Mandat de perquisition – Ordonnance de scellé – Demande de révision en vertu de 487.3(4) C.cr. – Révision effectuée ex parte et in camera

COURT OF QUEBEC

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
TOWN OF MONTREAL
CRIMINAL AND PENAL DIVISION

No: 500-26-039292-069, 500-26-039293-067, 500-26-039302-066, 500-26-039303-064

DATE: June 19th, 2007.

BY THE HONOURABLE CLAUDE MILLETTE, J.C.Q.

WORLD TAMIL MOVEMENT
APPLICANT
AND

MURALEEKARAN THURAIRATHAM
APPLICANT
JAIKUMAR SATHEESAN
APPLICANT

V.
THE ATTORNEY GENERAL OF CANADA
RESPONDENT

Judgment on an Application to Terminate or Vary a Sealing Order According to Section 487.3 (4) Criminal Code

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[1] The applicants bring an application to terminate or vary an order prohibiting access to and the disclosure of any information relating to four search warrants according to section 487.3(4) of the Criminal Code.

[2] Those search warrants were issued by a Justice of the Peace on the 12th of April 2006. The offences that were suspected to have been committed are the following:

> "Section 83.18 (1) C.C.C.
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> At or near the City of Montreal, District of Montreal Province of Quebec, between the 1st day of February 2003 and the 12th day of April 2006, did participate in or contribute to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist contrary to section 83.18 (1) of the Criminal Code of Canada.
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> Section 83.19 (1) C.C.C.
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> At the near the City of Montreal, District of Montreal Province of Quebec, between the 1st day of February 2003 and the 12th day of April 2006, did knowingly facilitate a terrorist activity contrary to section 83.19 (1) of the Criminal Code of Canada.
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> Section 83.02 C.C.C.
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> At or near the City of Montreal, District of Montreal Province of Quebec, between the 1st day of February 2003 and the 12th day of April 2006, did directly or indirectly, wilfully and without lawful justification or excuse, provide or collect property intending that it be used or knowing that it will be used, in whole or in part, in order to carry out terrorist activity contrary to section 83.02 of the Criminal Code of Canada.
>
> Section 83.03 C.C.C.

> At or near the City of Montreal, District of Montreal Province of Quebec, between the 1st day of February 2003 and the 12th day of April 2006, did directly or indirectly, wilfully and without lawful justification or excuse, collect property, provide or invite a person to provide, or make available property or financial or other related services intending that it be used or knowing that it will be used, in whole or in part, for the purpose of facilitating or carrying out any terrorist activity, or for the purpose of benefiting any person who is facilitating or carrying out such an activity contrary to section 83.03 of the Criminal Code of Canada."

[3] At the same time, the Justice of the Peace made an order prohibiting access to and the disclosure of any information relating to the warrants, production orders and authorizations.

[4] The warrants were executed on the 12th and the 13th of April 2006 and material was seized from the different locations searched.

[5] On the 5th of May 2006, the applicants brought the present application to a Judge of the Court of Québec to remove the sealing order. The main ground of the application was the allegation of terrorism that is mentioned in the warrants. The applicants wanted to know the basis of this allegation and, eventually, take civil actions in order to re-establish their reputation.

[6] On the 5th of May, counsel for the applicants and for the respondent agreed that the sealed envelope could be opened and that the contents of the information could be disclosed after giving the respondent an opportunity to edit some parts of the material. The application was postponed to the 14th of June and, then, to the 5th of July.

[7] On the 5th of July, copies of the information and of the sealing order were given to counsel for the applicants as well as an edited copy of the affidavit stating the grounds pertaining to the information. The copy of the affidavit was so extensively

edited that it was then virtually impossible to understand anything from the remaining text. The original documents were put back into the envelope and sealed again.

[8] Because of the extensive editing, on the 22nd of March of this year, the applicants brought again the application and asked for the removal of the editing. At the next hearing, counsel for the respondent offered to review the editing. A new copy of the affidavit was then tendered to counsel for the applicants with considerably less redacted portions. As Me Slimovitch, for the applicants, was nevertheless unsatisfied with those modifications, on the 24th of May 2007, Me Décarie, for the respondent, then provided the Court with the reasons for redacting every part of the text that was edited; this was done verbally by referring only to the grounds listed in section 487.3(2) of the Criminal Code.

[9] The applicants contend that referring only to the grounds listed in section 487.3(2) without any more details does not comply with the Dagenais/Mentuck test and is insufficient to justify the editing. Counsel for the applicants wants to have the opportunity to examine the informant and he alleges that this hearing should be held in open court. He is therefore requesting a public hearing in order to determine whether certain parts of the affidavit should be redacted in accordance with the Dagenais/Mentuck test. He argues that the procedure suggested by the Supreme Court in R. v. Garofoli (1990) 2 SCR 1421, concerning the challenging of a wiretap authorization, should be followed as it was done in several cases to which he has referred.

[10] On the other hand, counsel for the respondent pretends that this whole affair involves questions of Canada national security. Moreover, certain parts of the information were obtained from the Canadian Security Intelligence Service and cannot be disclosed in public. Therefore, the respondent is offering to provide the Court with an affidavit stating the reasons why the various redacted portions of the information should remain sealed and asks the Court to make a decision based on the allegations of this affidavit ex parte and in camera.

The Dagenais/Mentuck test

[11] The request of the applicants is based on the test developed by the Supreme Court of Canada in Dagenais v. Canadian Broadcasting Corp (1994) 3 S.C.R. 835 and in R v. Mentuck (2001) 3 S.C.R. 442. In the case of Dagenais, Lamer C.J. stated the test as follows:

> "A publication ban should only be ordered when:
> (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]"

[12] In the case of Mentuck, the Court reaffirmed the principles, but worded the test with some more requirements:

> " 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."

[13] Me Décarie, for the Attorney General of Canada, does not dispute that the Dagenais/Mentuck test must be applied in the present case and that the sealing order must be terminated or varied in accordance with the criteria determined by the Supreme Court. She only objects to a public hearing because the ends of justice could be subverted by such a hearing.

[14] It is useful to note immediately that the applicants are not asking for the issuance of a writ or certiorari to quash the sealing order that was made by the Justice of the Peace. They are not questioning the validity of the order. In fact, this Court would not have jurisdiction to quash the sealing order as this should be done by way of a writ of certiorari before the Superior Court. In the present case, the applicants are applying in virtue of section 487.3(4) of the Criminal Code to have the sealing order issued by the Justice of the Peace terminated or modified. This must be done of course in accordance with the Dagenais/Mentuck test.

The jurisprudence

[15] Me Slimovitch, for the applicants, has referred to several cases where public hearings were held to determine the appropriateness of a publication ban order or a sealing order. I will comment on some of those cases.

[16] In the case of Dagenais (supra), an injunction was requested by four members of a religious order who were charged with sexual assaults to restrain the broadcasting of a mini-series depicting sexual abuses in a catholic institution. The hearing on the injunction was obviously held publicly as the nature of the submissions and the grounds for asking for a publication ban were not in any way secret.

[17] The same situation prevailed in the case of Mentuck(supra). The Crown, during a murder trial, asked for a publication ban concerning the identity of undercover police officers and police operational methods. Again, for obvious reasons, this application had to be heard in open court.

[18] Counsel for the applicants also relied on the cases of Toronto Star Newspaper Ltd v. Ontario (2005) 2 RCS 188 and Ottawa Citizen Group Inc. et al v. The Queen et al 197 CCC (3d) 514 . In these two cases, search warrants had been issued as well as sealing orders. The media applied for writs of certiorari in both cases to quash the sealing orders and the applications were heard in public. In Toronto Star Newspaper Ltd, the sealing order was quashed, but the Superior Court edited certain portions of the affidavit to protect the informant's identity. The Ontario Court of Appeal affirmed the decision, but edited the affidavit more extensively for the same purpose. The appeal to the Supreme Court was dismissed.

[19] In Ottawa Citizen Group Inc., the Ontario Court of Appeal issued the writ of certiorari as to the names of innocent persons, but did not allow the media to publish the names; it only granted the permission to see the names. It is important to remind that the sealing order had been previously varied by the Justice of the Peace and the Court

of Appeal neither overruled nor even commented on the manner it proceeded. The decision of the Court of Appeal was solely based on the failure to consider reasonable alternative measures to a complete publication ban.

[20] In the recent case of Re Attorney General of Canada and O'Neill et al; Toronto Star Newspaper Limited et al, interveners 192 CCC (3d) 255, two warrants were issued to search the premises of the Ottawa Citizen newspaper and the home of O'Neill, a journalist, concerning an investigation into leaks of documents designated "classified secret". The Justice of the Peace also issued two sealing orders. The applicants moved to vacate the sealing orders by way of a writ of certiorari, alleging that the sealing orders were based on insufficient grounds.

[21] The Attorney General admitted that the sealing orders were overbroad and responded to the application by consenting to the variation of the orders and to the partial disclosure of the documents. Concerning the undisclosed portions, the respondent provided the Court with marginal notations that referred to the reasons listed in section 487.3(2) of the Criminal Code. The police officer was also heard, but counsel for the applicants rightly emphasized that he added scant evidence to justify the sealing orders.

[22] The orders were quashed and Ratushny J. stressed that, except for the content of the information itself, the Justice of the Peace did not express any specific reasons for issuing the sealing orders and that the issuance of the orders had been given cursory and hasty attention. She nevertheless permitted numerous redactions to remain in place.

[23] Finally, Me Slimovitch referred to the case of Desgroseillers v. R. 2005 JQ 1305, to support his submission that we should proceed in accordance with the procedure suggested by the Supreme Court in Garofoli(supra). In Desgroseillers, a search warrant and a sealing order had been issued concerning an offence of producing cannabis. The applicant was charged with producing cannabis and he applied to have the sealing order terminated because he wanted to check the validity of the search warrant. Provost J., of the Court of Quebec, opened the sealed envelope, allowed the Crown to edit the documents and handed the edited copies over to the applicant. However, he left to the trial judge the decision to allow the applicant to take cognizance of the edited portions of the documents.

The procedure under section 487.3(4) Criminal Code

[24] In the present case, it is important to stress that the applicants are not asking for the quashing of the sealing order. Therefore, I must take for granted that the sealing order was validly issued by the Justice of the Peace.

[25] The applicants are solely asking the Court to review the valid sealing order and, considering the circumstances, to vary or to terminate it. One of the circumstances I shall take into account is the fact that the warrants have been executed. On the other hand, one must not forget that the investigation is still ongoing and that the complete disclosure of the information could possibly compromise this investigation.

[26] Even if the Criminal Code does not make any provision for an ex parte and in camera hearing for the issuance of a search warrant, this principle was recognized by the Supreme Court in Nova Scotia (Attorney General) v. MacIntyre (1982) 1 SCR 175:

> "Although the rule is that of "open court" the rule admits of the exception referred to in Halsbury, namely, that in exceptional cases, where the administration of justice would be rendered impracticable by the presence of the public, the court may sit in camera. The issuance of a search warrant is such a case."

[27] Dickson J. further added:

> "In my opinion, however, 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 appellant concedes that at this point individuals who are directly 'interested' in the warrant have a right to inspect it. To that extent at least it enters the public domain. The appellant must, however, in some manner, justify granting access to the individuals directly concerned, while denying access to the public in general. I can find no compelling reason for distinguishing between the occupier of the premises searched and the public. The curtailment of the traditionally uninhibited accessibility of the public to the working of the courts should be undertaken with the greatest reluctance.
>
> …
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> Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right."

[28] Since then, Section 487.3 of the Criminal Code has been enacted and it expressly lists the reasons why access to information pertaining to a search warrant may be denied. Those reasons implicitly include the possibility to deny access even

after the warrant has been executed. On the other hand, it is then obvious that the respondent has the burden to prove that the order should remain in force.

[29] Most of the cases referred to by counsel for the applicants were applications for writs of certiorari. In the present case, the Court is rather asked to act in accordance with Section 487.3 of the Criminal Code. If, as already recognized by the Supreme Court, a Justice of the Peace may sit ex parte and in camera for the issuance of a search warrant and, consequently, for the issuance of a sealing order, there is absolutely no reason why a Justice of the Peace or a Judge would not have the same power when reviewing the sealing order, as provided by paragraph 4 of Section 487.3.

[30] As far as the Garofoli procedure is concerned, I fully agree with my colleague Provost J., considering the decision he had to make. But, in the present case, the applicants are not at trial and no charges have been laid. Therefore, I am of the opinion that the decision of Provost J. cannot be applied to the present case.

Conclusion

[31] The reasons why the applicants are asking the Court to vary or terminate the sealing order are legitimate and perfectly understandable and I will vary or terminate the sealing order if it may be done without subverting the ends of justice.

[32] I will therefore ask counsel for the Attorney General of Canada, for the purpose of the record, to file a copy of the last version of the edited documents with marginal

notations referring expressly to any of the reasons provided in section 487.3(2) of the Criminal Code, as she did verbally in the courtroom.

[33] This being so, I will allow her to file an affidavit explaining why the redacted portions of the information should remain secret and I will make a decision, ex parte and in camera, after carefully examining the unedited documents in relation with this affidavit.

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CLAUDE MILLETTE, J.C.Q.

Me Steven Slimovitch
Attorney for the applicants

Me Lyne Décarie
Attorney for the respondent