Case Name:

R. v. Eurocopter Canada Ltd.

Between
Her Majesty the Queen, respondent, and
Eurocopter Canada Limited, applicant

[2003] O.J. No. 4238
Court File No. SM132/00

Ontario Superior Court of Justice
Then J.

Heard: December 14, 18, 2001; February 11-13, June 3-6, 2002; written submissions, October 31, November 17, December 12, 2002 and January 2, 2003.
Judgment: October 31, 2003.
(106 paras.)

Counsel:

M. Bernstein and T. Shaw, for the respondent.
P. Schabas and T. Wong, for Eurocopter Canada.
K. Prehogan and N. Holland for Brian Mulroney, P.C.
E. Greenspan, Q.C., for Karlheinz Schreiber.
D. Henry and J. Rosen, for the CBC.

¶ 1 **THEN J.**:— The Applicant Crown invokes s. 487.3(4) of the Criminal Code to vary the order of this Court, dated January 10, 2001, which affirmed the sealing of certain search warrants and related documents by Mr. Justice Fontana of the Ontario Court of Justice (City of Ottawa) pursuant to s. 487.3(1) of the Criminal Code. Section 487.3 of the Criminal Code constitutes a substantial codification of the seminal case of A.G. of Nova Scotia v. MacIntyre (1982), 65 C.C.C. 129 (S.C.C.) wherein Dickson J. in dealing with public access to search warrant documents eloquently stated that the strong presumption in favour of public access to the courts could only be displaced by a value of superordinate importance such as the protection of the innocent. The Crown takes the position that it can no longer justify the sealing of the warrants and related documents under s. 487.3 of the Criminal Code save, for a minuscule portion of the information to obtain and supporting affidavits. Accordingly, the Crown seeks to vary this Court's January 10th order so that virtually all of the information currently under seal would be made public. At issue in this application is 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.

¶ 2 For the reasons that follow, I have concluded that save for any information protected by the privilege granted to informants pursuant to Leipert v. The Queen, [1997] 1 S.C.R. 281, all of the documents pertaining to the warrants in issue which the Crown has offered to make public as well as the information the Crown has sought to remain under seal should be made public.

THE FACTS

¶ 3 The facts leading to the decision of this Court to affirm the sealing orders made by Mr. Justice Fontana are outlined in this Court's judgment in R. v. Eurocopter Canada Ltd., [2001] O.J. No. 1591 at paras. 1-11 and need not be repeated here.

¶ 4 At para. 27 this Court stated:

> [27] Moreover, I have carefully assessed the three sealing affidavits as well as the information to obtain and I am satisfied that there is an ample evidentiary basis to support the application of the criteria referred to by Justice Fontana under s. 487.3(2) which satisfy the test under s. 487.3(1) namely a) that the ends of justice would be subverted by the disclosure for one of the reasons referred to in subsection (2) or the information may be used for an improper purpose and, b) that the ground referred to in paragraph (a) outweighs in importance the access to the information. (my emphasis)

¶ 5 Following upon this decision, the Crown on April 23, 2001 applied to this Court to vary some of the provisions contained in the orders and endorsements made by this Court and Justice Fontana on the basis that the Crown could no longer justify the sealing orders under s. 487.3 of the Criminal Code (see the Notice of Application for Variation of Order Pursuant to s. 487.3, dated April 23, 2001.) Although Eurocopter filed an appeal of the January 10, 2001 decision of this Court, it has not been pursued.

¶ 6 Prior to the return of the application on April 24, 2001, a Notice to Potentially Interested Parties was issued at the direction of this Court on April 9, 2001 advising of the hearing on April 24, 2001. Notice was sent to counsel for the CBC as it had earlier expressed an interest in the proceedings and had requested to be informed of any potential media participation in the proceedings. It should be noted that a reporter with the CBC had somehow obtained notice of the initial proceedings in this Court wherein the validity of Justice Fontana's sealing orders were challenged. The reporter attended with counsel to challenge the non-publication order and in camera order but was unsuccessful. No appeal was taken from that decision.

¶ 7 Notice was also sent to counsel for the Right Honourable Brian Mulroney, Karlheinz Schreiber and to Frank Moores. These notices were understood to be a precautionary measure as standing was not conceded by the Crown.

¶ 8 Following the hearing, on April 24, 2001 this Court issued two orders pursuant to the submissions of counsel. The first dated April 24, 2001 granted access to Eurocopter of virtually all the search warrant documents, including the search warrants, the Information to Obtain and affidavits in support subject to editing in certain discreet areas and a publication ban. The second order granted access to counsel for the CBC, counsel for Mr. Mulroney and counsel for Mr. Schreiber to the same documents subject to editing and a publication ban. The purpose of these orders was to permit full argument but to preclude publication of the information pending further order of the Court. Counsel for Mr. Moores was notified but did not attend and has received no further notice of these proceedings.

¶ 9 The applications for standing with respect to the Crown's application to vary the sealing orders were heard on July 14, 15 and 25, 2001. The CBC's right to standing on the Crown's application was accepted by the parties and by the Court. On October 4, 2001, the Court released its judgment granting standing to both Mr. Mulroney and Mr. Schreiber on the Crown's application to vary the sealing orders.

¶ 10 Counsel for both Mr. Mulroney and Mr. Schreiber sought standing on the basis that they were "interested persons" in the litigation and that their respective clients' reputations and privacy interests were entitled to the "protection of the innocent" as identified by Dickson J. in MacIntyre, supra, at p. 147.

¶ 11 With respect to the application of Mr. Mulroney for limited standing to monitor the proceedings, this Court observed at para. 8 of its October 4, 2001 ruling that such standing was appropriate:

> It is significant that neither the Crown or Eurocopter oppose standing, as both recognize a clear interest on the part of the applicant who, on the basis of the information disclosed to date, must fairly be viewed without qualification as an "innocent person."

¶ 12 In granting standing to counsel for Mr. Schreiber this Court observed:

> [21] I reiterate that the protection offered by Dickson J. in MacIntyre, supra, to the subject of the search, if innocent, was not specifically confined by him to the subject of the search. Moreover, there is no reason that I can discern to do so. It would seem obvious to me that if the subject of the search ... is deemed innocent if nothing is found during the search, and, is deserving of protection from disclosure because of the unjust possibility of stigmatization, then a non-target, who is nevertheless implicated but deemed innocent because the search yields nothing to advance his complicity, equally deserves protection. However, the task of the Court in this application is not to determine whether Mr. Schreiber in fact deserves the protection offered in MacIntyre, supra, but merely whether it is available to him, as an interested person, to seek it.
> [22] In my view, the standing of Eurocopter to seek the protection from disclosure based on MacIntyre, supra, is beyond doubt because it is the subject of the search. It would be unjust in the particular circumstances of this case given

the alleged involvement of Mr. Schreiber as outlined in the documents supporting the warrant and in view of the potential effect upon his name and reputation of the disclosure of this information not to give him an opportunity to at least make submissions as to the availability of the protection in MacIntyre, supra. Accordingly, I am disposed to exercise my discretion to give Mr. Schreiber standing as an "interested person" to make submissions with respect to the release, public access and publication of the search warrants and information in support of these warrants in connection with the investigation conducted by the R.C.M.P. of Eurocopter.

¶ 13 By agreement of Counsel, the date set for the argument on the merits of the Crown's application to vary the sealing orders was set for December 14, 2001.

¶ 14 On December 7, 2001, Eurocopter filed a factum in support of its application for the following relief:

a) an order quashing the search warrants at issue;
b) access to the remaining sealed material;
c) access to the material referred to in Eurocopter's letter of October 22, 2001, and the Crown's letter of November 5, 2001;
d) leave to cross-examine Inspector Al Matthews, pursuant to its application to quash;
e) an order that its application be heard in camera;
f) an order that its application be given priority to any other application; and
g) any other relief.

¶ 15 On December 14, 2001, all parties and those with standing attended before this Court. At these proceedings, the Crown sought the unsealing of further material as part of its original application to vary. The material was disclosed to counsel present, on the same terms as before, and the proceedings were adjourned to December 18, 2001. The status of documents released is usefully summarized in a schedule entitled "Document Status 2001-12-13".

¶ 16 On December 18, 2001, the parties and those with standing re-attended. All agreed, with the exception of the CBC, to adjourn the proceedings to a later date, so that there would be sufficient time to address the issues raised by the Crown's and Eurocopter's outstanding applications, and the applications of those with standing. It was agreed that the following applications should be heard at the next appearance:

a) the Crown's application to vary the existing sealing orders and allow access to material presently disclosed to counsel;
b) the Crown's application to continue to seal that which remains sealed and/or blacked out;
c) Eurocopter's application for limited and restricted access to that which remains sealed and/or blacked out; and
d) Eurocopter's interlocutory application for production and disclosure to counsel of certain documents referred to in the information in support of

the search warrants.

¶ 17 On December 18, 2001, the CBC gave notice of its application that all materials be made public and that all publication bans be lifted.

¶ 18 It was also agreed that the outstanding application of Eurocopter to quash was to be dealt with at a later date.

¶ 19 On February 11, 2002, the Crown commenced its argument on the merits of the application to vary the sealing orders. During the course of this argument, Mr. Greenspan submitted on behalf of Mr. Schreiber that on the face of the Information to Obtain there was admittedly contact between Mr. Pelossi, a Swiss citizen, and the R.C.M.P. He submitted this contact, which occurred on June 28, 1995, and which had not been mentioned in the Letter of Request ("L.O.R.") of September 1995, gave rise to a series of issues: whether such contact was illegal and in contravention of Swiss law; whether documents had been obtained in contravention of Swiss law; and, ultimately, whether the information in the warrant had been illegally obtained giving rise, in turn, to a probability that the warrant would be quashed. These serious allegations prompted the Crown to seek an adjournment which was granted with the consent of all counsel save for counsel of the CBC who was anxious to resolve the question of public access.

¶ 20 Proceedings were resumed with the consent of counsel on June 3, 2002 and counsel completed their submissions with respect to the Crown's application to vary pursuant to s. 487.3 of the Criminal Code on June 6, 2002.

¶ 21 On October 17, 2002, Eurocopter, Kurt Pfleiderer and Heinz Pluchthun were charged with fraud. As of January 2003, the Court had received all of the further written submissions with respect to the significance of this event.

¶ 22 The Preliminary Hearing with respect to the fraud charge commenced on September 8, 2003.

THE ISSUES

¶ 23 The issues before the Court may be characterized in the following manner:

(1) In the absence of justification by the Crown who had obtained the original sealing orders, should the search warrants and supporting materials remain sealed pursuant to s. 487.3 and subject to a publication ban?

(2) If the answer to the first question is negative, have Eurocopter and Karlheinz Schreiber discharged the onus on them to provide an evidentiary basis within s. 487.3 and at common law justifying the continued sealing of the information. More specifically the issue is whether the strong presumption of openness of the courts must give way upon a proper balancing of the following factors: (1) that Eurocopter and Karlheinz Schreiber are entitled to the "protection of the innocent" because the information to obtain the Letter of Request which in turn gave rise to the

obtaining of the warrant was illegally obtained; (2) that their privacy and reputation will be seriously diminished; and (3) that their fair trial rights will be infringed.

(3) What is the appropriate disposition of this application upon a proper balancing of the presumption of openness, the protection of the innocent, privacy rights and the fair trial rights of Eurocopter and Karlheinz Schreiber?

THE STATUTORY REGIME

Section 487.3 of the Criminal Code

¶ 24 Section 487.3(1) of the Criminal Code provides that a judge issuing a search warrant may make an order "prohibiting access to and the disclosure of any information relating to the warrant or the authorization" if the following grounds are met:

(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 improper purpose; and

(b) the ground referred to in paragraph (a) outweighs in importance the access to the information.

¶ 25 Subsection (2) of s. 487.3 delineates the circumstances in which "the ends of justice would be subverted by the disclosure" as follows:

(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.

¶ 26 Subsection (3) grants broad discretion to the judge making such an order to impose terms, including terms relating to the duration of the prohibition, partial disclosure, or deletion of any information or the occurrence of conditions. It states:

> 487.3(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).

Section 487.3(4) provides for an application to be made to the judge who made the order if a person wishes to vary or terminate it.

ANALYSIS

Issue 1 - Absence of Justification by the Crown

¶ 27 In dismissing the application for certiorari from the sealing orders made by Justice Fontana this Court in its ruling of January 10, 2001 at paras. 34-35 and 37 stated:

> There is a high onus on the state to justify sealing as MacIntyre, supra and Dagenais, supra make clear. To act judicially, the judge pursuant to s. 487.3 must balance the Charter values expounded by those authorities with consideration of the public interest and must find that the public interest outweighs the values permitting access ...
> I am persuaded that he exercised his discretion judicially in light of the test and the Charter principles which inform the test in the context of the evidentiary basis provided in the information to obtain and the three sealing affidavits ...
> In my view, while a sealing order of specific duration may not have been desirable, it would be more in keeping with the authorities which require as restrictive order as possible, for Justice Fontana to have required a periodic monitoring of the sealing order every four months. On those occasions, the Crown would be required to confirm to the satisfaction of the judge that the conditions requiring sealing were still extant.

¶ 28 It was in the context of the order of this Court that the Crown sought a variation pursuant to s. 487.4 of the Criminal Code on the basis that it could no longer justify a sealing order for virtually all of the information, save for continued sealing with respect to limited information pertaining to one informer, one innocent person and one investigative technique.

¶ 29 It will be convenient to first deal with the Crown's application to continue its proposed limited sealing with respect to these matters.

¶ 30 In exercising the jurisdiction of this Court under s. 487.3 of the Criminal Code, this Court must balance freedom of expression and openness of courts with the privacy and fair trial rights of Eurocopter and Mr. Schreiber. This balancing must be done in the context of the assertion by Eurocopter and Mr. Schreiber that they are entitled to the "protection of the innocent" which was accepted in MacIntyre, supra as a superordinate value capable of tipping the balance in favour of sealing. In striking this balance, counsel have accepted and I have proceeded on the basis that the two-step analytical approach in R. v. Mentuck, [2001] 3 S.C.R.

442 is appropriate to the determination of the availability of publication bans and to cases where a party seeks to restrict public access to court proceedings by means of sealing orders. This approach has recently been approved by Doherty J.A. in Toronto Star Newspapers Limited v. Ontario, [2003] O.J. No. 4006 (C.A.).

¶ 31 In Mentuck, the Supreme Court held that the test developed in CBC v. Dagenais, [1994] 3 S.C.R. 835, for publication bans when Charter-protected rights such as freedom of expression and fair trial rights were in conflict must to be modified and broadened in order to take into account concerns about the administration of justice (e.g. the protection of the well-being of police officers engaged in investigations and of the investigative techniques) other than the Charter rights raised in Dagenais. Iacobucci J. speaking for an unanimous Court stated at para. 32:

> 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.

¶ 32 With respect to the meaning of serious risk he added the following in para. 33:

> ... it must be a risk the reality of which is well-grounded in the evidence. It must also be a risk that poses a serious threat to the proper administration of justice. In other words, it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration sought to be obtained. (my emphasis)

¶ 33 The Court went on to emphasize that the burden of displacing the general rule of openness upon a "convincing" evidentiary basis is upon the party which would seek to displace this rule. At paras. 38-39, Iacobucci J. stated:

> [38] ... It is just as true in the case of common law as it is of statutory discretion that, as LaForest J. noted, "[t]he burden of displacing the general rule of openness lies on the party making the application": New Brunswick, supra, at para. 71; Dagenais, supra, at p. 875. Likewise, to again quote LaForest J. (paras. 72-73):
>
> There must be a sufficient evidentiary basis from which the trial judge may assess the application and upon which he or she may exercise his discretion judicially. ...
>
> A sufficient evidentiary basis permits a reviewing court to determine whether the evidence is capable of supporting that decision.
>
> [39] It is precisely because the presumption that courts should be open and

reporting of their proceedings should be uncensored is so strong and so highly valued in our society that the judge must have a convincing evidentiary basis for issuing a ban. (my emphasis)

¶ 34 I approach my task in assessing whether the Crown has justified its limited application for continued sealing in the manner described by Doherty J.A. in Toronto Star Newspapers, supra, at para. 26:

> The necessity standard described in Mentuck is a high one. The Crown must demonstrate, based on evidence, viewed through the lens of judicial experience, that absent a sealing order there is a serious risk to the proper administration of justice.

¶ 35 In the first place, the request for continued sealing with respect to the investigative technique has been withdrawn by the Crown as of March 10, 2003. There is at present no serious risk to the administration of justice within Mentuck justifying continued sealing of information with respect to the investigative technique.

¶ 36 Secondly, in my view on a proper weighing of the grounds specified under s. 487.3 of the Criminal Code, the request for the protection of a person identified generally as an employee in the Information to Obtain and which is sought on the basis of the "protection of the innocent" is not available. While I greatly sympathize with the situation of the person at issue, the justification put forward that revelation of identity will result in financial loss is insufficient to outweigh the strong presumption in favour of openness of the Courts. See: Regina and Unnamed Person (1985), 22 C.C.C. (3d) 284 (Ont. C.A.) at pp. 286-288; R. v. McArthur (1984), 13 C.C.C. (3d) 152 paras. 12-14 (Ont. H.C.). The continuation of the sealing order is not, in my view, necessary to prevent a serious risk to the administration of justice within the Mentuck test and accordingly, the continuation of the sealing order is refused.

¶ 37 Thirdly, the Crown seeks continuation of the sealing order on the basis that disclosure would compromise the identity of a confidential informant which, of course, is one of the enumerated reasons under s. 487.3(2) of the Criminal Code. However, this was not one of the reasons specified by Fontana J. as a justification of the original sealing orders in circumstances where it clearly could have been. In such circumstances, I would respectfully decline to "vary" a non-existent reason for sealing by making a sealing order for the first time on the basis of that reason.

¶ 38 However, that is not the end of the matter. It is clear from the Information to Obtain and the supporting documentation that the person who now seeks the protection of the confidential informant privilege both specifically sought and obtained assurance that the privilege would be granted in circumstances where the person otherwise fulfilled the requirement to be considered a confidential informant. See: Bisaillon v. Keable, [1983] 2 S.C.R. 60 at pp. 105-106. As was pointed out in R. v. Leipert, [1997] 1 S.C.R. 281 at p. 292-3:

> [14] In summary, informer privilege is of such importance that it cannot be balanced against other interests. Once established, neither the police nor the court

possess discretion to abridge it.
(b) Who may claim Informer Privilege
[15] The privilege belongs to the Crown: Solicitor General of Canada v. Royal Commission of Inquiry (Ontario Health Records), [1981] 2 S.C.R. 494. However, the Crown cannot, without the informer's consent, waive the privilege either expressly or by implication by not raising it: Bisaillon v. Keable, supra at p. 94. In that sense it also belongs to the informer. This follows from the purpose of the privilege, being the protection of those who provide information to the police and the encouragement of others to do the same. This is the second reason why the police and the courts do not have discretion to relieve against the privilege.

¶ 39 In the circumstances of this case, two conclusions follow with respect to the invocation of informer privilege on behalf of the Crown. First, there is no merit in the argument advanced by Mr. Schabas that the Crown waived the privilege by disclosing the name of the informant to this Court, for as we have seen from Leipert, supra, waiver can occur only if both the Crown and the informant waive the privilege. There is no evidence of consent to wavier on the part of the informant in this case. Also, there is no evidence to justify breach of the privilege on the basis of the innocence (of the accused) at stake exception. See: Watt's Manual of Criminal Evidence, (Toronto, Carswell, 2000) at pp. 130-135.

¶ 40 Secondly, as Justice Fontana did not provide protection to the confidential informant pursuant to s. 487.3 of the Criminal Code, it is inappropriate for this Court to "vary" his order to provide it for the first time. Rather, in my view, given the information provided to me with respect to the confidential informant in the affidavits supporting the sealing order, I am compelled to give the confidential informant the protection which the Crown seeks on the basis of Leipert, supra. Accordingly, the identity of the confidential informant will not be disclosed in either the Information to Obtain the search warrants or in the supporting affidavit materials. For the sake of clarity, the identity of the confidential informant as well as the information justifying the excising of the confidential informant will be the only material edited out from the materials which the Crown has offered to make public by way of its application to vary.

¶ 41 Mr. Schabas has submitted that given the continuance of the conditions which gave rise to the original sealing order at the instance of the Crown, namely, the protection of the innocent and as well as the exigencies of an ongoing investigation, the Crown has not demonstrated a material change in circumstances warranting a variation of the original order. Reliance is placed on the decision of the Supreme Court of Canada in R. v. Calder, [1996] 1 S.C.R. 660 where Sopinka J. at p. 671, quoting his own judgment in R. v. Adams, [1995] 4 S.C.R. 707 stated:

As a general rule, any order relating to the conduct of a trial can be varied or revoked if the circumstances that were present at the time the order was made have materially changed. In order to be material, the change must relate to a matter that justified the making of the order in the first place ...
For instance, if the order is a discretionary order pursuant to a common law rule, the precondition to its variation or revocation will be less formal. On the other hand, an order made under the authority of statute will attract more stringent conditions before it can be varied or revoked.

¶ 42 Both the CBC and the Crown submit that the material change in circumstances which has occurred is that the Crown cannot now justify any of the grounds or reasons for sealing or non-disclosure under s. 487.3 of the Criminal Code. I agree with that submission. There is at present no evidentiary basis proffered by the Crown upon which the continuation of the sealing orders of Justice Fontana as affirmed by this Court can be justified on any basis. The affidavits which constitute Exhibit 29 in this proceeding demonstrate that the Crown cannot justify continued sealing. The limited editing of the materials to protect the confidential informant is justified by Leipert, supra, and not by s. 487.3 of the Criminal Code. In such circumstances, the strong presumption of open courts must prevail unless the justification for either sealing or for a non-publication order is provided by either Eurocopter or Karlheinz Schreiber. It is to that issue to which I now turn.

Issue 2 - The Protection of Innocence Exception

¶ 43 It is necessary to examine the jurisprudence both in order to assess the status of the protection of the innocent within s. 487.3 of the Criminal Code in the context of the interplay of that value with the other values engaged in s. 487.3 of the Code, and also, in order to understand the nature of the evidentiary foundation necessary for the protection of the innocent to outweigh in importance the value of openness of courts or access to information.

¶ 44 The seminal case is MacIntyre, supra, in which Dickson J. in the context of dealing with public access to search warrants and the documents supporting them established the pre-eminence of the presumption in favour of open courts. In doing so, Dickson J. recognized the need to balance competing policy considerations such as the public interest in effective law enforcement and privacy with the judicial accountability and the transparency of the legal system which the openness of the courts fosters. He also recognized superordinate values such as the protection of the innocent which may serve to limit access to the records of the court.

¶ 45 MacIntyre is of essential importance to the resolution of the application before this Court not only because the principles which Dickson J. derived have resulted in the codification of the very section which is at issue before this court but because of MacIntyre provides guidance as to the legal content of the "protection of the innocent" and the extent to which innocence must be established in order to displace the strong presumption in favour of public access to the court.

¶ 46 In determining the extent of public access to court records, Dickson J. spoke of the need to strike the appropriate balance between competing policy considerations. At p. 144 he stated:

> By reason of the relatively few judicial decisions it is difficult, and probably unwise, to attempt any comprehensive definition of the right of access to judicial records or delineation of the factors to be taken into account in determining whether access is to be permitted. The question before us is limited to search warrants and informations. The response to that question, 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. ...

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.

¶ 47 Privacy per se is not in the view of Dickson J. sufficient to displace the presumption of openness. At p. 145 he stated:

> Let me deal first with the "privacy" argument. This is not the first occasion on which such an argument has been tested in the courts. Many times it has been urged that the "privacy" of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the Court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings.

¶ 48 Of direct relevance to the issues in this application, as it is the foundation of the position of counsel for Eurocopter and Karlheinz Schreiber that sealing continue, is Dickson J.'s view of the interplay between public accessibility and the protection of the innocent. At p. 147 he stated:

> 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.

¶ 49 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.

¶ 50 In this regard, Dickson J. stated the following at p. 149:

> Undoubtedly every Court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose.

> The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right. (my emphasis)

¶ 51 The other case to which reference need be made at this stage is Vickery v. Nova Scotia Supreme Court (Prothonotary) (1991), 64 C.C.C. (3d) 65, in which the Supreme Court of Canada once again examined the concept of protection of the innocent in the context of maximum accessibility to court records as posited by MacIntyre, supra. In Vickery a journalist sought access to audio and video tapes which were held inadmissible by the Court of Appeal on appeal from the accused's conviction for murder. At trial the tapes had been admitted into evidence. The Court of Appeal refused access to the tapes on the basis that, in the circumstances, the privacy interest of the accused outweighed the journalist's interest in viewing and publishing the exhibits. Stevenson J., on behalf of the majority of the Supreme Court, dismissed the further appeal, ruling that the accused was entitled to the protection of the innocent. At p. 95 he stated:

> I find it difficult to fathom how Nugent could be considered anything other than an innocent person within MacIntyre. Someone who has been accused and convicted of a serious crime on the basis of self-incriminating evidence obtained in violation of his Charter rights should not be made to bear the stigma resulting from unrestricted repetition of the very same illegally obtained evidence.

¶ 52 It is the position of Eurocopter and Karlheinz Schreiber that while they cannot maintain their innocence on the basis of nothing being found pursuant to the search warrants as in MacIntyre, they are nonetheless entitled to the protection of innocence within Vickery on the basis that whatever was found pursuant to the search warrant was illegally obtained. It is the Crown's position that the inadmissibility of the self-incriminatory evidence in Vickery was established beyond peradventure, and that this finding was the foundation for the Court's determination that the accused was entitled to the protection of the innocent. The Crown submits that, in the circumstances of this case, the assertion that the warrant was tainted by police misconduct and that the resulting evidence was illegally obtained amounts to mere allegation and speculation insufficient to support a consideration of protection of the innocent as in MacIntyre or Vickery as no sufficient evidentiary basis has been proffered to displace the presumption of maximum access. It is to a consideration of the evidentiary basis advanced by Eurocopter and Karlheinz Schreiber, which is said to underlie their claim for the protection of the innocent, to which I now turn.

The Contact between Pelossi and Sgt. Feigenwald and Supt. Bouchard on June 28, 1995

¶ 53 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.

¶ 54 On February 11, 2002, Mr. Greenspan, in response to the Crown's submission to vary the sealing orders, took the position that Mr. Schreiber was entitled to a continuation of the sealing orders because he fell within the protection of the innocent exception as set out in MacIntyre and Vickery. According to Mr. Greenspan there was good reason to believe that the contact on June 28, 1995 between Sgt. Feigenwald and Mr. Pelossi, (a Swiss citizen referred to the Information to Obtain the search warrants) was in contravention of Swiss law, specifically Article 271 of the Swiss Penal Code. Mr. Greenspan submits that on the record before me Eurocopter and Mr. Schreiber can establish that there is reasonable potential that the warrant will be quashed. In such circumstances, it is submitted that if the facts underlying the warrant also reveal that the damage to reputation is serious then the balance must tip in favour of the "innocent person".

¶ 55 Because of the importance of this issue to both the clients of Mr. Greenspan and Mr. Schabas it is necessary to outline in some detail both their specific submissions and also the documents adduced in these proceedings which bear on this issue.

¶ 56 Mr. Greenspan's submissions may be grouped into three areas.

¶ 57 First, Mr. Greenspan submitted that although the June 28th meeting occurred prior to the formal meeting authorized by the L.O.R. in September of 1995, no mention had been made of the prior meeting in the L.O.R. Rather the police suggested reference to the June 28th meeting be deleted from the L.O.R. Mr. Greenspan submits that an adverse inference may be drawn from this conduct by the police as to the legality of the June 28th meeting.

¶ 58 Secondly, Mr. Greenspan submitted that on his understanding of Swiss law a positive response by the Swiss to the L.O.R. would allow the R.C.M.P. through the office of a Swiss magistrate to interview a Swiss citizen to obtain a statement and to obtain documents. However, it was a serious offence to obtain a statement or documents prior to authorization pursuant to a L.O.R. Mr. Greenspan submitted that during a meeting in Mr. Greenspan's office during which Sgt. Feigenwald was interviewed to prepare a statement, Sgt. Feigenwald stated he had received documents on June 28, 1995 from Mr. Pelossi.

¶ 59 Thirdly, Mr. Greenspan also submitted that the omission by Insp. Matthews in the Information to Obtain the search warrants of specific dates upon which Mr. Pelossi gave documents to Sgt. Feigenwald also fairly gave rise to an inference that they had been obtained illegally on June 28, 1995. In view of the potential seriousness of these allegations, the Crown sought and obtained an adjournment to investigate further.

¶ 60 Upon the return of the application and with the consent of all counsel, the Crown produced a document entitled "R.C.M.P. report to Crown counsel (2002-05-03)". Documents entitled Productions 32 and 33 from a civil suit in Alberta involving Mr. Schreiber were adduced

by Mr. Greenspan with the consent of the Crown. Mr. Schabas provided to the Court the French version of Article 271 of the Swiss Penal Code. All of these materials, with the consent of counsel, were made part of the record of these proceedings.

¶ 61 It will be convenient to deal initially with Mr. Greenspan's third submission that the omission of specific dates upon which Pelossi gave documents to Sgt. Feigenwald in certain paragraphs of the Information to Obtain was done deliberately by Insp. Matthews to conceal the fact that the documents were obtained illegally on June 28, 1995. The Information to Obtain which is marked as Exhibit 30 in these proceedings, contains an Appendix C-2 in which the source of the documents referred to by Mr. Greenspan in each of the paragraphs of the Information to Obtain is explained.

¶ 62 It is clear from this appendix that all documents were obtained as a result of the L.O.R. in September 1995 and not as a result of the meeting on June 28, 1995. I am therefore in complete agreement with Mr. Bernstein that there is no merit in Mr. Greenspan's third submission.

¶ 63 I propose next to deal with Article 271 of the Swiss Penal Code which in the French version states:

> Art. 271
>
> 1. Celui qui, sans y être autorisé, aura procédé sur le territoire Suisse pour un Etat étranger a des actes qui relevant des pouvoirs publics, celui qui aura procédé à de tels actes pour un parti étranger ou une autre organisation de l'étranger, celui qui aura favorisé de tels actes, sera puni de l'emprisonnement et, dans les cas graves, de la réclusion.
> 2. Celui qui, en usant de violence, ruse ou menace, aura entraîné une personne à l'étranger pour la livrer à une autorité, à un parti ou à une autre organization de l'étranger, ou pour mettre sa vie ou son intégrité corporelle en danger, sera puni de la réclusion.
> 3. Celui qui aura préparé un tel enlévement sera puni de la réclusion ou de l'emprisonnement.

¶ 64 It can be gleaned, even in the absence of proof of an official English translation, that generally, unauthorized acts by a foreign state on Swiss territory constitute a serious offence. However, no expert evidence has been called to interpret what constitutes an offence and what is permissible. Moreover, the Court has been informed that no proceeding in Switzerland is available to determine the legality of the June 28th meeting, although Mr. Schreiber has attempted to initiate such a proceeding, because of the five-year limitation period which has expired. Mr. Schabas candidly conceded in argument that Article 271 must be interpreted by expert evidence before the Court can determine whether the June 28th meeting was in contravention of that article. There is accordingly a serious air of unreality in attempting to determine whether the June 28th meeting was illegal, as contended by Eurocopter and Mr. Schreiber, as none of the laws pertaining to the issue have been formally proven or expertly interpreted to enable the court to make that determination or even to assess whether a

contravention of Article 271 is reasonably probable in terms of the material presently before the court. See, Re Low (1933), 59 C.C.C. 346 (Ont. C.A.). The lack of expert evidence is a serious obstacle to my acceptance of the position advanced by Eurocopter and Mr. Schabas.

¶ 65 On the record before me, the only criteria as to the legality of the June 28th meeting is an assumption by Inspector McLean based on the information of the Swiss magistrates who instructed him. This assumption was that a formal L.O.R. was necessary to authorize any interview of a Swiss citizen by foreign police to obtain a statement from that citizen and/or to obtain documents. On the other hand, Inspector McLean assumed an informal interview was permissible so long as no statement and/or documents were obtained. It is accordingly only within these assumptions that the legality of the June 28th meeting can be assessed by this Court.

¶ 66 The R.C.M.P. Report addresses the issue of whether Sgt. Feigenweld obtained documents as a result of the meeting with Pelossi on June 28, 1995. In the Report, Insp. Matthews sets out the background as follows:

> Based on the file material available when I wrote the ITO (as still now) I was of the understanding that the visit of June 28, 1995 was for the purpose of seeing the then only known witness, Giorgio PELOSSI, to determine if there was sufficient grounds to investigation allegations then in the media and to justify the sending of an LOR. The visit had been cleared in advance by a Swiss magistrate contacted by our LO at Bern, Insp. Gene McLEAN, and the ground rules were essentially that no statements were to be taken or evidence to be gathered without an LOR in place. I was/am aware of notes taken by FF, but that no statement was obtained and none appears on file. Similarly, I was/am not aware, from the file record, of any documents being taken on June 28, 1995, although I presume some may have been shown or described during the conversation with PELOSSI. I do not know one way or another.

¶ 67 However, as a result of Mr. Greenspan's allegation that Sgt. Feigenwald had brought back documents from the June 28, 1995 meeting Insp Matthews was advised by S/Sgt. Alexander that on December 20, 2001, during the preparation of a witness statement, Sgt. Feigenwald contradicted himself on the issue of whether he had obtained documents at the June 28th meeting. Initially he stated that he brought back no documents but later stated he might have brought some documents in case Pelossi lost them. As a result of this information, Insp. Matthews requested the Crown to seek an adjournment so that an independent investigation could be conducted by Insp. Gaudreau.

¶ 68 Insp. Gaudreau interviewed all of the R.C.M.P. officers involved in the June 28, 1995 meeting, including Sgt. Feigenwald and Mr. Pelossi. Sgt. Feigenwald was initially of the view that he might have received non-banking documents but after an extensive review of the file and his notes he concluded that neither he nor Supt. Bouchard took any documents. In his witness statement he stated that he could not recollect taking any documents. Supt. Bouchard, who had also attended the meeting with Pelossi along with Sgt. Feigenwald, was very clear, as was Pelossi, that no documents were taken in accordance with the instructions that no documents were to be taken. Insp. Gaudreau concluded that no documents were taken and that the confusion

arose because Sgt. Feigenwald confused his notes for documents. It must be noted that none of the material in the R.C.M.P. Report was given under oath or was subject to cross-examination. It is not open to this court to make findings of credibility on this record. In my view, there is no sufficient evidentiary basis to conclude at this stage that Sgt. Feigenwald did obtain documents at the June 28, 1995 meeting with Pelossi.

¶ 69 I turn now to Production 32 and 33 adduced by Mr. Greenspan. These productions contained the original draft of the L.O.R. which at page 6 stated:

> Mr. Pelossi has been contacted by the R.C.M.P. investigation and is willing to travel to Zurich for the interview.

¶ 70 Inspector McLean, who was the R.C.M.P. Liaison Officer with the Swiss authorities, was asked to review the draft L.O.R. and to offer comments. In a memo dated August 24, 1995 he stated that he had discussed the matter with the senior magistrate in Zurich and that he was offering the following suggestion among others:

> FIRSTLY, on page 6 of the original draft I would suggest that the last sentence of paragraph two (2) be changed to read ------ Mr. PELOSSI is willing to travel to Zurich to be interviewed by the Swiss Examining Magistrate. ------ This will alleviate any problems actual or perceived vis a vis RCMP contact with a witness. (my emphasis)

¶ 71 Both Mr. Greenspan and Schabas rely very heavily on this comment as supportive of their submission that there exists at least a reasonable probability that the meeting between Sgt. Feigenwald and Pelossi was illegal and ultimately a reasonable basis for the conclusion that the L.O.R. was tainted and the evidence from Switzerland supporting the warrant illegally obtained. They submit that if the informal meeting was legal, there was no reason to delete the reference to this initial contact from the L.O.R. in order to alleviate an "actual problem".

¶ 72 Mr. Bernstein submits that there is no evidence that the meeting was illegal. He submits Insp. McLean, who has not been asked to explain his comments to this Court, cannot reasonably be taken either to have admitted wrongdoing or to be taken as having a consciousness of guilt. Mr. Bernstein points out that there is no ulterior motive for Inspector McLean to hide the fact that the June 28, 1995 meeting took place in view of Inspector McLean's extensive efforts to arrange an "informal" meeting between Pelossi and Feigenwald which met with the approval of the Swiss magistrates and which was on their advice to him in conformity with Swiss law. These efforts are thoroughly and openly documented in the material before this Court. Indeed, appended to the comments of Inspector McLean in the production upon which reliance is placed by Eurocopter and Mr. Schreiber is his fax to Sgt. Feigenwald of June 14, 1995 where Inspector McLean states:

> I have spoken to Swiss Central Agency and they approve your visit to Lugano to speak/meet with Pelossi (voluntarily). For requests of additional information and banking documentation, etc. a formal request via DOJ Ottawa will be required.

¶ 73 Also appended to this document is a note to file where Inspector McLean related his conversation with Mr. Pascal Gossin of the Federal Office for Police Matters, Berne, relating to the meeting with Pelossi. The note states:

> I also informed Mr. Gossin that there was an individual in Ticine that volunteered his services to the RCMP and that our members wished to meet informally with him to ascertain his value as a future witness in Canadian proceedings. Mr. Gossin stated this would be OK, but informal only.
> Later discussed with Dr. Luca Marazzi, Investigating Magistrate in Ticine and he said it would be fine if our investigators met this fellow, however it was to be informal only, ie; no statements, no receipt of any documentation, etc. etc.

¶ 74 On the record before me, I am in agreement with Mr. Bernstein that Eurocopter and Mr. Schreiber have not discharged the burden of proof upon them to demonstrate on the basis of reasonable probability that the June 28th meeting was illegal, which is the foundation of their claim to "protection of the innocent". In my view, there is no sufficient evidentiary basis on the record before me of an entitlement to "protection of the innocent" within MacIntyre and Vickery to overcome the strong presumption in favour of openness of the courts. As has been pointed out earlier in these reasons, Mentuck requires that a serious risk to the administration of justice be established. In my view, however, while the allegations that have been made are serious, neither the risk to the administration of justice nor its seriousness is well grounded in the evidence. Rather, on the record before me, the risk to the administration of justice does not rise beyond speculation.

¶ 75 As an alternative argument Mr. Schabas has submitted that even if the record is insufficient now to invoke the "protection of the innocent" exception, the publication ban should nevertheless remain in force until after the motion to quash which has been deferred to accommodate the present motion, so that the issues of openness and the protection of the innocent can be determined on an amplified record. I will return to this issue at a later time when dealing with the disposition of this application.

Fair Trial Rights

¶ 76 Mr. Schabas submits that the laying of a criminal charge against Eurocopter on October 17, 2002 as well as the commencement of the preliminary hearing on September 8, 2003 triggers its constitutional right to make full answer and defence and its right to a fair trial. It is submitted that pubic dissemination of the contents of the Information to Obtain at this stage would undermine these important constitutional rights and constitute a serious risk to the administration of justice.

¶ 77 Mr. Schabas submits that the Information to Obtain is lengthy and detailed setting out illegal transactions that Eurocopter has allegedly been involved in by summarizing information gathered from persons interviewed and documents. Mr. Schabas submits that because the information is similar to evidence which might be tendered at a preliminary hearing, publication of the information would undermine the publication ban on evidence tendered at the preliminary hearing and thus create a substantial risk to Eurocopter's right to a fair trial. However, there is no

evidence before the Court that the evidence which is being tendered by the Crown in support of a committal for trial is the same as, or even similar to, the material and allegations made in the Information to Obtain.

¶ 78 Mr. Schabas places some reliance on Regina v. Flahiff (1998), 123 C.C.C. (3d) 79 (Que. C.A.), where Rothman J.A. held that in circumstances where the Information to Obtain was largely based on the hearsay allegations of an accomplice, there was a serious threat to the fairness of the trial by publishing that prejudicial information where the same information would be protected at a preliminary hearing. I accept Mr. Bernstein's submission that the instant case does not turn primarily on the evidence of an accomplice but rather involves a complex fraud based on a myriad of commercial transactions.

¶ 79 I agree with counsel for the CBC that a theoretical possibility that there "might" be a similarity in the evidence to be adduced at the preliminary hearing is insufficient to meet the high standard described in Mentuck, i.e. without a sealing order there is a serious risk to the administration of justice.

¶ 80 Secondly, Mr. Schabas submits that the Information to Obtain is likely to overlap substantially with the disclosure to be received by Eurocopter, including whatever Crown brief is prepared. Again, the concern of Mr. Schabas is one pertaining to future possibilities and is therefore largely theoretical.

¶ 81 However, Mr. Schabas relies upon the statement of Trafford J. in Toronto Star Newspapers Ltd. v. Ontario, [2000] O.J. No. 2398 at para. 37:

> In my opinion there was no error of law made by Morten, J. going to his jurisdiction or otherwise on the face of the record. Looking at the ruling as a whole, he correctly stated the principles governing his discretion and correctly applied them to the circumstances of this case. ... Moreover, the values underlying the confidentiality of the brief of the Crown given by way of disclosure to the defence are fostered and otherwise recognized by the ruling made by Morten J. in this case. These values, as well as those embraced by the solicitor-client privilege which covers the utilization of the disclosure materials by the defence, are important ones to the administration of justice.

¶ 82 As Mr. Bernstein points out, the concerns of Trafford J. must be viewed in terms of the facts of that case. The Information to Obtain contained what was in effect the synopsis of the evidence of the witnesses who were pivotal to the prosecution of the charge in circumstances where it could readily be said that their evidence would likely be adduced at the preliminary and would be disclosed formally in the Crown brief. More importantly, Trafford J. identified a serious risk to the administration of justice in terms of the likelihood of the tainting of the evidence of these witnesses in the event of the disclosure of their evidence to each other. There is no such risk in the circumstances of this case. In my view, except in the rare case, the rare possibility of overlap between Crown disclosure and the Information to Obtain will not be a valid ground for continuing to seal the information or for obtaining a publication ban. As counsel for the CBC have submitted, in the majority of cases there is inevitably some overlap between

search warrant information and the disclosure provided by the Crown, and the information supporting the warrant is not sealed. I discern no serious risk to the administration of justice on this ground.

¶ 83 Thirdly, Mr. Schabas submits that "there is every reason to believe that unsealing of the Information to Obtain to the world will trigger a new wave of publicity" thus rendering, for example, a fair trial by an impartial jury impossible. The mode of trial was not in issue when the application was originally argued but I am now informed that at the commencement of the preliminary the accused Eurocopter elected trial by jury.

¶ 84 Intensive publicity is no stranger to this case and the very phrasing of Mr. Schabas' submission makes it clear that the effect of publicity on fair trial rights must be put in context. The allegations contained in the L.O.R. with respect to commissions alleged to have been paid to former Prime Minister Mulroney and to Frank Moores, a former Premier of Newfoundland, through the alleged intercession of Mr. Schreiber and his companies has been extensively publicized in books such as the Last Amigo, Karlheinz Schreiber and the Anatomy of a Scandal, pp. 326-327; On the Take, pp. 488-493, and the Fifth Estate television program (March 30, 2001). As well, there has been extensive publicity regarding the existence and execution of the search warrants in issue before me and the government's apology and the financial settlement to Mr. Mulroney with respect to these allegations. (See: Presumed Guilty: Brian Mulroney, the Airbus Affair and the Government of Canada, pp. 298-302). As Mr. Henry has pointed out, on behalf of the CBC, the charges against Eurocopter in October 2002 have attracted very little publicity. One can only speculate as to the nature and extent of publicity that may occur surrounding the disclosure of the Information to Obtain in this case.

¶ 85 The short point is that the publication of the Information to Obtain in this case will add nothing new to the essential allegations against Eurocopter and Mr. Schreiber, and will reiterate the innocence of Mr. Mulroney, all of which is already in the public domain. The Information to Obtain will also outline allegations of the participation of Eurocopter in a fraud upon the government by means of interviews and documents by providing details of complex commercial transactions. It is difficult to accept that a reiteration of "old news" augmented by the technical details of commercial transactions will significantly diminish Eurocopter's fair trial rights. More importantly, the Supreme Court has recognized that existing procedural safeguards in the form of challenges in the jury selection process, and strong direction by the trial judge will, except in the rarest of cases, be adequate to protect fair trial rights even in the face of extraordinary publicity. See, Dagenais, supra, at p. 319; Re Phillips v. Nova Scotia (Westray Inquiry) (1995), 98 C.C.C. (3d) 20 S.C.C. at paras. 114, 126-129, 134, 157-8, 161.

¶ 86 In my view, the observations made by Cory J. in Westray, supra, are particularly helpful. In that case involving the death of 26 miners in an underground explosion the Court of Appeal had stayed a proposed public inquiry on the basis that the extensive publicity which would be generated by the inquiry would affect the accused fair trial rights under s. 7 of the Charter by reason of its effect on the jury at trial. When the matter was argued before the Supreme Court, the accused had changed their election to judge alone. Sopinka J. on behalf of the majority of the Court would have lifted the stay on the basis that a trial by judge alone would not affect fair trial

rights. Justice Cory on behalf of three members of the Court held that fair trial rights would not have been compromised even if the matter were to be tried by a jury.

¶ 87 After considering the factors which should be considered in assessing the effect of publicity, Cory J. stated at paras. 128-130:

> [128] All these considerations form a part of the judicial task in determining an application to restrain an alleged impending breach of s. 11(d). They should not, however, overshadow the true goal of the analysis. What must be found in order for relief to be granted is that there is a high probability that the effect of publicizing inquiry hearings will be to leave potential jurors so irreparably prejudiced or to so impair the presumption of innocence that a fair trial is impossible. Such a conclusion does not necessarily follow upon proof that there has been or will be a great deal of publicity given to the hearings. Evidence establishing the probable effects of the publicity is also required.
> [129] It is for this reason that I must respectfully disagree with the suggestion made by the trial judge in R. v. Kenny, supra, at p. 74, that an accused enjoys a constitutional right to "be free from excessive adverse publicity while his or her trial is pending". The right which the accused enjoys is a right to a fair trial. If excessive adverse pre-trial publicity will violate this right, then s. 24(1) of the Charter requires that judicial relief be given. But relief should only follow satisfactory proof of a link between the publicity and its adverse effects. Negative publicity does not, in itself, preclude a fair trial. The nexus between publicity and its lasting effects may not be susceptible of scientific proof, but the focus must be upon that link and not upon the mere existence of publicity.
> [130] Further, the examination of the effects of publicity cannot be undertaken in isolation. The alleged partiality of jurors can only be measured in the context of the highly developed system of safeguards which have evolved in order to prevent just such a problem. (my emphasis)

¶ 88 With respect to those safeguards, he stated the following at para. 134:

> [134] The solemnity of the juror's oath, the existence of procedures such as change of venue and challenge for cause, and the careful attention which jurors pay to the instructions of a judge all help to ensure that jurors will carry out their duties impartially. In rare cases, sufficient proof that these safeguards are not likely to prevent juror bias may warrant some form of relief being granted under s. 24(1) of the Charter. (my emphasis)

¶ 89 Finally, at para. 158, Cory J. stated the following as to the absence of evidence of potential bias:

> [158] There has been no evidence put forward that the publicity to date has resulted in any actual bias in the community from which the jury pool will eventually be drawn. Nor has any explanation been offered as to why the standard safeguards for guaranteeing an impartial jury will not function

adequately in this case. Neither has there been any attempt to demonstrate why publicity from the inquiry in particular will prejudice jurors more than any of the publicity which has already occurred. (my emphasis)

¶ 90 In my view, all of the observations as to the lack of proof made by Cory J. in Westray are applicable to this case. Moreover, it must be remembered that the observations of Cory J. were made with the anticipation that potential jurors influenced by the Westray Inquiry would hear the actual evidence of witnesses under oath. In the situation here, potential jurors would be exposed only to the allegations of police officers and not to evidence which in my view is a distinction any fair minded potential juror would make. See: Lewis v. Daily Telegraph, [1962] 2 All E.R. 698 at 713 (C.A.), [1963] 2 All E.R. 151 at 155 (H.L.). Accordingly, it would appear to me that, if as Cory J. concluded, the Westray Inquiry hearings would not present an unacceptable risk to the s. 11(d) fair trial rights of the accused in that case, a fortiori, the possibility of such risk by the disclosure of allegations in the Information to Obtain in this case is even lower.

Privacy Rights

¶ 91 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, [1995] 2 S.C.R. 1130, 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) 241 [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.)).

¶ 92 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.

¶ 93 As I apprehend the position of both Mr. Schabas and Mr. Greenspan, they do not rely exclusively on the fact that the revelation of the Information to Obtain may cause serious

prejudice to their reputation for honesty and could thereby do serious harm to both their commercial or personal interests, which is conceded by both the Crown and the CBC. They submit that the Court should forestall a further invasion of privacy and loss of reputation because there is a reasonable prospect that the warrant will be quashed. However, if as I have found neither Eurocopter or Mr. Schreiber is entitled to the "protection of the innocent" on the record before me, and, if as I have found, there is on the present state of the record no reasonable probability that the warrant will be quashed, the mere fact of an invasion of privacy or loss of reputation is not sufficient in itself to tip the scale in favour of continued sealing. Moreover, in the special circumstances of this case, as has been noted previously, extensive publicity concerning the essential allegations affecting privacy and reputation are all in the public domain. In this context, there is much to be said for the argument advanced by the CBC that the revelations in the Information to Obtain, which at this stage are mere allegations, will not seriously affect either the privacy or reputation of either Eurocopter or Mr. Schreiber any more than has the publicity to date.

¶ 94 In the circumstances of this case, the observations of O'Brien J. in Re Regina and Several Unnamed Persons (1984), 8 C.C.C. (3d) 528 are particularly apt. After referring to the words of Dickson J. in MacIntyre that "as a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings", O'Brien J. stated the following at p. 531:

> In my view, if one were to accept the applicants' argument in this case, it would follow logically that, subject to the exercise of some judicial discretion, the more serious the alleged criminal act or the higher the standing or reputation of the accused in the community, the more such accused should be protected from publicity and, therefore, it would follow many serious criminal trials should be either privately or secretly conducted, or the identity of the accused not disclosed. In a free and democratic society, in my view this argument cannot be accepted. I believe it is a matter Of great public importance that the light of public knowledge should illuminate our court proceedings. Sometimes, that light may be harsh. I think I can put it no better than in a quotation from Bentham referred to by the Ontario Court of Appeal in Re Southam Inc. and The Queen (No. 1) (1983), 41 O.R. (2d) 113 at p. 120, 3 C.C.C. (3d) 515 at p. 521, 146 D.L.R. (3d) 408 at p. 415. The following quotation was approved:
>
> "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."
>
> In my view, the public interest in this matter far outweighs the risk of possible embarrassment to the individuals in this case. While one may have great sympathy for anyone charged with criminal offences, particularly offences such as this, that sympathy must not be allowed to interfere with the duty of the court to act judicially.

¶ 95 In my view, the potential loss of privacy or reputation, whether commercially or personally, which may result if the information pertaining to the search warrants is made public,

will not of itself constitute a serious risk to the administration of justice nor justify a denial of public access to the search warrants.

Disposition

¶ 96 As I have attempted to illustrate in my reasons, none of the parties have provided a sufficient evidentiary justification to demonstrate that the ends of justice would be subverted by the disclosure of the search warrant information at issue, nor that there is a serious risk to the administration of justice by the grounds advanced for sealing either individually or cumulatively. The balance, in my view, must be struck in favour of public access and openness of courts.

¶ 97 Before making the order appropriate to this conclusion, I wish to revisit Mr. Schabas' alternative argument, supported by Mr. Greenspan, that even if the appropriate evidentiary basis does not now exist for this Court to give effect to their submissions that sealing should remain in place to protect the innocent, the Court should not make a final decision until a ruling has been made on the motion to quash the search warrant which presumably will be made on an amplified record. I revisit this argument because it seems obvious that the Court must be extremely cautious in rejecting any argument based on the protection of the innocent as it is a value of superordinate importance which lies at the heart of the principles of fundamental justice. (See: Mills at para. 89).

¶ 98 After anxious consideration, I cannot accept Mr. Schabas' alternative argument essentially for two reasons. First, given the requirements of s. 487.3 of the Criminal Code and the test in Mentuck a party must put their best foot forward to provide the requisite evidentiary basis at the time that sealing is sought and not at some future time. Moreover, the notion that the conduct of the R.C.M.P. in connection with the L.O.R. amounted to criminal offences has been the subject of litigation since at least July of 2000. In the decision of Burrows J. in Schreiber v. A.G. Canada and The Queen in Right of Canada, [2000] A.J. No. 953 (Q.B.), Mr. Schreiber sought relief from the implied undertaking not to use information obtained in the discovery process outside that action for damages resulting from the issuing of the L.O.R. The information at issue was Production 32 and 33. In the course of his reasons, Burrows J. stated at para. 7:

> [7] This application is supported by the affidavit of a lawyer involved in the representation of Mr. Schreiber in this action. He swears that information obtained in the documentary production and the oral discovery, combined with information previously in the possession of Mr. Schreiber, gives Mr. Schreiber cause to believe certain members of the RCMP engaged in conduct which would amount to criminal offences in Liechtenstein and Switzerland in connection with the criminal investigation referred to in the September 1995 Letter of Request.

¶ 99 Although the relevance or availability of Production 32 and 33 may not have been known with precision, I agree with Mr. Bernstein that Eurocopter and Mr. Schreiber have had an ample opportunity to put their best foot forward in respect of providing the Court with the evidentiary basis to establish their entitlement to the "protection of the innocent".

¶ 100 Secondly, Dickson J.'s view in MacIntyre that public accessibility and judicial accountability with respect to search warrants are necessary to ensure the integrity of the administration of justice in order that either police or Crown misconduct may be exposed is of direct relevance to the issues in this case in which police misconduct has been alleged in obtaining the information supporting the search warrant. In this regard, he stated at p. 147:

> 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. (my emphasis)

¶ 101 In Canadian Newspapers Co. Ltd. v. Canada (A.G.) (1986), 55 O.R. (2d) 737 (Ont. H.C.) Osler J. eloquently made the point that in circumstances where police misconduct is alleged the absence of public scrutiny may itself constitute a serious risk to the administration of justice. At p. 748 he stated:

> It is easy to become impatient with the press and to criticize it for what may at times appear to be sensationalism. It is not necessary that the motives of the press be altruistic for the importance of press freedom to be apparent. As was stated in Reference Re Alberta Legislation, [1938] S.C.R. 100 at pp. 145-6, [1938] 2 D.L.R. 81 at p. 119:
>
> > Freedom of discussion is essential to enlighten public opinion in a democratic State; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the government concerning matters of public interest. There must be an untrammelled publication of the news and political opinions of the political parties contending for ascendancy.
>
> There can be no discussion when there is no information. We are fortunate enough to live in a country where police abuse has not been a major concern. Nevertheless, overzealousness is not unknown and mistakes do occur. The execution of a search warrant is in itself a major invasion of someone's privacy. So long as the present section stands, the botched or illegal execution of a search warrant may never come to public notice without the consent of one or more private individuals. Such individuals, however sensitive their own feelings may be, should not be given the power to prevent the disclosure of police mistake or misconduct.
> Additionally, 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.

¶ 102 It would seem to me that based upon the authorities to which I have referred, if the allegations of police misconduct are to be seriously pursued by means of a motion to quash the search warrants, then this Court is required to give the public access to that process. This is a very public case involving high public officials in the transaction of public business in which there are allegations of a fraud by a corporation dealing with the government of Canada. If as has been alleged, there has been police misconduct in the context of Canada's international relations which leads to a quashing of the warrant, the public should have full access to that proceeding. The essence of public scrutiny and judicial accountability is as both Dickson J. and Osler J. have pointed out is to expose and thereby to prevent this kind of alleged abuse.

¶ 103 For these reasons, the application of the Crown to vary the sealing orders is allowed to the extent requested by the Crown. The application of the Crown to continue the sealing orders with respect to the three discreet areas is dismissed save for the editing of the materials with respect to the confidential informant.

¶ 104 In fairness to all parties and at the specific request of one of them, I propose to make an order similar to that made by both McGarry J. and the Court of Appeal in Toronto Star Newspapers Ltd. v. Ontario, supra. The sealing orders and the publication ban shall remain in force for a period of one week so that the parties may exercise their rights of appeal. Thereafter the subject information shall be made public subject to any further sealing order or publication ban made by the Court of Appeal.

¶ 105 Also, while I see no reason why the result of this decision should not be published, however, given the extent to which reference has been made to matters which are presently under seal and to matters currently subject to a publication ban, the judgment of this Court will be subject to a publication ban on the same terms as above.

¶ 106 The parties and those interested persons who have been provided access to the materials will receive my decision at 9.00 a.m., Friday, October 31, 2003. The Court has undertaken to meet with counsel at 2:00 p.m. in order to advise those who have expressed an interest in these proceedings with respect to the status of the judgment of this Court.

THEN J.

cp/s/ln/qw/qlrme