CANADA
PROVINCE OF NOVA SCOTIA
COUNTY OF COLCHESTER

IN THE PROVINCIAL COURT OF NOVA SCOTIA

In the Matter of an Application to Vary a Sealing Order, *Criminal Code* s. 487.3

BETWEEN:

Canadian Broadcasting Corporation, Canadian Television Network, Global News, The Canadian Press, Globe and Mail, Post Media, Halifax Examiner, and Saltwire

-Applicants

-and-

Her Majesty the Queen in the Right of Canada (Canada Border Services Agency)
and
Her Majesty the Queen in the Right of Nova Scotia (Royal Canadian Mounted Police)

-Respondents

Respondents' Brief of Law – "Other Sufficient Reason"

Mark Covan and Scott Millar
Public Prosecution Service of Canada
Atlantic Regional Office
Suite 1400 Duke Tower
5251 Duke Street
Halifax NS
B3J 1P3

Shauna MacDonald and Mark Heerema
Public Prosecution Service of Nova Scotia
Public Prosecution Service of Nova Scotia
700-1625 Grafton Street
Halifax NS
B3J 0E8

Counsel for the RESPONDENTS

David Coles, Q.C.
Boyne Clarke LLP
99 Wyse Road Suite 600
P.O. Box 876 Dartmouth Main
Dartmouth NS
B2Y 3Z5

Counsel for the APPLICANTS

1. Evidence at the *ex parte in camera* hearing on October 27, 2020 revealed that certain redacted information contained within the first (7) ITOs has been determined through investigation to be inaccurate.

2. Although the material was redacted on the basis of an ongoing investigation, the investigation has progressed to the point where its release would no longer compromise it; however, the investigation is not at the point where the erroneous information can be corrected or properly contextualized publicly.

3. The Crown argues that s.487.3(2)(b)(iv) applies as a basis for maintaining a *temporary* redaction until such time as the investigation is at a stage where either context and accurate information can be disclosed, or a proper consideration of fair trial rights is made.[1]

4. Section 487.3(2)(b)(iv) provides that an order prohibiting access may be made on the ground that the ends of justice would be subverted by the disclosure "for any other sufficient reason". "Any other sufficient reason" is a residual category which contemplates a basis for redaction where the enumerated grounds do not apply. As noted in **R. v. Vice Media Canada**, 2016 ONSC 1961, varied on appeal for other reasons at 2017 ONCA 231, aff'd at [2018] S.C.J. 53 ["Vice Media"]:

> The range of circumstances that can justify a finding that the ends of justice would be subverted is open ended. While 487.3 (2) sets forth four specific bases, it also provides that such a finding can be made "for any other sufficient reason". Before making a sealing order, however, the justice must be satisfied that the reason for the order "outweighs in importance the access to the information. (para. 56)

[1] Fair trial rights have not been advanced as a basis for redaction as no charges have been laid. Should any type of charges result from the ongoing investigation, the Crown submits notice to affected parties and a fulsome consideration of the issue is appropriate.

5. Examples of what may constitute "other sufficient reason" under s. 487.3 have been rarely considered in case law.[2] One notable exception is reliance on this residual ground to ensure the fair trial rights of an accused, as in the case of **MacDonnell c. Flahiff**, 157 D.L.R. (4th) 485, 123 C.C.C. (3d) 79 (Que. C.A.), leave dismissed [1998] S.C.C.A. No. 87 [Flahiff]. There the Quebec Court of Appeal considered an application by accused persons to quash an order allowing access to search warrants wherein information obtained from a police agent and accomplice was referenced.

6. The Court found the material to be highly prejudicial, noting that it would "unfairly colour the trial they may have to face if they are committed to trial following their preliminary inquiry. If they are discharged at preliminary inquiry, the publication would have been even more unfair." (**Flahiff**, *supra* para. 26)

7. Referencing the ability of the accused to seek various publication bans during the conduct of the case through the judicial process, the Court found that given the nature of the information contained in the affidavit "it seems to me there ought to have been sufficient reason to prohibit publication of an affidavit containing hearsay evidence of an informer and accomplice that has not even been tested by cross-examination. It seems to me incongruous that the media should now be entitled to publish hearsay evidence of an informer and an accomplice on which he cannot now be cross-examined, while the media can be prevented from publishing his evidence at preliminary inquiry when he can be cross-examined and where he is under oath." (**Flahiff**, supra para. 30)

8. The Court found that no evidence beyond an examination of the information to obtain itself was required to consider the issue. (**Flahiff**, supra par. 29)

[2] The language of "for other sufficient reason" is also found under s. 537(1) of the Criminal Code (powers of a justice to adjourn and change the venue of a preliminary inquiry) and 672.5(13.1) (power of a Review Board to adjourn a hearing)

9. The Court went on to consider trial fairness in the context not only of a proper outcome, but the process in which it is to be conducted. They noted that "no accused should have to face his trial in an ongoing torrent of ***unfair publicity***" (**Flahiff**, *supra* para. 42) [Emphasis Added]

10. A consideration of fair trial rights was also conducted in **Vice Media**. Unlike **Flahiff**, the accused was not present at the hearing, nor was anyone present to protect his interests. The Court, relying on Justice Iacobucci in **Mentuck**, considered it the obligation of the Crown and Court to consider his fair trial interests.

11. The Crown argues that the underlying rationale of **Flahiff** can be effectively applied to the situation in the case at bar. Central to the discussion in **Flahiff** was the nature and quality of the evidence of a police informant and co-conspirator seeking to derive a benefit from Canadian and American authorities through his cooperation. In other words, he was a true *Vetrovec* witness. The Court commented on the lack of testing of the evidence at the search stage, and differentiated between it and the rigours that come with testing credibility through cross-examination and judicial cautions.

12. In other words, given the nature of the information, the Court was alive to the need for judicial scepticism as to the veracity of it.

13. Here the Court has evidence that information contained within the ITOs is now believed to be inaccurate. This is of no surprise: this information was obtained less than 24 hours after the shootings. Now, more than 6 months later, the investigation has progressed to the point where there is a more complete understanding of the subject matter in question.

14. The Crown argues that the ends of justice will be subverted through the release of inaccurate information because investigators are unable to provide correct information

and the context within which to understand the events in question. No core value is achieved through allowing access to information that is false at a time when it cannot be corrected.

15. The Court in **Postmedia Network Inc.,** 2019 BCPC 267 recognized the impact that release of details in an ITO has, noting the following:

> 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**. (para. 32) [Emphasis added]

16. Further, to the extent that inaccurate information involves any information about innocent third parties, the Crown argues that it is incumbent on the Court to require notice to them, in order that a fair consideration of the impact on their Charter rights can be fulsomely explored.

17. The rights of an innocent third party seem to be particularly engaged when the Court considers authorizing the release of information about them which the Court has an evidentiary basis to believe is false and could be injurious to their reputation and wellbeing.

18. Fundamentally the criminal trial process is a search for the truth. Allowing for the premature release of inaccurate information flies in the face of this principle. It can serve only to confuse and inflame the very public that the open court principle is meant to serve through information and education. The inaccuracies should remain temporarily redacted, until such time as they can be corrected in a public forum. This takes nothing

away from the value of debate and engagement, and incorporates the fairness that is fundamental to criminal justice.

All of which is respectfully submitted,

Shauna MacDonald

Mark Heerema