

Case Name:

Canada (Attorney General) v. O'Neill

Between

The Attorney General of Canada, respondent, and
Juliet O'Neill and Ottawa Citizen Group Inc.,
applicants, and

Toronto Star Newspapers Limited, The Globe and Mail, CTV
Television Inc., The Canadian Broadcasting Corporation
and The Canadian Civil Liberties Association, intervenors

[2004] O.J. No. 4649

Court File No. 11828

Ontario Superior Court of Justice

Ratushny J.

Heard: September 27-28, 2004.

Judgment: November 12, 2004.

(73 paras.)

Administrative law — Prerogative remedies — Grounds — Error of law — Civil evidence — Documentary evidence — Publication bans and confidentiality or sealing orders — Civil procedure — Discovery — Production and inspection of documents — Confidentiality orders — Evidence — Sealed evidence — Constitutional law — Canadian Charter of Rights and Freedoms — Fundamental freedoms — Freedom of expression — Remedies for denial of rights — Criminal law — Powers of search and seizure — Search warrants.

Application by the Ottawa Citizen and O'Neill by way of certiorari to have two sealing orders quashed. The RCMP had obtained search warrants from a Justice of the Peace to search the offices of the Ottawa Citizen newspaper and the home of O'Neill, a journalist with that newspaper. The warrants related to an investigation of leaks of certain information that had been designated as classified secrets within the meaning of the Security of Information Act. The Justice also issued sealing orders with respect to all information leading to the issuance of the search warrants and sealing orders on the basis that the disclosure of such information would subvert the ends of justice. The applicants argued that the sealing orders were invalid because they did not contain the name of the Justice who issued the search warrants. They also argued that the Justice made an error of law by issuing sealing orders that did not minimally impair the open court principle and the rights protected by section 2(b) of the Charter. In the event that the sealing orders were overturned, the Attorney General sought to have redacted portions of the information sealed.

HELD: Application allowed in part. The sealing orders were quashed, but some of the information that was the subject of the sealing orders was to remain sealed. Omitting the name of the justice was an inconsequential defect that did not undermine the validity of the sealing orders. The party seeking the

sealing order must show that such an order was necessary, in that the risk in question must be serious, it must be well-grounded in the evidence, and it must pose a serious danger to the administration of justice. The sealing orders in this case were too broad, and failed to minimally impair the open court principle. They limited the applicants' freedom of expression and freedom of the press, as well as the public's right to access the court system, in an unjustifiable manner. The RCMP did not provide the Justice of the Peace with the appropriate evidence to be able to properly decide whether to issue the sealing orders. The search warrant informations were treated as the evidentiary basis for the sealing orders, even though the requisite grounds for the issuance of search warrants and sealing orders were vastly different. Although not all of the Redactions could be justified, there was evidence of a serious risk to the administration of justice if certain Redactions were disclosed, on the basis that the documents had been classified as secret.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 2(b), 24(1).

Criminal Code of Canada, R.S.C. 1985, c. C-46, s. 487.3, 487.3(2), 487.3(2)(a)(iv), 487.3(4),

Security of Information Act, R.S.C. 1985, c. O-5, s. 4, 4(1), 4(3), 4(4)(b).

Counsel:

Luc Boucher, Eugene Williams, Q.C., and Pierre Lapointe, for The Attorney General of Canada

Richard G. Dearden, Wendy J. Wagner, David Paciocco and Michael D. Edelson, for Juliet O'Neill and the Ottawa Citizen Group Inc.

JUDGMENT: APPLICATION TO QUASH SEALING ORDERS

¶ 1 **RATUSHNY J.**:— The matters before this court involving the sealing of information away from the public eye illustrate the chilling effect of national security claims and secret classifications on the open court principle.

¶ 2 The applicants apply to have two sealing orders quashed and all information covered by the orders disclosed to the public.

¶ 3 The issues are the following:

1. Whether the sealing orders are nullities because of an error on their face;
2. Whether the sealing orders are invalid because the necessary preconditions to their issuance as set out in *R. v. Mentuck* (2001), 158 C.C.C. (3d) 449 have not been satisfied (the "Dagenais/Mentuck test");
3. Whether some of the information that was the subject of the sealing orders should remain sealed and not available to the public.

THE FACTS

¶ 4 On January 20, 2004, an RCMP officer met with a Justice of the Peace in order to obtain warrants to search two locations, one being an office of the Ottawa Citizen newspaper and the other being the home of Juliet O'Neill, a journalist with that newspaper. The officer also informed the Justice of the Peace he would be seeking sealing orders in connection with the search warrants.

¶ 5 The search warrants were related to the investigation of alleged leaks of information designated as "classified secret" in connection with an investigation pertaining to Mr. Maher Arar, contrary to section 4(1) of the Security of Information Act, R.S.C. 1985, c.O-5 (the "Act").

¶ 6 The officer provided the Justice of the Peace with approximately sixty pages of material in support of the two applications for the search warrants including two sixteen page Informations to Obtain the Warrants (the "Search Warrant Informations"). Except for the location to be searched, the two packages of documents in support of each search warrant were the same. After an initial two or three minutes with the Justice of the Peace, the officer waited outside the office for him to review the material.

¶ 7 The Justice of the Peace had the documents for approximately forty minutes and then met again with the officer. The RCMP officer was subsequently cross-examined as to what had transpired at this second meeting. He agreed that the Justice of the Peace discussed with him the description of the things to be searched for, then amended four appendices containing this description, signed the two search warrants (the "Search Warrants"), received the two sealing order applications from him for the first time, had them sworn in six places by him, reviewed the sealing order application material totalling twelve pages and finally, signed the two sealing orders (the "Sealing Orders"). All of this took twelve minutes. There was no oral discussion relating to the Sealing Orders and the officer testified it was his intention to rely on the whole package in support of the Sealing Orders including the Search Warrant Informations.

¶ 8 The Sealing Orders were applied for and issued under s. 487.3 of the Criminal Code of Canada, R.S.C. 1985, c. C-46. All information leading to the issuing of the Search Warrants and the Sealing Orders was sealed, on the basis stated in the Sealing Orders: "that disclosure of any information relating to the said warrant would subvert the ends of justice for one or more of the reasons set out in section 487.3(2) of the Code or that the information might be used for an improper purpose, and that these considerations outweigh in importance the provision of access to the said information".

¶ 9 The Sealing Orders had an indefinite term, remaining in effect until set aside by court order or terminated pursuant to an application under s. 487.3(4).

¶ 10 The next day, the Search Warrants were executed and material was seized from each location.

¶ 11 There has been no application by the respondent under s. 487.3(4) of the Code to vary the Sealing Orders. In response to the applicants' application, however, the respondent has consented to the variation of the Sealing Orders to disclose all of the information previously sealed, except for redacted portions in the Search Warrant Informations and one redacted portion in each of the Solemn Declarations forming part of the application material for the Sealing Orders (the "Solemn Declarations"). Those redacted portions have remained sealed.

¶ 12 Only the respondent and this Court have had access to the unredacted Search Warrant

Informations and the unredacted Solemn Declarations.

ISSUE #1: Whether the Sealing Orders are nullities because of an error on their face

¶ 13 The Sealing Orders indicate that the RCMP officer had applied for the Sealing Orders, the date the Search Warrants were issued and that the Search Warrants and all information relating to the Sealing Orders were required to be placed in a sealed packet affixed to each of the Sealing Orders. The error on the face of the Sealing Orders is the omission of the name of the justice issuing the Search Warrants.

¶ 14 An error on the face of a court order that is not so fundamental as to render the document of no legal effect may be categorized as an inconsequential defect in form: *R. v. Parent*, [1989] Y.J. No. 15 [Y.C.A.], referring to *The Queen v. Collins*, [1987] 1 S.C.R. 265 at 278.

¶ 15 In *Parent*, the issued search warrant had omitted the address of the place to be searched. The Yukon Territory Court of Appeal found this was a fatal defect invalidating the warrant. The warrant, the Court said, was in a form not authorized by law and it offended in a major way against the law of the land as expressed in *Re McAvoy* (1970) 12 C.R.N.S. 56 at 65:

... to avoid search warrants becoming an instrument of abuse it has long been understood that if a search warrant fails to adequately describe the offence, fails to accurately describe the premises to be searched, or fails to give an accurate description of the articles to be seized, then it will be invalid ...

¶ 16 In my view, the omission of the name of the justice issuing the Search Warrants does not, by reason of that defect alone, allow the Sealing Orders to be instruments of abuse. The error is more properly characterized as an inconsequential defect in form that does not undermine the validity of the Sealing Orders.

¶ 17 The applicants say it is also an error on the face of the Sealing Orders not to have any identification of which Search Warrant is being sealed and because it is unknown which of the two Sealing Orders seals each of the Search Warrants, it is the subject matter of the Sealing Orders that has been omitted.

¶ 18 I can't accept this to be an error on the face of the Sealing Orders that is akin to the subject matter, the address, of the search warrants in *Parent* having been omitted. There is no omission of the subject matter of the Sealing Orders. That subject matter or, the thing being sealed, is specified as being all information related to the Search Warrants of a specified date and related to the application by a named person for the Sealing Orders, all as is affixed in a sealed packet. What is omitted is the very purpose of the Sealing Orders, namely, to prohibit any access to the packet contents including information as to which location is to be searched under each of the Search Warrants. I think this part of the applicants' argument is more properly part of the assessment of the validity of the Sealing Orders according to the *Dagenais/Mentuck* test.

¶ 19 I, therefore, find the Sealing Orders are not nullities because of an error on their face.

ISSUE #2: Whether the Sealing Orders are invalid because the *Dagenais/Mentuck* test has not been

satisfied

¶ 20 The applicants apply by way of certiorari to have the Sealing Orders quashed because they allege the Justice of the Peace made an error of law in issuing them without meeting the Dagenais/Mentuck test so as to make a sealing order minimally impairing to the open court principle and the accompanying rights under s. 2(b) of the Canadian Charter of Rights and Freedoms of freedom of expression and freedom of the press.

1. Jurisdiction

¶ 21 This Court's jurisdiction to intervene by way of certiorari to quash an order made in excess of jurisdiction or that constitutes an error of law is well established and it is an error of law to order a publication ban that limits Charter rights in an unjustifiable manner: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at pages 864-867.

¶ 22 The standard of review I have applied in determining whether the Sealing Orders constitute an error of law is whether they limit Charter rights in an "unjustifiable or unauthorized way": *R. v. Toronto Star Newspapers Ltd.*, [2003] O.J. No. 4006 at para. 12, referring to *Dagenais*, supra.

¶ 23 As in *Toronto Star*, supra, at para. 12, it is agreed that the Dagenais/Mentuck test applies to a sealing order as well as to a non-publication order.

¶ 24 The remedial powers of this Court on a certiorari application involving challenges to the Sealing Orders on Charter grounds include the traditional remedy of quashing the Sealing Orders and are expanded to include the remedial powers under s. 24(1) of the Charter which allow this Court to decide the merits of the sealing order application and make the order which this Court concludes should have been made on the initial application: *Toronto Star*, supra, at para. 17. In the present case, the Sealing Orders have already been varied with the respondent's consent so that this Court's remedial power under s. 24(1) of the Charter is not concerned with the merits of the original sealing order applications, but with the merits of the remaining redacted portions of the Search Warrant Informations and the Solemn Declarations.

¶ 25 In reviewing the Sealing Orders issued by the Justice of the Peace, this Court's review is not a hearing de novo. Rather, it is limited to a review of the material that was before the Justice of the Peace before he signed the Sealing Orders, to determine whether he committed an error of law: *Toronto Star Newspapers Ltd. v. Ontario*, [2000] O.J. No. 2398 (Ont. S.C.J.) at paras. 30-31. I have, therefore, limited my review to the material the Justice of the Peace had before him before he signed the Sealing Orders and to the circumstances of his review, according to the RCMP officer's testimony on cross-examination.

¶ 26 This Court also has jurisdiction by way of statutory authority under s. 487.3(4) of the Criminal Code to terminate or vary the Sealing Orders.

2. The Dagenais/Mentuck test

¶ 27 The narrow grounds upon which a sealing order may be obtained and the requirement that a sealing order be carefully tailored so as to minimize restriction on public access are set out in s. 487.3 of the Criminal Code and reflect the controlling principles of public access to the courts and freedom of expression including freedom of the press: *Toronto Star*, supra, at paras. 18 and 19.

¶ 28 The principle of openness of judicial proceedings extends to the pre-trial stage of judicial proceedings, because the policy considerations upon which openness is predicated, including guaranteeing that justice be administered according to the rule of law and maintaining public confidence in the justice system, are the same as in the trial stage: *Re Vancouver Sun*, [2004] S.C.J. No. 41 at paras. 23-27.

¶ 29 In *Re Vancouver Sun*, supra, at paras. 28-31, the Supreme Court of Canada referred to its decisions in *Dagenais*, supra, and *R. v. Mentuck*, [2001] 3 S.C.R. 442, and to the *Dagenais/Mentuck* test as follows,

28 This Court has developed the adaptable *Dagenais/Mentuck* test to balance freedom of expression and other important rights and interests, thereby incorporating the essence of the balancing of the *Oakes* test: *Dagenais*, supra; *Mentuck*, supra; *R. v. Oakes*, [1986] 1 S.C.R. 103. The rights and interests considered are broader than simply the administration of justice and include a right to a fair trial ... and may include privacy and security interests.

29 From *Dagenais*, supra, and *Mentuck*, supra, this court has stated that a publication ban should be ordered only 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.

(*Mentuck*, supra, at para. 32)

30 The first part of the *Dagenais/Mentuck* test reflects the minimal impairment requirement of the *Oakes* test, and the second part of the *Dagenais/Mentuck* test reflects the proportionality requirement. The judge is required to consider not only "whether reasonable alternatives are available, but also to restrict the order as far as possible without sacrificing the prevention of the risk": *Mentuck*, supra, at para. 36.

31 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 (*Dagenais*, supra; *Mentuck*, supra); 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 (Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 2 S.C.R. 480, supra, at para. 69); or under rules of court, for example, a confidentiality order (Sierra Club of Canada v. Canada (Minister of Finance), [2002] 2 S.C.R. 522, 2002 SCC 41). The burden of displacing the general rule of openness lies on the party making the application: Canadian Broadcasting Corp. v. New Brunswick (Attorney General), supra, at para. 71.

¶ 30 The two-step approach of the Dagenais/Mentuck test contemplates first a showing of necessity by the party seeking the sealing order and secondly, a balancing of the positive and negative effects flowing from the requested order: Toronto Star, supra, at para. 20.

¶ 31 In its first branch, the Dagenais/Mentuck test incorporates a concept of necessity that contains several elements: the risk in question must be a serious one; it must be a risk the reality of which is well-grounded in the evidence; it must be a risk that poses a serious danger to the proper administration of justice, although judges are to be cautious in deciding what can be regarded as part of the administration of justice and should not interpret that term so widely as to keep secret a vast amount of information the disclosure of which would be compatible with the public interest: Mentuck, supra, at paras. 34 and 35.

¶ 32 In terms of the evidentiary basis required for issuing a publication ban, Mentuck, supra, at para. 39 said,

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.

¶ 33 It is these principles that inform my analysis of the validity of the Sealing Orders and the respondent's request that certain information remain sealed.

3. Analysis of the Validity of the Sealing Orders

¶ 34 The respondent concedes the Sealing Orders were overbroad and were not tailored so as to be minimally impairing to the principle of openness of the courts, to freedom of expression and to freedom of the press. However, the respondent does not concede that because of this, the Sealing Orders were invalid. It submits the test to be applied on certiorari is whether the Justice of the Peace "could" have issued the Sealing Orders and because they were issued one day before the premises were searched, there was an obvious need for confidentiality covering the unexecuted Search Warrants such that the Justice of the Peace "could" at that time issue the Sealing Orders to give effect to this need for confidentiality, making them valid at the time they were issued.

¶ 35 The problem with this argument is that the common law already recognizes the need for

confidentiality relating to an unexecuted search warrant: A.G. (Nova Scotia) v. MacIntyre, [1982] 1 S.C.R. 175 at page 188, and a court order is not required.

¶ 36 A further problem with this argument is that it does not accord with the statutory requirements of s. 487.3 of the Code, nor does it accord with the Dagenais/Mentuck test, all requiring a careful tailoring of a sealing order 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.

¶ 37 The Justice of the Peace was careful in his tailoring of the description of the things to be searched for.

¶ 38 The RCMP officer tailored the Search Warrant Informations in that they contained original information as opposed to the mostly standardized phrases in the application material for the Sealing Orders, and he intended the Search Warrant Informations to form part of the grounds for the Sealing Orders. He also tailored the document entitled "Application and Grounds for an Order Sealing Information Relating to a Search Warrant" by checking off certain reasons why the "ends of justice would be subverted by disclosure" and adding to the reason that disclosure would "cause prejudice to a specified public interest", the words "namely National Security". He further added to this document that "The grounds for asserting the reasons indicated above are that we are currently conducting an investigation on a possible leak of information from a classified secret document contrary to section 4(1) of the Security of Information Act".

¶ 39 The other material before the Justice of the Peace can fairly be described as "boiler-plate" documentation that requests a sealing order based on conclusory statements that simply repeat some of the words of s. 487.3(2) of the Code. And even though that section requires a weighing and a balancing of the positive and negative effects flowing from the requested Sealing Orders, no such process is revealed in any of the material submitted to the Justice of the Peace, other than statements, again conclusory, that "these considerations outweigh in importance the provision of access to the said information" or, that there were "overriding circumstances requiring the sealing of all information.

¶ 40 The Justice of the Peace was faced with a difficult situation. He had material before him that spoke of national security concerns, investigations of persons suspected of associations with terrorist activities including possible al-Qaeda connections, the controversies surrounding the Maher Arar matter, classified secret information and a possible leak of that information. The forms presented to him in support of the applications for the Sealing Orders assured him that the investigation was sensitive and complex, that disclosure of its existence could jeopardize the reputation of innocent persons, endanger investigational techniques and future investigations, result in the destruction of evidence and endanger national security. In that context, some of it ominous and intimidating, he quickly complied with the officer's request and sealed everything, apparently without hesitation.

¶ 41 However, apart from the information provided in the Search Warrant Informations, there was no attempt in the application material for the Sealing Orders to specify the broad nature or even the broad category of national security concerns that had arisen in this context. The Justice of the Peace was left to surmise what it might be, based on the Search Warrant Informations. There was no attempt in this application material to specify why the investigation, presumably referring to the investigation in respect of the alleged leak of secret information, was "sensitive and complex". There was no attempt to specify why

the disclosure of the fact that there was such an investigation could endanger investigational techniques, future investigations and endanger national security. Again, the Justice of the Peace was left to surmise what it might be, from the Search Warrant Informations.

¶ 42 Care was taken to provide an evidentiary basis for the RCMP officer's belief that he had reasonable and probable grounds to apply for the Search Warrants. Care was taken to ensure that the category of items to be searched for was not too broad. However, the degree of care applied to the issuing of the Search Warrants was not applied to the granting of the Sealing Orders. The Search Warrant Informations were treated as the evidentiary basis for the Sealing Orders even though the requisite grounds for the issuance of the Search Warrants and for the issuance of the Sealing Orders are vastly different. After the Justice of the Peace had reviewed the search warrant documentation, it took him 12 minutes to complete everything else, including the Sealing Orders.

¶ 43 The Sealing Orders appear to have been treated 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.

¶ 44 That the Sealing Orders were given cursory and hasty attention is evident from some of the mistakes made in their application material and on their face. The RCMP officer applied for time-limited sealing orders lasting 60 days, however the Sealing Orders were issued without time limitation. The name of the Justice of the Peace, as the justice issuing the Search Warrants, was inadvertently omitted on the face of the Sealing Orders. The RCMP officer admitted he forgot to check off one of the applicable boxes listing the reasons for the applications for the Sealing Orders. One of the application documents for the Sealing Orders erroneously identified the address of the Ottawa Citizen newspaper as being premises occupied by Juliet O'Neill. Other than the mechanical attachment of the sealed packet containing the Search Warrants and the Search Warrant Informations to the Sealing Orders, there is no identification on the face of the documentation as to which of the Sealing Orders operates to seal which of the Search Warrants. The RCMP officer admitted he failed to inform the Justice of the Peace that the existence of the RCMP investigation into the alleged leaks was public knowledge at that time. He also was frank in admitting that his only concern was to protect the ongoing RCMP investigation into the alleged leaks.

¶ 45 It is apparent on all of this evidence beginning with the RCMP officer's material that he presented to the Justice of the Peace and ending with the Sealing Orders made by the Justice of the Peace, that neither of them focused on the presumption of openness and the need to minimally impair the public's access to the material.

¶ 46 The Sealing Orders were too broad and the respondent concedes this defect. By sealing information indiscriminately, the Sealing Orders failed to minimally impair the open court principle. They failed to comply with s. 487.3 of the Code. They failed to satisfy the Dagenais/Mentuck test requiring a showing of necessity and a balancing of their salutary and deleterious effects.

¶ 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.

¶ 50 The Sealing Orders are therefore quashed for being invalid and the analysis turns to the merits of the request for a sealing order in respect of the presently redacted parts of the Search Warrant Informations and the Solemn Declarations.

ISSUE #3: Whether Some of the Information that was the Subject of the Sealing Orders Should Remain Sealed

¶ 51 The courts clearly retain a supervisory and protecting power over their own records. Public access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose, however, the presumption is in favour of public access. The party seeking to deny public access bears the burden of satisfying the Dagenais/Mentuck test. (MacIntyre, supra, at page 189; R. v. Garofoli (1990) 60 C.C.C. (3d) 161 at page 192 (S.C.C.); Toronto Star, supra, at para. 26)

¶ 52 The respondent submits it has disclosed publicly all the information it can and that the redacted portions of the Search Warrant Informations and the Solemn Declarations (the "Redactions") must remain sealed.

¶ 53 The respondent's reasons are varied, according to the nature of the text behind the Redactions that only this Court and the respondent have seen. With the respondent's concession that the Sealing Orders were overly broad and its subsequent disclosure of all but the Redactions, the respondent has supplemented whatever reasons still remain operative from the application material for the Sealing Orders, with marginal notations (the "Marginal Notations") beside the Redactions as requested by this Court, categorizing the reason for their non-disclosure. The Marginal Notations indicate at various places: "potentially injurious information", "ongoing investigations", "ongoing investigation", "information that could be detrimental to ongoing investigations", "prejudice to the interests of an innocent third party", "investigative technique" and "personal information".

¶ 54 During cross-examination of the RCMP officer and also during argument on this application, the respondent has supplied some further information as to the general content of some of the Redactions and has conceded to further disclosure where the information sealed has since been disclosed at a public

inquiry.

¶ 55 The applicants criticize the respondent's scant evidentiary basis for the Redactions. That evidentiary basis is comprised of the text behind the Redactions that the applicants have not seen and cannot factor into their argument, the application material for the Sealing Orders, the Marginal Notations and the RCMP officer's testimony on cross-examination.

¶ 56 Based on this evidence, the respondent submits it has satisfied the heavy burden required by the Dagenais/Mentuck test. It submits that each of the Redactions should remain sealed because there is a serious risk, well grounded in the evidence, that poses a serious danger to the proper administration of justice if the information were disclosed, and the salutary effects of each Redaction outweigh the deleterious effects on the rights and interests of the parties and the public.

¶ 57 The respondent agrees that the evidentiary basis for the Redactions is limited, but that this is due to my ruling barring them from placing other evidence before me in an ex parte hearing in the absence of the applicants and the public, as it had requested. The respondent submits that national security issues are exceptional when they are placed before the courts and that this Court should have reacted exceptionally and conducted a secret hearing that, and this comment is mine, would have denied public access to information in the midst of a public court proceeding over that very same issue. If I have a problem deciding whether disclosure would pose a serious danger to the proper administration of justice, the respondent says, I should err on the side of cautiousness, to be "better safe than sorry".

¶ 58 The respondent also points to the reason for the Search Warrants, involving an investigation of alleged leaks of information from a "secret classified document" that could provide evidence of offences contrary to s. 4 of the Act. Those possible offences are detailed in Appendix B to the Search Warrants and are listed as offences of wrongful communication of information contrary to s. 4(1), receiving secret information contrary to s. 4(3) and retaining or allowing possession of a secret document contrary to s. 4(4)(b).

¶ 59 As I understand this part of the respondent's argument, it is that where evidence establishes a document is classified as secret and it is an offence to communicate information from it, it would be tantamount to committing a further offence to further communicate that secret information that has been placed before this Court in the text behind some of the Redactions, which would be the situation if that text did not remain sealed and regardless that some of that secret information has already been placed in the public domain. In other words, as I understand the respondent's submission, just because secret information is already in the public domain does not justify its further disclosure by order of this Court. It remains classified secret information as the Search Warrant Informations indicate. The allegation is that it was wrongfully disclosed and those alleged wrongs cannot operate to make it "right" or lawful for this Court to do anything other than respect its secret classification and keep that information secret.

¶ 60 There is merit in this argument. Of course, information is not secret just because someone has called it secret. However, the evidence before me from the Search Warrant Informations is that the document was and remains classified as secret and the Act applies to such a document. I have no evidence of why the document is classified as secret. The only evidence before me is that it is protected by the Act and it is unlawful, because it is an offence, to disregard its secret classification.

¶ 61 I have, where indicated below, allowed some of the Redactions to remain on this basis, referred to as the "classified secret document" basis for the Dagenais/Mentuck test having been satisfied in these particular circumstances. I would not want it to be understood that this basis allows for an automatic sealing order. It is only after consideration of the context of each of these Redactions, the evidentiary basis offered and whether the Dagenais/Mentuck test has been satisfied, that I have allowed some Redactions to remain undisclosed on the classified secret document basis.

¶ 62 In these circumstances, I have concluded that the classified secret document basis is evidence of a serious risk to the proper administration of justice if such Redactions were disclosed and the positive effects, being the respecting of the secret classification and the non-commission of a further offence, outweigh the public interest in full disclosure.

¶ 63 The applicants further criticize the evidentiary basis they have been able to scrutinize, as being not only scant, but also only amounting to conclusory statements with no evidence having been provided by the respondent in support of each conclusion. This is a fair assessment of the evidentiary basis they have had access to and it falls to this Court to assess whether the text behind each of the Redactions provides evidence of a serious risk to the proper administration of justice, such that its disclosure would not be compatible with the public interest and the presumption of openness has been displaced, according to the Dagenais/Mentuck test.

¶ 64 For some of the Redactions, the respondent has justified their non-disclosure on the basis that their disclosure would cause "prejudice to the interests of an innocent third party". Section 487.3(2)(a)(iv) of the Code, allows for an order preventing disclosure of information where its disclosure would "prejudice the interests of an innocent person".

¶ 65 In this case, the "innocent person" concerned is the name of an "innocent third party" rather than the target of the Search Warrants, namely the applicant, Juliet O'Neill. In MacIntyre, supra, Dickson J. spoke of protection of the innocent in the context of the issue of access to search warrants and their supporting material and said the following at pages 186 and 187 regarding the protection of the innocent:

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.

¶ 66 In applying these principles to the present case, context is important. The Search Warrants were executed in furtherance of the RCMP's investigation of alleged leaks of classified secret information to the

applicant, Juliet O'Neill, a newspaper reporter. That investigation is ongoing. The name of a third party has arisen and there is no evidence that the third party is anything but an innocent third party. I conclude that in the context of an ongoing investigation and where there may be issues involving the applicants' confidential sources, a point that has not been argued to date, the principles underlying the "protection of the innocent" ground together with the probable deleterious effects on the innocent third party, freedom of the press and the on-going investigation, all combine to outweigh in importance the public's right to access to this third party's name.

¶ 67 It is on this basis that I have declined, as indicated below, to disclose the third party's name.

¶ 68 It is my conclusion that even though not all the Redactions are justified on the basis of the category referred to in the Marginal Notations and even though the respondent could have provided better descriptive evidence of some of the Redactions without disclosing their precise content, a process surely contemplated within the flexibility of the Dagenais/Mentuck test, some Redactions are to remain sealed, as indicated below.

The Redactions in the Search Warrant Informations

¶ 69 I have come to the following conclusions with respect to the Redactions in the Search Warrant Informations. Where I have concluded the Redactions are to remain sealed, I have attempted to provide as much description as possible of their unredacted content without disclosing the actual words behind the Redactions.

- Paragraph 3 Redactions: I am satisfied these few redacted words fall into the category of protecting communication of information from a classified secret document, for the reasons previously mentioned. The respondent agrees these words describe the extent to which the information in the applicant, Juliet O'Neill's article reflects portions of the classified secret document. They are to remain sealed.
 - Paragraph 4 Redactions: In paragraph 9, this document is referred to as being the classified secret document and I am satisfied these redactions are to remain sealed on this basis, for the reasons previously mentioned.
 - Paragraph 5 Redactions: The RCMP officer testified that these Redactions are about the timing of the information with respect to the classified secret document and that it is important to protect the nature of its origin. I am satisfied these Redactions are part of the classified secret document justification and they are to remain sealed on this basis.
 - Paragraph 6 Redactions: The RCMP officer testified that these Redactions were justified on the basis of a national security interest as they could identify an agency that needs to remain undisclosed. I am satisfied, on balance, that the disclosure of these Redactions would not be compatible with the public interest. They are to
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remain sealed.

- Paragraph 8 Redactions: I am satisfied these Redactions are to remain sealed on the classified secret document basis for the reasons previously mentioned.
- Paragraph 9 Redactions: I am satisfied these Redactions are to remain sealed on the classified secret document basis for the reasons previously mentioned.
- Paragraph 11 Redactions: The RCMP officer testified that the first Redaction involves the coded name of another ongoing investigation and its disclosure could provide information on its scope that could compromise that other investigation and endanger national security. The second and third Redactions name the region involved in this other ongoing investigation. I am satisfied, on balance, that the disclosure of these first, second and third Redactions would not be compatible with the public interest. They are to remain sealed.

The RCMP officer testified that the fourth and fifth Redactions pertain to the location of the RCMP building and for national security reasons that location should remain confidential even though it has an exterior sign indicating it is an RCMP building. There is no reason in the context of this paragraph and the public knowledge of the location of this building including information that has been released to the presently ongoing Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar (the "Arar Inquiry"), as filed by the applicants, that these Redactions should remain sealed. I order the fourth and fifth Redactions be disclosed.

The sixth Redaction has already been disclosed as part of the respondent's disclosure made during the course of argument on this application to quash the Sealing Orders of paragraph 7 of the Search Warrants Information. There is no reason in the context of this paragraph 11 to keep this sixth Redaction sealed and I order it be disclosed.

The seventh, eighth and ninth Redactions pertain to the coded name of another investigation and the location of the investigative team for this other investigation. I am satisfied, on balance, that the disclosure of these seventh, eighth and ninth Redactions would not be compatible with the public interest. They are to remain sealed.

- Paragraph 13 Redactions: The first Redaction has to do with the naming of the room of the investigative team for another investigation and as before, I am satisfied, on balance, that the disclosure of this would not be compatible with the
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public interest. It is to remain sealed.

The second and third Redactions pertain to the location of the RCMP building as in paragraph 11 and for the same reasons I order these Redactions be disclosed.

The fourth and final Redaction of paragraph 13 pertains to the coded name of another investigation and as before, I am satisfied, on balance, that its disclosure would not be compatible with the public interest. It is to remain sealed.

- Paragraphs 14, 15 and 16 Redactions: Again, this is the location of the RCMP building and for the same reasons as before I order these Redactions be disclosed, except for the final Redaction in paragraph 16 that pertains to the room for the investigative team for another investigation. As before, I am satisfied, on balance, that the disclosure of this final Redaction in paragraph 16 would not be compatible with the public interest and it is to remain sealed.
 - Paragraphs 17 and 18 Redactions: I fail to understand the basis for these redactions even though their Marginal Notations indicate "Information that could be detrimental to ongoing investigations" and "prejudice to the interests of an innocent third party". The RCMP officer seems to have been saying on cross-examination that the report referred to was in the category of secret classified information. However, there is no evidence of this before me and further, it appears from material filed by the applicants of evidence made public before the Arar Inquiry, that this information is already properly in the public domain. As there is no evidence of a serious risk posed to the administration of justice by disclosure of this information, I order these Redactions be disclosed.
 - Paragraph 20 Redactions: These Redactions, except for the last Redaction, have to do with the name of an RCMP employee receiving an e-mail message from an e-mail address that appears to belong to the applicants. Their Marginal Notations indicate that disclosure of the information could be detrimental to ongoing investigations. I agree, however, a more obvious reason for sealing, in my view, is that disclosure could prejudice the interests of an innocent person. The last Redaction involves a coded name of another investigation. I am satisfied, on balance, that the disclosure of these Redactions would not be compatible with the public interest. They are to remain sealed.
 - Paragraph 21 Redactions: These two Redactions pertain to the room number where the computer server for the Canadian Police Information Centre (CPIC) is located. I am satisfied, on balance, that disclosure of this location would not be compatible with the public interest and these Redactions are to remain sealed.
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- Paragraph 23 Redactions: The first and second Redactions are, as their Marginal Notations indicate, with respect to an investigational technique and the RCMP officer said it needed to be kept secret for future investigations. There is no evidence that this is a unique or unknown technique or that there is any serious risk posed to the proper administration of justice by its disclosure. I order the first and second Redactions be disclosed.

The third and last Redaction I am satisfied could prejudice the interests of an innocent person and if, as this paragraph explains, the e-mail message was in fact sent by the applicant, Juliet O'Neill, she will already have knowledge of this Redaction. I am satisfied, on balance, that the disclosure of this third Redaction would not be compatible with the public interest and it is to remain sealed.

- Paragraphs 24, 25 and 28 Redactions: I am satisfied that disclosure of all of these Redactions could prejudice the interests of an innocent person and that, on balance, their disclosure would not be compatible with the public interest. They are to remain sealed.
- Paragraphs 29, 30 and 37 Redactions: All of these Redactions protect personal information of the applicant, Juliet O'Neill. I understand Ms. O'Neill has waived her privacy interests in that information and if that is the case, these Redactions are to be disclosed.
- Paragraph 38 Redactions: These Redactions have Marginal Notations of "prejudice to the interests of an innocent third party", however, the RCMP officer disagreed, stating that their non-disclosure was to protect an investigative technique. While, in my view, both justifications could apply, there is no evidence that this is a unique or unknown technique or that there is any serious risk posed to the proper administration of justice by their disclosure. I order these Redactions be disclosed.
- Paragraphs 44, 45, 46 and 47 Redactions: These Redactions have Marginal Notations of "potential injurious information" and "ongoing investigation" and the RCMP officer further explained that their disclosure could compromise national security interests by identifying associated domestic agencies involved in this investigation and thereby cause prejudice to international relationships and the nature, extent and integrity of this, as well as other ongoing investigations. I am satisfied on balance, that the disclosure of these Redactions would reveal the extent to which other agencies have assisted in this investigation, and that such disclosure would not be compatible with the public interest. These Redactions are to remain sealed.

The Redaction in the Solemn Declarations

¶ 70 I am satisfied that disclosure of the Redaction in the Solemn Declarations could prejudice the interests of an innocent person and that, on balance, its disclosure would not be compatible with the public interest. This Redaction is to remain sealed.

Summary of Redactions that are to Remain Sealed

¶ 71 The Redactions that are to remain sealed, as referred to above, include the Redaction in the Solemn Declarations and the following Redactions in the Search Warrant Informations:

- Paragraph 3: all the Redactions are to remain sealed;
 - Paragraph 4: all the Redactions are to remain sealed;
 - Paragraph 5: all the Redactions are to remain sealed;
 - Paragraph 6: all the Redactions are to remain sealed;
 - Paragraph 8: all the Redactions are to remain sealed;
 - Paragraph 9: all the Redactions are to remain sealed;
 - Paragraph 11: the first, second, third, seventh, eighth and ninth Redactions are to remain sealed;
 - Paragraph 13: the first and fourth Redactions are to remain sealed;
 - Paragraph 16: the final Redaction is to remain sealed;
 - Paragraph 20: all the Redactions are to remain sealed;
 - Paragraph 21: all the Redactions are to remain sealed;
 - Paragraph 23: the third Redaction is to remain sealed;
 - Paragraph 24: all the Redactions are to remain sealed;
 - Paragraph 25: all the Redactions are to remain sealed;
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- Paragraph 28: all the Redactions are to remain sealed;
- Paragraph 44: all the Redactions are to remain sealed;
- Paragraph 45: all the Redactions are to remain sealed;
- Paragraph 46: all the Redactions are to remain sealed;
- Paragraph 47: all the Redactions are to remain sealed.

Summary of Redactions Ordered Disclosed

¶ 72 The Redactions ordered disclosed, as referred to above, are all contained in the Search Warrant Informations and are the following:

- Paragraph 11: the fourth, fifth and sixth Redactions are ordered disclosed;
- Paragraph 13: the second and third Redactions are ordered disclosed;
- Paragraph 14: all the Redactions are ordered disclosed;
- Paragraph 15: all the Redactions are ordered disclosed;
- Paragraph 16: all the Redactions except for the final Redaction are ordered disclosed;
- Paragraph 17: all the Redactions are ordered disclosed;
- Paragraph 18: all the Redactions are ordered disclosed;
- Paragraph 23: the first and second Redactions are ordered disclosed;
- Paragraphs 29, 30 and 37: if the applicant, Juliet O'Neill waives her privacy interests in these Redactions as I have understood her to have done, all the Redactions are ordered disclosed;
- Paragraph 38: all the Redactions are ordered disclosed.

¶ 73 To allow the respondent time to determine the measures it may wish to take with respect to the above disclosure orders, the disclosure orders shall only come into effect upon the expiry of 12 days after the release of this decision and only if no court order has been made by that time preventing that disclosure.

RATUSHNY J.

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information has already been placed in the public domain. In other words, as I understand the respondent's submission, just because secret information is already in the public domain does not justify its further disclosure by order of this Court. It remains classified secret information as the Search Warrant Informations indicate. The allegation is that it was wrongfully disclosed and those alleged **wrongs** cannot operate to **make** it "**right**" or lawful for this Court to do anything other than respect its secret classification and keep that information secret.

[para60] There is merit in this argument. Of course, information is not secret just because someone has called it secret. However, the evidence before me from the Search Warrant Informations is that the document was and remains classified as secret and the Act applies to such a document. I have no evidence of why the document is classified as secret. The only evidence before me is that it is protected by the Act and it is unlawful, because it is an offence, to disregard its secret classification.

[para61] I have, where indicated below, allowed some of
