NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Verrilli*, 2020 NSCA 64

Date: 20201015
Docket: CAC 492360
Registry: Halifax

Between:

Her Majesty The Queen

Appellant

v.

Daniel Verrilli

Respondent

Judge:	The Honourable Chief Justice Michael J. Wood
Appeal Heard:	September 14, 2020, in Halifax, Nova Scotia
Subject:	**Search Warrants – Access to ITO – Open Courts**
Summary:	The respondent was the target of a police investigation related to drug trafficking. Police obtained search warrants and orders sealing the ITOs under s. 487.3 of the *Criminal Code*. The warrants were executed and items seized but no charges laid. The respondent applied for access to the search warrant ITOs. Provincial Court judge applied the test in *Michaud v. Quebec* and placed the burden on the respondent to show some evidence that the authorization was unlawful before access would be given and dismissed the application. On judicial review the NSSC set the PC decision aside and concluded that *Dagenais/Mentuck* applied which placed the burden on the Crown to justify continuation of the sealing orders.
Issues:	What is the test to be applied on an application to vary sealing order under s. 487.3(4) of the *Criminal Code*?

Result: The appeal is dismissed. The open court principle applies once a search warrant is executed and *Dagenais/Mentuck* governs any discretionary order which limits that principle. This includes an application to vary a sealing order under s. 487.3(4).

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 16 pages.

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Judges:	Wood, C.J.N.S.; Beveridge and Beaton, JJ.A.
Appeal Heard:	September 14, 2020, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs, per reasons for judgment of Wood, C.J.N.S.; Beveridge and Beaton, JJ.A. concurring
Counsel:	Paul B. Adams, for the appellant J. Paul Niefer, for the respondent

Reasons for judgment:

Background

[1] In March 2018, Daniel Verrilli was under investigation for allegedly possessing cocaine for the purposes of trafficking. Police obtained three search warrants authorized by justices of the peace which were used to conduct searches of his home, business and motor vehicles. No charges were laid against Mr. Verrilli and various items which had been seized during the searches were returned to him.

[2] Mr. Verrilli wanted to determine why he had been the subject of the searches and made application to the Provincial Court of Nova Scotia for access to the documents provided to the justices of the peace to support the search warrant requests. These are generally referred to as Informations to Obtain (the "ITOs"). These had been sealed by order of the authorities who issued the warrants.

[3] Mr. Verrilli's application was denied by Judge David Ryan of the Provincial Court on the basis that he did not satisfy the burden on him to justify access to the sealed materials. He sought judicial review of this decision and Justice Joshua Arnold of the Supreme Court of Nova Scotia set aside the Provincial Court decision (2019 NSSC 263). Justice Arnold determined that the burden rested on the Crown to justify continuation of the sealing order and it was not for Mr. Verrilli to show evidence of unlawful authorization. He concluded Judge Ryan had applied the wrong test and directed Mr. Verrilli's application be sent back to Provincial Court for a further hearing.

[4] The Crown appealed Justice Arnold's decision alleging that he identified the wrong legal test for Mr. Verrilli's application to access the ITOs. For the reasons which follow, I conclude that Justice Arnold was correct in placing the onus on the Crown and would dismiss the appeal.

Procedural History

[5] At the time of application for a search warrant, the party requesting the warrant may also seek an order prohibiting access to the ITO. The process for obtaining such a sealing order is set out in s. 487.3 of the *Criminal Code*:

Order denying access to information

487.3 (1) On application made at the time an application is made for a warrant under this or any other Act of Parliament, an order under any of sections 487.013 to 487.018 or an authorization under section 529 or 529.4, or at a later time, a justice, a judge of a superior court of criminal jurisdiction or a judge of the Court of Quebec may make an order prohibiting access to, and the disclosure of, any information relating to the warrant, order or authorization on the ground that

(a) the ends of justice would be subverted by the disclosure for one of the reasons referred to in subsection (2) or the information might be used for an improper purpose; and

(b) the reason referred to in paragraph (a) outweighs in importance the access to the information.

Reasons

(2) For the purposes of paragraph (1)(a), an order may be made under subsection (1) on the ground that the ends of justice would be subverted by the disclosure

(a) if disclosure of the information would

(i) compromise the identity of a confidential informant,

(ii) compromise the nature and extent of an ongoing investigation,

(iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used, or

(iv) prejudice the interests of an innocent person; and

(b) for any other sufficient reason.

Procedure

(3) Where an order is made under subsection (1), all documents relating to the application shall, subject to any terms and conditions that the justice or judge considers desirable in the circumstances, including, without limiting the generality of the foregoing, any term or condition concerning the duration of the prohibition, partial disclosure of a document, deletion of any information or the occurrence of a condition, be placed in a packet and sealed by the justice or judge immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in any other place that the justice or judge may authorize and shall not be dealt with except in accordance with the terms and conditions specified in the order or as varied under subsection (4).

Application for variance of order

(4) An application to terminate the order or vary any of its terms and conditions may be made to the justice or judge who made the order or a judge of the court

> before which any proceedings arising out of the investigation in relation to which the warrant or production order was obtained may be held.
>
> 1997, c. 23, s. 14, c. 39, s. 12004, c. 3, s. 82014, c. 31, s. 22

[6] After learning that he had been the target of a criminal investigation and searches which ultimately did not result in charges, Mr. Verrilli made an application under s. 487.3(4) to access the ITOs which had been used to obtain the search warrants.

[7] On the initial hearing, counsel for both parties advised the Provincial Court judge that the test to be applied was set out in the Supreme Court of Canada decision in *Michaud v. Quebec (Attorney General)*, [1996] 3 S.C.R. 3. *Michaud* involved an application for access to the sealed packet containing the application and supporting affidavits used to obtain a wiretap authorization pursuant to s. 187 of the *Criminal Code*. As with Mr. Verrilli, Mr. Michaud had been the target of an investigation which did not result in charges. The Court concluded that s. 187 of the *Code* placed the burden on an applicant for access to a wiretap ITO to provide "some evidence that the initial authorization was obtained in an unlawful manner" (*Michaud*, para. 55). The Provincial Court judge concluded that Mr. Verrilli had not met this burden and his application for access to the search warrant ITOs was dismissed.

[8] On judicial review before the Supreme Court of Nova Scotia, Mr. Verrilli argued that *Michaud* did not govern his application under s. 487.3(4) of the *Code* and the proper test was found in the Supreme Court of Canada decisions in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *R. v. Mentuck*, 2001 SCC 76 (collectively referred to as "*Dagenais/Mentuck*") which places the burden on the Crown to justify continuation of the sealing orders. When applying this test a judge must take into account the necessity of the order as well as the balance between its salutary and deleterious effects.

[9] The reviewing judge concluded the test to be used was from *Dagenais/Mentuck* and not *Michaud* and remitted the matter back to the Provincial Court to be dealt with in accordance with that determination. His analysis is summarized at paragraphs 52-56:

> [52] This application relates to the right of a non-accused target to access the ITOs that led to the issuance of three search warrants. The legislative provisions governing search warrants are very different than those involving wiretaps. There is no legislative provision placing the onus on an applicant seeking to unseal an ITO similar to the statutory onus placed on an applicant seeking to unseal a

> wiretap. *Michaud* was a wiretap case. Wiretaps are subject to very specific provisions in the *Criminal Code* that limit access to the presumptively sealed packet of information.
>
> The *Criminal Code* search warrant provisions do not mirror the wiretap provisions. However, a judicial officer may determine that an ITO should be sealed in accordance with s. 487.3 of the *Criminal Code*. I cannot conclude that Parliament intended these two regimes to be treated the same way.
>
> [53] The Supreme Court of Canada was very clear in explaining that the *Dagenais/Mentuck* test applies to all discretionary actions that could limit the open court principle.
>
> [54] Practically speaking, there is little difference between the purpose for keeping a sealed wiretap packet confidential and keeping a sealed ITO confidential. However, Parliament could have created legislative provisions for search warrants that mirror those for wiretaps. But it did not do so.
>
> [55] The judge in this case adopted the approach that applies *Michaud* to search warrants. Although *Dagenais/Mentuck*, *Schmidt* and *Nur* were referred to by counsel in submissions to the judge, both parties accepted that *Michaud* applied and that the onus was on Mr. Verrilli to show more than a mere suspicion of police wrongdoing. Mr. Verrilli conceded that he was obligated to provide an evidentiary basis to show fraud, willful non-disclosure by the police, or a larger pattern of abusive conduct. The judge did not rely on the *Dagenais/Mentuck* approach which places the onus on the Crown to show that: (a) such a sealing order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and (b) that the salutary effects of the sealing order outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.
>
> [56] In my opinion, the parties and the judge were wrong to apply the *Michaud* standard and place the onus on Mr. Verrilli. The test in *Dagenais/Mentuck* governs when an application is made to unseal an ITO in accordance with s. 487.3(4) of the *Criminal Code*, and in these circumstances, places the onus on the Crown.

[10] On this appeal, the Crown argues the reviewing judge erred in applying *Dagenais/Mentuck* and says that the proper test to be applied on Mr. Verrilli's application is found in *Michaud*.

Positions of the Parties

Appellant

[11] The appellant says Mr. Verrilli is in a comparable position to the applicant in *Michaud*. Both had been the target of criminal investigations which did not result in charges and each had been subject to judicially authorized investigative techniques. In Mr. Verrilli's case, it was search warrants and for Mr. Michaud, wiretaps. Both parties sought access to the sealed ITOs which supported the authorizations.

[12] Although *Dagenais/Mentuck* governs the initial application for a sealing order under s. 487.3, the appellant argues that, once the order has been granted, the presumption of open courts is displaced. The balancing of interests between the individual and law enforcement, which led to the decision in *Michaud*, would then be applicable to an application under s. 487.3(4) to vary the sealing order.

Respondent

[13] The respondent notes that legislative schemes applicable to search warrants and wiretap authorizations are different. For the former, there is no automatic sealing of the ITO and it is necessary to make an application for a sealing order to the issuing authority who must then engage the *Dagenais/Mentuck* analysis. For wiretaps, s. 187 creates a statutory confidentiality with limited authority to permit access. The respondent says the analysis in *Michaud* is not applicable to an application under s. 487.3(4).

[14] The respondent says *Dagenais/Mentuck* applies at every step under s. 487.3 and the burden remains on the Crown throughout to justify the issuance and continuance of any sealing order.

Issue on Appeal

[15] The parties agree the issue on appeal is:

> What is the test to be applied in determining a non-accused person's application under s. 487.3(4) of the *Criminal Code* to access information subject to a valid sealing order after a search warrant has been executed?

[16] The respondent filed a notice of contention raising the following additional issue:

> Whether Judge Ryan erred in law by failing to address Mr. Verrilli's *Charter* argument that his unlawful arrest was evidence of contemporaneous and abusive conduct by the police.

[17] In light of my conclusion on the appeal, I need not address the issue raised in the notice of contention.

Standard of Review

[18] The parties agree that this appeal raises a question of law and the standard of review is correctness.

Analysis

[19] The submissions of the parties invite a comparative analysis of s. 187 and s. 487.3 of the *Criminal Code*. For ease of reference, I will set these out:

> **Manner in which application to be kept secret**
>
> **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).
>
> **Exception**
>
> (1.1) An authorization given under this Part need not be placed in the packet except where, pursuant to subsection 184.3(7) or (8), the original authorization is in the hands of the judge, in which case that judge must place it in the packet and the facsimile remains with the applicant.
>
> **Opening for further applications**
>
> (1.2) The sealed packet may be opened and its contents removed for the purpose of dealing with an application for a further authorization or with an application for renewal of an authorization.
>
> **Opening on order of judge**
>
> (1.3) A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 may order that the sealed packet be opened

and its contents removed for the purpose of copying and examining the documents contained in the packet.

Opening on order of trial judge

(1.4) A judge or provincial court judge before whom a trial is to be held and who has jurisdiction in the province in which an authorization was given may order that the sealed packet be opened and its contents removed for the purpose of copying and examining the documents contained in the packet if

(a) any matter relevant to the authorization or any evidence obtained pursuant to the authorization is in issue in the trial; and

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

Order for destruction of documents

(1.5) Where a sealed packet is opened, its contents shall not be destroyed except pursuant to an order of a judge of the same court as the judge who gave the authorization.

Order of judge

(2) An order under subsection (1.2), (1.3), (1.4) or (1.5) made with respect to documents relating to an application made pursuant to section 185 or subsection 186(6) or 196(2) may only be made after the Attorney General or the Minister of Public Safety and Emergency Preparedness by whom or on whose authority the application for the authorization to which the order relates was made has been given an opportunity to be heard.

Idem

(3) An order under subsection (1.2), (1.3), (1.4) or (1.5) made with respect to documents relating to an application made pursuant to subsection 184.2(2) or section 184.3 may only be made after the Attorney General has been given an opportunity to be heard.

Editing of copies

(4) Where a prosecution has been commenced and an accused applies for an order for the copying and examination of documents pursuant to subsection (1.3) or (1.4), the judge shall not, notwithstanding those subsections, provide any copy of any document to the accused until the prosecutor has deleted any part of the copy of the document that the prosecutor believes would be prejudicial to the public interest, including any part that the prosecutor believes could

(a) compromise the identity of any confidential informant;

(b) compromise the nature and extent of ongoing investigations;

(c) endanger persons engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used; or

(d) prejudice the interests of innocent persons.

Accused to be provided with copies

(5) After the prosecutor has deleted the parts of the copy of the document to be given to the accused under subsection (4), the accused shall be provided with an edited copy of the document.

Original documents to be returned

(6) After the accused has received an edited copy of a document, the prosecutor shall keep a copy of the original document, and an edited copy of the document and the original document shall be returned to the packet and the packet resealed.

Deleted parts

(7) An accused to whom an edited copy of a document has been provided pursuant to subsection (5) may request that the judge before whom the trial is to be held order that any part of the document deleted by the prosecutor be made available to the accused, and the judge shall order that a copy of any part that, in the opinion of the judge, is required in order for the accused to make full answer and defence and for which the provision of a judicial summary would not be sufficient, be made available to the accused.

Documents to be kept secret — related warrant or order

(8) The rules provided for in this section apply to all documents relating to a request for a related warrant or order referred to in subsection 184.2(5), 186(8) or 188(6) with any necessary modifications.

R.S., 1985, c. C-46, s. 187; R.S., 1985, c. 27 (1st Supp.), s. 24; 1993, c. 40, s. 7; 2005, c. 10, s. 24; 2014, c. 31, s. 10

[...]

Order denying access to information

487.3 (1) On application made at the time an application is made for a warrant under this or any other Act of Parliament, an order under any of sections 487.013 to 487.018 or an authorization under section 529 or 529.4, or at a later time, a justice, a judge of a superior court of criminal jurisdiction or a judge of the Court of Quebec may make an order prohibiting access to, and the disclosure of, any information relating to the warrant, order or authorization on the ground that

> (a) the ends of justice would be subverted by the disclosure for one of the reasons referred to in subsection (2) or the information might be used for an improper purpose; and
>
> (b) the reason referred to in paragraph (a) outweighs in importance the access to the information.

Reasons

(2) For the purposes of paragraph (1)(a), an order may be made under subsection (1) on the ground that the ends of justice would be subverted by the disclosure

(a) if disclosure of the information would

(i) compromise the identity of a confidential informant,

(ii) compromise the nature and extent of an ongoing investigation,

(iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used, or

(iv) prejudice the interests of an innocent person; and

(b) for any other sufficient reason.

Procedure

(3) Where an order is made under subsection (1), all documents relating to the application shall, subject to any terms and conditions that the justice or judge considers desirable in the circumstances, including, without limiting the generality of the foregoing, any term or condition concerning the duration of the prohibition, partial disclosure of a document, deletion of any information or the occurrence of a condition, be placed in a packet and sealed by the justice or judge immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in any other place that the justice or judge may authorize and shall not be dealt with except in accordance with the terms and conditions specified in the order or as varied under subsection (4).

Application for variance of order

(4) An application to terminate the order or vary any of its terms and conditions may be made to the justice or judge who made the order or a judge of the court before which any proceedings arising out of the investigation in relation to which the warrant or production order was obtained may be held.

1997, c. 23, s. 14, c. 39, s. 12004, c. 3, s. 82014, c. 31, s. 22

[20] Both sections describe a process whereby applications and supporting materials for investigative tools may be kept secret. They also outline the procedure for requesting access to these materials, particularly by accused persons. However, there is an obvious and significant difference. Under s. 187, a wiretap ITO is automatically confidential and placed under seal. With a search warrant ITO, under s. 487.3, there is no legislated confidentiality or sealing but rather an application may be made for a discretionary sealing order. Subsection 4 adds the procedure for a subsequent application to terminate or vary any of the terms and conditions of the order. There is no authority in s. 187 to vary or terminate the statutory confidentiality; although, an application can be made to a judge (under ss. 1.3) for an order to copy and examine the documents.

[21] The fact that Parliament chose to deal with the secrecy of the ITOs in relation to these two investigative tools so differently explains the variance in the jurisprudence related to these two sections of the *Code*.

[22] I will start my analysis by discussing the open court principle as described in *Dagenais/Mentuck* followed by an examination of search warrants and s. 487.3 and, finally, consideration of s. 187 and the decision in *Michaud*.

Dagenais/Mentuck

[23] In Canada, the open court principle is essential for public confidence in the courts and the administration of justice. Judicial proceedings are presumed to be open to the public and the media and should only be restricted where the party seeking to do so can provide sufficient justification. This principle was described by the Supreme Court of Canada in *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 as follows:

> 1 In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy.
>
> 2 That lesson of history is enshrined in the *Canadian Charter of Rights and Freedoms*. Section 2 (b) of the *Charter* guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.
>
> 3 The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.
>
> 4 Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice* or *unduly impair its proper administration*.

[24] In the *Dagenais/Mentuck* decisions, the Supreme Court of Canada considered applications for publication bans in the context of criminal proceedings. In *Dagenais*, the ban was directed at a television program which the applicant alleged would be prejudicial to the fairness of his jury trial then under way. In *Mentuck*, the request was for a temporary ban over the identity of certain

undercover police officers and the operational methods used in investigating the accused. The test for assessing whether to issue such common law publication bans was first set out in *Dagenais*, but modified in *Mentuck* to provide:

> [32] …
>
> A publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[25] In *Mentuck*, the Crown argued the identity of the undercover officers and the details of their operations should be banned in order to ensure officer safety as well as protect the integrity of ongoing and future undercover operations. The concern was that persons becoming aware of the details of the operation might be less susceptible to similar investigative techniques in the future. After applying the balancing test noted above, the Court imposed a temporary ban on publication of the identity of undercover officers but not with respect to investigative techniques.

[26] Although both *Dagenais* and *Mentuck* involved applications which were opposed by the media, it is not necessary for the media to be involved in order for the principles to apply. Even if the application is made *ex parte* and there is no person present to argue against the publication ban, a judge must still take into account the interests of the press and public (*Mentuck*, para. 38).

[27] In *Toronto Star*, the Supreme Court of Canada considered a challenge to sealing orders issued under s. 487.3 of the *Code* and concluded that the *Dagenais/Mentuck* analysis applies. The Court described the scope of these principles in very broad terms:

> 5 This criterion has come to be known as the *Dagenais/Mentuck* test, after the decisions of this Court in which the governing principles were established and refined. The issue in this case is whether that test, developed in the context of publication bans at the time of trial, applies as well at the pre-charge or "investigative stage" of criminal proceedings. More particularly, whether it applies to "sealing orders" concerning search warrants and the informations upon which their issuance was judicially authorized.

> 6 The Court of Appeal for Ontario held that it does and the Crown now appeals against that decision.
>
> 7 I would dismiss the appeal. In my view, the *Dagenais/Mentuck* test applies to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings. Any other conclusion appears to me inconsistent with an unbroken line of authority in this Court over the past two decades. And it would tend to undermine the open court principle inextricably incorporated into the core values of s. 2 (b) of the *Charter*.
>
> 8 The *Dagenais/Mentuck* test, though applicable at every stage of the judicial process, was from the outset meant to be applied in a flexible and contextual manner. A serious risk to the administration of justice at the investigative stage, for example, will often involve considerations that have become irrelevant by the time of trial. On the other hand, the perceived risk may be more difficult to demonstrate in a concrete manner at that early stage. Where a sealing order is at that stage solicited for a brief period only, this factor alone may well invite caution in opting for full and immediate disclosure.
>
> 9 Even then, however, a party seeking to limit public access to legal proceedings must rely on more than a generalized assertion that publicity could compromise investigative efficacy. If such a generalized assertion were sufficient to support a sealing order, the presumption would favour secrecy rather than openness, a plainly unacceptable result.

Search Warrants – s. 487.3

[28] Search warrants are important investigative tools for police. Their effectiveness depends upon secrecy in the sense that the target should not be aware that a warrant has been issued. Once a warrant has been executed, the concerns over secrecy are diminished. In 1982, the Supreme Court of Canada was asked to consider public access to search warrant records in *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175. The Court held that, once a warrant was executed, there was a presumption in favour of public access to the information unless the party seeking to maintain confidentiality could demonstrate the ends of justice would be subverted by disclosure.

[29] In *Toronto Star*, the Supreme Court reaffirmed the principles from *MacIntyre* and emphasised the burden on the party seeking to prevent public access to search warrant information:

> 21 After a search warrant has been executed, openness was to be presumptively favoured. The party seeking to deny public access thereafter was bound to prove that disclosure would subvert the ends of justice.

> 22 These principles, as they apply in the criminal investigative context, were subsequently adopted by Parliament and codified in s. 487.3 of the *Criminal Code*, R.S.C. 1985, c. C-46. That provision does not govern this case, since our concern here is with warrants issued under the *Provincial Offences Act* of Ontario, R.S.O. 1990, c. P.33. It nonetheless provides a useful reference point since it encapsulates in statutory form the common law that governs, in the absence of valid legislation to the contrary, throughout Canada.
>
> 23 Section 487.3(2) is of particular relevance to this case. It contemplates a sealing order on the ground that the ends of justice would be subverted, in that disclosure of the information would compromise the nature and extent of an ongoing investigation. That is what the Crown argued here. It is doubtless a proper ground for a sealing order with respect to an information used to obtain a provincial warrant and not only to informations under the *Criminal Code*. In either case, however, the ground must not just be asserted in the abstract; it must be supported by particularized grounds related to the investigation that is said to be imperilled. And that, as we shall see, is what Doherty J.A. found to be lacking here.

[30] As set out in *Toronto Star*, the *Dagenais/Mentuck* test applies at every stage of a judicial proceeding and to all discretionary orders that have the effect of limiting the open court principle. The test has been applied on applications to terminate or vary sealing orders under s. 487.3(4) of the *Code* (*Ottawa Citizen Group Inc. v. R.*, (2005) 75 O.R. (3d) 590 (CA); *R. v. Vice Media Canada Inc.*, 2017 ONCA 231).

[31] In *R. v. Esseghaier*, 2013 ONSC 5779, Durno, J. considered an application under s. 487.3(4) to unseal ITOs in relation to search warrants. An issue was raised with respect to who bore the burden on the application. In applying *Dagenais/Mentuck*, he concluded that the onus was on the Crown and accused, both of whom wanted the sealing order to continue. His analysis was as follows:

> 43 First, the sealing order was obtained in an *ex parte* application in chambers at a time when there was a presumption that the ITO would not be public because of the ongoing investigation. That presumption no longer applies after the warrants were executed. The context in which the determination is made has changed. The presumption of sealing no longer applies. *Toronto Star*, 2005, at para. 23. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.), at para. 71, LaForest J. held that "[t]he burden of displacing the general rule of openness lies on the party making the application." I am not persuaded the reference in *New Brunswick* to the party making the application relates to an application to unseal because it refers to displacing the general rule.

> 44 Second, to put the onus on the media would be to reverse the presumption in *Dagenais-Mentuck*. The effect would be that if a judge was persuaded to seal the ITO during the investigative stage, the presumption of openness would be reversed when the investigation was completed.
>
> 45 Third, *Michaud*, relied upon by Jaser, was a case involving a presumption of secrecy, not one of openness. That Michaud was unsuccessful in overcoming the presumption of secrecy does not assist Mr. Jaser.
>
> 46 Fourth, in *Dagenais*, Lamer C.J.C. provided general guidelines in regard to publication bans including that "the party seeking to justify the limitation of a right (in the case of a publication ban, the party seeking to limit freedom of expression) bears the burden of justifying the limitation." That party must establish, on a balance of probabilities, that a ban is necessary, as it relates to an important objective that cannot be achieved by reasonably available and effective alternative measures, that its scope is as limited as possible, and that there is a proportionality between the salutary and deleterious effects of the ban. at para. 98(c). Generalized assertions would not support a publication ban. *Toronto Star*, 2005.The party seeking confidentiality must allege a serious and specific risk. See also: *MacIntyre*, at p. 189, *Mentuck*, at para. 38 I appreciate that in *Toronto Star Newspapers Ltd. v. Ontario* (2005), 2005 SCC 41 (CanLII), 197 C.C.C. (3d) 1 (S.C.C.) the court was dealing with a sealing application as opposed to an unsealing application. However, the principles regarding the party opposing openness having the onus remain.
>
> 47 While the argument raised here was not argued in *Dagenais*, there are no qualifications in *Dagenais* about the times when the presumption applies.

[32] Durno J. distinguished *Michaud* on the basis that the regime under s. 187 of the *Code* involved a presumption of secrecy and not openness, whereas with an executed search warrant the presumption is openness.

[33] It is clear from all these authorities, once a warrant has been executed, there is a presumption that the ITO will become accessible to the public unless the party wishing to limit that access can justify the limitations being sought. This applies not just at the initial application for a search warrant where a sealing order may be requested, but also any subsequent application to vary or terminate that order under s. 487.3(4).

Section 187 – Michaud

[34] The *Dagenais/Mentuck* analysis has not been applied in the context of an application to open a sealed packet under s. 187 of the *Code*. That is not surprising since the section creates a statutory presumption of secrecy rather than openness. The *Dagenais/Mentuck* principles apply in contexts where the open court principle arises.

[35] *Michaud* was decided approximately two years after *Dagenais* and the Supreme Court of Canada made no reference to its earlier decision which reinforces the conclusion that s. 187 and its presumption of secrecy is outside the scope of the *Dagenais/Mentuck* principles. As noted in *Michaud,* the interests to be balanced in that case were between the individual applicant and law enforcement authorities. There was no public or media interest discussed. Since there was no discretionary order impinging on the openness of courts due to the statutory confidentiality, *Dagenais/Mentuck* had no application.

Conclusion

[36] For an application under s. 487.3(4) of the *Code* following execution of a search warrant, the *Dagenais/Mentuck* principles apply and any party seeking to continue a sealing order limiting access to the supporting ITO bears the burden of justification. In this case, that was the Crown, who opposed Mr. Verrilli's application. The Provincial Court judge erred in applying the *Michaud* test and placing the burden on Mr. Verrilli to provide some evidence that the warrants were unlawfully granted before permitting access to the ITOs.

[37] Concerns about the possibility that disclosure of wiretap ITO information might make future police investigations less effective form part of the rationale related to the *Michaud* decision. These same issues may arise on applications for discretionary publication bans and sealing orders. Examples can be found in *Mentuck* and *Toronto Star*. The difference between the *Michaud* and *Dagenais/Mentuck* approaches is not whether protection of investigative techniques can be considered but, rather, where the evidentiary burden lies and how the presumption in favour of open courts is taken into account.

[38] I would dismiss the Crown appeal and, as directed by Justice Arnold, Mr. Verrilli's application should be remitted to the Provincial Court for disposition in accordance with the applicable principles.

[39] At the conclusion of argument, counsel for Mr. Verrilli requested costs if successful. Costs were not sought or awarded in the court below nor mentioned in either party's factum on appeal. In these circumstances, I would not exercise my discretion to award costs of the appeal.

Wood, C.J.N.S.

Concurred in:

Beveridge, J.A.

Beaton, J.A.