SUPREME COURT OF NOVA SCOTIA

Citation: *Canada (Attorney General) v. Canada Revenue Agency*, 2018 NSSC 51

Date: 2018-03-08
Docket: CRH471920
Registry: Halifax

Between:

The Attorney General of Canada

v.

The Commissioner of Canada Revenue Agency

LIBRARY HEADING

Decision

Judge:	The Honourable Justice Michael J. Wood
Heard:	March 1, 2018 in Halifax, Nova Scotia
Written Decision:	March 8, 2018
Subject:	Charter of Rights and Freedoms – s. 2(b) – Freedom of Expression Courts – Open Court Principle and Sealing Orders
Summary:	Federal Crown applied for order under s. 462.48 of Criminal Code to require CRA to produce tax records in relation to ongoing investigation. Code does not provide for sealing of application record and Crown applied under court's common law jurisdiction to seal court file. Court directed hearing on issue of whether media were entitled to notice of the sealing order application.
Issues:	Was the Crown required to provide the media with notice of the application to seal the court file?

Result: Crown acknowledged that media should be permitted to challenge issuance and scope of sealing order but only after the fact. Used analogy of search warrant to support position that prior notice would harm administration of justice.

CBC argued that notice should be given under principles in *Dagenais* and *Mentuck.* It agreed that media notice should be redacted to remove information that might damage investigation or breach informant privilege.

Court rejected search warrant analogy because no danger of loss of tax records if prior notice. Applied open courts principle and concluded that prior notice to media should be provided. Noted that media had important role to play in assisting the court in the balancing of interests required by the *Mentuck* test. Administrative burden imposed on Crown by requiring notice and preparation of redacted materials is reasonable in light of onus on them to justify any restriction of public access to court records.

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Judge: The Honourable Justice Michael J. Wood

Heard: March 1, 2018, in Halifax, Nova Scotia

Counsel: Paul Adams and Suhanya Edwards,
for The Attorney General of Canada

David Coles QC and Alexandria Barnes (Articled Clerk),
for the Canadian Broadcasting Corporation

By the Court:

[1] The open court principle is fundamental to public confidence in the Canadian judiciary. Courts and judges must do their work in a manner that is accountable and transparent. People are entitled to know what was decided and on what basis. Court secrecy is only permissible when a clear justification can be demonstrated.

[2] This case raises the openness principle in the context of deciding when and to what extent the public is entitled to access court records. As is usually the case, the media is acting as representative of the public.

Background

[3] This matter arises out of an application by the Attorney General of Canada for an order under s. 462.48 of the *Criminal Code* requiring the Commissioner of Canada Revenue Agency to provide tax information in relation to an ongoing investigation. This order is only available for investigations into certain specified offences. These include money laundering and some offences under the *Controlled Drugs and Substances Act*. The nature of the application is described in subsection 2, which reads:

> (2) An application under subsection (1.1) shall be made *ex parte* in writing to a judge and be accompanied by an affidavit sworn on the information and belief of the Attorney General or a person specially designated by the Attorney General for that purpose deposing to the following matters, namely,
>
> (a) the offence or matter under investigation;
>
> (b) the person in relation to whom the information or documents referred to in paragraph (c) are required;
>
> (c) the type of information or book, record, writing, return or other document obtained by or on behalf of the Minister of National Revenue for the purposes of the *Income Tax Act* to which access is sought or that is proposed to be examined or communicated; and
>
> (d) the facts relied on to justify the belief, on reasonable grounds, that the person referred to in paragraph (b) has committed or benefited from the commission of any of the offences referred to in subsection (1.1) and that the information or documents referred to in paragraph (c) are likely to be of substantial value, whether alone or together with other material, to the investigation for the purposes of which the application is made.

[4] The Crown's application was made in January 2018. In addition to the production order, they applied to seal the court file on the basis that, if disclosed, it contained information that might identify a confidential informant or impair the integrity of the ongoing investigation. Unlike the situation with various investigatory warrants, the *Code* does not provide authority for an order to seal the s. 462.48 application materials.

[5] The Crown's application for a sealing order is based upon the Court's inherent common law jurisdiction over its own process.

[6] With respect to the application for a sealing order, I advised the Crown that notice to the media was required under the Court's guidelines for media access and publication bans as well as *Civil Procedure Rules 85.04* and *85.05*. These provide as follows:

> Order for confidentiality
>
> 85.04 (1) A judge may order that a court record be kept confidential only if the judge is satisfied that it is in accordance with law to do so, including the freedom of the press and other media under section 2 of the *Canadian Charter of Rights and Freedoms* and the open courts principle.
>
> (2) An order that provides for any of the following is an example of an order for confidentiality:
>
> (a) sealing a court document or an exhibit in a proceeding;
>
> (b) requiring the prothonotary to block access to a recording of all or part of a proceeding;
>
> (c) banning publication of part or all of a proceeding;
>
> (d) permitting a party, or a person who is referred to in a court document but is not a party, to be identified by a pseudonym, including in a heading.
>
> (3) A judge who is satisfied that it is in accordance with law to make an order excluding the public from a courtroom, under Section 37 of the *Judicature Act*, may make an order for confidentiality to aid the purpose of the exclusion.
>
> Notice of motion for confidentiality order
>
> 85.05 (1) A party who makes a motion for an order for confidentiality, or to exclude the public from a courtroom, must give reasonable notice to representatives of media, unless a judge orders otherwise.
>
> (2) The notice to media representatives may be given by using the service provided by all courts in Nova Scotia for giving notice to the media through the internet.

> (3) A judge who excepts a party from having to give notice to media representatives must file a report of the decision with the prothonotary at Halifax.
>
> (4) The prothonotary at Halifax must do both of the following with judges' reports of a decision to except notice to media representatives:
>
> (a) make the reports available for inspection and provide a copy on demand, unless the report itself is sealed;
>
> (b) respond to a person who asks about the number of reports that are sealed in a calendar year.

[7] The Crown objected to providing notice to the media of the application for the sealing order and requested the opportunity to make further submissions on that question. A hearing was scheduled for March 1, 2018, to address this issue and I directed that the media be given notice. The Canadian Broadcasting Corporation retained counsel and participated.

Positions of the Parties

The Crown

[8] The Crown acknowledged that the media was entitled to make submissions with respect to whether a court file should be sealed and, if so, on what terms. They argued that it should not be at the time of the initial application for the sealing order. They said after an order was granted the media could apply to challenge it, on notice to the Crown.

[9] The Crown's position is that to require advance notice of the request for a sealing order would defeat the *ex parte* nature of the application under s. 462.48 of the *Code* and potentially interfere with the ongoing investigation. Such media involvement was said to be impractical and contrary to the existing substantive law as set out in *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 SCR 175, and subsequent cases.

[10] *MacIntyre* dealt with access to search warrants and supporting material, which the Crown argued was analogous to the production order under s. 462.48 of the *Code*. If so, the principle from *MacIntyre*, that there should be no public disclosure of search warrant information prior to execution of the warrant, should be applicable.

[11] The Crown said that the *Civil Procedure Rules* in question were not applicable to criminal matters and should be limited to civil proceedings.

Canadian Broadcasting Corporation

[12] CBC argued that the *Civil Procedure Rules* should be interpreted as applicable to any request to seal a court file. Even if they are limited to civil proceedings, *Rules 85.04 and 85.05* simply represent a codification of the law and ought to govern any application to seal a file.

[13] CBC spoke of the role of the media in providing access to court processes and the accountability which this creates. It said that by having media participate in the initial application for a sealing order, the proper balance between the public interest in court openness and any risk to the administration of justice can be better assessed.

[14] Counsel for CBC acknowledged that protection of confidential informants and the integrity of an ongoing investigation are important and should not be undermined by any media involvement. He gave a number of examples where the media was able to participate in a meaningful way without the necessity that such information be provided to them.

[15] CBC also took issue with the Crown's position that media involvement on the initial application for a sealing order would be impractical. They pointed out that there was no evidence provided to support that assertion.

[16] The overriding position of CBC is that a production order under s. 462.48 is not equivalent to a search warrant because there is no risk the tax records will be lost if the existence of the application is disclosed prior to service of the order. They argue the Crown is seeking a discretionary common law sealing order, which represents an infringement of s. 2(b) of the *Canadian Charter of Rights and Freedoms,* entitling the media to notice of the application and the opportunity to make submissions prior to the order being granted.

Legal Principles

Open Courts and Sealing Orders

[17] In Canada, courts and their proceedings are presumed to be open to the public and media. This openness can only be restricted where a party seeking to do so can establish sufficient justification. The opening comments in the Supreme Court of Canada decision in *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, describe this fundamental principle on the following terms:

> 1 In any constitutional climate, the administration of justice thrives on exposure to light – and withers under a cloud of secrecy.

> 2 That lesson of history is enshrined in the *Canadian Charter of Rights and Freedoms*. Section 2(*b*) of the *Charter* guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.
>
> 3 The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.
>
> 4 Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice* or *unduly impair its proper administration.*

[18] In the context of publication bans, the Supreme Court of Canada developed a test which balanced the competing interests. In *R. v. Mentuck*, 2001 SCC 76, the Court framed that test as follows:

> … 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.

[19] This test applies to any discretionary order which would have the effect of infringing on the open court principle, even if the public or media do not participate in the proceeding. In those circumstances the hearing judge is still required to consider the *Charter* protected rights. The party seeking the ban bears the evidentiary and persuasive burden of justifying the order. On this issue the Supreme Court in *Mentuck* said:

> 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 matters of such public importance as the administration of justice.

[20] If there was any uncertainty as to whether the *Mentuck* principles were limited to publication bans or applied before charges were laid, this was conclusively resolved in *Toronto Star* where the Court said:

> 5 This criterion has come to be known as the *Dagenais/Mentuck* test, after the decisions of this Court in which the governing principles were established and refined. The issue in this case is whether that test, developed in the context of publication bans at the time of trial, applies as well at the pre-charge or "investigative stage" of criminal proceedings. More particularly, whether it applies to "sealing orders" concerning search warrants and the informations upon which their issuance was judicially authorized.
>
> 6 The Court of Appeal for Ontario held that it does and the Crown now appeals against that decision.
>
> 7 I would dismiss the appeal. In my view, the *Dagenais/Mentuck* test applies to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings. Any other conclusion appears to me inconsistent with an unbroken line of authority in this Court over the past two decades. And it would tend to undermine the open court principle inextricably incorporated into the core values of s. 2(*b*) of the *Charter*.

> 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.
>
> 9 Even then, however, a party seeking to limit public access to legal proceedings must rely on more than a generalized assertion that publicity could compromise investigative efficacy. If such a generalized assertion were sufficient to support a sealing order, the presumption would favour secrecy rather than openness, a plainly unacceptable result.

[21] The *Mentuck* test applies to the initial decision whether to grant a publication ban or sealing order, as well as any subsequent application to rescind or vary it. The party seeking to obtain or maintain the order will always have the burden to justify the restriction on public and media access (see *R. v. Esseghaier*, 2013 ONSC 5779, at paras. 52-56, and *Postmedia Network Inc. v. R.*, 2017 ONSC 1433, at paras. 8-9).

Search Warrants

[22] The Crown argues that a production order under s. 462.48 of the *Code* is analogous to a search warrant when considering whether to seal the court file. For this reason I will review how courts have treated requests to seal search warrant records.

[23] Search warrants are an important investigative tool for police. They will be granted where a judge or justice of the peace is satisfied that there are sufficient grounds for their issuance. The success of the warrant depends upon an element of surprise. If the target is aware that a search warrant will be executed there is a significant risk that the evidence being sought will be moved or destroyed. For this reason there is generally no public access to search warrant records prior to execution of the warrant. After execution, the presumption of public access arises.

[24] The Supreme Court of Canada dealt with access to search warrant records in *MacIntyre*. That case was decided before the *Charter*, but the Court concluded that once a warrant had been executed there was normally no justification to exclude the public from accessing the court records. Prior to execution the administration of justice justified the proceeding being conducted *in camera*.

[25] The rationale for distinguishing between the period before and after execution is the desire to protect the effectiveness of search warrants. This is demonstrated by the following comments from the *MacIntyre* decision:

> The search warrant in recent years has become an increasingly important investigatory aid, as crime and criminals become increasingly sophisticated and the incidence of corporate white collar crime multiplies. The effectiveness of any search made pursuant to the issuance of a search warrant will depend much upon timing, upon the degree of confidentiality which attends the issuance of the warrant and upon the element of surprise which attends the search.
>
> (at page 180)
>
> …
>
> That brings me to the second argument raised by the appellant. The point taken here is that the effective administration of justice would be frustrated if individuals were permitted to be present when the warrants were issued. Therefore, the proceeding must be conducted in camera, as an exception to the open court principle. I agree. The effective administration of justice does justify the exclusion of the public from the proceedings attending the actual issuance of the warrant. The Attorneys General have established, at least to my satisfaction, that if the application for the warrant were made in open court the search for the instrumentalities of crime would, at best, be severely hampered and, at worst, rendered entirely fruitless. In a process in which surprise and secrecy may play a decisive role the occupier of the premises to be searched would be alerted, before the execution of the warrant, with the probable consequence of destruction or removal of evidence. I agree with counsel for the Attorney General of Ontario that the presence in an open courtroom of members of the public, media personnel, and, potentially, contacts of suspected accused in respect of whom the search is to be made, would render the mechanism of a search warrant utterly useless.
>
> (at pages 187 – 188)
>
> …
>
> The 'administration of justice' argument is based on the fear that certain persons will destroy evidence and thus deprive the police of the fruits of their search. Yet the appellant agrees these very individuals (i.e. those 'directly interested') have a right to see the warrant, and the material upon which it is based, once it has been executed. The appellants do not argue for blanket confidentiality with respect to warrants. Logically, if those directly interested can see the warrant, a third party who has no interest in the case at all is not a threat to the administration of justice. By definition, he has no evidence that he can destroy. Concern for preserving evidence and for the effective administration of justice cannot justify excluding him.
>
> (at page 189)

[26] The distinction between public access before and after execution of a search warrant, and the underlying rationale for this distinction, was maintained by the Supreme Court of Canada in the post *Charter* decision in *Toronto Star* where the Court said:

> 20 Search warrants are obtained *ex parte* and *in camera*, and generally executed before any charges have been laid. The Crown had contended in *MacIntyre* that they ought therefore to be presumptively shrouded in secrecy in order to preserve the integrity of the ongoing investigation. The Court found instead that the presumption of openness was effectively rebutted *until* the search warrant was executed -- but not thereafter. In the words of Dickson J.:
>
> > ... the force of the 'administration of justice' argument abates once the warrant has been executed, *i.e.* after entry and search. There is thereafter a "diminished interest in confidentiality" as the purposes of the policy of secrecy are largely, if not entirely, accomplished. The need for continued concealment virtually disappears.... The curtailment of the traditionally uninhibited accessibility of the public to the working of the courts should be undertaken with the greatest reluctance. [pp. 188-89]
>
> 21 After a search warrant has been executed, openness was to be presumptively favoured. The party seeking to deny public access thereafter was bound to prove that disclosure would subvert the ends of justice.
>
> 22 These principles, as they apply in the criminal investigative context, were subsequently adopted by Parliament and codified in s. 487.3 of the *Criminal Code*, R.S.C. 1985, c. C-46. That provision does not govern this case, since our concern here is with warrants issued under the *Provincial Offences Act* of Ontario, R.S.O. 1990, c. P.33. It nonetheless provides a useful reference point since it encapsulates in statutory form the common law that governs, in the absence of valid legislation to the contrary, throughout Canada.

[27] In this decision the Court emphasized that the open court principle and the *Mentuck* test applied to all discretionary judicial orders limiting access to judicial proceedings, including applications to seal search warrant materials (para. 30).

Role of the Media

[28] The role of the media permeates all of the jurisprudence concerning open courts, publication bans and sealing orders. As in this case, they are the eyes and the ears of the public and provide the exposure to light on which the administration of justice thrives. It is invariably media representatives who seek to challenge the limits of publication bans and sealing orders. In doing so, they can bring a very important perspective when a discretionary order limiting public access to the court is under consideration.

[29] The *Toronto Star* decision illustrates the valuable contribution that media participants can make. In that case search warrants were issued by a justice of the peace and, after execution of those warrants, the Crown applied to have the records sealed on the basis that material in the file could identify a confidential informant and interfere with ongoing criminal investigations. The application was made *ex parte* . After receiving the submissions of the Crown, but prior to giving her decision, the judge received a request from media representatives to appear and make submissions. She denied the request and granted an order sealing the entire file for three months.

[30] The Ontario Court of Appeal (2003 CanLII 13331) found that the judge lost jurisdiction because she failed to give the media the opportunity to make submissions before the sealing order was granted. The Court described the value of media participation as follows:

> [14] The London Free Press, as a representative of the media, had a clear interest in the subject matter of the proceedings. A brief adjournment could have been allowed to permit counsel to make submissions on behalf of The London Free Press without in any way compromising the secrecy of the documents. The media has an important role to play in applications brought to prohibit public access to court records or to prohibit publication of court proceedings: *Dagenais, supra*, at pp. 867-68 S.C.R., pp. 309-11 C.C.C. The potentially positive role of the media is evident in this case. The sealing order granted in the Ontario Court of Justice was beyond what even the Crown now asserts. Had counsel for the media been given an opportunity to make submissions, at a minimum, counsel may have convinced the court that the proposed sealing order was too broad.
>
> [15] There was no good reason to deny The London Free Press an opportunity to make submissions. The only reason mentioned by Livingstone J., the availability of an appeal, is irrelevant to the question of whether The London Free Press should have been given an opportunity to be heard and is also wrong in law, since in fact The London Free Press did not have a right of appeal.

[31] When the Supreme Court of Canada issued its decision, it did not need to deal with the issue of loss of jurisdiction, however it said the following:

> 13 The Court of Appeal for Ontario held that Livingstone J. had exceeded her jurisdiction by refusing to grant a brief adjournment to allow counsel for the media to attend and make submissions on the application for a sealing order. Speaking for the court, Doherty J.A. found that the media can legitimately be expected to play an important role on applications to prohibit their access, and that of the public they serve, to court records and court proceedings. "There was no good reason", he stated, "to deny *The London Free Press* an opportunity to make submissions" (para. 15). This amounted, in his view, to a denial of natural justice and resulted in a loss

> of jurisdiction. I find it unnecessary to express a decided view on this branch of the matter, since it is not in issue before us, and find it sufficient for present purposes to refer to the guidelines on notice to the media and media standing set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, particularly at pp. 868-69 and 890-91.

[32] As is apparent from the outcome of that litigation, the sealing order granted in the *Toronto Star* case was too broad. In fact, the Crown conceded as much on appeal. If the hearing judge had the benefit of media submissions it may have assisted her in avoiding the mistakes which she made. This is because the *Mentuck* test requires a careful balancing between the interest of the Crown in seeking a sealing order and the constitutional right of public access to court records and proceedings.

[33] The important role of media in hearings involving publication bans and sealing orders is evident from the guidelines of the Nova Scotia Courts for media and public access. These were developed in collaboration with media representatives and adopted by the Courts as of June 2017. In addition the Executive Office of the Nova Scotia Judiciary has established a service whereby parties can provide electronic notification to the media of pending applications. The published information with respect to these initiatives includes the following:

> The Supreme Court of Canada, in several rulings, has recognized that the media, as representatives of the general public, must be given special consideration when applying certain rules and policies of the Courts. As such, although this document applies to members of the public as well as the media, certain exemptions and priorities are afforded to members of the media to enhance their ability to do their work.
>
> …
>
> In *Dagenais v. Canadian Broadcasting Corporation* [1994] 3 SCR 835, and *R. v Mentuck*, 2001 SCC 76, the Supreme Court of Canada set out the framework for discretionary publication bans. It said Judges may only order a ban when it is necessary to prevent a serious risk to the administration of justice and there are no alternative measures and after weighing its effect on freedom of the press, the right to a fair and public trial and the efficacy of the administration of justice. If a Judge decides a ban is warranted, it is only to be as restrictive in scope and time as is necessary to achieve its purpose. The *Dagenais* decision also said that the media should have standing to be heard and to raise objections in open court when a party requests a non-statutory ban. At the same time, it left a Judge some discretion in deciding if and when the media will be given such standing.
>
> …
>
> The idea behind the Notice-of-Applications-for-Publication-Bans Service is to give the press/media notice of an application for a discretionary publication ban or

> request for confidentiality of proceedings (such as sealing order, an in-camera hearing, and permission to identify the parties pseudonyms) in a court proceeding. The purpose of the notification is to provide the media with an opportunity to oppose the application if they choose to do so.
>
> This service was established by the Nova Scotia Judiciary and the local press/media in response to the Supreme Court of Canada ruling in *Dagenais v. Canadian Broadcasting Corporation* ((1994), 3 S.C.R. 835). There, the Court directed that Judges "should give the media standing (if sought)" and may direct that third parties affected by the proposed ban – invariably, the media – be given notice.

Procedure on Applications for Sealing Orders

[34] When the media participates in a hearing in which the Court is considering whether to grant, rescind or vary a sealing order, they should have sufficient information with respect to the proposed grounds for the order so they can make effective submissions. Obviously, the media notice should not include the information which the sealing order is intended to protect. As the authorities indicate the burden is on the applicant to prepare the necessary notification materials.

[35] In *R. v. Toronto Star Newspapers Limited*, 2005 CanLII 47737(ONSC), the media applied to set aside the order sealing information used to obtain search warrants. On the application the Crown provided the media with a copy of the sealing order and an edited version of the information used to obtain the warrants. The media objected to the scope of the redactions which were made. The Court was given an unredacted copy of the information with the deleted portions identified. After hearing submissions the judge made specific rulings with respect to each of the edited portions. The Ontario Court of Appeal in *R. v. Canadian Broadcasting Corporation*, 2008 ONCA 397, commented on this practice with approval. On that issue the Court said:

> 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.

[36] The Court of Appeal recognized that this placed a burden on the Crown but concluded this was appropriate because of the onus on them to justify the sealing order. This rationale is set out in the following passage:

> 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*.

[37] A similar approach was taken by the Ontario Court of Appeal in *XY v. United States*, 2013 ONCA 497, which involved a motion to seal a court record of an application for judicial review in order to protect XY's informant privilege. The procedure for media participation in that case was as follows:

> 4 Several members of the media were granted leave to intervene in XY's motion to seal the court record and to hold the hearing *in camera*. Counsel for the media, the applicant, and the respondent came before me on February 26, 2013 to speak to the matter. Pursuant to the procedure set out by the Supreme Court of Canada in *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253, at paras. 45-61, proceedings commenced *in camera*, and I determined that XY qualifies as a confidential informer and is therefore entitled to claim informer privilege. I then received preliminary submissions from counsel as to what elements of the record could be safely disclosed to the public without tending to reveal XY's identity. The matter was adjourned and a written endorsement was issued directing counsel for XY and the Crown to file a redacted record and factums to be reviewed by the court and ultimately released to the media and to the public. Counsel reattended before me on July 23, 2013 to argue whether the extent of this proposed disclosure was satisfactory, or ought to be more fulsome still in order to comply with the open court principle. The parties to this motion largely agreed on the extent to which the hearing should be held *in camera*.

[38] In some circumstances the Court may conclude that information should be disclosed to media counsel on their undertaking not to permit it to be viewed by others. There may also be cases where the hearing should be *in camera* so that counsel can make more detailed submissions. The *Esseghaier* case was such a situation and the process followed by Durno J. was described as follows:

> 6 As a result of an earlier ruling, redacted copies of the ITOs were provided to counsel for the media so that they could present their arguments. The PPSC provided charts for each order setting out the redacted paragraphs and the reason why the portions were redacted such as "national security." The media's counsels signed undertakings that only counsel and their assistants were permitted to view the ITOs. The media filed facta setting out their positions and the PPSC and Mr. Jaser filed responding material. All facta were subject to sealing orders as they referred to matters that were subject to the original sealing orders. While given an opportunity to do so, Mr. Esseghaier did not file any written material.
>
> 7 During the argument the court remained open, with counsel, when necessary, making submissions referring to the relevant paragraphs in the facta and ITOs without providing the details that are sealed. This procedure was suggested recently in *X.Y. v. United States*, 2013 ONCA 497, at para. 15. While counsel were told that if they could not make their submissions without referring to the details, the court could be closed for that portion of their submissions, no counsel requested the court be closed.

[39] There are undoubtedly other examples of how courts have dealt with ensuring that media have sufficient information to make submissions with respect to the necessity for a sealing order and its scope. What is clear from all of the authorities, is that the administrative burden of preparing redacted materials lies with the party requesting the sealing order. If there is some disagreement about the extent of any redactions, that can be addressed by the hearing judge.

Analysis and Disposition

Does the open court principle apply to an application for a sealing order?

[40] The Supreme Court of Canada decisions in *Mentuck* and *Toronto Star* make it clear that the principle of openness applies at all stages of a criminal proceeding, including investigations. Judges or justices of the peace who are asked to seal files or impose publication bans are required to apply the *Mentuck* test.

[41] In my view there is no question that the open court principle means that the public should be entitled to have access to the application materials for a production order under s. 462.48 of the *Code*, unless the administration of justice requires otherwise. This means that where the Crown wishes to prevent or postpone access, they have the burden of satisfying the Court that the restriction is in accordance with the *Mentuck* principles.

Should the media be given prior notice of the application for a sealing order?

[42] The Crown argues that notice to the media of the application for the sealing order would threaten the administration of justice. They say the production order is analogous to a search warrant and rely on the Supreme Court decision in *MacIntyre* which held that there should be no access to search warrant applications until after the warrant is executed. They also say that it would be impractical to require advance notice to the media every time a sealing order is sought ancillary to a production order.

[43] Other reasons advanced in support of denying media notification included defeating the *ex parte* nature of the s. 462.48 process, risk to ongoing investigations and informant privilege and the inapplicability of the *Civil Procedure Rules* to criminal matters.

[44] In my view the analogy to search warrants is not justified. An order seeking tax records from the Canada Revenue Agency carries no risk that the target of the order will be lost or destroyed if the application were publicly disclosed. With search warrants the administration of justice will be harmed if the evidence being sought is lost because of notification prior to execution. This is the fundamental basis for the decision in *MacIntyre*. No similar concern arises with respect to an application under s. 462.48 of the *Code*.

[45] Parliament has recognized the fundamental differences between search warrants and orders under s. 462.48. For the former, s. 487.3 of the *Code* includes statutory authority for an order prohibiting public access to search warrant files. There is no equivalent provision in relation to s. 462.48.

[46] Although the Crown argued the impracticality of giving notice to the media, they provided no evidentiary support for that position. I have no information with respect to whether orders under s. 462.48 are sought with any regularity. As the cases indicate, imposing an administrative burden on a party seeking to restrict public access to court records is appropriate in light of the constitutional principles in play. Practicality or convenience will not be sufficient justifications for overriding the interests protected by s. 2(b) of the *Charter*.

[47] The Crown acknowledges that the media is entitled to make submissions on the validity and scope of an order sealing the application file. Their only concern is the timing of that hearing. Even if the search warrant analogy were applicable, media participation would arise no later than the date on which CRA responded to the order because that would be when it was “executed”.

[48] If I accept the Crown’s position, there will be an initial application and *in camera* hearing where the judge will be required to apply the *Mentuck* test without any media participation. The Crown would be expected to provide arguments in support of the desirability of the sealing order but also with respect to the availability of other options and the public interest in disclosure. There would then be a later hearing with media participation where there would be further submissions on those same issues.

[49] In my view there is no logical or legal reason to exclude media representatives from the first hearing and create a two stage process. Media involvement when the sealing order is initially considered will assist the Court in the balancing exercise

that *Mentuck* requires. It would reduce the risk that a sealing order might be granted on overly broad terms in violation of s. 2(b) of the *Charter*.

[50] The Crown also argued that providing notice of the application for a sealing order might risk the ongoing investigation and informant privilege. These are issues which might justify the granting of a sealing order, but are not relevant to whether notice is to be given to the media. The authorities are clear that the Crown can and should redact from the application materials any information which they believe should be protected from disclosure.

[51] There was a suggestion that, in some instances, there may be an element of urgency, which would prevent notice being given. It is difficult to envision what those circumstances might be since there is no risk that tax records would disappear. That rare situation could be addressed with the judge at the time of the application and a decision made as to how best to proceed.

[52] Another argument advanced by the Crown was that requiring notice of the application for a sealing order would be contrary to the statutory direction that an application under s. 462.48 be made *ex parte*. *Ex parte* applications are regularly made in open court and disclosed on publicly available dockets. There are no automatic sealing orders or publication bans imposed in those proceedings. If a party wishes to prevent public access they are required to make an application for an order in accordance with the *Mentuck* guidelines. Requiring media notice of the request to seal the court record does not change the *ex parte* nature of the s. 462.48 process.

[53] Both parties spent considerable time on submissions with respect to whether *Civil Procedure Rule 85* applied to an order sealing a file in relation to a criminal matter. In my view there is no need to decide this issue because *Rule 85.05* simply codifies a process whereby the common law and constitutional principles in *Mentuck* are recognized.

[54] The sealing order sought by the Crown arises from the Court's common law authority and not the *Criminal Code*. The Court's jurisdiction over its own process is the basis for creating a procedure whereby the *Mentuck* guidelines can be implemented. Even if *Civil Procedure Rule 85.05* is not applicable to criminal matters, I would adopt the same process for dealing with the sealing order in this case.

[55] As it apparent from the above I am satisfied that the media are entitled to prior notice of the Crown's application for a sealing order.

Ongoing Process

[56] The next step in this process is to schedule a hearing for the application for the sealing order. The Crown is to prepare redacted application materials suitable for giving notice to the media and provide these to the court and counsel for CBC by no later than March 26, 2018. Once this has been done a date for the hearing of the application will be set in consultation with counsel. Notice of that hearing shall be given to other media through the courts' electronic notification service.

Wood, J.