

IN THE PROVINCIAL COURT OF NEW BRUNSWICK

JUDICIAL DISTRICT OF SAINT JOHN

Citation: Saint John Police Force v. Canadian Broadcasting Corporation Et al, 2013 NBPC 19
Date: October 4, 2013

DECISION ON MOTION TO VARY A PUBLICATION BAN MADE IN RESPECT OF THE EVIDENCE OF CONSTABLE STEPHEN DAVIDSON

ERRATUM

Please note the following corrections to the above noted decision:

Paragraph [14] at pages 7 & 8 should read:

Decision

Page 288 Lines 20-21 [Redaction of rest of page removed]

And at page 8 immediately before the sub-header "Transcript of August 13, 2012"

Transcript of August 1, 2012

Page 23 Line 18
Page 24 Lines 9, 10, 14, 23
Page 42 Lines 8, 16-17

A corrected version of the decision is attached.

JACKSON, C.P.C.J.

Background:

[1] During the hearing of the application by the Saint John Police Force ("the Police") to extend a sealing order in respect of various Search Warrants and Production Orders issued during the investigation of the death of Richard Oland, Constable Stephen Davidson gave evidence and was made available for cross examination during both an In Camera hearing with only counsel present, and during an Ex-Parte hearing with only myself and Crown Counsel present.

[2] I rendered decision on the application on September 28, 2012 (Saint John Police Force v. Canadian Broadcasting Corporation et al 2012 NBPC 17), varying the several sealing orders subject to certain conditions.

[3] The Canadian Broadcasting Corporation and Brunswick News Inc. ("the Media") appealed my decision in regard to the publication of names of persons who were the subject of any Search Warrant and also asked that the publication ban on the evidence of Constable Davidson given during both the In Camera and Ex-Parte hearings be lifted.

[4] Mr. Justice Grant rendered his decision on May 17, 2013 (Canadian Broadcasting Corporation et al v. Saint John Police Force et al 2013 NBQB 167), allowing the appeal as it related to

the publication of the names of those subject to Search Warrants, but declining to order a variation of the Publication Ban made during the hearing. At paragraph 59 of his decision, Justice Grant said:

"[59] (b) The application to lift the publication ban and sealing order on the evidence of Constable Davidson is dismissed without prejudice to the applicants' right to request that it be further reviewed by the Provincial Court Judge."

The Media have now made application to have the aforesaid publication ban and sealing order lifted and all parties were heard on September 6, 2013 in Saint John.

Positions of the Parties

[5] The Media position is that any testimony given by Constable Davidson which does not fall within one of the exceptions listed in paragraph 24 of my decision (supra), should be made available to the public. They posit that there is neither an evidentiary nor a legal basis to keep confidential much of Constable Davidson's evidence given in Court. Indeed, following an agreed upon procedure, redacted copies of the various transcripts of evidence were made available to the media.

[6] The Police contend that the Court must always bear in mind that a balance must be sought between the public's right to know and the ability of the police to both protect hallmark evidence, and not to have an ongoing investigation compromised. The Police and Media differ on the nature of "Hallmark Evidence"

and, in particular, whether or not that term only applies to things mentioned in sub paragraph 24(d) of my decision, or may also apply to evidence derived or flowing from that evidence.

[7] Mr. Miller and Mr. Teed, counsel for the Interested Parties dealt specifically with testimony relating to what has been called "the log book", which is referred to at paragraphs 9 and 22 of my decision. In that decision, I concluded that:

"[22] ...because nothing was found as a result of either the seizure or the forensic analysis, I am of the opinion that those warrants and all associated documents should remain sealed on the basis of the privacy interests of innocent persons."

That portion of the decision was not appealed, and consequently the warrants and associated documents remain sealed. The Interested Parties position is that because of that fact, all testimony of Constable Davidson in relation to the log book or those warrants should also remain entirely redacted. The Media reply that while the warrants remain sealed, the totality of Constable Davidson's evidence need not be redacted while conceding that of it some may be.

Decision

[8] The procedure I alluded to earlier, whereby redacted transcripts of Constable Davidson's evidence were made available to the public was as follows: I made the original redactions and forwarded those on to counsel for the Police, who in turn suggested some further redactions, and then sent the transcripts

along to counsel for the Interested Parties, who made further redactions; specifically, as I have already noted, relating to the "log book" testimony. The transcripts were sent to counsel for the Media. By consent, these redacted transcripts were ordered to be available for release to the public. This decision deals with whether all the suggested redactions will continue or whether some of them will be varied or lifted.

[9] In my view, many of the proposed redactions are overly broad. Only that testimony which falls squarely within the parameters of sub paragraphs [A], [C], and [D] of paragraph 24 of my original decision should be redacted.

[10] I would agree that "hallmark evidence" may include other than the examples I set out in sub paragraph 24[D], but it is not so elastic a concept as to include any information relating to the death of Mr. Oland. In this case specifically, the exact time of death, for example, although not listed, would be hallmark evidence, as would be the identity, or subsequent location of any of the deceased's personal effects said to have been in his possession at the time of his death.

[11] Turning specifically to the testimony as it relates to the "log book" warrants, I agree with counsel for the Media that simply obliterating all testimony on that subject is too broad. The fact that the item was subjected to forensic testing and that no forensic evidence of any nature came from that testing

is already widely known. The original sealing order was made on the basis of the privacy interests of innocent persons, and therefore unless the testimony somehow violates those interests it should not be redacted. In reviewing the sections of the transcripts sought to be redacted by counsel for the Interested Parties, I noted that much of it is not in fact testimony of Constable Davidson but rather submissions of Counsel, which, quite frankly, I cannot see a basis on which I could redact.

[12] Mr. Miller also wished to have redacted any reference in the transcripts to "private investigations", arguing that the public would immediately assume that it was his client who had engaged them and perhaps draw unfavourable inferences. In ordering the public release of Constable Davidson's affidavit, these words were omitted; however that order was made on consent of all counsel. I can conceive of no legal basis on which I might order the redaction of these words where they appear in the transcripts. If the suggestion is that Mr. Miller's clients privacy interests, or "innocence at stake" interests are at play, it is clear that some proof of impairment of those interests must be proffered. In this case there is at most a suggestion or inference of prejudice which is, in my view, insufficient to redact those words.

[13] The other issue raised by Mr. Miller was the redaction of the Christian names of his client's stepson and daughter. While

conceding that they may indeed be innocent parties to this investigation, I know of no legal basis on which I might redact their names, as long as uniquely private information is not disclosed.

[14] Having considered the competing interests at play, I order that the transcripts be redacted as follows:

Transcript of July 31, 2012

| | |
|----------|---|
| Page 44 | Line 12 [Redaction from line 6 to page 45 line 5 removed] |
| Page 140 | Lines 11-12 [Redaction of lines 1-5 & 10 removed] |
| Page 141 | [Redaction of lines 4 and 11-12 removed] |
| Page 142 | [Redaction of lines 16-18 removed] |
| Page 143 | Lines 20-12 [Redaction of lines 5-9 and 18-19 removed] |
| Page 144 | Lines 1, 8, 13-17, 19, 21-22 [Redaction of lines 9-12, 18-19 removed] |
| Page 145 | Lines 1-2 |
| Page 146 | [Redaction of lines 9-13 removed] |
| Page 153 | Lines 21-22 |
| Page 154 | Lines 3-4, 7-8, 11-13 [Redaction of lines, 2, 6 removed] |
| Page 155 | Lines 1-2 |
| Page 157 | [Redaction of lines 12-13 removed] |
| Page 158 | Lines 5-6 [Redaction of lines 7-8 removed] |
| Page 160 | Line 10, 13-14, 17-18 [Redaction of lines 9, 11-12 removed] |
| Page 161 | Lines 4-5, 8, 9-10, 11-12 |
| Page 163 | Lines 10-13, 16-17 [Redaction of lines 9, 15 removed] |
| Page 164 | Lines 3, 5-6, 8, 16-17 [Redaction to lines 4, 7 removed] |
| Page 167 | [Redaction to lines 17, 20 removed] |
| Page 168 | [Redaction to line 1 removed] |
| Page 170 | Lines 2-3, 13, 16-17 |
| Page 171 | Lines 1, 8, 13, 19-20 [Redaction to lines 10, 21, 22 removed] |
| Page 172 | Lines 15-16, 22 [Redaction to lines 3, 12-15, 18, 19-21 removed] |

Page 173 Lines 1-3
 Page 174 [Redaction to line 12 removed]
 Page 175 Lines 17-18, 20
 Page 176 Lines 2-3, 11, 14-16, 18-20 [Redaction
 to lines 12, 21 removed]
 Page 178 Lines 10, 16-17 [Redaction to line 7
 removed]
 Page 180 Lines 13, 15, 18-19 [Redaction to lines
 16, 20-21 removed]
 Page 181 Lines 8-9 [Redaction to lines 11-12
 removed]
 Page 183 Lines 14-16 [Redaction to lines 17-21
 removed]
 Page 184 17-18 [Redaction to the rest of the
 page removed]
 Page 185 [Redaction to lines 1-3 removed]
 Page 191 [Redaction to lines 3, 6-7, 14 removed]
 Page 195 Lines 4, 11-13, 15, 21-22
 [Redaction to line 14 removed]
 Page 196 Lines 1, 3, 11, 13-14, 21-22 [Redaction
 to lines 2, 12 removed]
 Page 201 [Redaction to lines 8-9, 12-13 removed]
 Page 202 [Redaction to lines 7, 10-12 removed]
 Page 204 [Redaction to lines 2-3, 5-7 removed]
 Page 207 Lines 10, 14
 Page 208 Line 8
 Page 221 [Redaction to line 6, 9 removed]
 Page 228 Lines 3, 19, 20
 Page 236 Lines 12-14
 Page 238 Lines 10-11 [Redaction to lines 14-15
 removed]
 Page 286 [Redaction of lines 14 to end of page,
 removed]
 Page 287 [Redaction of entire page removed]
 Page 288 Lines 20-21 [Redaction of rest of page
 removed]
 Page 289 Lines 8, 13, 16-17 [Redaction of rest
 of page removed]
 Page 290 Lines 14-15 [Redaction of rest of page
 removed]
 Page 291 Lines 8, 14 [Redaction of rest of page
 removed]
 Page 292 [Redaction of entire page removed]
 Page 293 Line 8 [Redaction of rest of page
 removed]
 Page 294 [Redaction of rest of page removed]
 Page 295 [Redaction of rest of page removed]

Page 296 Lines 6, 10, 18, 20, 22 [Redaction of rest of page removed]
Page 297 Lines 11, 16, 20 [Redaction of rest of page removed]
Page 298 Lines 2, 14, 20-21 [Redaction of rest of page removed]
Page 299 Lines 9, 10, 13-14 [Redaction of rest of page removed]
Page 300 Lines 2, 6 [Redaction of rest of page removed]
Page 301 [Redaction of entire page removed]
Page 302 [Redaction of entire page removed]
Page 303 Lines 12-13 [Redaction of rest of page removed]
Page 304 [Redactions removed]
Page 305 [Redactions removed]
Page 310 [Redactions removed]
Page 311 [Redactions removed]
Page 312 [Redactions removed]
Page 313 [Redactions removed]
Page 314 [Redactions removed]
Page 317 [Redactions removed]
Page 322 Line 20 [Redaction to line 21 removed]
Page 323 [Redactions removed]

Transcript of August 1, 2012

Page 23 Line 18
Page 24 Lines 9, 10, 14, 23
Page 42 Lines 8, 16-17

Transcript of August 13, 2012

Page 11 [Redactions to lines 9-21 removed]
Page 135 Lines 13-14

Transcript of August 16-17, 2012

Page 19 Lines 18-19
Page 159 [Redaction to line 23 removed]

Transcript of August 17, 2012

Page 67 [Redactions to lines 4-19 removed]
Page 71 [Redactions removed]
Page 72 [Redactions removed]
Page 106 [Redactions to lines 16-18 removed]
Page 117 [Redactions to lines 2-11 removed]

Page 122 Lines 15, 18-19, 22-23 [Other
 redactions on page removed]
Page 123 Lines 1-2 [Redactions on lines 3-11
 removed]
Page 129 [Redactions to lines 19-21 removed]

R. Leslie Jackson, C.P.C.J.N.B