SUPREME COURT OF NOVA SCOTIA
Citation: *Doe v. Halifax Regional Municipality*, 2017 NSSC 17

Date: 20170124
Docket: Hfx Nos. 447302 and 447305
Registry: Halifax

Between:

John Doe and Jane Doe

Plaintiffs

v.

Halifax Regional Municipality c.o.b. The Halifax Regional Police Service, Constable Gary Bassol, and Constable Ashley Lewis

Defendants

v.

Canadian Broadcasting Corporation

Other Party

Judge: The Honourable Justice Jamie Campbell

Heard: January 20, 2017, in Halifax, Nova Scotia

Counsel: Wayne Bacchus and Igor Yushchenko for the Plaintiffs
Karen MacDonald for the Defendants
David Coles, Q.C., Allison Reid and Edgar Burns for the Other Party

Introduction

[1] This case is about how far the protections given to police informers can intrude upon the principle of an open court.

[2] Police work often depends on confidential informers. If their safety is compromised that is not only unfair but dangerous. It also has serious public policy implications. Not many people will likely be willing to offer information on a confidential basis if they sense that there is a risk that they will be thrown under the bus in the end.

[3] The principle of an open court is fundamental to the justice system in a liberal democracy. Justice is not administered behind closed doors and journalists serve a critical role in making sure that those doors remain open.

[4] When those principles collide, the judge does not look for a compromise by which the informer loses some of the protection of his or her identity and assumes some risk to allow for public scrutiny of the process. The identity of the informer must be protected, absolutely. That must be done in a way that impairs the rights of the public to full access to an open court only to the extent necessary to protect the identity of the informer. Any restriction that goes beyond what is needed to protect the informer's identity is an unwarranted restriction on the principle of an open court.

Facts

[5] While many cases are unusual in their own ways, the unusual aspect of this case is particularly relevant. It doesn't merely involve a confidential police informer as a witness. The confidential police informer is a party. His status as a police informer is not incidental to the case and does not arise tangentially. The case is about his status as a confidential police informer and how he says he was denied the protections to which he was entitled.

[6] It is not necessary to assume that the facts as set out in the pleadings are true. It has already been found that John Doe is police informer. The other allegations will eventually be tested in court. It is the nature of those allegations, whether or not they are proven to be true, that is significant.

[7] The Plaintiffs, now known as John Doe and Jane Doe have sued the Halifax Regional Municipality and two police officers. They allege that John Doe was a

confidential police informer whose identity was negligently disclosed by the two police officers. John Doe says that after his identity was disclosed he and his girlfriend, Jane Doe, who is also a Plaintiff, began receiving threatening phone calls and messages. John Doe says that after those incidents he was told by one of the police officers to leave Nova Scotia and relocate for his safety.

[8] John Doe is a confidential police informer. Jane Doe is not a confidential police informer. That determination was made after an *in camera* hearing held for the purpose of determining only whether John Doe was a police informer. No media or other counsel were entitled to attend. Following that hearing a case management meeting was held involving counsel for the Plaintiffs, counsel for Halifax Regional Municipality (HRM) and counsel for the Canadian Broadcasting Corporation (CBC), on behalf of the media. The purpose of that meeting was to consider the procedure for the second stage of the hearing. David Coles, Q.C., counsel for the CBC and his instructing solicitor provided an undertaking to the court agreeing that any confidential information received in the course of this second stage would be kept confidential. As it turns out, no further evidence was put forward by the Plaintiffs and no confidential information was disclosed. That is likely for the best in any event. The confidentiality of the identity of a police informer should be absolute and information that might lead to identification should not properly be shared even with legal counsel who agree to maintain the confidentiality of the material.

[9] The hearing on January 20, 2017 was to determine the scope of any confidentiality order. The motion was made under s. 37 of the *Judicature Act* and *Nova Scotia Civil Procedure Rule* 85.04. Section 37 provides the authority for a judge to exclude the public from the courtroom where it is in the interest of the proper administration of justice. Rule 85.04 permits a judge to order that court records be kept confidential if he or she is satisfied that it is in accordance with law to do so. That may include sealing a document or exhibit, requiring the prothonotary to block access to a recording of all or part of a proceeding, banning publication, or permitting a person to be referred to by a pseudonym.

Issues

[10] The issue is what, if any, confidentiality order should be imposed.

[11] The CBC says that the appropriate order in this case would be to limit publication by using a pseudonym for John Doe, and to protect his identity by having him testify either behind a screen or by video from another location. John

Doe is of course a pseudonym. Other than that the media should be entitled to report on what takes place during the course of the trial because the public has a right to know the facts that might give rise to an obligation for HRM to pay damages. The CBC asserts that John Doe has not put forward any evidence to establish the risk to his safety if the case is reported on in this way.

[12] Both the Plaintiffs and HRM argue that the courtroom should be closed to the public during the trial of this matter and the court file should be sealed.

Informer Privilege

[13] The law protects the identity of police informers from being revealed in public or in court. The protection is for the benefit of the informer but also serves the objective of reassuring other potential informers that their identities will be protected. The protection is so important that once it is found to exist, as it has here with respect to John Doe, courts are not entitled to balance the benefit of the privilege against other considerations.[1] It does not depend on judicial discretion but is a "legal rule of public order by which the judge is bound."[2] Once the privilege has been found to exist the court is bound to apply it and to protect the informer's identity. "Indeed, the duty of a court not to breach the privilege is of the same nature as the duty of the police or the Crown."[3]

[14] The rule is absolute. The informer himself or herself cannot unilaterally waive the privilege. It belongs to both the Crown and the informer.

[15] Justice Bastarache in *Named Person v. Vancouver Sun* noted that the privilege is not only absolute and non-discretionary but extremely broad in its application. It applies to the identity of every informer, where the informer is present, is not present, or is a witness. It applies in criminal cases and in civil cases, like this one. It applies to documentary evidence and oral testimony. "*Any* information which might tend to identify an informer is protected by the privilege. Thus the protection is not limited simply to the informer's name, but extends to any information that might lead to identification."[4]

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[1] *R. v. Leipert*, [1997] 1 S.C.R. 281 (SCC), para. 12.
[2] *Bisaillon v. Keable*, [1983] 2 S.C.R. 60 (SCC), at p. 93.
[3] *Named Person v. Vancouver Sun*, 2007 SCC 43, at para. 21.
[4] Para. 26.

[16] The informer privilege rule has but one exception. It can be abridged if it is necessary to establish innocence in a criminal trial.

> "Once a trial judge is satisfied that the privilege exists, a complete and total bar on any disclosure of the informer's identity applies. Outside the innocence at stake exception, the rule's protection is absolute. No case-by-case weighing of the justification for the privilege is permitted. All information which might tend to identify the informer is protected by the privilege, and neither the Crown nor the court has any discretion to disclose this information in any proceeding, at any time."[5]

[17] The informer privilege is not something to be trifled with. It involves a person's safety and an important matter of public policy. A judge is not allowed to order compromises with respect to that person's safety in order to accommodate other highly valued principles. The privilege is not only with respect to publication of information but involves the disclosure of information that might lead to identification of the informer.

[18] Under such a robust privilege there is then no obligation on the part of an informer to lead evidence to establish the nature or extent of the risk faced in the event of a disclosure. The protection is not calibrated to the level of perceived risk.

The Open Court Principle

[19] It is beyond question that the principle that courts should be open to the public and the media is fundamental. It is a "broad principle of general application to all judicial proceedings."[6]

[20] The Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corp.*[7] and *R. v. Mentuck*[8] developed a test to balance freedom of expression through an open court and other important rights and interests. The test has two parts that involve minimal impairment of the right and proportionality. The test has a wide area of application but as the Supreme Court noted in *Vancouver Sun* it should not be extended beyond its scope. The *Dagenais/Mentuck* test applies to the

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[5] *Vancouver Sun*, para. 30.
[6] Para. 34.
[7] [1994] 3 S.C.R. 835 (SCC).
[8] [2001] 3 S.C.R. 442 (SCC).

consideration of discretionary publication bans. “The informer privilege rule does *not* provide a trial judge with a discretionary power to order a publication ban. Quite the contrary.”[9] The judge is bound to apply the ban.

[21] The open court principle is not balanced against informer privilege. The informer privilege is to be fully and absolutely enforced.

Scope of the Ban

[22] The judge has no discretion about applying the informer privilege rule. But to ensure that the open court principle is respected, the informer privilege should cover only information that “would in fact tend to reveal an informer’s identity.”[10] All other information should be able to be disclosed and published under the open court principle.

> In more practical terms, this will mean that a trial judge must have the authority to hold an entire proceeding *in camera* if informer privilege is found to be present; however, an entirely *in camera* proceeding should be seen as a last resort. A judge ought to make every effort to ensure that as much information as possible is made public, and that disclosure and publication are restricted only for that information which might tend to reveal the informer’s identity.[11]

[23] The issue then is the extent to which information can be heard in open court and published without compromising the informer privilege. In most cases the presence of a police informer will not cause the pall of secrecy to be cast over the entire proceeding. Only the information that would tend to identify the informer will not be disclosed. The issue is not publication but disclosure. The informer’s identity is not disclosed in open court with an obligation placed on the media not to report on it. The informer’s identity cannot be disclosed at all.

The Nature of This Case

[24] This is a civil action taken by John Doe and Jane Doe against HRM and the two police officers. The subject matter of the case is the privilege and whether or

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[9] *Vancouver Sun*, para. 37.
[10] Para. 40.
[11] Para. 41.

how it was breached. The privilege does not arise as an incidental part of the proceeding but is central to it.

[25] John Doe's identity must be protected. That protection is absolute. It has been argued that his identity has already been compromised by a media story about the case. John Doe cannot waive the privilege himself even by commencing a legal action disclosing information that might lead to his identity. The privilege goes beyond the interests of John Doe himself. There is a public interest in maintaining the privilege. As Justice Bastarache noted in *Vancouver Sun* the question of informer privilege will usually arise in the context of a trial where counsel seeks to cross-examine a crown witness about whether or not he or she has been a police informer. Where the person signifies his or her identity as an informer that would be different from a situation where the person came forward for the purpose of enforcing the confidential informer agreement. John Doe in this case, started the action because he asserts that the police have compromised his identity. That should in no way limit the entitlement to the protection of his identity.

[26] This case will involve evidence about how John Doe came to be a police informer, the information provided to the police, the manner in which his confidentially was alleged to have been breached, and the consequences for him of that alleged breach. John Doe and Jane Doe will likely each given evidence. It is very unlike a single witness in a criminal trial.

[27] Using a pseudonym for John Doe alone would be entirely inadequate. The protection is not against publication, such as the ban that is in place with respect to the identity of young people in Youth Justice Court. That protection is for their reputations not for their physical safety. Here, if the public can see John Doe in the process of giving evidence he will be known, despite the use of the pseudonym. Even if it can be said that the trial would not attract large numbers of people, having him testify in public would identify him publicly. It would amount to a serious compromise of the informer privilege.

[28] Similarly, if Jane Doe's identity is disclosed as the girlfriend of John Doe, John Doe will be identified as a police informer.

[29] The use of a screen or permitting evidence to be given by video link would not provide the kind of protection the privilege requires. Even if the person's face cannot be seen someone who is familiar with that person's voice can identify him or her. More importantly though the pieces of information that will come out in the course of the trial can be used to make strong inferences about the identity of John

Doe. Anyone sitting in the open courtroom could potentially make those inferences. In an open courtroom, even if the media published nothing, information would be disclosed, publicly, that would tend to identify John Doe as a police informer.

[30] If members of the public are permitted to attend the trial, there is no way to control who those members of the public might be. There is no practical way to limit what information those people share with others. A seemingly innocuous piece of information put together with other seemingly innocuous pieces of information could allow for inferences to be made even if John Doe were to give evidence in a way that masks his physical appearance and other distinguishing characteristics. It would not be reasonable to expect a trial judge during the course of the trial to monitor the aggregation of potentially identifying information. That would not be consistent with the nature of informer privilege.

[31] Even partially closing the courtroom to the public would not provide the kind of protection that the privilege requires. If the public were to be excluded and some representative media outlets were permitted to attend the trial to allow for some level of public information about the important issues at stake in the trial, with an order in place to prevent the media from identifying John Doe, that would not be enough. If the media were to report on the case and refrain from making any references that might tend to disclose the identity of John Doe that would offer him the same type of protection that is in place with respect to accused young people and witnesses in Youth Justice Court. In that situation, the media would make a judgment at the time of publication as to whether the disclosure of information would tend to identify the young person whose privacy interests are at stake. Informer privilege is not an issue of privacy. John Doe's personal safety would be put in the hands of a discretionary decision by the media as to what would or would not tend to disclose his identity. One media outlet might assume that the disclosure of a location, the nature of the offence about which information was given, the nature of the information that was given, the date on which the information was given, the manner in which the privilege was alleged to have been breached, or the kinds of damages alleged to have been suffered, would not disclose identity while another might conclude that the people who are most directly involved with the matter could readily determine the identity of John Doe from one or a combination of those things.

[32] Allowing media outlets to publish information that in their judgment would not disclose his identity makes the media the effective guardians of his identity.

The protections offered by informer privilege are far more robust than that would allow.

[33] The only form of order that will provide for protection of the disclosure of information that would lead to the identity of John Doe is one that requires the case to be conducted entirely *in camera*. The order will require that exhibits in the trial be sealed and that the prothonotary block access to the recording of the trial. I am not satisfied that a ban on the publication of information that has already been published or on the publicly filed pleadings in this matter is required.

[34] The Plaintiffs' motions are granted with costs to the Plaintiffs and HRM. If the parties are unable to agree on the amount of costs I will hear them on that matter.

Campbell, J.