CITATION: *The Globe and Mail Inc. v. R.*, 2017 ONSC 2407
COURT FILE NO.: 17-13278
DATE: 2017/04/21

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
THE GLOBE AND MAIL INC., THE CANADIAN BROADCASTING CORPORATION, POSTMEDIA NETWORK INC., and CTV NEWS, A DIVISION OF BELL MEDIA INC.	*Tae Mee Park* and *Peter Jacobsen*, counsel for the Applicants
Applicants	
– and –	
HER MAJESTY THE QUEEN	*Moray Welch*, counsel for the Respondent/Crown
Respondent	
– and –	
MARK NORMAN	*Owen M. Rees*, counsel for the Interested Party
Interested Party	
– and –	
CHANTIER DAVIE CANADA INC. and FEDERAL FLEET SERVICES INC.	*Barbara A. McIssac* and *David P. Taylor*, counsel for the Interveners
Interveners	
	HEARD AT OTTAWA: April 11, 2017, with supplementary written submissions filed April 18, 2017.

RULING ON APPLICATION UNDER S. 487.3(4)

PHILLIPS J.

[1] This is an application pursuant to section 487.3 of the *Criminal Code* for an order lifting the sealing orders made between January 2, 2017 and January 9, 2017 in respect of various

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judicial authorizations, including a search warrant executed at the private residence of Vice-Admiral Mark Norman in Ottawa.

[2] The Applicants, The Globe and Mail Inc. *et al* ("The Globe and Mail"), argue that the open court principle should result in the documents, including any Information to Obtain (ITO) sworn in support of any judicial authorization, being released into the public domain now that the warrants have been executed. While The Globe and Mail does not contest the appropriateness of redactions related to cabinet confidentiality, it argues that any restriction on publication in respect of any remainder would be an unwarranted infringement of freedom of expression as set out in section 2(b) of the *Charter*.

[3] Vice-Admiral Norman does not propose that the various sealing orders be maintained, except as considered necessary by the Attorney General of Canada to protect personal information of third parties or cabinet confidences. He does argue, however, that a publication ban should be made over various parts of the remainder of the ITO, a result he asserts is necessary to preserve his right to be tried by an impartial tribunal as guaranteed by section 11(d) of the *Charter*. Vice-Admiral Norman argues that it is fundamentally unfair for him to be subjected to a trial by news media, especially to the extent that such a "trial" will involve inadmissible and inadequately tested evidence and allegations.

[4] The Crown supports the position taken by Vice-Admiral Norman.

[5] Chantier Davie Canada Inc. and Federal Fleet Services Inc. ("Chantier Davie") were granted standing as interveners. They largely join with Vice-Admiral Norman and further argue for a sealing order to remain in respect of several documents. Their argument is that they are innocent third parties who have a commercial confidentiality interest in what are essentially incidental details about the shipbuilding contract in question.

The Facts

[6] In 2014, Canada found itself without any naval supply ships. The expected lifecycles of previous supply vessels had run their course faster than anticipated. On July 31, 2015, Chantier Davie entered into a Letter of Intent with the Government of Canada for the conversion of a container ship into a supply ship capable of supporting the operations of the Royal Canadian Navy.

[7] The Letter of Intent specified that the Government of Canada would enter into a non-competitive contract with Chantier Davie to retrofit a ship for approximately $667 million. In addition, the Letter specified that should the Government of Canada decide not to award the contract to Chantier Davie by November 30, 2015, the Government would reimburse Chantier Davie's costs up to $89 million.

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[8] The July 31, 2015 Letter of Intent contained a confidentiality clause, protecting information and documents exchanged during negotiations. I infer that such a clause was deemed necessary in order to encourage frank and candid discussions for the purposes of negotiating a contract with regard to the project. Further to this confidentiality agreement, a working group was formed consisting of representatives of Chantier Davie, Public Services and Procurement Canada, the Royal Canadian Navy, the Department of National Defence, and from time to time, the Privy Council office, Industry Canada, and third-party advisers to the government. The working group freely exchanged confidential project strategy and other information in order to ascertain the needs of the Navy and Chantier Davie's ability to satisfy them, and at what cost.

[9] I assume from his rank that Vice-Admiral Norman would have been part of the working group or at least privy to its activities. It would not make sense for the Navy's Vice-Admiral to be kept out of the loop about procurement of something so important to his branch of the armed forces.

[10] On October 7, 2015, the commercial ship "Asterix" arrived at Chantier Davie in Lévis, Québec. Work began to refurbish it according to the Letter of Intent.

[11] A federal election was held October 19, 2015. The result was a change in government.

[12] It would appear, for reasons unknown, that some in the shipbuilding community had come to believe that the change in government meant that the Navy supply ship contract was back up for grabs. At least one company wrote to several of the new cabinet ministers in a letter dated November 17, 2015, imploring them to reconsider the steps undertaken by the previous government to have Chantier Davie provide the supply ship. The letter extolled the virtues of another option and asked for support from the new Minsters with respect to the notion that other alternatives be competitively evaluated before a contract is finalized with Chantier Davie.

[13] A committee of the cabinet met on November 19, 2015.

[14] On November 20, 2015, a news article written by journalist James Cudmore was published on the CBC's website. The article stated "CBC News has learned that on Thursday [November 19, 2015], the [cabinet] committee has delayed deciding on the deal for at least two months, provoking anger inside some corners of the shipbuilding industry and fears inside the navy".

[15] The judicial authorizations forming the subject matter of this Application were obtained as investigative steps relating to the apparent leak to the press of information subject to cabinet confidentiality. For various reasons, it is the opinion of the ITO affiant that the information was directly or indirectly revealed to the public by Vice-Admiral Norman in a manner constituting an

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offense under section 122[1] of the *Criminal Code*, as well as sections 4(1)(a) and 4(4)(b) of the *Security of Information Act*.[2]

The Law

[16] The parties seeking a sealing order or publication ban bear the onus of satisfying the court that any sort of restriction to the open court principle is warranted. They must rebut, on a balance of probabilities, the presumption that once a search warrant has been executed the material filed in support of obtaining it is to be made accessible to the public.

[17] All agree that the analysis shall involve the so-called *Dagenais/ Mentuck* test, meaning that a publication ban should only result when:

(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
(b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[18] As Iacobucci J. explained in *R. v. Mentuck*, 2001 SCC 76 at para 34, the "risk" in the first prong of the analysis must be real, substantial and well-grounded in the evidence: "it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained."

[19] That said, the *Dagenais/ Mentuck* test must be applied in a way sensitive to the unique circumstances of each given case. As Fish J. put it in *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 at para 31: "Regard must always be had to the circumstances in which a sealing order is sought by the Crown, or by others with a real and demonstrated interest in delaying public disclosure. The test, though applicable at *all* stages, is a flexible and contextual one".

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[1] In *R. v. Boulanger*, [2006] 2 S.C.R. 49, the Supreme Court of Canada explained that the offence of breach of trust by public officer is made out where the Crown establishes the following elements beyond a reasonable doubt: (1) the accused is an official; (2) the accused was acting in connection with the duties of his office; (3) the accused breached the standard of responsibility and conduct demanded of him by the nature of the office; (4) the conduct of the accused represented a serious and marked departure from the standards expected of an individual in the accused's position of public trust; and (5) the accused acted with the intention to use his public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt or oppressive purpose. The *mens rea* required turns on the intention to use one's public office for purposes other than the benefit of the public.
[2] I note, as did the ITO affiant, that sections 4(1)(a) and 4(4)(b) of the *Security of Information Act*, have been found to be unconstitutional (see: *O'Neill v. Attorney General of Canada* (2006), 82 O.R. (3d) 241).

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Analysis

[20] I accept that this matter will involve sustained and intense publicity. The subject matter and status of those involved makes for a certainty of high public interest. It is to be expected that the news media will endeavour to satisfy that high public interest with in-depth and extensive coverage.

[21] I begin, however, by noting that publicity *per se*, even if intense and sustained, cannot on its own be said to unduly compromise the likelihood of empaneling an impartial jury. One must consider that jury trials often involve highly unusual events that have seized the attention of the community. It is not uncommon for a criminal case to be the talk of the town. What is central to the analysis is not the scope of potential publicity, but rather its effect on the key interests affected. Those key interests are not mere privacy or any general disinterest in being the focus of attention. Rather, the concern is in respect of the affected individual's legal rights as guaranteed by the *Charter*.

[22] Just because publicity has been extensive and effective enough to put the entire populace in the know about the background to a criminal charge, it does not follow that that same populace cannot produce a jury willing and able to put aside any preconceptions and decide the case on its merits.

[23] The optimal juror is an informed citizen. No one should want a trial decided by a group of ignoramuses. People should follow current events and know what is going on in their communities. This can include learning about events that might be crimes, just as it can mean following any police investigation into those matters. It should be normal that if it becomes necessary to empanel a jury, the panel will have heard about the events giving rise to the allegation, and indeed know something of the basis for the charge. The question is not whether they have read or heard things about the allegation before the court, but rather whether they will likely be able to set aside that knowledge and decide the case solely on the evidence presented in the trial.

[24] Our law has considerable faith in the ability of jurors to set aside any knowledge they might have about an allegation and decide the case on the evidence put before them within the confines of a trial. As Lamer C.J. put it in *Dagenais v. CBC*, [1994] 3 SCR 835 at p. 884:

> To begin, I doubt that jurors are always adversely influenced by publications. There is no data available on this issue. However, common sense dictates that in some cases jurors may be adversely affected. Assuming this, I nevertheless believe that jurors are capable of following instructions from trial judges and ignoring information not presented to them in the course of the criminal

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proceedings. As Lord Taylor C.J. wrote in *Ex parte Telegraph Plc.* [1993] 2 All E.R. 971 (C.A.), at p. 978:

> In determining whether publication of matter would cause a substantial risk of prejudice to a future trial, a court should credit the jury with the will and ability to abide by the judge's direction to decide the case only on the evidence before them.

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[25] All that being said, however, there are times when there is a basis to believe that jurors will be unlikely to properly discharge their function. When it comes to publicity, the question is not so much about quantity but about the nature, quality, and consequences of the anticipated publicity on an individual's right to be tried by an impartial tribunal as guaranteed by section 11(d) of the *Charter*. The jurisprudence identifies two general headings upon which such an assertion could be based. First, when the publicity so disseminates problematic content that the likelihood of impartiality is diminished beyond the point where it can be reasonably expected to be repaired. Second, where the publicity so stigmatizes the subject that unfair prejudicial reasoning against his interests becomes the reasonably expected outcome despite whatever the process can try to do about it. These two general streams were recently discussed and affirmed by the Court of Appeal for Ontario in *R. v. Vice Media Canada Inc.*, 2017 ONCA 231.

[26] The question of content speaks to presumptively inadmissible evidence. It is obviously problematic if the potential jury pool comes to know about information that will presumably not be put before the eventual jury at trial. Inadmissible evidence is often quite powerful. It can include apparent confessions, for instance. In the context of an affidavit sworn in support of an ITO, it includes opinion proffered by the affiant, on its face a breach of the rule against opinion evidence. The fallout from that opinion is made worse by the fact that it is often based on hearsay, or other presumptively inadmissible sources.

[27] I do not consider the content of the ITO before me to give rise to untenable risk of polluting the potential jury pool. I note that the main statements allegedly attributable to Vice-Admiral Norman are contained in e-mails apparently written by him. As such, they exist in the form of a reliable record. More importantly, they would appear to be presumptively admissible. The communications in question are seized pursuant to judicial authorization. They are not made to any person in authority and are thereby not caught by the confessions rule. Indeed, they would be part of the *actus reus* of the alleged offense.

[28] It cannot be said that the mere fact of the communications in question leads inexorably to a conclusion of guilt such that potential jury impartiality would be compromised. The offences contemplated here require far more than just evidence of communication about the subject at hand. To be found to have been the leak which breached cabinet confidentiality the remainder of the informational loop must be found to have been airtight. Even if Vice-Admiral Norman was

putting information into the public domain, that might not mean he was the first or only one to do so. If he was not the first, was he certainly breaching confidentiality? If the information was already revealed, would he necessarily have been engaged in a serious and marked departure from the standards expected of an individual in a similar position of public trust? Moreover, surely the communications *per se* are not automatic proof of an intention to use one's public office for a purpose other than the benefit of the public. In my estimation, an informed member of the public would understand all that. The e-mails in question are by no means smoking guns.

[29] The existence of the affiant's opinion in the ITO is benign and of no consequence. While the affiant does opine that an offence has been committed, that opinion is no different from what is proffered in every ITO on every subject. In my view, the public understands that the police can have an opinion when they see fit to investigate. I also believe the public understands that a search warrant is just an investigative step. As such, the opinions in an ITO would be understood to be drawn from a body of information that falls short of reasonable and probable grounds to even make an arrest, let alone proof beyond reasonable doubt of criminal culpability. Surely police opinion is taken with a healthy grain of salt by any reasonably informed member of the public. In every trial, the police obviously have an opinion about what happened. As an example, one might consider that an arrest is an expression of opinion: the peace officer is demonstrating subjective belief that the arrestee has committed an offence. No one would suggest that a potential juror would be unduly swayed by that sort of demonstrated opinion. In this case, the officer articulates what he makes of the communications in question. His observations are unremarkable. I conclude that the public would see them for what they are such that they carry no real risk of prejudicial effect. Frankly, if it is thought that the public puts such stock in opinion proffered by the police like this that they cannot thereafter be impartial we should get rid of the jury system.

[30] The second stream of fallout from publicity relates to potential for stigmatizing effect. In some circumstances, publicity can so tar an individual that unfair prejudicial reasoning against his interests becomes the reasonably expected outcome.

[31] The criminal law is the country's shared value system. Sometimes, the conduct caught by the law is so offensive to that value system that unshakable stigma automatically attaches to any alleged transgressor despite the features built into the law to prevent that result. Some alleged evidence of misconduct is so jarring and upsetting to the public conscience as to threaten the idea that news of it can be disabused by a jury and verdict rendered only on evidence presented during trial.

[32] The circumstances in *Vice Media, supra*, are an example of that phenomenon. That case involved an ITO setting out a basis to believe that the individual in question was a member of ISIS. Everyone could agree that ISIS serves as an exemplar of the extent of mankind's capacity to do horrible things. Contemplation of what ISIS has done and might do next sends shivers up

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the spine of any right thinking Canadian. Even the suggestion of membership in such a group would create a stigma about an individual in the minds of the broader public that could be impossible to dispel. Other examples can readily be found in the case-law of alleged misconduct that is shockingly beyond the pale.

[33] While I do not mean to minimize the potential allegation that Vice-Admiral Norman could end up facing, it is not the sort of allegation, in my view, which carries meaningful risk of attaching stigma to him such that the public would become unable to be impartial if ever called upon to judge him. Certainly, cabinet secrecy is important. It is necessary that cabinet feel able to engage in full and candid debate without fear that all points raised around the table will have to be answered for later. However, even in light of the significance of the alleged wrongdoing here, I do not see the allegations as set out in the ITO to have potential to so stigmatize the individual affected that his fair trial rights would be compromised.

[34] It is part of Canada's history for military procurement and political considerations to go hand in hand. From Ross rifles to Sea King helicopters, supplies for the armed forces have often been buffeted by political winds. The results are perhaps not always well received by those on the receiving end of the supply chain. Here, it would appear that in late 2015, a long-awaited initiative to replace the Navy's supply ship was maybe headed off the rails due to political considerations, a possibility that allegedly upset a man most eagerly awaiting completion of the contract. In my view, that mindset and alleged communication arising from it is hardly the stuff of stigma or moral turpitude. At its highest, it appears that the potential allegation against Vice-Admiral Norman is that he was trying to keep a contractual relationship together so that the country might get itself a badly needed supply ship. A reasonable member of the informed public might understand the frustration of being Vice-Admiral of a Navy that cannot on its own go more than a tank of gas away from port. Nowhere is there any suggestion that the man was even thinking of trying to line his own pockets, or get any personal advantage whatsoever. An officer of his rank would be expected to develop and maintain relationships with those in the business of supplying the Navy and his communications with such people are not, therefore, in and of themselves untoward.

[35] I cannot agree that Vice-Admiral Norman would be stigmatized by the allegation as set out in the ITO such that the potential jury pool would develop a bias against him, even after sustained and extensive publicity.

[36] There is a result I am asked to consider that would potentially make a publication ban more palatable. That is, a publication ban offset by an unsealing order. This way, the open court principle would be respected in the sense that members of the public could attend the courthouse to review the documents in question, yet the deleterious effects of extensive publicity would be mitigated by non-publication. This is analogous to the way bail hearings and preliminary inquiries are public without being publicized. While I recognize that this is a commonly applied

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result in the search warrant context, and was an approach recently affirmed by the Ontario Court of Appeal in *Vice Media*, in my opinion, the extremely high news value in this particular case make that possibility undesirable.

[37] While not claiming this to be cutting-edge insight, I observe that the Internet has changed the way information is disseminated. While most technological advances are incremental, the Internet has been a fundamental game-changer. Not long ago, a printing press, radio tower or TV network was required to reach a mass audience. Now, an audience of millions is available through the sort of smart phones possessed by nearly everyone. The result of all this is that information whips around the world largely unfiltered in almost real time.

[38] In my view, the idea that an unsealing order will keep the court open to those able and willing to attend to review documents and that a publication ban could then still have salutary effect fails to consider the sheer power of social media. All that would happen is the mainstream media would be prevented from disseminating information while versions of that same information would get into everyone's hands in any event. While I appreciate that a publication ban could include social media, such attempt to dictate the tides of internet discourse would be the administration of justice setting itself up for failure. Responsible stewardship of the rule of law should include accepting its limits.

[39] The reason this acceptance of reality is important is because if the Globe and Mail *et al* have any product anymore, it is not simply news or information. Information is now both free and freely available. What the mainstream media are selling is the stamp of truth and reliability. They have a product worth paying for only so long as they maintain an earned reputation for accuracy and responsibility. Benching the mainstream media by a publication ban while unsealing the documents in question would just cede the field to disseminators of information unburdened by motivation to care about any longer-term reputation for truthful, accurate and balanced reporting. In this case, given the strong likelihood that the information will be broadly disseminated one way or the other, the solution of unsealing documents while still imposing a publication ban over them is no solution at all. In fact, in my view, it creates a result contrary to the public good and to Vice-Admiral Norman's interests.

[40] In any event, in the final analysis, I cannot agree that the prospect of publication of the sections of the ITO in question passes the first prong of the *Dagenais/ Mentuck* test. I am not persuaded that a publication ban is necessary in order to prevent a serious risk to the proper administration of justice. While I do not deny the negatives inherent in being the focus of the news media, and indeed in enduring a trial of sorts in the press, I am not persuaded that the content and nature of the publicity constitutes infringement into the legal rights guaranteed by the *Charter*. I am confident that measures like the challenge for cause process, as well as the presumption that jurors can disabuse themselves of information and follow judicial instructions,

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will adequately mitigate any consequences from the extensive publicity to be expected in this matter.

[41] Even if I assume some degree of necessity with respect to the first prong of the test, say with respect to the general unfairness of having to experience a torrent of media coverage while not under any actual charge, I cannot say that the salutary effects of the publication ban would outweigh the deleterious effects.

[42] As the Supreme Court of Canada said in *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 SCR 122 at p. 129:

> Freedom of the press is indeed an important and essential attribute of a free and democratic society, and measures which prohibit the media from publishing information deemed of interest obviously restrict that freedom.

[43] Similarly, in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 SCR 1326, Cory J. wrote at pp. 1336-37:

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed, a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over emphasized.
> …
> …The principle of freedom of speech and expression has been firmly accepted as a necessary feature of modern democracy.

[44] The case at bar involves matters close to the heart of our democracy. There is strong democratic value in the public being able to determine whether the system is working as it should.

[45] A search warrant is an investigative step. Beyond the fact that the warrant in this case has been executed, no one but the police knows the state of the investigation. It is entirely possible that Vice-Admiral Norman will never be charged with anything. This whole matter could just fade away with the public never learning enough to know what it was all about. How would the people ever know if the decision to search the residence or to not ultimately charge was reasonable?

[46] At its core, the open court principle is about accountability. All participants in the justice system, from peace officer to Chief Justice are, first and foremost, public servants. Unless good reason exists to do otherwise, the public must be put in a position to oversee and second-guess the decisions taken by all functionaries within the administration of justice. In this case, the

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public should be made able to assess the appropriateness of the police and judicial decisions taken thus far, and possibly those to be taken in future. Depriving the public of the ability to hold the authorities accountable in this case is unwarranted.

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[47] I have every confidence that should it come to pass, Vice-Admiral Norman will receive a fair trial in front of an impartial jury, despite whatever ends up in the news.

[48] The position taken by the intervener is partially compelling. The documents highlighted by Chantier Davie contain pricing information which could be considered commercially sensitive. In my view, a sealing order is necessary in respect of those dollar amounts. Such an order is necessary in order to prevent a serious risk to the proper administration of justice, in that such administration ought not infringe the interests of innocent third parties if feasible. I consider that the information in question was conveyed within the confines of a contractual relationship, which specified parameters of confidentiality. Chantier Davie would have reasonably expected its communications to be confined to those privy to the contract. In my view, it is a serious risk to the proper administration of justice to trample that agreement in these circumstances.

[49] The salutary effects of the sealing order in respect of the Chantier Davie pricing data outweigh any deleterious effects. While I am aware that the affiant saw fit to include the information in his affidavit, the pricing information would surely not have been key to any of his opinions or the ultimate judicial authorization. As such, the pricing information is immaterial to the public's ability to assess the appropriateness of the police conduct and the issuance of the warrant. As mentioned, I see that sort of accountability as being the basis for the open court principle in the first place. The fact that the accountability can occur without the information in question makes its absence unimportant.

[50] I agree with the position taken by the interveners and I decline to disturb the existing sealing order as it relates to any of the numbers on page 61 of 97 of the Edited ITO, as well as portions of page 78 of 97 of the Edited ITO. I wish to make clear, however, that I am speaking specifically about numbers, not words. All of the other redactions sought by the interveners fail the *Dagenais/ Mentuck* test. Those redactions are not required to prevent a serious risk to the administration of justice. The informed public can be expected to understand that the communications in question are only one side of a coin and weight them accordingly. As importantly, the communications in question are all part of what the public will require to assess the appropriateness of the state conduct throughout. In my view, in these circumstances, even if the Chantier Davie communications involve third parties who were drawn into the limelight through no wrongdoing with a consequential risk of some reputational harm, their interests should give way to the open court principle.

Conclusion

[51] With the exception of the uncontested portions redacted by the Attorney General of Canada due to cabinet confidentiality and to protect the personal information of third parties, as well as the pricing information in the Chantier Davie communications outlined above, I order the documents forming the basis of this Application to be unsealed and available to the public. Furthermore, I decline to make any sort of publication ban.

[52] It is a principle of fundamental justice that all parties made to suffer an infringement to their interests by a judicial proceeding should have a right to appellate review. Obviously, in these circumstances, such a right would be rendered moot if this decision were to take immediate effect. I hereby stay this decision for 7 days to allow any affected party to consider filing an appeal. If such an appeal is initiated, this decision should remain in abeyance and of no effect until that process has run its course.

Justice Kevin B. Phillips

Released: April 21, 2017

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THE GLOBE AND MAIL INC., THE CANADIAN BROADCASTING CORPORATION, POSTMEDIA NETWORK INC., and CTV NEWS, A DIVISION OF BELL MEDIA INC.

Applicants

– and –

HER MAJESTY THE QUEEN

Respondent

– and –

MARK NORMAN

Interested Party

– and –

CHANTIER DAVIE CANADA INC. and FEDERAL FLEET SERVICES INC.

Intervenors

RULING ON APPLICATION UNDER S. 487.3(4)

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