CITATION: Commissioner of Competition v. X, 2018 ONSC 3374
COURT FILE NO.: 17-13302
DATE: 2018/05/30

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
COMMISSIONER OF COMPETITION	)	Marisa Ferraiuolo and Gary Caracciolo, Public Prosecution Service of Canada, Competition Law Section, for the Respondent
Respondent	)	
– and –	)	
X	)	Scott K. Fenton and Lynda E. Morgan, for the Applicant
Applicant	)	
– and –	)	
THE GLOBE AND MAIL INC., CANADIAN BROADCASTING CORPORATION, POSTMEDIA NETWORK INC., AND CTV NEWS, A DIVISION OF BELL MEDIA INC.	)	Tae Mee Park and Peter M. Jacobsen, for the Interveners
Interveners	)	
	)	**HEARD:** April 26, 2018

DECISION ON APPLICATION BY PERSON X

RATUSHNY J.

[1] Person X (also, the "Applicant") is an alleged participant in a price-fixing conspiracy in the fresh commercial bread industry in Canada.

[2] Person X seeks an Order prohibiting the publication of specific information in four Informations to Obtain (the "ITOs") that directly or indirectly reveal the Applicant's identity.

1. The Facts

[3] On March 3, 2015, the Competition Bureau (the "Bureau") granted an immunity marker to Loblaw Companies Limited/Weston Foods (Canada) Incorporated (the "Immunity Applicants"). The Immunity Applicants provided proffers to the Bureau pursuant to the Bureau's Immunity Program under the *Competition Act*, R.S.C. 1985, c. C-34.

[4] In December 2016 and March 2017, respectively, the Bureau interviewed two of the Immunity Applicants' witnesses whose identities are presently redacted from public view.

[5] In August 2017, the Bureau commenced an inquiry to investigate allegations that Canada Bread Company Limited ("Canada Bread"), the Immunity Applicants, Wal-Mart Canada Corporation ("Walmart"), Sobeys Incorporated ("Sobeys"), Metro Incorporated ("Metro"), Giant Tiger Stores Limited ("GT"), and other persons known and unknown, had participated in a conspiracy to fix the wholesale and retail price of fresh commercial bread in Canada. It is alleged that the price-fixing conspiracy commenced in November 2001 and continued until October 31, 2017.

[6] On October 26, 30 and 31 and November 1, 2017, the Bureau made *ex parte* applications for search warrants against Canada Bread, the Immunity Applicants, Walmart, Sobeys, Metro, GT and Overwaitea Food Group (the "Searched Parties"), pursuant to sections 15 and 16 of the *Competition Act* (the "Search Warrants"). The Search Warrants were issued on the basis of four similar ITOs sworn by Senior Competition Law Officer Simon Bessette (the "Affiant").

[7] Since October 31, 2017, there has been extensive media coverage across Canada about the Investigation.

[8] In December 2017, the Immunity Applicants publicly admitted to participating in industry-wide anti-competitive activity by bread price-fixing for over 14 years. They revealed that they had been co-operating with the Bureau as Immunity Applicants since March 2015 and that their employees responsible were no longer with the companies.

[9] In each of the ITOs, 8 paragraphs of a total of approximately 60 pages relate to the Applicant (the "8 Paragraphs"). In each of the 8 Paragraphs, the Affiant relies on an interview

by the Bureau of the Immunity Applicants' witness "A" in support of the Applicant's alleged involvement in initiating the price-fixing "conspiracy, agreement or arrangement."

[10] The Applicant was not a target of the Search Warrants or one of the parties whose premises were searched. It is acknowledged by all parties that the bread price-fixing investigation (the "Investigation") is in its early stages and that due to its complexity, it could be years before it is concluded. No criminal charges have been laid against anyone, including the Applicant, and there is no indication that the Applicant will be charged.

[11] In response to this pending application by the Applicant, the 8 Paragraphs in the ITOs (and the names of the two Immunity Applicants' witnesses) were ordered redacted by my Order dated January 26, 2018. The remaining contents of the ITOs (the "Redacted ITOs") were made public on January 31, 2018, pursuant to the terms of that Order.

[12] When the Redacted ITOs were publicly released on January 31, 2018, the media reported widely on the Investigation revealed in the Redacted ITOs and the alleged involvement of the Searched Parties, including that the alleged price-fixing had commenced in 2001 and that retailers had raised their bread prices 15 times, by roughly 10 cents each time.

[13] The Interveners were granted leave to intervene by my Order dated March 22, 2018.

[14] For the purposes of this application, the Interveners and the Searched Parties have had full access to all content in unredated form in the 8 Paragraphs that the Applicant now seeks to continue to shield from public view by the requested non-publication order.

[15] At this point in time, and pursuant to the continuing publication ban in accordance with my Order dated March 22, 2018, the Applicant's identity has not been publicly released.

2. The Order Sought

[16] The Applicant seeks a non-publication order for the parts of the 8 Paragraphs in the ITOs that directly or indirectly reveal the identity of the Applicant. The Applicant has specifically identified those parts by different colored edits in each of the 8 Paragraphs, entered as Exhibit 1 on this application. The black edits are redactions currently in place to keep confidential the identity of the Immunity Applicants' witness "A". The green edits are redactions requested by

the Applicant and agreed to by Sobeys and Metro if a publication ban is ordered on this application. The red edits are additional redactions requested by the Applicant and not agreed to by Sobeys or Metro.

[17] The Applicant submits the application does not over-reach, as it only requests a narrow non-publication order that still permits full public and media access to all other unredacted parts of the ITOs including parts of the presently redacted 8 Paragraphs. The Applicant submits that in the result, public access to a full and robust account of the informational basis in the ITOs for the granting of the Search Warrants is maintained.

[18] The Interveners (also, the "Media Conglomerate") oppose the Applicant's requested non-publication order on the basis that the application is "seeking to infringe the freedom of expression rights of the media and the public in connection with an investigation that affects nearly all Canadians—the alleged price-fixing of bread, a fundamental food staple."

[19] Counsel for the Respondent and for some of the Searched Parties attended the hearing of the application and contributed their positions to it. Sobeys takes no position, however, it offered input on proposed redactions should the application be granted. Metro supports the position of the Media Conglomerate, however, it also offered input on proposed redactions should the application be granted. The Respondent does not contest the application, however, it does not concede any of the Applicant's allegations pointing to frailties with respect to certain content in the 8 Paragraphs of each of the ITOs. The Immunity Applicants support the Respondent's submissions relating to the content of the 8 Paragraphs and take no position on the application. Each of Canada Bread and GT also take no position on the application.

3. The 8 Paragraphs

[20] The content of the 8 Paragraphs describes one conversation the Immunity Applicants' witness "A" told the Affiant it had had with Person X, an employee of Canada Bread, more than ten years ago. Witness "A" remembered that Person X had made certain remarks to it, including giving a PowerPoint presentation during an industry event, demonstrating that fresh bread in Canada was undervalued from a price realization standpoint both on the wholesale and retail side. Witness "A" remembered being told by Person X during this conversation that Person X was "going to the retailers to get their buy-in for a price increase with the goal of orchestrating

alignment through the retail community." Witness "A" also remembered that a first price increase was announced by Canada Bread sometime in February 2002.

4. The Applicable Law

[21] In seeking a non-publication order for parts of the 8 Paragraphs, the Applicant is asking this Court to exercise its discretion and limit public access to court proceedings that are presumptively open.

[22] The applicable law and governing principles regarding Canada's open court system and discretionary court orders that limit the presumptive openness of court proceedings are not in dispute.

[23] They have been reiterated in numerous cases and I repeat them only in summary form, quoting from some of their succinct expression in *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188, as they appear to me to resonate in the present case:

> Section 2(b) of the *Charter* guarantees freedom of communication and freedom of expression and "depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians." (para. 2)
>
> These freedoms "though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted." (para. 3)
>
> "It is now well established that court proceedings are presumptively 'open' in Canada" and "public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would subvert the ends of justice or unduly impair its proper administration." (para. 4)
>
> The criteria governing the exercise of judicial discretion in dealing with competing claims related to court proceedings have come to be known as the *Dagenais/Mentuck* test. (para. 5)
>
> The *Dagenais/Mentuck* test requires that restrictions on the open court principle in relation to judicial proceedings can be ordered only when the party seeking such a restriction establishes that:

> (a) such an order is necessary in order to prevent serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice (para. 26).

The 'risk' in the first prong of the *Dagenais/Mentuck* test must be "*real, substantial*, and *well grounded in the evidence*: "It is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained". (para. 27, referring to Iacobucci J. writing for the Court in *R. v. Mentuck*, [2001] 3 S.C.R. 442, at para. 34) [original emphasis]

[24] The statutory expression of the criteria to be considered in deciding whether to limit access to and disclosure of any information relating to search warrants is contained in section 487.3 of the *Criminal Code*, R.S.C. 1985, c. C-46, the relevant parts of which are as follows:

> **Order denying access to information**
> **487.3 (1)** On application made at the time an application is made for a warrant under this or any other Act of Parliament, an order under any of sections 487.013 to 487.018 or an authorization under section 529 or 529.4, or at a later time, a justice, a judge of a superior court of criminal jurisdiction or a judge of the Court of Quebec may make an order prohibiting access to, and the disclosure of, any information relating to the warrant, order or authorization on the ground that
>
> **(a)** the ends of justice would be subverted by the disclosure for one of the reasons referred to in subsection (2) or the information might be used for an improper purpose; and
>
> **(b)** the reason referred to in paragraph (a) outweighs in importance the access to the information.
>
> **Reasons**
> **(2)** For the purposes of paragraph (1)(a), an order may be made under subsection (1) on the ground that the ends of justice would be subverted by the disclosure
>
> **(a)** if disclosure of the information would
>
> **(i)** compromise the identity of a confidential informant,

> **(ii)** compromise the nature and extent of an ongoing investigation,
>
> **(iii)** endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used, or
>
> **(iv)** prejudice the interests of an innocent person; and
>
> **(b)** for any other sufficient reason.

[25] The Applicant asserts a status in this application as an "innocent person" under section 487.3(2)(a)(iv) of the *Criminal Code*. The Interveners accept this assertion.

[26] There is an overlap between section 487.3 and the common law *Dagenais/Mentuck* test, such that for the application to be granted and a non-publication order made, the Applicant must satisfy the Court (I accept the Applicant's submissions in this regard) of all of the following:

a. disclosure of the allegations in the ITOs regarding the Applicant would prejudice the interests of the Applicant as an "innocent person" pursuant to s. 487.3(2)(a)(iv), such that failure to prevent the disclosure would cause the ends of justice to be subverted under s. 487.3(1)(a);

b. the need to prevent the disclosure that would cause the ends of justice to be subverted outweighs in importance public access to the information under s. 487.3(1)(b);

c. the Order sought is necessary to prevent "serious risk to proper administration of justice" and "reasonably alternative measures" will not prevent the risk (*Dagenais/Mentuck* first part); and

d. the salutary effects of the non-publication order outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice (*Dagenais/Mentuck* second part).

(*Toronto Star v. R.*, 2006 ONCJ 544, at para. 11; *Vancouver Sun* (*Re*), 2004 SCC 43, [2004] S.C.R. 332, at para. 3; *Mentuck*, at para. 32.)

[27] While there is an obvious balancing of rights and interests in considering the Applicant's request for a non-publication order, I repeat the observations of MacPherson J.A. in *Ottawa Citizen Group Inc. v. Canada (Attorney General)* (2005), 75 O.R. (3d) 590 (C.A.), at para. 65, as referred to by Nordheimer J. in *Canadian Broadcasting Corporation and Others v. HMQ*, 2013 ONSC 6983, at para. 22, that this balancing should not "conjure the image of neutrality or even-handedness" because of the "centrality of a free press and open courts in Canadian society and in the Canadian constitution" leading to "almost a presumption against any form of secrecy in all aspects of court proceedings in Canada."

5. The Applicant

[28] The Applicant has filed an affidavit on this application. There has been no cross-examination on the affidavit and, as the Applicant's counsel points out, that evidence has not been contradicted and must be accepted as unchallenged.

[29] In the affidavit, the Applicant speaks of a career and reputation spanning decades, both professional and personal, that all parties agree can be described as stellar. The Applicant has no criminal record and has not been charged in the Investigation.

[30] The Applicant explains that "it" was an employee of Canada Bread for a very short time during the period described in the heading to the 8 Paragraphs of the ITOs as the "genesis of the alleged conspiracy", amounting to less than a six-month period at that time compared to the 16 years of alleged price-fixing conduct in the commercial fresh bread industry, as set out in the ITOs.

[31] The Applicant details its personal history before and after Canada Bread and its "concern about irreversible personal reputational, economic and professional prejudice that will follow if [it is] named or indirectly identified in the public version of the ITOs."

[32] The Applicant's concerns focus on the "significant impact on [its] professional reputation" of public knowledge of allegations inferring that it was engaged in illegal conduct. It says, "The allegations challenge the core of what makes [it] a distinctive leader." It speaks of its

reputation as being "socially responsible", "values driven" and "doing well by doing good" and, if its identity were known, of "significant prejudicial economic effects both for the company presently employing the Applicant and for [the Applicant's] own interests."

[33] The Applicant lists tangible, probable, and negative financial consequences for it and the many personal and professional ventures in which the Applicant is involved, should the allegation of criminal conduct be made public.

[34] The Applicant supports philanthropic causes both financially and by volunteering and says, "An unproven public allegation that infers or implies that I engaged in criminal conduct would destroy the reputation I have built over many years, and would impact on my ability to participate in a meaningful way in the future, impacting both me personally and the charities that I am involved with now or in the future."

[35] The Applicant is also concerned about the impact on its children and their professional relationships if it is named or indirectly identified in the public version of the ITOs.

6. Analysis

(1) Innocent Person

[36] I agree the Applicant is properly characterized under s. 487.3(2)(a)(iv) of the *Criminal Code* as an "innocent person" claiming that its interests would be prejudiced by the disclosure of its identity.

[37] The Applicant was not a named target in the ITOs. The Applicant was not searched as a result of the Search Warrants. The Applicant was an employee of Canada Bread for a small fraction of the time of the alleged illegal activity. The Applicant is implicated in the alleged price-fixing by one person's remembrance of one conversation that occurred over a decade earlier. That remembrance remains untested. No charges have been laid. The Investigation is ongoing and still in its early stages. The Applicant's name has not been made public. The presumption of innocence prevails. Certainly under any definition of "innocent person", the Applicant qualifies.

[38] In the pre-*Charter* ground-breaking case of *Attorney-General v. MacIntyre*, [1982] 1 S.C.R. 175, at pp. 186-7, Dickson J. refers to protecting the interests of an "innocent person" as

one of the "social values of superordinate importance", in the context of search warrants being issued and nothing found.

[39] The Interveners do not dispute this characterization of the Applicant as an innocent person but submit that the prejudice claimed fails to rise to a sufficient level to displace the open court principle.

[40] The Interveners agree reputation is important, and here, a good reputation, but that there is no evidence of the Applicant's stellar reputation being at risk of serious prejudice if its identity is disclosed.

[41] The Interveners point to *Canadian Broadcasting Corporation v. Canada*, [2007] O.J. No. 5436, aff'd 2008 ONCA 297 ("*Kelly*"), where there had been an investigation into a series of allegations made against certain officers of the Toronto Police Service. Search warrants and another authorization were issued and executed. One officer, Kelly, out of other officers named in the material filed to obtain the search warrants and the authorization, was charged and pleaded guilty.

[42] The media applicants in *Kelly* sought to have sealing orders varied and the names of the other police officers disclosed because of an "ongoing public interest in any allegations of wrongful conduct that are made against officers of the Toronto Police Service" (para. 8).

[43] The respondents, the Toronto Police Association on behalf of the unnamed police officers, asserted that the allegations in the materials in support of the warrants were made by a police agent and could not be substantiated, and that the officers never had charges laid against them. All of this, the respondents said in defense of continuing the sealing order and opposing a publication ban, caused them to be considered as "innocent persons who have a fundamental privacy right to protect" (para. 9).

[44] Nordheimer J. conducted a section 487.3 and *Dagenais/Mentuck* analysis and balancing, and concluded that though publication of the officer's names may be a "disadvantage" (para. 28) to the individual concerned and an "embarrassment" (para. 31), in the end the public interest outweighed those degrees of prejudice because "the assertion has been made that there may have been a failure at senior levels of one of Canada's largest police services to fully investigate

serious allegations involving some of their own officers. The possibility that there has been such inaction is also unquestionably of significant public interest" (para. 32). As a result, the Court ordered that the names could be disclosed.

[45] The Interveners submit that *Kelly* is an analogous case to this application. I respectfully disagree. Its principal distinguishing factor to the present case, in my view, is that the conduct of unnamed police officers in *Kelly* was at the core of the issue to be further investigated by the granting of the search warrants. The conduct of those unnamed officers and the findings of the Special Task Force referred to at para. 26 of *Kelly* were front and center to the assertion of a possible failure involving the Toronto Police Service in investigating its own. This raised the bar higher for the proposed sealing order or publication ban to be able to outweigh the "significant public interest" factor. Disadvantage to reputation and embarrassment were not enough to displace that public interest and the presumption of openness.

[46] In the present case, by way of contrast to *Kelly*, the Applicant's alleged conduct is described as being relatively brief compared to the alleged 16-year period of price-fixing. It is an allegation unable to be tested by the Applicant, who has no standing to be able to challenge the validity of the Search Warrants. The Investigation is in its early stages and is ongoing, without any charges having been laid at the present time.

[47] While there is clearly great public interest in the allegations of price-fixing of the everyday commodity of fresh bread in Canada, as there was in *Kelly* regarding the conduct of unnamed police officers, the issue of the Applicant's alleged role in the price-fixing is not comparable to the centrality of the issue of the conduct of the unnamed officers in *Kelly* that led to the *Dagenais/Mentuck* balancing remaining in favour of the public interest and public access.

[48] This consideration of the distinguishing factors between *Kelly* and the present case engages the balancing process continued below.

(2) The Prejudice Claimed and the First Part of the Dagenais/Mentuck Test

[49] The Applicant claims serious and permanent adverse risks to its reputation and the continuance of its many personal, professional and charitable endeavours if its identity is released. The Applicant's counsel adds to these risks the concern that pre-trial publicity arising

out of the untested allegations in the 8 Paragraphs would prejudice the Applicant's fair trial rights in the event it is charged.

[50] The Interveners say that: this is all mere speculation by the Applicant; the Applicant is quite capable of defending itself if its identity is known; the public will evaluate the allegations against the Applicant with a fair mind; and it is too speculative at this early stage to fear a degradation of the Applicant's fair trial rights.

[51] The Interveners point to *The Globe and Mail Inc. v. R.*, 2017 ONSC 2407, regarding Vice-Admiral Mark Norman, who asserted that his fair trial rights would be prejudiced by the release of certain sealed information that had led to search warrants being issued. Vice-Admiral Norman's name and circumstances had received extensive media coverage and public interest at the time of the media's application to lift sealing orders. Phillips J. concluded that the high public interest in the case outweighed any risk that an impartial jury could not be empanelled, and ordered the information disclosed.

[52] The Applicant's circumstances and resulting risk of prejudice are, however, markedly different from those of Vice-Admiral Norman. As stated above, the Applicant's alleged conduct is described as being relatively brief compared to the alleged 16-year period of price-fixing. The allegation is unable to be tested by the Applicant, who has no standing to challenge the validity of the Search Warrants. The Investigation is in its early stages and no charges have been laid at the present time. The Investigation could take years to conclude. The Applicant's name has not been released to the public.

[53] As stated in *Mentuck* at para. 34 and as quoted above, the serious risk must be "real, substantial and well grounded in the evidence" and it must be more than trying to obtain a benefit or advantage to the administration of justice. I add to this, in the circumstances of the present case where the public interest component weighs heavily, that it must be more than a risk of mere disadvantage, more than a risk of embarrassment, and more than a desire to be free of publicity. Additionally, it is the "risk" of prejudice that needs to be proved rather than the occurrence of the actual prejudice because, as the Applicant's counsel has submitted, no one has a crystal ball.

[54] In *R. v. Eurocopter Canada Ltd.* (2003), 67 O.R. (3d) 763 (S.C.), at para. 53, Then J. references the first part of the *Dagenais/Mentuck* test and states, "I do not doubt that the unjust stigmatization of reputation and invasion of privacy of an innocent person constitutes a serious risk to the administration of justice."

[55] I agree with this statement, although I recognize that the characterization of the stigmatization as "unjust" by Then J. is not a characterization I would reach in respect of the allegations against the Applicant in the 8 Paragraphs. To do so would be a premature conclusion on the evidence on this application. Suffice it to say, paraphrasing *Eurocopter*, I agree the stigmatization of reputation and invasion of privacy of an innocent person constitutes a serious risk to the proper administration of justice, as referred to in the first part of the *Dagenais/Mentuck* test.

[56] I conclude the Applicant has established that:

(1) disclosure of the Applicant's identity, in all of the Applicant's past and present circumstances including the present status of the Investigation, would prejudice the interests of the Applicant as an innocent person;

(2) the risk is irreversible personal reputational, economic, and professional prejudice;

(3) the risk of this prejudice is real, substantial, and well grounded in the evidence and amounts to more than speculation, mere disadvantage, embarrassment or a wish to be free of publicity; and

(4) as such, this risk of prejudice to this innocent person constitutes a serious risk to the proper administration of justice according to the first part of the *Dagenais/Mentuck* test, and also to the ends of justice being subverted by disclosure of the Applicant's identity according to this factor in s. 487.3(1)(a) of the *Criminal Code*.

[57] I do not conclude that there is a serious and real risk of prejudice to the Applicant's fair trial rights at this point in time, primarily given the very early stages of the Investigation and the fair trial protections that exist in Canadian law (I agree with the Interveners in this respect).

[58] With respect to the Applicant's submissions regarding the untested nature of the allegations against the Applicant in the 8 Paragraphs and the possible frailties of this evidence, I agree with counsel for Sobeys and the Immunity Applicants and thank them for their caution, that these submissions from the Applicant could well impact on a judicial consideration at a later date regarding the validity of the Search Warrants, so that any comment by this Court at this time could be premature and amount to pre-judging the issue. While I recognize the untested nature of this evidence in the 8 Paragraphs as a circumstance to be considered on this application, I make no further comment on that evidence.

[59] This brings the analysis to a balancing of interests.

(3) The Balancing: Section 487.3 and the Second Part of the Dagenais/Mentuck Test

[60] The requisite balancing occurs by including the overlap between s. 487.3(1)(b) considerations and both parts of the *Dagenais/Mentuck* test.

[61] The balancing on this application, beginning with the presumption against any form of secrecy in Canadian court proceedings, can be generally characterized as involving the competing claims of the requested restriction of a non-publication order and the open court principle. More specifically, it involves the competing claims of a serious and real risk of prejudice to the innocent person-Applicant if its identity is disclosed, and the importance of public access to information about the Applicant's identity in the 8 Paragraphs.

[62] The balancing must start, therefore, with presumptively greater weight given to the *Charter* guarantees of freedom of expression, freedom of the press and freedom of communication, and public access to the Investigation that is clearly of public interest.

[63] The non-publication order sought by the Applicant, as for any non-publication order, clearly impinges on these *Charter* guarantees and the open court principle. The issues are by how much in all of the circumstances, and whether the salutary effects outweigh the deleterious effects. If the Applicant had requested the entirety of the 8 Paragraphs to be subject to a non-publication order, I would agree with the Interveners that public access to allow the public to understand the alleged "genesis" of the illegal conduct was being unduly restricted. I agree the

public has a great interest in and a right to know and understand the basis for the Investigation and the resulting Search Warrants.

[64] However, the balancing also involves, according to the first part of the *Dagenais/Mentuck* test, a consideration of "reasonably alternative measures" that would prevent the risk of prejudice to the Applicant and then, according to the second part of that test, a weighing of the salutary and deleterious effects of the reasonably alternative measures and, if the non-publication order is granted as a reasonably alternative measure, a conclusion that its salutary effects outweigh the deleterious.

[65] The Applicant has been careful to build in "reasonably alternative measures" in its application by tailoring its request to one of a narrow non-publication order.

[66] A reading of the contents of the 8 Paragraphs in Exhibit 1 subject to most of the Applicant's proposed edits and redactions, when contrasted with a reading of a full unredacted version of the 8 Paragraphs, leads me to conclude that the Applicant's tailored request constitutes, for the most part, a minimal impairment of the open court principle.

[67] There are three exceptions to this conclusion. The first is with respect to the heading, "*Genesis of the Alleged Conspiracy, Agreement or Arrangement – Direct Communications*" for the 8 Paragraphs. This heading has not been subject to a sealing order or publication ban and has been reported in the media. The Applicant refers to the heading as unjustly salacious and conclusory, given the untested nature of the allegations against the Applicant. This heading, however, is but one of many headings in the approximately 60 pages of the ITOs, all presumably intended to assist and guide the reader and the authorizing judge in understanding the grounds for the requested Search Warrants. It is not proof of anything. It does serve to place the 8 Paragraphs in context. It does not directly or indirectly identify the Applicant. As such, the deleterious effects of its redaction from public view outweigh any salutary effects. I conclude that the requested non-publication order should not include this heading, so that it can continue to serve as a guide to the public.

[68] The second exception is with respect to the last two lines in paragraph 4.27 of Exhibit 1, marked with solid red edits, at the top of page 20 for three of the ITOs. I do not understand that

this information serves to identify the Applicant, however, it does add to the informational basis for the Search Warrants. As such, the deleterious effects of its redaction from public view outweigh any salutary effects. It is to remain in the form, and be able to be made public, as follows: "*clearly when he left the meeting, Person X had a feeling and a sense that I was anxious and willing on behalf of Weston Bakeries to comply with an increase.*"

[69] The third exception is with respect to parts of the first two lines in paragraph 4.32 of Exhibit 1, marked with solid red edits. For most of this information, I do not understand that it serves to identify the Applicant but again, it does add to the informational basis for the Search Warrants. As such, the deleterious effects of its redaction from public view outweigh any salutary effects. It is to remain in the form, and be able to be made public, as follows: "*** *stated that * must have had a follow-up discussion with Person X after * interaction with Person X *** because * does not recall...*"

[70] To summarize, I conclude that the granting of the requested non-publication order for the 8 Paragraphs, subject to the three exceptions, will still allow the public to understand the alleged genesis of the illegal conduct described in the publicly released ITOs and the underpinning for the Search Warrants that were issued.

[71] I do not conclude, in all of the circumstances of the Investigation as reviewed before and particularly given all the other information available to the public under the ITOs, that it is a matter of great public importance or interest for the public to know the name of Person X implicated by evidence from the Immunity Applicants' witness "A" as allegedly being involved in the genesis of the alleged illegal conduct.

[72] I accept that an appropriate balance has been struck by the requested non-publication order, subject to the three exceptions, between protecting the important public interest in and access to the information leading to the issuance of the Search Warrants, and the serious risk of prejudice to the innocent person-Applicant if the Applicant's identity were revealed at this time.

[73] I conclude, therefore, that the salutary effects of the proposed non-publication order, with the three exceptions, outweigh its deleterious effects on the open court principle.

7. Orders Made

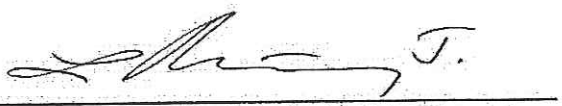
[74] It is for these reasons that the application is granted in large part. The following Orders are made:

1. An Order prohibiting the publication of information that could directly or indirectly reveal the Applicant's identity, including from the 8 Paragraphs in the ITOs and from all materials filed on this application;

2. An Order prohibiting the publication of the information in the 8 Paragraphs under all of the black, red and green edits in Exhibit 1, namely, in paragraphs 4.24 to 4.30 and 4.32 for three of the ITOs and for the ITO dated October 30, 2017, corresponding edits for its paragraphs 4.15 to 4.21 and 4.23, EXCEPT for the heading before the 8 Paragraphs in respect of all of the ITOs; and EXCEPT for the part of paragraph 4.27 in the three ITOs and its corresponding paragraph in the single ITO as indicated in paragraph 68 above; and EXCEPT for the part of paragraph 4.32 in the three ITOs and its corresponding paragraph in the single ITO as indicated in paragraph 69 above. For clarity, all the edits in Exhibit 1 that the Applicant has requested be replaced by a reference to "Person X" are granted, so that the words under the Applicant's indication of "Person X" in Exhibit 1 are included in this non-publication Order. The 8 Paragraphs in their edited form pursuant to the terms of this Order are referred to as the "Further Redacted 8 Paragraphs";

3. An Order allowing the publication of the Further Redacted 8 Paragraphs, subject to the above Orders.

[75] If there are further details to be settled, I can be contacted.



The Honourable Madam Justice Lynn Ratushny

Released: May 30, 2018

CITATION: Commissioner of Competition v. X, 2018 ONSC 3374
COURT FILE NO.: 17-13302
DATE: 2018/05/30

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

COMMISSIONER OF COMPETITION

Respondent

– and –

X

Applicant

– and –

THE GLOBE AND MAIL INC., CANADIAN BROADCASTING CORPORATION, POSTMEDIA NETWORK INC., AND CTV NEWS, A DIVISION OF BELL MEDIA INC.

Interveners

DECISION ON APPLICATION BY PERSON X

RATUSHNY J.

Released: May 30, 2018