Citation: In the Matter of an Application Under s. 83.28 of the Criminal Code and The Vancouver Sun 2003 BCSC 1330

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Ruling on Media Application
The Honourable Madam Justice H. Holmes
July 24, 2003

In the Matter of an Application Under s. 83.28 of the *Criminal Code*

and

The Vancouver Sun

THIS RULING IS PUBLICLY RELEASED

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Counsel for Intervener, *The Vancouver Sun*:	R.S. Anderson
Place and Date of Hearing:	Vancouver, B.C. July 23, 2003

[1] **THE COURT:** *The Vancouver Sun* seeks access by way of a two-staged process I will outline below, to material filed in or arising from recent *in camera* proceedings before me, and a declaration that neither the proceedings to date nor any future proceedings should be held *in camera*.

[2] At the proposed first stage, counsel for the applicant would file an undertaking of confidentiality, and would have an opportunity to view the material in question under specified terms, along with one or two members of the applicant's editorial board who would be subject to the same restrictive terms. This is proposed as a means of enabling the applicant to know enough about the proceedings to determine whether or not to pursue the application to the second stage of seeking access and publication in the ordinary fashion and without restrictive terms. Similar two-staged approaches were taken in the cases of ***Clark v. The Queen*** (20 August 1999), Vancouver, BL0146 (B.C.S.C.), ***Pacific Press Ltd. v. Canada (Minister of Employment and Immigration)***, [1990] 1 F.C. 419 (C.A.), and ***R. v. A.***, [1990] 1 S.C.R. 992.

[3] The application is opposed on the basis that the confidentiality of the proceedings is necessary to preserve the integrity of the investigation and to prevent advertent or

inadvertent mischief in the community against the person to be examined.

[4] In a Synopsis of Reasons for Judgment Dated July 21, 2003, issued on July 23, 2003, I describe the general nature and the outcome of the *in camera* proceedings. In brief, the proceedings concerned the interpretation, application, and constitutionality of the new s. 83.28 of the ***Criminal Code***, which provides for investigative hearings in relation to terrorism offences, as defined in s. 2 of the ***Code***.

[5] As the synopsis explains, an order issued on May 6, 2003, requiring a named person to attend for examination by the agent for the Attorney General in an investigative hearing on the basis of reasonable grounds for believing that a terrorism offence has been committed and that information concerning the offence is likely to be obtained as a result of the examination. The named person required to attend for examination is not an accused or a suspect in relation to the terrorism offence concerned. The terrorism offence relates to two explosions which occurred between June 22 and 23, 1985, and caused the deaths of two baggage handlers and injuries to four others in Narita, Japan, and the deaths of the 329 passengers and crew of Air India Flight 182, off the west coast of Ireland.

[6] Mr. Malik and Mr. Bagri are currently on trial for conspiracy to murder and other offences relating to those events. Their trial is commonly referred to as the "Air India trial".

[7] I considered the issues raised by the applications, determined that the order was validly issued and constitutionally sound, and ordered that the investigative hearing proceed on specified terms. Those terms provided, in the unusual circumstances, for counsel for Mr. Malik and counsel for Mr. Bagri, as well as the agent for the Attorney General, to examine the person in the hearing. Additional terms provided for the protection of the privacy and other rights and interests of the person to be examined, and for the protection of the integrity of the investigation.

[8] At the hearing of this application, I indicated on the record that the investigative hearing has been adjourned, and that the named person has indicated an intention to seek leave to appeal my decision to the Supreme Court of Canada.

[9] Section 83.28 came into force on December 24, 2001, as part of the large package of amendments in the ***Anti-terrorism Act***. It allows a peace officer to apply *ex parte* to a judge for an order for the gathering of information. The judge must be satisfied that the Attorney General has given consent to

the application, and that there are reasonable grounds to believe that a terrorism offence has been committed or is about to be committed and essentially that a person has relevant information. The nature and specificity of the expected information required to base an order depends on whether the terrorism offence has already occurred or is expected to occur.

[10] A person named in an order issued under s. 83.28 must attend before a judge to be examined under oath or otherwise by an agent of the Attorney General. The person has the right to retain and instruct counsel at any stage of the proceedings. In the examination they must answer questions and produce material that could assist in the information-gathering process, unless a privilege or other non-disclosure principle or law applies. Their answers are subject to express use and derivative use immunity provisions. The judge issuing the order for the hearing may include other terms or conditions for the conduct of the investigative hearing that he or she considers desirable, including terms and conditions for the protection of the interests of the person named in the order and of third parties, or for the protection of any ongoing investigation.

[11] Courts have wrestled with the appropriate balance between the various rights and interests at play in the decision whether to deny or restrict public access to court proceedings or to ban or restrict publication of such proceedings.

[12] In ***CBC v. Dagenais***, [1994] 3 S.C.R. 835, the Supreme Court of Canada set out the test for assessing the ***Charter*** rights at play in relation to the potential risks of publication on the fairness of the accused's trial, and concluded, at 878:

> ... 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.

[13] There is no suggestion here that publication of, or access to, the proceedings before me would jeopardize the fairness of the accused persons' ongoing trial. Rather, the applicable interest for consideration, along with the important rights and interests favouring open proceedings, is the public interest in the investigation of an extremely serious offence.

[14] In ***R. v. Mentuck***, [2001] 3 S.C.R. 442, 2001 SCC 76 at ¶32, Iacobucci J. for the Supreme Court restated the ***Dagenais*** test to explicitly accommodate a consideration of interests in addition to fair trial rights, including, "other crucial aspects of the administration of justice", such as the integrity of investigations:

> 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.

Iacobucci J. also stipulated at ¶34 that the risk to the administration of justice relied on to support a ban on publication must be well-grounded in the evidence, and must be a real and substantial one that poses a serious threat to the proper administration of justice. It must be a serious danger sought to be avoided, and not a substantial benefit or advantage sought to be gained.

[15] Although the test restated in ***Mentuck*** addresses situations involving additional interests to those relating to freedom of expression and the right of an accused person to a fair and public trial, it nonetheless considered the interplay and appropriate method of considering the various interests at play in the context of a trial proceeding. One area of the evidence in question there related to police investigative methods; its publication was said to potentially jeopardize the investigation of other cases. Although the court reframed the ***Dagenais*** test to accommodate the consideration of the public interest in effective police investigations, it did so in the context of a trial or trial proceedings where the public interest in open access is incontrovertibly high.

[16] The concluding paragraph of the synopsis of my July 21 reasons for judgment speaks of the nature of the procedure under s. 83.28 and authorized by the order:

> The procedure under s. 83.28 relates to the investigative process. The examination conducted under the order may have an incidental effect on the ongoing trial. However, I have found that the predominant purpose of the examination is to further the ongoing investigation. Accordingly, my reasons for decision dated July 21, 2003, which involve a more extensive discussion of the issues and the underlying facts, will remain sealed until the conclusion of the investigative hearing or any earlier order of the court.

[17] As Mr. Anderson notes, s. 83.28 does not expressly provide for the proceedings to be held *in camera*. However, the same may be said of the provisions relating to the issuance of search warrants, as was noted in ***Nova Scotia v. MacIntyre***, [1982] 1 S.C.R. 175 at 180:

> The ***Criminal Code*** gives little guidance on the question of accessibility to the general public of search warrants and the underlying informations.

I therefore draw no inference from Parliament's failure to expressly provide that s. 83.28 proceedings will be heard *in camera*.

[18] As I have noted above, s. 83.28(5) does expressly recognize the public interest in effective investigations. It provides that the judge issuing the order for the hearing may include terms and conditions for its conduct, including for the protection of any ongoing investigation.

[19] In ***CBC v. New Brunswick***, [1996] 3 S.C.R. 480 La Forest J., at 497, made several *caveats* to the recognition of the importance of public access to the courts as a fundamental aspect of our democratic society. Among them was what I read as a recognition adopted from the ***MacIntyre*** case that certain judicial processes are inherently inconsistent with public access:

> ... this Court has noted on previous occasions that public access to certain judicial processes would render the administration of justice unworkable; see ***MacIntyre***, supra. The importance of ensuring that the administration of justice is not rendered unworkable provides a palpable reason for prohibiting public access to many of the other types of processes of which the intervener makes mention. Indeed, as we have seen in this case, the open court principle itself must yield to circumstances that would render the proper administration of justice unworkable.

[20] The discussion in ***MacIntyre*** concerned public access to the proceedings relating to the issuance of search warrants. Dickson J., as he then was, at 179, said:

> The issuance of a search warrant is a judicial act on the part of the justice, usually performed ex parte and in camera, by the very nature of the proceedings.

At 183-184, he reviewed the broad policy considerations underlying the right of access to search warrants and informations to obtain them, and spoke of the "strong public policy in favour of 'openness' in respect of judicial acts". He concluded that:

> The concern for accountability is not diminished by the fact that the search warrants might be issued by a justice in camera. On the contrary, this fact increases the policy argument in favour of accessibility. Initial secrecy surrounding the issuance of warrants may lead to abuse, and publicity is a strong deterrent to potential malversation.

> In short, what should be sought is maximum accountability and accessibility but not to the extent of harming the innocent or of impairing the efficiency of the search warrant as a weapon in society's never-ending fight against crime.

[21] Dickson J. at 187-188 spoke of the general rule that at every stage of the process public accessibility and concomitant judicial accountability should prevail, subject to curtailment only when there is a need to protect social values of superordinate importance. He then concluded that the public interest in the effective administration of justice requires the exclusion of the public from the proceedings relating to the issuance of the warrant. With public access at that stage, a search warrant would be in his words "utterly useless".

[22] Mr. Anderson emphasizes that Dickson J.'s conclusion rested largely on the secrecy required for the effective use of search warrants. He noted that here, by contrast, the named person is aware of the order and the examination. He disputes on a similar basis Mr. Wright’s comparison of the public access proposed here to a situation of telling the targets of an investigation that their telephones will be tapped pursuant to a judicial authorization.

[23] The investigative procedure in s. 83.28 is indeed different in this regard from other investigative procedures

provided for in the ***Criminal Code*** which require judicial authorization. The simple fact that the person to be examined will have to be notified of the order and the date, time, and place of the examination, and of the items they are to bring to the examination, removes from the investigative process any element of surprise to that person.

[24] However, surprise in the investigative process is not its unique or defining characteristic or utility. Other aspects of the investigative process speak strongly against public access and publication until the particular procedure is complete. I will offer some examples, but by doing so I do not mean to suggest that these apply in this case. Rather, they are illustrative of some of the features of the investigative process which in my view render it inconsistent with public access until the particular procedure is complete. They also render inappropriate, in the same context, a mechanism of editing or blacking out of sensitive content; in other contexts, that can be a useful mechanism for satisfying the important obligation to ensure that any restrictions on access and publication are as limited as possible.

[25] In the investigative process, potential jeopardy to witnesses or evidence may flow not only from suspects' knowledge of the nature of the investigative procedure, but

also from the identity of the person sought to be subject to it, or from other specific details. It may flow regardless of the knowledge of that person of the status of the proposed procedure, and regardless of the views of that person as to the conduct of that procedure. It may flow not only from what is said in the process relating to authorization of the procedure, but also from who says it and from what is not said.

[26] These and other features of the investigative process in my view render many investigative procedures inherently inappropriate for public scrutiny at the stage before they are completed.

[27] After they are completed, different considerations apply. In ***MacIntyre***, for example, public access was granted to the search warrant and the material in support after the warrant had been executed, because the need for surprise no longer applied.

[28] In ***CBC v. New Brunswick***, La Forest J. at ¶69 outlined a three-part test to govern the application of s. 486(1) of the ***Criminal Code***, which enacts a discretionary bar on public and media access to the court. A judge exercising that discretion must: (a) consider the available options and whether there are any other reasonable and effective alternatives available;

(b) consider whether the order is limited as much as possible; and (c) weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate. Similar considerations apply in the present context.

[29] As indicated in the synopsis, I have already determined that my reasons for judgment issued on July 21 will be released after the completion of the investigative hearing. It may well be that other material relating to the *in camera* proceedings can appropriately be released at that time. That can then be considered if application is made. I note also that the synopsis released publicly provides a broad outline of the proceedings and their outcome.

[30] In those circumstances, I do not grant the order requested, including that part which seeks access by way of undertakings in a proposed first stage. In my view, that proposed first step would perform no useful function in the context I have described.

"H. Holmes, J."
The Honourable Madam Justice H. Holmes