Citation: ☼ Postmedia Network Inc. v. Her Majesty the Queen
2019 BCPC 267

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File No: 234883-1
Registry: Surrey

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

Criminal Court

Between

POSTMEDIA NETWORK INC.

Applicant

and

**HER MAJESTY THE QUEEN
FOR THE PROVINCE OF BRITISH COLUMBIA**

ATTORNEY GENERAL OF CANADA FOR THE RCMP

GARY LENZ AND CRAIG JAMES

Respondents

**REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE G.S. GILL**

Counsel for Postmedia Network Inc. (Applicant)	D.H. Coles
Counsel for Her Majesty the Queen for the Province of British Columbia (Respondent)	B. Martland, Q.C.
Counsel for the Attorney General of Canada (Respondent)	J. Katz
Counsel for G. Lenz (Respondent)	R. Cooper
Counsel for C. James (Respondent)	G. Cameron
Place of Hearing:	Surrey, B.C.
Date of Hearing:	October 9, 2019

Date of Judgment: November 19, 2019

Introduction

[1] Postmedia Network Inc. (“Postmedia”) makes application to vacate or vary Sealing Orders made on February 16, 2019 and April 9, 2019 for disclosure of material relating thereto, including Production Orders and Informations to Obtain (“ITO”) in support thereof.

[2] The application is opposed by Crown, by the Attorney General of Canada on behalf of the Royal Canadian Mounted Police (“the police”), and by Craig James and Gary Lenz. Messrs. James and Lenz were, at the material time pertinent to these proceedings, respectively the Clerk and the Sergeant-at-Arms of the British Columbia Legislative Assembly.

[3] On November 20, 2018, Mr. James and Mr. Lenz were placed on administrative leave by the Legislative Assembly, owing to various allegations of misconduct made against them by the Speaker of the Legislative Assembly, Darryl Plecas. The matter, having been referred to the police, resulted in the commencement of an investigation, and eventually the preparation and issuance of the ITO and resulting Orders, which are the subject of the present application to unseal. Mr. James and Mr. Lenz are each mentioned to in the ITO.

[4] For reasons that follow, I conclude that the application should be allowed on a limited basis, with the unsealing of the documents at issue on a redacted basis.

Material Filed on Application

[5] At this hearing, Crown provided the Court with un-redacted copies of all sealed ITOs and resulting Orders, which were then marked as sealed Exhibit #1. Counsel for Postmedia received redacted copies of this exhibit for the purpose of this application on the condition it not be further disclosed to anyone. Counsel for Messrs. James and Lenz did not receive this material, which, for the purposes of this hearing, they did not contest.

[6] On the hearing of this application, and in support of its position opposing unsealing, Crown filed a further affidavit sworn by the ITO affiant. This affidavit was provided to all counsel, including counsel for Messrs. James and Lenz, in confidence, and was marked as sealed Exhibit #2.

[7] Exhibit #3 comprises a larger affidavit, filed by Postmedia, to which is appended the following appendices, all of which are in the public domain:

A. Report of Speaker Darryl Plecas to the Legislative Assembly Management Committee Concerning Allegations of Misconduct by Senior Officers of the British Columbia Legislative Assembly dated January 21, 2019;

B. Brief Legal Submission on behalf of Craig James, Clerk of the Legislative Assembly dated February 7, 2019;

C. Brief Legal Submission on behalf of Gary Lenz, Sergeant-at-Arms dated February 7, 2019;

D. Report of Darryl Plecas to the House Leaders and LAMC in reply to responses of Mr. James and Mr. Lenz dated February 20, 2019;

E. Letter and response of Craig James to report of Speaker Darryl Plecas dated February 21, 2019;

F. Response of Gary Lenz, Sergeant-at-Arms of the British Columbia Legislative Assembly to the Plecas report dated February 21, 2019;

G. Report on the Special Investigation into Allegations Against the Clerk and Sergeant-at-Arms of the Legislative Assembly of British Columbia of the Right Hon. Beverly McLachlin, P.C, C.C dated May 3, 2019;

H. Audit report of Carol Bellringer, Auditor General titled “Expense Policies and Practices in the Offices of the Speaker, Clerk and Sergeant-at-Arms” dated September 2019;

I. Print-out news release from website of office of the auditor General of British Columbia dated September 19, 2019 and titled “Gaps and weaknesses in policy framework and practices at the Legislative Assembly”;

J. Print-out from Globe and Mail website dated November 21, 2018 and authored by Justine Hunter and Ian Bailey, titled “Investigation into B.C. legislature officials underway since at least start of the year”;

K. Print-out from the CBC website dated January 31, 2019 and authored by Karin Larsen, titled “Chronology of a scandal: A timeline of the explosive Plecas report”;

L. Print-out from the CBC website dated May 13, 2019 and authored by Bethany Lindsay and Tanya Fletcher, titled “B.C. Legislature Clerk Craig James retires as a spending report finds he committed misconduct”;

M. Print-out from Times colonist website dated July 13, 2019 and authored by Derrick Penner and Gordon Hoekstra titled “Plecas launches new investigation into suspended B.C. legislature sergeant-at-arms”.

[8] Not appended to the foregoing affidavit but referred to during the course of counsel submissions during this application was an additional report, titled “Investigation Report Pursuant to Special Provincial Constable Complaint Procedure Regulation, B.C. Reg. 206/98 In the Matter of Allegations Regarding the Conduct of Special Provincial Constable Gary Lenz, authored by Doug LePard, O.O.M, M.A. to the Hon. Darryl Plecas, Speaker of the Legislative Assembly dated September 9, 2019”. (“LePard Report”). A redacted version may be found on the Legislative Assembly website.

Statutory Framework and Legal Test

[9] Section 487.3 of the *Criminal Code* sets out the applicable statutory framework:

> **Order denying access to information**
>
> 487.3(1) On application made at the time an application is made for a warrant under this or any other Act of Parliament, an order under any of sections 487.013 to 487.018 or an authorization under section 529 or 529.4, or at a later time, a justice, a judge of a superior court of criminal jurisdiction or a judge of the Court of Quebec may make an order prohibiting access to, and the disclosure of, any information relating to the warrant, order or authorization 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 reason referred to in paragraph (a) outweighs in importance the access to the information.
>
> **Reasons**
>
> (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.

[10] The foregoing s. 487.3 framework is applied using what is commonly known as the *Dagenais/Mentuck* test. Essentially, *R. v. Mentuk*, [2001] 3 S.C.R. 442 reformulated the principles originally set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, adapting them to a wider array of circumstances, described in *Mentuk* at paras. 32 to 39:

> **32** The Dagenais test requires findings of (a) necessity of the publication ban, and (b) proportionality between the ban's salutary and deleterious effects. However, while Dagenais framed the test in the specific terms of the case, it is now necessary to frame it more broadly so as to allow explicitly for consideration of the interests involved in the instant case and other cases where such orders are sought in order to protect other crucial aspects of the administration of justice. In assessing whether to issue common law publication bans, therefore, in my opinion, a better way of stating the proper analytical approach for cases of the kind involved herein would be:
>
> 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.
>
> **33** This reformulation of the Dagenais test aims not to disturb the essence of that test, but to restate it in terms that more plainly recognize, as Lamer C.J. himself did in that case, that publication bans may invoke more interests and rights than the rights to trial fairness and freedom of expression. This version encompasses the analysis conducted in Dagenais, and Lamer C.J.'s discussion of the relative merits of publication bans remains relevant. Indeed, in those common law publication ban cases where [page463] only freedom of expression and trial fairness issues are raised, the test should be applied precisely as it was in

Dagenais. For cases where concerns about the proper administration of justice other than those two Charter rights are raised, the present, broader approach, will allow these concerns to be weighed as well. There may also be other cases which raise interests other than the administration of justice, for which a similar approach would be used, depending of course on the particular danger at issue and rights and interests at stake.

34 I would add some general comments that should be kept in mind in applying the test. The first branch of the test contains several important elements that can be collapsed in the concept of "necessity", but that are worth pausing to enumerate. One required element is that the risk in question be a serious one, or, as Lamer C.J. put it at p. 878 in Dagenais, a "real and substantial" risk. That is, 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 of justice sought to be obtained.

35 A second element is the meaning of "the proper administration of justice". I do not wish to restrict unduly the kind of dangers which may make a ban necessary, as discretion is an essential aspect of the common law rule in question. However, judges should be cautious in deciding what can be regarded as part of the administration of justice. Obviously the use of police operatives and informers is part of the administration of justice, as are such practices as witness protection programs. However, courts should not interpret that term so widely as to keep secret [page464] a vast amount of enforcement information the disclosure of which would be compatible with the public interest.

36 The third element I wish to mention was recognized by La Forest J. in New Brunswick, supra, at para. 69, when he formulated the three part test discussed above. La Forest J.'s second step is clearly intended to reflect the minimal impairment branch of the Oakes test, and the same component is present in the requirement at common law that lesser alternative measures not be able to prevent the risk. This aspect of the test for common law publication bans requires the judge not only to consider whether reasonable alternatives are available, but also to restrict the order as far as possible without sacrificing the prevention of the risk.

37 It also bears repeating that the relevant rights and interests will be aligned differently in different cases, and the purposes and effects invoked by the parties must be taken into account in a case-specific manner. Where the accused is seeking the publication ban on the basis that his trial will be compromised, a judge would improperly apply the test if he relied on the right to a public trial to the disadvantage of the accused. This test exists to ground the exercise of discretion in a constitutionally sound manner, not to command the same result in every case. Trial judges must, at the outset, use their best judgment to determine which rights and interests are in conflict. In most cases this will not be overly onerous. The

> parties will frame their arguments in terms that make clear the interests they feel are threatened by the issuance or refusal of a publication ban and those they are ready to sacrifice in the face of the threat.
>
> **38** In some cases, however, most notably when there is no party or intervener present to argue the interests of the press and the public to free expression, the trial judge must take account of these interests without the benefit of argument. The consideration of unrepresented interests must not be taken lightly, especially where Charter-protected rights such as freedom of expression are at stake. It is just as true in the case of common law as it is of statutory discretion that, as La Forest 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 La Forest J. (at 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 or her discretion judicially.
> >
> > A sufficient evidentiary basis permits a reviewing court to determine whether the evidence is capable of supporting the decision.
>
> In cases where the right of the public to free expression is at stake, however, and no party comes forward to press for that right, the judge must consider not only the evidence before him, but also the demands of that fundamental right. The absence of evidence opposed to the granting of a ban, that is, should not be taken as mitigating the importance of the right to free expression in applying the test.
>
> **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. Effective investigation and evidence gathering, while important in its own right, should not be regarded as weakening the strong presumptive public interest, which may go unargued by counsel more frequently as the number of applications for publication bans increases, in a transparent court system and in generally unrestricted speech on [page 466] matters of such public importance as the administration of justice.

[11] There exist a number of case authorities amplifying on the various relevant factors, their interplay, weighing and balancing. It is important to note the *Dagenais/Mentuk* test must be applied contextually and not formulaically, and in this regard, I have carefully reviewed and taken into consideration all of the decisions cited by counsel.

[12] At the heart of the *Dagenais/Mentuk* test lies the open court principle, a core value in an open and democratic society and reflected in s. 2(b) of the *Canadian Charter of Rights and Freedoms*.

[13] Once a sealed ITO and any resulting authorization has been executed, the presumption then lies in favour of openness, with the onus being on parties opposing to establish, on clear and convincing evidence that disclosure would subvert the ends of justice.

[14] Postmedia, while bearing no related onus, stresses the importance of the disclosure rights at stake, noting they are the right of the public in a free and democratic society.

[15] The open court principle, particularly in connection with these types of cases, was affirmed by the Supreme Court of Canada in *Nova Scotia (Attorney General) v. MacIntyre,* [1982] 1 S.C.R. 175 in the following terms:

> …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. 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 the 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.

[16] See also in this regard *The Vancouver Sun v. AG Canada et al*, 2004 SCC 43, at paras. 23 to 27 wherein the Supreme Court of Canada recognized the open court principle as:

- a hallmark of a democratic society,
- a cornerstone of the common law,
- guaranteeing the non-arbitrary and rule of law based integrity of judicial processes,
- inextricably linked to the right of freedom of expression guaranteed by s. 2(b) of the *Charter*, advancing its core values including freedom of the press to report on judicial proceedings, and
- extending to the pretrial stage of judicial proceedings.

Positions of the Parties

[17] As earlier noted, counsel for the Crown, counsel for AG (Canada) on behalf of the police, counsel for Mr. James, and counsel for Mr. Lenz all oppose Postmedia's unsealing application, with each making their own submissions, as well as largely adopting the submissions of the others.

[18] The Crown and the AG (Canada), filed the affidavit of Cst. Yonadim (sealed Exhibit #2). Although they concede this affidavit is necessarily expressed largely as opinion and in generalized terms, it is sworn by the same affiant as the ITO, and as such, is based on that officer's intimate knowledge of the case details. They say that when this affidavit is read in conjunction with the sealed ITO and the Postmedia affidavit (Exhibit #3), which discloses all of the broader aspects of the case already in the public domain, it paints a complete picture constituting significant evidence of a substantial risk to the administration of justice, the impacts of which are described to arise in three different ways:

1. the integrity of the police investigation;
2. the fair trial rights of any persons who may eventually be charged; and

3. the privacy rights of third parties.

[19] Firstly, it is said the police investigation, described as ongoing and complex, may be adversely impacted. The investigation is also characterized as being highly sensitive, given the profile of the individuals, including public officials, who are involved and the information that has already been released.

[20] Insofar as a detailed recitation of the factors set out in the sealed affidavit and un-redacted ITO may result in disclosing the very type of information sought to be kept sealed, I will refrain in these Reasons from other than a generalized discussion of same.

[21] Broadly speaking, the main concern supported by the affidavit and accompanying submissions is that this investigation is complex and incomplete. The main concern is that release of the ITO would provide information of a nature and quality that could impair the ability of the police to properly conduct the more extensive investigation and wherever that investigation may ultimately lead.

[22] All parties point out there already exists a large volume of public domain material comprising allegations, refutations, reports, audits, investigations and findings. Counsel for Postmedia suggest this dilutes any concerns relating to release of the ITO.

[23] The other parties suggest the opposite, namely that the investigative material generated by the police should not be inserted into this already heavy stream of content but rather, remain isolated from it. The Crown submits that the application to unseal must be weighed recognizing there is a significant volume of information already known to the public, thereby diluting the very need for unsealing.

[24] In this environment, the question of unsealing also requires a careful review of the information already in possession of the public. This is especially so, given that a number of the findings and reports completed thus far appear to deal with issues co-incidental to, but not comprising, the criminal investigation. For example, the report prepared by the Honourable former Chief Justice (Appendix G to Exhibit #3) was provided in the context of potential misconduct contrary to established policy or practice governing spending on behalf of the Legislative Assembly. The Auditor General's report

(Appendix H to Exhibit #3) addresses the adequacy of that very framework of policies, practices, and oversight mechanisms as they relate to the expenditure of public funds. The LePard Report examines the conduct of Mr. Lenz in the context of a specific complaint against him under the *Police Act* with respect to his role in the investigation of the Speaker's concerns about Mr. James. Each of these reports avoid making, or being seen to have made findings of criminal wrongdoing.

[25] The Crown and police agree that on the face of it, the police investigation includes allegations relating to a log splitter and a trailer, matters that are already known to the public. What is stressed by Crown and the AG (Canada) is that the police investigation is much broader and more complex than this.

[26] There are many examples of other types of misconduct pointedly alleged in much of the material appended to Exhibit #3, including taking of liquor, inappropriate expense allowance claims, purchase of personal items at public expense, and inappropriate benefits claims.

[27] The public is also aware of the identities of some other individuals who have been said to be in some way involved in these various matters. Although many such names have been redacted in some of the publicized reports, their identities may at times be inferred from other contextual information, including job titles or roles.

[28] It is said that placing the ITO in the public domain will make certain details known to potential suspects, witnesses, and others in a way that could impact the ability of the police to conduct this broader investigation, including matters not necessarily directly addressed in the ITO, but which persons having access to it could determine are being investigated, risking impairment of the integrity of the investigation and thereby subverting the ends of justice.

[29] A cited example was that someone learning the identity of any person(s) having actually spoken to the police about the log splitter or the trailer may well know that this person (or persons) also has knowledge of other conduct, not necessarily limited to Mr. James or Mr. Lenz, that could be the subject of the police investigation. Such a person

could then potentially take steps to interfere with the investigation. Put simply, disclosure in complex, high profile investigations that are still ongoing seriously risks evoking different responses by persons in ways difficult to foresee or forestall.

[30] It is further argued that unsealing and dissemination may dissuade cooperation by persons not yet contacted or identified, including those having a public profile. It may influence witness recollections, either consciously or subconsciously, so as to taint their truthfulness, reliability or accuracy. It could also adversely impact the privacy rights and reputations of innocent third parties, including of those who might have played entirely legitimate or incidental roles in the conduct under scrutiny.

[31] While it is true there is much information already in the public domain, including identification of persons either directly named or identified indirectly from their titles or positions, what the public does not yet exhaustively know is which persons have actually spoken to the police, what information they may have imparted to the police, or on what specific evidence, information or belief the police obtained the authorizations, and how that information may connect to other aspects of the broader investigation.

[32] I recognize that even though there may be some overlap with information already in the public domain, release of an ITO, including some of this same information but now under the imprimatur of a police investigation, could lend to it a sense of greater legitimacy or reliability in the eyes of the public, as well as in the eyes of persons who may in some way relate to the investigation.

[33] In short, while the public might have some idea of the various other allegations of misconduct, there is no public information as yet from the police outlining which matters the police are, or are not, investigating, or specifically what type of documents, data or other evidence they are seeking to gather. Parties opposing this application argue that release of the ITO, even if some of it includes information already known to the public, would provide that information, directly or by inference, and thereby subvert the ends of justice.

[34] The affidavit of Cst. Yonadim, filed as sealed Exhibit #2, addresses the manner in which the foregoing becomes a cause of serious concern. Therein, the Constable describes ten specific ways in which she believes unsealing would compromise and be detrimental to both the nature and to the extent of the investigation, which she describes as ongoing and complex.

[35] Postmedia asserts that the evidence filed by parties opposing, including the sealed affidavit (Exhibit #2), amounts to nothing more than vague, unsubstantiated and generalized opinion evidence, unsupported by any facts specific to this case, and thereby failing to meet the necessary evidentiary standard. The concerns raised are said to not establish a *serious* risk to subverting the ends of justice, being alleged in the most general of terms and not sufficiently grounded in evidence.

[36] Postmedia also says that the mere fact of an ongoing investigation, or a general assertion of risk of harm to an investigation, should not automatically result in a sealing order, and that while negative impact on police operations may be a factor, sealing should not be done to retain investigative advantage.

[37] While I agree some of the assertions are indeed of a generalized nature with respect to impacts, not all of them can be so characterized, particularly when read in conjunction with the un-redacted copy of the ITO provided to the Court and weighed in the broader context of the various issues at play, which are addressed in some of the reports appended to Exhibit #3.

[38] In *HMTQ v. Toronto Star Newspapers*, 2005 SCC 41, concerns by the Crown that release of information would compromise the nature and extent of an ongoing investigation were rejected by the court on the basis that those concerns were asserted essentially in the abstract and as an unsupported general proposition, as well as amounting to providing the police with an investigative advantage, as opposed to constituting evidence of harm.

[39] Upholding the ruling by the Ontario Court of Appeal, Fish, J. stated at paragraph 36:

> **36** In support of its application, the Crown relied exclusively on the affidavit of a police officer who asserted his belief, "based on [his] involvement in this investigation that the release of the Warrants, Informations to Obtain and other documents would interfere with the integrity of the ongoing police investigation" (Appellant's Record, at p. 70). The officer stated that, should the contents of the information become public, witnesses could be fixed with information from sources other than their personal knowledge and expressed his opinion "that the release of the details contained in the Informations to Obtain [the search warrants] has the potential to make it more difficult for the Ontario Provincial Police to gather the best evidence in respect of its investigation" (Appellant's Record, at p. 72).
>
> **37** Doherty J.A. rejected these broad assertions for two reasons.
>
> **38** First, he found that they amounted to a "general proposition that pre-trial publication of the details of a police investigation risks the tainting of statements taken from potential witnesses" (para. 26). In Doherty J.A.'s view, if that general proposition were sufficient to obtain a sealing order,
>
> > …the presumptive rule would favour secrecy and not openness prior to trial. A general assertion that public disclosure may distract from the ability of the police to get at the truth by tainting a potential witness's statement is no more valid than the equally general and contrary assertion that public disclosure enhances the ability of the police to get at the truth by causing concerned citizens to come forward with valuable information. [para. 26]
>
> **39** Second, Doherty J.A. found that the affiant's concern, for which he offered no specific basis, amounted to a mere assertion that "the police might have an advantage in questioning some individuals if those individuals [are] unaware of the details of the police investigation" (para. 27). In oral argument before this Court, counsel for the Crown referred to this as the "advantage of surprise". In this regard, Doherty J.A. noted Iacobucci J.'s conclusion in *Mentuck*, at para. 34, that access to court documents cannot be denied solely for the purpose of giving law enforcement officers an investigative *advantage*; rather, the party seeking confidentiality must at the very least allege a *serious and specific risk to the integrity of the criminal investigation*.

[40] The investigation in *Toronto Star*, *supra*, involved search warrants issued for various locations linked to a meat packing business in connection with alleged violations of provincial legislation regulating the slaughter of cattle and fraudulent business practices. The suitability for human consumption of the meat had become a matter of public concern.

[41] I believe the *Toronto Star* case is distinguishable from the present case insofar as the subject matter of the charges in that case had already been identified, and appear to have been relatively narrow and well-defined in scope. By contrast, it is the very fact that the police investigation in the current case is still in the evidence gathering stage, with respect to possible offenses, or even possible offenders, not yet entirely known or identified. While difficult to quantify with precision, it is more than a general assertion, and is sufficiently grounded, contextually speaking, in the broader facts of this high profile case involving operations and expenditures at or connected to the Legislative Assembly.

[42] Revealing which persons have spoken to the police by inference reveals that the police consider these sources and their evidence to be credible, trustworthy, and providing the credibly based probability needed for issuance of the judicial authorizations. While this, in and of itself, is not necessarily a bar to unsealing, the contextual facts of this case establish that public knowledge of information contained in the ITO, including the names or roles of persons having provided specifically identified information to the police, would, according to the sworn evidence of the affiant, have the types of impacts on the investigation referred to in some of paragraph 9 (a) through (j) of the sealed affidavit, and thereby risking compromise of that further and as yet incomplete investigation.

[43] The potential for additional offences, or even suspects, to be identified through some of the people mentioned in the ITO is what gives rise to the case complexity. Persons connected to these matters or otherwise having knowledge of them, and whether as of yet contacted by police or not, upon learning about the details contained in the ITO would have the ability, if they so choose, to anticipate the direction of the broader, high profile investigation, and thereby influence it in negative ways.

Fair Trial Rights, Privacy and Stigmatization

[44] Concern about unsealing having an adverse impact on the fair trial rights of any person(s) who may be charged was raised by counsel for the Crown, counsel for the police, as well as counsel for each of Messrs. James and Lenz.

[45] There is no question that Messrs. James and Lenz retain the full benefit of protection afforded to “innocent persons” as contemplated by s. 487.3(2)(iv) of the *Criminal Code*.

[46] Counsel on behalf of Mr. James and Mr. Lenz, stressed that the detailed responses their clients filed with the Legislative Assembly were intended by them to be kept in confidence, and they did not consent to their public dissemination, such that this should not in any way be regarded as a waiver or voluntary dilution by them of their privacy and fair trial rights.

[47] I must also be mindful that un-redacted unsealing could adversely impact the privacy rights and reputations of innocent third parties, including of those playing entirely legitimate or incidental roles in the conduct under scrutiny.

[48] That said, the case authorities often appear to weigh more in favour of disclosure than secrecy, with regard to the potential for impact on the innocent, their reputations and privacy, including that of innocent third parties.

[49] In *Nova Scotia (Attorney General) v. MacIntyre*, *supra*, Dickson, J. stated the following:

> 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.

[50] Similarly, in *Phillips v. The Vancouver Sun*, 2004 BCCA 14, Prowse, J.A. made the following observations:

> [82]…Further, under section 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 related 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 offense 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. …

[51] In my view, the privacy interests in the present case, while nonetheless important and deserving of consideration, are considerably attenuated by virtue of many of the details surrounding the allegations having already made their way into the public domain, even if not all such dissemination was necessarily foreseen or intended by those providing the information.

[52] With respect to fair trial rights, counsel opposing unsealing noted that even after an Information is sworn, disclosure is often limited, typically pursuant to publication bans made at bail hearings and preliminary hearings. While that is true, it must be remembered that those situations are, in some respects, markedly different from pre-trial judicial proceedings. Once a person is charged, the hearings that follow involve the presentation of evidence collected from any number of sources, all of which, when presented in a courtroom open to the public, might not otherwise have any disclosure safeguards preserving fair trial rights.

[53] Counsel opposing also point out that this application should be assessed in the context of a criminal justice process in which disclosure rights typically accrue even to accused persons only after charges are laid and not before. They stress that no party, including the media, has an absolute right to pre-charge disclosure.

[54] Counsel also noted that the high publicity and politically charged atmosphere extant will already render it difficult for any persons who may be eventually charged to receive a fair trial, including the ability to make full answer and defence, in particular in a trial before a jury. In this regard, the words of Chief Justice Lamer in *Dagenais*, *supra*, are particularly instructive:

> [88] … More problematic is the situation in which there is a period of sustained pre-trial publicity concerning matters that will be the subject of the trial. In such circumstances, the effect of instructions is considerably lessened. Impressions may be created in the minds of the jury that cannot be consciously dispelled. The jury may at the end of the day be unable to separate the evidence in court from information that was implanted by a steady stream of publicity.

[55] In *R. v. Vice Media Canada Inc.*, 2016 ONSC 1961, MacDonnell, J. underlined the difficulty that can arise in accurately assessing the risk of jury tainting:

> **87** At this point in the criminal proceedings against Farah Shirdon, it is difficult to precisely estimate how serious a risk there is of jury tainting. In his judgment for the Supreme Court in *Toronto Star Newspapers v. Canada*, Justice Fish cautioned against expecting a clear demonstration of the risk at the early stages of the criminal process:
>
> > The *Dagenais/Mentuck* test, though applicable at every stage of the judicial process, was from the outset meant to be applied in a flexible and contextual manner. A serious risk to the administration of justice at the investigative stage, for example, will often involve considerations that have become irrelevant by the time of trial. On the other hand, the perceived risk may be more difficult to demonstrate in a concrete manner at that early stage. Where a sealing order is at that stage solicited for a brief period only, this factor alone may well invite caution in opting for full and immediate disclosure.

[56] The possibility that any future trial may proceed before a jury is not itself necessarily inconsistent with pre-trial public disclosure. While it is clear that the longer and more sustained the public exposure, the greater the potential risk for jury bias, juries can be selected and instructed in ways to promote a verdict only on evidence from the trial, as opposed to outside sources.

[57] Disclosure of pre-trial information contained in an ITO can affect not only trial fairness and privacy rights but can also stigmatize individuals not charged, or even charged and thereafter acquitted.

[58] Unquestionably, release of disputed material into the public domain can cause persons feeling torn between the need to make a public response to address the

stigma, and having to weigh the possible implications of any detrimental effects thereby on their fair trial rights in the event criminal charges should ever proceed.

[59] The risk of stigmatization was addressed in *Vice Media*, *supra*, in the following terms:

> **91** After referring to the concern expressed by Chief Justice Lamer in *Dagenais* with respect to jury tainting, Justice Rothman made it clear that his concern was broader. He stated:
>
> > I would, respectfully, go somewhat further. The "fairness" of a trial is not limited to a fair outcome or verdict, although that, of course, is critically important. A fair trial also involves the fairness of the process in which it is to be conducted. No accused should have to face his trial in an ongoing torrent of unfair publicity. No judge or jury should have to strain to banish unfair and unsupported publicity from their minds so that they can reach an impartial verdict based on the evidence. Fairness in a trial involves, in some measure, the impartiality and serenity of the atmosphere in which the trial is conducted.
>
> …
>
> **96** What is in issue in this case is not the impact of the publication of information presented at a bail hearing or at a preliminary inquiry but the impact of permitting access to information that was presented to a court in a proceeding even further removed from a trial, one at which an accused or a potential accused had no right to be heard. In light of the *ex parte* nature of the process for obtaining search warrants or similar authorizations, the concerns that the Supreme Court had with respect to stigmatizing an accused with untested and one-sided prejudicial allegations apply with even greater force.

[60] Counsel for Messrs. James and Lenz point out the foregoing excerpts are particularly apt with respect to their clients who they maintain have already had to face the public release of large volumes of information regarding allegations against them.

[61] However, it must not be forgotten that the public also has an interest in there being a fair and independent process involving the investigation and prosecution of criminal complaints. Part of that public interest is met through the open court principle and the freedom of expression enshrined in s. 2(b) of the *Charter*.

[62] Having considered the impacted interests, I find that any risk to the right to a fair trial, and the ability to make full answer and defence would not be materially affected by unsealing, under the circumstances of this case, including having regard to information already in the public domain.

Political Impact

[63] Here I would note the use of the word “political” was presented in a way not necessarily implying only partisan interests, but rather the use of the word in its broader sense, all of which could constitute use of the information for an improper purpose falling under s. 487.3(1)(a) of the *Criminal Code*.

[64] Counsel opposing unsealing submitted that disclosure of the ITO could be used for improper political purpose, given that this application, at the time it was heard, was made during a federal election campaign. Counsel submitted this could enable improper use of this information, particularly given what was characterized as the potentially political nature of the investigation involving, as it does, public officers, policies and practices of the Legislative Assembly. The federal election has now concluded thereby diminishing this specific aspect of the argument.

[65] Counsel for Mr. Lenz asserted that a prime example of improper political use was the release (only the day before the hearing of this application) of the LePard Report via a method counsel described as having been “leaked to the press”.

[66] Another example, mentioned earlier, was that apparently neither Mr. James nor Mr. Lenz agreed to his own response to the Speaker’s allegations being made public, the inference being that this could also be construed as use of the information for an improper purpose.

[67] Essentially, counsel opposing the application maintain it is this very lack of control over sensitive information, having a significant political dimension, making its way into the public domain, and thereafter potentially being misused, arguing against release of the ITO over concerns that this information would likely suffer the same fate of improper political use.

[68] It should not be overlooked that each of Messrs. James and Lenz have themselves at other times made responses to the allegations against them, fully intending that they be publicized. Mr. James has, for example, publicly invited an even more fulsome release of information that he has provided in response to the allegations against him (see Appendix L of Exhibit #3), and Mr. Lenz has more recently given a lengthy media interview following his resignation.

[69] To the extent that it may bear on this application, and based on the information at hand, I am unable to make any specific determination as to whether any of the reports or other cited material were released appropriately or otherwise. Regardless, they are now in the domain of public knowledge, some of them in redacted format.

[70] There is no question that the subject matter of these proceedings has a distinct political dimension, the high profile of which has been further amplified by the public release of a great deal of information already. I must be mindful of that environment as I consider the impact of unsealing on the risk to the administration of justice, including any impact on the reputations, privacy, or fair trial rights of individuals.

[71] On the whole, and on the basis of the evidence presented, while unsealing and dissemination to meet the needs of transparency in judicial process may add to the existing controversy to a degree, I am unconvinced as to any sufficient evidentiary basis for concern that it would result in the information being used for an improper purpose, including any purpose that could be described as political. Disclosure, balanced and appropriate to the circumstances and reflecting the open court principle, applying the *Dagenais/Mentuk* test, by its very nature invites public scrutiny and commentary as to judicial proceedings. That is its purpose.

Timing of Release

[72] The overarching submission of the Crown and police is not that the order cannot ever be unsealed; rather that now is too soon to do so. Cases cited as examples included *R. v. Eurocopter Canada Ltd.*, [2001] O.J. No. 1592 and *National Post Co. v. Ontario*, [2003] O.J. No. 2238.

[73] In *Eurocopter,* at paras. 17 to 21, the Ontario Superior Court of Justice ruled it inappropriate to unseal any information relating to the warrant, including even a partial disclosure through summaries or by editing, pursuant to s. 487.3(3). Based on the filed police affidavit, the Court found that the ends of justice would be subverted by the disclosure for reasons, pursuant to s. 487.3(2), that the disclosure of the information would compromise the nature and extent of the investigation and it would prejudice the interests of an innocent person.

[74] In *National Post,* the Court summarized its earlier findings to not unseal the material, until the police investigation was substantially complete, at para. 1:

> …In particular, I expressed the concern that in light of the complex and ongoing investigation requiring the analysis of a voluminous amount of material; the fact that disclosure of the information contained in the affidavits would have the very real potential to undermine the very object of the investigation; the fact that certain individuals under investigation should not be aware of other individuals under investigation as that knowledge could cause great mischief; and the fact that there was the potential of prejudicing the reputations of innocent individuals due to the wide scope of the investigation and the numerous targets of the investigation-that access must be denied. …

[75] On the issue of timing, however, there is no entitlement, per se, to a sealing order pending completion of a police investigation. Rather, the presumption of openness arises immediately upon execution of the authorization to search, and the matter must thereafter be assessed contextually. This was discussed by the Ontario Superior Court of Justice in *HMTQ v. Minassian*, 2019 ONSC 4455 at para. 63:

> [63] Secondly, the case authority is clear that delayed reporting of court proceedings is still an infringement of free expression and the general principle that all court proceedings should be open to the public. The defence argues that there is no particular reason why the press needs to report this information today, as opposed to months from now when the trial starts. That is true. But, the openness of the court process is not based on timing. It is by its very nature, always open.

[76] As will be seen, to the extent that redactions to the ITO can address the risk, I do not see anything to be gained by delayed reporting that cannot be addressed at the current time through appropriate redactions.

[77] There is no question that the allegations against Messrs. James and Lenz, and their responses in turn, have taken on a publicly adversarial tone. But this should not in or of itself constitute a basis to entirely deny this application or rebut the strong presumption of openness, particularly where measures can be taken through appropriate redactions and other safeguards associated to the trial process, to properly balance the interests in freedom of expression against the risks to protected rights. Were that not the case, it would mean that the open court principal would be frustrated any time a matter presented with a high public profile during an ongoing police investigation.

[78] I am mindful of the challenges inherent in this contextual balancing, as noted by Fish, J., in *Toronto Star*, *supra*:

> **8** The *Dagenais/Mentuck* test, though applicable at every stage of the judicial process, was from the outset meant to be applied in a flexible and contextual manner. A serious risk to the administration of justice at the investigative stage, for example, will often involve considerations that have become irrelevant by the time of trial. On the other hand, the perceived risk may be more difficult to demonstrate in a concrete manner at that early stage. Where a sealing order is at that stage solicited for a brief period only, this factor alone may well invite caution in opting for full and immediate disclosure.

[79] Postmedia submits the material, including the ITO, should be released un-redacted or, in the alternative, in a form redacted to the Court's satisfaction.

[80] Messrs. James and Lenz submit the material should remain sealed.

[81] Crown and the police submit the material should remain sealed, but later provided to the court a CD comprised of a suggested version of a further redacted ITO (redacted differently than the redacted version filed as sealed Exhibit #1) for the Court to review for possible release, should there be a determination in favour of limited

unsealing. I have directed the Clerk of the Court that this CD and accompanying cover letter be marked as sealed Exhibit #4.

[82] Based on a careful and contextual weighing and balancing, I conclude there is sufficient evidence upon which I am satisfied that unsealing of the material, un-redacted, would subvert the ends of justice by posing a real and substantial risk to the administration of justice, such that it outweighs the importance of access. The salutary effect of the sealing order, namely protecting the integrity of an ongoing, complex investigation outweighs the deleterious effects, including diminution of freedom of expression and the open court principle. To that extent, the application to unseal in un-redacted format is disallowed.

[83] However, a reasonable and proportionate alternate measure exists, namely appropriate redaction of the ITO and related material, to reduce that risk, such that the sealing order would, to that extent, no longer be necessary. On that basis, the deleterious impacts of such a redacted release would be outweighed by the salutary effects on the freedom of the press and the open court principle, which would under those circumstances be only minimally impaired.

[84] I find that unsealing of a redacted ITO would stigmatize and impact the protected rights of innocent parties and individuals, including Messrs. James and Lenz only minimally, if at all, and those impacts are outweighed by the salutary effects of such unsealing, namely the promotion of those rights enshrined within the open court principle and s. 2(b) of the *Charter*.

[85] I would only add further that unsealing, but only to a limited degree, on the basis of protecting the ongoing investigation would not, in my view, constitute conferring an advantage to the police, but rather the retention of safeguards, the absence of which would leave open the very real prospect of interference by anyone who police believe might be so inclined.

[86] The ITO and related Orders will be released in the redacted format that was provided to the Court following the hearing of the application, and marked for the purposes of this hearing as sealed Exhibit #4.

[87] This decision shall be stayed from taking effect until twelve o'clock noon on Friday November 22nd to facilitate any party wishing to file an application for its review.

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The Honourable Judge G.S. Gill
Provincial Court of British Columbia