SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Atwood*, 2021 NSSC 106

Date: 20210326
Docket: Pic No. 502196
Registry: Pictou

Between:

Her Majesty the Queen

Applicant

v.

The Honourable Judge Del Atwood of the Provincial Court of Nova Scotia

Respondent

DECISION ON JUDICIAL REVIEW
Restriction on Publication: s. 486.4 of the *Criminal Code*

Judge:	The Honourable Justice Scott C. Norton
Heard:	March 24, 2021, in Pictou, Nova Scotia
Counsel:	Peter Dostal, for the Applicant Respondent did not Appear

Order restricting publication — sexual offences
486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application
(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Victim under 18 — other offences
(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application
(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall
(a) as soon as feasible, inform the victim of their right to make an application for the order; and
(b) on application of the victim or the prosecutor, make the order.

Child pornography
(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography

within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

By the Court:

Introduction

[1] The Crown seeks judicial review of the decision of the Honourable Judge Del Atwood of the Provincial Court to refuse to issue the requested sealing order under section 487.3 and the requested non-disclosure order under s. 487.0191 of the *Criminal Code*, R.S.C., 1985, c. C-46. The Crown requests an Order of *mandamus* directing the Provincial Court Judge to make the orders requested. The issue is whether the Provincial Court Judge exceeded his jurisdiction by refusing to grant the orders.

[2] For the reasons that follow I find that the decision of Judge Atwood to deny the sealing order was a proper exercise of his jurisdiction and discretion and accordingly the requested order of *mandamus* is denied. With regard to the non-disclosure order, the judge exceeded his jurisdiction by making a "pivotal" finding based on his interpretation of foreign legislation that was not in evidence before him. He also made factual assumptions that were unsupported by evidence. Accordingly *mandamus* will issue to order that the learned judge reconsider the application for a non-disclosure order based on the record. The authorities clearly state that a superior

court, through an order for *mandamus*, cannot instruct how the inferior court is to exercise its jurisdiction.

Background

[3] The evidential record consists of the following:

(a) Information to Obtain dated August 21, 2020.
(b) Information to Obtain dated October 23, 2020.
(c) Affidavit of Cst. MacFarlane dated October 23, 2020.
(d) Transcript of court record from October 30,2020.
(e) Written reasons for decision dated December 24, 2020.

[4] Based on the Information to Obtain which the judge found was properly before the court on oath and on Form 5.004, the judge made the following findings of fact (Decision pp. 6-7):

- In July 2020, a person in Nova Scotia made available child pornography using a social-media platform known as Instagram; this material was viewed by a young person in the United States, who reported it to authorities in that country.
- Instagram is a photo-and-video sharing service owned by Facebook, Inc. It appears to be both a trademark and a computer application. Users of the application may upload media which may be viewed by other users. Anyone may register as a user by providing an email address and a telephone number. Users are issue unique ID numbers when their accounts are created.
- Facebook, Inc. is incorporated in the United States.
- Facebook, Inc. has a physical office in Canada.

- Facebook, Inc. has the possession or control of Instagram user data that would help police in Nova Scotia identify the person in Nova Scotia who made child pornography available on Instagram in July 2020;
- Facebook, Inc. has informed the police investigator that it will comply with a general production order from a Canadian court.

[5] Based on his findings, Judge Atwood was satisfied that there were reasonable grounds to believe that (p.7):

- a child pornography offence under s. 163.1(3) of the *Code* has been committed in Nova Scotia;
- data in the possession of Facebook, Inc. will afford evidence respecting the commission of the offence;
- Facebook, Inc. has a physical presence in Canada.

[6] Judge Atwood granted a general production order in the form submitted by the prosecution directed to Facebook, Inc. pursuant to s. 487.014 of the *Code*.

[7] The Judge then considered the Crown request for a sealing order pursuant to Section 487.3 of the Criminal Code which provides:

> **487.3(1) Order denying access to information**
>
> 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.

487.3(2) Reasons

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.

487.3(3) Procedure

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).

487.3(4) Application for variance of order

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.

[8] Judge Atwood noted that s. 487.3(1) provides the issuing judge with a discretion based on the criteria contained in subsection (2) and that the consideration of those criteria is to be informed by the principles set out in *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *R. v. Mentuck*, 2001 SCC 76. He

stated that these principles apply to all discretionary actions which might limit the open courts principle.

[9] The judge noted that the reason given by the Crown for the issuance of the sealing order was that the ITO contained "private information concerning an innocent third party who is a youth". The judge noted that these grounds appear to implicate s. 487(2)(a)(i)-(ii) and (iv). Judge Atwood further noted that the young person had been fully anonymized in the ITO and were the ITO to be exposed to public scrutiny there is "no risk that the identity of the young person might be revealed" (emphasis added)(p.14).

[10] The judge did issue a publication ban on any information that could identify the youth. The judge then described that in his over ten-year tenure there had been only one application for access to search warrant/production-order material, and in that case the court regulated access to the ITO in accordance with the common law supervisory authority described in *MacIntyre v. Nova Scotia (Attorney General)* [1982] 1 S.C.R.175. He concluded by stating that "the risks of disclosure are non-existent as there is virtually no risk of the ITO being disclosed" (p.15).

[11] Judge Atwood declined the sealing order as not necessary in the circumstances.

[12] The Crown also sought a non-disclosure order, directed to Instagram, under s. 487.0191 of the *Code*:

> **487.0191(1) Order prohibiting disclosure**
>
> On *ex parte* application made by a peace officer or public officer, a justice or judge may make an order prohibiting a person from disclosing the existence or some or all of the contents of a preservation demand made under section 487.012 or a preservation or production order made under any of sections 487.013 to 487.018 during the period set out in the order.
>
> **487.0191(2) Conditions for making order**
>
> Before making the order, the justice or judge must be satisfied by information on oath in Form 5.009 that there are reasonable grounds to believe that the disclosure during that period would jeopardize the conduct of the investigation of the offence to which the preservation demand or the preservation or production order relates.
>
> **487.0191(3) Form**
>
> The order is to be in Form 5.0091.
>
> **487.0191(4) Application to revoke or vary order**
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> A peace officer or a public officer or a person, financial institution or entity that is subject to an order made under subsection (1) may apply in writing to the justice or judge who made the order — or to a judge in the judicial district where the order was made — to revoke or vary the order.

[13] Judge Atwood noted that the statute did not appear to circumscribe to whom the disclosure should be prohibited. He further noted that the order is in the discretion of the court which is to be informed by the criterion in s. 487.0191(2): would disclosure of a production order jeopardize the conduct of the investigation?

[14] The Crown sought an order that would seek to prevent Facebook, Inc. from disclosing the existence of the order to anybody, which the judge noted would

presumably exclude their outside legal counsel and regulatory authorities in the U.S. and elsewhere.

[15] Judge Atwood found that the only disclosure that might pose a jeopardy to the investigation would be disclosure to the person police are seeking to identify as having made child pornography available. He went on to find (p.17):

> The draft order prepared by the prosecution is directed at Instagram (which would seem to be a trademark); however, the ITO describes Facebook, Inc. as the actual data custodian. Accordingly I will address this issue as an application seeking to impose a prohibition on Facebook, Inc.
>
> Orders under this provision are discretionary; the exercise of judicial discretion is to be informed by the criterion of § 487.0191(2): would disclosure of a production order jeopardize the conduct of the investigation?
>
> The prosecution seeks an open-ended order, which would seek to prohibit Facebook, Inc. from disclosing the existence of the order to anybody-which would, presumably, include outside legal counsel, as well as to investigative and regulatory authorities in the US and elsewhere.
>
> This last point is, in my view, pivotal. While it is true that Facebook, Inc. has a physical presence in Canada, it is a US organization. It remains subject to US laws.
>
> There is a common misperception that social-media organizations and other internet-service providers operate in spheres-at least in the US- of total immunity from the law. This is incorrect. While these businesses do enjoy some degree of qualified immunity from civil and criminal liability arsing from the actions of third-party users (and I say this recognizing that this statement is a great oversimplification of the complexity of the issue), they are not free of legal obligations.
>
> Of particular application to Facebook, Inc. is the *Communications Decency Act*, 47 USC §230 [*CDA*]. Under the terms of the *CDA*, Facebook, Inc. is subject to positive duties which it must fulfil if it becomes aware that its services are being exploited for criminal purposes. It must remove the content. It must report the content to proper authorities. It must discontinue the services provided to the user. It must cooperate in law-enforcement, and, when applicable, child-protection investigations.

> My reading of the legislation leads me to conclude that it is inevitable that Facebook, Inc. would be required, in order to comply with the *CDA* to disclose to US authorities the existence of the production order which I have issued.
>
> Further, Facebook, Inc., may need to seek legal advice.
>
> In fact, one may comprehend readily an array of due-diligence steps that might have to be done by Facebook, Inc. which would involve disclosing the existence of the production order.
>
> Again, I return to the prior question: "Disclosure to whom?" It seems to me that the only disclosure that might pose a jeopardy to the investigation would be disclosure to the person police are seeking to identify as having made child pornography available.
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> I feel confident that it is unlikely that Facebook, Inc. would seek to tip-off that person. Even if one were to question the company's sense of civic duty (which I am not inclined to doing so in this case, given its level of cooperation with Canadian authorities) it seems unlikely that it would do something that would put it in conflict with the *CDA.*
>
> Finally, I would note that, if the objective of the disclosure prohibition is to avoid alerting the person who is the target of the investigation, it might be too late to worry about that, given that Facebook, Inc. likely already will have terminated that person's account and removed the offending content, in compliance with the *CDA.*

[16] Judge Atwood found that the Crown had not established the necessity for granting a non-disclosure order.

[17] The judge concluded by stating that the court will regulate access to the materials filed in accordance with *MacIntyre*.

Crown's Position

[18] The Crown argues that the necessary implication appears to be that Judge Atwood relied upon the expectation that should he receive an application to disclose

the records, he may then embark on an assessment that is effectively the same as the standard set out in s. 487.3.

[19] The Crown argues that there are several problems with this approach:

1. It assumes that close scrutiny will necessarily be taken each and every time a request is made for these records. While this may be Judge Atwood's personal practice, *Macintyre* provides for a permissive authority that would be at the discretion of each individual judge. A judicial officer could well assume that all unsealed records are presumably releasable based on the open court principle.
2. By giving precedent to the discretionary public interest assessment available under *MacIntyre*, it renders s. 487.3, as well as all other "sealing" provisions redundant.
3. An approach that treats s. 487.3 as superfluous runs afoul of the fundamental principle that statutory law must come before common law. S. 487.3 is clear legislation that permits applicants to obtain orders that prohibit disclosure of records held by the court where there are sufficient grounds to do so.
4. Judge Atwood's reliance on his own experience as a judge with applications to access an ITO is flawed as s. 487.3 has no interpretive history relating to statistical frequency.

[20] With regard to the refusal of the non-disclosure order under s. 487.0191(1) the Crown argues:

1. That Judge Atwood should not have relied on foreign law that was not proved by way of expert evidence. Foreign law is a question of fact that a Canadian judge is not presumed to know. The parties were entitled to test any such evidence. The judge was not permitted to do his own research of social studies or literature or scientific reports that is only revealed to the parties at the time of the decision per *R. v. B.M.S.*, 2016 NSCA 35.

2. The judge relied on a number of assumptions that were not in evidence and could not reasonably be inferred from the evidence. The judge assumed that Facebook would not "tip off" anyone and would follow its civic duty. He assumed a number of consequences arising from the discovery of the offence including account termination. It is not apparent from where these beliefs are derived.

[21] As to the question of whether the judge exceeded his jurisdiction, the Crown acknowledges that the request for a non-disclosure order did not specify the party to whom the disclosure should be prohibited. However, the Crown submits that the evidence supporting the request clearly contemplated specific classes of individuals whose knowledge of the production might imperil the case. Most notably, the order should prohibit disclosure to the account-holder or members of the public who may notify the account-holder. While his discretion permitted him to specify to whom the prohibition applies, it does not allow him to deny the order based on speculative side-effects of foreign law upon the order.

[22] The Crown concludes by saying that any judicial authority applying common sense and judicial experience would be well aware of the substantial risks involved. It is for this reason they argue that it would be unreasonable for judicial authority to refuse to grant the order for non-disclosure on the unchallenged evidence.

Standard of Review

[23] The *Criminal Code* does not provide for an appeal from a decision not to grant a sealing order under s. 487.3 or 487.0191. Accordingly the Crown brings this motion for the prerogative writ of *mandamus* seeking an order from the superior court mandating that the inferior court issue the orders sought.

[24] The appropriate standard of review was addressed by the Ontario Court of Appeal in *R. v. Vice Media Canada Inc.*, 2017 ONCA 231. In that case the applicants sought a prerogative writ of *certiorari* to quash a production order. The application judge refused and the applicants appealed. Justice Doherty, for the Court, instructed as follows:

> 20 The scope of review contemplated by prerogative writ review of search warrants and similar investigative tools is well-settled. **The reviewing court will quash the order only if, having regard to the record before the issuing judge, as augmented by evidence before the reviewing judge, no judge acting reasonably could have concluded that the order should be made**: *R. v. Garofoli*, [1990] 2 S.C.R. 1421 (S.C.C.), at p. 1452; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253 (S.C.C.), at para. 40; *R. v. Sadikov*, 2014 ONCA 72, 305 C.C.C. (3d) 421 (Ont. C.A.), at paras. 83-84; and *R. v. Nero*, 2016 ONCA 160, 334 C.C.C. (3d) 148 (Ont. C.A.), at para. 71. The "*Garofoli*" standard of review has been applied on motions brought by the media to quash a search warrant: see *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477 (S.C.C.), at para. 80.
>
> …
>
> 24 There are at least three good reasons for applying the *Garofoli* standard to all motions to quash warrants and similar documents. First, the warrant or production order is a presumptively valid court order. A review of that order, proceeding as a de novo examination of the order's merits, would be inconsistent with the existence of a valid order. Second, the *Garofoli* standard of review is consistent with the standard of review selected by Parliament in providing a statutory road to review

> production orders under s. 487.0193(4). If the *Garofoli* standard were rejected in favour of a more interventionist standard, as proposed, the statutory reasonableness standard would become irrelevant except in those rare cases where the initial order was made by a Superior Court, thereby rendering prerogative writ relief unavailable.
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> 25 Third, and most important, the nature of the decision made by the issuing justice invites a deferential standard of review. The issuing justice must weigh the evidence offered in the supporting material, consider what inferences should be drawn from that material and, if satisfied that the preconditions to the warrant or production order exist, decide whether, in all of the circumstances, he or she should exercise a discretion in favour of granting the warrant or production order.
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> 26 Appellate courts have long recognized that decisions which rest on the weighing of evidence and the exercise of discretion are not readily amenable to a correctness standard of review. Realistically speaking, there is often no "right" or "wrong" answer to such questions. Appellate review under the guise of the correctness standard simply becomes a redoing of the function performed at first instance. That "redo" adds time and expense, but little else to the process.

[25] Accordingly, I must consider whether, having regard to the record before Judge Atwood, no judge acting reasonably could have reached the conclusion that Judge Atwood came to on each of the two applications before him.

Analysis

The Sealing Order: s. 487.3 *Criminal Code*

[26] To obtain a sealing order a party must satisfy the two part *Dagenais-Mentuck* test, described by Doherty J.A. in *Vice Media* as follows, at para 44:

> First, the party must show that the sealing order is necessary to prevent a serious risk to the proper administration of justice because alternative, less intrusive, measures cannot prevent that risk. Second, the party must demonstrate that the benefits of the sealing order outweigh its negative impact 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: see *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188 (S.C.C.), at para. 26.

[27] In my view, Judge Atwood's reasons, at para 31 , provide a reasonable basis for refusing to grant the sealing order. The Crown's focus for seeking the order was that the ITO contained "private information concerning an innocent third party who is a youth". The transcript discloses that there was no oral submission on the issue of pre-charge investigative secrecy, although there was mention of that concern in the written Application before the judge.

[28] The judge's finding, based on the record before him, that the young person had been fully anonymized in the ITO, and were the ITO to be exposed to public scrutiny, there is "no risk that the identity of the young person might be revealed" is entirely consistent with the *Dagenais-Mentuck* test and not a conclusion that this Court can say no judge acting reasonably could have reached.

[29] I do not read the decision of the learned judge as rejecting the validity and importance of pre-charge investigative secrecy. The fact that it is not specifically addressed in his decision does not, in the circumstances of this case, amount to a failure to exercise jurisdiction or exceed his jurisdiction.

[30] The arguments advanced by the Crown focus on the comments that the judge considered that any request for production of the file materials could be managed by him. I consider these comments are *obiter*. If they are not *obiter*, I have concerns about that approach as a matter of general practice.

[31] The entire statutory purpose of s. 487.3 is to ensure that the ends of justice are not subverted by the disclosure of sensitive investigative information as articulated in subsection (2). The common law protections described in *MacIntyre*, along with a publication ban, and the judge's own intentions, are no substitute for the statutory protections authorized by the *Criminal Code*.

[32] The risk of subversion of the ends of justice cannot be managed by any individual judge's comfort with their own practices to prevent access to information that should not be disclosed. Requests for access to the contents of court files can be made through many judicial officers. The judge may be on vacation or away from the courthouse on other business when a request to view the file is presented. Without a proper sealing order in place there is no certainty that the judge's intention to restrict access to certain information will be assured.

[33] However, as the judge's discretion to refuse the sealing order was within his jurisdiction and discretion to make on the facts of this case, the application for *mandamus* on the sealing order decision is dismissed.

The Non-Disclosure Order: s. 487.0191 *Criminal Code*

[34] Judge Atwood's decision was based "pivotally" on his analysis of a U.S. statute which was not in evidence before him; was not submitted to him by counsel; and, in respect of which, counsel was not provided any opportunity to make submissions. In addition, the judge made a number of factual assumptions and inferences with no evidence upon which to make them.

[35] Judge Atwood's concerns with Facebook, Inc.'s possible need to seek legal counsel and its requirement to comply with US law are valid concerns but, as is commonly done, could have been dealt with by wording the order to allow for these exceptions. In addition, Judge Atwood could have required Facebook, Inc. to be given notice of the application so that they could make submissions if they desired.

[36] *Mandamus* is available as a remedy where the inferior judicial body fails to accept or exercise its jurisdiction or exceeds that jurisdiction. *Mandamus* is a discretionary order and one that the superior court can refuse to invoke, especially

where there are equally effective alternative remedies. *Harelkin v University of Regina*, [1979] 2 S.C.R. 561, per Beetz J., at para 130.

[37] In *R. v. M.P.S.*, 2013 BCSC 525, Justice Romilly dealt with an application for *mandamus* and *certiorari* to require a provincial court judge to permit cross-examination of the complainants on past sexual behaviour, which the judge had refused. Romilly J. explained the nature of the prerogative relief sought as follows:

> 10 *Mandamus*, Latin for "we command", is the name of the prerogative writ that issues from a court of superior jurisdiction to the inferior tribunal commanding the latter to exercise its jurisdiction. The writ is available where the inferior court, tribunal, or public body has either failed or wrongly exercised its jurisdiction such that there has been a jurisdictional error. If the interior tribunal or public body erroneously refuses to act on the grounds that it lacks territorial or legal jurisdiction, mandamus will lie to compel it to accept jurisdiction.

[38] In *R. v. Vasarhelyi*, 2011 ONCA 397, Watt J.A., for the Ontario Court of Appeal wrote:

> 50 The appellant seeks "*mandamus/certiorari* compelling the issuance of process". Both *mandamus* and *certiorari* are extraordinary remedies that issue out of a superior court for jurisdictional default or excess. Each is discretionary. Neither issues as of right.
>
> 51 An order in lieu of *mandamus* may be granted to compel a court of limited jurisdiction to exercise a jurisdiction or discharge a duty, but not to compel the court, tribunal or official to exercise the jurisdiction or discharge the duty in a particular way.
>
> 52 Jurisdiction has to do with the authority to decide an issue or perform a duty, not the nature or correctness of the decision made: *Belgo Canadian Pulp & Paper Co. v. Trois-Rivières* (Cour des sessions de la paix) (1919), 33 C.C.C. 310 (C.S. Que.). In Review, at pp. 317-318. On subjects within its jurisdiction, if a court of limited jurisdiction misconstrues a statute or otherwise misdecides the law, the

> remedy to correct the legal error is an appeal from the final disposition, not an application for an order in lieu of the extraordinary remedies of mandamus or certiorari: *Long Point Co. v. Anderson* (1891), 18 O.A.R. 401 (Ont. C.A.), at pp. 406 ; 407-408; 411.
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> 53 As a general rule, errors in the admission or exclusion of evidence are not jurisdictional errors: *Cohen v. R.*, [1979] 2 S.C.R. 305 (S.C.C.), at pp. 307-308. Further, errors in the application of the rules of evidence are not jurisdictional errors: *R. v. DesChamplain*, [2004] 3 S.C.R. 601 (S.C.C.), at para. 17. The same may be said about errors in interpreting statutory provisions that are not jurisdictional in nature.
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> [Emphasis added]

[39] In my view, the decision of the learned judge to deny the non-disclosure order based on foreign legislation and factual considerations that were not in the record before him, was a decision that exceeded his jurisdiction. However, an order for *mandamus* cannot compel the judge to decide the application in a particular way.

[40] Accordingly, I grant the application for an order for *mandamus* requiring Judge Atwood to rehear the application for the non-disclosure order based on the record before him.

Norton, J.