SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Riley*, 2023 NSSC 377

Date: 20231127
Docket: CRH-502058
Registry: Halifax

Between:

His Majesty the King

v.

Randy Desmond Riley

APPLICATION FOR RETROACTIVE PUBLICATION BAN (CONFIDENTIALITY ORDER) IN ACCORDANCE WITH THE *WITNESS PROTECTION PROGRAM ACT*

Judge: The Honourable Justice Joshua Arnold

Heard: October 6 and 18, 2023, in Dartmouth, Nova Scotia

Counsel:
Jan Jensen, for the Attorney General of Canada on behalf of the Witness Protection Program (applicant)
Peter Craig, K.C., and Stephen Anstey, for the Provincial Crown
Trevor McGuigan, Desiree Jones, and Jordan Richard, for Randy Riley
David Coles, K.C., counsel for the CBC (respondent)
Tim Bousquet, self-represented, on behalf of The Halifax Examiner (respondent)

Overview

[1] Randy Riley was acquitted by a jury of second-degree murder and unlawful possession of a firearm on October 5, 2023. Kaitlin Fuller testified for the Crown, was examined and cross-examined at length, and was the subject of a *Vetrovec* caution. She was mentioned in reporting by the CBC, but her evidence was reported in greater detail in two online articles by the *Halifax Examiner*, an online publication. After the *Halifax Examiner's* articles were posted, the Federal Attorney General, representing the Witness Protection Program (WPP), applied for a retroactive confidentiality order in relation to the details of Ms. Fuller's evidence. (The parties have generally referred to the requested order as a "publication ban", but in fact it contains broader provisions, including sealing of court materials.)

Facts

[2] Chad Smith was shot and killed on October 23, 2010. Randy Riley and Nathan Johnson were each charged with first-degree murder and unlawful possession of a firearm in relation to the shooting. They both successfully applied for severance, Nathan Johnson was convicted of first-degree murder by a jury on December 4, 2015. His appeal to the Nova Scotia Court of Appeal was unanimously denied. Randy Riley was convicted of second-degree murder and unlawful possession of a firearm in 2018. Mr. Riley's conviction was affirmed on appeal but ultimately quashed by the Supreme Court of Canada: 2019 NSCA 94, reversed by 2020 SCC 31.

[3] The re-trial was originally scheduled for trial on October 1 – 29, 2021. Peter Craig, KC, the Senior Crown Attorney assigned to the file, was unexpectedly unavailable, and the trial was adjourned by Cambell J. The re-trial was then scheduled for June 2 – 29, 2022, before me. That trial was adjourned because it came to the Crown's attention that Kaitlin Fuller, who had been in and out of the Witness Protection Program between 2010 and 2014, had re-entered the program in or around July 2021. During the course of dealing with the WPP disclosure issues, Jan Jensen, counsel for the WPP, advised the court that the disclosure process for Ms. Fuller's WPP file could take up to six (6) months due to the time required by the WPP to vet her file prior to disclosing it to the PPS Crown, who would then disclose the information to the defence. In order to accommodate the WPP disclosure process, the re-trial was rescheduled to commence on September 5, 2023.

[4] At the outset of the trial on September 5, 2023, the Crown requested the following publication ban, which was agreed to by Mr. Riley, and not objected to by any members of the media:

> The physical description, image or likeness, such as drawings or photographs, of Kaitlin Fuller, who is a witness in this trial, shall not be published in any document, broadcast or transmission.
>
> No publication, transmission or broadcast of any evidence taken in this trial shall be linked or cross-referenced to any previously published document, broadcast or transmission which identified Kaitlin Fuller by physical description, image, or likeness.

[5] Ms. Fuller was called as a witness by the Crown. She testified between September 20 and 22, 2023. She described her personal circumstances in detail on direct examination and was vigorously cross-examined in relation to many aspects of her life. Ms. Fuller testified that she was in and out of the WPP between 2010 and 2014, having been removed from the program at various points due to breaches of her agreement. She was cross-examined at length regarding her unsavory character, her criminal record, drug addiction, and her financial motivation to re-enter the WPP for the benefit of herself and her family. The jury was given a *Vetrovec* caution in relation to her evidence in the final charge. As noted, at the outset of the trial a publication ban had been requested by the Crown and agreed to by Mr. Riley regarding Ms. Fuller. The *Halifax Examiner* and CBC News ran stories during the trial that included details of Ms. Fuller's testimony, all within the confines of the publication ban.

[6] The WPP now objects to two of the *Halifax Examiner's* articles, claiming that they breach provisions of the *Witness Protection Program Act*, S.C. 1996, c. 15, prohibiting disclosure of certain information about a "protected person." As such, the Federal Attorney General filed a motion requesting the following relief:

> The Attorney General of Canada representing the Witness Protection Program, the moving party in this proceeding, moves for:
>
> a. an order banning publication of any information pertaining to the protected person, Kaitlin Fuller and her family, and their interactions with the Witness Protection Program;
>
> b. an order sealing her testimony in this trial and any exhibits that originated with the Witness Protection Program or which contain images of her or her family members; and

> c. an order permitting the Attorney General of Canada to file a sealed, confidential version of the affidavit and unredacted version of its submissions in support of this motion to be viewed only by the presiding Justice, and to file a redacted public version of those submissions.

[7] In support of its application, the WPP filed multiple briefs and an affidavit, which has been sealed (although a redacted copy was provided to the parties). In essence, the WPP submits that due to the "mosaic" of personal information elicited during Ms. Fuller's testimony, there is a risk that she and her family can be identified, and therefore their safety is at risk. The WPP says in its brief:

> 14. Courts have recognized that even harmless looking information must be protected. Information that may be innocuous on its face may be highly informative on closer consideration; it may be informative to someone who simply knows the witness better than does the Court; or the combination of information with other pieces of information can be greater than the sum of its parts through the "mosaic effect." An informed reader may fit a piece of apparently innocuous information into the general picture which he has before him, and be in a position to arrive at some damaging deductions.

[8] According to the statement of facts in the WPP brief of September 29, 2023:

> 4. The witness at issue, Ms. Fuller, entered the Witness Protection Program (the "Program") on an emergency basis in November 2010 and she entered into a Protection Agreement on July 15, 2013. She was again admitted on an emergency basis on August 30, 2021 and readmitted on February 22, 2022. Family members were also engaged with the Program.
>
> 5. Ms. Fuller's situation was assessed by members of the Program and the threat against her was found to be credible. Ms. Fuller is a "protected person" as defined in section 2 of the *Witness Protection Program Act*, (*"WPPA"*). That definition includes current and former protectees, meaning a person receiving protection under the Program.
>
> 6. Ms. Fuller testified as a Crown witness in the first trial of Randy Riley. In September 2023, she again testified as a Crown witness in his second trial. It is the AGS's understanding that the Crown asked for a ban on identifying Ms. Fuller and a ban on publishing images of her.
>
> 7. Members of the Program learned of details of Ms. Fuller's testimony and other information apparently disclosed in Court from a media article. A ten-page article was published online dated September 22, 2023, discussing Ms. Fuller, her examination, her testimony and, apparently, reproducing information from exhibits in this trial.

[9] At the outset of the first day of the motion hearing, David Coles, counsel for CBC, indicated that CBC and the WPP had come to an agreement in relation to the publication ban. The parties had jointly agreed:

> **UPON APPLICATION** by the Attorney General of Canada representing the Witness Protection Program for:
>
> a. an Order banning publication by any means of any information pertaining to personal details of Kaitlin Fuller and her family and any of their interactions with the Witness Protection Program, except:
>
> i. the total amount of financial support received from the Program
>
> ii. that the Defence attacks the truthfulness of some of her testimony by alleging it was given so she could re-enter the Program
>
> iii. that the Defence alleges she broke Program rules, but no particulars of those [breaches];
>
> b. an order sealing her testimony in this trial and any exhibits that originated with the Witness Protection Program or which contain images of her or her family members; and
>
> c. an order permitting the Attorney General of Canada to file a sealed, confidential version of an affidavit and unredacted version of its submissions in support of this motion to be viewed only by the presiding Justice, and to file a redacted public version of these submissions.
>
> **AND UPON** hearing counsel and reviewing the Motion, Brief and Affidavit filed in support of the Motion;
>
> **AND UPON BEING SATISFIED** that such an order is appropriate;
>
> **IT IS HEREBY ORDERED THAT**:
>
> 1. No information shall be published in any form or by any means pertaining to personal details of Kaitlin Fuller and her family and any of their interactions with the Witness Protection Program, except:
>
> i. the total amount of financial support received from the Program;
>
> ii. that the Defence attacks the truthfulness of some of her testimony by alleging it was given so she could re-enter the Program; and
>
> iii. that the Defence alleges she broke Program rules, but no particulars of those [breaches];
>
> 2. The following shall be kept sealed and shall not form part of the public record in this proceeding:
>
> i. Kaitlin Fuller's testimony in this trial;
>
> ii. all exhibits that originated with the Witness Protection Program;

iii. all exhibits which contain images of Kaitlin Fuller or her family members.

3. The Attorney General of Canada may file a sealed, confidential version of the affidavit of a member of the Witness Protection Program and an unredacted version of its brief in support of this motion to be viewed only by the presiding Justice.

[10] Tim Bousquet, self-represented on behalf of the *Halifax Examiner*, of which he is publisher, did not agree with the proposed publication ban. Additionally, during submissions, the WPP clarified that it was requesting that the publication ban be imposed retroactively to already-existing publications that were in compliance with the original publication ban. CBC then took the position that it was not consenting to that aspect of the publication ban. The matter went to a full hearing. A temporary order was agreed to by all parties, and granted by the court, which states:

1. Until the final conclusion of the motion and a decision on it is rendered, no information shall be published in any form or by any means pertaining to personal details of Kaitlin Fuller and her family and any of their interactions with the Witness Protection Program, except:

   i. the total amount of financial support received from the Program;

   ii. that the Defence attacked the truthfulness of some of her testimony by alleging it was given so she could re-enter the Program; and

   iii. that the Defence alleged she broke Program rules, but no particulars of those [breaches];

   all of which applies from October 6th, 2023 forward, but not to publications before that date.

2. Until the final conclusion of the motion and a decision on it is rendered, Kaitlin Fuller's testimony in this trial shall be kept sealed and shall not form part of the public record, with the exception that counsel appearing on behalf of the Applicant Attorney General of Canada, Jan Jensen, may have access to a copy of the testimony.

3. Until the final conclusion of the motion and a decision on it is rendered, the sealed, confidential version of the affidavit of a member of the Witness Protection Program and an unredacted version of the Attorney General of Canada's brief in support of this motion which was filed with the Court shall remain sealed, to be viewed only by the presiding Justice.

[11] In its brief of October 12, 2023, the Attorney General asked for a new form of order, in the following terms:

40. The Attorney General of Canada asks for an order as follows:

    a. No information shall be published in any form or by any means pertaining to personal details of Kaitlin Fuller and her family or any of their interactions with the Witness Protection Program;

    b. All reasonable steps shall be taken by the CBC, Tim Bousquet and the Halifax Examiner and any other author or owner who has direct or indirect control of a website, to remove all articles or other online publications, postings, or portions thereof, which predate this order and contain personal details of Kaitlin Fuller and her family or any of their interactions with the Witness Protection Program;

    c. The following is excluded from the above, in respect of past, present and future publications:

        i. the total amount of financial support received by Kaitlin Fuller from the Program;

        ii. that the Defence attacked the truthfulness of some of Kaitlin Fuller's testimony by alleging it was given so that she could re-enter the Program;

        iii. that the Defence alleged she broke Program rules, but no particulars of those [breaches];

        iv. any interactions between Ms. Fuller and Mr. Riley.

    d. Kaitlin Fuller's testimony in this trial shall be kept sealed and shall not form part of the public record;

    e. The sealed, confidential version of the affidavit of a member of the Witness Protection Program and an unredacted version of the Attorney General of Canada's first brief in support of this motion which was filed with the Court shall remain sealed, to be viewed only by the presiding Justice; and

    f. This order will be distributed to the media via the Court's system for notifying the media of publication ban applications.

Witness Protection Program Act

[12] The purpose of the *Witness Protection Program Act* is set out at section 3, which states, in part:

> **3** The purpose of this Act is to promote law enforcement, national security, national defence and public safety by facilitating the protection of persons
>
> …

> **(c)** who have been admitted to a designated program.

[13] According to remarks by Candice Bergen, then Parliamentary Secretary to the Minister of Public Safety, speaking in support of amendments to the *WPPA* in 2013, the goal of the WPP is "to keep those involved and their information safe and secure" (House of Commons Debates, May 23, 2013 (Part A)).

[14] The *WPPA* imposes prohibitions on disclosure of certain information at s. 11(1):

> **11 (1)** Subject to sections 11.1 to 11.5, no person shall directly or indirectly disclose
>
> > **(a)** any information that reveals, or from which may be inferred, the location or a change of identity of a person that they know is a protected person;
> >
> > **(b)** any information about the means and methods by which protected persons are protected, knowing that or being reckless as to whether the disclosure could result in substantial harm to any protected person; or
> >
> > **(c)** the identity and role of a person who provides protection or directly or indirectly assists in providing protection, knowing that or being reckless as to whether the disclosure could result in substantial harm to
> >
> > > **(i)** that person,
> > >
> > > **(ii)** a member of that person's family, or
> > >
> > > **(iii)** any protected person.

[15] The Court's duty in the event of a disclosure of information protected by s. 11(1) is addressed at ss. 11.5(4) and (5):

> **Court — confidentiality**
>
> **(4)** Once a disclosure described in subsection 11(1) is made to a court, the court shall take any measures that it considers necessary to ensure that the information remains confidential.
>
> **Exception — court**
>
> **(5)** A court may make a disclosure described in subsection 11(1) for the purpose of preventing a miscarriage of justice, but in doing so it shall disclose only the information that it considers necessary for that purpose and shall disclose the information only to persons who require it for that purpose.

[16] In this case the court had no role in the disclosure of Ms. Fuller's information to the defence. The WPP vetted and disclosed the material to the PPS.

Then the PPS disclosed the material to the defence. Section 21 makes contravention of s. 11(1) an offence punishable by indictment or on summary conviction.

Publication Bans

[17] The WPP has requested a "publication ban." Beyond general references to the prohibitions on disclosure of information under the *WPPA*, the application is not precise as to the source of authority to make a publication ban (the *WPPA* makes no specific reference to publication). A publication ban, on its face, is a limit on the right to "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication" guaranteed by section 2(b) of the *Charter of Rights and Freedoms*. It is also a limit on the "Open Courts Principle." The *Criminal Code* authorizes restrictions on court openness in certain circumstances, such as the court's power to issue an order in respect of information that could identify a victim, a witness, or a justice system participant pursuant to section 486.5, which states, in part:

> **Order restricting publication — victims and witnesses**
>
> **486.5 (1)** Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.
>
> **Justice system participants**
>
> **(2)** On application of the prosecutor in respect of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection (2.1), or on application of such a justice system participant, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.
>
> …
>
> **Factors to be considered**
>
> **(7)** In determining whether to make an order, the judge or justice shall consider
>
> **(a)** the right to a fair and public hearing;

> **(b)** whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed;
>
> **(c)** whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;
>
> **(d)** society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;
>
> **(e)** whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;
>
> **(f)** the salutary and deleterious effects of the proposed order;
>
> **(g)** the impact of the proposed order on the freedom of expression of those affected by it; and
>
> **(h)** any other factor that the judge or justice considers relevant.
>
> **Conditions**
>
> **(8)** An order may be subject to any conditions that the judge or justice thinks fit.

[18] Further, s. 648 of the *Criminal Code* prohibits publication of information about portions of a jury trial at which the jury is not present until after the jury retires to consider its verdict.

[19] Common law publication bans are governed by the evolving analysis derived from such cases as *Dagenais v. Canadian Broadcasting Corp*., [1994] 3 S.C.R. 835 and *R. v. Mentuck*, 2001 SCC 76. The current leading case is *Sherman Estate v. Donovan*, 2021 SCC 25, as recently confirmed in *Canadian Broadcasting Corporation v. Manitoba*, 2023 SCC 27. In *Sherman Estate* Kasirer J. said, for the court:

> [38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
>
> (1) court openness poses a serious risk to an important public interest;

> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[20] There does not appear to be any reported caselaw addressing the interaction of statutory or common law publication bans with the prohibition on disclosure of certain information respecting protected persons under the *WPPA*, although there are a limited number of cases dealing with remedies under the *WPPA*. In *R. v. Jennings*, 2018 ABQB 103, the accused sought disclosure of certain WPP records. The Attorney General filed an affidavit sworn by a WPP coordinator. The accused sought to cross-examine the coordinator. The court allowed an application by the Attorney General permitting the coordinator to testify under a pseudonym and behind a screen. In making the order, the court relied on s. 486.31 of the *Criminal Code*, as well as the common law test. Section 486.31 states:

> **Non-disclosure of witness' identity**
>
> **486.31 (1)** In any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a witness, make an order directing that any information that could identify the witness not be disclosed in the course of the proceedings if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.
>
> **Hearing may be held**
>
> **(2)** The judge or justice may hold a hearing to determine whether the order should be made, and the hearing may be in private.
>
> **Factors to be considered**
>
> **(3)** In determining whether to make the order, the judge or justice shall consider
>
> **(a)** the right to a fair and public hearing;
>
> **(b)** the nature of the offence;
>
> **(c)** whether the witness needs the order for their security or to protect them from intimidation or retaliation;

> **(d)** whether the order is needed to protect the security of anyone known to the witness;
>
> **(e)** whether the order is needed to protect the identity of a peace officer who has acted, is acting or will be acting in an undercover capacity, or of a person who has acted, is acting or will be acting covertly under the direction of a peace officer;
>
> **(e.1)** whether the order is needed to protect the witness's identity if they have had, have or will have responsibilities relating to national security or intelligence;
>
> **(f)** society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process;
>
> **(g)** the importance of the witness' testimony to the case;
>
> **(h)** whether effective alternatives to the making of the proposed order are available in the circumstances;
>
> **(i)** the salutary and deleterious effects of the proposed order; and
>
> **(j)** any other factor that the judge or justice considers relevant.
>
> **No adverse inference**
>
> **(4)** No adverse inference may be drawn from the fact that an order is, or is not, made under this section.

[21] The court in *Jennings* said:

> [11] I note that the factors in s. 486.31(3) of the Criminal Code are very similar to the principles in ***Mentuck***, in particular the necessity provision (see ss. (c) –(e1)) and the balancing of the beneficial and harmful effects of the ban that is sought (see (i)). In my view, it is reasonable to suggest that s. 486.31, enacted in 2015, effectively codifies these common law principles.
>
> [12] Sections 11 and 11.5 of the *Witness Protection Program Act* similarly mirror the ***Mentuck*** test of necessity and proportionality.

[22] In making the order, the court said:

> [13] The evidence Cpl. Doe provided in his affidavits and the evidence he would give in cross-examination on those affidavits did not deal with any specifics about the charges against the Accused. Rather, his evidence was limited to general evidence about the operation of the WPP and its relationship within the RCMP to active investigative units. He had no evidence about these Accused specifically or the investigation about them. His evidence did not deal with the witnesses who were considered for the WPP in this case.

> [14] When I analyze the factors in s 486.31, I conclude that these generally favor making the order sought. While the right to a fair and public hearing is important and the charges here are very serious, the evidence establishes a need to protect the witness, a peace officer, from intimidation and to protect the security of others. Further, the integrity of the WPP is integral to encouraging the reporting of offences and the participation of witnesses in the criminal justice process. If witnesses are concerned that the officers providing protection might be coerced into providing identifying information about them, they may be less likely to come forward.
>
> [15] Moreover, given the nature of the evidence, unrelated to questions about the Accused's guilt or innocence, the harmful effects of the order are minimal. The Court and the lawyers can see the witness testify, and the Accused and the public can hear his evidence. His name has little relevance to the administration of justice in this case. The beneficial effects, on the other hand, are clear, as described in Cpl. Doe's affidavits.
>
> [16] Finally, under s.11.5(4) and (5) of the *Witness Protection Program Act*, the Court is required to take measures to ensure that such disclosure remains confidential, and may only disclose the information that is necessary to prevent a miscarriage of justice. In my view, disclosing the name or likeness of Cpl. Doe is not necessary to prevent a miscarriage of justice.
>
> [17] I conclude that, as long as this Court balances the harmful and beneficial effects of an order limiting publication and public access, it is ensuring that it is not "reckless as to whether the disclosure could result in substantial harm". As a result, I concluded that the identity and likeness of Cpl. Doe should not be disclosed because it could result in substantial harm to him, his family, and protected persons.

[23] Therefore, the court in *Jennings* undertook the *Dagenais/Mentuck* balancing process when considering s. 11.5(4) and (5) of the *WPPA*.

Position of the WPP

[24] The Attorney General says the *WPPA* imposes a mandatory obligation on the court to take all necessary measures to protect the identity of parties protected by the *WPPA*:

> 17. The *WPPA* imposes a statutory obligation on the Court to take all necessary measures to maintain confidentiality. Accordingly, the common law test for discretionary confidentiality orders from *Sherman Estate* is not relevant. The need for the safeguards for witnesses and their families, and for those employed by the Program whose own safety may be jeopardized in the course of providing protection, make the rationale for the statutory

> protections clear. Witness protection is a high-risk activity and disclosure of prohibited information could potentially result in substantial harm.
>
> 18. The rationale is echoed in the Program's purpose: to promote law enforcement, national security, national defence and public safety by facilitating the protection of persons who are involved directly or indirectly in providing assistance in law enforcement matters in relation to activities conducted by the RCMP or other law enforcement agencies.

[25] The Attorney General acknowledges that what it is requesting, essentially a retroactive publication ban, is unprecedented:

> 2. There appears to be no reported precedent of a Court ordering an online article by the media that was published prior to the publication ban issuing be taken down. However, the broad power conferred on the Court to take any measures necessary in the *Witness Protection Program Act* necessarily includes such a power. There are many precedents where courts draw upon other statutory authority or their inherent jurisdiction to order parties to remove publications they previously made online.
>
> …
>
> 12. The AGC has found no cases directly on point, but the unique wording of *WPPA* subsection 11.5(4) and the availability of such a remedy in similar circumstances show that the Court can make the order as requested. The analysis must start with the wording of the subsection, which confers very broad powers on the Court in such a circumstance:
>
> > **Court – confidentiality**
> >
> > **(4)** Once a disclosure described in subsection 11(1) is made to a court, the court shall take <u>any measures</u> that it considers necessary to ensure that the information remains confidential. (emphasis added)

[26] The Attorney General says Ms. Fuller's protection under the *WPPA* is not contingent on a *Criminal Code* publication ban, and that the *WPPA* provides such broad discretion to the court as to allow for the imposition of broad remedies, including a publication ban. The WPP says that it was incumbent on the court and the parties to prevent breaches the *WPPA*, that the court and the parties should have intuitively been aware of what might constitute a breach and that it is essentially mandatory that the retroactive publication ban it has requested be ordered:

> There was no lawful publication of information protected by *WPPA* s. 11 (1) in the first place, as that subsection prohibits disclosure of the categorized

> information, directly or indirectly. That prohibition was not dependent on a publication ban issuing, first. This confusion seems partly to have arisen because of unfamiliarity with the *WPPA*: if, by contrast; the published material contravened the protections for child and youth information under the *Youth Criminal Justice Act*, it would seem unlikely that this needed to be re-emphasized.
>
> The order is sought pursuant to *WPPA* s 11.5(4), which does not state that the AGC must "put forward concrete evidence of harm," as the CBC suggests in its letter. For ease of reference, the subsection reads:
>
> > (4) Once a disclosure described in subsection 11 (1) is made to a court, the court shall take any measures that it considers necessary to ensure that the information remains confidential.
>
> The only precondition to the Court taking the measures requested is that a "disclosure described in subsection 11 (1) is made to a court." That sole condition has occurred, as evidenced in the affidavit of the WPP member dated September 29, 2023.

[27] While the Attorney General maintains that the common law test for a publication ban does not govern here, counsel nevertheless concedes that there is a discretionary element to the court's power under s. 11.5(4) of the *WPPA*:

> As to CBC's argument on the jurisdiction to make such an order, it is undoubted that the Court has inherent jurisdiction. here to make such an order. But again, the statutory source of jurisdiction here is *WPPA* s. 11.5(4), which directs that once s. 11(1) disclosure has been made, " ... the court shall take any measures that it considers necessary to ensure that the information remains confidential." It is mandatory that the Court take measures by operation of law, and, in these circumstances, an order as sought by the AGC is mandatory. The test for discretionary bans pursuant to *Sherman Estate* is not applicable.
>
> *WPPA* s. 11.5(4) does include a discretionary component: for the Court to "take any measures," it is required that the Court "considers [those measures to be] necessary." What a court "considers necessary" is broad wording. It is not constrained by the test in *Sherman Estate*. Because that decision is the leading authority on restrictions to court openness, however, it is useful to see that the principles the Supreme Court of Canada stated are met here, and the order must be considered necessary. Most of the following have already been discussed in the AGC's previous written and oral submissions:
>
> *Serious risk to an important interest*
>
> - There is an extremely important personal interest in protecting the life and safety of the protected persons Ms. Fuller and persons related to Ms. Fuller, by

keeping confidential any information that reveals, or from which may be inferred, directly or indirectly, their location or a change of identity;

- There is an important public interest in maintaining the integrity of the *WPPA* scheme, so that such vital and vulnerable justice participants can be confident in their protection;

- There is an important personal and public interest in maintaining the safety of persons in the WPP who provide protective services.

Reasonable alternative measures will not prevent the risk

- The risks emerge from the extensive details about Ms. Fuller reported by the Halifax Examiner, in the article dated September 22, 2023, attached to the WPP member's affidavit and the subsequent article dated September 25, 2023;
- Keeping the information from ongoing availability online and distribution is required, and there is no alternative, as demonstrated by the fact the articles have not been removed by the Halifax Examiner, even in the interim;

The benefits of the order outweigh its negative effects

- The benefits of protecting life and safety and maintaining the *WPPA* 's integrity outweigh the minor limitations on what cannot be reported from this trial;
- The order was crafted with input from CBC to make exceptions to what cannot be reported, and the Halifax Examiner had the opportunity during this motion to give its input on the proposed order;
- Although CBC and Mr. Bousquet made abstract statements about limiting press freedom, the only specific complaints by Mr. Bousquet was that he opposed the order so the Examiner would be able to "embarrass the Crown" about its case, and that this motion brought by the AGC was somehow about the Crown being embarrassed. However, Mr. Bousquet's position rests on misconceptions about the Public Prosecution Service, which took no position on this motion, and the WPP, which does not prosecute offences, and the fact that neither have their pick of which person might have witnessed things material to a serious offence; and
- Freedom of the press in this circumstance, like many others, is tempered by the competing interests in the justice system, where reporting runs against the interests of keenly vulnerable

> participants such as confidential informants, children and young persons, victims of sexual assault, and, here, protected persons under the WPPA playing a particularly vital and vulnerable role.

Position of CBC and *The Halifax Examiner*

[28] CBC takes the position that section 11.5(4) of the *WPPA* does not authorize the order sought by the Attorney General. The provision states that "[o]nce a disclosure described in subsection 11(1) is made to a court, the court shall take any measures that it considers necessary to ensure that the information remains confidential." As counsel for CBC points out, the information in question here has already been published; it cannot "remain" confidential. Counsel submits that the court "should not order/interpret the law to have retroactive application when such an order/interpretation will necessarily be unenforceable." The Attorney General points out in response, not unreasonably, that this interpretation would in fact tend to encourage publication in order to circumvent the *WPPA*.

[29] CBC cites *R. v. Canadian Broadcasting Corp.*, [2018] 1 S.C.R. 196, where a murder victim had been identified in CBC reports before the imposition of a publication ban under section 484.4(2.2). CBC subsequently refused to remove the pre-publication ban reports. The Crown sought an order for criminal contempt of the ban, and a mandatory injunction requiring removal of the identifying information. The application was dismissed at the trial court level, but the Alberta Court of Appeal ordered the mandatory injunction. In reversing the Court of Appeal decision, the Supreme Court of Canada said:

> [28] In this case, and as I have explained, the first stage of the modified *RJR — MacDonald* test required the Crown to satisfy the chambers judge that there was a strong likelihood on the law and the evidence presented that it would be successful in proving CBC's guilt of criminal contempt of court. This is not an easy burden to discharge and, as I shall explain, the Crown has failed to do so here.
>
> [29] In *United Nurses of Alberta*, McLachlin J. (as she then was) described the elements of criminal contempt of court in these terms:
>
> > To establish criminal contempt the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*). The Crown must prove these elements beyond a reasonable doubt.

> [30] As to the *actus reus* — that is, as to whether the Crown could demonstrate a strong *prima facie* case that CBC "defied or disobeyed [the publication ban] in a public way" by leaving the victim's identifying information on its website — the chambers judge rejected the Crown's submission that s. 486.4(2.1)'s terms "publish[ed]" and "transmit[ted]" should be "broad[ly]" interpreted. In his view, the meaning of that text was not so obvious that the Crown could "likely succeed at trial" in showing that s. 486.4(2.1) would capture the impugned articles on CBC's website, since they had been posted *prior* to the issuance of a publication ban. In other words, and as CBC argued before the chambers judge, the statutory text might also be reasonably taken as prohibiting only publication which occurred for the first time *after* a publication ban.

[30] The court concluded that in view of the existence of two arguable interpretations of the section authorizing the ban, the chambers judge had not erred in concluding that the Crown had not established a strong *prima facie* case of criminal contempt (para. 31).

[31] *R v. CBC* does not deal specifically with s 11.5 of the *WPPA*. It is noteworthy, however, that the procedure followed in that case was not to request a "retroactive" publication ban, but to seek a publication ban going forward, combined with a mandatory injunction to remove the impugned information that was already published. No such injunction is requested here.

[32] Counsel for CBC also relies on section 11(g) of the *Charter of Rights and Freedoms*, setting out the right of a "person charged with an offence ... not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations..." To the court's knowledge, there are no criminal charges active or pending in respect of the publication at this time.

[33] CBC further argues that in assessing whether there is a "serious risk to an important public interest" (*Sherman Estate* at para. 38) the applicant must provide "evidence of harm with regards to <u>each fact</u> that the AG for Canada wants unpublished" (emphasis by counsel). The court in *Sherman Estate* noted that such evidence could be in the form of direct evidence or logical inferences (para. 97), and said, "it is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative" (para. 98). CBC submits that the Attorney General has not provided such evidence.

[34] The Attorney General denies that evidence of harm is necessary, since it is not referenced in s. 11.5(4). According to the Attorney General, once a disclosure described in section 11(1) occurs, it is "mandatory that the court take measures by operation of law, and in these circumstances, an order as sought by the AGC is mandatory."

[35] Finally, CBC submits that requiring the already-published articles to be removed does not address the possibility of third parties publishing information derived from those articles.

Analysis

[36] There does not appear to be any reported caselaw directly dealing with the interaction of statutory or common law publication bans with the prohibitions on disclosure of information about a "protected person" under the *WPPA* who is testifying in a trial. As noted above, in *Jennings*, however, the court considered the *WPPA* in the context of an application by the accused for disclosure of certain WPP information. The Attorney General of Canada filed an affidavit of a WPP program coordinator. When the accused sought to cross-examine the coordinator on the application, the Attorney General successfully applied for an order under section 486.31 of the *Criminal Code* permitting the coordinator to testify under a pseudonym and behind a screen. Section 486.31 permits the court to "make an order directing that any information that could identify the witness not be disclosed in the course of the proceedings if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice" (This provision is distinct from the publication ban authorized by s. 486.5.).

[37] The court in *Jennings* commented that the relevant considerations under section 486.31 "are very similar to the principles in *Mentuck*" and that "[s]ections 11 and 11.5 of the *Witness Protection Program Act* similarly mirror the *Mentuck* test of necessity and proportionality" (paras. 11-12).

[38] In *Jennings*, the Attorney General's application appears to have been brought promptly, when the issue of a potential impact of in-court disclosure of information affecting WPP-protected interests emerged. By contrast, in this case, the Attorney General initially disclosed information to the Crown after an extended period of scrutiny, necessitating a trial adjournment. The trial then proceeded (more than one year later) under a publication ban specifically framed with WPP concerns in mind, to the full knowledge of WPP personnel. The Attorney General

then brought the present application toward the end of the trial, raising additional claims about the impact of public reporting on WPP-protected interests.

[39] I am satisfied that the considerations going to a common law publication ban as identified in the long-standing and evolving *Dagenais*/*Mentuck* analysis, as described in *Sherman Estate* (and *Canadian Broadcasting Corporation v. Manitoba*) are relevant to an application for measures under the authority of the *WPPA*.

[40] Applying the factors set out in *Sherman Estate*, it is not controversial that the non-disclosure requirements of section 11(1) of the *WPPA* – and specifically "any information that reveals, or from which may be inferred, the location or a change of identity of a person that they know is a protected person" (s. 11(1)(a)) – represent an important public interest. While there is no specific evidence here of an actual risk to the personal safety of the protected person, a protected person under the *WPPA* must be able to be confident that their identity and location are being protected if the purposes of the legislation are to be served. I accept that publication of information that could lead to identification of the person or their location does pose a serious risk to that important public interest.

[41] The second consideration under the *Sherman Estate* test is whether "the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk..." The Attorney General submits that the risks in question "emerge from the extensive details about Ms. Fuller reported by the *Halifax Examiner*" in articles dated September 22 and 25, 2023, and says "[k]eeping the information from ongoing availability online and distribution is required, and there is no alternative, as demonstrated by the fact the articles have not been removed by the *Halifax Examiner*, even in the interim..." I am satisfied that, going forward, there is no reasonable alternative to a publication ban on information protected under the *WPPA* that will prevent this risk.

[42] I acknowledge that there was an obvious alternative measure that could have prevented the present situation: the WPP, aware that a protected person was testifying in a murder trial and that her evidence might touch upon information pertinent to her WPP status, could have monitored the situation and raised its concerns – through the PPS Crowns if necessary – before news organizations, reasonably believing they were bound only by the existing publication ban, published allegedly objectionable information.

[43] This leaves the final question: do the benefits of the proposed order outweigh its negative effects? This issue requires some consideration of the broader background to this application, and of the details of the remedy sought.

[44] Again, the WPP disclosed materials relating to Kaitlin Fuller to the PPS Crown after many months of careful vetting, accommodated by a relatively lengthy adjournment justified by the purported scale of the task for WPP staff to process the documents. Once received, the PPS Crown, in turn, disclosed the vetted materials to the defence. Prior to the commencement of trial, the Crown requested a very specific publication ban in relation to Ms. Fuller, whose terms were formulated taking into account her status as a WPP-protected person.

[45] The WPP knew exactly what material had been disclosed about Ms. Fuller, and precisely what she might be examined about. Neither WPP staff, the Attorney General, nor the PPS Crown on their behalf, made any request or application to the court in advance of Ms. Fuller's testimony to seek an additional or augmented publication ban reflective of the concerns the Attorney General has now raised *ex post facto* in this application. Plainclothes police escorted Ms. Fuller in and out of the courtroom during her testimony, and remained in the courtroom while she testified. However, no WPP personnel or counsel for the Attorney General attended during the three days of Ms. Fuller's testimony, despite their knowledge that this was a public trial during which she would be examined and cross-examined, and that her evidence – particularly on cross-examination – was inevitably going to involve her participation with the WPP.

[46] Those reporting on the trial, it appears, complied with the publication ban as ordered. Because the affidavit filed by the WPP has been sealed, and the participating media have only been supplied with a vetted affidavit, neither the parties nor the public are aware of the specific contents of the articles that are of concern to the WPP, other than the WPP's global claim that there is a risk that a "matrix" of information could lead to Ms. Fuller's identification.

[47] The WPP's implicit position, as advanced by the Attorney General, is that the parties, the court, and the media, not the WPP itself, are responsible for monitoring the evidence to ensure that nothing mentioned could inadvertently run afoul of the WPP's interpretation of the scope of prohibited disclosure. This includes not only information that on its face violates the *WPPA*, but also other information that WPP personnel may consider to be part of a "matrix". This is ill-considered. How could anyone – court, media or parties – know what additional

"matrix" of information might be of concern to the WPP, aside from WPP personnel themselves? And having failed to alert anyone as to its concerns in advance of trial, or prior to Ms. Fuller's testimony, the WPP now demands a "retroactive" publication ban – which appears to be unknown to the law – requiring the *Halifax Examiner* to take down two of its articles, at its own expense, without identifying what aspects of the articles are allegedly in breach of the disclosure prohibitions in the *WPPA*.

[48] There was an obvious alternative measure that could have prevented the present situation: the WPP, aware that a protected person was testifying in a murder trial and that her evidence might touch upon information pertinent to her WPP status, could have monitored the situation and raised its concerns – through the PPS Crowns if necessary – before news organizations, reasonably believing they were bound only by the existing publication ban, published allegedly objectionable information.

[49] The Attorney General submits that the benefit of "protecting life and safety" outweighs "minor limitations" on the ability to report on the trial. While accusing the affected news organizations of making "abstract statements" about limiting press freedom, the Attorney General is equally abstract in arguing that freedom of the press must be "tempered by the competing interests in the justice system, where reporting runs against the interests of keenly vulnerable participants", such as *WPPA* protected persons.

[50] I am left to conclude that an additional publication ban/confidentiality order is necessary because of the interests at stake, and specifically the potential for disclosure of information that could reveal, or permit an inference about, the identity or location of a protected person under the Act, namely Ms. Fuller. However, I also conclude that proportionality requires this order to be framed much more narrowly than the Attorney General would prefer. Anything beyond a prospective publication ban would have an impact that is disproportional to its negative effects.

[51] To purport to make this order retroactive would result in potential criminalization of reporting and publishing done in good faith reliance on an existing publication ban. As counsel for the Attorney General conceded in the hearing, the WPP could have monitored the trial, and specifically Ms. Fuller's evidence. They could have acted promptly. They were fully aware that Ms. Fuller would be cross-examined and that the subject of her relationship with the WPP

would arise in her evidence. I reject any suggestion that the WPP can claim to have been taken by surprise. Having opted not to take what they now say are necessary steps when they might have been effective, they now request draconian measures after the horse has left the barn. In effect the Attorney General seeks an absolute veto over public reporting before, during, and after a trial where a protected person testifies, with no public disclosure of the specifics of what is being objected to, and which can be invoked after the fact, when the impugned information has already been published. Going further, they ask that the court act simply as a mouthpiece for the WPP in imposing these *ex post facto* measures, without really undertaking any balancing or exercising any discretion.

[52] Counsel for the Attorney General insisted that their position simply reflects an inescapable interpretation of the *WPPA*. But the *WPPA* provides practically no concrete guidance. The court's duty under s. 11.5(4) of the *WPPA* is to take "any measures that it considers necessary..." That does not mean that the trial judge operates in a vacuum. As this case demonstrates, information regarded as objectionable by the WPP will not necessarily be obvious when it happens to arise at trial. How is the court expected to decide on "necessary" measures when the only entity capable of identifying potentially problematic disclosure, that could potentially, in the "matrix", be "identifying," is absent? When it was put to counsel that a more expansive publication ban could have been sought before or during trial, the only explanation appeared to be that they chose not to do so, combined with vague speculation that the request would have been denied.

[53] The Attorney General concedes that they have no authority that would support a giving a publication ban retroactive effect – that is, to deem the new order as having been in effect during the trial. There is no dispute that in some contexts the court can order material removed from a website, such as defamatory material, material published in contravention of a publication ban, or material that violates a statue, such as the *Youth Criminal Justice Act*. I would not rule out the possibility that section 11.5(4) might permit such an order in appropriate circumstances, particularly where information has been disclosed in violation of an existing order or publication ban. That is not the case here.

[54] The Attorney General further submits that the only news organization directly impacted by the proposed retroactive effect – at this point, at least – is the *Halifax Examiner*, and that the *Examiner*'s publisher has been privy to this application. That is irrelevant to the potential for the *Examiner* or its personnel to be subject to retroactive criminal charges as a result of their publishing activities

before the application was brought. Once again, the Attorney General insists that this is simply the result of the automatic operation of the legislation. I reject this submission. While describing the provision as mandatory, counsel for the Attorney General simultaneously conceded that the court's duty to "take any measures that it considers necessary" contains an element of discretion.

[55] I conclude that it would be disproportional to any good that would be accomplished to make an order that would retroactively criminalize good faith publication simply because the Attorney General and the WPP chose not to take the necessary steps ahead of time, or because they later changed their minds. In addition to the potential consequences for those who published the information, to make such an order would have a chilling effect on freedom of speech in any proceeding where a WPP-protected witness testifies.

Conclusion

[56] I order a prospective publication ban/confidentiality order on the terms originally proposed by the Attorney General and agreed to by CBC, with the proviso that the order does not have retroactive effect.

Arnold, J.