CITATION: R. v. VICE MEDIA CANADA INC. and BEN MAKUCH, 2016 ONSC 1961
COURT FILE NO.: 15-M-9-218
DATE: 20160329

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
HER MAJESTY THE QUEEN Respondent	Sarah Shaikh, for the Respondent
– and –	
	Iain A.C. MacKinnon, for the Applicants
VICE MEDIA CANADA INC. and BEN MAKUCH Applicants	
	HEARD: March 1, 2016

MacDonnell, J.

[1] On February 13, 2015, Justice Nadelle of the Ontario Court of Justice issued a production order pursuant to what was then ss. 487.012(1) and (3) of the *Criminal Code,* directing the applicants Vice Media Canada Inc. and Ben Makuch to produce certain documents and data pertaining to communications with or concerning Farah Shirdon. The application for the production order was made *ex parte* on the basis of an Information To Obtain (ITO) sworn by Constable Grewal of the RCMP. Pursuant to s. 487.3(1) of the *Code*, Justice Nadelle further ordered that the production order and the ITO be sealed pending further order by a court of competent jurisdiction.

[2] At the time those orders were issued, Farah Shirdon was under investigation for a number of offences related to his suspected involvement with a terrorist organization, namely ISIS. Shirdon, who was 21 years of age, and who had been raised in Calgary, was believed to have left Canada in March 2014 to join ISIS in Iraq or Syria. He has since been charged with six terrorism offences. He has not been arrested.

[3] Vice Media Canada Inc. ("Vice Media") is a media company that produces stories and content for its multimedia network of websites, TV channels, films and mobile platforms. Ben Makuch is a news reporter and video producer for Vice Media. Between June and October 2014 Mr. Makuch wrote and Vice Media published three articles about Shirdon's involvement with ISIS. Those articles were based in large part on communications between Mr. Makuch and Shirdon through the Kik text messaging service.

[4] There are three applications before the court:

(i) an application for *certiorari* to quash the production order;

(ii) in the alternative, an application under s. 487.0193 of the *Criminal Code* for an order revoking or varying the production order;

(iii) in any event, an application for an order setting aside the sealing order.

[5] For the reasons that follow, the applications to quash, revoke or vary the production order are dismissed. The application to vary the sealing order to permit access to the production order and the ITO is allowed in part, but an order temporarily banning publication of information pertaining to Farah Shirdon's alleged involvement with ISIS is imposed.

I. Should the Production Order Be Quashed?

(a) The principles to be applied by the authorizing justice

[6] A production order authorizes state conduct that amounts to a search or seizure and thus it is subject to the reasonableness requirement imposed by s. 8 of the *Canadian Charter of Rights and Freedoms*: *R. v. Nero*, 2016 ONCA 160, at paragraph 65. A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable: *R. v. Collins*, [1987] 1 S.C.R. 265, at paragraph 23.

[7] The production order in this case was issued under the authority of what were then ss. 487.012(1) and (3) of the *Criminal Code*. Pursuant to those provisions, a justice to whom an application is made is required to be satisfied that there are reasonable grounds to believe (a) that an offence against the *Criminal Code* or other federal statute has been or is suspected to have been committed, (b) that the documents or data sought will afford evidence respecting the commission of the offence, and (c) that the person who is subject to the order has possession or control of the documents or data.

[8] However, even if those requirements are fulfilled, the justice is not obliged to issue a production order. Section 487.012 provides that the court "may" do so, which implies the exercise of discretion.[1] The public interest in the investigation and suppression of crime is not the only interest to be considered. In *Canadian Broadcasting Corporation v. Lessard*, [1991] 3 S.C.R. 421, Justice Cory observed that notwithstanding that the statutory preconditions have been satisfied, the authorization of a search is not automatic. He stated:

> For example, a greater degree of privacy may be expected in a home than in commercial premises which may be subject to statutory regulation and inspection. At the same time, among commercial premises, the media are entitled to particularly careful consideration, both as to the issuance of a search warrant and as to the conditions that may be attached to a warrant to ensure that any disruption of the gathering and dissemination of news is limited as much as possible. The

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[1] *Canadian Broadcasting Corp. v. Manitoba (Attorney General)*, 2009 MBCA 122, at paragraph 26

> media are entitled to this special consideration because of the importance of their role in a democratic society.[2] [emphasis added]

[9] Justice Cory set forth nine principles that must be taken into account when considering whether a search of the media should be authorized. The third of those principles calls upon the justice to engage in a balancing:

> The justice of the peace should ensure that a balance is struck between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news gathering and news dissemination. It must be borne in mind that the media play a vital role in the functioning of a democratic society. Generally speaking, the news media will not be implicated in the crime under investigation. They are truly an innocent third party. This is a particularly important factor to be considered in attempting to strike an appropriate balance, including the consideration of imposing conditions on that warrant.[3]

[10] Justice Cory was clear, however, that the special consideration afforded to the media does not import new or additional requirements for the issuance of search warrants or similar orders. In *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459, the companion case to *Lessard*, he stated:

> What it does is provide a backdrop against which the reasonableness of the search may be evaluated. It requires that careful consideration be given not only to whether a warrant should issue but also to the conditions which might properly be imposed upon any search of media premises.[4]

(b) The principles to be applied on a review

[11] Where an application is brought for an order in the nature of *certiorari* to quash a production order, the test to be applied by the reviewing judge is the familiar *Garofoli* test: *Nero*, *supra,* at paragraph 69. The review is not a *de novo* hearing of the original application: "the reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the [order], then he or she should not interfere."[5]

[12] The record for the reviewing judge to consider consists of the ITO that was presented to the authorizing justice, any additional evidence adduced at the hearing, and the submissions of counsel. The review proceeds from a presumption that the order is valid, but the presumption is rebuttable. The review requires "a contextual analysis of the record, not a piecemeal dissection of individual items of evidence shorn of their context": *Nero*, at paragraph 68. Like the authorizing justice, the reviewing judge is entitled to draw reasonable inferences from the contents of the

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[2] paragraph 46
[3] paragraph 47
[4] paragraph 32
[5] *R. v. Garofoli*, [1990] 2 S.C.R. 1421, at paragraph 56

ITO. The fact that an item of evidence in the ITO may support more than one inference, or even a contrary inference to one supportive of a condition precedent, is of no moment. The inquiry begins and ends with an assessment of whether the ITO contains reliable evidence that might reasonably be believed on the basis of which the warrant or order *could* have issued: *Nero*, at paragraph 71.

[13] Those principles remain fully applicable where the target of the production order is a media outlet. In particular, the test remains whether the ITO contains reliable evidence that might reasonably be believed on the basis of which the order *could* have issued. However, bearing in mind that the authorizing justice is required to give special consideration to the vital role of the media in a democratic society and to take into account the principles listed by Justice Cory in *Lessard*, the justice on a review must ask whether, on the basis of what was before the authorizing justice, he or she *could* have found the issuance of the production order against a media target to be reasonable: *Canadian Broadcasting Corp. v. Manitoba (Attorney General), supra,* at paragraph 70.

(c) The position of the applicants

[14] In broad terms, the applicants advance three submissions in support of their position that the production order should be quashed:

> (i) first, they submit that the affiant did not assert a belief that the material sought would afford evidence of the commission of the offences under investigation, that the affiant did not set forth reasonable grounds for such a belief, and that the application for a production order was purely a fishing expedition. Thus, the applicants submit, the application for a production order should have been rejected for non-compliance with the statutory requirements;
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> (ii) second, they submit that the production order was overbroad;
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> (ii) third, they submit that the ITO did not disclose a basis upon which the authorizing justice could reasonably have struck the balance between the interests of the state in the investigation of crime and the *Charter*-protected right of the media to gather and disseminate the news in favour of a production order.

(d) Did the ITO reveal grounds to believe the material sought "will afford evidence"?

[15] The applicants submit that the ITO does not set forth a basis for a reasonable belief that the material sought to be produced "will afford evidence" of the commission of any of the offences under investigation. Indeed, they go further and submit that except in one limited respect the affiant did not even assert that the material would afford evidence of the offences. In relation to that one limited area, they submit that the investigators already have substantial evidence, which is a factor that is relevant to whether the requisite balancing process should be resolved in favour of issuing a production order.

[16] In making that submission, the applicants rely heavily on their interpretation of paragraph 68 of the ITO, which states:

> The information about how contact was made with Shirdon to set up the Vice Video Interview is vital evidence to substantiate the fact that he was in Iraq at the

> time of the Vice Video Interview as he says he was. This in turn is vital context evidence to prove that his implicit admissions of murder and his stated threats of further violence and murder were done sincerely as opposed to the actions of a foolish or mentally unstable individual enjoying the hubris of internet celebrity. Proof that he was in Iraq at the time also adds significant cogency to the video evidence where he states that they were under attack at the time of the interview. [emphasis added]

[17] The applicants submit that this paragraph, and in particular the portion that is underlined, demonstrates that the only reason why the investigators want *any* of the material covered by the production order is to establish that Farah Shirdon was in Iraq at the time of the Vice Video Interview.[6] They say that nowhere else in the ITO is there an indication of how the material 'will afford evidence'. They then build on that submission to argue that if that is the only reason why the investigators want the material, the production order is overbroad.

[18] In my respectful view, the applicants have misread the structure of the ITO and the meaning of paragraph 68.

[19] To understand paragraph 68, one has to start with paragraph 64, in which the affiant set forth three categories of material that the investigators were seeking. Subparagraph 64a sought the production of "any notes and all records of communications made by Makuch or any employee of Vice Media Canada Inc. and Vice Studio Canada Inc. respecting the means of effecting contact with Shirdon… or respecting communications with Shirdon…" Subparagraph 64b required the production of "unedited copies of any electronic records of all communications between Makuch or any employee of Vice Media Canada Inc. and Vice Studio Canada Inc. and Shirdon…over the Kik messenger…" Subparagraph 64c required the production of "paper printouts, screen captures or any other computer records of all communications between Makuch or any employee of Vice Media Canada Inc., Vice Studio Canada Inc. and Shirdon…over Kik messenger".

[20] There are significant differences between what was sought under subparagraph 64a and what was sought under subparagraphs 64b and 64c. Subparagraph 64a required the production of "notes" of any communications that Mr. Makuch or other employees of Vice had with *anyone*, not just Shirdon, "respecting the means of effecting contact with Shirdon…" regardless of how those communications were made. Neither 64b nor 64c required the production of "notes", and both of the latter paragraphs were directed only to communications with Shirdon and only to communications over the Kik messenger service. The expansion of the proposed order beyond communications with Shirdon over Kik messenger to include those with *anyone* by any means, provided they concerned the means of contacting Shirdon, called for an explanation and on my reading of the ITO that is what the affiant attempted to provide in paragraph 68. That is, paragraph 68 was meant to explain why the material in subparagraph 64a would provide evidence. I do not read paragraph 68 as purporting to explain why the investigators wanted the communications described in subparagraphs 64b and 64c, all of which were communications to

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[6] On September 24, 2014 a journalist with Vice Media's United States operations conducted an interview with Shirdon over Skype that was subsequently posted online.

which Shirdon was a party. Unlike the material in subparagraph 64a, no additional explanation was required for how those communications would provide evidence because, reading the ITO as a whole, "the connection between the items sought and the offence is one that might be gathered easily by inference from the very nature of the [offences] and the material sought"[7]. In such circumstances, "the informant [was] not obliged to underline the obvious."[8]

[21] The applicants submit that apart from paragraph 68, nowhere in the ITO did the affiant say that he believed that the material sought to be produced would afford evidence of the offences under investigation. I do not accept that submission. In paragraphs 7 to 17 of the ITO the affiant provided an overview of the results of the investigation. At paragraph 15, he set forth his basis for believing that Farah Shirdon had made statements to Mr. Makuch with respect to his involvement in ISIS. On their face, those statements were evidence of the commission of the offences under investigation. At paragraph 17, the affiant stated that he had "reasonable grounds for believing that the following documents or data" from Mr. Makuch and Vice Media "will afford evidence of the…offences". Among the documents he listed were screen captures of Mr. Makuch's communications with Shirdon. In my opinion, no additional explanation was required as to the manner in which those communications would provide evidence. The authorizing judge could easily have concluded that the 'will afford evidence' requirement set forth in s. 487.012(3)(b) had been satisfied.

(e) Is the production order overbroad?

[22] The applicants' submission that the production order is overbroad is related to and somewhat dependent on their submission with respect to the meaning of paragraph 68, which I have rejected. If I understood their position correctly, however, they also submit that the ITO did not disclose a basis upon which the authorizing justice could have concluded that there were reasonable grounds to believe that the particular material described in subparagraph 64a would afford evidence, and thus that the production order is overbroad.[9]

[23] In the circumstances of this case, it is unnecessary to determine the merits of that argument. It is common ground that the only material that the applicants have in their possession is screen captures of the Kik communications, which are covered by subparagraph 64c. As I have said, I am satisfied that there were reasonable grounds set forth in the ITO on the basis of which the authorizing justice could have decided that the material described in subparagraph 64c would afford evidence. Assuming without deciding that either or both of subparagraphs 64a and b are overbroad, it would not be necessary that the entire production order be quashed.

[24] The law is clear that invalid parts of an order such as this may be severable. In *Re Regina and Johnson & Franklin Wholesale Distributors* (1971), 3 C.C.C. (3d) 484 (B.C.C.A.), a search warrant issued in support of an investigation into the distribution of obscene material authorized a search for obscene books at the distributor's premises, as well "company records, including invoices". The warrant was valid insofar as it authorized a search for obscene books but it was overbroad in relation to records or invoices because it left it open to the police to seize every

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[7] *R. v. Lubell*, [1973] O.J. No 179 (Ont. H.C.J.), at paragraph 5

[88] *ibid*

[9] Subparagraphs 2a, b and c of the production order track the language of subparagraphs 64a, b and c *verbatim*.

record in the possession of the company, regardless of whether it was connected to the offence. However, the British Columbia Court of Appeal held, the portion of the warrant authorizing the seizure of records was severable from the portion authorizing the seizure of books. As Tysoe J.A. put it at page 490: "The bad part of the warrant is clearly severable from the good."

[25] In *R. v. Paterson, Ackworth and Kovach* (1985), 18 C.C.C. (3d) 137, the Ontario Court of Appeal applied *Johnson & Franklin Wholesale Distributors* in the context of an invalid basket clause in a wiretap authorization. All of the interceptions that took place in that case occurred under the valid portions of the authorization. Justice Martin noted that "the 'basket clause' was never resorted to, it generated no evidence, nor any derivative evidence" and he held that it was severable. Justice Martin's reasons were specifically adopted by the Supreme Court of Canada in *R. v. Grabowski*, [1985] 2 S.C.R. 434. Speaking for the Court, Justice Chouinard stated:

> When there is a clear dividing line between the good and bad parts of an authorization, and they are not so interwoven that they cannot be separated but are actually separate authorizations given in the same order, the Court in my opinion can divide the order and preserve the valid portion, which then forms the authorization. In such a case interceptions made under the valid authorization are admissible.[10]

[26] All of the material that is subject to the production order in the case at bar falls within subparagraph 64c, which I am satisfied is not overbroad. Subparagraph 64c is not so interwoven with subparagraphs 64a and 64b that it cannot be separated from them. Accordingly, I reject the submission that the order should be quashed for overbreadth.

(f) Could the authorizing justice have determined that issuing the production order was reasonable?

[27] As indicated earlier, in his majority reasons in *Lessard* Justice Cory set forth nine principles that a justice must take into account when considering whether a search of the media should be authorized. One of those principles was the following:

> Although it is not a constitutional requirement, the affidavit material should ordinarily disclose whether there are alternative sources from which the information may reasonably be obtained and, if there is an alternative source, that it has been investigated and all reasonable efforts to obtain the information have been exhausted.[11]

[28] In paragraph 67 of the ITO, the affiant stated:

> Makuch stated in his article that the Vice Video Interview was set up after his contact with Shirdon over Kik messenger. Pursuant to another Court Order, Kik Interactive produced documents for Shirdon's Kik account. The documents and data received from Kik Interactive do not provide any content of the conversation but only a time stamp of when Shirdon… spoke with another Kik user (identities

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[10] paragraph 61
[11] paragraph 47

> not provided). Kik does not store the content of the conversation. The only persons privy to the content of the conversation in this instance would be Makuch and Shirdon. Kik messenger is a mobile device based application, as such users have the option to save their conversations either as a screenshot (Picture) or save the entire conversation on their device. The document and data sought in this Application cannot be obtained through Kik or from another individual or company. [emphasis added]

[29] The applicants acknowledge that based on the last sentence of paragraph 67 the authorizing justice could have found that there was no alternative source for the Kik screenshots themselves. They argue, however, that there were alternate ways of acquiring the *information* that the screenshots contained. For example, the investigators had the articles that Makuch had written in which he had set forth the substance of what Shirdon had said in the text messages. Further, they say, it was open to the investigators to subpoena Mr. Makuch to testify about the texts. Thus, the submission goes, the authorizing justice could not reasonably have resolved the balancing process in favour of requiring the applicants to produce the screenshots.

[30] In support of their position, the applicants place particular weight on the decision of Justice Glithero in *R. v. Dunphy*, [2006] O.J. No. 850 (Sup. Ct.). Mr. Dunphy was a newspaper reporter who over the course of about four years had written a number of stories about the murder of a Hamilton lawyer. It was suspected that the murder was carried out by members of a criminal organization headed by one Paul Gravelle. In a number of the stories, Dunphy had referred to conversations that he had with Gravelle, who denied being involved in the murder.

[31] The police officers who were investigating the murder applied to Justice Glithero for an order under s. 487.012 requiring Dunphy to produce all of the notes of his interviews with Gravelle. Dunphy took the position that anything that would be of interest to the police had already been set forth in the newspaper stories he had written.

[32] Justice Glithero refused to make a production order, essentially for two reasons. First, he was not satisfied, on the basis of the ITO, that the notes would afford "evidence respecting the commission of the offence". He stated:

> ... The Information before me indicates that Mr. Dunphy has said that anything relevant to the murders is already reported in his newspaper articles. The prosecution believes otherwise or, at least, argues that Mr. Dunphy may not be in a position to accurately assess what is relevant as he may not be privy to all the information available to the police. Nevertheless, is the police belief "one of credibly based probability" or is it "mere suspicion, conjecture, hypothesis or a 'fishing expedition'." The only evidence before me on this application as to what is contained in the notes is Mr. Dunphy's assertion to the police that anything relevant to the murders is already contained in the published articles. There is no actual evidence from the affiant that Mr. Dunphy's notes contain any information that is not already the subject of the published articles. In my opinion, the applicant's suggestion that the notes will afford additional information relevant to

> the murders falls into the category of suspicion, conjecture or hypothesis and is in that sense a "fishing expedition".[12]

[33] It would go too far to say that Justice Glithero held that it is up to the target of a production order to decide if the police really need what the target is being asked to produce. What Justice Glithero was faced with was an absence of evidence that Dunphy's notes had any more *information* from a *witness* than what he had included in his newspaper stories. In Justice Glithero's view, the police were simply guessing that there might be more. In the case at bar, the police were not seeking information that Mr. Makuch had obtained from a witness – they were seeking copies of the actual electronic communications made by an accused. Further, the affiant did set forth a basis for his belief that the material in question – the screen captures – were in existence and that they would provide evidence of the offences.[13]

[34] Second, Justice Glithero was not satisfied that the police did not have alternate sources for the information they were seeking. He stated:

> ...[The] authorities direct me to consider whether there are "alternate sources from which the information may reasonably be obtained and, if there is an alternative source, that it has been investigated and all reasonable efforts to obtain the information had been exhausted. Here, the information sought relates to things Mr. Gravelle is believed to have possibly mentioned to Mr. Dunphy. Mr. Gravelle is the real source of the information sought. Paul Gravelle has offered on more than one occasion to co-operate with the police, and to provide them with the information he has in respect of the murder, albeit on one occasion requiring that such disclosure be part of a deal involving the dropping of charges as against him and his brother. Mr. Gravelle has gratuitously offered information to the police previously, which offer the police declined. While the police may understandably have reservations about his candour, this is a two edged sword and if he is not to be believed, then presumably what he has to say would be of no assistance to the prosecution.
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> Paul Gravelle, as a source of information, is available to the police as an "alternate" source to Mr. Dunphy's notes. It has not been shown to my satisfaction that all reasonable efforts to obtain information from him directly have been exhausted. ...
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> In my opinion, the Information is not sufficient to satisfy me, on the standard of credibility based probability, that the notes will afford evidence in respect of the commission of these murders. Nor am I satisfied that the alternative source of any information that does exist has been investigated and that all reasonable efforts to obtain the information have been exhausted. Paul Gravelle is the obvious alternate source and in my opinion, given his previous offers to supply information, it is not

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[12] paragraph 48
[13] at paragraphs 66 and 70 of the ITO

> shown that all reasonable efforts to obtain that information otherwise have been exhausted. Further, I am not satisfied that other efforts cannot be utilized, reasonably, to obtain any other or further information from Paul Gravelle, either at the preliminary hearing or at the trial.[14]

[35] Once again, the situation that was presented to the authorizing justice in the case at bar is different from that presented to Justice Glithero. On Justice Glithero's view of the facts, Gravelle was not an accused but rather a witness. In the circumstances, it was hardly surprising that Justice Glithero would find that the logical course for the police to follow would be to talk directly to the witness rather than trying to get what he may have said to a reporter. In other words, the information sought could be obtained by the police by a route other than requiring a reporter to surrender his notes. In the case at bar, Shirdon is the accused. The police were not simply looking to what he said as information that might advance the investigation; they were seeking evidence directly admissible against him in the proposed prosecution.

[36] Further, in *Dunphy* the witness – Gravelle – was available and willing to talk to the police. Shirdon was not available to the police. All that they knew was that he was somewhere in the Middle East. And what they were seeking, at least insofar as subparagraph 64c was concerned, was not Makuch's notes but rather the screenshots, printouts or other *computer* records of Shirdon's statements. That is, they wanted copies of Shirdon's actual electronic communications as they appeared on the computer screen of the person to whom those communications were made. In essence, the police were seeking recordings of the communications.

[37] The fact that the screen captures of Shirdon's electronic communications would be the best and most reliable evidence of what he said is not determinative of where the balance should be struck on an application for a production order directed to a media outlet. However, it is a relevant consideration. It must also be said that it is hard to understand how the suggestion that Mr. Makuch be subpoenaed to testify to the communications would ameliorate the concern that the applicants have raised with respect to participating in a police investigation. From the source's perspective, whether the material is provided pursuant to a production order or under subpoena would seem to be six of one or a half-dozen of the other.

[38] The applicants also rely on the decision of the Manitoba Court of Appeal in *Canadian Broadcasting Corp. v. Manitoba (Attorney General), supra.* In that case, the RCMP had obtained a production order requiring the CBC to produce videotapes of a press conference that had been called by the accused, at which he may have made statements in relation to the matters with which he had been charged. The CBC moved successfully to quash the order. The Manitoba Court of Appeal affirmed the decision of the reviewing judge.

[39] In the view of the reviewing judge, the authorizing judge could not have properly issued the production order because not all of the pertinent factors had been disclosed to her. Importantly, the affiant had not disclosed that the RCMP knew about the press conference in advance and chose not to go. In that regard, Steel J.A. stated:

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[14] paragraphs 49, 50 and 52

> For the reviewing judge, the significance of this non-disclosure is that the authorizing judge would not have known that by not sending an RCMP officer to attend the press conference in Winnipeg, the RCMP were making a choice and that they had an opportunity to obtain the information themselves firsthand. This is important because, as the reviewing judge pointed out, in any analysis which attempts to strike the balance between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news gathering and dissemination, the RCMP decision not to attend the press conference is a fact that provides added force to the concern that the media not be casually implicated as an investigative arm of the police.[15] [emphasis added]

[40] Justice Steel further stated:

> The reviewing judge found as a fact that this non-disclosure was material. I agree with this conclusion. Had the RCMP attended the press conference, they could have conducted their own investigation. By choosing not to attend, the RCMP left itself in a position to merely guess at what might have occurred at the press conference and then attempted to "deputize" the media by making the application for the production order without disclosing these facts to the authorizing judge.[16] [emphasis added]

[41] Once again, the case at bar is readily distinguishable. There is no suggestion here that the investigators were in a position to be privy to the communications in question, or that they made a choice not to get the communications themselves, or that they decided to 'deputize' Mr. Makuch or Vice Media to get the evidence for them. Further, there is no suggestion that they failed to disclose any material facts in relation to what they knew about the communications.

[42] In my opinion, the ITO disclosed a basis upon which the authorizing justice could have determined that not only was there no alternative source from which to obtain copies of the actual electronic communications sent by Shirdon to Mr. Makuch, but that there was no alternative source for evidence of the same quality and reliability.

(g) Conclusions.

[43] In assessing the competing interests in this case, the authorizing justice was entitled to take into account that there was no alternative source for the Kik screenshots. He was also entitled to consider that the maker of the communications, Shirdon, was not a confidential source and that the communications were not made with an understanding that they would not be shared. Indeed, the only reasonable inference appears to be that Shirdon regarded Mr. Makuch and Vice Media as the channels through which he would speak to the whole world. I accept that this is not a complete answer to the applicants' concerns but it is a factor that tends to attenuate them.

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[15] paragraph 49
[16] paragraph 53

[44] The authorizing justice was also entitled to consider that the bulk of the information that Shirdon communicated to Mr. Makuch had been published by Mr. Makuch. Indeed, the applicants take the position that all of it found its way in Mr. Makuch's articles. In *Lessard*, one of the principles that Justice Cory stated must be taken into account when balancing the public interest in the suppression of crime with freedom of the press was that "if the information sought has been disseminated by the media in whole or in part, this will be a factor which will favour the issuing of the search warrant."[17]

[45] Justice Cory also stated, implicitly if not explicitly, that a justice to whom an application for an order authorizing a search is made should consider the impact of the implementation of the order on the newsgathering activities of the media.[18] The production order that was requested in this case was calculated to not disrupt or interfere with the work of either Mr. Makuch or Vice Media.

[46] The screen captures are important evidence in relation to very serious allegations. There is a strong public interest in the effective investigation and prosecution of such allegations. The screen captures are a copy of the actual electronic messages that Shirdon placed on Mr. Makuch's computer screen. They are highly reliable evidence that do not require a second hand interpretation.

[47] I am satisfied that the ITO set forth a basis upon which, after taking into account the special position of the media, the authorizing justice *could* have determined that the balance between the interests of law enforcement and the media's right to freedom of expression favoured making the production order.

[48] Accordingly, the application to quash the production order is dismissed.

II. Should the Production Order be Revoked or Varied?

[49] As an alternative position, the applicants submit that if the court is not prepared to quash the production order, it should be revoked or varied.

[50] The authority to revoke or vary a production order is provided in s. 487.0193(1) of the *Code*, which states that the target of the order "may apply in writing to the justice or judge who made the order – or to a judge in the judicial district where the order was made – to revoke or vary the order." For the purposes of this provision, "judge" means a judge of the Superior Court: s. 487.011. Subsection 487.0193(4) provides that the justice or judge may revoke or vary the order if satisfied (a) that it is unreasonable to require the applicant to produce the material in question, or (b) that production of the document would disclose information that is privileged "or otherwise protected from disclosure by law".

[51] The applicants do not claim that it is unreasonable to require them to produce the Kik messenger logs or that the information contained therein is privileged, but they do claim that it is "otherwise protected by law". They submit that the special position of the media that has been

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[17] paragraph 47
[18] paragraph 53

affirmed in common law decisions such as *Lessard* is embraced within the concept of "otherwise protected by law", and thus that journalists are protected against compelled disclosure of their work product, private notes, and material that is not published or broadcast.

[52] This submission was not pressed with any vigor in oral argument. The only authority cited in support of it was the decision of Justice Greene in *Thompson Reuters Canada Ltd. v. Canada*, 2013 ONCJ 568. In that case, Justice Greene accepted that the exemptions from compliance with a production order set forth in what is now s. 487.0193(1) of the Code "should be interpreted in a manner that recognizes the special position of the media in our society."[19] However, Justice Greene found it unnecessary to determine how that special position might find recognition within the concept of "otherwise protected by law". Her judgment is not authority for the position taken by the applicants here.

[53] I am not persuaded that the Kik logs are protected by law from disclosure. The decisions of the Supreme Court in the *Lessard* and *New Brunswick* establish that the special position of the media is a factor to be taken into account in considering whether to authorize a search, just as the special position of a home is factor to be considered, but that special position does not import new or additional requirements for the issuance of search warrants or similar orders. Rather, "it [provides] a backdrop against which the reasonableness of the search may be evaluated. It requires that careful consideration be given not only to whether a warrant should issue but also to the conditions which might properly be imposed upon any search of media premises."[20]

[54] As a second alternative, the applicants submit that the production order should be narrowly limited to information in the Kik logs that will "truly" afford evidence of the offences. In that respect, they submit, the order should require only the production of what is referenced in paragraph 68 of the ITO. For the reasons set forth earlier, it is my view that the applicants have misread paragraph 68. In any event, it does not appear to me that this remedy is one that is contemplated by ss. 487.0193(4).

III. Should the ITO be Unsealed?

(a) General principles

[55] Any consideration of whether a sealing order in relation to an ITO used to obtain an authorization for a search should be set aside begins with the presumption that full public access should be permitted:

> Once a search warrant is executed and something has been seized pursuant to that search warrant, the warrant and the information to obtain the warrant are available to the public unless a party seeking a sealing order can demonstrate that public access would subvert the ends of justice... The narrow grounds upon which a sealing order may be obtained and the requirement that the sealing order be

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[19] paragraph 18
[20] paragraph 32

> carefully tailored so as to minimize restriction on public access are demonstrated in s. 487.3 of the *Criminal Code*...[21]

[56] Subsection 487.3(1) of the *Code* provides that an order prohibiting access to and the disclosure of any information relating to a production order may be made on the ground that "the ends of justice would be subverted by the disclosure" or that "the information might be used for an improper purpose". The range of circumstances that can justify a finding that the ends of justice would be subverted is open ended. While s. 487.3(2) sets forth four specific bases, it also provides that such a finding can be made "for any other sufficient reason". Before making a sealing order, however, the justice must be satisfied that the reason for the order "outweighs in importance the access to the information": s. 487.3(1)(b).

[57] In this case, the sealing order recited that it was being made "upon being satisfied that the ends of justice would be subverted by the disclosure for one of the reasons referred to in s. 487.3(2) or that the information might be used for an improper purpose", and "that the grounds justifying the non-disclosure outweigh in importance the access to the information." As no further reasons were provided, there is no way to know which of the grounds referred to in s. 487.3(2) persuaded the justice to make the order or what satisfied him that the information might be used for an improper purpose. More to the point, however, there is no basis to suggest that he considered measures other than a complete sealing order, such as, for example, limiting the duration of the order. In *R. v. Canadian Broadcasting Corp.*, 2008 ONCA 397, Justice Juriansz held that "the failure to consider alternative measures short of a full-fledged non-access order amounts to an error of law on the face of the record".[22]

[58] It is not clear whether the application to set aside or vary the sealing order in the case at bar is an application for *certiorari* or an application pursuant to ss. 487.3(4) of the *Code*. That subsection provides that an application to set aside or vary "may be made to the justice or judge who made the order or to a judge of the court before which any proceedings arising out of the investigation in relation to which the warrant or production order was obtained may be held." As the applicants have not referenced s. 487.3(4), I proceed on the basis that this is a *certiorari* application. In some circumstances, the authority of the court to fashion a remedy might be wider under s. 487.3(4) but where, as here, an error of law on the face of the record has been established, the remedial powers of the court on a *certiorari* application include the authority "to decide the merits of the sealing order application and make the order which the court concludes should have been made".[23] Accordingly, how the application is characterized in this case is of no practical significance.

[59] For a sealing order to be constitutional, compliance with the preconditions set forth in s. 487.3(1) is required, but while compliance is required it is not in itself sufficient. The well-known *Dagenais/Mentuck* test applies to *all* discretionary court orders that limit freedom of

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[21] per Doherty J.A. in *Toronto Star Newspapers Ltd. v. Ontario*, [2003] O.J. No. 4006, affirmed 2005 SCC 41; see also *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175

[22] paragraph 26; see also *Ottawa Citizen Group Inc. v. Canada*, [2005] O.J. No. 2209, at paragraph 48

[23] *Toronto Star Newspapers Ltd. v. Ontario, supra*, per Doherty J.A. at paragraph 17; *Dagenais v. CBC*, [1994] 3 S.C.R. 835, at paragraph 38

expression and freedom of the press in relation to legal proceedings.[24] Thus, in addition to being satisfied that the statutory preconditions had been fulfilled, the authorizing judge was required to be satisfied that:

> (a) an order denying access was necessary to prevent a serious risk to the proper administration of justice because reasonably alternative measures would not prevent the risk; and
>
> (b) the salutary effects of denial of access outweighed 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.

(b) Does access to the ITO pose a serious risk to the proper administration of justice?

[60] The Crown concedes that some portions of the ITO no longer need to be subject to a sealing order. The Crown contends, however, that to protect the integrity and efficacy of the ongoing investigation, to avoid prejudicing the interests of innocent persons, and to protect the right of Farah Shirdon to a fair trial, a prohibition on access to the bulk of the ITO remains justified.

(i) the ongoing investigation

[61] Section 487.3(2)(a)(ii) provides that a sealing order can be made on the basis that the ends of justice would be subverted because disclosure would "compromise the nature and extent of an ongoing investigation."

[62] In seeking to have all the materials relating to the application for the production order sealed, Constable Grewal deposed that "disclosure would compromise the ongoing nature and extent of this RCMP investigation".[25] He asserted that premature disclosure of the contents of the ITO would "alter the RCMP's ability to continue to investigate the offences described" and would alert certain individuals that they may be the subject of investigation.[26] Constable Grewal's ITO was sworn more than a year ago, in February 2015, but Corporal Ross made clear in an affidavit sworn on February 10, 2016 that the RCMP continues to have those concerns. He stated:

> Shirdon is still at large. Although charges have been laid, the investigation is ongoing. It is essential that the investigative efforts pursed to date remain sealed in order to preserve the integrity of further investigative efforts that are being undertaken. I believe the release of the details of the investigative efforts will jeopardize the collection of further evidence because disclosure would cause the subject(s) of the investigation to alter their behaviour. This would hamper ongoing investigative efforts. Please have regard to paragraphs 74 and 75 of the [ITO].

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[24] *Toronto Star Newspapers Ltd. v. Ontario,* 2005 SCC 41, per Fish J. at paragraph 7.
[25] paragraph 74 of the ITO
[26] subparagraphs 75a and 75c

> As Team Commander, I am familiar with the ongoing investigation. Investigative steps, such as the ones described in paragraphs 11, 60(c), (e), and (h) have continued since the [ITO] was sworn.[27]

[63] Paragraphs 11, 60(c), (e), and (h) merely set forth that the police have been monitoring open-source social-networking sites

[64] It is well-settled that the early disclosure of material contained in an ITO is capable of significantly impairing the ability of the police to investigate criminal activity and that in some circumstances "that impairment may be such as to result in a serious risk to the proper administration of justice."[28] However, the risk must be demonstrated to exist in the particular case. More is required than a generalized assertion that publicity could compromise investigative efficacy. "[The] ground must not just be asserted in the abstract; it must be supported by particularized grounds related to the investigation that is said to be imperiled."[29] Further, it must be kept in mind that pursuant to the *Dagenais/Mentuck* test, "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."[30] As Doherty J.A. has put it, "fundamental freedoms, like the freedom of expression and freedom of the press, cannot…be sacrificed to give the police a 'leg up' on an investigation."[31]

[65] The essence of the submission that disclosure of the contents of the ITO would compromise the ongoing investigation is that if Farah Shirdon became aware that his use of social networking sites had caught the attention of the police he would 'alter his behaviour' and a valuable source of evidence would dry up. I accept that in the particular circumstances of a given case such a concern could amount to more than a generalized assertion of a risk to the administration of justice. But in the circumstances of this case the concern has not been shown to be a serious risk. Shirdon knew before he left Canada that he was under investigation by Canadian security authorities. At page 51 of the ITO, Constable Grewal stated: "Shirdon is well aware that media and other entities are following his presence on the social networking sites". At page 65 he stated: "Shirdon is aware that journalists are following his Twitter account.... The above Tweet reads like a heading for a news article, therefore I believe it likely Shirdon is directing the above Tweet to the journalists. This demonstrates that Shirdon wants the world to know…" In the circumstances, it could hardly come as a surprise to Shirdon that among those paying attention are the security authorities who have charged him with terrorism offences. In other words, it is reasonable to infer that he has been conducting himself as he has with full awareness of the probability that the authorities were carrying on their investigation in the manner described in paragraphs 11, 60(c), 60(e) and 60(h) of the ITO.

[66] Apart from the concern discussed above, the only other basis upon which it is said that the ongoing investigation would be compromised is the assertion in Constable Ross's affidavit that "it is essential that the investigative efforts pursued to date remain sealed in order to preserve

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[27] paragraphs 7 and 8
[28] *Toronto Star Newspapers Ltd. v. Ontario, supra*; per Doherty J.A. at paragraph 26; per Fish J. at paragraph 23
[29] *ibid*, per Fish J. at paragraph 23
[30] *R. v. Mentuck*, 2001 SCC 76, per Iacobucci J. at paragraph 34
[31] *Toronto Star Newspapers Ltd. v. Ontario, supra.* at paragraph 27

the integrity of further investigative efforts that are being undertaken". That assertion is even more of a generalized assertion of potential prejudice than was found to be insufficient in *Toronto Star Newspapers Ltd. v. Ontario, supra.* I agree, however, that the police ought not to be required, as part of the price of obtaining a production order, to publicly disclose the investigative steps that they propose to take in the future. Such a requirement would pose a serious risk to the proper administration of justice. Accordingly, I am persuaded that access to subparagraphs 63b and 63c must be denied, and those subparagraphs will be redacted from the copy of the ITO to which access is permitted.

[67] There has been no demonstration of any other serious risk to the proper administration of justice based on compromising an ongoing investigation. Access to the contents of the ITO, apart from subparagraphs 63b and 63c, cannot be denied on that basis.

(ii) the interests of innocent persons

[68] Section 487.3(2)(a)(ii) provides that a sealing order can be made on the basis that the ends of justice would be subverted because disclosure would "prejudice the interests of an innocent person".

[69] There are three persons whose identities the Crown submits should remain redacted pursuant to s. 487.3(2)(a)(ii), namely the persons mentioned in paragraphs 32, 33 and 34 of the ITO. Each of those persons has provided information to the investigators. There is no dispute that each of them is an "innocent person". The question is whether permitting access to the portions of the ITO that pertain to them would prejudice their interests and, if so, whether a failure to make an order redacting those portions of the ITO would give rise to a serious risk to the proper administration of justice.

[70] In my view, the persons referred to in paragraphs 32 and 33 are in a different position from that of the person referred to in paragraph 34. With respect to the need for a sealing order in relation to the identity of the first two persons, the Crown relies on subparagraph 75b of the ITO sworn by Constable Grewal and on the affidavit of Corporal Ross. Subparagraph 75b sets forth Constable Grewal's concern that identifying these two persons "would attract unwanted media and public attention". Corporal Ross's affidavit expands on that concern. He states that the person referred to in paragraph 32 has indicated a "fear of backlash due to racism or connection with a person charged with terrorism offences … [and] a fear of losing his/her employment". He further states that the person referred to in paragraph 33 has indicated a fear "that publicity will expose his/her family to hatred" and "that involvement in this case could adversely affect their employment".

[71] I accept that the concerns that those two persons have with respect to being perceived to have a connection to a person charged with terrorism offences is genuine. I also accept that disregarding the privacy concerns of innocent persons who may be able to shed light on serious criminal activity can have adverse consequences for the proper administration of justice. However, the assessment of whether a failure to redact information that could reveal the identities of these two persons would 'subvert the ends of justice', within the meaning of s. 487.3(1), or give rise to a serious risk to the proper administration of justice, under the *Dagenais/Mentuck* test, requires that their subjective concerns be put into the context of an objective assessment of the record.

[72] The application record makes it clear that the fact that Farah Shirdon has been charged with terrorism offences is well known in the community in which the first two individuals live and work. The existence and nature of the connection between them and him is something of which the media is already aware. Prohibiting access to paragraphs 32 and 33 would not protect them from the "unwanted media and public attention" about which Constable Grewal has expressed concern. Further, access to those paragraphs cannot be expected to materially increase the risk that they will suffer the kind of prejudice that they fear. Indeed, far from suggesting that these two persons have any kind of connection to, involvement with or sympathy for terrorists or terrorism, the contents of those paragraphs clearly demonstrate the opposite. In that respect, a redaction of those paragraphs might work a greater prejudice to those persons' interests than permitting access. In any event, I am not persuaded that a serious risk to the proper administration of justice has been shown in relation to the persons referred to in paragraphs 32 and 33.

[73] Crown counsel submitted that if I were not satisfied that a case had been made out for redacting paragraphs 32 and 33 so as to prevent the identification of the persons referred to therein, notice should be given so that they might make submissions. The question of whether such persons are entitled to notice has been the subject of differing judicial opinions: see, *e.g. R. v. C.B.C.*, 2013 ONSC 6983, at paragraph 11, and *R. v. Esseghaier*, 2013 ONSC 5779 at paragraph 160. It is unnecessary to resolve the disagreement in this case. As Corporal Ross's affidavit states, the persons referred to in paragraphs 32 and 33 not only were given the opportunity to state their concerns, they have done so. I have had no difficulty understanding their position and an opportunity to make further submissions is unnecessary. For the reasons I have stated, however, I do not believe that their concerns establish a serious risk to the proper administration of justice.

[74] I consider the person referred to in paragraph 34 to be in a different position in relation to the nature of a connection to the case and to Farah Shirdon. This person told Corporal Ross that he/she did not wish the details of his/her involvement in the investigation to be made public "due to fear of negative publicity". The person has told Corporal Ross that if they had known that their identity would be made public at this stage of the process, they would not have talked to the police. The context of this investigation has to be kept in mind: this is a case that concerns a brutal terrorist organization that has amply demonstrated a willingness to inflict horrific and barbaric violence. In such a case, there are legitimate concerns about the willingness of witnesses to co-operate with the authorities: cf. *R. v. Esseghaier*, *supra*, at paragraph 165. This person's implicit concern for his/her safety is a reasonable concern. In all the circumstances I am satisfied that revealing the identity of this person would constitute a serious risk to the proper administration of justice. In my view, there is no reasonable alternative to denying access to any information that could reveal his/her identity.

(iii) the fair trial interests of Farah Shirdon

[75] Farah Shirdon was not present at the hearing of this application nor was there anyone to represent his interests. His right to a fair trial is protected under both ss. 7 and 11(d) of the *Charter*, and while the protection of that right is not specifically mentioned in s. 487.3 as a ground for a sealing order, it would fall within the scope of s 487.3(2)(b), which provides that in

addition to the grounds specifically mentioned, a sealing order can be made "for any other sufficient reason".

[76] Quite properly, Ms. Shaikh has made submissions with respect to how permitting public access to the ITO might affect Shirdon's fair trial interests. Even had she not done so, I would be obliged to consider that question. In *Mentuck*, Justice Iacobucci stated that in cases in which there is no one present on behalf of unrepresented interests, the court must nonetheless take those interests into account. He stated: "The consideration of unrepresented interests must not be taken lightly, especially where *Charter*-protected rights ... are at stake... [32] The *Charter*-protected right of which Justice Iacobucci was speaking in *Mentuck* was freedom of expression, but his comments are equally applicable to the *Charter*-protected right to a fair trial.

the risk to jury impartiality

[77] In *Dagenais v. CBC*, Chief Justice Lamer noted that in most cases in which issues of trial fairness and freedom of the press appear to collide, "attention is focused on a particular potential source of trial unfairness – the possibility that adverse pre-trial publicity might make it difficult or impossible to find an impartial jury".[33] While the *Charter* provides safeguards against serious risks to jury impartiality, he stated, "it does not require that all conceivable steps be taken to remove even the most speculative risks." Among the measures that can attenuate the risks are "changing venues, sequestering jurors [and] allowing challenges for cause".[34] In addition, although common sense dictates that in some cases jurors may be affected by information gathered outside of the criminal proceedings, juries are presumed to be capable of following instructions to ignore such information. That is particularly to be expected, he stated, in a situation such as was presented in *Dagenais*, which involved an "identifiable and finite [source] of pre-trial publicity", namely a fictional television program based on allegations that were being heard or were about to be heard by a jury. More problematic, he acknowledged, is the situation in which there is a period of sustained pre-trial publicity concerning matters that will be the subject of the trial. In such circumstances, "the effect of instructions is considerably lessened. Impressions may be created in the minds of the jury that cannot be consciously dispelled. The jury may at the end of the day be unable to separate the evidence in court from information that was implanted by a steady stream of publicity."[35]

[78] In arguing for or against orders restricting access or publication, it is not uncommon for both sides to rely on *dicta* from *Dagenais*. Counsel for the media frequently fasten on the Chief Justice's affirmation of the faith that our system has in the ability of jurors to follow instructions, on his recognition that measures are available to ensure jury impartiality, and on his assertion that the right to a fair trial does not require that steps be taken to remove every risk, no matter how speculative.

[79] On occasion, those arguments have succeeded. In *National Post Co. v. Canada (Attorney General)*, [2003] O.J. No. 2238 (Sup. Ct.), for example, Justice McKinnon stated, at paragraph 34:

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[32] paragraph 38
[33] paragraph 76
[34] paragraph 79
[35] paragraph 88

> Analyzing the principles in *Dagenais*, I am unable to conclude on a balance of probabilities that the publication of what is contained in the edited version [of the ITO] would affect the fair trial rights of the potential accused… A trial is likely many months, if not years, distant from today. Charges have not yet been laid although are expected to be laid very soon. It is unknown whether the accused shall elect trial by judge and jury or trial by judge alone. Should the trial be by jury, I am satisfied that it will occur in such fullness of time that any damage occasioned by publication today may be addressed through the use of available safeguards during the jury selection process and appropriate instructions to the jury once selected.

[80] Similarly, in *CBC v. Canada*, 2013 ONSC 7309, Justice Nordheimer stated, at paragraph 50:

> We should not, in my view, jump too readily to the conclusion that persons summoned for jury duty will not be able to disassociate themselves from information that they may have heard or read in the media. Indeed, the challenge for cause process asks each prospective juror to reflect on and answer that very question. We should also not be too ready to conclude that jurors will not be able to concentrate on the evidence that they will hear and decide the case based on that evidence and for no other reason.

[81] As Justice Nordheimer observed, this is an area with respect to which "different judges faced with different facts in different cases may well reach different conclusions".[36] It is not difficult to find cases in which different judges have done so.

[82] For example, in *R. v. Esseghaier, supra,* Justice Durno noted that "if a challenge for cause was always the answer to publicity concerns there would never be publication bans in applications of this nature." He held that "there will be cases in which there is a serious risk if evidence is published for which a challenge for cause is not the answer. This is one of those cases."[37] In *R. v. N.Y.*, [2008] O.J. No 1217 (Sup. Ct.), a young person was being tried for terrorism-related offences. In order to protect the fair trial rights of a number of adult accused who were to be tried subsequently in ordinary court, the Crown sought a partial publication ban. Counsel for a number of media organizations opposed the ban. They argued that it is "difficult to identify a hypothetical fact situation in which a publication ban would ever be necessary given the availability of a challenge for cause procedure and the jurisprudence that reflects the faith we place in juries to follow a judge's instructions."[38] Justice Sproat rejected that argument. He noted that notwithstanding our faith in juries, it is recognized that in some circumstances "jurors, being human, may find it impossible to honour their oath and follow the instructions of the trial judge if presented with highly prejudicial information."[39] Further, as a matter of common sense, "the likelihood of jurors being adversely affected would be greatest in a high profile case, with

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[36] paragraph 53
[37] paragraph 124
[38] paragraph 60
[39] paragraph 62

intense media coverage, involving evidence that the public may understandably find alarming and threatening."[40]

[83] The issue of whether publication bans are necessary to ensure fair trials was considered by the Ontario Court of Appeal in *Toronto Star Newspapers v. Canada*, 2009 ONCA 59 (reversed on other grounds, 2010 SCC 21). The issue in that case was whether the infringement of s. 2(b) of the *Charter* occasioned by the mandatory publication ban at a bail hearing, which is required by s. 517 of the *Criminal Code,* could be justified under s. 1 of the *Charter*. Writing for the majority in the Court of Appeal, Justice Feldman stated:

> For the reasons I have outlined above, I conclude that the potential for jurors to be affected by prejudicial information they have heard outside the trial has been accepted by the courts as something that must be guarded against in order to protect both the accused's right to a fair trial and the public's right to be confident that justice is done. Clearly some jurors will be able to follow their oaths and disabuse themselves of prior information they may have learned about the accused or the case. Our faith in juries is based on their willingness to do so. However, some jurors may not be able to do so, or may not realize that they have been influenced or affected by pre-trial publicity. Further, in some instances, depending on the nature of the prejudicial information, it may be impossible for even the most conscientious jurors to disabuse themselves of that information...[41]

[84] Justice Feldman further noted:

> It is also, in my view, no longer appropriate or realistic to rely on jurors' faded memories of any pre-trial publicity by the time of the trial as the basis for confidence that they will not remember what they read or heard. Once something has been published, any juror need only "Google" the accused on the Internet to retrieve and review the entire story.[42]

[85] In the result, the majority in the Court of Appeal concluded that a mandatory publication ban was overbroad and that s. 517 should be read down so as to exclude cases that would not be tried by a jury. The Supreme Court of Canada reversed the Court of Appeal on that point and held that the mandatory ban was constitutional. Writing for the majority, Justice Deschamps did not comment directly on the portion of Justice Feldman's reasons set out above, but she did touch upon the issue of the efficacy of publication bans. Her comments were made in the context of the concern that if publication bans at bail hearings were discretionary, the courts would be clogged with *Dagenais/Mentuck* hearings and the ability to quickly deal with bail would be seriously impacted. In response to that concern, the media argued that bail hearings would almost never be delayed because the *Dagenais/Mentuck* test would rarely be met. They argued that since

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[40] paragraph 68
[41] paragraph175
[42] paragraph 177

the prospect of jury tainting is "purely speculative" defence counsel would seldom bring applications for bans. Justice Deschamps rejected that argument:

> This proposition is based on the assumption that accused would renounce their interest in trial fairness to ensure an expeditious hearing. This is exactly the kind of compromise the mandatory ban is intended to avoid. The appellants' argument is in fact based on the incorrect view that the ban has nothing to do with the rights of the accused to a fair trial and to fair access to bail. It is simply wrong to assume that neither the bail hearing itself nor the disclosure of information, evidence or the reasons for the justice's order would have any effect on the accused's interests.[43] [emphasis added]

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[86] It is apparent from the material in the application record that this case has attracted national media attention. That is hardly surprising. The brutality and barbarism of ISIS has shocked the civilized world. The prospect of young persons in Canada being radicalized and joining such an organization – of becoming homegrown terrorists – is a matter of great concern. The attention that this case has attracted is not something that one can reasonably expect to fade with time. In any event, as Justice Feldman noted in her reasons in *Toronto Star Newspapers v. Canada,* "once something has been published, any juror need only 'Google' the accused on the Internet to retrieve and review the entire story."[44]

[87] At this point in the criminal proceedings against Farah Shirdon, it is difficult to precisely estimate how serious a risk there is of jury tainting. In his judgment for the Supreme Court in *Toronto Star Newspapers v. Canada*, Justice Fish cautioned against expecting a clear demonstration of the risk at the early stages of the criminal process:

> The *Dagenais/Mentuck* test, though applicable at every stage of the judicial process, was from the outset meant to be applied in a flexible and contextual manner. A serious risk to the administration of justice at the investigative stage, for example, will often involve considerations that have become irrelevant by the time of trial. On the other hand, the perceived risk may be more difficult to demonstrate in a concrete manner at that early stage. Where a sealing order is at that stage solicited for a brief period only, this factor alone may well invite caution in opting for full and immediate disclosure.[45]

[88] I am satisfied that publication of portions of the information contained in the ITO concerning Farah Shirdon's alleged involvement with ISIS and of statements he is alleged to have made, some of which the public might find to be quite alarming, would pose a serious risk to his right to be tried by an impartial jury.

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[43] paragraph 57
[44] paragraph 177
[45] paragraph 8

the risk of stigmatization

[89] The potential for jury tainting is not the only trial fairness concern to be considered on an application to set aside an order prohibiting access to the contents of an ITO: the danger of stigmatizing an accused or a potential accused with untested and one-sided information must also be taken into account.

[90] In *R. v. Flahiff* (1998), 123 C.C.C. (3d) 79 the issue before the Quebec Court of Appeal was whether a Superior Court judge had erred in failing to quash the order of the issuing judge permitting access to and publication of the contents of an ITO underlying a number of search warrants. The ITO included the detailed allegations against the accused/appellants made by an accomplice. Speaking for the Court of Appeal, Justice Rothman stated:

> Why should appellants have to face their trial preceded by a cloud of highly prejudicial pre-trial publicity based on the hearsay allegations of an accomplice which they cannot, at this stage, contradict or challenge?
>
> They would not have to face this kind of prejudice if the evidence were given at a preliminary inquiry or a bail hearing. Surely the same reasons exist in this case for a publication ban of these allegations in a search warrant information which have not yet been admitted into evidence. What is to be gained, at this stage, in subjecting appellants to the prejudice of publishing the hearsay evidence of an accomplice?[46]

[91] After referring to the concern expressed by Chief Justice Lamer in *Dagenais* with respect to jury tainting, Justice Rothman made it clear that his concern was broader. He stated:

> I would, respectfully, go somewhat further. The "fairness" of a trial is not limited to a fair outcome or verdict, although that, of course, is critically important. A fair trial also involves the fairness of the process in which it is to be conducted. No accused should have to face his trial in an ongoing torrent of unfair publicity. No judge or jury should have to strain to banish unfair and unsupported publicity from their minds so that they can reach an impartial verdict based on the evidence. Fairness in a trial involves, in some measure, the impartiality and serenity of the atmosphere in which the trial is conducted.[47]

[92] Justice Rothman's view that the concept of trial fairness at stake in the context of an application for access to an ITO involves more than jury impartiality found an echo some 12 years later in the judgment of the Supreme Court of Canada in *Toronto Star Newspapers v. Canada*, *supra*. As I indicated earlier, the Supreme Court held that the mandatory publication ban at a bail hearing required by s. 517 of the *Criminal Code* was an infringement of s. 2(b) of the *Charter* that was justified under s. 1. The question in the case at bar is not whether a mandatory order that infringes s. 2(b) can be justified but whether, applying the *Dagenais/Mentuck* test, a discretionary order should be upheld. However, as Chief Justice Lamer said in *Dagenais*, and as Justice Deschamps confirmed in *Toronto Star Newspapers*, "the test

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[46] paragraphs 39 and 40
[47] paragraph 42

developed in *Dagenais/Mentuck* incorporates the essence of the balancing exercise mandated by the *Oakes* test".[48] At some point under both tests the court is called upon to assess whether the salutary effects of the measure in question outweigh its deleterious effects.

[93] In *Toronto Star Newspapers*, one of the salutary effects recognized by the Supreme Court was ensuring expeditious bail hearings, but that was not the only one. Justice Deschamps stated:

> Nonetheless, on balance, I must find that in the context of the bail process, the deleterious effects of the limits on the publication of information are outweighed by the need to ensure certainty and timeliness, to conserve resources, and to avert the disclosure of untested prejudicial information; in other words, to guarantee as much as possible trial fairness and fair access to bail. Although not a perfect outcome, the mandatory ban represents a reasonable compromise.[49]

[94] Earlier in her reasons, Justice Deschamps had made clear that "the need...to avert the disclosure of untested prejudicial information" in order to "guarantee as much as possible trial fairness" did not arise solely because of a concern about jury tainting. She adopted the view of Justice Rosenberg in the Ontario Court of Appeal that "the interest in a fair trial embraces not simply the narrow interest of preventing potential jurors from being influenced by prejudicial material that might be disclosed at a bail hearing, but other interests intended to safeguard the accused's and society's interest in a fair trial."[50] She noted that the provisions that were introduced as part of the *Bail Reform Act* (S.C. 1970-71-72, c. 37), one of which was s. 517, were enacted in response to a perception that "measures were required to protect an accused person, *who could bear a stigma* even after being acquitted."[51] Thus, she stated, Parliament's primary objective in enacting a mandatory ban "can be defined *on the basis of an understanding of trial fairness that is not limited to averting jury bias*".[52] She stated that Parliament's objectives of safeguarding the right to a fair trial and ensuring expeditious bail hearings "were to be achieved by establishing a process that facilitated early release of an accused in order to mitigate the harshness of his or her interaction with the criminal justice system, *limit the stigma as far as possible,* and ensure that the trier of fact remains impartial." She held that all of those objectives were pressing and substantial. After discussing the provenance of s. 517, she stated that "it can be inferred...that the interests to be protected included *not only* the avoidance of stigmatization of the accused, *but also* trial fairness."[53] (italics and underlining added)

[95] The Supreme Court illustrated its recognition that pre-trial publicity can unfairly stigmatize an accused and undermine the right to a fair trial with a reference to the objectives of a different but similar provision of the *Code*, namely the mandatory publication ban on the evidence at a preliminary inquiry required by s. 539. In that respect, Justice Deschamps stated:

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[48] paragraph 18; see also *Mentuck* at paragraph 27
[49] paragraph 60
[50] 2009 ONCA 59, at paragraph 38
[51] paragraph 23
[52] paragraph 23
[53] paragraph 31

> That ban was discussed by the Standing Committee on Justice and Legal Affairs. Minister Turner justified it as follows:
>
> > We are not talking about a situation of legitimate publicity at an open trial once the jury is empanelled. If the evidence at the preliminary inquiry is then brought into the trial it becomes part of the evidence of the trial. What we are trying to prevent is a preliminary pre-trial by newspaper prior to the time that a magistrate may have bound a man over for trial. He may find that the charges are dismissed but the damage has been done. (*Minutes of Proceedings and Evidence*, No. 11, 1st Sess., 28th Parl., March 18, 1969, at pp. 501-2)
>
> These comments go beyond averting jury bias. They address the broader goal of protecting the right to a fair trial.[54] [emphasis added]

[96] What is in issue in this case is not the impact of the publication of information presented at a bail hearing or at a preliminary inquiry but the impact of permitting access to information that was presented to a court in a proceeding even further removed from a trial, one at which an accused or a potential accused had no right to be heard. In light of the *ex parte* nature of the process for obtaining search warrants or similar authorizations, the concerns that the Supreme Court had with respect to stigmatizing an accused with untested and one-sided prejudicial allegations apply with even greater force.

[97] As I mentioned earlier, the allegations in the ITO are that Shirdon has left Canada to join and participate in the activities of a brutal terrorist organization. Those allegations, none of which has been tested as of yet, have significant potential to stigmatize him in advance of any court proceedings at which he would have the opportunity to be heard. I am satisfied that publication of the portions of the ITO concerning his alleged involvement with ISIS and setting forth statements he is alleged to have made would put his right to a fair trial in jeopardy, not only because of the potential impact of that information on the impartiality of a jury but also because of its capacity to stigmatize him.

[98] Accordingly I am satisfied that publication of that information would pose a serious risk to the proper administration of justice.

(c) Is There a Reasonable Alternative to Denying Access?

[99] To carry an order denying access past the first branch of the *Dagenais/Mentuck* test more than a serious risk to the proper administration of justice is required. It must also be shown that the order is necessary "because reasonably alternative measures will not prevent the risk".

[100] For the reasons I have stated, I am satisfied that making public the untested information gathered by the police concerning Farah Shirdon's involvement with ISIS would give rise to a serious risk to his *Charter*-protected right to a fair trial. That risk, however, flows not from permitting access to the information but from permitting it to be widely disseminated. In other words, the risk to the proper administration of justice flows not from access but from publicity.

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[54] paragraph 31

Accordingly, the question that must be addressed is whether permitting access but banning publication is a reasonable alternative measure.

[101] On behalf of the applicants, Mr. MacKinnon submits that a publication ban is not a reasonable alternative measure, and that once it is determined that access to the information contained in the ITO should be permitted, the media should be free to publish that information. In that respect, Mr. MacKinnon relies heavily on the reasons of Justice Nordheimer in *CBC v. Canada*, 2013 ONSC 7309.

[102] In *CBC v. Canada*, various media organizations sought access to the ITO that had been sworn in support of a search warrant that was issued in the course of an investigation of the mayor of Toronto. Arising out of that investigation, a person named Lisi had been charged with extortion. As Justice Nordheimer noted, the ITO contained allegations that "[do] not reflect well on Mr. Lisi". Counsel for Mr. Lisi was not opposed to allowing the media to have access to the contents of the ITO but he submitted that to protect Mr. Lisi's fair trial rights they should not be permitted to publish any of it.

[103] Justice Nordheimer characterized the position taken by Lisi as the "access equals scrutiny argument." He noted that support for it could be found in the judgment of the Quebec Court of Appeal in *R. v. Flahiff, supra,* and he acknowledged that *Flahiff* was 'partly adopted' by Justice Durno in *Esseghaier*, *supra*. However, he was not persuaded that the argument was sound. He stated:

> I confess to having real difficulty with the access but not publication solution largely because it strikes me as relying very much on a legal distinction as opposed to a real one. Access alone does nothing to advance the s. 2(b) *Charter* rights of the applicants that include freedom of expression. The key reason for allowing the media to have access to such information is so that they can publish it and consequently inform the public about what has transpired in a legal proceeding. The core purpose underlying the openness principal is not to inform the media, it is to inform the public. The media is simply the vehicle through which the public is informed.[55]

[104] After referring to *Edmonton Journal v. Alberta (Attorney General)*,[56] Justice Nordheimer stated that permitting access but prohibiting publication does not represent public scrutiny but rather, at best, private selective scrutiny without an ability to express the results of that scrutiny. It does not allow the public to form their own views as to the appropriateness of the actions that have taken place, nor does it allow for any public criticism of those actions should criticism be warranted. He rejected the notion that permitting individuals to attend at the courthouse to obtain copies of an ITO for their personal perusal enabled the public to be truly informed. He stated that "while a relatively few individuals might avail themselves of that opportunity, the vast majority

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[55] paragraph 58
[56] [1989] 2 S.C.R. 1326

will not. To offer that as a solution for public access is to ignore the practical restrictions, including personal priorities, that individual members of the public will have."[57] He concluded:

> The simple fact remains that access to the information by the media with a prohibition on its publication does not achieve the important goal of allowing for public scrutiny. That option does not therefore represent a reasonable alternative measure because it defeats the core purpose for which access to the information is given.[58] [emphasis added]

[105] As I read his reasons, Justice Nordheimer's rejection of the option of permitting access but prohibiting publication was not tied to the specific facts of the case before him but was based on the general principle, which he derived from *Edmonton Journal*, that because of the role that the media plays as the conduit through which the public is informed, permitting access but banning publication cannot be a reasonable alternative.

[106] In my respectful view, the weight of authority is contrary to that conclusion.

[107] There can be no doubt with respect to the importance of the decision of the Supreme Court of Canada in *Edmonton Journal* and of Justice Cory's articulation, in that case, of the crucial role that the press plays in allowing for public scrutiny of the courts. There is also no doubt as to the general applicability of what Justice Cory said to all cases in which restrictions are sought to be placed on freedom of the press. But apart from affirming the crucial role of a free press in a democratic society, *Edmonton Journal* is of little assistance in resolving the question of whether permitting access but prohibiting publication can be a reasonable alternative measure within the meaning of the first branch of the *Dagenais/Mentuck* test.

[108] The question in *Edmonton Journal* was whether the provisions of the Alberta *Judicature Act* that placed a permanent publication ban on evidence presented in open court in trials and other proceedings in relation to family law matters could be justified under s. 1 of the *Charter*. Not surprisingly, the Supreme Court held that it could not. However, the Supreme Court was not dealing with the issue presented here, and that was presented in the authorities I will come to, of whether imposing a *temporary* publication ban *pending trial* in order to prevent a serious risk to the proper administration of justice was a reasonable alternative to a complete denial of access. As discussed earlier in these reasons, the Supreme Court has held that publication bans of the latter kind can be demonstrably justified, and it has come to that conclusion after considering the principles from *Edmonton Journal*: see *Toronto Star Newspapers Ltd.*, at paragraph 58.

[109] Justice Nordheimer found the decision of the Quebec Court of Appeal in *Flahiff* unpersuasive. As was described earlier, the issue in that case was whether a Superior Court judge had erred in failing to quash the order of the issuing judge permitting access to and publication of the contents of the ITO underlying a number of search warrants. The ITO included detailed allegations against the accused/appellants that had been made by an accomplice. Speaking for the Court of Appeal, Justice Rothman stated:

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[57] paragraph 63
[58] paragraph 65

> **48** In the present case, I believe that the publishing of the allegations of the affidavit, particularly the information obtained from [the accomplice], does represent a real and substantial risk to the fairness of the trial, a risk that is at least as great as if one were to publish the evidence to be given by [the accomplice] at appellants' preliminary inquiry. Nor do I see any reasonably available alternative measures that would prevent the risk.
>
> **49** While I recognize that there are some deleterious effects that impact upon freedom of expression and freedom of the press in prohibiting publication of the affidavit until appellants' trial, I believe the salutary effects of the ban in insuring a fair trial far outweigh these temporary deleterious effects.
>
> **50** On balance, I am of the view that the publication ban was necessary to insure a fair trial and it should be imposed until after appellants' trial.
>
> **51** To assure that the impact of the publication ban on the freedom of the press is as narrowly circumscribed as possible, I would nonetheless permit the press and the media generally to have access to the documents so that they can have full knowledge of the contents of the search warrant as well as the affidavit or information on which it was based. This would allow the press full scrutiny, in the public interest, of the search warrant documents notwithstanding the temporary ban on publication. [emphasis added]

[110] In the course of his consideration of the impact of pre-trial publicity on jury impartiality in *CBC v. Canada*, Justice Nordheimer questioned whether *Flahiff* was good law. He stated that "...*Flahiff* was decided prior to the decisions of the Supreme Court of Canada in *Mentuck* and in *Toronto Star*. There is good reason to question the correctness of the decision in *Flahiff* in light of those later authorities."[59] It is not clear what aspect of the Supreme Court's decision in *Toronto Star* Justice Nordheimer was referring to. Justice Fish, who delivered the judgment of the Supreme Court, did refer to *Flahiff*, but he did so in positive terms, citing it as an example of a case "in which the [*Dagenais/Mentuck*] test was effectively and reasonably applied."[60] More importantly, however, subsequent to the decision in *Mentuck* the portions of the judgment of Justice Rothman set out above, and in particular paragraph 51, were referred to, adopted and applied by the Ontario Court of Appeal in *Ottawa Citizen Group Inc. v. Canada*, [2005] O.J. No. 2209.

[111] The issue in *Ottawa Citizen* was whether a Superior Court judge had erred in refusing to quash a partial sealing order in relation to seven search warrants and the underlying ITO. The warrants had been issued in the course of an investigation into the role the government may have played in the detention of certain individuals in Syrian prisons, and what the media wanted were the names of the persons subject to the searches. The Superior Court judge was concerned about the harm that might be caused to the interests of those individuals, who were innocent persons, particularly as the searches occurred in the context of a national security investigation.

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[59] paragraph 54
[60] paragraph 34

[112] Writing for the Court of Appeal, Justice MacPherson stated: " In my view, [the authorizing judge] failed in this case to consider a reasonable alternative measure - namely, permitting press access to the names of the subjects of the search warrants but at the same time prohibiting their publication in any articles or editorials."[61] Justice MacPherson acknowledged "the importance of, and the relationship between, freedom of the press and open courts", and he accepted that any attempt by a party to obtain a sealing order in relation to any aspect of a court proceeding, including the obtaining of a search warrant, "must be subject to close scrutiny and meet rigorous standards." However, he noted, although freedom of the press is largely unfettered, it is not absolute, and it must balanced with other important values in Canadian society, including the protection of the innocent. How then, he asked, should the balance between press freedom and open courts, on the one hand, and the protection of the innocent, on the other, be struck? He responded:

> In my view, the balance struck in the excellent reasons of Rothman J.A. of the Quebec Court of Appeal in *Flahiff* is a sound basis for the balance to be struck in this case.[62]

[113] After quoting, in its entirety, paragraph 51 of Justice Rothman's reasons, Justice MacPherson stated:

> By analogy, the appropriate order in this appeal would be an access order permitting the press to have access to the names of the subjects of the search warrants coupled with an order prohibiting the press from publishing their names or any information that might disclose the names.[63]

[114] Justice MacPherson concluded:

> The presumption against secrecy applies, specifically, to sealing orders. As expressed by Iacobucci and Arbour JJ. in *Vancouver Sun* at para. 50, "the present facts clearly illustrate the mischief that flows from a presumption of secrecy. Secrecy then becomes the norm, is applied across the board, and sealing orders follow as a matter of course". The courts need to be vigilant to guard against this progression. In this case, an order combining press access to the names of the subjects of the search warrants with a prohibition on publishing those names strikes a proper balance.
>
> I would allow the appeal, set aside the sealing order, and make an order permitting the Ottawa Citizen and other media to have access to the names of the subjects of the search warrants, but subject to a prohibition against publishing those names or any information that might tend to identify them.[64]

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[61] paragraph 43
[62] paragraph 57
[63] paragraph 58
[64] paragraphs 66-67. In *R. v. Canadian Broadcasting Corp.*, 2008 ONCA 397, which was decided *after* the decision of the Supreme Court in *Toronto Star*, the main ground of appeal relied upon by the appellant was that the release of portions of an ITO in support of a search warrant would prejudice his right to a fair trial. In support of that

[115] As Justice Nordheimer noted, Justice Durno applied *Flahiff* in *Esseghaier* in holding that permitting access to search warrant materials but prohibiting publication was a reasonable alternative to a sealing order. Justice McKinnon applied *Flahiff* in coming to the same conclusion in *National Post Co. v. Canada (Attorney General)*, *supra*. In *National Post*, which involved an application by the media to set aside a sealing order in relation to search warrant materials, one of the issues to be decided was framed by Justice McKinnon in the following terms: "Are the applicants entitled to publish the portions of evidence to which they have been granted access? In other words, does a right of access necessarily involve a right to publish?" Justice McKinnon's consideration of that question included the following:

> The applicants argue that there is no distinction between the right to access and the right to publish. [Counsel] argues that access without the right of publication would be useless to his clients' purposes.
>
> I respectfully disagree. There is a very important value being respected when a member of the public is afforded access to court documents. The same value permits members of the public, including members of the media, to attend bail hearings or preliminary inquiries. The value is this: Justice must not only be done, but manifestly seen to be done. Anyone may apply to access a search warrant and the information upon which it is based where something has been seized, subject to the constraints of s. 486.3. An interested member of the public, including a member of the media, can satisfy himself or herself that due process has been respected during the process of the issuance and execution of the warrant. A member of the public, including a member of the media, can attend a bail hearing or a preliminary inquiry to ensure that justice is being done, and that the rights of all parties are being respected.
>
> The fact that a right of access exists and is afforded to any citizen, including a member of the media, constitutes an important element of our criminal justice system. The fact that in certain circumstances this right does not include the right to publish what is observed or heard does not thereby intrinsically undermine the right itself. No right is absolute. Many rights are subject to conditions. The right of access to a bail hearing or a preliminary hearing comes with a condition, namely that evidence heard will not be published. What is being recognized in the limitation of the right is the important value that an accused person will not be faced with the risk of an unfair trial because of undue pretrial publicity.
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> I am not persuaded that the media should enjoy rights which they might obtain through access to informations filed to obtain search warrants which have not been tested through cross-examination, nor vetted as to what may be admissible

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submission, he relied on *Flahiff*. Writing for the Court of Appeal, Justice Juriansz referred to the relevant portions of Justice Rothman's reasons but held that *Flahiff* was distinguishable in that the portions of the ITO that the appellant sought to seal did not implicate the appellant in the crime with which he was charged. However, it is implicit in the way that Justice Juriansz dealt with *Flahiff* that he considered it to remain good law.

> or not admissible, nor analyzed as to what may be hearsay and what may not be hearsay, nor reviewed as to whether innocent third parties may be affected, and publish all of such information in advance of charges being laid. It is for this reason that s. 487.3 requires the court to balance the interests at stake.[65]

[116] In the end, Justice McKinnon determined that on the facts of the case before him a publication ban was unnecessary. After a consideration of the reasoning in *Dagenais*, he stated: "I am unable to conclude on a balance of probabilities that the publication of what is contained in the edited version [of the ITO] would affect the fair trial rights of the potential accused."[66]

[117] Two decisions of the Alberta Court of Queen's Bench have also confirmed the reasonableness of orders granting access to the contents of ITOs but prohibiting publication, In *R. v. Hennessey*, [2008] A.J. No. 1563, Justice Ross permitted access to two ITOs after they were edited to protect the identities of certain persons involved in the case. After considering, *inter alia*, the decision in *Flahiff*, however, Justice Ross also made an order banning publication of the contents of the ITOs. *Hennessey* was followed by Justice Germain in *R. v. Twitchell*, [2009] A.J. No. 1558, where once again access to redacted ITOs was permitted, but a publication ban was put in place.

[118] As Justice McKinnon alluded to in *National Post,* the situation in which the media will find itself if a publication ban is imposed is not anomalous. There are many situations in which access to information presented in court is permitted but publication is prohibited. Bail hearings and preliminary inquiries are two obvious examples, but the same situation prevails with respect to pre-trial motions in jury cases[67] and, to a more limited extent, in cases in which orders have been made under s. 486.4 or 486.5 of the *Code.*

[119] No doubt, each of *Flahiff, Ottawa Citizen, National Post, Esseghaier, Hennessey* and *Twitchell* can be distinguished on its facts. The point, however, is that in each of the disparate fact situations presented by those cases an order permitting access but prohibiting publication was held to be within the realm of reasonable alternatives. And in all of those cases, except *National Post,* such an order was made.

[120] In light of *Ottawa Citizen*, it is not open to me to accept that as a matter of principle allowing access but prohibiting publication is not a reasonable alternative. That is not to say that it will be a reasonable alternative in every case – whether it will be so will be a case-specific determination that will require consideration of the second branch of the *Dagenais/Mentuck* test.[68]

(d) Do the Salutary Effects of a Publication Ban Outweigh the Deleterious Effects

[121] The second branch of the *Dagenais/Mentuck* test requires consideration of whether the salutary effects of a publication ban outweigh its deleterious impact on the rights and interests of

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[65] paragraphs 22 to 25
[66] paragraph 34
[67] By virtue of s. 648(1) of the *Code*, when combined with s. 645(5)
[68] See, e.g. *R. v. Canadian Broadcasting Corp, supra*; *National Post (McKinnon J), supra*

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.

[122] The main salutary effect of a publication ban would be the alleviation of the risk of jury tainting and the minimization of stigmatization from the dissemination of untested, prejudicial and potentially one-sided information. In short, it would enhance the prospect of Mr. Shirdon receiving a fair trial.

[123] To be sure, as Justice Nordheimer accurately observed in *CBC v. Canada,* there are also deleterious effects. However, "the Constitution does not always guarantee the ideal,"[69] and in that respect the decision of the Supreme Court of Canada in *Toronto Star Newspapers Ltd. v. Canada,* is once again instructive. As discussed earlier, the issue in that case was whether the infringement of s. 2(b) of the *Charter* effected by the mandatory publication ban provided for in s. 517 of the *Code* could be justified under s. 1. Although the test under s. 1 is not identical to the *Dagenais/Mentuck* test, under both tests the court is called upon to assess whether the salutary effects of the measure in question outweigh its deleterious impact.[70] With respect to that assessment, Justice Deschamps stated:

> [The] deleterious effects of a publication ban should not be downplayed. Section 517 bars the media from informing the population on matters of interest which could otherwise be subject more widely to public debate: *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326. To this extent, it impairs "[t]he freedom of individuals to discuss information about the institutions of government, [and] their policies and practices" (*New Brunswick*, at para. 18).
>
> The ban prevents full public access to, and full scrutiny of, the criminal justice process. Moreover, the bail hearing may attract considerable media attention and its outcome may not be fully understood by the public, as was apparently the case when Mr. White in the Alberta case and certain of the accused in the Ontario case were initially released. In such cases, the media would be better equipped to explain the judicial process to the public if the information they could convey were not restricted.
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> Nonetheless, on balance, I must find that in the context of the bail process, the deleterious effects of the limits on the publication of information are outweighed by the need to ensure certainty and timeliness, to conserve resources, and to avert the disclosure of untested prejudicial information; in other words, to guarantee as much as possible trial fairness and fair access to bail. Although not a perfect outcome, the mandatory ban represents a reasonable compromise.[71]

[124] In weighing the deleterious impact of a publication ban in this case, two further considerations are relevant.

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[69] *Dagenais*, per Lamer C.J.C. at paragraph 76
[70] *supra*, paragraph 92
[71] paragraphs 58 to 60

[125] First, what is contemplated is not a permanent ban but rather one that will apply only until the end of the preliminary inquiry, if Farah Shirdon is discharged, or to the end of the trial, if he is committed for trial, or until the proceedings against him are otherwise brought to an end. I appreciate that in *CBC v. Canada,* Justice Nordheimer expressed the view that "the impact of a publication ban of [two or more years] on the immediacy that naturally arises from the public's right to have information, especially when it relates to current affairs, is so significant that it may well be, in practical terms, the equivalent of a permanent ban."[72] Thus, he stated, the distinction between a temporary ban and a permanent ban is "more apparent than real." In *Toronto Star Newspapers Ltd.,* however, the Supreme Court of Canada held that the distinction was an important consideration in assessing the extent to which a publication bar would impair s. 2(b) and freedom of the press.[73] See also *Mentuck*, at paragraph 47, and *Esseghaier*, at paragraph 131.

[126] Second, what is contemplated is not an absolute ban on the publication of the search warrant materials. The media can still publish the identity of the target of the investigation, the nature of the materials sought by the production order, the date on which the application was made and the order was issued, the nature of the materials sought, and some portions of the ITO. Again, this was a consideration that the Supreme Court regarded as important in *Toronto Star Newspapers Ltd.* Justice Deschamps observed that this kind of partial publication ban "may make journalists' work more difficult, but it does not prevent them from conveying and commenting on basic, relevant information."[74]

[127] On balance, I conclude that although a temporary publication ban on the portions of the ITO that set forth information gathered by the investigators in support of the allegations against Mr. Shirdon will have a deleterious impact on the s. 2(b) rights enjoyed by the media, that impact is outweighed by the need to protect the fair trial of Mr. Shirdon.

IV. Disposition

[128] The applications to quash, revoke or vary the production order are dismissed.

[129] The sealing order made by the authorizing justice will remain in force for two weeks from today's date to permit the parties to exercise their rights of appeal. Thereafter, in the absence of another court order relating to sealing and/or publication, the orders set forth below will be effective.

[130] The application to vary the sealing order is allowed. Access is permitted to a copy of the ITO that has been redacted to prevent disclosure of information that is subject to national security claims, information that could disclose the identity of the person referred to in paragraph 34, and information contained in subparagraphs 63b and 63c.

[131] To carry this order into effect, Crown counsel will provide a draft copy of a redacted ITO to counsel for the applicants within seven days from today's date, and counsel for the applicants will have seven days to respond. If the parties are in agreement with respect to the redactions, the redacted copy will be placed in the court file and public access to it will be permitted. If the

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[72] paragraph 55
[73] paragraph 39
[74] paragraph 40

parties are unable to agree on what portions of paragraph 34 should be redacted, the court will determine the issue. In any event, the original unredacted ITO will remain sealed.

[132] Subject to further order of the court, the information set forth in the portions of the ITO listed in *Schedule A*, *infra*, shall, not be published in any document or broadcast or transmitted in any way before such time as Farah Shirdon is either discharged after a preliminary inquiry or, if he is ordered to stand trial, the trial is ended, or the proceedings against him are otherwise brought to an end. Should Farah Shirdon not be arrested within two years from today's date, the continued need for a publication ban may be addressed.

[133] These reasons are subject a temporary publication ban. The Crown shall have seven days from today's date to provide any suggested redactions to the applicants and the applicants will have seven days to respond. Any redactions upon which there are disagreements will be determined by the Court. The publication ban in relation to these reasons will expire 21 days from today, subject to further order of the court.

Ian MacDonell, J.

MacDonnell, J.

Released: March 29, 2016

Schedule A
Portions of the ITO That Are Subject to a Publication Ban

1) All portions of the ITO indicated to be "Investigator's Comments".

2) Page 16, paragraph 31

3) Page 17, paragraph 32c

4) Page 21, paragraph 33p

5) Page 24, paragraph 35c

6) Page 28, items iii and iv

7) Page 29, beginning with item ix, to page 34, after item xix

8) Page 35, beginning with paragraph m, to page 41, after item xxiv

9) Page 42, beginning with paragraph p, to page 45, after item xi

10) Page 46, beginning with paragraph u, to page 48, after item IV

11) Page 49, beginning with paragraph 37, to page 71, after "Investigator's Comment"

12) Page 87 to page 88, after paragraph g

13) Page 89, after paragraph j, to page 91, just before paragraph 54

14) Pages 93 to 96, re paragraph 60

15) Page 97, paragraphs 63b and 63c