# ONTARIO COURT OF JUSTICE

IN THE MATTER OF an application for an order terminating or varying the order of Justice S.E. Marin dated May 31, 2013 sealing documents relating to search warrants and any related orders executed at various locations and addresses in the City of Toronto between May 31, 2013 and June 14, 2013.

**TORONTO STAR NEWSPAPERS LIMITED, THE GLOBE AND MAIL INC., CTV, A DIVISION OF BELL MEDIA INC., CANADIAN BROADCASTING CORPORATION, SHAW TELEVISION LIMITED PARTNERSHIP, POSTMEDIA NETWORK INC., SUN MEDIA CORPORATION and CANADIAN PRESS ENTERPRISES INC.**

Applicants

**and**

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**

Respondent

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Before Justice P. Downes
Heard on September 12, 2013
Reasons for Judgment released on September 16, 2013

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**Ryder Gilliland ..... for the applicant Toronto Star Newspapers Ltd.**

**Peter Jacobsen ..... for the applicants The Globe And Mail Inc., CTV, a Division of Bell Media Inc., Canadian Broadcasting Corporation, Shaw Television Limited Partnership, Postmedia Network Inc., Sun Media Corporation and Canadian Press Enterprises Inc.**

**Jeffrey A. Levy and G. Paul Renwick ..... for the Crown**

**Ashley Audet ..... for the accused Brett Kersey**

**Adam Boni ..... for the accused Ayamle Omar and agent for John Rosen, counsel for the accused Brent Abrahams**

**Ariel Herscovitch ..... for the accused Daoud Hussein**

**Franklin Lyons ..... agent for Edward H. Royle & Associates, counsel for the accused Curtis Elliot and Cory Peterson**

**Indira Stewart ..... as agent for Bob Richardson, counsel for the accused Monir Kassim.**[1]

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[1] While counsel for these individual accused arrested as part of Project Traveller wish to be heard on other issues should they arise, they understandably did not seek to make submissions on the issue addressed in this ruling.

**DOWNES J.:**

## 1.0 INTRODUCTION

[1] The applicant media organizations have applied under s. 487.3(4) of the *Criminal Code* to vary the order imposed by my colleague Marin J. on May 31 sealing an Information to Obtain a search warrant (the May 31 ITO). That warrant was one of many obtained by the Toronto Police during what is now widely known as "Project Traveller", an investigation into alleged gang-related activity concentrated in the north-west of the city.

[2] The applicants say that because the warrant has been executed, items seized and arrests made, the ITO is now presumptively open to the public and any continued sealing is only justified if I am satisfied that the criteria in s. 487.3(1) and (2) are still operative. Otherwise, the continued sealing order violates the media's and the public's right to access under s. 2(b) of the *Charter*.

[3] The application was filed on June 14, 2013. On June 17, 2013 Marin J. adjourned it to July 2, 2013. On that date I heard submissions and made a ruling concerning the manner and timing by which this application should proceed.[2]

[4] Since then, the applicants have filed a further application seeking the same relief in respect of several other ITOs filed in support of various judicial authorizations during Project Traveller.[3] The Crown has provided to the parties and the Court what it believes to be a comprehensive chart of approximately 80 judicial authorizations, the supporting ITOs for which were all sealed pursuant to s. 487.3.[4] The media intends to pursue the same relief in relation to all of these.

[5] The Crown agrees that the sealing orders should be varied, but says that the ITOs must be redacted before they are released to the media or the public. Broadly speaking the Crown justifies those proposed redactions on two grounds: first that they are necessary to protect the identity of a confidential informant under s. 487.3(2)(a)(i), and second, that disclosure is prohibited under s. 193 of the *Criminal Code*, presumably invoking s. 487.3(2)(b). The ends of justice would, the Crown submits, be subverted by wholesale disclosure of the ITO, and the reasons for the redactions outweigh the importance of access to the information in accordance with s. 487.3(1)(b).

[6] I do not understand the applicants to take issue with the latter proposition to the extent that if indeed the proposed redactions would disclose the identity of a confidential in-

[2] There followed a formal Order dated July 8, 2013 which was amended on August 26, 2013. Both are attached as Appendix "A" to these reasons.

[3] These include conventional search warrants, Production Orders under s.487.012, a Tracking Warrant under s.492.1, a Number Recorder Warrant under s.492.2, and "Feeney" warrants under s.529 of the *Code*.

[4] The chart is attached as Appendix "B". For the purposes of these reasons the particular addresses for which the authorizations were sought are redacted, pending clarification from the Crown on their release. The number of authorizations would not, of course, necessarily correspond to the number of sworn ITOs, since one ITO may have supported the issuance of multiple authorizations.

formant, or if their disclosure would constitute an offence under s. 193 then they agree that those are justifiable grounds for disclosing only a redacted version of the ITO. The former ground is not in issue in relation to the May 31 ITO; the Crown seeks to justify the redactions of that ITO *only* on the basis that their disclosure would constitute a criminal offence under s. 193(1).

[7] This ruling addresses the correctness of that position.

[8] While formally relating only to the May 31 ITO, the resolution of that issue impacts many of the ITOs that are the subject of the second, and will be the subject of subsequent applications to vary the sealing orders described in Appendix "B". There are important reasons to ensure that these applications be addressed without undue delay. I am hopeful that my ruling on the narrow issue raised at this stage will ultimately mean a more expeditious resolution of all the subsequent unsealing applications in relation to Project Traveller authorizations.

## 2.0 THE ISSUE

[9] In accordance with my earlier Order, on August 7, 2013 the Crown provided the applicants with a copy of the May 31 ITO, about 90 per cent of which was redacted. I was provided with both a redacted and an unredacted copy. With the exception of one paragraph,[5] the Crown explains all of those redactions on the basis of s. 193 of the *Criminal Code* because they describe conversations captured pursuant to judicially authorized non-consensual interceptions of private communications (generally referred to as wiretaps).

[10] Broadly stated, s. 193 makes it a criminal offence to disclose the contents of a non-consensual interception except in certain enumerated circumstances. The Crown's reading of those exceptions would prohibit the disclosure sought by the applicants.

[11] If the Crown is correct then, it submits, I must dismiss the application without regard to the balancing process referred to as the *Dagenais/Mentuck* test which sets out the approach that should be taken to any orders which restrict public access to the courts. In other words, if disclosure of the ITO is statutorily prohibited by s. 193, then in the absence of a constitutional challenge to that section, the application must fail.

[12] The applicants agree that the potential disclosure of intercepted communications engages s. 193, but they say that section has no application in the present circumstances. They submit that s. 193, on its face, in fact *authorizes* the disclosure they seek. A plain reading of the section is all that is required to resolve the issue.

[13] That then is the issue to be determined at this stage: does s. 193 of the *Criminal Code* prohibit the unsealing of those portions of an ITO which reveal the contents of a judicially authorized non-consensual intercept? Put another way, does s. 193, in and of itself, *require* that the ITO remain sealed under the terms of s. 487.03?

[5] The Crown seeks to redact paragraph 347 of the ITO because it, "relates to a police investigative technique which cannot be disclosed." That single paragraph will be addressed when the parties next appear before me on this application.

[14] While the issue is narrowly framed, it is far from simple to resolve. It engages principles of statutory interpretation as well as *Charter*-infused values respecting the open court principle and the right of public access to the work of the courts. It also requires a careful examination of the statutory context in which s. 193 exists and, importantly, an appreciation of the high degree of privacy and confidentiality attaching to the subject matter of Part VI of the *Criminal Code*.

[15] After anxious consideration, and for the reasons that follow, I have concluded that s. 193 of the *Code* is a bar to the order requested by the applicants. In my view the intercepts referred to in the ITO were disclosed "in the course of or for the purpose of [a] criminal investigation" pursuant to the exception in s. 193(2)(b). Save for any that were tendered in evidence at a bail hearing, they were not disclosed "in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings in which the person may be required to give evidence on oath" under s. 193(2)(a). As such, the provisions of s. 193(3) are not engaged and the disclosure of the intercepts to the public at this stage would be a criminal offence. In my view that constitutes a "sufficient reason" for the continued partial sealing of the May 31 ITO under s. 487.3(2)(b) of the *Code*. Countervailing interests of access and scrutiny cannot outweigh the statutory prohibition and consequently the application must fail.

## 3.0 THE STATUTORY PROVISIONS

[16] The May 31 ITO was sealed pursuant to s. 487.3. That section provides:

> 487.3 (1) A judge or justice may, on application made at the time of issuing a warrant under this or any other Act of Parliament or a production order under section 487.012 or 487.013, or of granting an authorization to enter a dwelling-house under section 529 or an authorization under section 529.4 or at any time thereafter, make an order prohibiting access to and the disclosure of any information relating to the warrant, production order or authorization on the ground that
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> (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 ground referred to in paragraph (a) outweighs in importance the access to the information.
>
> (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.

[17] The sealing order was based on evidence contained in the ITO, including the affiant's reference to prior wiretap authorizations but did not specifically advert to s. 193 of the *Code*. I am satisfied that the ITO did indeed contain descriptions of the contents of intercepts judicially authorized under Part VI of the *Code*.

[18] Part VI includes section 193, which reads as follows (the most pertinent excerpts are emphasized):

> 193. (1) Where a private communication has been intercepted by means of an electro-magnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator thereof or of the person intended by the originator thereof to receive it, every one who, without the express consent of the originator thereof or of the person intended by the originator thereof to receive it, wilfully
>
> (a) uses or discloses the private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof, or
>
> (b) discloses the existence thereof,
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.
>
> (2) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication
>
> ***(a) in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings in which the person may be required to give evidence on oath;***
>
> ***(b) in the course of or for the purpose of any criminal investigation if the private communication was lawfully intercepted;***
>
> (c) in giving notice under section 189 or furnishing further particulars pursuant to an order under section 190;
>
> (d) in the course of the operation of
>
> (i) a telephone, telegraph or other communication service to the public,
>
> (ii) a department or an agency of the Government of Canada, or
>
> (iii) services relating to the management or protection of a computer system, as defined in subsection 342.1(2),
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> if the disclosure is necessarily incidental to an interception described in paragraph 184(2)(c), (d) or (e);
>
> (e) where disclosure is made to a peace officer or prosecutor in Canada or to a person or authority with responsibility in a foreign state for the investigation or prosecution of offences and is intended to be in the interests of the administration of justice in Canada or elsewhere; or
>
> (f) where the disclosure is made to the Director of the Canadian Security Intelligence Service or to an employee of the Service for the purpose of enabling the Service to perform its duties and functions under section 12 of the Canadian Security Intelligence Service Act.
>
> ***(3) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any***

> ***part thereof or who discloses the existence of a private communication where that which is disclosed by him was, prior to the disclosure, lawfully disclosed in the course of or for the purpose of giving evidence in proceedings referred to in paragraph (2)(a).***

[19] Part VI also contains its own provisions controlling access to and disclosure of material relating to the application for judicial authorization. Section 187, for example, provides, *inter alia*:

> 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).

## 4.0 THE CONSTITUTIONAL CONTEXT

[20] In approaching the specific interpretation of s. 193, the applicants emphasize that this issue arises in the context of well-established and important principles rooted in the values expressed in s.2 (b) of the *Charter*.

[21] I have already referred to those important principles in my ruling of July 2, 2013. The Supreme Court of Canada has made it clear that accountability and the open court principle require that a sealing order should only continue after the execution of the warrant where the Crown "can demonstrate that public access would subvert the ends of justice": *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188.

[22] The applicants also submit that any interpretation of s.193 of the *Code* must be undertaken in accordance with *Charter* values: *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559.

[23] The Crown takes no issue with these general principles. As I have already said, it submits, however, that the balancing process in *Dagenais/Mentuck* and the respect for s. 2(b) values of openness are all subjugated to the clear prohibition contained in s. 193. No amount of *Charter*-infused interpretation can modify that prohibition and, absent a constitutional challenge to s. 193, there is no discretion in the Court to balance competing values against Parliament's clearly expressed intention to carefully circumscribe the disclosure of intercepted communications.

## 5.0 THE STATUTORY CONTEXT: PART VI OF THE *CRIMINAL CODE*

[24] Parliament has seen fit to mandate a heightened level of confidentiality to the contents of secretly recorded telephone conversations between non-consenting parties. It has done so through Part VI of the *Code*.

[25] Part VI of the *Code* is a comprehensive scheme to protect private communications. In *R. v. Telus Communications Co.*, [2013] S.C.J. No. 16 at para. 3 the Supreme Court of Canada described Part VI as having the "objective of protecting individual privacy interests in communications by imposing *particularly rigorous safeguards*" [emphasis added]. At paragraph 23 the Court endorsed the holding of Zuber J.A. in *R. v. Welsh* (1977), 32 C.C.C. (2d) 363 (Ont. C.A.):

> It is apparent that in enacting the *Protection of Privacy Act*, 1973-74 (Can.), c. 50, ... Parliament had two objectives. The first was to protect private communications by prohibiting interception and to render inadmissible evidence obtained in violation of the statute. The second objective, which balances the first, was to recognize the need to allow the appropriate authorities, subject to specific controls, to intercept private communications in the investigation of serious crime, and to adduce the evidence thus obtained.

[26] *R. v. Telus* affirmed that, "because the purpose of Part VI is to restrict the ability of the police to obtain and disclose private communications, it is drafted broadly to ensure the necessary protection." The safeguards in Part VI, "illuminate Parliament's intention that a higher degree of protection be available for private communications": *R. v. Telus*, *supra*, at para. 31; *Michaud v. Quebec (Attorney General)*, [1996] 3 S.C.R. 3; *R. v. Siemens*, [1998] A.J. No. 1 (C.A.); R. Hubbard, P. Brauti & S. Fenton, *Wiretapping and Other Electronic Surveillance: Law and Procedure*, loose leaf, (Aurora, Ont.: Canada Law Book, 2006) at page 13-12.2.

[27] The confidentiality and disclosure provisions of Part VI clearly provide a special and elevated protection to individual privacy. As the British Columbia Court of Appeal put it in *R. v. Guess*, [2000] B.C.J. No. 2023 (C.A.) at para. 17:

> When provisions were introduced by Parliament into the *Criminal Code* in the early 1970s allowing the interception of private communications, it was undoubtedly a concern of government that intercepted private communications, "wiretap", should not compromise legitimate privacy interests of the citizenry more widely than was strictly requisite for the purposes of combating crime. That rationale clearly underlies the provisions found in s. 193.1, *supra*. There is a positive obligation laid upon police and prosecutorial authorities to not disseminate such materials except in accordance with the provisions of the statutory scheme. For instance, it is permissible to disclose such materials in the course of giving evidence or in giving to an accused or counsel for an accused notice of an intention to produce such intercepted communications in a court proceeding. But it is not permissible to disseminate such material to the world at large.

[28] The heightened confidentiality provisions are not difficult to rationalize: these are telephone conversations secretly recorded without the consent of the participants. In an affidavit such as the one sealed by Justice Marin, the police are not relying on observations of public behaviour, or on the movements of people in the public domain, or on documents that may be private but in the hands of a third party. They are not even relying on ostensibly conversations overheard in a public place. These are conversations which Parliament has said are deserving of the highest degree of privacy and protection from disclosure. That is why it went so far as to make it a criminal offence, punishable by two years in prison, to disclose them except in certain narrowly circumscribed situations.

[29] Affording this kind of protection to innocent third parties is consistent with other statutory and common law frameworks touching on access and disclosure such as the provisions of ss. 278.1 to 278.91 of the *Criminal Code* and the dicta of the Supreme Court of Canada in *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Siemens*, *supra*, at para. 26.

[30] It is both this backdrop and the values underlying s. 2(b) of the *Charter* that must inform the interpretation of s. 193 in this case.

## 6.0 THE APPLICATION OF SECTION 193

### 6.1 The Applicants' Position

[31] The applicants' position is not a complicated one: since the ITO in support of the May 31 warrant disclosed the contents of judicially authorized intercepts, those contents become evidence given in the course of a criminal or other proceeding under s. 193(2)(a). It is this subsection that permitted the affiant to include the intercepts in his application without attracting criminal liability under s. 193(1).

[32] The applicants go on to argue that once the exception in s. 193(2)(a) is engaged then any *further* disclosure of the intercepts disclosed in the ITO is also explicitly permitted under s. 193(3). That subsection permits disclosure without criminal liability where disclosure of the intercepts has *already* been made, "in the course of or for the purpose of giving evidence in proceedings referred to in paragraph (2)(a)." As the factum of one of the applicants, "where information gathered as a result of Part VI authorizations is included in materials relied on by law enforcement officials to obtain a search warrant, it is no longer subject to the prohibition on the disclosure of the existence or contents of the private communications found in s.193 of the *Criminal Code*."

[33] As a result, the applicants submit, the contents of the intercepts referred to in the May 31 ITO "are presumptively open to the public." Since the Crown has offered no other justification for their remaining sealed (save for one paragraph), the sealing order must be lifted and the May 31 ITO disclosed.

### 6.2 The Crown's Position

[34] The Crown offers a two-pronged response to the applicants' interpretation of s.193. First, it says that s. 193(2)(a) does not apply to the May 31 ITO because the ITO was not used, "in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings." The search warrant application in this case was outside of criminal proceedings as that term is understood in the context of the life of a criminal case.

[35] Second, the Crown says that s. 193(3) has no application because the disclosure of the intercepts in the May 31 ITO was not made under the exception in s. 193(2)(a). Rather, the Crown submits, it was protected by the exception in s. 193(2)(b), "in the course of or for the purpose of any criminal investigation."

## 6.3. Analysis

### 6.3.1 Section 193 Generally

[36] In *R. v. Dunn*, [2013] O.J. No. 3918 (C.A.) at paras. 36 to 38 the Court of Appeal for Ontario recently reiterated the first principles of modern statutory interpretation:

> The approach to statutory interpretation has been set out in any number of decisions from the Supreme Court of Canada. It begins with the well-known principle from Elmer A. Driedger, Construction of Statutes, 2nd ed., (Toronto: Butterworths, 1983) at p. 87:
>
> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> [37] As stated by Iacobucci J. in *Bell Express Vu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at paras. 26-28, this approach applies in a wide variety of interpretive contexts, including the interpretation of criminal statutes: see e.g. *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; *R. v. Davis*, [1999] 3 S.C.R. 759. Because Driedger's principle is the preferred approach, the principle of strict construction of penal statutes only applies where some ambiguity remains in the meaning of the provision after the contextual and purposive approach has been undertaken by the interpreting court: *Bell ExpressVu*, at paras. 28 and 30.
>
> [38] The modern approach requires the court to consider the grammatical and ordinary sense of the words used, the broader context having regard to the scheme and object of the Act, and the intention of Parliament.

[37] The applicants' position finds its most generous support in the judgment of Madam Justice Ross in *R. v. Hennessey*, [2008] A.J. No. 1563 (Q.B.). In that case the applicants sought an order under s. 487.3 restricting public access to and publication of an Information to Obtain a DNA warrant and a Production Order on the grounds that disclosure would prejudice their rights to a fair trial in the criminal proceeding in which they were co-accused.

[38] The applicants in *Hennessy* took the position that portions of the ITOs referring to intercepted private communications should be removed prior to any unsealing of the documents because permitting access to them would violate s. 193 of the *Criminal Code*. At para. 26 of her judgment Ross J. rejected that argument. Her reasons capture succinctly the position of the applicants in this case:

> I conclude that s. 193 does not prohibit the disclosure sought in this application. Section 193 (2)(a) provides an exception permitting disclosure of the content or existence of intercepted private communications where this is done "in the course of or for the purpose of giving evidence in any civil or criminal proceedings". Thus the police officers who referred to intercepted communications in the Informations did not commit an offence under s. 193 (1). Section 193 (3) provides a further exception for anyone who discloses the content or existence of an intercepted private communication "where that which is disclosed by him was, prior to the disclosure, lawfully disclosed in the course of or for the purpose of giving evidence in proceedings referred to in para. 2(a)". Thus, secondary or derivative disclosures are not offences under s. 193 (1).

[39] Ross J. proceeded to apply the *Dagenais/Mentuck* test to the ITO in question, "taking into account the special considerations that relate to wiretaps": *R. v. Hennessy, supra*, at para. 34.

[40] The applicants' position finds other limited support outside of Ontario: see *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.*, [2010] B.C.J. No. 2347 (C.A.).

[41] Other considerations of s. 193, however, have reflected a less expansive approach to its application: see *R. v. Guess*, supra; *R. v. Guilbride*, [2001] B.C.J. No. 2108 (Prov Ct.) at para. 23; *R. v. Malik*, [2003] B.C.J. No. 2976 (S.C.); *R. v. Adam*, [2006] B.C.J. No. 919 (S.C.).

[42] There is scant authority in Ontario. In *National Post Co. v. Canada (Attorney General)*, [2003] O.J. No. 2238 (S.C.J.); leave to appeal refused, [2003] S.C.C.A. No. 422, McKinnon J. considered the provisions of s. 193 in the context of an application under s. 487.3(4) to terminate a sealing order in relation to Informations to Obtain certain search warrants. As in this case, one of the ITOs had been substantially redacted to remove references to conversations recorded pursuant to judicially authorized interceptions. In that case, too, the applicant media organizations argued that once the officer had incorporated by reference evidence of the interception of private communications into his affidavit to obtain the search warrant, they were entitled to publish the information in accordance with the Supreme Court's decision in *MacIntyre*.

[43] McKinnon J. rejected the applicants' argument, holding at para. 12 that "[s]ection 193 of the *Code* cannot be read independently of the entire scheme of Part VI of the *Criminal Code* relating to 'Invasion of Privacy'. A textual analysis is mandated." He went on to conclude at para. 17 that:

> 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.

[44] As a decision of the Superior Court of Ontario, I consider *National* Post to be a significant if not binding authority.

[45] Although the Ontario Court of Appeal has not addressed this issue directly, the Crown points to *R. v. Canadian Broadcasting Corp*., [2008] O.J. No. 1966, in support of its position that the inclusion of intercepted communications in an ITO does not extinguish their confidentiality under s. 193(3).

[46] In that case the Court was reviewing the decision of Leitch J. on an application for

*certiorari* to quash or vary orders sealing materials in support of search warrants. Leitch J. ordered some of the ITOs unsealed but left portions of them sealed because, as she put it, "there are privacy rights that must be protected as required by s. 193 (1) of the *Criminal Code*": *R. v. Canadian Broadcasting Corp.*, [2007] O.J. No. 301 (S.C.J.) at para. 50. Both the accused and the media appealed from Leitch J.'s decision, arguing respectively that her order was too narrow or too broad. In dismissing both appeals the Court of Appeal referred to the merits of the various grounds relied on by Leitch J. for continuing the sealing order but made no comment on the correctness of her decision regarding the application of s. 193.

[47] The decision is of limited value to the present issue, but I accept that it at least stands for the proposition that the Court of Appeal did not consider Leitch J.'s reliance on s.193 as a basis for continued sealing to be clearly erroneous.

[48] In a more broadly framed submission the applicants say that if the contents of the ITO are protected by s. 193 then they may never be seen by the public and there will be no means by which the issuing judicial officer can be held to account in accordance with the values of s. 2(b) of the *Charter*. In my view that argument has little resonance in the context of the disclosure of non-consensual intercepts. Even if one accepts the general and, in my view, inaccurate implication that the Crown's interpretation of s. 193 means that the warrant process is somehow immune from scrutiny,[6] in some circumstances that is simply the price to be paid for protecting the vital (and *Charter*-protected) interests of innocent third parties. In *R. v. Adam, supra*, at para. 130, Romilly J. put it this way:

> Parliament and the Supreme Court of Canada have both recognized the vital importance of wiretap authorizations in combating crime, especially sophisticated crime. Both these entities have also recognized the particularly intrusive nature of this form of investigation. The compromise that they have reached, as I see it, is this - the severe invasion of privacy inherent in wiretaps is an acceptable sacrifice given the value of this tool, but the trade-off is that this process must operate with more confidentiality and secrecy than other investigative tools.

[49] The same result would obtain if an investigation and prosecution proceeded on the basis of evidence gathered exclusively by means of intercepted communications without resort to any search warrants or other judicial authorizations. No one suggests that in those circumstances there would be an inevitable failure of public scrutiny.

[50] Even search warrant applications themselves are not necessarily open to public view. As the court held in *MacIntyre* at p. 187, where search warrants are executed and nothing is seized (notwithstanding the invasion of privacy which may well have already taken place in the course of execution), "[t]he public right to know must yield to the protection of the innocent."

[51] Similarly, references in an ITO to confidential police informants or to other evidence that may qualify for protection under a form of privilege do not give way to the open court principle. That kind of information is disclosed only in very narrowly circumscribed

[6] It is not, of course. It is subject to challenge by the accused at their trial or even (though rarely) pre-trial by way of *certiorari*.

situations and in some cases will also be captured by specific provisions in s. 487.3. Surely a statutory regime such as s. 193 designed for the very purpose of maintaining confidentiality qualifies as a "sufficient reason" to refuse public access under s. 487.3. No amount of countervailing public interest in disclosure could serve to defeat Parliament's expressed prohibition.

[52] In my view the ends of justice would be subverted by an order overriding a statutory prohibition designed to ensure confidentiality: see *Re: Yanover et al.*, [1982] O.J. No. 3676 (Ont. C.J.) and *Re: Gerol And The Queen*, [1982] O.J. No. 3655 (Ont. C.J.).

[53] In my view, the interpretation of s. 193 urged by the applicants would lead to the unprincipled result that where law enforcement officials had lawfully intercepted telephone conversations and rely on the contents of those interceptions in applying for a subsequent judicial authorization to intercept telephone conversations, the provisions of Part VI would make the affidavit filed in support of the application presumptively sealed, subject only to very limited exceptions and carefully circumscribed procedures,[7] yet where those same intercepts are relied on to obtain a search warrant, then the privacy and confidentiality provisions attached to them under Part VI would evaporate.

[54] Such a result is not consistent with the spirit and intent of Part VI. It cannot be what Parliament intended in enacting s. 193 and in would be inconsistent with its expressed intention of keeping the contents of non-consensual intercepts confidential except in accordance with carefully established procedures.

[55] It is for these reasons that, in my respectful view, the holding in *R. v. Hennessy*, *supra*, cannot be sustained as a general proposition when measured against the elevated privacy interests inherent in non-consensual intercepts. The applicants are surely correct when they highlight the need for transparency and openness. But in the current context their position is overly-simplistic and fails to account for the overall statutory context in which the use and disclosure of intercepted communications is situated.

[56] It is important to emphasize that my interpretation of the scope of the confidentiality provisions in s. 193 is unaffected by any speculation or suggestions as to what might be contained in the ITO in question. That is why I have not made mention of the evidence on this application about what the applicants say might be contained in the ITOs. Just because the applicants suggest, rightly or wrongly, that the contents of the intercepts in this case might be of heightened interest to the public does not change the fact that in my view there is a statutory prohibition to them being disclosed. That prohibition would apply regardless of who or what is said to be referred to in the sealed materials.

### 6.3.2 The Meaning of "Criminal Proceedings" in s.193 (2)(a)

[57] As discussed, section 193(3) is only engaged if the contents of the intercept were

[7] The applicants acknowledge that they are not seeking access to materials in support of the Part VI authorizations, presumably because they appreciate they would not be entitled to receive them.

previously disclosed "in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings." The success of the applicants' argument therefore depends on whether the application before the issuing Justice in this case falls under the rubric of "criminal proceedings."

[58] I have not been made aware of any decision that has considered the issue of whether pre-charge applications for a search warrant are "criminal proceedings" in s. 193(2)(a). The applicants point to *Toronto Star Newspapers Ltd. v. Ontario*, *supra*, at para. 5, where the Court refers to the search warrant application as, "the pre-charge or 'investigative ***stage'*** of criminal proceedings" [emphasis added].

[59] The search warrant application is elsewhere described as a "proceeding" or an "interlocutory procedure": see for example *Attorney General of Nova Scotia v. MacIntyre, supra*, at para. 72; *Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338. Section 118 of the *Criminal Code* defines "judicial proceeding" for the purposes of Part IV of the *Code* as a proceeding: "in or under the authority of a court of justice," or "before a court, judge, justice, provincial court judge or coroner."

[60] Yet none of these examples squarely address the question of when "criminal proceedings" – the term used in s. 193(2)(a) – commence.

[61] In *R. v. Linamar Holdings Inc.*, [2007] O.J. No. 4859, leave to appeal refused, [2008] S.C.C.A. No. 33, however, the Ontario Court of Appeal held at para. 10 that, "[t]he laying of the information before a justice of the peace is the first formal step taken in the proceedings before the Provincial Offences Court and in our view constitutes the institution of the proceedings": see also *Regina v. Southwick, Ex parte Gilbert Steel Ltd.*, [1967] O.J. No. 1034 (C.A.) at para. 10. Section 193 refers to "proceedings" in the plural.

[62] In the *Charter* s. 11(b) context, it is well-established that the accused's rights are not engaged until an information is sworn: *R. v. Kalanj*, [1989] 1 S.C.R. 1594.

[63] Statutory interpretation is a delicate art, but the particular words used must have some meaning. The reference to proceedings in the plural in my view leaves open the possibility that an application for a search warrant might be "a proceeding," but not in the course of criminal *proceedings*, which only commence upon the laying of an information.

[64] In my view, the decision in *Linamar Holdings* is clear and I am bound by it: at the time the May 31 ITO was sworn criminal proceedings had not commenced. Section193(2)(a) therefore has no application.

[65] On this interpretation of s. 193(2)(a) one might fairly ask what principled reason justifies the distinction between a bail hearing, a preliminary inquiry or a trial on the one hand and a search warrant application made prior to any information being laid on the other. Why does s. 193(3) prohibit the media from reporting on evidence about the contents of an interception given at the latter while they could (subject to any judicially-imposed publication ban) freely report on the same evidence if it were given at any of the first three proceedings? In this case, the Crown concedes that but for s. 193 it would have no objection to the

May 31 ITO being unsealed and indeed, there would presumably be no basis to seek and order under s. 487.3.

[66] In my view the answer to that question is that Parliament has chosen to make the commencement of proceedings the tipping point at which the balance between the various interests begins to change. It may be that no one is ever charged and no proceedings are ever instituted. Parliament has decided that until they are, the contents of non-consensual intercepts must retain and be given a high degree of confidentiality.

[67] I was troubled, however, by one aspect of the Crown's submissions. In response to a question from the Court the Crown confirmed that portions of intercepts ***had*** been tendered in evidence on behalf of the Crown at bail hearings for some of the accused in Project Traveller. On that basis it would seem on the face of it that s. 193(3) is triggered and the wiretaps referred to in the bail hearing become disclosable in the ITO.

[68] The Crown agrees in principle, but says that what becomes disclosable under s. 193(3) is not the entirety of the May 31 ITO, or even those excerpts of the ITO which may have been relied on at the bail hearings. What *can* be lawfully disclosed under s. 193(3) are the proceedings at the bail hearings, because those were the "criminal proceedings" referred to in s. 193(2)(a) at which the wiretaps were disclosed. Those portions, the Crown says, are available to the media by ordering a copy of the transcript of the pertinent bail hearings.

[69] I do not accept the Crown's position on this issue. While I agree that reliance on some of the information contained in the May 31 ITO at the bail hearings does not trigger disclosure of the entire ITO, it does require that those portions not be redacted from it. My interpretation of s.193 is grounded in Part VI's overriding concerns for protecting the privacy of intercepted communications. Surely where those very conversations have been tendered in open court at a bail hearing, there is no longer any justification for redacting them in the ITO.

[70] I accept that, as Mr. Levy put it his submissions, it might be a time-consuming task to identify those portions of the ITO that were relied on at the bail hearings, but that is not a principled reason for interpreting s.193 in the manner urged by the Crown. It may be that the practical effect of this particular issue is minimal in that the media may be content to simply obtain a transcript of the bail hearings. But in my view they are entitled to see those portions of the May 31 ITO that have been tendered by the Crown at a bail hearing.

[71] I would add, however, that those portions of the ITO could not be used in a manner that would subvert any publication ban ordered at the accused's bail hearings.

[72] It is not clear whether a different interpretation of s. 193(2)(a) would obtain in respect of an identical ITO sworn *after* an information is sworn is not clear. But that is not this case and must be addressed if and when that situation arises.

### 6.3.3 The s. 193(2)(b) Exception

[73] Regardless of the conclusion they come to regarding the application of s. 193, none of the decisions already referred to have squarely addressed the two issues raised by the

Crown in response to this application. Thus in rejecting the media applicants' interpretation of s. 193(3) the judgment of McKinnon J. in *National Post*, for example, does not go on to address the question of how the disclosure of intercepts in an ITO manage to avoid criminal liability under s. 193(1). In *Hennessy* it is assumed without discussion that the disclosures in the ITO were captured by s. 192(2)(a).

[74] As already mentioned, however, the Crown says that the disclosures in the ITO were made not pursuant to s. 193(2)(a) but pursuant to subsection (b), "in the course of or for the purpose of any criminal investigation." It goes without saying that the use of intercepts in a subsequent ITO must find justification somewhere. No one could seriously suggest that legitimate law enforcement concerns could be frustrated by a prohibition on their use in an ITO for a search warrant. Particularly in light of my interpretation of the phrase "criminal proceedings" found in s. 193(2)(a), I accept that s. 193(2)(b) must be the operative subsection here.

[75] Many authorities have referred to the search warrant as an "investigative tool." In *Hudson's Bay Co. v. Canada (Director of Investigation and Research under the Competition Act)*, [1992] O.J. No. 1174 (Gen. Div.) at para. 17 the Court described the search warrant as, "an investigative tool and until the investigation is complete the Crown cannot make a proper determination of whether to prosecute."

[76] In discussing the purpose of the search warrant provisions of the *Criminal Code* in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, the Court referred to the role of the search warrant at the "investigative phase" of a case and held, at paras. 21-22:

> [a]t the investigative stage the authorities are charged with determining the following: What happened? Who did it? Is the conduct criminally culpable behaviour? Search warrants are a staple investigative tool for answering those questions, and the section authorizing their issuance must be interpreted in that light.... The function of the police, and other peace officers, is to investigate incidents which might be criminal, make a conscientious and informed decision as to whether charges should be laid, and then present the full and unadulterated facts to the prosecutorial authorities.

[77] It is at that stage, of course, that an information might be laid and, in accordance with the Court of Appeal's decision in *R. v. Linamar Holdings Inc.*, *supra*, criminal proceedings begin.

## 7.0 CONCLUSION

[78] The fundamental role of the media in facilitating the public's access to and scrutiny of the courts is beyond dispute. Practical difficulties in their accessing court documents must be minimized so that their legitimate pursuit of sealed records can be adjudicated fully and expeditiously on the merits. At the same time, investigations such as the present one are large, complex, multi-faceted projects. The kind of information relied on to obtain judicial authorizations invariably engages many sensitive issues that are not resolvable solely by reference to the need for and right to public and media access. The issue raised on this applica-

tion is but one example of the nuanced difficulties associated with these kinds of cases.

[79] I accept that courts should strive to promote interpretations that tend to promote *Charter* values over interpretations that do not. But that is only the case, "in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations": *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 62.

[80] The apparently straightforward issue of statutory interpretation raised in this application has turned out to be far from simple to resolve. But in my view, the differing interpretations offered of s. 193 are not equally plausible. As I have said, one leads to anomalous and inconsistent results while the other is consistent with the general theme and tenor of the *Criminal Code's* Part VI approach to the interception of private communications. Considered in context, the interpretations urged by the Crown are in my view consistent with a rational scheme governing interception of private communications: *R. v. Dunn*, *supra*, at para. 61.

[81] Section 487.3 justifies the sealing of materials in support of the issuance of a search warrant if the ends of justice would be subverted by the disclosure for any "sufficient reason." In my view a statutory provision that the disclosure would amount to a criminal offence is such a sufficient reason. If the operation of that statutory provision impairs the *Charter* rights of the pubic or the media because it serves to deny access to information which should be in the public domain, then that provision may be constitutionally vulnerable. But the constitutionality of s. 193 is not before me.

[82] In my view the relief sought by the applicants is statute-barred by virtue of s. 193 and the application must fail.

[83] I am satisfied upon careful review of the May 31 ITO that, subject to further consideration of the single excerpt in paragraph 347 of the ITO, all of the redactions made by the Crown, save for any portions which were tendered in evidence at any bail hearing, properly fall under the provisions of s. 193 and cannot be disclosed.

[84] Unless the applicants indicate that they do not require it, the Crown is ordered to provide the applicants with the further redacted version of the May 31 ITO in accordance with these reasons. I will hear submissions on the precise wording of an order, including the question of timing, and will address paragraph 347 when the parties appear before me on September 20, 2013.

[85] I am indebted to all counsel for their thoughtful and helpful submissions.

**Released: September 16, 2013**

Signed: "Justice Downes"