Case Name:

Phillips v. Vancouver Sun

Between
Murray Phillips, respondent (applicant), and
The Vancouver Sun, appellant (respondent), and
The Attorney General for British Columbia, Vancouver City Police Department and The Honourable Judge David Smyth, respondents (respondents)
(Vancouver Registry No. CA030083)
And between
The Vancouver Sun, appellant (applicant), and
Murray Phillips, The Attorney General for British Columbia, Vancouver City Police Department and Justice of the Peace Richard Yee, respondents (respondents)
(Vancouver Registry No. CA030361)

[2004] B.C.J. No. 14

2004 BCCA 14

238 D.L.R. (4th) 167

192 B.C.A.C. 250

27 B.C.L.R. (4th) 27

182 C.C.C. (3d) 483

19 C.R. (6th) 55

60 W.C.B. (2d) 82

Vancouver Registry Nos. CA030083 and CA030361

British Columbia Court of Appeal
Vancouver, British Columbia

Rowles, Prowse and Saunders JJ.A.

Heard: November 21, 2003.
Judgment: January 13, 2004.

(94 paras.)

Criminal law -- Special powers -- Search warrants -- Public inspection of information and warrant -- Crown -- Examination of public documents -- Freedom of information, bars --Disclosure were public interest outweighs risk of harm.

Appeal by Vancouver Sun from denial of access to search-warrant information. Phillips was a police officer under investigation for breach of trust as a public officer. His office was searched under search warrant and his work product was seized. The Criminal Code empowered sealing judicial-proceeding materials if disclosure would subvert the ends of justice by prejudice to an innocent person. It further empowered a judge who may hear proceedings arising out of a warrant to vary a sealing order. The search warrant materials were sealed. The investigation concluded and Phillips was not charged. Vancouver Sun obtained an order vacating the sealing order and authorizing edited disclosure on grounds the search warrant materials did not delve into Phillips's private affairs but related to the performance of his public duty. A reviewing judge restored the sealing order on grounds the judge below lacked jurisdiction given the impossibility of proceedings, erred technically in vacating the sealing order rather than varying it, and erred on the merits since Phillips was an innocent person having never been charged and his privacy rights outweighed the principle of openness of the judicial proceedings. Vancouver Sun appealed.

HELD: Appeal allowed. The reviewing judge's decision was set aside and the order allowing edited disclosure was reinstated. The judge who pronounced the order allowing edited disclosure had jurisdiction even though further proceedings were impossible because the Criminal Code's wording "may" was couched in the future tense and extended to judges before whom proceedings would have been held had the investigation led to charges. The judge's use of "vacated" rather than "vary" was a technical error which did not substantially change the intent of the order. The judge correctly concluded Phillips had failed to meet the Code's test of showing disclosure would subvert the ends of justice since the search was not of his home but of his office, and the subject matter of the search was not his private affairs but his work product relating to his carrying out his public duty. The prejudice to him therefore as an innocent person did not outweigh the principle of openness in judicial proceedings.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 7, 8.

Criminal Code, ss. 122, 446(5), 487.3, 487.3(4), 487.3(2)(a)(iv).

Counsel:

R.S. Anderson and C.J. Doucet, for the appellant.
D.G. Butcher, for the respondent, Murray Phillips.
R.W. Gourlay, Q.C. and K. Wedel, for the respondent, the Attorney General.
No one appeared, for the respondent, Vancouver City Police Department.

[Editor's note: A corrigendum was released by the Court January 13, 2003; the correction has been made to the text and the corrigendum is appended to this document.]

The judgment of the Court was delivered by

PROWSE J.A.:--

INTRODUCTION

1 There are two appeals before the Court involving, firstly, the interpretation of s. 487.3(4) of the Criminal Code, R.S.C. 1985, c. C-46 (the "Code") and, secondly, an application by the Vancouver Sun (the "Sun") pursuant to s. 487.3 for access to and disclosure of edited copies of a search warrant, Information to Obtain a Search Warrant (the "Information") and related materials in circumstances where no charges have been laid against the target of the search.

2 The first appeal is from the decision of Mr. Justice Parrett, made August 7, 2002, granting certiorari and quashing the order of the Honourable Judge Smyth, pronounced January 11, 2002, which granted disclosure of an edited version of the warrant, Information and related materials to the Sun. Mr. Justice Parrett's order restored the prior sealing order made by Justice of the Peace Yee ("J.P. Yee"), on September 29, 2000 with respect to these materials. Mr. Justice Parrett's reasons for judgment may be found at 2002 BCSC 1169.

3 The second appeal is from the decision of Associate Chief Justice Dohm, made November 27, 2002, dismissing the Sun's application for an order of certiorari quashing the first sealing order of J.P. Yee, made September 29, 2000 and the subsequent order of J.P. Yee, made October 28, 2002, both of which denied access to the warrant, Information and related materials.

4 In upholding the sealing order, Associate Chief Justice Dohm was invited by counsel to follow the decision of Mr. Justice Parrett, and he did so.

5 Madam Justice Saunders made an order on April 29, 2003 that the two appeals be heard together.

6 The Vancouver Police Department (the "VPD") did not appear on the appeals, but the Court was advised that the VPD adopted the submissions of the Attorney General for British Columbia.

THE ISSUES

7 The Sun submits that Mr. Justice Parrett erred:

(1) in misinterpreting s. 487.3(4) of the Code by finding that Judge Smyth had no jurisdiction to terminate and/or vary the sealing order of J.P. Yee;
(2) in finding that certiorari would lie to quash Judge Smyth's order on the basis of error of law on the face of the record;
(3) in finding on the merits that disclosure of the sealed materials should be denied.

8 Since Associate Chief Justice Dohm's order turned on the correctness of Mr. Justice Parrett's order, the parties agree that this Court's resolution of these three issues will be determinative of the principal issues raised on both appeals.

BACKGROUND

9 In May 1999, the respondent, Cst. Phillips, was a detective constable employed in the robbery squad of the respondent, the VPD, working out of the police station at 312 Main Street, Vancouver, B.C.

10 On May 27, 1999, Detective Constable Patrick Fogarty of the VPD swore an Information to Obtain a Search Warrant in relation to a search at the police station in furtherance of an investigation of Cst. Phillips for the offence of breach of trust by a public officer, contrary to s. 122 of the Code.

11 On May 27, 1999, Justice of the Peace Cyr issued a search warrant pursuant to s. 487.3 of the Code and, on that same date, ordered that all search warrant materials be sealed until September 1, 1999.

12 The search of the police station was conducted on May 28, 1999, and various documents and other materials were seized.

13 On September 29, 2000, J.P. Yee issued a sealing order of the search warrant materials (the "sealing order") until "further order of the court". (Between September 1, 1999 and September 29, 2000, no sealing order was in effect.)

14 On November 19, 2001, the Sun applied before Judge Smyth for an order "setting aside" the sealing order and seeking access to the sealed materials. Since the investigation was over, and subject to editing concerns, the Crown and the VPD did not oppose the Sun's application. At that time, the Crown advised the court that no charges were going to be laid against Cst. Phillips.

15 In reasons dated January 11, 2002, Judge Smyth vacated the sealing order and further ordered that an edited version of the warrant and Information be disclosed to the Sun. He then imposed a one-week stay of his order to permit Cst. Phillips to apply for certiorari.

16 Upon hearing Cst. Phillips' application for certiorari, Mr. Justice Parrett made the order of August 7, 2002 which is the subject of the first appeal. The Sun filed an appeal from that order on August 30, 2002.

17 On October 16, 2002, based on Mr. Justice Parrett's interpretation of s. 487.3(4) of the Code, the Sun applied to J.P. Yee for an order varying or vacating his sealing order, and simultaneously invited him to dismiss the application on the basis of Mr. Justice Parrett's decision. J.P. Yee gave reasons dismissing the application on October 28, 2002.

18 The Sun applied for certiorari, and on November 27, 2002, Associate Chief Justice Dohm made the second order under appeal.

19 The investigation of Cst. Phillips, and the subsequent decisions not to lay criminal charges or to proceed with proposed disciplinary proceedings against him attracted considerable media attention, as evidenced by numerous newspaper articles contained in the Appeal Books.

DISCUSSION OF THE ISSUES

(1) Interpretation of s. 487.3(4) of the Code

20 Section 487.3 of the Code provides for the making, varying, and termination of sealing orders in relation to search warrants and related materials. It provides, in part:

> 487.3 (1) A judge or justice may, on application made at the time of issuing a warrant under this or any other Act of Parliament . . . or at any time thereafter, make an order prohibiting access to and the disclosure of any information relating to the warrant . . . on the ground that
>
> (a) the ends of justice would be subverted by the disclosure for one of the reasons referred to in subsection (2) or the information might be used for an improper purpose; and
> (b) the ground referred to in paragraph (a) outweighs in importance the access to the information.
>
> (2) For the purposes of paragraph (1)(a), an order may be made under subsection (1) on the ground that the ends of justice would be subverted by the disclosure
>
> (a) if disclosure of the information would
>
> (i) compromise the identity of a confidential informant,
> (ii) compromise the nature and extent of an ongoing investigation,
> (iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used, or
> (iv) prejudice the interests of an innocent person; and
>
> (b) for any other sufficient reason.
>
> (3) Where an order is made under subsection (1), all documents relating to the application shall, subject to any terms and conditions that the justice or judge considers desirable in the circumstances, including, without limiting the generality of the foregoing, any term or condition concerning the duration of the prohibition, partial disclosure of a document, deletion of any information or the occurrence of a condition, be placed in a packet and sealed by the justice or judge immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in any other place that the justice or judge may authorize and shall not be dealt with except in accordance with the terms and conditions specified in the order or as varied under subsection (4).
> (4) An application to terminate the order or vary any of its terms and conditions may be made to the justice or judge who made the order or a judge of the court before which any proceedings arising out of

> the investigation in relation to which the warrant was obtained may be held.

[Emphasis added.]

21 A "justice" is defined in s. 2 of the Code to mean "a justice of the peace or a provincial court judge."

22 Mr. Justice Parrett concluded that Judge Smyth did not have jurisdiction to vary the sealing order pursuant to s. 487.3(4) of the Code on the basis that he was neither the justice nor judge who made the order, nor "a judge of the court before which any proceedings arising out of the investigation in relation to which the warrant was obtained may be held." In his view, the fact that the investigation giving rise to the warrant had ended, together with the fact that the Crown was not proceeding with charges against Cst. Phillips, meant that there was no court before which proceedings arising out of the investigation "may be held" within the meaning of s. 487.3(4). He concluded that, while the Supreme Court could vary the sealing order pursuant to its inherent jurisdiction, the Provincial Court, being a creature of statute, could not.

23 Mr. Justice Parrett's conclusions in that regard are stated at paras. 33-35 of his reasons:

> The language of s. 487.3(4) appears calculated, in my view, to allow applications to be made during the time between the issuance of a search warrant and the initiation of proceedings rather than in those relatively rare applications brought where a decision has been made not to proceed with charges.
>
> While it may seem to be an anomaly in the legislation, absent a specific legislative authorization the jurisdiction does not exist in a court which has only statutory jurisdiction.
>
> In the present case there was no uncertainty, the decision had been made and no proceedings would be initiated, nor have they been. In these circumstances the options available under s. 487.3(4) were reduced to bringing the application before the "justice or judge" who made the order or to a court of inherent jurisdiction. I am satisfied that there was no jurisdiction in the court below to entertain the application in the circumstances of this case.

24 In my view, Mr. Justice Parrett's interpretation of s. 487.3(4) fails to give effect to the plain meaning of the words "the court before which any proceedings . . . may be held." This phrase is couched in the future tense. I agree with the Crown that it includes the court before which proceedings could be held, if proceedings were instituted. Its language is not restricted to the court before which proceedings have in fact been instituted or would in fact be instituted. In most cases, the court before which any proceedings may be held would be the Provincial Court since, in British Columbia, every charge, whether summary or indictable, is commenced by an Information laid in that court. The only exception is where the Crown decides to proceed by direct indictment in the Supreme Court.

25 I am satisfied that the clear intent of s. 487.3(4) is to provide the court in which "any" proceedings arising out of the investigation in relation to which the warrant was obtained could be instituted with the jurisdiction to vary or terminate a sealing order issued under s. 487.3(1). I note that this interpretation is consistent with the wording of the sealing order in issue, which provided that it should remain in effect "until further order of the court." Given the fact that the sealed documents were then under the control of the Provincial Court, it is reasonable to conclude that J.P. Yee had in mind an order of the Provincial Court.

26 The narrow reading of s. 487.3(4) adopted by Mr. Justice Parrett does not take into account the broad jurisdiction given to Provincial Court judges to make a sealing order under s. 487.3(1), either at the time of issuance of the search warrant "or any time thereafter". Nor does it recognize the general power of each court to control its own processes. As Mr. Justice Dickson stated in the leading case of A.-G. N.S. v. MacIntyre, [1982] 1 S.C.R. 175 at 189, 132 D.L.R. (3d) 385, "Undoubtedly every Court has a supervisory and protecting power over its own records." This general power would be rendered nugatory if the only Provincial Court judge who could vary the order was the one who made it.

27 The narrow construction placed on this provision by Parrett J. also gives rise to practical problems which militate against his interpretation. For example, if the justice or judge who made the original sealing order were unavailable, ill or deceased, any application to vary would have to be dealt with by the Supreme Court - a cumbersome procedure which could result in unnecessary delay and expense. Counsel for the Sun and the Crown submit that it is unlikely that Parliament intended this result.

28 Mr. Justice Parrett acknowledged that his interpretation of s. 487.3(4) gave rise to an anomaly and that it significantly restricted the powers of Provincial Court judges to deal with such orders.

29 In the result, I am not persuaded that Parliament intended to limit the jurisdiction of Provincial Court judges in this manner. I note that no rationale has been provided for reading this provision in such a restrictive fashion. For these reasons, I conclude that Mr. Justice Parrett erred in finding that Judge Smyth did not have jurisdiction under s. 487.3(4) of the Code to vary the order of J.P. Yee.

(2) Error of Law on the Face of the Record

30 The next issue which arises is whether Mr. Justice Parrett erred in finding that Judge Smyth's order should be quashed on the basis of error of law on the face of the record.

31 The specific error which Mr. Justice Parrett found constituted an error of law on the face of the record arose from Judge Smyth's reasons, at para. 21, and from the form of order drafted by counsel following Judge Smyth's decision. The relevant provision of the order states:

> THIS COURT ORDERS that the Sealing Order of a Search Warrant and an Information to Obtain a Search Warrant relating to a search executed on or about May 28, 1999 at the office premises of the Respondent Murray Phillips be vacated, and an edited version of the Search Warrant and Information to Obtain a Search Warrant be disclosed to the Applicant.

32 Paragraph 21 of Judge Smyth's reasons simply provides that "I order the disclosure of the edited warrant and its supporting materials."

33 All counsel agree that, in order to comply with s. 487.3(4) of the Code, the order should have been drafted to provide that the order of J.P Yee be "varied" to provide for disclosure of the edited warrant and Information. The word "vacated" should not have been used. It is not seriously disputed that this was the intent of Judge Smyth's order, and that the error in the drafted order is one of form rather than substance.

34 Mr. Justice Parrett found that the order referred to in para. 21 of Judge Smyth's reasons was ambiguous. At paras. 51-53 of his reasons, he stated:

> Finally, as I stated earlier, the language of the order in para. 21 is ambiguous. On its face it directs disclosure of the "edited warrant and its supporting materials". It does not direct disclosure of only the edited version of the Information to Obtain and it does not clearly deal with whether or not the sealing order is terminated or whether it is varied in order to disclose the edited versions.
>
> Clarity and precision is needed in dealing with such matters and, regrettably, its absence in the present case leads to uncertainty as to the order given in the court below.
>
> These difficulties, I find, constitute errors on the face of the record of the court below within the meaning of the relevant authorities.

[Emphasis in original.]

35 While it is undoubtedly true that orders should be drawn with clarity and precision, I am unable to agree that the deficiencies in form referred to by Parrett J. justify a quashing of Judge Smyth's order. Although the original application before Judge Smyth sought access to unedited versions of the warrant and supporting materials, counsel agreed to an editing process during the course of the proceedings such that the only real issue became whether any access should be permitted to the edited materials. No one was in doubt as to the nature of the order made; nor did the parties view it as ambiguous.

36 In my view, the Provincial Court, like other courts, has the power to correct errors of form under its general powers to control its own processes. For that reason, and in the absence of authority to the contrary, I conclude that Mr. Justice Parrett erred in treating the imprecision in para. 21 of Judge Smyth's reasons, and in the drafting of his order, as constituting an error of law on the face of the record justifying an order to quash.

(3) The Merits - Disclosure or Non-Disclosure

(a) Introduction

37 If I am right in finding that Judge Smyth had jurisdiction to vary the sealing order, and that his reasons and order do not give rise to an error of law on the face of the record, a further issue, raised by Cst. Phillips, is whether Judge Smyth erred in law in the exercise of his discretion by fail-

ing to give adequate consideration to Charter principles in accordance with Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835. This issue arises only in relation to the first appeal.

38 After dealing with this issue, I will go on to deal with the merits of Mr. Justice Parrett's order refusing disclosure, since his reasons were adopted by Associate Chief Justice Dohm in making the second order under appeal.

39 In discussing the merits of these decisions, I will refer to several of the authorities cited by counsel.

(b) Judge Smyth's Order

40 Cst. Phillips submits that Judge Smyth's order providing for disclosure of the edited materials should be set aside on the merits, as failing to properly take into account Cst. Phillips' privacy interests, and the potential damage to his reputation. He submits that he is an "innocent person" within the meaning of s. 487.3(2)(a)(iv) of the Code, such that his privacy interests, protected by ss. 7 and 8 of the Canadian Charter of Rights and Freedoms, should have taken precedence over the public's right to obtain access to the sealed materials. In that regard, he relies on the analysis of Chief Justice Lamer, speaking for the majority, in Dagenais.

41 In Dagenais, the court was considering a pretrial publication ban imposed under the common law to prevent the airing of a television program, the contents of which potentially jeopardized the fair trial rights of four accused. There, Chief Justice Lamer stated that the exercise of a judge's discretion whether or not to impose a publication ban should be exercised in accordance with Charter principles. That was so whether the ban was imposed by statute or under the common law. Failure to do so could give rise to a reversible error in law open to attack through certiorari. Further, the remedies available to the court would not be restricted to quashing the order but would include remedies consistent with those available under s. 24(1) of the Charter.

42 In stating that his privacy interests are of superordinate importance in this case, Cst. Phillips relies heavily on the fact that he was never charged with an offence. In short, he submits that Mr. Justice Parrett's analysis of the merits should be preferred to that of Judge Smyth.

43 Judge Smyth framed the issue before him (at para. 5 of his reasons) as "whether the principle of openness by which judicial proceedings are generally governed should yield to the privacy interests Cst. Phillips claims."

44 In answering this question, Judge Smyth reviewed the reasons for judgment of Mr. Justice Dickson, speaking for the majority in MacIntyre, supra, and several other decisions referred to by counsel, including R. v. Mentuck, [2001] 3 S.C.R. 442. I will discuss those decisions later in these reasons.

45 Judge Smyth concluded that Cst. Phillips was "an innocent person" within the meaning of s. 487.3(2)(a)(iv) of the Code. He also considered the Charter principles at stake, as reflected by his statement that he would have to determine "whether [Cst. Phillips'] general privacy interests subsumed under s. 7 of the Charter should be subordinated in this instance to the applicant's s. 2(b) rights." (para. 17.)

46 Judge Smyth ultimately resolved that balancing process in favour of disclosure, as reflected in the following extract from his reasons for judgment at paras. 19-20:

> While I would not be comfortable saying that Cst. Phillips has no privacy interests relevant to this discussion, as the applicant submitted in argument, I think that his privacy interest in the results of the search and the basis upon which it was made must carry little weight. The search concerned an allegation that he had committed a breach of trust as an officer of the Vancouver Police Department. It was conducted at his place of work. I have been given a copy of the report made to a justice following the search and the things seized consisted almost entirely of files, notes and other information and things gathered or used in the course of his employment. This was not a search delving into Cst. Phillips' private affairs, but rather the performance of his public duty, and the things seized in the search appear to relate directly to his performance of that duty.
>
> Conclusion
>
> I agree with The Vancouver Sun that the investigation of Cst. Phillips and the judicial proceedings taken in respect of that investigation are matters of public interest. So far as possible they should be open to public examination. That is what the principle of openness calls for. It can scarcely be over-stressed that no charges have been laid against Cst. Phillips, but in my view the privacy interest he has shown in this application should not be preferred to the s. 2(b) rights asserted by the applicant, and are really of the kind Dickson, J. had in mind when he wrote (at p. 402 of MacIntyre) that: "As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings."

47 Cst. Phillips submits that the error in this passage arises from Judge Smyth's statement that Cst. Phillips' privacy interests "must carry little weight."

48 In my view, it is apparent from reviewing Judge Smyth's reasons as a whole that he was fully alive to the public interest in preserving the privacy interests of individuals. In the circumstances of this case, however, he concluded that Cst. Phillips' privacy interests were entitled to less weight than the public interest in disclosure. I agree with his conclusion in that regard, and I am satisfied that it is in accord with the MacIntyre decision and with the principles set forth in the other authorities to which I will refer later in these reasons.

49 I now turn to an analysis of the merits of Mr. Justice Parrett's decision which forms the foundation of both orders under appeal.

(c) Mr. Justice Parrett's Order

50 Mr. Justice Parrett concluded that the balancing of interests referred to in MacIntyre, and in s. 487.3 of the Code, favoured protecting Cst. Phillips' privacy interests, including protection of his reputation. The fact that no charges had been laid against Cst. Phillips was critical to Parrett J.'s entire analysis in arriving at that conclusion. He framed the fundamental issue before him at para. 63 of his reasons:

> The substance of the present application [for access] reduces itself to this: Does the public interest in the execution of a search warrant which results in no charges being laid override the privacy interests of an individual who faces no criminal

> charges? Put another way, in each case where a search warrant is granted, does the fact that items are seized pursuant to the warrant result in the underlying information becoming public even where charges do not proceed?

51 In my view, posing the question in this fashion suggests that there is only one "right" answer which applies in every case in which a search warrant is issued and items are seized pursuant to that warrant, but no charges are laid. It is apparent from his analysis that Mr. Justice Parrett thought that there was only one right answer to this question, and that the answer was "no disclosure." In that regard, he stated, at para. 86 of his reasons:

> It simply cannot be the case that it is the seizure of items or the absence of seizures which triggers an overriding public interest in disclosure. What must, in my view, trigger that public interest is, rather, at the least, the seizure of evidence which discloses the commission of a criminal offence, and the initiation of criminal proceedings. Absent such a result the search is of primary interest only to the persons whose rights of privacy have been invaded by the search.

[Emphasis added.]

52 Later in his judgment (paras. 90-91), Mr. Justice Parrett concludes that the MacIntyre emphasis on openness of court proceedings "is predicated on charges proceeding to trial."

53 In my view, the MacIntyre decision does not justify such a narrow reading. In fact, at p. 186 of the decision, Dickson J. adverts to the fact that, in some cases, disclosure is necessary precisely because the Crown has made a decision not to lay charges.

54 I turn, then, to the MacIntyre decision.

55 As previously stated, MacIntyre is the leading case on access to search warrants and related materials. Although it was decided in 1982, approximately three months prior to the enactment of the Charter, it ultimately formed the foundation for s. 487.3 of the Code, which was enacted in 1997. Subsequent decisions of the Supreme Court of Canada, and of other courts, continue to rely on Dickson J.'s analysis in MacIntyre when issues of access to search warrant materials and related issues arise.

56 In MacIntyre, the Chief Clerk and Justice of the Peace of the Provincial Court refused to permit Mr. MacIntyre, a journalist who was researching a story on political patronage and fund raising, to have access to executed search warrants and related materials, on the basis that such materials were not available for inspection by the general public. Mr. MacIntyre applied pursuant to then s. 446(5) of the Code for a declaration that he, as a member of the public, was entitled to inspect such documents. Section 446(5) provided:

> (5) Where anything is detained under subsection (1) [the general power of search and seizure], a judge of a superior court of criminal jurisdiction or of a court of criminal jurisdiction may, on summary application on behalf of a person who has an interest in what is detained, after three clear days

> notice to the Attorney General, order that the person by or on whose behalf the application is made be permitted to examine anything so detained.

57 The Nova Scotia Supreme Court granted the declaration, [1980] N.S.J. No. 369. The Nova Scotia Court of Appeal not only upheld the declaration, but also stated that the public was entitled to be present in open court when search warrants were issued, [1980] N.S.J. No. 394.

58 On appeal to the Supreme Court of Canada, all members of the Court agreed that the Court of Appeal had erred in finding that members of the public were entitled to be present at the time search warrants are issued. They were divided on whether the public was entitled to obtain access to such documents.

59 Mr. Justice Dickson wrote for the majority in finding that Mr. MacIntyre was entitled to a declaration in the following terms:

> IT IS DECLARED that after a search warrant has been executed, and objects found as a result of the search are brought before a Justice pursuant to s. 446 of the Criminal Code, a member of the public is entitled to inspect the warrant and the information upon which the warrant has been issued pursuant to s. 443 of the Code. [at 190]

60 There is no indication in this declaration that it is a condition precedent to public access to these documents that someone be charged with an offence arising from the investigation giving rise to the warrants. Nor is there any indication in MacIntyre whether charges had been laid in relation to the warrant materials to which access was sought. Thus, I am unable to agree with Mr. Justice Parrett that MacIntyre stands for the proposition that it is only after charges have been laid that the public is entitled to seek, and obtain, access to such documents. Rather, that is a factor to be considered by the court in determining whether access should be granted.

61 In discussing the search warrant provisions of the Code, Mr. Justice Dickson noted that Parliament had made a clear policy choice that the public interest in the detection, investigation and prosecution of crime was to be given precedence over the competing public interest of protecting the individual from interference with the enjoyment of his property. He went on to note, however, that the Code provided little guidance on the question of accessibility by the public to search warrants and related documents. For that reason, he concluded that it would be unwise to attempt any comprehensive determination of the right of access to judicial records. At pp. 183-84, he stated:

> The question before us is limited to search warrants and informations. The response to that question [of public access], it seems to me, should be guided by several broad policy considerations, namely, respect for the privacy of the individual, protection of the administration of justice, implementation of the will of Parliament that a search warrant be an effective aid in the investigation of crime, and finally, a strong public policy in favour of "openness" in respect of judicial acts. The rationale of this last-mentioned consideration has been eloquently expressed by Bentham in these terms:
>
> > In the darkness of secrecy, sinister interest, and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is

> no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and surest of all guards against improbity. It keeps the judge himself while trying under trial.

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.

In short, what should be sought is maximum accountability and accessibility but not to the extent of harming the innocent or of impairing the efficiency of the search warrant as a weapon in society's never-ending fight against crime.

62 Dickson J. expressly rejected the argument that the principle of openness of court proceedings was restricted to the trial and did not apply at the pre-trial investigative stage of proceedings. At pp. 185-186 of the decision, he stated:

> The same policy considerations upon which is predicated our reluctance to inhibit accessibility at the trial stage are still present and should be addressed at the pre-trial stage. Parliament has seen fit, and properly so, considering the importance of the derogation from fundamental common law rights, to involve the judiciary in the issuance of search warrants and the disposition of the property seized, if any. I find it difficult to accept the view 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.

63 And, at pp. 186-87, he stated:

> At every stage the rule should be one of public accessibility and concomitant judicial accountability; all with a view to ensuring there is no abuse in the issue of search warrants, that once issued they are executed according to law, and finally that any evidence seized is dealt with according to law. A decision by the Crown not to prosecute, notwithstanding the finding of evidence appearing to establish the commission of a crime may, in some circumstances, raise issues of public importance.
>
> In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent.
>
> Many search warrants are issued and executed, and nothing is found. In these circumstances, does the interest served by giving access to the public outweigh that served in protecting those persons whose premises have been searched and nothing has been found? Must they endure the stigmatization to name and reputation which would follow publication of the search? Protection of the innocent from unnecessary harm is a valid and important policy consideration. In my view

> that consideration overrides the public access interest in those cases where a search is made and nothing is found. The public right to know must yield to the protection of the innocent. If the warrant is executed and something is seized, other considerations come to bear.

[Emphasis added.]

64 Later in his reasons, Dickson J. went on to make the statement referred to at para. 26 of my reasons that "every Court has a supervisory and protecting power over its own records" whereby the court can deny access where the ends of justice would be subverted by access, or where the documents might be used for an improper purpose.

65 I note here that various courts and commentators, including the Law Reform Commission in its report: Public and Media Access to the Criminal Process, Working Paper 56 (Ottawa: Law Reform Commission of Canada, 1987), have debated the significance of the distinction drawn by Dickson J. between searches resulting in seizures, and searches where nothing is seized, in relation to the issue of determining whether someone is an "innocent person" whose privacy interests are of superordinate importance. I also emphasize that, in this case, no one seriously disputes that Cst. Phillips qualifies as an "innocent person" within the meaning of s. 487.3(2)(a)(iv) of the Code, given the fact that he was never charged with an offence, and despite the fact that materials were seized from his office in the course of the search. This view, with which I agree, was also shared by Judge Smyth and Mr. Justice Parrett.

66 Counsel for the Sun, the Crown and the VPD do not agree, however, that the fact that Cst. Phillips is to be regarded as an innocent person is determinative of the disclosure issue. In their view, prejudice to the interests of an innocent person is simply one factor the court must consider in determining whether disclosure should be made. It is entitled to significant weight, but it does not necessarily tip the scales against disclosure. I agree.

67 The critical analysis under s. 487.3 involves a balancing of interests in accordance with the provisions of that section which, as earlier stated, provides:

> 487.3 (1) A judge or justice may, on application made at the time of issuing a warrant under this or any other Act of Parliament . . . or at any time thereafter, make an order prohibiting access to and the disclosure of any information relating to the warrant . . . on the ground that
>
> (a) the ends of justice would be subverted by the disclosure for one of the reasons referred to in subsection (2) or the information might be used for an improper purpose; and
> (b) the ground referred to in paragraph (a) outweighs in importance the access to the information.

> (2) For the purposes of paragraph (1)(a), an order may be made under subsection (1) on the ground that the ends of justice would be subverted by the disclosure
>
> (a) if disclosure of the information would
>
> (i) compromise the identity of a confidential informant,
> (ii) compromise the nature and extent of an ongoing investigation,
> (iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used, or
> (iv) prejudice the interests of an innocent person; and
>
> (b) for any other sufficient reason.

68 It is apparent from the language of this section that it was drafted to accord with Dickson J.'s judgment in MacIntyre. In my view, it also reflects the Charter principles in issue here; namely, the principles of freedom of expression and freedom of the press encompassed under s. 2(b) of the Charter, and the public interest in protecting individual privacy encompassed under ss. 7 and 8 of the Charter. The section does so by starting from the presumption of openness referred to in MacIntyre, taking into account the well-recognized concerns for the proper administration of justice including the protection of informants and the need to preserve the integrity of ongoing investigations, and considering the protection of the privacy interests of innocent persons. The privacy interests are protected by taking into account any prejudice that may be occasioned to innocent persons in the event disclosure is granted, as well as whether the disclosure of the information could be used for an improper purpose.

69 The ultimate question to be resolved by the balancing of interests under s. 487.3 is whether any of the interests subsumed under s-s. 487.3(1)(a), which incorporates the grounds set forth in s-s. 487.3(2), "outweighs in importance the access to the information."

70 A recent decision which counsel for the Sun relies upon as shedding some light on the balancing process under s. 487.3 is R. v. Eurocopter Canada Ltd., [2003] O.J. No. 4238 (Sup. Ct. J.). There, the Crown was applying to vary a sealing order under s. 487.3 of the Code to permit public access to a warrant and supporting materials on the basis that the Crown could no longer justify the sealing order that was in place. Mr. Justice Then framed the argument before him as "whether the Court should continue the sealing orders at the instance of Eurocopter Canada Limited ("Eurocopter") and Karlheinz Schreiber who submit that their entitlement to the protection of the innocent within the framework of s. 487.3 and at common law, in conjunction with their privacy rights and fair trial rights, outweighs the strong presumption of public access to the courts."

71 Mr. Justice Then concluded that, except for information relating to informants, the warrants and supporting materials should be made public. In that case, charges had been laid, and the accused raised arguments concerning the validity of the warrants and their right to a fair trial.

72 In dealing with the "protection of innocence exception", Mr. Justice Then placed considerable reliance on MacIntyre and stated his view that s. 487.3 of the Code represents a "substantial codification" of the principles set forth in that decision. At para. 47 of his reasons, Mr. Justice Then noted that privacy interests per se were not sufficient to displace the presumption of openness. He

then went on to refer to the quote from MacIntyre (referred to at para. 63, supra) in which Dickson J. referred to the importance of protection of the innocent from unnecessary harm, and his distinction between searches where something is seized and searches where nothing is seized. Mr. Justice Then found it unnecessary to engage in the controversy involving the interpretation of that passage. At para. 49 of his reasons, he stated:

> At this point I propose to leave open the issue of whether the example of innocence adverted to by Dickson J. is exhaustive as I do not propose at this stage to decide, as Mr. Henry for the CBC would submit, that only the protection of this precise form of innocence will displace the presumption in favour of openness. However, what is clear from MacIntyre is that the burden of proof is upon the person who would deny public access.

73 In Eurocopter, the accused sought to persuade the Court that their privacy and related reputation interests should be given superordinate status over the public's right to access to the search warrant materials on the basis that the warrants in issue had been illegally obtained. In considering that submission, Mr. Justice Then referred (at para. 53) to the Mentuck decision, which counsel before him had agreed should be applied. At para. 53 of Eurocopter, Mr. Justice Then stated:

> In the context of s. 487.3 of the Criminal Code as informed by Mentuck, the burden was on the Crown to displace the general rule of openness by means of a sufficient evidentiary basis with respect inter alia to the exigencies of the investigation and the protection of the innocent in order to initially obtain a sealing order and a publication ban. Similarly, the burden of proof and the provision of an evidentiary basis for the continuance of the sealing order and the publication ban must lie now with the party seeking the continuance when the Crown is no longer in a position to justify either the original sealing order or the publication ban. The party seeking the sealing order must demonstrate based on evidence that absent a sealing order there is a serious risk to the administration of justice. In this respect I do not doubt that the unjust stigmatization of reputation and invasion of privacy of an innocent person constitutes a serious risk to the administration of justice. The issue is whether Eurocopter and Mr. Schreiber have discharged the evidentiary burden upon them to prove that there is a reasonable probability the information supporting the warrants was illegally obtained.

[Emphasis added.]

74 In the result, Mr. Justice Then found that the accused had not met the burden upon them to demonstrate, on the basis of reasonable probability, that the search was illegal, which was the foundation of their claim to "protection of the innocent".

75 Mr. Justice Then went on to reject the argument that the right of the accused to a fair trial was jeopardized by granting access to the search warrant materials. In so doing, he referred to Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, in the context of the incorporation of

Charter values into the balancing process. The Hill decision is relied upon by Cst. Phillips in this case as highlighting the importance of the protection of his reputation.

76 Mr. Justice Then dealt with the relationship between Hill and MacIntyre at paras. 91-92 of his reasons:

> In MacIntyre, Dickson J. recognized that the privacy rights of individuals must be respected and weighed in the balance with other compelling policy considerations, such as effective law enforcement, in determining whether the presumption in favour of openness of the courts should prevail. Privacy rights also attract the protection of the Charter equal to other Charter values and, accordingly, must be respected and put in the balance with other Charter values in this case. In Hill v. Church of Scientology of Toronto [citation omitted], Cory J. in dealing with a Charter challenge to the tort of defamation stated the following with respect to privacy rights at para. 121:
>
> > . . . reputation is intimately related to the right to privacy which has been accorded constitutional protection. As La Forest J. wrote in R. v. Dyment (1988), 55 D.L.R. (4th) 503 at pp. 512-13, 45 C.C.C. (3d) 244, [1988] 2 S.C.R. 417, privacy, including informational privacy, is "[g]rounded in man's physical and moral autonomy" and "is essential for the well-being of the individual". The publication of defamatory comments constitutes an invasion of the individual's personal privacy and is an affront to that person's dignity. The protection of a person's reputation is indeed worthy of protection in our democratic society and must be carefully balanced against the equally important right of freedom of expression.
>
> (See also: R. v. Mills (1999), 139 C.C.C. (3d) 321 at pp. 364-369 (S.C.C.).)
>
> In assessing the nature of the balance to be struck, it is pertinent to recall that Dickson J. in MacIntyre held that if the "protection of the innocent" is properly made out, the right to be free of the stigmatization and loss of reputation associated with the revelation of the Information to Obtain does prevail over the presumption of access and open courts. However, in MacIntyre, Dickson J. also held that the loss of privacy per se, in the sense of embarrassment or loss of reputation is not, in itself sufficient to overcome the presumption in favour of openness.

77 In considering the weight to be given to the various factors under s. 487.3, as informed by Mentuck, Mr. Justice Then referred to the anomaly which would occur if the question of loss of reputation or privacy, per se, were given inordinate weight since that would mean the more serious the offence and the higher the standing of the individual at risk, the greater the likelihood that the proceedings would be kept secret from the public. In the result, in the circumstances before him, he concluded that the balance must be struck in favour of public access.

78 Unlike this case and Eurocopter, the Mentuck decision (which is also relied upon by the Sun) did not involve the application of s. 487.3 of the Code, but, rather, a publication ban at trial to protect the identity of police officers and the investigatory methods they employed in their undercover operation. The accused and two newspapers opposed the ban. The trial judge granted a

one-year ban on the identity of the undercover operators but refused to grant a ban with respect to the operational methods used by the police. This decision was upheld on appeal to the Ontario Court of Appeal and on a subsequent appeal to the Supreme Court of Canada.

79 Mr. Justice Iacobucci, speaking for the court, noted that the decision raised "important questions about publicity rights in trials" which Parliament had not addressed in the Code and thus was to be determined by the common law. There, Iacobucci J. posited the following principles (at para. 32) as governing the court's discretion in determining whether to issue a publication ban at common law:

> A publication ban should only be ordered 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.

80 These principles were considered in relation to the sealing of search warrants not only by Mr. Justice Then in Eurocopter, but also by the Ontario Court of Appeal in Toronto Star Newspapers Ltd. v. Ontario, [2003] O.J. No. 4006 (C.A.). In Toronto Star, the Crown applied for an order sealing search warrants, the Information, and related documents in relation to six searches which had been executed against a meat-packing business pursuant to an investigation under provincial legislation. (Thus, s. 487.3 of the Code did not apply.) The Crown alleged that the disclosure of the material in the warrants could identify a confidential informant and could interfere with the ongoing police investigation, both of which are relevant factors under s. 487.3 of the Code. The order was granted. Two newspapers sought and obtained an order for certiorari in the Supreme Court quashing the sealing order. The quashing order was upheld on appeal. Although the ratio of the Court of Appeal decision turned on the narrow ground of the Provincial Court judge's refusal to grant an adjournment so that the newspapers could be heard from, the Court went on to endorse the Mentuck analysis referred to above as relevant to the determination of whether a sealing order should be granted.

81 Counsel for Cst. Phillips sought to distinguish the various cases relied upon by the Sun on the basis that none of them dealt with the situation, as here, where the person who was the target of the investigation and named in the warrant had not been charged with a criminal offence. In his view, that factor should be highly persuasive, if not determinative, in the balancing of interests under s. 487.3.

82 As earlier noted, however, it is not clear that anyone had been charged with an offence in MacIntyre. Further, under s. 487.3, prejudice to the innocent is but one of several factors the court must take into consideration in determining whether a sealing order should be granted or varied. The extent of the prejudice an innocent person may suffer if access is granted may vary substantially depending on such things as the nature and extent of the investigation, the nature of the charges laid, if any, the nature and extent of the publicity surrounding the case, the extent to which the search warrant material may reveal personal, confidential or intimate matters only peripherally re-

lated to the investigation or charge, and various other factors. Section 487.3 does not, on its face, separate out those who have been charged with a criminal offence from those who have not been charged. Nor does the fact that someone has not been charged give rise to any logical or necessary inference that they should be protected from disclosure by virtue of that fact alone. Rather, as Mr. Justice Osler said in Canadian Newspapers Co. v. Canada (A.G.), (1986), 29 C.C.C. (3d) 109 at 121 (Ont. H.C.J.), (in considering the constitutionality of s. 487.2 of the Code): ". . . the very fact that no charge is laid may in some circumstances properly merit criticism and, in my view, the failure to lay a charge, or even to lay a particular charge 'in relation to which the warrant was issued' should not justify the prohibition of publication."

83 As earlier noted, Mr. Justice Dickson made a similar observation in MacIntyre when he said, at p. 186:

> At every stage the rule should be one of public accessibility and concomitant judicial accountability; all with a view to ensuring there is no abuse in the issue of search warrants, that once issued they are executed according to law, and finally that any evidence seized is dealt with according to law. A decision by the Crown not to prosecute, notwithstanding the finding of evidence appearing to establish the commission of a crime may, in some circumstances, raise issues of public importance.

[Emphasis added.]

84 With these authorities in mind, I return to the merits of Cst. Phillips' position that the sealing order should be continued.

85 In this case, the basis for making the sealing order in the first instance was to protect the confidentiality of informants (s. 487.3(2)(a)(i)), and to preserve the ongoing investigation into the allegations of breach of public office against Cst. Phillips (s. 487.3(2)(a)(ii)). Given the editing of the warrant materials which counsel agreed was appropriate in this case, these considerations no longer apply. Neither the Crown nor the VPD opposes the Sun's position that the sealing order should be varied to the extent of providing access to edited versions of the warrant, Information and related materials.

86 Cst. Phillips takes the position, nonetheless, that the ends of justice would be subverted by granting access to the materials, and, in particular, to the Information.

87 Because the balancing of interests under s. 487.3 must depend on the individual circumstances of each case, I have reviewed the edited materials to which access is sought. I have also reviewed the other materials in the Appeal Books which form part of the record on this appeal. The newspaper articles in the materials before us raise questions as to whether the prosecuting authorities and the VPD ought to have proceeded differently as a result of this investigation, including the decisions not to lay criminal charges against Cst. Phillips and not to proceed with internal disciplinary measures. The articles also cast a shadow over Cst. Phillips.

88 Although Cst. Phillips has been subjected to publicity in relation to this investigation in the past, he is entitled to take the position that "enough is enough" and to seek to persuade the court that

whatever interest the media may have in obtaining the further information it seeks, he has a greater interest in being left alone and not being subjected to further public scrutiny.

89 In approaching the balancing process, I agree with Judge Smyth that the nature and extent of this search, and the nature of the materials obtained as a result of the search are relevant in assessing the prejudice to Cst. Phillips' privacy interests. I will repeat what Judge Smyth said at para. 19 of his reasons in that regard:

> The search concerned an allegation that [Cst. Phillips] had committed a breach of trust as an officer of the Vancouver Police Department. It was conducted at his place of work. I have been given a copy of the report made to a justice following the search and the things seized consisted almost entirely of files, notes and other information and things gathered or used in the course of his employment. This was not a search delving into Cst. Phillips' private affairs, but rather the performance of his public duty, and the things seized in the search appear to relate directly to his performance of that duty.

90 This was not a search of Cst. Phillips' home, which the courts have generally regarded as highly invasive of individual privacy. Rather, it was a search of his office and a seizure of items, most of which could be described as "work product" in circumstances which would not attract a high expectation of privacy on the part of Cst. Phillips. I agree with Judge Smyth that Cst. Phillips suffered less prejudice to his privacy interest than if the search had been of his home, or of his personal papers and possessions.

91 On the other hand, it is a very serious matter for someone in the position of Cst. Phillips to be accused of breach of public trust and to be subjected to ongoing public scrutiny once it has been determined that there is no basis for proceeding with charges. In that respect, I agree with Mr. Justice Parrett that the fact of no charge being laid is a significant factor in the balancing process. Further, the fact that there has already been publicity about this case does not mean that further publicity which may flow from disclosure is of little consequence to Cst. Phillips.

92 In all of the circumstances, while I find that Cst. Phillips undoubtedly has a significant privacy interest at stake in these proceedings, and while I agree with Judge Smyth that "It can scarcely be over-stressed that no charges have been laid against Cst. Phillips", I find that Cst. Phillips has not established that the prejudice to him as an innocent person within the meaning of s. 487.3 outweighs the public interest in having access to the edited materials. To use the language of that section, Cst. Phillips has not established that an order permitting the Sun to have access to the edited warrant, Information and related materials would subvert the ends of justice having regard to the factors set forth in s. 487.3(2)(a), or that the information might be used for an improper purpose. In my view, the result would be the same if the not dissimilar criteria for common law publication bans set forth in Mentuck (quoted at para. 79 of these reasons) were applied.

CONCLUSION

93 I would allow both appeals. In the first appeal, I would set aside the order of Mr. Justice Parrett. I would reinstate and amend the order of Judge Smyth to provide that the sealing order made by J.P. Yee on September 29, 2000 be varied to provide disclosure to the Sun of an edited copy of the warrant, Information and related materials.

94 In the second appeal, I would set aside the order of Associate Chief Justice Dohm and quash the order of J.P. Yee made October 28, 2002.

PROWSE J.A.
ROWLES J.A.:-- I agree.
SAUNDERS J.A.:-- I agree.

* * * * *

CORRIGENDUM

Released: January 13, 2003

Changes were made at p. 30, para. 70.

The words: "of the Supreme Court of Canada" have been removed.

cp/i/qw/qlrds/qlsng/qlbdp/qlsxs