Federal Court  Cour fédérale

Date: 20210713

Docket: DES-5-20

Citation: 2021 FC 737

Ottawa, Ontario, July 13, 2021

PRESENT: Mr. Justice Norris

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

CAMERON JAY ORTIS

Respondent

and

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

ORDER AND REASONS

I. OVERVIEW

[1] Cameron Jay Ortis is charged with a number of offences under the *Security of Information Act*, RSC 1985, c O-5, and the *Criminal Code*, RSC 1985, c C-46. His trial before a judge and jury in the Ontario Superior Court of Justice at Ottawa is scheduled to begin in September 2022. The Public Prosecution Service of Canada ("PPSC"), under the direction of the Director of Public Prosecutions ("DPP"), has carriage of this prosecution on behalf of the Crown.

[2] Crown disclosure provided to Mr. Ortis has been redacted to protect certain information the release of which, it is alleged, would be injurious to international relations, national defence or national security. The Attorney General of Canada ("AGC") has applied under section 38.04 of the *Canada Evidence Act*, RSC 1985, c C-5 ("*CEA*"), for an order confirming the prohibition of disclosure of the redacted information. Mr. Ortis and the DPP/PPSC are respondents on this application. I am the designated judge seized with this application.

[3] For ease of reference, in these reasons I will refer to sections 38 to 38.17 of the *CEA* as the section 38 scheme and the underlying application as the section 38 application.

[4] It is anticipated that there will be both public and private hearings in connection with the section 38 application. It is also anticipated that, during the public hearing, there will be discussion of the evidence the Crown intends to lead at Mr. Ortis's trial. The PPSC and Mr. Ortis share a concern that publication of that evidence and the PPSC's submissions in relation to it before Mr. Ortis's trial has concluded would pose a risk to the fairness of that trial.

They also share a concern that permitting publication of this information and evidence now would effectively nullify bans on publication that were ordered by the Ontario Court of Justice and the Superior Court of Justice in connection with bail proceedings in those courts. As a result, they have jointly brought a motion for an order prohibiting publication of the evidence and submissions that will be presented during the public part of the section 38 application as well as an order prohibiting public access to documents the PPSC intends to file in connection with the public hearing. They also seek an order to the same effect with respect to the Court's Reasons for Judgment on the section 38 application to the extent that those reasons include references to evidence and submissions presented in the public hearing. Finally, they ask that all orders be in effect until the conclusion of Mr. Ortis's trial.

[5] This appears to be the first time such orders have been sought in relation to a public section 38 hearing.

[6] The moving parties are seeking discretionary orders from the Court that would place limits on the open court principle as it applies to the public part of the section 38 application. If granted, the orders would carve out time-limited exceptions to the usual rule that, in Canada, court records and court proceedings are open to the public and can be reported on by the news media without delay.

[7] The AGC did not take a position on the motion.

[8] Despite notice being given to the public, which includes interested representatives of the news media, that this motion was before the Court, no representatives of the news media requested the opportunity to make representations in opposition to the relief being sought: see *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 868-69 and 872.

[9] Even though the motion was therefore unopposed, given the important interests at stake, I have instructed myself that the burden on the moving parties is unaffected by this. To be entitled to the relief they seek, the moving parties must still satisfy me, in accordance with the applicable test, that the orders they have requested are warranted.

[10] Applying the test articulated by the Supreme Court of Canada in *Sherman Estate v Donovan*, 2021 SCC 25, I am satisfied that an order should be made restricting publication of the information and evidence (including submissions) presented by the PPSC during the public part of the section 38 application and, further, that an order should also be made prohibiting public access to materials that will be filed by the PPSC in connection with that hearing. This is because I am satisfied that unrestricted openness of the public part of the section 38 application poses a serious risk to important public interests, the orders sought are necessary to prevent this serious risk, and, as a matter of proportionality, the benefits of the orders outweigh their negative effects. These orders should be in effect until the conclusion of Mr. Ortis's criminal trial.

[11] At this time, I am able to make orders addressing the publication of information and evidence (including submissions) that will be presented at the public hearing as well as public access to materials that will be filed by the PPSC in connection with that hearing. However,

since I do not yet know exactly how I will structure my Reasons for Judgment on the merits of the section 38 application, I am not in a position to formulate the order that will accompany the release of those reasons. At the appropriate time, I will make an order relating to the publication of those reasons that is consistent with the orders I am making now.

II. BACKGROUND

[12] The charges against Mr. Ortis relate to his alleged conduct while he was the Director General of the RCMP's National Intelligence Coordination Center. Mr. Ortis was a civilian member of the RCMP. He was based at its national headquarters in Ottawa. Broadly speaking, the alleged conduct spans the period from January 1, 2014, until September 12, 2019.

[13] Mr. Ortis was arrested and charged in September 2019. Since then, his case has attracted extensive local, national, and international media interest and coverage.

[14] A bail hearing was held in the Ontario Court of Justice on October 17, 18 and 22, 2019, before Justice of the Peace Legault. Pursuant to subsection 517(1) of the *Criminal Code*, the Justice of the Peace ordered that "the evidence taken, the information given or the representations made and the reasons, if any, given or to be given by the justice shall not be published in any document, or broadcast or transmitted in any way" before such time as, if a preliminary inquiry is held, Mr. Ortis is discharged or, if Mr. Ortis is ordered to stand trial, the trial is ended.

[15] Mr. Ortis was ordered release on bail. However, the Crown applied to review this order under subsection 521(1) of the *Criminal Code*. The Crown's application was heard by Justice Labrosse of the Superior Court of Justice on October 30 and November 8, 2019. In connection with this hearing, Justice Labrosse made an order under subsection 521(10) of the *Criminal Code.* That provision incorporates into bail reviews the subsection 517(1) power to order a ban on the publication of certain information for a specified period of time.

[16] The Crown's bail review application was allowed on November 8, 2019, and the bail order was vacated. Mr. Ortis has been detained in custody since then.

[17] The Crown elected to proceed by way of a direct indictment under section 577 of the *Criminal Code*. As a result, no preliminary inquiry was held. The publication bans made under subsections 517(1) and 521(10) of the *Criminal Code* will therefore remain in effect until the conclusion of Mr. Ortis's trial. As mentioned above, that trial is scheduled to begin in September 2022.

[18] As also mentioned above, the AGC has applied to the Federal Court for an order confirming the prohibition on disclosure of certain information that has been redacted from Crown disclosure that has been provided to Mr. Ortis. The test that the Court will apply in determining whether to confirm the prohibition on disclosure or, instead, to order some form of disclosure (e.g. by lifting redactions or summarizing redacted information) is set out in *Canada (Attorney General) v Ribic*, 2003 FCA 246. Briefly, the designated judge hearing the section 38 application will need to determine whether the information in question is relevant to an issue in

Mr. Ortis's criminal trial; if it is relevant, whether its disclosure would be injurious to international relations, national defence or national security; and, if disclosure would be injurious, whether the public interest in disclosure outweighs the public interest in non-disclosure.

[19] Among other things, the *CEA* section 38 scheme provides that the hearing of this application may proceed in public, in private, or by a combination of the two (subsection 38.11(1)). Further, the scheme provides that parties who are permitted to make representations on the application may do so *ex parte*; indeed, if so requested, the Court must give the AGC the opportunity to make *ex parte* representations (subsection 38.11(2)). Any *ex parte* representations (whether by the AGC or another party) must be made in private (subsection 38.11(3)).

[20] As a result of earlier case management conferences, it is anticipated that the section 38 application in this case will proceed in the following three stages:

- First, a public hearing at which the PPSC will present evidence and submissions on the application of the *Ribic* test (or, at least, certain aspects of it). The submissions will focus on the charges against Mr. Ortis and the evidence the Crown intends to lead in its case at trial. It is anticipated that the PPSC will file a Memorandum of Fact and Law as well as a compendium of the evidence the Crown intends to rely on at trial. That evidence will either be summarized or presented in the form in which it will be tendered at trial (e.g. documentary exhibits). Counsel for Mr. Ortis will be present for this part of the hearing but he does not anticipate making any submissions at this stage. Counsel for the

AGC and the *amici curiae* appointed in this matter will also be present but it is not expected that they will make any submissions at this stage, either.

- Second, a private hearing at which counsel for Mr. Ortis will make submissions on the application of the *Ribic* test (or, at least, certain aspects of it). Counsel for the PPSC will not be present for this part of the hearing. Counsel for the AGC and the *amici curiae* will be present but, again, it is not expected that they will make submissions at this stage.

- Third, a private hearing at which the AGC will lead evidence and make submissions on the application of the *Ribic* test. Counsel for Mr. Ortis will not be present at this hearing, nor will counsel for the PPSC. The *amici curiae* will be present. In accordance with the terms of the order appointing them, they will have the right to cross-examine any witnesses called by the AGC and to make submissions on the application of the *Ribic* test.

[21] The present motion relates only to the public hearing, the first of the three stages. No order is required with respect to the private hearings because the *CEA* section 38 scheme itself ensures the confidentiality of those proceedings and any information that is not ultimately ordered disclosed under that scheme.

[22] The moving parties accept that the public – including representatives of the news media – should be permitted to attend and observe the public hearing but they seek a time-limited ban on publication of the submissions made by the PPSC and any information or evidence presented in that hearing. The moving parties also seek an order prohibiting public access to any documents

filed by the PPSC in connection with that hearing in order to ensure that those documents do not enter into public circulation prior to the conclusion of Mr. Ortis's trial.

III. ISSUES

[23] This motion gives rise to the following issues:

a) What is the source of the Court's authority to make the orders requested?

b) What test should the Court apply in determining whether the orders should be made?

c) Have the moving parties satisfied the applicable test?

IV. ANALYSIS

A. *What is the source of the Court's authority to make the orders requested?*

[24] Although there is no question that the Court has the authority to make the orders requested by the moving parties, there is some uncertainty, at least in my mind, about the source of that authority. Specifically, is the authority provided for by the *CEA* or something else? Even if the same test applies regardless of the source (because what is at issue are discretionary orders limiting the open court principle), it is nevertheless important to be clear about the authority under which the Court is acting.

[25] To simplify the discussion that follows, I will refer to the orders sought by the moving parties as a publication ban (with respect to the public hearing, as described above) and a confidentiality order (with respect to materials that will be filed in connection with the public

hearing, as also described above). Since I have found that there are distinct sources for the authority to make these orders in relation to a public proceeding under *CEA* section 38, it will be convenient to deal with each type of order separately.

(1) The Publication Ban

[26] The moving parties seek a publication ban under either subsection 38.12(1) of the *CEA* or, in the alternative, the common law. I am not persuaded that a publication ban over otherwise public information is the sort of protective order contemplated by subsection 38.12(1) of the *CEA.* However, I am satisfied that a ban on publication of the court's proceedings can be ordered in the exercise of the Court's power to control its own process and to function as a court of law.

[27] Subsection 38.12(1) of the *CEA* provides as follows:

Protective order	**Ordonnance de confidentialité**
38.12 (1) The judge conducting a hearing under subsection 38.04(5) or the court hearing an appeal or review of an order made under any of subsections 38.06(1) to (3) may make any order that the judge or the court considers appropriate in the circumstances to protect the confidentiality of any information to which the hearing, appeal or review relates.	**38.12 (1)** Le juge saisi d'une affaire au titre du paragraphe 38.04(5) ou le tribunal saisi de l'appel ou de l'examen d'une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) peut rendre toute ordonnance qu'il estime indiquée en l'espèce en vue de protéger la confidentialité de tout renseignement sur lequel porte l'audience, l'appel ou l'examen.

[28] Considering the text, context and purpose of this provision, in my view, the protective orders it contemplates relate to protecting the confidentiality of the information that is the subject-matter of the section 38 proceeding – namely, information the disclosure of which is alleged to be injurious to international relations, national defence or national security. None of the information sought to be protected by the publication ban requested by the moving parties is information of this type; on the contrary, it relates to the evidence the Crown intends to present in public at Mr. Ortis's trial (subject, of course, to rulings as to its admissibility by the trial judge). Further, as noted above, the moving parties accept that the public should be able to attend the section 38 hearing where this information and evidence is discussed. In short, there is no meaningful sense in which the information that would be covered by the publication ban is "confidential" as this term is used in the *CEA* section 38 scheme when referring to the "information to which the hearing […] relates."

[29] On the other hand, I am satisfied that the power to order a publication ban is necessarily implied by the Federal Court's ability to control its own process and to function as a court of law: see generally *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at paras 16 to 26. Where it is necessary in the interests of justice to do so, the Court must be able to make an order restricting the publication of its proceedings. To repeat, that there is such authority is not disputed in the present case.

(2) The Confidentiality Order

[30] The moving parties also seek an order prohibiting public access to documents the PPSC intends to file with the Court and rely on in the public section 38 hearing. They seek this order

under subsection 38.12(2) of the *CEA* or, in the alternative, rule 151 of the *Federal Courts Rules*, SOR/98-106. While subsection 38.12(2) of the *CEA* provides the authority to make a sealing order with respect to court records, I am not persuaded that this authority extends to the sort of information and evidence that will be found in the documents in question here. On the other hand, rule 151 clearly provides the authority to make a confidentiality order with respect to such materials. I am satisfied that an order under this provision would meet the needs demonstrated by the moving parties.

[31] Subsection 38.12(2) of the *CEA* provides as follows:

Court records	**Dossier**
(2) The court records relating to a hearing that is held, or an appeal or review that is heard, in private or to any ex parte representations are confidential. The judge or the court may order that the court records, or any part of them, relating to a private or public hearing, appeal or review be sealed and kept in a location to which the public has no access.	**(2)** Le dossier ayant trait à l'audience, à l'appel ou à l'examen tenu à huis clos ainsi que celui se rapportant aux observations présentées en l'absence d'autres parties sont confidentiels. Le juge ou le tribunal saisi peut ordonner que tout dossier ou partie d'un dossier ayant trait à une audience, un appel ou un examen tenus à huis clos ou en public soit placé sous scellé et gardé dans un lieu interdit au public.

[32] Once again, considering the text, context, and purpose of this provision, I am not persuaded that it applies to the type of documents the PPSC intends to file given what is expected to be included in them. The provision affirms that court records relating to private hearings and *ex parte* representations are confidential. The court records in question here do not relate to a private hearing, nor are they *ex parte* representations. The provision does contemplate

sealing orders with respect to court records relating to a public hearing of a section 38 application but it seems to me that this is meant to provide a safeguard in case, for example, sensitive or potentially injurious information is inadvertently disclosed during a public hearing. This is not the sort of information or evidence that would be subject to the order sought by the moving parties.

[33] On the other hand, there is no question that rule 151 of the *Federal Courts Rules*, SOR/98-106 provides the authority to order that the documents the PPSC intends to file be treated as confidential and that they not be accessible to the public. I am satisfied that this is the appropriate provision under which to grant the relief the moving parties are seeking.

[34] To be clear, there is no suggestion that Mr. Ortis, the AGC or the *amici curiae* should not have unrestricted access to the documents the PPSC intends to file; indeed, I expect they will all receive copies of these documents in due course directly from the PPSC. Consequently, while the PPSC should mark these documents as confidential when they are filed (in accordance with rule 152(1) of the *Federal Courts Rules*), and while the Registry should not permit access to these documents by any member of the public (as provided for by rule 152(2)(d)), there should be no need to engage the process for access to the documents by a solicitor of record, as otherwise contemplated by rule 152(2)(a) through (c).

B. *What test should the Court apply in determining whether the orders should be made?*

[35] As has already been noted, the moving parties seek discretionary orders from the Court that would place limits on the open court principle.

[36] The meaning and rationale of the open court principle are well-known; little elaboration is required here. The general rule is that justice should be carried out in courts that are open to the public and not in secret. Doing so helps to ensure the integrity of court proceedings, enhances the legitimacy of decisions, fosters public confidence in the court system, and promotes public understanding of the administration of justice. Open courts are a fundamental component of the rule of law. They are also essential to the proper functioning of democratic forms of government. As well, because the news media often act as the eyes and ears of the public, the open court principle has an important constitutional dimension, engaging the rights guaranteed by section 2(b) of the *Charter*. These weighty considerations have given rise to a strong presumption that court proceedings and court records should be open to the public and can be reported on by the news media without delay: see *Sherman Estate* at paras 30 and 39 and the authorities cited therein.

[37] The test that must be met by a party asking a court to exercise discretion in a way that limits the open court principle was recast recently in *Sherman Estate*. Writing for the Court, Justice Kasirer emphasized that the new test preserves the essence of the test previously established by the Court while clarifying the burden on an applicant seeking an exception to the open court principle.

[38] The test is as follows:

> 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.
>
> (*Sherman Estate* at para 38)

C. *Have the moving parties satisfied the applicable test?*

[39] As I will explain, I am satisfied that the moving parties have established all three of the elements of the *Sherman Estate* test.

(1) Would court openness pose a serious risk to an important public interest?

[40] The moving parties submit that publication of information and evidence (including submissions) presented during the public part of the section 38 application before Mr. Ortis's trial has concluded would pose a serious risk to two important public interests. One is the fairness of Mr. Ortis's trial. The other is ensuring the continued effectiveness of the publication bans ordered in connection with the bail proceedings. I agree in both respects.

[41] First, it is indisputable that the fairness of Mr. Ortis's trial is an important public interest. The right to a fair trial is guaranteed by section 11(d) of the *Charter*. It is "a fundamental pillar without which the edifice of the rule of law would crumble" (*R v NS*, 2012 SCC 72 at para 38). The interest in a fair trial embraces not simply the narrow interest of preventing potential jurors from being influenced by prejudicial information (as, for example, might be presented at a bail hearing) but also "other interests intended to safeguard the accused's and society's interest in a

fair trial" (*Toronto Star Newspapers Ltd v Canada*, 2009 ONCA 59 at para 38 (per Rosenberg JA), quoted with approval in *Toronto Star Newspapers Ltd v Canada*, 2010 SCC 21 at para 22). This includes ensuring that the jury decides the case solely on the evidence presented at trial and the trial judge's instructions on the law.

[42] I am satisfied that publication of information and evidence presented in the public part of the section 38 application before the conclusion of Mr. Ortis's trial would pose a serious risk to the fairness of that trial. This is because that information and evidence will be one-sided (relating as it will solely to the evidence the Crown will be relying on to prove the charges) and untested (since the issues at play in the section 38 application are quite different from those that will be at play at trial) (cf. *Toronto Star Newspapers Ltd* (SCC) at para 32). Further, it is no part of the role of the designated judge hearing the section 38 application to anticipate let alone determine whether the Crown's evidence that will be discussed in the public hearing will be admissible at trial or not. Depending on the trial judge's rulings on admissibility and other factors, the Crown's case at trial could end up looking quite different from how it is presented in the section 38 application. Finally, in advancing their position on the section 38 application, it is open to counsel for the PPSC to adduce and rely on "anything that, in the opinion of the judge, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law" (*CEA* subsection 38.06(3.1)). This unusual rule permits the admission of a wider range of information and evidence in the section 38 proceeding than would be admissible at the criminal trial. In sum, by exposing potential jurors to information and evidence that has not yet (and may never) become part of the trial, publication of that information and evidence before the trial has concluded poses a serious risk to the fairness of that trial.

[43] Second, ensuring that the actions of this Court do not undermine the effectiveness of the publication bans ordered by the Ontario Court of Justice and the Superior Court of Justice is also an important public interest. In part this is because those orders help to protect the fairness of Mr. Ortis's trial, as just discussed (cf. *Toronto Star Newspapers* (SCC) at paras 22-23). But over and above this, there is an additional public interest in ensuring that, to the greatest extent possible, the actions of one court do not frustrate or undermine the actions of another. I see this as an aspect of what Justice Iacobucci spoke of in *R v Mentuck*, 2001 SCC 76, as the important public interest in "the proper administration of justice" (at paras 32-33). I am satisfied that permitting publication of the information and evidence (including submissions) that will be presented in the public part of the section 38 application before the conclusion of Mr. Ortis's trial would pose a serious risk to this important public interest as well.

(2) Are the orders sought necessary to prevent these serious risks to important public interests?

[44] The critical question at this stage of the test is whether reasonably alternative measures will prevent the risks identified in the preceding section. The moving parties submit that there are no reasonably alternative measures that would prevent these risks and, consequently, that the orders sought are necessary. I agree.

[45] In *Dagenais*, Chief Justice Lamer identified a number of measures that can be used to protect the fairness and integrity of a criminal trial from the adverse effects of pre-trial publicity, including:

- Adjourning the trial
- Changing the venue of the trial

- Sequestering the jury
- Challenges for cause
- "Strong" judicial direction to the jury

(*Dagenais* at 881)

[46] I am satisfied that none of these potential measures are reasonable alternatives capable of preventing the risks identified above.

[47] To begin with the obvious, sequestering the jury is not a reasonable alternative when there is, as of yet, no jury to sequester. By the time there is a jury to sequester, the damage would already be done. The same is true of instructions to the jury to ignore reporting about the case in the media. This can be effective during a trial but it is meaningless at this stage. Further, given that the start of the trial is still over a year away, adjourning the trial would accomplish nothing while potentially jeopardizing Mr. Ortis's right to be tried within a reasonable time as guaranteed by section 11(b) of the *Charter*. Finally, given how widespread reporting of this case has been (and would likely be if publication of the information and evidence in question were permitted now), the effectiveness of a change of venue is doubtful at best.

[48] On the other hand, challenge for cause on the basis of pre-trial publicity (if permitted by the trial judge) is capable of screening out jurors who are unable to set aside any opinions they may have formed as a result of exposure to information about the case. Similarly, our confidence in jury trials is founded, in part, on the belief that jurors can and will follow the trial judge's instructions, including instructions to ignore any extraneous information to which they may have been exposed: see *Dagenais* at 884-86. I do not doubt the effectiveness of either of

these measures in preventing pre-trial publicity from interfering with the jury's consideration of this case. However, I am not satisfied that they would be as effective in protecting the fairness and integrity of the trial as limiting pre-trial publicity in the first place.

[49] Even if I took a different view of the effectiveness of challenges for cause and jury instructions, it remains the case that neither of these measures is capable of addressing the risk to the second important public interest identified above – namely, not undermining the publication bans ordered by the Ontario Court of Justice and the Superior Court of Justice. Nothing short of another publication ban is capable of preventing this risk.

[50] I consider the need for a confidentiality order to be a closer call. One alternative measure that readily springs to mind is the publication ban we have just been discussing. Why would extending that order to the court records in question not be sufficient to prevent the risks to important public interests I have identified? However, after careful consideration, I am satisfied that a publication ban alone would not be as effective at preventing the serious risk to important public interests as a publication ban in conjunction with a confidentiality order over certain court records would be. An important consideration in this respect is the moving parties' representation that, to date, none of the actual evidence the Crown intends to rely on at trial has been published or is otherwise known to the wider public.

(3) As a matter of proportionality, do the benefits of the orders outweigh their negative effects?

[51] Finally, the moving parties submit that the benefits of the orders they seek outweigh their negative effects. Once again, I agree.

[52] Any limitation on the openness of courts is a serious matter because it runs counter to all of the benefits of the open court principle mentioned above. That being said, these negative effects are mitigated in this case by two important considerations. First, as has been mentioned, the moving parties agree that the public – including representatives of the news media – should be permitted to attend the hearing that would be subject to the publication ban they are seeking. Thus, this will not be a private or secret hearing. Nevertheless, the publication ban (and confidentiality order) would place a significant limitation on the ability of the news media to report on the public proceeding. This brings me to the second important mitigating consideration: the publication ban and the confidentiality order would be time-limited; they will come to an end at the conclusion of Mr. Ortis's trial. At that point, members of the news media will be free to report on all aspects of the public section 38 hearing, if they so choose. Thus, the benefits of the open court principle, to the extent that they are protected and promoted by media reporting of court proceedings, would not be frustrated entirely but only deferred: see *Toronto Star Newspapers Ltd* (SCC) at para 39.

[53] On the other hand, the orders requested would make significant contributions to protecting Mr. Ortis's right to a fair trial and preventing conflict between the work of the Federal

Court and orders of the Ontario courts. These are significant benefits. As a matter of proportionality, they outweigh the negative effects of the orders.

[54] While there are important differences between the present case and *Toronto Star Newspapers Ltd* (SCC), there are also important similarities. I draw support for my conclusion that the benefits of the orders in question here outweigh their negative effects from the majority's conclusion in that case that section 517 of the *Criminal Code* is constitutional. See, in particular, paragraphs 58 to 60 of Justice Deschamps reasons, where she sets out her conclusion that the benefits of a time-limited publication ban over bail hearings outweigh, as a matter of proportionality, the negative effects of the ban on the open court principle and the right to freedom of expression. While that analysis was conducted under section 1 of the *Charter* in relation to a legislative enactment, there are clear parallels between that test and the test that applies here: see *Sherman Estate* at para 40.

V. CONCLUSION

[55] For these reasons, I am satisfied that the orders requested by the moving parties are warranted. The terms of the orders are set out below.

ORDER IN DES-5-20

THIS COURT ORDERS that

1. The information and evidence (including submissions) presented by the Public Prosecution Service of Canada during the public hearing of this application under section 38.04 of the *Canada Evidence Act* shall not be published in any document, or broadcast or transmitted in any way before the criminal trial of Cameron Jay Ortis in the Ontario Superior Court of Justice has concluded.
2. Any transcript of the public hearing of this application shall include the preceding term on the cover page.
3. Any transcript of the public hearing of this application shall also prominently display on each page that its contents are subject to a publication ban.
4. Any document filed by the Public Prosecution Service of Canada in connection with the public hearing of this application in which reference is made to evidence the Crown intends to present at the criminal trial of Cameron Jay Ortis shall be clearly marked as confidential and shall identify this order as the source of the requirement to treat the document as confidential.
5. The Registry shall not make available to any member of the public any document marked as confidential by the Public Prosecution Service of Canada in accordance with the preceding term or any information derived therefrom before the criminal trial of Cameron Jay Ortis in the Ontario Superior Court of Justice has concluded.

"John Norris"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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