evidence as part of a cumulative bits-and-pieces mosaic, which, if enough pieces were put together, could

give vital information.

Further, the concept that money is utilized to protect witnesses would be of such common knowledge that the fact that protected persons who presumably could not work in their field or calling due to their hidden status would be given some money is not so fundamental nor unique to the program that it should fall within the definition of the ways and means of the program, to prohibit disclosure. Nothing is revealed by this. No one who gave any thought to the issue of a witness protection could ever believe that it operates in a vacuum. There is nothing striking or unusual about the amount paid that would define a place of residence or a lifestyle. Any suggestion that people would embrace the witness protection program for the moneys involved simply lacks common sense. Who would want to witness a murder simply so they could receive a small monthly payment while in hiding and fearful for their life? The witness protection program operates under stringent application requirements, perceived needs and risk assessment, and is not available simply on request or demand. Further, the witness protection program relates only to the most egregious cases of risk, where often, as here, the crime under investigation is extremely serious. The internal screening process belies the notion that if the public knew that people received funds for spending money while under the program, it would make the program less effective is not a realistic argument.

There is no legislative basis for excluding any of the transcripts of the evidence of Officer ’X’ and ’Y’. Their names and identities were protected by the steps taken when they were sworn as witnesses, and there is nothing in their evidence that indicates anything that would adversely affect the witness protection program in the context of their evidence about Mr. Shawyer in it. The application by the witness protection service for an exclusion of the release of this evidence is dismissed. The request by counsel for the media to allow the media full access to the transcript of witnesses ’X’ and ’Y’ without any restriction or redaction, except the steps already taken in Court to protect the identity of the witness and the location of their activity, is permitted.

I now turn to consider the second element, which is the sealed document. This document was also made an exhibit in the proceedings with the consent of both Crown and defence. As an exhibit, it is presumptively releasable to the media, unless the applicant for its restriction can establish a justification against disclosure. The entire legal basis for excluding that document is that it is a disclosure which is prohibited by statute. The applicable legislation flows from the federal *Witness Protection Program Act*, which was first enacted in 1996. On June 26th, 2013, the Harper government’s Bill C-51 was given royal assent and came into effect on November 1st, 2014. The impact of the amendments clarified disclosure issues by altering section 11(1) by increasing prohibition on disclosure. The legislation, with superfluous wording deleted, now reads as follows: (as read)

> Disclosure is prohibited. Section 11(1): No person shall directly or indirectly disclose:
>
> (b) any information about the means and methods by which protected persons are protected.

Section 11(2) also defines and explains what the government meant by means and methods of protection. It includes information about: (as read)

> (a) covert operational methods used to provide protection;
>
> (b) covert administrative methods used to support the provisions of protection; and
>
> (c) any means used to record or exchange confidential information.

Counsel very helpfully provided the Court with the Harper government's background around these amendments, and included in that background is a discussion about what means and methods of protection are all about. It is clear that not every single administrative piece of paper falls within the definition of a prohibited disclosure. Further, the backgrounder, while helpful, is not the law, and I must interpret the statute as it reads.

In this particular case, Exhibit voir dire 7 contains the signature of the accused and the date it was signed and the initials of the accused to a document entitled "Rules for Applicant's Awaiting Possible Admission to Alberta's Witness Security Program".

There is nothing in that document which discloses the location or change of identity either of a person, nor with respect to counsel who argues contrary, is that information caught within the definition of means and methods. A means and a method analysis is something that the witness protection branch does to protect somebody and not what a person seeking protection understands about the program and agrees to do as his or her contribution to it. It is my view that the document in question is not caught by the prohibition, nor the disclosure provisions of that specific legislation. Any legislation that purports to prohibit the disclosure of information in a free and democratic society should be narrowly construed. Accordingly, for the witness protection service to exclude a document which becomes an exhibit in a trial on a common-law approach as an exception to court openness, they would have to show by reasonable and cogent evidence that they are entitled to an exemption on the basis that the failure to do so would subvert the ends of justice or unduly impair the administration of justice. Numerous judges at numerous

court levels have expressed the importance of an open court. I can add nothing to those discussions. This openness also applies to the forms and documentation of the witness protection programs, unless they fall within a statutorily prescribed prohibition against disclosure.

When the witness protection branch cannot establish a direct statutory prohibition against disclosure, they must rely on the development of the law from the Supreme Court of Canada that requires that before there's an order-limiting access, it must be adjudicated based on appropriate evidence that, first, such an order is necessary to prevent a serious risk to the proper administration of justice because reasonably available alternate measures will not prevent the risk, and secondly, that the salutary effects of a publication ban outweigh the deleterious effects on the rights and interests of the parties and the public.

The witness protection services has not proven that the document in question falls within the definition of the statutorily prohibited releasable documents, and they have also not satisfied the common-law test for denying access. Accordingly, the media may have access to the exhibit as filed, which also, within it's context, has several deleted paragraphs, on page 2, 3, 4, and 5 of the document. The media is not entitled to information that was not part of the exhibit and which was redacted by agreement of counsel before the document was filed with the Court and subsequently marked as an exhibit.

I turn to consider the third issue raised by the application to limit access to some of the video recording of the interview starting on July 11th, 2013. In the main, the video has been effectively released to the media but counsel for Mr. Shawyer wishes to restrict the media's ability to use portions of the interview during which Mr. Shawyer is attempting to place the blame for the arson and murder which occurred in this case on a former co-accused, Mr. Gardiner. The media has already fairly undertaken not to play portions of the tape that relate to accusations currently unproven against another third party. In this particular case, there has been a re-election, removing this trial from that of a judge and jury to one of judge alone. In a judge and jury trial, reports by media can inadvertently taint a jury pool, but that is not the case here. Therefore, there is no issue relating to the release of the video statement, with the exception of a possible risk on a personal level to the accused. If his statement, through the media reporting, becomes widely identified as one in which he is blaming others, those others may attempt to retaliate in the prison environment where the accused now resides. However, this argument has to be based on fact and not speculation. I accept the evidence from the statement that Mr. Shawyer is genuinely apprehensive about this. However, I must agree with media counsel that more evidence, specifically of the risk, is required. In this case, despite the strong argument of counsel for Mr. Shawyer, we have only a speculative suggestion that his risks in the prison system pending trial will be heightened or increased by the release of the full

video.

The application of Mr. Shawyer to prohibit disclosure of certain aspects of the video must therefore fail. The media will have access to the full video statement with the exception of the identified privacy concerns that have already been discussed, namely, the locations and the identification of two individuals by first name, the timestamp bar on the video, and their own limiting agreement not to broadcast accusations identifying third parties other than Mr. Gardiner. This concludes my discussion on these preliminary points on the disclosure issue. I now invite counsel to advise me if there are any additional applications they wish to make flowing from my ruling at this time.

MS. FLAHERTY: My Lord, your decision didn't comment on paragraphs 8 and 11 of the rules document, which media counsel, Mr. Kozak, had indicated his client was willing to redact if that document was going to be released.

THE COURT: Thank you. Then there will be a footnote reflecting that that is indeed the case. The document wasn't numbered, as I could see it. There was lots of stuff taken out of the document that was filed as an exhibit. Is the copy you gave Mr. Kozak perhaps more inclusive?

MS. FLAHERTY: The copy that you would have seen would be the same copy that was provided to Mr. Kozak, and on the third page, page 3, there are numbered paragraphs, and it's number 8 and 11 on that page that he's agreed to further redact.

THE COURT: Then I will incorporate that as a consent item to my order.

MS. FLAHERTY: Thank you, My Lord.

THE COURT: Do you need any further narration on that, or will this discussion satisfy you?

MS. FLAHERTY: This discussion satisfies me.

THE COURT: Are you making any other application at this time?

MS. FLAHERTY: No, My Lord.

THE COURT: Mr. Kozak?

MR. KOZAK: There are perhaps only two issues arising. The only one that I think -- I thank my friend Ms. Flaherty -- is there are certain publication bans that will continue, but I think that we have to deal with the time limitation, and so, for example, anything that would identify Officers 'X' and 'Y', that is a publication ban, but I believe my friend and I agreed to defer the discussion of how long that ban should last, until your ruling, and I'm prepared to address it now if my friend is as well.

The second issue deals with the videotape, and that is, yes, you've accurately enumerated all of the exceptions to the general access, and thank you for doing that and making it clear. The media's indication that they are not going to broadcast or publish that part of the tape that deals with the third party not charged with an offence. You accurately summarized that. However, like any order of the Court, when it comes to the restriction, circumstances may change, so as long as it's apparent that if circumstances do change, we are at liberty to come back to the Court to seek a variation on that restriction, on notice to the participants. That's the only issue that arises there.

THE COURT: Ms. Flaherty, do you have any problem with that approach?

So my order will be expanded to indicate that notwithstanding my ruling, if circumstances change that require any of the elements to be reviewed, I will hear from you then.

MS. FLAHERTY: Thank you, My Lord.

THE COURT: And I'm just wondering if you wanted to make any application yourself, Ms. Flaherty? It's not appropriate for me to, you know, throw out any lifelines or anything, but I don't know how strongly your client feels about this. I'm sure Mr. Kozak would understand if you were wanting to race up to the Court of Appeal to have my knuckles rapped in some way about my ruling. I understand that you feel strongly about these issues, but I'm not going to go say anything more.

MS. FLAHERTY: Thank you, My Lord. Just so that I'm clear, I apologize, I thought at one point you had moved onto the video. If my friend wants to make an application with regard to the publication bans that are already in place, then we'll have an opportunity to address it that time. Is that -- ?

THE COURT: No. He'd like to discuss it today with you, and with me, how long the ban will exist for, the basic location ban and identity of the officer's ban. How long will that exist for. And he's prepared to discuss that today or hear from you about discussing it another time, and he is, I think, serving us notice that if

his client later decides that maybe they should get relief from their undertaking not to broadcast portions that relate to the third parties. We could all sort of speculate and visualize in the future why that might occur. Then Mr. Kozak wants to at least preserve on the record that he has the right to come back and apply on the basis of a change of circumstances.

MS. FLAHERTY: Yes, My Lord. On notice to the witness security program.

THE COURT: Sure. Okay.

MS. FLAHERTY: That would be fine. That's my understanding.

THE COURT: Yeah.

MS. FLAHERTY: And if my friend would like to make submissions on duration this morning -- ?

THE COURT: I really would prefer not to do that today, frankly. We still are a long way from discussion of that. We have the trial to conduct in February.

MR. KOZAK: Yes.

THE COURT: And I have other counsel waiting for their decision. I'd prefer to defer that, Mr. Kozak, to another time, and it might be that you can at that point reach an agreement. The record will show that you've raised a concern today.

MR. KOZAK: We have had preliminary discussions, and I think that's appropriate. It may be that we'll be able to reach an agreement, and if so, we don't have to take up any additional court time.

THE COURT: Sure.

MR. KOZAK: That's fine. That's a common-sense way of approaching it.

MS. FLAHERTY: I agree, My Lord. There are protections in place right now, and the order does allow for variation on application to the Court, if it's needed.

THE COURT: All right. So as it relates to these disclosure items, are there any other applications to be made?

MR. KOZAK: No, My Lord. Thank you.

MS. FLAHERTY: No, My Lord.

(PORTION OF PROCEEDINGS OMITTED BY REQUEST)

PROCEEDINGS ADJOURNED UNTIL 10:00 A.M., FEBRUARY 1, 2016

Certificate of Transcript

I, Allison Hawkins, certify that the foregoing pages are a complete and accurate transcript of the proceedings, taken down by me in shorthand and recorded by a sound-recording machine and transcribed from my shorthand notes to the best of my skill and ability.

Digitally Certified: 2015-11-18 14:51:59
Allison Hawkins, CSR(A)
Order No. 58213-15-2

Pages:	15
Lines:	577
Characters:	25173

File Locator:	fa9f76c88e1511e5be460017a4770810
Digital Fingerprint:	be9d67166e5e86b3c684927465a925d312ab46c3c8a544e12ede43f91e88861c

---