CITATION: R. v. Canadian Broadcasting Corporation, 2008 ONCA 397
DATE: 20080521
DOCKET: C46754 & C46778

COURT OF APPEAL FOR ONTARIO

WINKLER C.J.O., SHARPE and JURIANSZ JJ.A.

IN THE MATTER OF an application for *certiorari* brought by the Canadian Broadcasting Corporation and Sun Media Corporation for an order quashing the decision or decisions of Justice of the Peace Taylor rendered on or about June 8, 2006, and for an order quashing the decision or decisions of Justice of the Peace Glover rendered on or about April 9, 2006, sealing search warrant materials, including the information or informations to obtain the warrants and the sealing orders themselves relating to an investigation into the murder of eight individuals whose bodies were located near Shedden in Southern Ontario.

IN THE MATTER OF an application for an order in the nature of *mandamus* brought by the Canadian Broadcasting Corporation and Sun Media Corporation requiring the Ontario Court of Justice to forthwith unseal the warrants, the informations to obtain the warrants, the sealing orders and any other documents relating to the search warrants that were executed in the City of Winnipeg and at the property of Wayne Kellestine located at 32196 Aberdeen Line, Dutton-Dunwich, relating to an investigation into the murder of eight individuals whose bodies were located near Shedden in Southern Ontario.

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

and

CANADIAN BROADCASTING CORPORATION

Respondent (Applicant)

and

BRETT GARDINER

Appellant (Respondent/Intervener)

AND BETWEEN:

HER MAJESTY THE QUEEN

Respondent

and

BRETT GARDINER

Respondent on Cross-Appeal
(Respondent/Intervener)

and

CANADIAN BROADCASTING CORPORATION and SUN MEDIA CORPORATION

Appellants (Applicants)

Christopher Hicks and Bella Petrouchinova for Brett Gardiner

Ryder Gilliland for CBC and Sun Media

Robert W. Hubbard and Joseph Perfetto for the Crown

Heard: February 12, 2008

On appeal from the judgment of Regional Senior Justice Lynne C. Leitch of the Superior Court of Justice dated January 29, 2007, with supplementary reasons dated February 9, 2007, reported at [2007] O.J. No. 301 and [2007] O.J. No. 590.

JURIANSZ J.A.:

[1] In April and June 2006, five search warrants were issued and executed in connection with the police investigation into the deaths of eight alleged members of the Bandidos Outlaw Motorcycle Gang. The search warrants and the information used to obtain them were sealed from public view.

[2] The Canadian Broadcasting Corporation and Sun Media Corporation ("the media") applied for orders to quash or vary the judicial orders pursuant to which the warrant materials were sealed. Four of the individuals who were originally charged with

offences relating to the warrants intervened and requested that the media's application be dismissed. The Crown also opposed the application.

[3] The application was heard on October 17, 2006 by Leitch R.S.J. In reasons dated January 29, 2007, with supplementary reasons dated February 15, 2007, the application judge granted the media's application to the extent of ordering that specified portions of the warrant materials be unsealed. The application judge ordered that sealing orders should continue in force with respect to the remainder of the warrant materials.

[4] Two separate appeals were taken from the application judge's order: one by Brett Gardiner and the other by the media. On March 8, 2007, this court imposed a stay at Gardiner's request and ordered that the materials are to remain sealed pending appeal.

[5] Gardiner is among six persons currently awaiting trial on charges of first degree murder in connection with the eight deaths. He is the only one who appeals from the application judge's order. Gardiner contends that the application judge erred in releasing any portion of the search warrant materials. His primary position is that the original sealing orders should be restored. The media also appeal the application judge's order. The media take the contrary position that the application judge's sealing order is overbroad.

[6] I would dismiss both appeals. Gardiner fails, in my view, to advance any basis for restoring the original sealing orders. In disposing of the media's appeal, I first find that the application judge's reasons are not adequate to permit consideration and disposition of this appeal on its merits. In the end, however, I propose to dismiss the media's appeal because a judge of the Superior Court has now been assigned to the upcoming trial of the appellant Gardiner and his co-accused and he has since issued an order banning publication, broadcast and Internet posting of all pre-trial materials.

[7] I first summarize the facts giving rising to the appeals and the reasons of the application judge before explaining my reasons for dismissing the appeals.

Factual Background

[8] On April 8, 2006, the bodies of eight men were found in four abandoned cars near Shedden. Over the next several weeks, eight individuals were arrested in connection with the deaths. The appellant Gardiner and five others were each charged with eight counts of first degree murder. Two other individuals were both charged with eight counts of accessory after the fact to murder.

[9] The day after the discovery of the bodies, on April 9, 2006, Justice of the Peace Glover issued a warrant authorizing the search of a farm property near where the bodies were found ("Glover warrant"). The Glover warrant includes three appendices to the warrant to search and the information to obtain. These appendices provide a description of the things to be searched, a description of the offences, and the grounds for believing that the search will afford evidence of the offences.

[10] On June 8, 2006, Justice of the Peace Taylor issued four related warrants authorizing the search of three homes and a vehicle in Winnipeg ("Taylor warrants"). The Taylor warrants are found in one voluminous document, which consists of multiple appendices to the informations to obtain and multiple appendices to each of the four warrants to search, including a 189-page affidavit setting out the grounds to believe the searches will afford evidence of the offences.

[11] The affidavits sworn in support of the Glover and Taylor warrants include a request that the warrants, informations to obtain, and any related documents be sealed. As noted by the application judge at para. 35 of her reasons, Justice of the Peace Glover issued an order sealing only the affidavit setting out the grounds for the warrant. Notwithstanding the limited terms of her sealing order, all of the materials relating to the Glover warrant were sealed, as was the sealing order itself. As further noted by the application judge at para. 36, Justice of the Peace Taylor's order directed that "the packet and its contents (which according to an asterisk are the contents of the packet and all related documents including reports and returns) are to be kept in a place where the public has no access."

[12] Section 487.3 of the *Code* authorizes a judge or justice issuing a search warrant under the *Code* to make an order prohibiting access to and disclosure of any information relating to the warrant. Subsections (1) and (2) of this provision establish the following analytical framework that is to govern an application for a sealing order:

> 487.3 (1) A judge or justice may, on application made at the time of issuing a warrant under this or any other Act of Parliament …, make an order prohibiting access to and the disclosure of any information relating to the warrant, production 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 ground referred to in paragraph (a) outweighs in importance the access to the information.
>
> (2) For the purposes of paragraph (1)(a), an order may be made under subsection (1) on the ground that the ends of justice would be subverted by the disclosure
>
> > (a) if disclosure of the information would
> >
> > > (i) compromise the identity of a confidential informant,

> (ii) compromise the nature and extent of an ongoing investigation,
>
> (iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used, or
>
> (iv) prejudice the interests of an innocent person; and
>
> (b) for any other sufficient reason.

[13] Subsection 487.3(3) empowers the judge or justice to impose terms or conditions on the order restricting access, including terms that speak to the duration of the order and terms that permit the partial disclosure of a document:

> (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).

The Application to Unseal the Warrant Materials

[14] By way of an amended notice dated October 2, 2006, the media brought an application for *certiorari,* seeking to quash or vary the sealing orders imposed by Justices of the Peace Glover and Taylor, as well as for an order in the nature of *mandamus* seeking to require the Ontario Court of Justice to unseal all of the search warrant documents relating to the warrants and to provide public access to them.

[15] As noted above, four of the individuals charged with the related offences intervened on the media's application and requested that it be dismissed. In the alternative, the interveners asked that any order unsealing the warrants provide that there be no access until the completion of the proceedings. The Crown similarly took the position that the application be dismissed without prejudice to the application being

brought again after the conclusion of the trials of all accused. The Crown in the alternative sought an order requiring that edited copies of the affidavits be made available to the public at the end of the trial of all accused. In the further alternative, the Crown proposed that the affidavit material be unsealed for the purposes of permitting the Crown to edit the material (reviewable upon application to the court) and that the edited copy be publicly available on the condition that the content not be published until the completion of all trials.

[16] At the hearing on October 17, 2006, the Crown did not provide the application judge with a specific rationalization as to why the various portions of the warrant materials should remain under seal. The Crown did disclose an edited version of the sealed materials to defence counsel, but not in time to allow defence counsel the opportunity to review the disclosed materials prior to the hearing. The edited version was not made available to counsel for the media. As a result, the parties advanced submissions about the legal principles to be applied on an application to quash or vary a sealing order, but they did not advance submissions about how those principles should be applied to the specific portions of the sealed warrant materials in issue.

Application Judge's Decision

[17] The application judge observed that *Toronto Star Newspapers Ltd. v. Ontario* (2005), 197 C.C.C. (3d) 1 at paras. 5, 7 (S.C.C.) makes it clear that the *Dagenais/Mentuck* test sets forth the criteria that govern the discretionary decision to impose a sealing order under s. 487.3(1). That test, as stated in *R. v. Mentuck* (2001), 158 C.C.C. (3d) 449 at para. 32 (S.C.C.), provides:

> 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.

[18] The application judge concluded at para. 40 that the justices of the peace committed errors of law on the face of the record because they failed to apply this test properly. In particular, she concluded that they failed to consider the second part of the first step of the *Dagenais/Mentuck* test, namely, whether there were reasonable alternative measures that would have prevented a serious risk to the proper administration of justice short of a complete and indefinite sealing order. The application judge observed that this part of the *Dagenais/Mentuck* test is also a requirement of s. 487.3(3).

[19] Having found an error of law on the face of the record, the application judge held that she must apply the *Dagenais/Mentuck* test and the provisions of s. 487.3(3) in determining what orders the justices of the peace should have made. On this question, she received no assistance from the parties who simply agreed that the sealed material should be provided for her review. She commented at para. 49:

> On this application counsel did not make any submissions on the proper editing or redacting of information from the search warrants. The respondents/interveners had no opportunity to do so because they had just received the materials in issue. Therefore I have undertaken my review of the sealed material without the benefit of such submissions.

[20] After reviewing the sealed materials on her own in chambers, the application judge found that some of the warrant materials should be unsealed and other portions should remain sealed. She ordered that the Glover and Taylor warrants be unsealed to the extent of disclosing the description of the things to be searched for, the description of the offences, as well as specified paragraphs of the appendices to the warrants that set out the police observations of the victims and the crime scene. She ordered that the remainder of the warrant materials should remain sealed.

[21] The application judge justified the continued sealing of the remainder of the Glover warrant materials on the grounds specified in s. 487.3(2)(a)(ii) and (iv) of the *Code* (*i.e.*, disclosure would compromise the nature and extent of an ongoing investigation and prejudice the interests of an innocent person). She also justified the continued sealing by reference to privacy rights that must be respected pursuant to s. 193(1) of the *Code* and by a finding of a risk to the fair trial rights of the accused if the information were disclosed. In the latter respect, she noted at para. 50 that some of the evidence in the Glover information to obtain "can be characterized as evidence that would not be admissible at trial."

[22] The application judge justified the continued sealing of the remainder of the Taylor warrant materials on all of the above grounds, as well as on the grounds specified in s. 487.3(2)(a)(i) and (iii) (*i.e.*, that disclosure would compromise the identity of a confidential informant and that disclosure would endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used). Regarding the information in the Taylor warrants that the application judge found would risk compromising fair trial rights, she observed at para. 52: "some of the information is of a nature that it would not constitute admissible evidence at trial, some information is only the deponent's interpretation of events and communications outlined and some information is unique forensic evidence."

[23] The application judge did not indicate any more precisely the basis for her conclusion that the continued sealing order was justified on the specified grounds. She explained this lack of detail in her reasons as follows at para. 54:

> In order for these reasons to remain unsealed I have not outlined with particularity details relating to the grounds that I have relied on for making the sealing orders described above. I have concluded that if I were to do so, there would be no practical effect to the orders made.

[24] The application judge also considered whether there were reasonable alternative measures short of an indefinite sealing order. She was satisfied that the sealing order need only be in force until the conclusion of the trials or the final disposition of the charges on their merits, subject to further order of the court. She stipulated that her order unsealing portions of the search warrant should not take immediate effect, and allowed the Crown and counsel for the accused to make written submissions as to whether further editing was required.

[25] After Gardiner's counsel made additional submissions, the application judge released a supplementary decision in which she slightly modified her order as it relates to the Taylor warrants. In particular, she ordered that several items and phrases found in the description of the things to be searched be edited because of a risk to the accused's fair trial rights.

Analysis

1. Gardiner's Appeal

[26] The appellant Gardiner submits that the application judge erred in concluding that the justices of the peace committed an error of law on the face of the record. I cannot accept this submission. This court in *R. v. Ottawa Citizen Group Inc.* (2005), 75 O.R. (3d) 590 at para. 48, made it clear that the "failure to consider alternative measures short of a full-fledged non-access order amounts to an error of law on the face of the record. It ignores both the 'terms and conditions' language in s. 487.3(3) of the *Code*, which invites consideration of tailored non-disclosure orders, and the explicit language in the first branch of the *Mentuck* test."

[27] In my view, there is no basis whatsoever in the record to suggest that Justice of the Peace Glover considered measures other than a complete sealing order in respect of the affidavit supporting the information to obtain, or that Justice of the Peace Taylor had regard to reasonably alternative measures short of a complete sealing order of all of the warrant materials as is required by s. 487.3(3) and the *Dagenais/Mentuck* test.

[28] The appellant Gardiner advances the alternative submission that even if we conclude that the issuing justices erred in law, the application judge erred in finding that the release of the specified portions of the warrant materials would not unfairly prejudice

his right to a fair trial. In advancing this submission, the appellant relies on *R. v. Flahiff* (1998), 123 C.C.C. (3d) 79 (Que. C.A.), leave to appeal to S.C.C. refused, [1998] S.C.J. No. 87, as providing support for the general proposition asserted in his factum that "the information to obtain the warrant was unchallenged incriminating evidence, which could be nothing but extremely prejudicial".

[29] In my view, *Flahiff* does not stand for the general proposition that pre-trial publication of any information found in search warrant materials will necessarily prejudice an accused in a way that adversely affects the right to a fair trial. The search warrant documents in *Flahiff* included information obtained from "a police informer and accomplice, who had agreed to cooperate with Canadian and U.S. authorities with a view to reducing his own sentence. Most of the information is, of course, hearsay and, if true, it is highly incriminating [of the accused]" (at p. 87).

[30] Speaking for the court, Rothman J.A. stated: "It can hardly be doubted that a serious threat to the fairness of a trial would constitute a 'sufficient reason'" within the meaning of s. 487.3(2)(b) of the *Code* so as to justify an order restricting access to search warrant materials. He went on to say at p. 91 that trial fairness is not limited to a fair verdict, but also involves the fairness of the process in which the trial is 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.

[31] Rothman J.A. quashed the issuing justice's order, which granted a journalist's application for access to the search warrant documents without imposing restrictions on publication rights. Rothman J.A. granted access to the documents, but imposed a temporary ban on publication pending the completion of the trial.

[32] The type of information at issue in *Flahiff* is very different from the information released by the application judge in this case. Here, the disclosed information does not constitute incriminating evidence against the appellant Gardiner. The descriptions of police observations of the crime scene and the condition of the victims do not serve to implicate Gardiner in any way in these deaths. Furthermore, the nature of the descriptions cannot be said to be so graphic or shocking that potential jurors would be unduly affected thereby. Nor, more generally, would pre-trial publication of the disclosed information place irreversible ideas in the minds of potential jurors that would prevent them from being impartial at the trial, or that would make it impossible for them to distinguish between evidence heard during the trial and information acquired outside of the courtroom.

[33] For these reasons, I would dismiss the appellant Gardiner's appeal from the application judge's partial sealing orders.

2. The Media's Appeal

[34] The media's appeal in the present case is not susceptible to effective appellate review. There are two reasons for this. The first is the application judge's unwillingness to state with any particularity the details relating to the grounds she relied on for sealing the specified portions of the warrant materials. The second reason relates to the manner in which the parties proceeded on the *certiorari* application and on this appeal. In both instances, the parties made no specific submissions about how the particular content of the voluminous search warrant materials can be said to engage the grounds relied on by the application judge for imposing the partial sealing orders.

[35] The media appellants are not to blame for this state of affairs. They could not make specific submissions because they did not have access to even an edited version of the materials. Counsel for the appellant Gardiner had an edited version, which was received on an undertaking not to publish or otherwise distribute its content. However, he simply advanced the general argument – rejected above – that the public dissemination of any of the warrant materials would unduly prejudice the appellant's right to a fair trial.

[36] Of greatest concern is that the Crown did not identify the grounds upon which specific paragraphs in the warrant materials should be kept sealed. We are left with the approximately 30 pages of the Glover warrant materials and the approximately 400 pages of the Taylor warrant materials to review on our own without assistance from the parties and without the benefit of an analysis by the application judge. An appeal to this court is not a hearing *de novo* and proceeding in this way is not compatible with the appellate review function.

[37] Having said that, this court has nonetheless reviewed the Glover and Taylor warrant materials. We are able to speculate about what information the application judge may have concluded would compromise the identity of a confidential informant, or the nature and extent of an ongoing investigation, or endanger a person engaged in particular intelligence gathering techniques, or prejudice the privacy interests of an innocent person and/or the fair trial rights of the accused. However, each of these grounds raises its own issues and requires its own analysis.

[38] A brief examination of these grounds demonstrates the large measure of judgment involved in deciding whether or not a particular ground applies so as to justify an order restricting access to information found in the warrant materials.

[39] With regard to the need to protect the identity of a confidential informant referred to in s. 487.3(2)(a)(i), the Supreme Court of Canada has established that, aside from the innocence at stake exception, informer privilege is absolute: *Named Person v. Vancouver Sun*, 2007 SCC 43. Even so, judgment is required to identify what information might in fact compromise the identity of a confidential informant.

[40] Similarly, to assess whether disclosing information in search warrant documents would compromise the extent of an ongoing investigation under s. 487.3(2)(a)(ii), the mere fact that there is an ongoing investigation will not automatically result in a sealing order. Doherty J.A. made this point and discussed some of the factors to be considered in assessing whether a sealing order is justified on that basis in *R. v. Toronto Star Newspapers* (2003), 67 O.R. (3d) 577 at para. 26, affirmed (2005), 197 C.C.C. (3d) 1 (S.C.C.).

[41] Judgment must also be exercised in assessing the ground in s. 487.3(2)(a)(iii), which permits restricting access to information that would endanger persons engaged in particular intelligence gathering techniques. As Iacobucci J. said in *Mentuck* at p. 469, the court must consider the specificity of the information, the seriousness of the risk it poses, and to what extent the information may already be in the public realm.

[42] As well, judgment is required in assessing the ground in s. 487.3(2)(a)(iv) of protecting the innocent. The protection of the innocent does not always prevail over the public's right to know. In every case, all the pertinent rights and interests must be weighed and balanced, as Sharpe J.A. pointed out in *Episcopal Corp. of the Diocese of Alexandria-Cornwall v. Cornwall (Public Inquiry)* (2007), 278 D.L.R. (4th) 550 at para. 42 (Ont. C.A.).

[43] Finally, considerable judgment is called for in determining whether a sealing order is necessary to avoid prejudicing the fair trial rights of an accused. The typical concern is that potential jurors will be tainted by exposure to publicly-disseminated information about the case. This concern, where it legitimately exists, can usually be addressed by a publication ban rather than a sealing order.

[44] On our reading of the materials, without the benefit of submissions or particularized reasons of the application judge, it seems to us that there is much information that the application judge must have kept under seal solely on the basis of avoiding prejudice to fair trial rights. The application judge indicated that she gave consideration to the alternative of a publication ban rather than a sealing order and went on to state without elaboration that a publication ban would be inadequate. She suggested that, because some of the information in the Glover and Taylor warrants might not be admissible at trial, its disclosure might risk compromising the fair trial rights of the accused.

[45] In my view, the fact that information might be inadmissible at trial is not necessarily a sufficient ground for imposing a sealing order. The application judge's reasons are not adequate to enable us to understand why a publication ban could not have met the concern about the fair trial rights of the accused.

[46] The foregoing discussion illustrates that judgment and discretion are involved in imposing even a partial sealing order on search warrant materials. This court should not be called upon to exercise that judgment and discretion *de novo* on appeal without the

benefit of reasons or submissions. As I have observed, the manner in which this case proceeded calls for this court to perform an exercise that is incompatible with the appellate function.

[47] The Crown proceeded differently in *R. v. Toronto Star Newspapers Ltd.* (2005), 204 C.C.C. (3d) 397 (Ont. S.C.J.) per Nordheimer J. That case also involved a *certiorari* application brought by various media organizations to set aside a sealing order that sealed from public view the information used to obtain multiple search warrants. The different procedure the Crown used in that case enabled the court to deal with the matter efficiently and to indicate the basis of its decision.

[48] Before the hearing, the Crown reviewed the search warrant materials and redacted those portions about which it had specific concerns. The Crown prepared a table setting out its position in an organized format. The table contained three columns: the page numbers of the warrant material, the grounds for redacting any of those pages, and a description of the edited information. The Crown consented to a preliminary order permitting it to provide the actual sealing order and the edited version of the information used to obtain the warrants to each of the media applicants. The edited version and the table setting out the Crown's position provided the basis for the submissions to the application judge. To facilitate the judge's review of the material, the Crown provided him with a copy of the warrant materials, with the edited portions identified by highlighter, thus eliminating the need to compare the edited version with the original.

[49] The application judge then made specific rulings regarding each of the Crown's proposed edits, which are found in an appendix to his reasons. This appendix incorporates the table provided by the Crown and includes an additional column indicating whether the application judge accepted or rejected the Crown's proposed edits with a brief explanation of the basis for each decision. Had an appeal been pursued in that case, the appellate court could have reviewed each of these conclusions, deferring or interfering where appropriate.

[50] Turning back to the present case, it is important to emphasize that the actions that led to the problems facing the parties and the application judge began with the sealing orders issued by the justices of the peace and the way those orders were understood and implemented by court staff. The *Dagenais*/*Mentuck* standard, as codified in s. 487.3(1) of the *Code*, applies from the outset and should be kept in mind by the issuing justice when asked to impose a blanket sealing order on search warrant materials. I recognize that it may not be feasible for the issuing justice to parse the materials paragraph-by-paragraph before fashioning the terms of a sealing order at the time the warrant is issued. However, court staff should not withhold material from the public that is beyond the ambit of the sealing order, as appears to have been the case with the Glover warrant. In other words, court staff should not, as a matter of administrative practice, seal the terms of the sealing order itself, or seal information that is not subject to the terms of the order.

[51] Where a sealing order is imposed and an application to unseal warrant materials is commenced, some of the further problems encountered in this case can be avoided by the application judge taking firmer control of how the parties – primarily the Crown – proceed on the application. For example, at the outset, the judge should require the Crown to identify the grounds upon which it opposes allowing access to the specific portions of the warrant materials. The Crown should set out its position in an organized format, such as the table prepared by the Crown and incorporated in Nordheimer J.'s reasons in *Toronto Star*. This document should be provided to the other parties to allow them to make effective submissions. The Crown should provide an unedited copy of the warrant materials to the court, with the edited information identified by highlighting or otherwise, to clearly indicate what portions it seeks to have sealed.

[52] Preliminary orders may be required to decide what information is provided to the parties and on what terms they are to receive it. In the present case, it would have been preferable if the application judge had decided not to proceed with the merits of the application after learning that the parties had not received the edited information in time to make submissions on it.

[53] Placing the onus on the Crown to perform the burdensome task just described reflects the presumption that once a search warrant has been executed, the warrant and the information upon which it is based must be made available to the public unless it is demonstrated that the ends of justice would be subverted by disclosure of the information. The Crown, as the only party with access to all of the information, is in the best position to perform this task.

[54] The hearing must, of course, be tailored to the particular case. However, regardless of how the hearing proceeds, requiring the Crown to set out the alleged grounds for a sealing order ensures that there will be in place a starting point for resolving the issues at hand. This document will also prove helpful in dealing with procedural issues that might arise, including what material should be disclosed to other counsel to facilitate argument, on what basis such disclosure should be made, as well as whether some part of the hearing must proceed *in camera*.

[55] The document will also simplify the court's obligation to give reasons for its conclusions. In order to be susceptible to appellate review, the application judge's reasons should indicate the specific basis upon which particular portions of the warrant materials are to be kept under seal. This laborious task would be made much simpler if the court were able to indicate its disposition of each proposed redaction in an organized format such as that used by the court in *Toronto Star*. The use of such a format will also help to alleviate the concern expressed by the application judge in this case that the rendering of reasons might have the effect of making the sealing order ineffective.

[56] In some cases, the application judge may find that it is not possible to adequately explain the reason for sealing information without providing an analysis that reveals sensitive information. This concern does not, however, discharge the judge from the

obligation of providing sufficiently detailed reasons so that his or her decision is comprehensible by the parties and susceptible of appellate review. Where it is clear that the judge's reasons would disclose information that she concludes should be sealed, the judge may prepare and release a redacted version of her reasons. If the judge decides to take this course, it will be necessary to decide who will receive the unredacted version of the reasons, as well as when the unredacted reasons will become available to the public.

[57] By way of example, this court released redacted reasons in *R. v. E.W.M.* (2006), 223 C.C.C. (3d) 407. In that case, the court's release of its reasons would have "published" information subject to a publication ban issued at a bail hearing. The complete reasons were immediately provided to the parties and were made available to the public at the end of the trial.

[58] In the present case, I am of the view that the application judge's reasons and the parties' submissions are inadequate to enable us to effectively discharge the appellate review function. This court is unable to discern the justification for the grounds relied on by the application judge to impose a partial sealing order. We are thus unable to review her decision in a meaningful way: see *R. v Sheppard* (2002), 162 C.C.C. (3d) 298 (S.C.C.).

[59] This conclusion would usually result in the appeal being allowed, the decision being set aside, and the matter being remitted for redetermination. However, I would not allow the appeal but dismiss it. Were this court to allow the media's appeal because of the concerns identified about the inadequacy of the application judge's reasons, this disposition would have two undesirable effects.

[60] First, setting aside the application judge's order would have the effect of reinstating the broader sealing orders imposed by the issuing justices. Second, because we are not in a position to assess the merits of the partial sealing order imposed by the application judge, we would have to remit the matter to a judge of the Superior Court to hear the media's application afresh. Yet, as noted above, a judge of that court has now been assigned to the trial of the underlying charges and has issued an order banning publication of all pre-trial materials. Were we to allow the appeal and remit the application, the result would be that another judge would be called upon to render a decision that could interfere with the assigned judge's control of the trial proceeding.

[61] In my view, this court should therefore exercise its discretion to dismiss the media's appeal, with leave to recommence the *certiorari* application before the judge assigned to the trial of the appellant Gardiner and the co-accused.

"R.G. Juriansz J.A."
"I agree W. Winkler C.J.O."
"I agree Robert J. Sharpe J.A."

RELEASED: May 21, 2008