SUPREME COURT OF NOVA SCOTIA
Citation: *Verrilli v. Her Majesty the Queen*, 2019 NSSC 263

Date: 2019 09 05
Docket: Hfx No. 484089
Registry: Halifax

Between:

Daniel Verrilli

Applicant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Joshua Arnold
Heard:	May 1, 2019, in Halifax, Nova Scotia
Counsel:	J. Paul Niefer, on behalf of the Applicant Suhanya Edwards, on behalf of the Respondent

By the Court:

Overview

[1] Daniel Verrilli was the subject of three search warrants the police used to search his residence and vehicles. The warrants alleged that Mr. Verrilli had possession of cocaine for the purpose of trafficking. The Information to Obtain ("ITO") in relation to all three search warrants was sealed by each issuing justice of the peace. Various items, including cellular telephones and cash were seized during the searches, but no cocaine was located by the police. No charges were laid against Mr. Verrilli. The seized items were made available for their return. Mr. Verrilli applied to Provincial Court to examine the sealed information in order to determine why he had been the subject of the searches. His application was denied by Judge David Ryan. Mr. Verrilli now applies for *certiorari*/judicial review of the decision refusing his access to the sealed information.

Facts

[2] The background facts relevant to this application were succinctly summarized by the judge in his written decision dismissing Mr. Verrilli's request to unseal the ITOs:

> [1] The Applicant Daniel Verrilli is an interested non-accused party seeking access to the Informations to Obtain (ITOs) relative to three search warrants authorized by three separate Justices of the Peace between March 16th and March 17th, 2018. All three search warrants (Exhibits 1, 2 and 3) allege the following:
>
> > Daniel Verrilli (Date of Birth: 1984-[…]) AKA Daniel Ferris (Date of Birth: 1984-[…]) a (sic) did have in his possession for the purpose of trafficking, Cocaine, a substance included in Schedule 1 of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, and did thereby commit an offence contrary to s. 5(2) of the said Act.
>
> [2] Section 5(2) of the *Controlled Drugs and Substanaces Act*, S.C. 1996, c. 19, states:
>
> > No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III, IV or V.
>
> Cocaine is included under Schedule I. By virtue of s. 5(3)(a), every person who contravenes s. 5(2) is guilty of an indictable offence and liable to imprisonment for life.

> [3] In the case-at-bar, three separate search warrants were issued under s. 11 of the *Controlled Drugs and Substances Act* pursuant to the sworn information of Detective Constable Gena Elizabeth Graham. Upon application under s. 487.3(1) of the *Criminal Code* relative to each search warrant, an Order was granted by each issuing Justice of the Peace prohibiting disclosure of the information filed in support of obtaining the respective search warrants.
>
> [4] The Applicant was arrested without warrant by police when they executed the initial Warrant to Search on March 17, 2018, at Lusso Car Detailing and Sales located at 421 Sackville Drive, Lower Sackville, Nova Scotia. The warrant also authorized the search of any vehicle located on the property of 421 Sackville Drive, Lower Sackville, Nova Scotia. However, no subsequent charges were laid by police. Items seized as a result of that initial search are found in Exhibit 1. The other two search warrants also were executed but there were no related arrests or subsequent charges.
>
> [5] In his Application to gain "access to the sealed search warrant documentation for the purpose of inspecting the informations to obtain, for both the search warrants and sealing orders, with redactions as necessary to protect privilege" dated August 16, 2018, counsel for the Applicant, states (at pp. 2-3):
>
> > Mr. Verrilli does not stand accused of a criminal offence. And, with the expected return of his items, he does not face the threat of criminal charges with respect to the search warrants at issue.
> >
> > As evidenced by his affidavit, Mr. Verrilli does not know of any reason as to why the police would reasonably believe that he possessed cocaine for the purpose of trafficking. Mr. Verrilli swears that he did not have cocaine, nor does he traffic cocaine. As such, the only reasonable conclusion is that the police obtained the search warrants on the basis of unreliable information and an insufficient investigation.
> >
> > Mr. Verrilli is therefore asking this Honourable Court to allow him to inspect the Information to Obtain for each of the three search warrants, with any redactions as necessary to protect privileged information, so that it can be determined if the police breached his section 8 or 9 *Charter* rights.
>
> The *Charter* rights referenced by the Applicant are the right to be secure against unreasonable search and seizure (s. 8); and the right not to be arbitrarily detained or imprisoned (s. 9).
>
> [6] Mr. Verrilli is bringing this application under s. 487.3(4) of the *Criminal Code*. …

[3] The judge added that there was no apparent dispute between the parties that s. 487.3(4) applied. He dismissed Mr. Verrilli's application on December 14,

2018. On January 9, 2019, Mr. Verrilli made application for *certiorari*/judicial review.

Jurisdiction

[4] The parties agree that this court has jurisdiction to hear an application for *certiorari*/judicial review in accordance with *Phillips v. Vancouver Sun*, 2004 BCCA 14, *British Columbia (Director of Civil Forfeiture) v. Hells Angels Motorcycle Corp.*, 2014 BCCA 330, *Dagenais v. Canadian Broadcasting Corp*., [1994] 2 SCR 835, and *R. v. Awashish*, 2018 SCC 45, where Rowe J. stated:

> [11] The availability of extraordinary remedies is constrained by similar concerns … The use of *certiorari* is therefore tightly limited by the *Criminal Code* and the common law so as to ensure that it is not used to do an "end-run" around the rule against interlocutory appeals... For example, in preliminary inquiries, jurisdictional error must be shown for *certiorari* to be granted. This includes where the preliminary inquiry judge commits an accused to stand trial in the absence of any evidence on an essential element of the offence … or acts contrary to the rules of natural justice...
>
> [12] *Certiorari* is available to third parties in a wider range of circumstances than for parties, given that third parties have no right of appeal. In addition to having certiorari available to review jurisdictional errors, a third party can seek *certiorari* to challenge an error of law on the face of the record, such as a publication ban that unjustifiably limits rights protected by the *Canadian Charter of Rights and Freedoms* … or a ruling dismissing a lawyer's application to withdraw ...

[5] In *Awashish*, the court did not elaborate on what constituted a "final and conclusive" order, but cited *R. v. Primeau*, [1995] 2 S.C.R. 60, where, referring to *Dagenais. v. Canadian Broadcasting Corp*, [1994] 3 S.C.R. 835, the majority stated at paragraph 12 that "an order deciding an issue with respect to a third party is a final order."

Standard of Review

[6] In *R. v. R.E.W.*, 2011 NSCA 18, Beveridge J.A. held at paragraphs 29-33 that deference was required on issues of fact, or "where a trial judge is required to balance competing interests…". Justice Beveridge also held at paragraph 35 that the issues for determination did "not involve an attack on findings of fact, but rather in the application of the correct legal principles and as such, except where otherwise mentioned, will be reviewed on a standard of correctness."

[7] In this case the issue is whether the judge applied the correct legal principles. His decision is subject to review for correctness.

The Decision Under Review

[8] The search warrants in this case were issued pursuant to s. 11 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. The ITOs were sealed by order under s. 487.3(1) of the *Criminal Code* and the application to unseal was made by Mr. Verrilli in accordance with s. 487.3(4). Section 487.3 states:

> 487.3 (1) On application made at the time an application is made for a warrant under this or any other Act of Parliament, an order under any of sections 487.013 to 487.018 or an authorization under section 529 or 529.4, or at a later time, a justice, a judge of a superior court of criminal jurisdiction or a judge of the Court of Quebec may make an order prohibiting access to, and the disclosure of, any information relating to the warrant, order or authorization on the ground that
>
> > (a) the ends of justice would be subverted by the disclosure for one of the reasons referred to in subsection (2) or the information might be used for an improper purpose; and
> >
> > (b) the reason referred to in paragraph (a) outweighs in importance the access to the information.
>
> Reasons
>
> (2) For the purposes of paragraph (1)(a), an order may be made under subsection (1) on the ground that the ends of justice would be subverted by the disclosure
>
> > (a) if disclosure of the information would
> >
> > > (i) compromise the identity of a confidential informant,
> > >
> > > (ii) compromise the nature and extent of an ongoing investigation,
> > >
> > > (iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used, or
> > >
> > > (iv) prejudice the interests of an innocent person; and
> >
> > (b) for any other sufficient reason.
>
> Procedure
>
> (3) Where an order is made under subsection (1), all documents relating to the application shall, subject to any terms and conditions that the justice or judge considers desirable in the circumstances, including, without limiting the generality of the foregoing, any term or condition concerning the duration of the prohibition, partial disclosure of a document, deletion of any information or the

> occurrence of a condition, be placed in a packet and sealed by the justice or judge immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in any other place that the justice or judge may authorize and shall not be dealt with except in accordance with the terms and conditions specified in the order or as varied under subsection (4).
>
> Application for variance of order
>
> (4) An application to terminate the order or vary any of its terms and conditions may be made to the justice or judge who made the order or a judge of the court before which any proceedings arising out of the investigation in relation to which the warrant or production order was obtained may be held.

[9] Mr. Verrilli sought access to the ITOs, "with any redactions as necessary to protect privileged information" in order to determine whether his rights under ss. 8 (unreasonable search and seizure) or 9 (arbitrary detention or imprisonment) of the *Charter of Rights and Freedoms* were breached.

[10] In his decision, the judge reviewed the law respecting confidentiality of search warrants and ITOs originating with *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 SCR 175. He also cited *R. v. Gerol* (1982), 69 C.C.C. (2d) 232, [1982] O.J. No. 3655 (Ont. Prov. Ct. (Crim. Div.)), the Supreme Court of Canada's decision in *Michaud v. Quebec (Attorney General)*, [1996] 3 SCR 3, and *National Post Co. v. Ontario* (2003), 176 CCC (3d) 432, 2003 CarswellOnt 2134 (Sup. Ct. J.). Based on the submissions of counsel for the applicant and the Crown, the judge applied the onus and test as outlined in *Michaud*, a case concerned with wiretaps, holding that the same reasoning governed an application under s. 487.3. In his written decision the judge stated:

> [8] In *MacIntyre*, Dickson J. summarized the issue to be addressed relative to search warrants and their supporting materials as follows (at pg. 181-182):
>
> > The question, therefore, is whether, in law, any distinction can be drawn, in respect of accessibility, between those persons who might be termed 'interested parties' and those members of the public who are unable to show any special interest in the proceedings.
>
> Where a search warrant has been issued and executed but nothing found, the Court held (at pg. 187):
>
> > Protection of the innocent from unnecessary harm … overrides the public access interest in most cases where a search is made and nothing is found. The public right to know must yield to the protection of the innocent. If the warrant is executed and something is seized, other considerations come to bear.

The nature of those "other considerations" were not explored by the Court. However, one of those considerations would be, I suggest, whether or not the items seized resulted in criminal charges against the 'interested party'. In the case-at-bar, no charges were laid against the Applicant; in fact, he was provided with contact information for the investigating officer so as to retrieve items detailed in two exhibit logs (Crown Brief, para. 8).

[9] In *R. v. Gerol*, [1982] O.J. No. 3655, Scullion, P.C.J., citing *McIntyre*, found (at para. 29) that:

> the court has the power to grant an application prohibiting access to informations in support of search warrants *to the public and/or interested parties* in circumstances where the ends of justice would be subverted by disclosure or when the records might be used for an improper purpose. (Emphasis in original)

[10] Both the *MacIntyre* and *Gerol* decisions were followed and considered respectively in *National Post Co. v. Ontario*, 2003 CarswellOnt 2134 (Ont. Sup. Ct. Justice), leave to appeal to the Supreme Court of Canada denied April 22, 2004. That case concerned the application by National Post Company and Societé Radio-Canada for an order pursuant to s. 487.3 of the *Criminal Code* and sections 2(b) and 24(1) of the *Canadian Charter of Rights and Freedoms* to vary or terminate a sealing order prohibiting access to and disclosure of informations relating to search warrants. In the course of his decision denying the application for access to the unedited record of evidence, MacKinnon J. held (at para. 17) that the:

> *decision of the Supreme Court of Canada in Michaud [Michaud v. Quebec (Attorney General), [1996] 3 S.C.R. 3] must be considered when applying the principles identified by the same court in MacIntyre*. [Emphasis in original].

I note that there does not appear to be any dispute between the parties that the case of *Michaud v. Quebec (Attorney General),* [1996] 3 S.C.R. 3 is applicable to the case-at-bar: Crown's Brief at paras 2-3; Defence Application/Brief at pg. 4. However, the Crown disputes the Applicant's interpretation of *Michaud* as it relates to the purported balancing of interests in the exercising of judicial discretion to open the sealed packets.

[11] This brings us to the next stage of the analysis, namely: what are the foundational principles underlying the exercise of judicial discretion to open a sealed packet to an interested non-accused party? The *Michaud* decision (at para. 39) provides the blueprint for determining the exercise of judicial discretion relative to sealed packets sought to be unsealed by an interested non-accused party.

> As the previous cases indicate, *an interested non-accused party who seeks access to the packet must demonstrate more than a mere suspicion of police wrongdoing; he or she will normally be compelled to produce some*

> *evidence which suggests that the authorization was procured through fraud or wilful non-disclosure by the police. But such a judicial order may well be justified in cases beyond circumstances of potential fraud or non-disclosure. As this Court has repeatedly stressed, the statutory power to open the sealed packet ultimately remains a matter of judicial discretion which should be exercised upon a careful balancing of the competing interests of the individual and law enforcement.* Accordingly, it would be inappropriate to delimit the full range of conceivable situations where such an order might be warranted. [Emphasis in original]

In balancing those competing interests, I am obliged to and do adopt the Supreme Court's position in *Michaud* (at para. 18) that

> the careful balancing of interests that Parliament reached in adopting the provision must inform the determination of whether a non-accused person enjoys a constitutional right to examine such confidential court documents under a purposive and contextual examination of the Charter.

[12] The court in *Michaud* concluded (at para. 5) as follows:

> I am not persuaded that this settled, purposive interpretation of s. 187(1)(a)(ii) ought to be altered in light of s. 8 of the *Charter*. In *Dersch*, this Court held that notwithstanding the existing interpretation of the predecessor of s. 187(1)(a)(ii), where the wiretap target faces subsequent criminal prosecution, this statutory discretion must be exercised systematically in favour of access to give effect to an accused's right to full answer and defence under s. 7 of the *Charter* and an accused's right to challenge the admission of potentially unlawfully intercepted evidence under ss. 8 and 24(2) of the *Charter*. But where a target faces no threat of imprisonment, *Dersch* clearly indicated that "different considerations" apply. *Under such circumstances, these different "considerations" persuade me that a non-accused target is not constitutionally entitled to examine the contents of the packet in the absence of some evidence which suggests that the original authorization was unlawfully granted. While an individual has an important and vital right to the disclosure of governmental information* in order to effectuate his or her substantive constitutional rights under ss. 7 and 8 of the *Charter*, it is my belief that *this right does not compel absolute access to confidential information held by the state where the individual does not face the jeopardy of the criminal process.* [Emphasis in original]

So, too, in exercising judicial discretion on the current application under s. 487.3(4) of the *Criminal Code* to open a sealed packet, the "non-accused target is not constitutionally entitled to examine the contents of the packet in the absence of some evidence which suggests that the original authorization was unlawfully granted."

> [13] By shifting the evidentiary burden to the Applicant seeking access to sealed information under s. 487.3 of the *Criminal Code*, the *Michaud* decision also provides a blueprint for determining whether or not "the ends of justice would be subverted by disclosure" to an interested non-accused party "or when the records might be used for an improper purpose" by an interested non-accused party.: *Gerol, supra*. In explaining that evidentiary burden, Chief Justice Lamer for the majority stated (at para. 39) that "*an interested non-accused party who seeks access to the packet must demonstrate more than a mere suspicion of police wrongdoing*…" [Emphasis in original]

[11] The judge found that shifting the burden to the applicant, as required by *Michaud*, provided a "blueprint" for determining whether "the ends of justice would be subverted by the disclosure … or the information might be used for an improper purpose" under s. 487.3(1)(a). He reviewed the applicant's evidence, particularly the cross-examination on his affidavit, and then referred to the Chief Justice's statement in *Michaud* that "an interested non-accused party who seeks access to the packet must demonstrate more than a mere suspicion of police wrongdoing…". The judge held that Mr. Verrilli's evidence did not meet that standard:

> [23] … The evidence of the Applicant fails to meet that test. He was less than candid in relating his business background and operational status of his businesses on or about March 17, 2018. In his Affidavit the Applicant alleged a decrease in his sales and a continuing negative impact on his business but then withdrew that allegation on the record during cross-examination… He later testified that "it's more of a defamation of character than it would be a decrease in sales"… He maintained that his relationship with the neighbouring baby store was strained but offered nothing substantive by way of proof.
>
> [24] The Applicant referred to police conduct involving his friend which he felt amounted to ongoing harassment… His reference to a subsequent 'sneak and peak' operation on that friend is nothing more that [sic] speculation based on his friend's lack of any criminal record and his friend's association with him…
>
> [25] The evidence before this Court falls short of advancing the Applicant's contentions and application to unseal the sealed warrants and supporting documentation. Further, in balancing the competing interests of the individual and of law enforcement referred to by the Supreme Court of Canada in *MacIntyre*, and in keeping with the further direction of the Court in *Michaud*, I am of the opinion that the evidence put forth by the Applicant is little more than suspicion and speculation.
>
> [26] I have heard and considered the evidence of the Applicant, and I am not persuaded that the Applicant, Mr. Verrilli, has demonstrated more than a mere suspicion of police wrongdoing. There is no evidence before this Court which

> suggests that the original search warrants were unlawfully granted. In balancing the competing interests of the individual and law enforcement, I am exercising my judicial discretion in favour of the public interest in law enforcement as elaborated upon in the *MacIntyre* and *Michaud* decisions of the Supreme Court of Canada. The sealed packets will not be unsealed as requested by the Applicant.

[12] As such, the application under s. 487.3(4) was dismissed.

Issue: Who has the burden of proof when an interested non-accused party seeks access to a sealed Information to Obtain in accordance with s. 487.3(4) of the *Criminal Code*?

Divergent Lines of Authority

[13] There are two lines of superior court reasoning on this issue, none from this jurisdiction, and no appellate authority directly on point. Some courts have ruled that the test for unsealing a wiretap packet as set out in *Michaud* applies and places the burden on the applicant. Some courts have ruled that the *Dagenais/Mentuck* test applies as this is a discretionary confidentiality order and therefore places the burden on the Crown.

The Dagenais/Mentuck Test

[14] Contrary to his position at the hearing, Mr. Verrilli now says that an application for variation or termination of a sealing order under s 487.3(4) is subject to the analysis for discretionary confidentiality orders developed in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 SCC 76. The analysis was summarized in *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, where Fish J. said, for the court:

> 26 The *Dagenais* test was reaffirmed but somewhat reformulated in *Mentuck*, where the Crown sought a ban on publication of the names and identities of undercover officers and on the investigative techniques they had used. The Court held in that case that discretionary action to limit freedom of expression in relation to judicial proceedings encompasses a broad variety of interests and that 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. [para. 32]
>
> 27 Iacobucci J., writing for the Court, noted that the "risk" in the first prong of the analysis must be real, substantial, and well grounded in the evidence: "it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained" (para. 34).

[15] Justice Fish went on to confirm the broad scope of the application of the *Dagenais*/*Mentuck* test in *Toronto Star*:

> 28 The *Dagenais*/*Mentuck* test, as it has since come to be known, has been applied to the exercise of discretion to limit freedom of expression and of the press in a variety of legal settings. And this Court has recently held that the test applies to all discretionary actions which have that limiting effect:
>
> > While the test was developed in the context of publication bans, it is equally applicable to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings. Discretion must be exercised in accordance with the Charter, whether it arises under the common law, as is the case with a publication ban . . .; is authorized by statute, for example under s. 486(1) of the *Criminal Code* which allows the exclusion of the public from judicial proceedings in certain circumstances … or under rules of court, for example, a confidentiality order... (*Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, 2004 SCC 43, at para. 31)
>
> 29 Finally, in *Vancouver Sun*, the Court expressly endorsed the reasons of Dickson J. in *MacIntyre* and emphasized that the presumption of openness extends to the pre-trial stage of judicial proceedings. "The open court principle", it was held, "is inextricably linked to the freedom of expression protected by s. 2(b) of the Charter and advances the core values therein" (para. 26). It therefore applies at every stage of proceedings (paras. 23-27).
>
> 30 The Crown now argues that the open court principle embodied in the *Dagenais/Mentuck* test ought not to be applied when the Crown seeks to seal search warrant application materials. This argument is doomed to failure by more than two decades of unwavering decisions in this Court: the *Dagenais/Mentuck* test has repeatedly and consistently been applied to all discretionary judicial orders limiting the openness of judicial proceedings. (Emphasis in original)

[16] In *Toronto Star* the Supreme Court of Canada rejected the Crown's submission that *Dagenais*/*Mentuck* should not apply where the Crown seeks a sealing order for search warrant application materials. The court reiterated that the *Dagenais/Mentuck* test applies to all discretionary actions.

[17] *Dagenais* indicates at p. 865, that "[s]ince the common law rule does not authorize publication bans that limit *Charter* rights in an unjustifiable manner, an order implementing such a publication ban is an error of law on the face of the record", which can be challenged by *certiorari*. *Dagenais*/*Mentuck* must be applied whether or not there is a party or intervenor present. In *Mentuck*, the court stated:

> 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.

[18] The Crown submits that *Dagenais*/*Mentuck* applies to an original application for a sealing order, but not to a variation of that order:

> 9. At the variation stage, different standards apply to obtain access to sealed materials depending on the applicant. In each case, the Supreme Court of Canada

> has determined that the test for access is consistent with the *Charter* protected rights of the applicant:
>
> > i) for an accused, there is an automatic right to access based on the *Charter* section 7 right to full answer and defence;
> >
> > ii) for media, the *Dagenais/Mentuck* test applies based on the section [sic] s. 2(b) *Charter* right to freedom of the press; and
> >
> > iii) for a non-accused, like the applicant, the *Michaud* test applies and is consistent with *Charter* section 8.
>
> 10. In *Michaud*, the Supreme Court of Canada decided that once a sealing order is in place, a non-accused person seeking to vary it and obtain disclosure bears the onus to make "a preliminary showing which suggests that the initial authorization was obtained in an unlawful manner." The applicant conceded that this was the correct test when he applied to the application judge; he now submits that the judge should have first applied the *Dagenais/Mentuck* test to the initial order and then applied the *Michaud* test to vary it. The applicant was right the first time.

[19] It should be noted that the order in *Michaud* was a mandatory order respecting wiretap materials, not a discretionary order. In *Canada (Attorney General) v. Canada Revenue Agency*, 2018 NSSC 51, Wood J. (as he then was) discussed whether the *Dagenais/ Mentuck* test applies to sealing orders and variations of the sealing orders regarding search warrants. He stated:

> [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 (CanLII), at paras. 52-56, and *Postmedia Network Inc. v. R.*, 2017 ONSC 1433 (CanLII), at paras. 8-9).

[20] In relation to an application to unseal a search warrant, if the *Dagenais/Mentuck* test is applied, the Crown will have the opportunity to satisfy the court that the continued sealing or redaction of any part is justified. If an applicant is successful, the ITO will be subject to any appropriate editing prior to it being disclosed.

Sealing orders and search warrants

[21] In *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 SCR 175, Dickson J. (as he then was), for the majority, described the balancing of interests represented by the availability of search warrants, at p.180:

> As is often the case in a free society there are at work two conflicting public interests. The one has to do with civil liberties and the protection of the individual from interference with the enjoyment of his property. There is a clear and important social value in avoidance of arbitrary searches and unlawful seizures. The other, competing, interest lies in the effective detection and proof of crime and the prompt apprehension and conviction of offenders. Public protection, afforded by efficient and effective law enforcement, is enhanced through the proper use of search warrants.
>
> In this balancing of interests, Parliament has made a clear policy choice. The public interest in the detection, investigation and prosecution of crimes has been permitted to dominate the individual interest. To the extent of its reach, s. 443 has been introduced as an aid in the administration of justice and enforcement of the provisions of the *Criminal Code*.

[22] There was no dispute in *McIntyre* that an "interested party" had the right to inspect the information or the warrant (pp. 181-182). Justice Dickson made the following remarks about situations where warrants were executed but nothing was found, at pp. 186-187:

> At every stage the rule should be one of public accessibility and concomitant judicial accountability; all with a view to ensuring there is no abuse in the issue of search warrants, that once issued they are executed according to law, and finally that any evidence seized is dealt with according to law. A decision by the Crown not to prosecute, notwithstanding the finding of evidence appearing to establish the commission of a crime may, in some circumstances, raise issues of public importance.
>
> In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent.
>
> Many search warrants are issued and executed, and nothing is found. In these circumstances, does the interest served by giving access to the public outweigh that served in protecting those persons whose premises have been searched and nothing has been found? Must they endure the stigmatization to name and reputation which would follow publication of the search? Protection of the innocent from unnecessary harm is a valid and important policy consideration. In my view that consideration overrides the public access interest in those cases where a search is made and nothing is found. The public right to know must yield to the protection of the innocent. If the warrant is executed and something is seized, other considerations come to bear.

[23] Justice Dickson did not detail the "other considerations." In the instant case the judge suggested that one consideration would be "whether or not the items seized resulted in criminal charges against the 'interested party'."

[24] In *Toronto Star*, Justice Fish elaborated on the comments in *MacIntyre*:

> 18 Once a search warrant is executed, the warrant and the information upon which it is issued must be made available to the public unless an applicant seeking a sealing order can demonstrate that public access would subvert the ends of justice... "[W]hat should be sought", it was held in *MacIntyre*, "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" (Dickson J., as he then was, speaking for the majority, at p. 184).

[25] Justice Fish acknowledged that *MacIntyre* was not a Charter case, but said the court in *MacIntyre* was "alert … to the principles of openness and accountability in judicial proceedings that are now subsumed under the Charter's guarantee of freedom of expression and of the press." He continued:

> 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.

[26] Justice Fish went on to discuss s. 487.3:

> 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*... That provision does not govern this case, since our concern here is with warrants issued under the *Provincial Offences Act* of Ontario... 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.

> 23 Section 487.3(2) is of particular relevance to this case. It contemplates a sealing order on the ground that the ends of justice would be subverted, in that disclosure of the information would compromise the nature and extent of an ongoing investigation. That is what the Crown argued here. It is doubtless a proper ground for a sealing order with respect to an information used to obtain a provincial warrant and not only to informations under the *Criminal Code*. In either case, however, the ground must not just be asserted in the abstract; it must be supported by particularized grounds related to the investigation that is said to be imperilled...

R. v. Michaud: Unsealing of Wiretaps

[27] Mr. Verrilli's objections center on the Judge's application of *Michaud*, where a non-accused person sought disclosure of sealed information relating to a wiretap. The *Criminal Code* provisions relating to sealing and unsealing of wiretap packets go into great detail about the procedures involved. They impose a mandatory confidentiality order, unlike the discretionary order respecting search warrant information pursuant to s. 487.3. The most relevant provisions of s. 187 provide:

> 187 (1) All documents relating to an application made pursuant to any provision of this Part are confidential and, subject to subsection (1.1), shall be placed in a packet and sealed by the judge to whom the application is made immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in such other place as the judge may authorize and shall not be dealt with except in accordance with subsections (1.2) to (1.5).
>
> …
>
> Opening on order of judge
>
> (1.3) A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 may order that the sealed packet be opened and its contents removed for the purpose of copying and examining the documents contained in the packet.
>
> Opening on order of trial judge
>
> (1.4) A judge or provincial court judge before whom a trial is to be held and who has jurisdiction in the province in which an authorization was given may order that the sealed packet be opened and its contents removed for the purpose of copying and examining the documents contained in the packet if
>
> > (a) any matter relevant to the authorization or any evidence obtained pursuant to the authorization is in issue in the trial; and

> (b) the accused applies for such an order for the purpose of consulting the documents to prepare for trial.

[28] The issue in *Michaud* was whether presumptive access to the sealed packet by an accused extended to a non-accused seeking evidence to support Charter or damage claims. The minority, *per* La Forest and Sopinka JJ., took the view that such a motion should be granted automatically, as an extension of the reasoning in *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505. However, speaking for the majority, Lamer C.J.C. reached a different conclusion:

> 3 … While I would also allow the appeal in this instance, I profoundly disagree with their interpretation of a non-accused target's right to examine the sealed packet under the *Criminal Code* and the Charter. The existing legislative and judicial authorities on s. 187(1)(a)(ii) strongly indicate that Parliament intended the contents of the packet to remain presumptively "confidential" in the interests of preserving the secrecy of police investigative techniques and police informers. For a wiretap to be executed under Part VI of the Code, a judge will have already concluded that the application and supporting affidavits, on their face, raise reasonable and probable grounds for the interception of a subject's private communications. However, as an additional safeguard, Parliament vested a designated judge with a broad discretion to open and selectively distribute the contents of the packet. But where a former surveillance target applies for access in the absence of any threat of criminal prosecution, Parliament clearly intended that the state's pressing interest in confidentiality of the packet should represent the dominant consideration in the exercise of this discretion. Accordingly, previous courts have properly concluded that this discretion to open the packet should not be exercised upon the mere suspicion of wrongdoing by the state; rather, judicial discretion under s. 187(1)(a)(ii) should only be exercised on the basis of "good cause", i.e., upon a preliminary showing which suggests that the original authorization was obtained unlawfully.
>
> 4 Thus, in my view, where a non-accused target has applied for a judicial order under s. 187(1)(a)(ii) (or under the current s. 187(1.3)), a judge should normally only exercise his or her discretion in favour of granting access upon the presentation of some evidence that law enforcement officials engaged in fraud or wilful non-disclosure in obtaining the authorization. If the target is successful in securing access to the packet under s. 187(1)(a)(ii), he or she may only then seek access to the recording materials upon a new motion in a subsequent proceeding.
>
> 5 I am not persuaded that this settled, purposive interpretation of s. 187(1)(a)(ii) ought to be altered in light of s. 8 of the Charter. In *Dersch*, this Court held that notwithstanding the existing interpretation of the predecessor of s. 187(1)(a)(ii), where the wiretap target faces subsequent criminal prosecution, this statutory discretion must be exercised systematically in favour of access to give effect to an accused's right to full answer and defence under s. 7 of the Charter and an

> accused's right to challenge the admission of potentially unlawfully intercepted evidence under ss. 8 and 24(2) of the Charter. But where a target faces no threat of imprisonment, *Dersch* clearly indicated that "different considerations" apply. Under such circumstances, these different "considerations" persuade me that a non-accused target is not constitutionally entitled to examine the contents of the packet in the absence of some evidence which suggests that the original authorization was unlawfully granted. While an individual has an important and vital right to the disclosure of governmental information in order to effectuate his or her substantive constitutional rights under ss. 7 and 8 of the Charter, it is my belief that this right does not compel absolute access to confidential information held by the state where the individual does not face the jeopardy of the criminal process.

[29] The Chief Justice discussed the nature and content of the statutory discretion under s. 187(1)(a)(ii):

> 18 This general framework of analysis properly reflects the approach of this Court in *Dersch*, which underscored that the pre-existing interpretation of s. 187(1)(a)(ii) continues to operate in relation to a non-accused, subject to a subsequent Charter challenge. As Sopinka J. stated for the majority, at p. 1517:
>
> > The judge still has a discretion [under s. 187(1)(a)(ii)] but, in the case of an accused, it would not be judicially exercised and in conformity with the Charter right unless the application is granted. This does not affect the discretion in respect of a request by a target or a member of the public who is not an accused person, to which different considerations would apply. <u>This is not an amendment to the section, but rather an alteration of the judicial interpretation placed on it in light of the Charter</u>. [Emphasis in *Michaud*.]
>
> Regretfully, I do not believe that the analysis adopted by La Forest and Sopinka JJ. in the present appeal is faithful to this Court's earlier approach in *Dersch*. My two colleagues effectively subsume these two distinct questions into one constitutional inquiry, namely whether a non-accused enjoys an independent Charter right of access to the packet. Perhaps more seriously, the single-barrelled analysis adopted by my colleagues gives short shrift to Parliament's intent and purpose in adopting the provision. In my view, an appreciation of the careful balancing of interests that Parliament reached in adopting the provision must inform the determination of whether a non-accused person enjoys a constitutional right to examine such confidential court documents under a purposive and contextual examination of the Charter.

[30] The Chief Justice summarized the relevant analysis in the following terms:

> 39 As the previous cases indicate, an interested non-accused party who seeks access to the packet must demonstrate more than a mere suspicion of police

> wrongdoing; he or she will normally be compelled to produce some evidence which suggests that the authorization was procured through fraud or wilful non-disclosure by the police. But such a judicial order may well be justified in cases beyond circumstances of potential fraud or non-disclosure. As this Court has repeatedly stressed, the statutory power to open the sealed packet ultimately remains a matter of judicial discretion which should be exercised upon a careful balancing of the competing interests of the individual and law enforcement. Accordingly, it would be inappropriate to delimit the full range of conceivable situations where such an order might be warranted. But without exhausting the breadth of judicial discretion under s. 187(1)(a)(ii), it would seem to me that a larger pattern of abusive conduct by law enforcement authorities which occurred contemporaneously with the acquisition of a surveillance authorization might be sufficient to raise an inference that the original authorization was obtained unlawfully and that access should be granted. That thought aside however, the task of elaborating the full scope of judicial discretion under s. 187(1)(a)(ii) is properly left to future courts.

[31] In *Michaud*, Lamer C.J.C. held that whether s. 8 of the *Charter* was not violated by s.187(1)(a)(ii) of the *Criminal Code*, and discussed the need to balance the individual's rights with the state's pressing need to preserve secrecy in certain limited situations. He stated:

> 46 It is thus apparent that a <u>non-accused</u> surveillance target such as the appellant cannot rely on *Dersch* to support a claim of automatic access to the packet under the Charter. The appellant faces no imminent criminal prosecution. He has no basis for seeking disclosure to effectuate his constitutional right to full answer and defence, nor does he have any need to challenge the reception of potentially inadmissible evidence. Indeed, the majority in *Dersch* acknowledged that <u>different</u> considerations ought to govern the exercise of judicial discretion under s. 187(1)(a)(ii) where a non-accused target or an interested third party applies for access to the packet. As the majority stated, at p. 1517:
>
> > The judge still has a discretion [under s. 187(1)(a)(ii) to open the packet] but, in the case of an accused, it would not be judicially exercised and in conformity with the *Charter* right unless the application is granted. <u>This does not affect the discretion in respect of a request by a target or a member of the public who is not an accused person, to which different considerations would apply</u>. [Emphasis in original]
>
> 47 Upon reflection, the relevant "considerations" persuade me that a non-accused surveillance target does not similarly enjoy automatic access to the sealed packet under s. 8 of the *Charter*. There is nothing in the history or purpose of s. 8 to suggest that the subject of a search and seizure enjoys an absolute right to examine confidential authorizing materials held by the state upon mere suspicion of wrongdoing by law enforcement authorities. Indeed, outside the wiretapping

domain, this Court has repeatedly held that a criminal accused does not enjoy an absolute right to disclosure of confidential investigative information held by the state under the right to full answer and defence. As this Court held in *R. v. Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 S.C.R. 326, at p. 339, the Crown's obligation to disclose all relevant information prior to trial "is not absolute". Under *Stinchcombe* and its progeny, the Crown is not obliged to disclose information which is clearly irrelevant, beyond the control of the prosecution, or protected by a recognized form of privilege. ... As Sopinka J. elaborated in *Durette, supra*, at p. 495, the Crown may justify non-disclosure in circumstances where "the public interest in non-disclosure outweighs the accused's interest in disclosure".

…

49 Similarly, I believe that in defining a non-accused's right under s. 8 to obtain confidential wiretap documents held by the state, the individual's right to contest an invasion of privacy must be weighed against the state's legitimate interest in protecting the secrecy of its investigations. Where an individual does not face the jeopardy of the criminal process, I believe that greater weight must be attached to state's interest in confidentiality. As this Court has repeatedly stressed, the meaning and content of the constitutional guarantees of the *Charter* will vary according to the relevant context. ... Pursuant to this contextual approach, we have noted that the content of the legal rights of the *Charter* will often be interpreted more flexibly where the relevant state action does not threaten the individual with the risk of imprisonment. ... Similarly, in defining the content of s. 8 of the *Charter*, we have held that the standard of "reasonableness" in assessing the constitutionality of a search and seizure must be defined less onerously in the regulatory context as opposed to the criminal process. ... But as I reiterated in my concurring reasons in *143471 Canada Inc. v. Quebec (Attorney General)*, [1994] 2 S.C.R. 339, at pp. 347-49, the content of s. 8 should not be defined according to a rigid, formal classification of regulatory and criminal offences.

50 Applying these established principles of *Charter* analysis, I find that the existing interpretation of s. 187(1)(a)(ii), as applied to a request for access to the packet by a non-accused surveillance target, does not offend s. 8 of the *Charter*. An individual who has received notification that he or she has been subjected to a wiretap does indeed have an important privacy interest in securing the necessary documents to contest the lawfulness of such a search. But where that individual is not threatened by criminal prosecution and imprisonment, this important interest must be balanced against the state's pressing interest in preserving the secrecy of the packet. The high standard of disclosure of *Stinchcombe* was justified, at p. 336, on the basis that full disclosure is "one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted". As McLachlin J. reiterated in *Seaboyer, supra*, at p. 611, courts have been "extremely cautious" in restricting an accused's power to call evidence given "the fundamental tenet of our judicial system that an innocent person must not be

convicted". But where the individual faces no risk of the stigma of conviction, the justification for such a strict standard is accordingly diminished.

51 By contrast, the state's interest in protecting the confidentiality of its investigative methods and police informers remains compelling. The reality of modern law enforcement is that police authorities must frequently act under the cloak of secrecy to effectively counteract the activities of sophisticated criminal enterprises. In that endeavour, electronic surveillance represents one of the most vital and important arrows in the state's quiver of investigative techniques, particularly in the prosecution of drug offences. ...

52 The effectiveness of such surveillance would be dramatically undermined if the state was routinely required to disclose the application and affidavits filed in support of a surveillance authorization to every non-accused surveillance target. The wiretap application will often provide a crucial insight into the *modus operandi* of electronic surveillance, and regular disclosure would permit criminal organizations to adjust their activities accordingly. Perhaps most importantly, the application and affidavits are often premised exclusively on information delivered to the authorities by police informers. …

53 The procedural alternative of automatic disclosure with appropriate editing, well elaborated by this Court in *Garofoli*, *supra*, will not always be sufficient to protect the interests of law enforcement. I reiterate that in its recent amendments to Part VI, Parliament specifically chose to adopt a discretionary scheme of disclosure for non-accused persons under s. 187(1.3) as opposed to a scheme of automatic disclosure coupled with editing under ss. 187(1.4) and 187(5). In so doing, Parliament clearly accepted that there was an important qualitative difference between a regime of no disclosure and a regime of disclosure coupled with editing. An edited wiretap application, with the name of a police informer properly blacklined, may still leave significant clues as to the identity of the informer. Sophisticated criminal enterprises may be able to identify the informer on the basis of the mere content of a leak. The release of a diligently edited wiretap application may thus unintentionally reveal the identity of a police informer, with potentially fatal consequences. In light of such risks, Parliament, relying on its legislative experience and its vast institutional resources, made a reasoned judgment that it was preferable to enact a general rule of discretionary non-disclosure.

…

55 The existing judicial interpretation of s. 187(1)(a)(ii), in my view, strikes an appropriate balance between the individual's interest in contesting the validity of an authorized interception of communications and the public's interest in the confidentiality of law enforcement techniques and police informers. Under Part VI, where an individual receives notice of an interception under s. 196(1), a judge will have already examined the original wiretap application and supporting affidavits and have concluded that they demonstrate reasonable and probable grounds for a search. In light of the existence of prior authorization in addition to

> the other procedural and substantive protections contained within Part VI, I believe that Canadian courts have adequately balanced the relevant interests in concluding that the statutory discretion to open the packet should normally only be exercised in favour of a non-accused target upon some evidence that the initial authorization was obtained in an unlawful manner. Accordingly, under a purposive and contextual interpretation of the *Charter*, I believe that the prevailing interpretation of the judicial power to open a sealed packet under s. 187(1)(a)(ii), as applied to a request for access by a non-accused target of electronic surveillance, satisfies the constitutional protection against unreasonable searches and seizures.

[32] Mr. Verrilli says the decisions applying *Michaud* in the context of s 487.3 "without analyzing the statutory grant of discretion provided by s. 487.3(4) in light of the [*Dagenais*/*Mentuck*] principles" are incorrectly decided. He also says the judge assumed that the sealing orders were lawful "without examining the supporting evidence and without applying the legal principles of the *Dagenais*/*Mentuck* test." This, he argues, was an error of law on the face of the record. Mr. Verrilli also says the execution of the search warrants was a significant change that occurred after the sealing orders were authorized, making the application of *Dagenais*/*Mentuck* critical.

Cases following Michaud-type reasoning

[33] *Michaud* dealt with an application to unseal of wiretap packets whereas the instant case involves an application to unseal a sealed ITO in relation to a search warrant. There are two divergent lines of authority on the question of whether *Michaud* extends beyond the wiretap regime to sealing orders over ITOs and search warrants.

[34] In *R. v. Schmidt*, [1996] B.C.J. No. 2341, 1996 CarswellBC 2512 (SC), the petitioners' home was searched under a warrant and they were charged with drug offences. The ITO was sealed. The petitioners sought disclosure of the ITO. The charges were then stayed, but the petitioners maintained their application, submitting that they were "entitled as citizens to know why the police came to their homes, disrupted their lives, arrested them, seized their property, and photographed and fingerprinted them." They argued that they were "entitled to examine the packet in order to determine if their section 7 or 8 rights have been infringed..." They relied on *MacIntyre* for the principle that "a member of the public is entitled to inspect a search warrant and the information upon which it has been issued."

[35] The Crown argued that a non-accused person did not have presumptive access to the ITO, relying on *Michaud* by analogy. The petitioners argued that *Michaud* was irrelevant, being based on a legislative framework that had no equivalent for search warrants. The Crown responded that *Michaud* applied to search warrants "with even more force … because the packet has been sealed as a result of a considered judicial decision that confidentiality is necessary for the reasons set out in the relevant order." Justice Humphries held that *Michaud* governed in the circumstances:

> 28 Weighing the privacy interest of the non-accused target against the state's interest in protecting the confidentiality of its investigative methods and police informers, and recognizing that Parliament had invested judges with discretion to allow access to such an applicant, the majority set out general parameters for the exercise of that discretion. Although not entirely foreclosing the range of situations where a packet might be accessed by a non-accused target in the wiretap context, Lamer C.J.C. stated that the present judicial interpretation respecting the exercise of discretion in that context satisfies constitutional requirements. That interpretation, as set out above, would require some evidence from the non-accused target that the initial authorization was obtained in an unlawful manner.
>
> 29 Does the fact that there is a legislative presumption of confidentiality for wiretap authorizations mean that those concerns are any less compelling in the search warrant context where a judge has considered the packet and has determined that it must remain confidential? I cannot see [that] it would. Searches are as crucial an investigat[ive] tool as wiretap. In the wiretap context, a judge determines that an authorization should issue. In the search warrant context, a justice of the peace performs the same function. In the wiretap context, the legislation dictates that the package remain confidential. In the context of these search warrants, a provincial court judge has determined, after examining the packet, that it should remain confidential for the reasons set out in the sealing order - exactly those reasons which were of concern to the majority in *Michaud*. In the wiretap context, access to the packet, other than by the accused, is discretionary, with constitutional requirements satisfied by requiring the applicant to adduce some evidence that the initial authorization was obtained in an unlawful manner before obtaining access. Given the sealing order, access by a non-accused person to the Information to Obtain must also be discretionary. With respect to the exercise of that discretion, I am unable to distinguish the search warrant context from the wiretap context. Exactly the same concerns apply. It therefore follows that unless the non-accused person adduces some evidence to suggest that the authorization for the search was obtained unlawfully, the Information to Obtain must remain sealed.

[36] The application was accordingly dismissed.

[37] In *National Post Co. v. Ontario* (2003), 176 C.C.C. (3d) 432, 2003 CarswellOnt 2134 (Sup. Ct. J.), two media organizations applied for variation or termination of a s. 487.3 sealing order respecting search warrants. The sealing order related to references in the ITO to information obtained through wiretaps. Justice McKinnon noted that it was "acknowledged by counsel that the exercise of the discretion conferred by s. 487.3 of the Code must be exercised in accordance with the principles enunciated in *Dagenais*." (para. 10). In denying the application, however, McKinnon J. also discussed *Michaud*:

> 17 I agree with this distinction. The decision of the Supreme Court of Canada in *Michaud* must be considered when applying the principles identified by the same court in *MacIntyre*. The wiretap regime is intended to be confidential. Access to affidavits in support of wiretap orders are strictly controlled. Notification is strictly controlled. Applications are subject to strict court control. To argue that because reference has been made to information obtained through a wiretap in an application to obtain a search warrant suddenly transforms the information into the public domain cannot be sustained. Various interests must be balanced before such a result can obtain. To decide otherwise would make the provisions of s. 486.3 of the Code irrelevant, and might cause police officers who swear informations to obtain warrants to be less forthcoming than necessary with all pertinent information.

[38] The court in *National Post* did not consider *Schmidt*, and was concerned primarily with the status of the wiretap material contained in the ITO. There was no dispute as to the application of *Dagenais*/*Mentuck*.

Search Warrant cases not following Michaud-type reasoning

[39] In *Canada (Attorney General) v. O'Neill* (2004), 192 C.C.C. (3d) 255, 2004 CarswellOnt 4801 (Ont. Sup. Ct. J.), the applicant sought *certiorari* to quash sealing orders over ITOs leading to the issuance of search warrants. There was no application to vary pursuant to s. 487.3(4). The applicants argued that the Justice of the Peace erred in law by issuing the sealing orders without applying the *Dagenais*/*Mentuck* test. The reviewing judge stated that *Dagenais*/*Mentuck* required a s. 487.3 sealing order to be carefully tailored "so as to minimize the restriction on public access at the time the order is made, regardless of whether the search warrant has or has not been executed." (para. 27). It appeared that the Justice of the Peace treated the sealing order "as an automatic next step springing naturally from the reasons for issuing the Search Warrants, without the necessary close scrutiny required to protect the public's right of access as much as possible." (para. 43). Neither the officer seeking the search warrants nor the Justice of the

Peace had considered the presumption of openness and minimal impairment. The court thus quashed the sealing orders:

> 47 These failings are significant. There is more at stake than simply two defective orders. Fundamental to Canada's rule of law and to the operation of our democracy is the principle that all of our judicial proceedings should be open to public scrutiny and public criticism. Every time the public is excluded from some part of Canada's court process, there exists the potential that the operation of Canada's rule of law and its democracy is being secretly undermined. National security confidentiality claims are to be considered seriously. They are naturally intimidating. However, there is no presumption in favour of secrecy, even in the face of national security confidentiality issues arising during judicial proceedings. That is the very reason for the *Dagenais*/*Mentuck* test. It is a flexible test directed towards maintaining the integrity of Canada's justice system but allowing, in exceptional circumstances and only where all other reasonable alternatives have been explored, for the non-disclosure of certain information that is before the courts.
>
> 48 The Sealing Orders limited the applicants' Charter rights including the fundamental right of freedom of expression and freedom of the press. They limited the public's right of access to our court system. They limited these fundamental rights in both an unauthorized and unjustifiable way.
>
> 49 I am satisfied that the RCMP officer did not provide the appropriate evidence to allow the Justice of the Peace to properly decide whether to issue the Sealing Orders or to issue them in restricted form. The Justice of the Peace was not able to comply and did not comply with the law when he signed them, thereby committing an error of law.

[40] *O'Neill* makes no reference to *Michaud* or *Schmidt*.

[41] In *Canadian Broadcasting Corporation v. HMQ*, 2013 ONSC 6983, the ITO in question included references to material derived from wiretaps. After referring to the power to make a sealing order under s. 487.3, Nordheimer J. said:

> [17] The Crown bears the onus of having to satisfy the court that the existing sealing order should be maintained. The presumption is that, once a search warrant is executed, the material filed in support of obtaining the search warrant is to be made accessible to the public. As the Supreme Court of Canada said in *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188 per Fish J. at para. 18:
>
> > Once a search warrant is executed, the warrant and the information upon which it is issued must be made available to the public unless an applicant

> seeking a sealing order can demonstrate that public access would subvert the ends of justice: [citation omitted]
>
> [18] In deciding that issue, it is established (and accepted by all parties here) that the *Dagenais*/*Mentuck* test is to be applied…

[42] As in *National Post*, the court in *CBC* did not refer to *Schmidt*; in *CBC* there was also no reference to *Michaud*. As in *National Post*, there was no dispute that *Dagenais*/*Mentuck* applied.

[43] The point was considered again, with the same result as in *National Post* and *CBC*, in *Re Duru-Obisi*, 2015 ONCJ 216, where the applicants sought to vary or terminate sealing orders in respect of two search warrants that had been executed without charges being brought. Discussing the Crown's argument, Borenstein J. said:

> [21] The Provincial Crown's position that the I.T.O. is presumptively public only once the warrant has been executed and items seized is based on Justice Dickson's comments in *A.G. (Nova Scotia) v MacIntyre* … where he draws a distinction between searches where items are seized and not and finds that, where items are not seized, the warrant and ITO are not presumptively public.
>
> [22] There are two problems with the Crown's position. First, the Applicants are seeking access to the I.T.O. in their capacity as the occupiers of the home that was searched. They are not seeking that the I.T.O. be presumptively public. The Crown's opposition conflates the Applicants request for access with public accessibility. Second, Justice Dickson was concerned with avoiding the potential public embarrassment to those whose premises are searched where nothing is found. He was not seeking to limit an occupier's right to the information upon which his or her home was searched.

[44] Noting that the open court principle had become more forceful since the Charter, Borenstein J. went on to reference comments about the presumptive openness of search warrants in *Toronto Star* and *CBC*, and concluded:

> [26] Accordingly, while there exists valid reason to seal a search warrant and I.T.O. prior to execution, that rationale evaporates once the warrant has been executed subject to necessary redactions or sealing Orders as prescribed by section 487.3 in the context of the test in *Dagenais*/*Mentuck* test. Apart from those restrictions in that context, the rationale prohibiting public access following execution where nothing is seized does not apply and certainly does not apply to the occupier of the residence searched.

> [27] Moreover, there is no principled reason why the occupier of a home searched should have less access to the information than the media would have had items been seized.
>
> [28] Accordingly, the I.T.O.s in their entirety in this case are accessible to the Applicants subject to the Crown satisfying the court that the continued sealing or redaction of any part is justified. The onus is upon the Crown. This is consistent with the open court principle. Further, in this regard, I refer to the decision of Justice Nordheimer in *R. v. CBC* [2013] O.J. 5178 (Ont. S.C.) where search warrants were granted in a criminal case and the related ITO's were sealed by the issuing justice…

[45] As in *CBC*, the court in *Duru-Obisi* did not reference *Michaud* or *Schmidt*.

Recent Cases

[46] The leading post-*Schmidt* case to the contrary, standing for the proposition that the *Michaud* reasoning *does* extend to sealing orders respecting search warrants, is *R. v. Nur*, 2015 ONSC 7777, leave to appeal denied, [2016] S.C.C.A. No. 54. In *Nur*, the applicants applied to vary a sealing order pursuant to s. 487.3(4) to allow disclosure to them of the ITO, in order to allow them to examine it for evidence of a violation of their section 8 rights. They were not charged with any offences. The applicants relied on *CBC* and *Duru-Obisi* as authority for a presumptive right of access to ITOs after they were executed. The Crown, relying on *Schmidt*, argued that *Michaud* applied. The court summarized the Crown's position:

> [7] As set out in *Michaud* in the case of Part VI of the *Criminal Code*, the intention of Parliament was to confer on a judge considering the variation or termination of the sealing of a wiretap an unlimited discretion. The same can be said to apply to a judge considering an application under section 487.3(4) of the *Criminal Code*. The Supreme Court of Canada in *Michaud*, at para. 39, went on to state that in the case of a wiretap, and I quote: "[a]n interested non‑accused party who seeks access to the packet must demonstrate more than a mere suspicion of police wrongdoing; he or she will normally be compelled to produce some evidence which suggests that the authorization was procured through fraud or wilful non‑disclosure by the police."
>
> [8] The Supreme Court of Canada in *Michaud* highlighted at para. 49 that the rights of a non‑accused under section 8 of the Charter to obtain a confidential wiretap document must be weighed against the state's legitimate interest in protecting the secrecy of its investigations. In *Schmidt*, the British Columbia Supreme Court went on to note that searches under a general warrant are as crucial an investigative tool as a wiretap. In a wiretap, the *Criminal Code*

> automatically seals the information. As for a general warrant under section 487.3, a provincial court judge has determined, after examining the ITO that it should remain confidential for the reasons set out in the sealing order. The provincial court judge also has the jurisdiction to impose limits on the sealing order, pursuant to section 487.3(3) of the *Criminal Code*. The British Columbia Supreme Court in *Schmidt* goes on to state that it is unable to distinguish the search warrant context from the wiretap context.

[47] Justice Labrosse distinguished *Duru-Obisi*, noting that the analysis in that case "relied upon relating the open‑court principle in cases involving the media to those of the non‑accused homeowner who is subject to a warrant and seizure", with which the court did not agree (para. 9). Further, the court in *Duru-Obisi* did "not seem to have been presented with the reasoning in *Michaud* or *Schmidt* and I decline to apply the same reasoning as *Duru-Obisi* with the open‑court principle to these non‑accused Applicants." (para. 9). As such, the court adopted the *Schmidt* reasoning, and commented on the appropriate procedure:

> [10] I adopt the approach taken by the British Columbia Supreme Court in *Schmidt* and conclude that before a court will consider varying or terminating a sealing order made under section 487.3, the non‑accused applicant must provide some evidentiary basis to suggest that the authorization for the search was obtained unlawfully. I note that the burden on an applicant should not be high given that the applicant is somewhat hampered by a lack of information. Further, it would, in my view, likely give the application judge reason to open the sealed packet and evaluate the evidence of the applicant against the ITO as a first step (see *Michaud* at para. 28). The application judge would then establish the procedure for redacting the documentation where required and assess any terms to the release of the documentation.

[48] *Nur* was followed in *R. v. Paugh*, 2018 BCPC 149, where the applicant applied to vary or terminate a sealing order over information relating to a search warrant. No charges had been laid. The court followed *Schmidt* and *Nur* in holding that *Michaud* applied to search warrants. Koturbash J. remarked that a "sealing order pursuant to section 487.3 is more robust than the sealing of a wire-tap packet because the former must pass [judicial] scrutiny." (para. 15). He summarized the relevant principles:

> [18] In summary, the following principles apply when [a] non-accused applicant applies to either terminate or vary a sealing order:
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> 1. The open court principle is an important principle that applies to all judicial acts. However, the principle is not absolute and there are

> exceptions. The issuance of a warrant is an exception because they are done *ex parte* and in camera.
>
> 2. The presumption that the information to obtain be accessible to the public flows from the open court principle. However, it is only a presumption and not absolute.
>
> 3. An exception to the presumption is section 487.3 which allows a sealing order to be made. Where the sealing order extends beyond the execution of the warrant, the order displaces the presumption of access by the public. In these circumstances, the non-accused applicant bears the onus under section 487.3(4) of establishing some basis upon which the court can conclude that the warrant may have been improperly issued. [Emphasis in original]

[49] Judge Koturbash concluded that the applicant had provided no evidentiary foundation for a finding that the warrant might have been improperly issued. He also noted that the Crown had adduced unchallenged evidence "that disclosure would compromise the identity of a confidential informant, reveal the identities of persons of interest, and subvert the ongoing investigation." (para. 20). Accordingly, he concluded, "[e]ven if I were to accept that the Crown bears the onus of rebutting the presumption of access, which I do not, the Crown has met that onus." (para. 21).

[50] On the other hand, *Nur* was not followed in *Re Wiseman*, [2018] O.J. No. 2667 (Ct. J.), where the applicants sought variation of a sealing order subject to any editing necessary to protect confidential informant privilege. They were not subject to any charges. The court referred to *Nur*, but declined to follow it, due to the distinct legislative regime governing wiretaps:

> 15 The Supreme Court of Canada in *Michaud* conducted an analysis of the scope of the judicial power under section 187 and held that the contents of the packet remain presumptively confidential. Search warrants, and Informations to Obtain search warrants, are not presumptively confidential. The Supreme Court of Canada has reiterated this time and time again, on the importance of public access to information related to court proceedings, including search warrants.
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> 16 In *'Toronto Star Newspapers v. Ontario*, [2005] 2 SCR 188, the Supreme Court at paragraph 20 was quoting Justice Dickson in *Macintyre*, [1982] 1 S.C.R. 175 and I quote,
>
> > "...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."
>
> 17 At paragraph 21 the Supreme Court indicates, "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."
>
> 18 Here, in the case before me, the press is not seeking to vary the sealing order. But in my view, in this case, a potential innocent person is seeking that order.
>
> 19 The principles of law do not vary in accordance with the parties seeking the variation of the sealing order. The Crown in this case has not substantiated in any way how the original sealing order is necessary under section 487.3, or, for that matter, the *Mentuck* test. Both parties agree, however, that the Information to Obtain must be edited to protect any confidential informant privilege. I agree.

[51] The court accepted the parties' joint view that the ITO should be edited to protect confidential informant privilege.

Analysis

[52] This application relates to the right of a non-accused target to access the ITOs that led to the issuance of three search warrants. The legislative provisions governing search warrants are very different than those involving wiretaps. There is no legislative provision placing the onus on an applicant seeking to unseal an ITO similar to the statutory onus placed on an applicant seeking to unseal a wiretap. *Michaud* was a wiretap case. Wiretaps are subject to very specific provisions in the *Criminal Code* that limit access to the presumptively sealed packet of information.

The *Criminal Code* search warrant provisions do not mirror the wiretap provisions. However, a judicial officer may determine that an ITO should be sealed in accordance with s. 487.3 of the *Criminal Code*. I cannot conclude that Parliament intended these two regimes to be treated the same way.

[53] The Supreme Court of Canada was very clear in explaining that the *Dagenais/Mentuck* test applies to all discretionary actions that could limit the open court principle.

[54] Practically speaking, there is little difference between the purpose for keeping a sealed wiretap packet confidential and keeping a sealed ITO

confidential. However, Parliament could have created legislative provisions for search warrants that mirror those for wiretaps. But it did not do so.

[55] The judge in this case adopted the approach that applies *Michaud* to search warrants. Although *Dagenais/Mentuck*, *Schmidt* and *Nur* were referred to by counsel in submissions to the judge, both parties accepted that *Michaud* applied and that the onus was on Mr. Verrilli to show more than a mere suspicion of police wrongdoing. Mr. Verrilli conceded that he was obligated to provide an evidentiary basis to show fraud, willful non-disclosure by the police, or a larger pattern of abusive conduct. The judge did not rely on the *Dagenais/Mentuck* approach which places the onus on the Crown to show that: (a) such a sealing 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) that the salutary effects of the sealing order 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.

[56] In my opinion, the parties and the judge were wrong to apply the *Michaud* standard and place the onus on Mr. Verrilli. The test in *Dagenais/Mentuck* governs when an application is made to unseal an ITO in accordance with s. 487.3(4) of the *Criminal Code*, and in these circumstances, places the onus on the Crown.

Conclusion

[57] The standard of review in this matter is one of correctness. The judge was incorrect in applying the principles outlined in *Michaud*.

[58] Mr. Verrilli's application for *certiorari*/judicial review is granted. The matter will be remitted to Provincial Court for a new hearing placing the appropriate onus on the Crown to meet the test as set out in *Dagenais/Mentuck*.

Arnold, J.