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DATE : January 14, 2016

BEFORE THE HONOURABLE JUSTICE LORI RENÉE WEITZMAN, J.C.Q.

RIADH BEN AÏSSA
ST-CLAIR ARMITAGE
STÉPHANE ROY
Petitionners

v.

MEDIA QMI
and
MONTREAL GAZETTE
and
LA PRESSE
Respondents

and
THE QUEEN
(DPCP)
MISE EN CAUSE

DECISION ON A MOTION TO RESTRICT PUBLICATION

INTRODUCTION

[1] This motion, like most requesting a publication ban, involves the balancing of constitutionally protected rights. On the one hand, the media request that the court ensure that their freedom of expression rights enshrined in s. 2(b*)* of the *Charter* are unhampered and that they be allowed to publish the contents of an "Information to Obtain" ("ITO") without restriction. On the other hand, the petitioners, facing criminal charges in matters attracting considerable media attention, ask that the court protect their fair trial rights under *Charter* ss. 7 and 11(d) by limiting the publication of the contents of the ITO.

<u>The context</u>

[2] In the context of a large-scale criminal investigation code-named "Lauréat", regarding allegations of corruption in the financing, construction, and maintenance contracts for the McGill University Health Center (MUHC), several restraint orders for property were issued between February 2013 and September 2014. In support of the judicial authorizations for these restraint orders, police submitted ITOs – sworn affidavits summarizing information obtained during their investigation. The main issue in the present motion is whether the media's rights regarding the content of these affidavits should be restricted.

[3] The petitioners and others are facing criminal charges in relation to the alleged corruption in the "Lauréat" investigation. In December 2014, in order to meet its disclosure obligations in this criminal file involving the petitioners, Quebec's Director of criminal and penal prosecutions (DPCP) requested that the Quebec Court unseal the 21 ITOs sworn in support of the restraint orders, pursuant to s. 487.3(4) of the *Criminal Code* (*Cr.C.*). The motion to unseal was granted without any contestation. In order for all concerned parties to review the documents and, if necessary, for the DPCP to redact the affidavits, a temporary publication ban was agreed to and was thus ordered by the Quebec Court.

[4] The entire contents of the affidavits in question have now been disclosed to the petitioners as well as to the media.

[5] The media seek the right to publish any and all parts of these ITOs. The petitioners, supported in their request by the DPCP, ask this court to prohibit publication of certain specified parts of the ITOs.

[6] In order to simplify the hearing of this motion, the parties agreed to proceed with one such ITO ("affidavit #14004A"), acknowledging that the decision made regarding the targeted paragraphs in this affidavit will apply equally to the corresponding paragraphs in each of the 20 others. (A comparison table of all 21 ITOs was provided for the Court indicating the paragraph numbers at issue).

The contents at issue

[7] The petitioners do not seek a blanket publication ban on the entire contents of the ITOs, but have targeted specific sections of the affidavits which, they submit, should not be published. These portions of the ITOs can be summarized as follows:

> **Paragraph 8:** refers to five email exchanges in November 2009 between Pierre Duhaime and Riadh Ben Aïssa regarding a meeting about the MUHC.
>
> **Paragraph 13:** is a point-form summary of a discussion between Pierre Duhaime and a lawyer, Me Garneau, relating to exchanges in December 2009 between Pierre Duhaime and Riadh Ben Aïssa.
>
> **Paragraph 17:** refers to five emails dated between April 21 and 22, 2010, between Stéphane Roy and Hugues Crener regarding an urgent transfer of $10 million from Tunis to the account of Sierra Asset Management.

Paragraph 18: refers to an April 23, 2010 transfer order from Tunis of $10 million to the account of Sierra Asset Management signed by Riadh Ben Aïssa, Hugues Crener and Stéphane Roy.

Paragraph 19: refers to correspondence dated April 23, 2010, from Riadh Ben Aïssa to a bank in Tunis confirming the $10 million transfer to Sierra Asset Management and indicating that other similar transfers will follow.

Paragraph 20: refers to a July 22, 2010 transfer order from Tunis to Sierra Asset Management, signed by Riadh Ben Aïssa and Hugues Crener.

Paragraph 21: refers to a July 26, 2010, email from Hugues Crener to Riadh Ben Aïssa advising that the transfer order date is July 22.

Paragraph 22: describes emails between December 14 and December 17, 2010 from Stéphane Roy to Hugues Crener and Riadh Ben Aïssa regarding a $5 million transfer to Sierra Asset Management.

Paragraph 23: refers to a $5 million transfer order from Tunis to Sierra Asset Management signed by Riadh Ben Aïssa and Hugues Crener on December 20 2010.

Paragraph 24: refers to emails between August 4 and August 22, 2011, from Stéphane Roy to Hugues Crener regarding a request to transfer $2.5 million to Sierra Asset Management.

Paragraph 25: refers to a $2.5 million transfer order on August 15, 2011, sent from Tunis to Sierra Asset Management, signed by Riadh Ben Aïssa and Hugues Crener.

[8] Each of the following paragraphs summarizes the contents of witness statements taken in the course of the police investigation, between September and December 2012:

Paragraph 42: summarizes a sworn statement of Gilles Laramée, chief financial officer of SNC-Lavalin.

Paragraph 43: summarizes a sworn statement of Stéphane Roy, financial comptroller at SNC-Lavalin.

Paragraph 44: summarizes a written statement of Pasquale Di Lillo, financial comptroller at SNC-Lavalin.

Paragraph 45: summarizes a written statement of Michael Novak, principal vice President of SNC-Lavalin.

Paragraph 46: summarizes a written statement of Réjean Goulet, in-house counsel ("directeur du contentieux") at SNC-Lavalin [the introduction to paragraph 46 erroneously refers to *Michael Novak* and not *Réjean Goulet*. This error appears in some, but not all of the 21 affidavits at issue].

Paragraph 47: summarizes a written statement of André Dumais, in charge of verifying the selection process for the Glen campus "PPP".

Paragraph 48: summarizes a written statement of Yves Gauthier, coordinator of the MUHC project for SNC-Lavalin

Paragraph 49: summarizes a written statement of Imma Franco, Associate Director for planning and coordination of the MUHC.

Paragraph 50: summarizes a written statement of Charles Chebl, project manager for the MUHC for SNC-Lavalin.

Paragraph 51: summarizes a written statement of Miguel Fraile, project manager for the MUHC, for the firm "Partenariat CUSM".

APPLICABLE LAW

1. Statutory publication bans

Section 517 *Cr.C.*:

(1) If the prosecutor or the accused intends to show cause under section 515, he or she shall so state to the justice and the justice may, and shall on application by the accused, before or at any time during the course of the proceedings under that section, make an order directing that the evidence taken, the information given or the representations made and the reasons, if any, given or to be given by the justice shall not be published in any document, or broadcast or transmitted in any way before such time as

(a) if a preliminary inquiry is held, the accused in respect of whom the proceedings are held is discharged; or

(b) if the accused in respect of whom the proceedings are held is tried or ordered to stand trial, the trial is ended.

2) Every one who fails without lawful excuse, the proof of which lies on him, to comply with an order made under subsection (1) is guilty of an offence punishable on summary conviction.

Section 539 *Cr.C.*:

(1) Prior to the commencement of the taking of evidence at a preliminary inquiry, the justice holding the inquiry

(a) may, if application therefor is made by the prosecutor, and

(b) shall, if application therefor is made by any of the accused,

make an order directing that the evidence taken at the inquiry shall not be published in any document or broadcast or transmitted in any way before such time as, in respect of each of the accused,

(c) he or she is discharged, or

(d) if he or she is ordered to stand trial, the trial is ended.

2. The Dagenais/Mentuck test for discretionary publication bans

[9] In *Dagenais* v. *CBC*, the Supreme Court of Canada set out the applicable test for balancing the constitutional rights enshrined in ss. 2(b) and 11(d) of the *Charter*:

A publication ban should only be ordered when:

(a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and

> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.[1]

[10] This test was reformulated to apply to all cases of publications bans, affecting not only an accused's 11(d) rights but also broader considerations of the interests related to the proper administration of justice. The principles to be applied in deciding an issue of restricted publication are now referred to as the "Dagenais/Mentuck test", which operates to limit publication bans to situations where:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interest 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.[2]

[11] In *Toronto Star Newspapers,* the Supreme Court of Canada unanimously confirmed that the Dagenais/Mentuck test applies to all discretionary court orders that limit freedom of expression or freedom of the press[3].

THE POSITION OF THE PARTIES

The petitioners

[12] The petitioners advance a two-pronged argument in favour of a limited publication ban, the first raising the problem of potentially contradictory court orders, and the second dealing with the prejudice caused by publication.

1. The conflict with publication bans already ordered, pursuant to ss. 517 and 539 *Cr.C.*

[13] In the case of Riadh Ben Aïssa, a bail hearing took place in the fall of 2014. The prosecution tendered evidence of the entire police investigation leading up to the charges against Riadh Ben Aïssa, including the statements of witnesses which are

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1 *Dagenais* v. *Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at para. 73.

2 *R. v. Mentuck*, 2001 SCC 442 at para. 32; *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 at para. 26.

3 *Toronto Star*, *supra* note 2 at para. 7. See also *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332 at para. 31.

referred to in the ITO. Pursuant to the statutorily mandated publication ban in s. 517 *Cr.C.*, Lachance J. ordered that all of the evidence heard at the bail hearing be protected by a publication ban.

[14] The preliminary inquiry against several accused (including these three petitioners) facing fraud and corruption charges in relation to the MUHC project began in February 2015, and is still ongoing, to be continued in June 2016. Pursuant to a statutorily mandated publication ban, under s. 539 *Cr.C.*, Mascia J. ordered that none of the testimony or evidence heard in the course of the preliminary hearing be published.

[15] Although the ITO considered in the present motion was not tendered as evidence at either the bail hearing or the preliminary inquiry, much of the content of the ITO is the same as, or significantly overlaps, with the evidence (whether testimonial or documentary) subject to the publication bans. The petitioners submit that in order to preserve the coherence of our justice system, avoid contradictory court orders, and to truly provide the protection that ss. 517 and 539 were designed to afford, any details in the ITO which provide the same information as that covered by the statutory bans must necessarily be covered by an identical prohibition. The petitioners contend that if ss. 517 and 539 *Cr.C.* are to have any useful effect, the publication bans ordered pursuant to those sections cannot simply be neutralised by allowing the media to publish that very same information, even if it is obtained through another source.

2. <u>The Dagenais/Mentuck analysis</u>

[16] The second prong of the petitioners' argument is that publishing the paragraphs referred to in the sworn ITO would pose a risk their fair trial rights.

[17] First, they argue that prejudice would be caused by allowing the publication of information that is incriminating yet untested. They underscore that the ITO summarizes the affiant's own opinion about the nature and quality of the evidence gathered. As well, every witness statement summarized in the ITO will eventually be subject to cross-examination. It is only then that the reliability and veracity of these statements will truly be tested and the proper nuances in the evidence exposed. According to the petitioners, the strength of the prosecution's case is directly linked to the reliability of these witnesses. Lachance J. specifically noted this in her decision granting bail to Riadh Ben Aïssa. Moreover, it is the position of the petitioners that several of these witnesses may have a serious motive to incriminate others and find a scapegoat for activities that they themselves were involved in. This provides the proper foundation to

delay publication of the summary of these statements until their reliability can be properly scrutinized in court.

[18] Moreover, some of the information included in the ITO may eventually be found to be inadmissible at trial. For example, the statements of Stéphane Roy, summarized at paragraph 43 of the ITO and of Charles Chebl, summarized at paragraph 50 of the ITO, are inadmissible against them at their trial unless and until the prosecution establishes beyond reasonable doubt that they were given freely and voluntarily.

[19] The petitioners argue overall that allowing the public full access to the entire ITO at issue here may create indelible negative impressions against the accused facing criminal charges. A constant barrage of media exposure tainting their reputations and presenting one side of the story, ostensibly as evidence against them, may well make it impossible to find twelve impartial jurors.

[20] Regarding the proof of the risk to a fair trial, the petitioners urge the Court to follow the reasoning of the Quebec Superior Court in *Groupe TVA.* v. *Auclair*[4] in which Vauclair J. explained that the real and substantial risk contemplated by the Dagenais/Mentuck test does not require a demonstration of inevitable harm. It is appropriate for the judge hearing such a motion to resort to common sense and judicial notice in order to assess the potential risk, in the absence of demonstrated proof of the effects of publicity.

[21] While the petitioners recognize the importance of the constitutional guarantees of freedom of expression, they insist that these not be allowed trump their rights to a fair trial. The publication ban requested does not cover the entire ITO, but is specifically crafted to allow for a proper balance between competing constitutional rights. The petitioners claim that this partial publication ban is necessary to preserve their rights, while representing a small but necessary infringement on the rights of the media.

[22] The petitioners refer to publication bans applied in similar cases by judges faced with the same conflict, for example in *R.* c. *La Presse*[5], *Société Radio-Canada* c. *Auclair*[6] and *Flahiff* c. *Cour du Québec*[7]. In each instance, the Court applied the balancing test and decided that a publication ban was required.

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4 *Groupe TVA* c. *Auclair*, (October 2, 2012), Montréal 500-01-020150-097 (QCCS) at paras. 55–56.
5 *R.* c. *La Presse*, 2013 QCCQ 14773.
6 *Société Radio-Canada* c. *Auclair*, 2010 QCCS 4627.

[23] On a more general note, the petitioners decry the approach adopted by many affiants in their ITOs, whereby they provide much more information than is truly required. This creates an opportunity for private and/or incriminating information to be disseminated to the public, in accordance with the "open-court principle" and thus allows the court of public opinion to draw negative conclusions well before any trial is properly heard. The damage to reputations thus caused can never be fully redressed, regardless of the outcome of an eventual trial - in some cases, no charges are ever laid. Therefore, the petitioners submit, in order to fully protect their individual rights, publication should not be allowed until the information is challenged effectively through the trial process.

The DPCP

[24] The representatives of the DPCP agree that the requested partial publication ban is necessary in the present matter. They note that at the bail hearing of Riadh Ben Aïssa, the prosecution's evidence was presented through the testimony of the principal investigator, Jean-Frédérick Gagnon, who is also the affiant of the ITOs presently at issue. Mr Gagnon summarized all of the evidence for the judge, and he specifically referred to certain written statements, summarized in the ITO, parts of which were read out verbatim at the bail hearing. The sworn "KGB" statements of Gilles Laramée and Stéphane Roy were tendered as evidence at the bail hearing. It is the position of the DPCP that publication of any part of the contents of any of these statements would violate the publication ban ordered pursuant to s. 517 *Cr.C.* In addition, the DPCP echo the petitioners' concern with respect to preserving fair trial rights.

The media

[25] The media submit that the only issue to be decided here is that set out in the Dagenais/Mentuck test. The fact that similar or related information is covered by publication bans currently in force pursuant to ss. 517 and 593 *Cr.C.* is not relevant to the issue to be decided by this Court. The media readily admit that had the ITO been tendered as evidence at the bail hearing or the preliminary inquiry, it could not be published. However, any information not specifically subject to such a ban must be presumptively accessible and publishable, unless a discretionary order is made pursuant to the Dagenais/Mentuck test.

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[7] *Flahiff* c. *Cour du Québec*, [1998] J.Q. no 2.

[26] According to the media, the application of the Dagenais/Mentuck test here does not allow for any limit on publication. In the absence of any evidence of a real risk to a fair trial and/ or to the proper administration of justice, the constitutional rights enshrined in s. 2 (b) of the *Charter* must be fully protected.

[27] The media contend that each of the examples of discretionary publication bans referred to by the petitioners can be easily distinguished on its facts. Unlike those cases, the information at issue here does not come from unsavory witnesses, and it is in large part either confirmed by documentary evidence, or by the consistent content found in the written statements.

[28] Finally, the media note that much of this information is already in the public domain, thus further diminishing any risk that could possibly be created by publishing the paragraphs in question. For example, paragraphs 30-33, which were originally part of the petitioners' motion for non-publication, contain information about these same transfers of funds to Sierra Asset Management. These paragraphs were removed from the present motion in view of the fact that they were not covered by the earlier temporary publication ban and are already in the public domain. In addition, paragraph 30 refers to an annex to the affidavit ("annexe A"), which has already been published. This Annex is a diagram which maps out in detail the trail of funds transferred. It specifically refers to four transfer orders to Sierra Asset Management for a total of $22,500,000, authorized by Riadh Ben Aïssa and Hugues Crener. The diagram provides information and photographs of several of those accused in this matter, including Riadh Ben Aïssa, and Paragraph 33 of the affidavit, which is also not covered by this motion, states that Stéphane Roy received and deposited two cheques from Riadh Ben Aïssa in July and September 2011, for a total of $18,000.

[29] On the whole, the media submit that the paragraphs at issue here may simply complete the information already in the public domain, and certainly do not increase any harm or prejudice to the petitioners.

ANALYSIS

1. <u>The conflict with the statutory publication bans already imposed</u>

[30] The issue of whether a publication ban ordered pursuant to s. 517 *Cr.C.* automatically bans publication of the same information contained in an ITO was dealt

with in the case of *Société Radio-Canada* v. *Auclair*[8] in which Brunton J. held that the s. 517 ban could not operate to preclude publication of information obtained through a source other than the bail hearing. As such, where an ITO in support of a warrant to search was not tendered as evidence at the bail hearing, its contents could be published, subject to a Dagenais/Mentuck analysis.

[31] The limited scope of a s. 517 publication ban was also noted by Abella J. (in dissent on the question of the constitutionality of s. 517 *Cr.C.*), in *Toronto Star* v. *Canada*:

> In any event, s. 517 only protects an accused from disclosure of pre-trial information from a bail hearing. There is no legislative protection from potentially prejudicial pre-trial information that emanates from sources other than the bail hearing.[9]

[32] This reasoning flows directly from the wording of s. 517 which allows for an order prohibiting publication of "evidence taken, information given, representations made and reasons given". The same rationale applies to s. 539, which prohibits the publication of "the evidence taken at the [preliminary] inquiry".

[33] The Court is mindful of the fact that the publication bans provided in ss. 517 and 539 do not provide the full scope of protection desired by the petitioners and may even result in rendering the ban ineffective for certain sensitive information. The answer to these concerns must be to resort in each instance to the balancing required by the Dagenais/Mentuck analysis.

[34] The Supreme Court of Canada has repeatedly underscored the fundamental importance of the openness and accessibility of the courts. Against this backdrop, the statutory publication bans, which do not take into account the Dagenais/Mentuck balancing, must not be expanded beyond the strict confines of the statutory dictates.

[35] It is also true, as noted by Durno J in *R.* v. *CTV*[10] that extending the publication ban to information from sources other than the bail hearing or the preliminary inquiry would result in "significant uncertainty regarding what could be published". As Durno J.'s

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[8] *Société Radio-Canada*, *supra* note 6.
[9] *Toronto Star*, *supra* note 2 at para. 73.
[10] *R.* v. *CTV*, 2013 ONSC 5779.

hypotheticals show, if statutory publication bans were interpreted as including material obtained through other sources, we would be left with a largely unworkable regime:

> For example, if the police conducted a press conference at the time of arrests and outlined the allegations, and the nature of some of the evidence, and that same evidence were given at the bail hearing, would the media be precluded from reporting what had been said at the press conference? Assuming the ITOs were unsealed and access or publication permitted, would the media have to obtain a copy of the bail hearing transcript to determine whether what they intended to publish was covered at the bail hearing despite the fact they obtained the information from another source?[11]

[36] For these reasons, the Court finds that the ITO cannot be considered to be subject to the publication bans imposed pursuant to ss. 517 and 539, as it was not evidence taken at the bail and preliminary hearings. The overlap of information at issue and the necessity of ordering a partial publication ban can only be considered according to the Dagenais/ Mentuck analysis, as will be canvassed below.

2. The Dagenais/Mentuck analysis

[37] The Dagenais/Mentuck test must be applied in the context of an overall principle of openness, as reaffirmed by the Supreme Court of Canada in *Toronto Star Newspapers Ltd* v. *Ontario*:

> It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would subvert the ends of justice or unduly impair its proper administration.[12]

[38] The Supreme Court of Canada in *Dagenais*[13] and later *in Mentuck*[14] underscored the importance of the open-court principle and the rights of freedom of expression and freedom of the press in relation to judicial proceedings. These fundamental principles are viewed as "hallmarks of a democratic society"[15] and any encroachment on them

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11 *CTV*, *supra* note 10 at para. 78.
12 *Toronto Star*, *supra* note 2 at para. 4.
13 *Dagenais*, *supra* note 1.
14 *Mentuck*, *supra* note 2.
15 *Canadian Broadcasting Corp.* v. *New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 at para. 22; *Vancouver Sun supra,* note 3 at para. 23.

must be properly justified and appropriately limited. In *Vancouver Sun*, the Supreme Court of Canada described the openness of the courts and judicial processes as being "necessary to maintain the independence and impartiality of courts", "integral to public confidence in the justice system" and "a principal component of the legitimacy of the judicial process"[16].

[39] Even before the entrenchment of these constitutional protections in the *Charter*, the presumption in favour of openness and accessibility was recognized by the Supreme Court of Canada. In *Nova Scotia (Attorney General)* v. *MacIntyre*[17], Dickson J. stated: that "At every stage the rule should be one of public accessibility and concomitant judicial accountability" and "curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance".

[40] The burden rests on the party seeking to limit publication to establish both branches of the test[18] and it requires proof, "well–grounded in the evidence" of a "real and substantial risk" that poses "a serious threat to the proper administration of justice"[19]. Although it is true that the bar cannot be placed so high as to require actual proof of inevitable and irreparable harm, the language used by the Supreme Court makes it clear that nothing short of a realistic potential of very serious risk, which cannot be contained by alternative measures, will suffice to limit publication.

[41] The assessment of the alleged risk to the proper administration of justice, and of the available alternative measures to prevent it, must not be considered "mechanistically." As Fish J. points out in *Toronto Star Newspapers*, the Dagenais/Mentuck test must be applied "flexibly and contextually"[20]. Different considerations may indeed apply to untested information gathered at the pre-trial stage from those governing actual trials. In certain cases, a temporary publication ban is found to be necessary. Some examples of this flexible approach were submitted to the Court, such as the publication bans ordered in the matters of *Société Radio-Canada* c. *Auclair*[21], *R.* c. *La Presse*[22], and *Flahiff* c. *Cour du Québec*[23].

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16 *Vancouver Sun*, *supra* note 3 at para. 25.
17 *Nova Scotia (Attorney General)* v. *MacIntyre*, [1982] 1 S.C.R. 175 at paras. 26–27.
18 *Mentuck*, *supra* note 2 at paras. 26 and 38.
19 *Ibid* at para. 34.
20 *Toronto Star*, *supra* note 2 at paras. 8, 31.
21 *Société Radio-Canada*, *supra* note 6.
22 *La Presse*, *supra* note 5.

[42] The Court agrees with Downs J.'s characterisation of the nature of the information covered by the publication bans in those three cases. He states:

> Or, dans ces trois jugements, certaines allégations retrouvées aux dénonciations provenaient exclusivement de sources intrinsèquement non fiables qui ne devaient pas être publiées avant procès. Par exemple, dans la décision Auclair, l'interdit de publication et de diffusion visait les allégations d'un ancien membre des Hells Angels. Dans la décision de la juge Despots relative au projet "Honorer" (Ville de Laval), il s'agissait de témoins à qui des avantages avaient été promis en échange de leur témoignage. Alors que dans l'arrêt Flahiff, il s'agissait des allégations d'un informateur de police et complice des accusés, qui collaborait en échange d'une réduction de sa peine.[24]

[43] A publication ban was also ordered in *R.* v. *CTV*[25], where Durno J. concluded that sensational and troubling depictions of a train derailment related to terrorist activities were likely to create an emotional response which would so enflame the jurors as to create prejudicial impressions that could not be dispelled.

[44] In each case where a publication ban was ordered, the judge's discretion was so exercised owing to the nature of the information sought to be published and the prejudice such publication would cause. In the present matter, the information sought to be shielded from the public is neither particularly sensational, nor does it emanate from questionable sources. It is largely confirmed by documentary evidence or by the witness' statements. Moreover, there is little in this ITO which has not already been published, or alluded to, in previous news reports. To the extent that this ITO provides further detail, it is along the very same lines of the many publications covering the alleged corruption surrounding the MUHC project in the past few years.

Safeguards

[45] Any risks to the fair trial interests of the petitioners caused by the publication of this ITO can be contained by the safeguards already in place. The Supreme Court of Canada has consistently endorsed our jury system and has confirmed that juries are perfectly capable of following judges' instructions and deciding case based solely on the

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23 *Flahiff*, *supra* note 7.
24 *Corporation Sun Média et Dubois*, 2013 QCCQ 14371 at paras. 72–73.
25 *CTV*, *supra* note 10.

evidence before them[26]. In *R.* v. *Find* the Supreme Court of Canada addressed "offence–based biases" by jurors and reaffirmed the faith placed in jurors to judge impartially according to their oath:

> As discussed, the safeguards of the trial process and the instructions of the trial judge are designed to replace emotional reactions with rational, dispassionate assessment. Our long experience in the context of the trial of other serious offences suggests that our faith in this cleansing process is not misplaced. The presumption of innocence, the oath or affirmation, the diffusive effects of collective deliberation, the requirement of jury unanimity, specific directions from the trial judge and counsel, a regime of evidentiary and statutory protections, the adversarial nature of the proceedings and their general solemnity, and numerous other precautions both subtle and manifest - all collaborate to keep the jury on the path to an impartial verdict despite offence-based prejudice.[27]

[46] These same safeguards will operate to effectively neutralize any negative impressions created by pre-trial publicity.

<u>The nature of information contained in an ITO</u>

[47] Although the petitioners complain of too much extraneous information in the ITO, the law obliges an affiant to provide "full and frank disclosure of material facts", which must be summarized "truthfully, fully and plainly"[28]. If there is a tendency towards being overly inclusive in affidavits used to obtain judicial authorizations, this is likely the result of officers attempting to provide full disclosure, and not of an oblique purpose of exposing extraneous facts to the public.

[48] It must also be remembered that unlike trials, judicial authorizations are issued in chambers. Referring again to the principles of openness and accessibility, it is essential that the media have access to these authorizations in order to shed light on this pre-trial process. As Dickson J. plainly stated in *McIntyre,* there is no reason to accept "that a judicial act performed during a trial is open to public scrutiny but a judicial act performed at the pre-trial stage remains shrouded in secrecy"[29]. He states:

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[26] *Dagenais*, *supra* note 1 at para 87; *Phillips* v. *Nova Scotia* (*Commission of Inquiry into the Westray Mine Tragedy*), [1995] 2 S.C.R. 97 at para.133.

[27] *R.* v. *Find*, 2001 SCC 32 at para. 107.

[28] *R.* v. *Araujo*, [2000] 2 S.C.R. 992 at paras. 46–47.

[29] *MacIntyre*, *supra* note 17 at para. 25.

> The concern for accountability is not diminished by the fact that the search warrants might be issued by a justice in camera. On the contrary, this fact increases the policy argument in favour of accessibility. Initial secrecy surrounding the issuance of warrants may lead to abuse, and publicity is a strong deterrent to potential malversation.[30]

Reputation and privacy interests

[49] Apart from the fair trial rights at issue, the petitioners also refer more generally to the negative effect of publicity on their reputations. However, in these circumstances, the potential loss of privacy or damage to reputation which may result if the ITO were made public is not determinative in the Dagenais/Mentuck analysis. As Cory J. noted in *Phillips*, "negative publicity does not, in and of itself, prelude a fair trial"[31]. Thus this would not justify a denial of public access to the information.

The Statement of an accused

[50] The Dagenais / Mentuck analysis attracts different considerations in the case of a statement by an accused. The strict rule preventing publication of a statement of an accused to a person in authority before it is ruled admissible by the trial judge is well known. In *Groupe TVA* c. *Auclair*, Vauclair J. highlights the distinct approach to be favoured with this evidence and he states:

> "Je n'ai aucune difficulté à croire que l'impact potentiel d'aveux inadmissibles soit une ligne assez claire à tirer en matière de non-publication".[32]

[51] This was also the view expressed by Cory, J. in *Phillips* v. *Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*:

> The publication of [the evidence of the accused] at the Inquiry might mean that potential jurors would have been exposed to testimony that they might never hear at the trial. This coupled with the fact that it came from the accused themselves would make it difficult for jurors, despite their good intentions and the best of instructions from the trial judge to set it aside and leave it out of their

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[30] *Ibid,* at para. 18.
[31] *Commission of Inquiry into the Westray Mine Tragedy*, *supra* note 26 at para. 129.
[32] *Groupe TVA*, *supra* note 4 at para. 60.

> considerations. In respect of this evidence, then, there is a clearly identifiable and serious risk that the fair trial rights of the two accused will be jeopardized.[33]

[52] It would thus appear that there are no reasonable alternative measures to an outright ban in the case of the risks caused by publication of an accused's statement prior to a ruling on its admissibility.

CONCLUSION

Paragraphs 8, 13, 17-25, 42, and 44-49 and 51 of the ITO

[53] The petitioners have failed to establish that the publication of these paragraphs the ITO will constitute a real and serious risk to their fair trial interests. Considering the fact that much of this information has already been made public, and considering the usual safeguards preventing jurors from deciding on preconceived ideas, the Court finds that such an order is not necessary to prevent a risk to the proper administration of justice.

Paragraphs 43 and 50 (referring to the statements of Mr Roy and Mr Chebl)

[54] Applying the different considerations that are at play when dealing with the statement of an accused given to a person in authority, this Court finds that publication of the accuseds' statements, or part thereof, prior to a voir-dire determining their admissibility would represent a serious risk to their fair trial rights and to the administration of justice. In this case, the salutary effects of the publication ban outweigh the deleterious effects on the right to free expression.

FOR THESE REASONS, THE COURT:

> **GRANTS** the motion for non–publication regarding the summary of the statement of Mr Stéphane Roy, in paragraph 43 of the ITO (and corresponding paragraphs of the other 20 ITOs);
>
> **GRANTS** the motion for non–publication regarding the summary of the statement of Mr Charles Chebl, in paragraph 50 of the ITO (and corresponding paragraphs of the other 20 ITOs);
>
> **DISMISSES** the motion for the remainder of the ITO;

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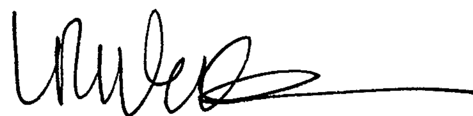
[33] *Commission of Inquiry into the Westray Mine Tragedy*, *supra* note 26 at para. 162.

SUSPENDS the effect of this decision for 10 days, in order to allow an appeal of this decision.



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Dates of hearings: October 29 and December 16, 2015.