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R. v. Moosemay

Between
Her Majesty the Queen, and
Beatrice Moosemay, Terrance Marr, Errol Maurice Bear
a.k.a. Errol Maurice Moosemay and Gloria Chartrand

[2001] A.J. No. 1164

2001 ABPC 156

[2002] 2 W.W.R. 581

97 Alta. L.R. (3d) 387

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53 W.C.B. (2d) 363

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Alberta Provincial Court
Criminal Division
Calgary, Alberta

Fradsham Prov. Ct. J.

Judgment: filed August 29, 2001.

(41 paras.)

Counsel:

D.C. Elliott, for the Crown.

J.M. Lutz, for the accused.

REASONS FOR RULING ON AN APPLICATION OF WITNESS
TO TESTIFY UNDER A PSEUDONYM

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FRADSHAM PROV. CT. J.:--

INTRODUCTION

1 During the course of this trial, the Crown called a witness who wished to testify under a pseudonym. I permitted him to do so, and, given that such applications are not common, promised to file written reasons for my decision. These are those reasons both in respect of the court's jurisdiction to grant such a request, and whether the request should be honoured.

FACTS

2 "A-9" is an individual who was engaged by the Natural Resources Services agency of the Government of Alberta to gather information about certain suspected violations of the Wildlife Act (Alberta). For reasons which I will outline later, he wished to testify under a pseudonym.

LAW AND ANALYSIS

(A) Jurisdiction Of The Court To Permit Testimony To Be Given Under a Pseudonym

3 The Criminal Code¹ contains provisions setting out special arrangements under which witnesses may testify (e.g.: section 486), but does not directly deal with testimony under a pseudonym. Further, the Criminal Code contains provisions regarding the imposition of a ban on publication [e.g.: section 486(4.1)], but that is somewhat different from testifying under a pseudonym. Under a ban on publication, some or all of what happens in the courtroom is not permitted to be disclosed outside the courtroom. However, if a witness testifies under a pseudonym, all that occurs inside the courtroom may be published, but the witness does not disclose his or her name orally so it cannot be reported because it is not known by those who hear the evidence. Issues relating to exhibits will be discussed later.

4 Though there is no statutory authority, I am satisfied that the common law clothes a trial court with authority to permit a witness, in the appropriate circumstances, to testify under a pseudonym. The question then becomes whether it will withstand Charter scrutiny.

5 In Great Britain, witnesses are often permitted to testify under a pseudonym in blackmail cases. In *R. v. Socialist Worker Printers and Publishers Ltd.* [1975] 1 All ER 142 (Q.B.), Lord Chief Justice Widgery said, at p. 144:

"...for more years than any of us can remember it has been a commonplace in

blackmail charges for the complainant to be allowed to give his evidence without disclosing his name. That is not out of any feelings of tenderness towards the victim of the blackmail, a man or woman very often who deserves no such consideration at all. The reason why the courts in the past have so often used this device in this type of blackmail case where the complainant has something to hide, is because there is a keen public interest in getting blackmailers convicted and sentenced, and experience shows that grave difficulty may be suffered in getting complainants to come forward unless they are given this kind of protection. Hence, no doubt, the ready acceptance on the part of counsel for the defence of the suggestion that the two blackmail victims should not have their names disclosed but should be known as Mr. Y and Mr. Z."

6 The practice is not restricted to blackmail cases, though its use in other instances is more rare. The British position is summarized in Archbold - Pleading, Evidence and Practice in Criminal Cases, 42nd edition, (1985, London, Sweet & Maxwell; edited by Stephen Mitchell, P.J. Richardson, and John Huxley Buzzard), at pp. 392-393:

"It is submitted however, that although the established practice of full disclosure in open court should generally be followed, a trial judge in the exercise of his inherent jurisdiction to control the proceedings being conducted before him, may properly permit a departure from the practice in appropriate cases the most usual and obvious examples of which are certain types of blackmail. Blackmail apart, departures from the usual practice have been and will be extremely rare, and in considering whether or not to permit such a departure the judge should bear in mind, inter alia, that publication of a witness's name and/or address up and down the country or even locally, may result in further witnesses coming forward, the existence of whom may not otherwise have been known. In *R. v. Socialist Worker*, ante, reference was made by Lord Widgery without disapproval to the departure permitted by the trial judge in *R. v. Jones, Dee and Gilbert*, Central Criminal Court, December 1973 (unreported). In that case, it was alleged inter alia, that certain of the defendants were parties to contraventions of section 31 of the Sexual Offences Act 1956 (woman exercising control over prostitute) and that following the commencement of police inquiries it was alleged that all the defendants were involved in attempts to pervert the course of public justice by endeavouring to persuade certain former prostitutes not to tell the truth about their relationships with the principal defendant. The judge permitted each of the six girls called for the Crown to be referred to through the trial by a letter of the alphabet. Certain of the relevant considerations were (i) none of the girls had been engaged in prostitution prior to their association with Jones, (ii) all but one or two had not engaged in prostitution since terminating their relationship with Jones, and several had since either married or become engaged. In short, the rationale of this particular departure from the usual practice was that unless the

anonymity of these former prostitutes was preserved grave difficulty may be suffered in obtaining the necessary evidence in any future case of that nature.

In *Shaw v. D.P.P.* (1962) 45 Cr.App.R. 113, the anonymity of the prostitutes called for the Crown on counts of conspiring to corrupt morals, publishing obscene articles, and living on immoral earnings was preserved by referring to them as 'Miss X', etc. This drew no adverse comment from the Court of Criminal Appeal or the House of Lords.

Where a witness is permitted to give evidence without stating his name and address in public the usual practice is for him to write down the details on a piece of paper. The document is sometimes exhibited."

7 In Canada, witnesses have been allowed to testify under a pseudonym in a wider variety of cases. In *Re Canadian Newspaper Co. Ltd. and Isaac et al.* (1988) 63 O.R. (2d) 698 (Div. Ct.), a witness was permitted to testify at an inquest under the name of "Mr. X". The witness did not want to disclose his identity because he did not want anyone (including his family) to know that he was "a street alcoholic and bitters drinker". After the witness testified using the noted pseudonym, the *Globe and Mail* newspaper objected to the procedure which had been used, and sought an order directing disclosure of the name of the witness on the grounds that a failure to do so violated the freedom of the press set out in section 2 of the Canadian Charter of Rights and Freedoms ("the Charter"). In reviewing the matter, Campbell, J. said (at p. 701):

"The procedure followed was unusual. It went contrary to the strong presumption that the public's knowledge of public proceedings should not be restricted by any device except when required by the ends of justice in the clearest cases. It should therefore be subjected to strict scrutiny."

8 Later at pp. 708-9, Campbell, J. said:

"We do not wish to encourage the practice of permitting witnesses to testify without giving their names. It represents a departure from the strong presumption that witnesses should ordinarily be identified.

Although the identity of a witness is a piece of evidence it is a very special piece of evidence which enables the public to know the true source of the averments made from the witness stand.

Trial courts on rare occasions will permit a witness to testify under a sobriquet, in

cases such as blackmail, and will use the technique or a non-publication order to protect the identity of a sexual complainant.

It is however important to realize that this jurisdiction is subject to the strictest of limitations. Zuber J.A. pointed out in *Re R. and Unnamed Person* (1985), 22 C.C.C. (3d) 284 at p. 288, 20 C.R.R. 188, that there is no power in a court to create a discretionary power of privacy to be extended to those caught up in the criminal process."²

9 Campbell, J. then found that the coroner had the power to make the order permitting testimony under a pseudonym, and upheld the order. However, the other two members of the bench (Hughes and Austin, JJ.), while agreeing with Campbell, J.'s result, did not agree that the coroner's order was within his powers, though they did not specifically disagree with the above quoted statements of Campbell, J.

10 In the end result, the case provides support for the proposition that one should only permit a witness to testify under a pseudonym after careful consideration because it runs contrary to the general rule that witnesses should be identified, and witnesses do not enjoy a right of privacy simpliciter.

11 To conclude on this issue, I am satisfied that a trial judge has authority under the common law to permit a witness to testify under a pseudonym. That authority is not limited to any particular type of case, but the discretion must be exercised judiciously, and sparingly. It should not be exercised simply to prevent embarrassment to the witness.

(B) Reasons For Granting The Application In This Case

12 In the case at Bar, the witness, though not his true identity, was well known to the accused persons. The witness wished to testify without disclosing his real name. Prior to being sworn, he stated that his reasons were that he feared one of the accused. He said his fear was based on alleged conversations between he and one of the accused in which that accused person purportedly indicated that he would visit violence on any who "crossed" (i.e., betrayed) him.

13 On the basis of those statements, I granted the order. I am satisfied that fear for the safety of a witness provides an adequate basis for the order. I rely on the Alberta Court of Appeal's decision in *R. v. Gingras* (1992), 71 C.C.C. (3d) 53, in which a witness, who was a prison inmate, testified under a pseudonym because he feared for his safety. He was not afraid of the accused, who knew his true identity, but was afraid of others in the prison system. At pp. 60-61, the Court said:

"Counsel for the accused suggests that it is in the interests of every accused that every Crown witness testify in his proper name, so that persons who are not present in court but read the newspapers will know who the witness is and come

forward voluntarily if they spot any inaccuracies in the evidence of the witness. That may be one of the background reasons for promoting openness of trials and not routinely having witnesses testify anonymously. But we cannot say that it is a strong enough consideration to bar the use of pseudonym where a witness has a legitimate reason for fearing death or injury if he testifies in his real name."

14 In my view, before a Court may permit a witness to testify under a pseudonym because of that witness's fear for his or her safety, it is necessary for the Court to be satisfied that the witness's fear has a legitimate basis. In other words, the Court must be satisfied, on a balance of probabilities, that there are reasonable grounds for the fear. It is not necessary for the court to conclusively find as facts those things which give rise to the witness's fear. The Court need only conclude that the witness's expressed fear is objectively reasonable on the "facts" as understood by the witness. A broad analogy may be drawn with the requirement that a peace officer have reasonable and probable grounds to effect an arrest without warrant [section 450(1)(a)].³ In the case at Bar, I am satisfied that the witness has a legitimate reason for his fear.⁴

(C) Procedure

15 Having decided that I would allow the witness to testify under a pseudonym, I had the witness sworn under the name "A-9" (his undercover identity). He then adopted as true the unsworn representations he had made in support of the "pseudonym application". I then followed the English practice of having the witness write his real name on a piece of paper which I had marked as an exhibit. That was shown to defence counsel on the undertaking that they would not disclose it to the accused, nor to anyone else who would disclose it to the accused. The exhibit was then sealed. A representative of one of the two daily Calgary newspapers was present in court, and was aware of what was done. Indeed, that representative indicated that her organization took no position on the witness testifying under a pseudonym and the exhibit being sealed, and that position was later confirmed to the Court by counsel acting for the newspaper.⁵

(D) Charter Considerations

16 Is section 2(b) of the Charter offended when a witness is permitted to testify under a pseudonym, or when the exhibit disclosing his or her name is sealed?

(i) Use of pseudonym

17 In *Witnesses* by Alan Mewett, Q.C. and Peter Sankoff (2000, Carswell, Scarborough), the learned authors state, at p. 20-15:

"To what extent the formerly generally accepted practice of permitting witnesses to testify under a pseudonym in certain cases is still permissible is open to question in view of the Charter. Since there are now specific statutory provisions in respect of many sexual offences, which will be considered shortly, this is

likely to arise only in cases, for example, of blackmail where the victim's testimony may be necessarily embarrassing or perhaps in cases such as a charge of keeping a common bawdy-house where the testimony of persons present may be required. It is clear that reasons of such embarrassment would not be sufficient to justify holding the trial in camera, but whether the inherent jurisdiction of the court could now be invoked to permit such a witness to testify anonymously depends upon balancing a regard for the interest in the due administration of justice with the guaranteed freedom of the press, and whatever that entails, and other guaranteed freedoms."

18 With respect, I am of a somewhat different view. In my opinion, permitting a witness to testify under a pseudonym does not infringe section 2(b) of the Charter, and therefore no balancing is required. Section 2(b) allows the media to report what occurs in Canadian courtrooms. The media act as the "eyes and ears" of those who cannot be present in the courtroom: *Edmonton Journal v. Attorney-General for Alberta et al.* (1989) 64 D.L.R. (4th) 577 (S.C.C.) at p. 610, per Cory, J. Section 2(b) of the Charter does not grant the media standing to try to influence what happens in the courtroom. It permits the media to make representations concerning a proposed ban on publication of what happens in the courtroom (the proceedings), but that is different from having standing to influence how those proceedings are conducted. In the case at Bar, the press is able to report on what the witness says, but is not able to report as to his identity because it is never uttered out loud. A member of the public sitting in the courtroom will know no more than a person reading a verbatim transcript of the proceedings. Consequently, the press's ability to act as the "eyes and ears" of the public is not in any way hampered.

(ii) Sealing the exhibit⁶

19 Generally, the public (which includes the press) has access to court files. However, that ability to access files is not absolute.⁷ In *Solomon v. McLaughlin* (1982), 20 Alta. L.R. (2d) 63 (Q.B.), certain members of the press sought access to court files relating to a Thaddeus Drabick who was then holding two sheriff's bailiffs hostage. Bracco, J. (as he then was), reviewed the law concerning the ability of the public (and the press as members of that public) to access court files. At p. 76, His Lordship summarized the law as follows:

"A. There is no statutory provision compelling a clerk of the court or his deputy to permit public access, including all media, to court files; however, the common law, as recently enlarged by the Supreme Court of Canada in the *MacIntyre* case, 40 N.R. 181, allows public and media access to court files with some exceptions.

- B. There are only three statutory exceptions, to open access of files, namely, (i) files impounded by order of the court; (ii) solicitor-client contingency fee agreements; and (iii) transcripts of examinations for discovery.

At common law the exceptions to public accessibility are based on 'the need to protect social values of superordinate importance', one of which is the protection of the innocent. A further category of exceptions to open access is founded in the administration of justice, i.e., where the administration of justice would be rendered impracticable by the presence of the public."

20 Only the first of the three statutory exceptions referred to by Bracco, J. (i.e., the impounding of documents by the court) is relevant to this discussion. In Alberta civil courts, the power is set out in Rule 199 of the Rules of Court: "A record produced to a Court may be ordered to be impounded, and after impoundment it may not be inspected, except by leave of the Court."

21 That control even extends to documents which have been produced in court, but not yet made exhibits: *Beck v. Value Capital Ltd.* [1974] 3 All E.R. 437 (Ch. D).

22 The equivalent law in England has been summarized in Halsbury's Laws of England (4th ed.) in volume 37, paragraph 525:

"Documents which have been put in evidence on the trial of an action are in the custody of the court and may be impounded by order of the court. While in the custody of the court, impounded documents must not be delivered out of its custody except in compliance with an order made by a judge; and they may not be inspected except on an order signed by a judge, preferably the judge on whose order they were impounded."⁸

23 When the court impounds a document, the same result is achieved as when an exhibit is sealed, and certain section 2(b) Charter issues may be common to both. However, the acts of impounding and sealing are two distinct acts. The power to impound a document is set out in the Rules of Court, while the power to seal an exhibit comes from the common law. The power to impound a document is more broad than the power to seal in that the power to impound can apply to documents in the custody of the court, though not yet made exhibits (*Beck v. Value Capital Ltd.*, *supra*).

24 The "further category of exceptions to open access" noted by Bracco, J. is created by the common law. In *MacIntyre v. Attorney General of Nova Scotia et al.* (1982) 40 N.R. 181 (S.C.C.), the Court considered the ability of the public to access search warrants and the Informations used to obtain them. Though Dickson J. (as he then was), who gave the majority decision, specifically noted that the matter before the Court related to search warrants and Informations, the comments of His Lordship do provide assistance when considering the question of public access to court exhibits, or, when framed in the converse, the question of the court sealing an exhibit.⁹

25 Dickson, J. in *MacIntyre v. Attorney General of Nova Scotia et al.*, *supra*, said, at p. 191:

"In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent."

26 He then succinctly set forth the common law power of a court to restrict access to its documents (which is what sealing an exhibit achieves), with the reminder that there must be good cause to depart from the general rule of open access. At p. 193, he said this:

"Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right."

27 In *Vickery v. Prothonotary*, Supreme Court (N.S.), (1991) 124 N.R. 95 (S.C.C.), Stevenson, J., speaking for the majority, addressed the need for an open trial process which is sensitive to the circumstances in which exhibits are brought into that process. At pp. 107-108, His Lordship said:

"I do not, for one moment, gainsay the importance of the principle that justice must be administered openly, but I am inclined to agree with the observation of Powell, J., of the United States Supreme Court, quoted by Macdonald, J.A., in the judgment appealed from, that '[t]he requirement of a public trial is satisfied by the opportunity of members of the public and press to attend the trial and to report what they have observed.' (*Nixon v. Warner Communications* (1978), 435 U.S. 589, at p. 610)

In the course of that judgment, Powell, J., noted that the court having custody of records and other material has a responsibility to exercise an informed discretion 'with a sensitive appreciation of the circumstances that led to their production' (p. 603)."

28 In the case at Bar, the circumstances that led to the production of the sealed exhibit are of particular importance. The decision to allow the witness to testify under a pseudonym had already been made, and it will be recalled that no non-party member of the public, including the news media, has any standing to address that issue. I then chose to follow the English practice of having the witness write his name on a piece of paper which is then entered as an exhibit, and immediately sealed.¹⁰ The creation and sealing of the exhibit, and the leave granted to the witness to testify under a pseudonym, are inextricably linked. A successful attack on the sealing order would effectively also set aside the permission to testify under a pseudonym.

29 It is therefore imperative to remember why the witness was allowed to testify under a pseudonym: the personal safety of the witness. In *R. v. Paterson* (1998) 122 C.C.C. (3d) 254

(B.C.C.A.), the Court, at p. 281, discussed the sometimes competing goals of a public trial and witness protection:

"In our view, the protection of vulnerable witnesses is analogous to the concern the court has for the protection of complainants in sexual assault cases. In some cases, witnesses as non-participants may have as much to lose as complainants. Here the balance must be struck between the rights of the accused to a perfectly public trial and the rights of vulnerable witnesses to the minimal protection of not having their names published in circumstances where the trial was otherwise open to the public including the media and where there was no impediment imposed on the right of the media to publish the evidence the witnesses gave at the trial or to inform the public that such a ban was ordered and what the reasons given by the trial judge for that ban were."

30 Similar comments were made in *R. v. McArthur* (1984) 10 C.R.R. 220 (Ont. H.C.J.). In that case, the Crown sought an order prohibiting publication of the names of witnesses who were inmates in the prison system. Those witnesses were to be called to give evidence about conversations they had with the accused in which he had allegedly inculpated himself in a murder. The concern was that an inmate who testified against another inmate ran the real risk of suffering reprisals for his or her cooperation with the police. Though the facts that led to the concern for witness safety in that case differ from the facts in the case at Bar, the comments of Dupont, J. at pp. 223-225 help express the motivation behind orders protecting witness identity:

"A basic foundation rule in our administration of justice requires that our courts conduct trial proceedings in public. The principle finds its origin in the common law but is confirmed in s. 442(1) of the Code that I have just referred to. It has repeatedly been recognized that the ability of the public to keep abreast, remain acquainted with and to scrutinize judicial proceedings provides undoubtedly one of the main safeguards of the integrity of our system. It is the surest security to fair and just administration of justice. This 'open door policy' as it has been referred to, must admit a few exceptions if public respect and confidence is to be maintained. The very strength of our system is based primarily on the law per se but also the power of the law brought about by the trusted confidence of the general public of such system. Any deviation from full disclosure of such proceedings must be restricted to the most meritorious and/or extraordinary compelling circumstances.

The court is not here dealing with an application for the exclusion of the press and/or the public from the court-room (sic). This trial is to proceed in a usual public manner with one exception being that requested in the application, and which is restricted to the issue of whether the identity of certain of the witnesses

to be called should be kept from the public knowledge for the reasons outlined earlier. This case must be distinguished from those where the court is asked to restrain publication of names where not to do so would create embarrassment, humiliation or even financial loss. Under most of such circumstances, the rights of complete public disclosure is paramount.

The witnesses here are concerned, not with their reputation, finances or integrity but with their physical safety and vulnerability to violence from other inmates. It is not unusual for police in conducting their investigations to inquire and obtain statements from inmates as to conversations allegedly had with an accused while in custody at the same penal institution. Not infrequently such statements provide much-needed evidence to establish the truth of certain alleged facts, some of which may inculpate the accused. Others may assist the accused. If their identity as witnesses was revealed while they were still inmates, they would undoubtedly be deterred from revealing any information that might assist in the administration of justice by virtue of the resulting threat to their physical safety by actions of other inmates.

The administration of justice as a whole will benefit substantially if these witnesses are permitted to testify under conditions that will remove fear from external threats. Failure to provide such protection is to close one's eyes to direct or indirect interference with witnesses. This would encourage threats and prevent inmates from testifying, thus militate adversely to the administration of justice and the public interest. The public interest is better served by assuring within reason and justice that such evidence is available to the courts. If this can be achieved by the court without adversely affecting the evidence as it relates to the accused or the trial, the court ought not to hesitate to provide the necessary protection to such inmate witnesses."

31 In summary, I am satisfied that the common law permits me, as trial judge, to seal an exhibit, and thereby restrict public access to it, if I find there to be sufficient cause such as the protection of innocent persons. Individuals in the circumstances of the witness called before me (i.e., an informant working undercover for law enforcement officials), and who are called to give evidence qualify as such innocent persons. If, as in this case, such an individual has legitimate reason to fear for his or her safety, then the court may act to protect that person by sealing the exhibit which discloses that person's identity.

32 Does the sealing of the exhibit which contains the name of the witness potentially violate section 2(b) of the Charter?

33 MacIntyre v. Attorney General of Nova Scotia et al., supra, pre-dated the Charter by approximately three months. Accordingly, it does not provide assistance in resolving this question. In *Edmonton Journal v. Attorney-General for Alberta et al.*, supra, Cory, J. said:

"It is equally important for the press to be able to report upon and for the citizen to receive information pertaining to court documents" (p. 610).

34 However, Killeen, J., in *National Bank of Canada v. Melnitzer et al.* (1991), 84 D.L.R. (4th) 315 (Ont. Ct. - Gen. Div.), when considering *Edmonton Journal*, supra, said, at p. 324:

"I do not read Cory J.'s judgment as purporting to constitutionalize, through s. 2(b) of the Charter, a right in the press or other media to have access to all documents which have created or even put into the record where such documents have been legitimately sealed by the court under provincial law."

The conclusions of Killeen, J., even though made after the Charter came into effect, were reached without the benefit of the Supreme Court of Canada's decision in *Canadian Broadcasting Corp. v. Dagenais et al.* (1994) 175 N.R. 1.

35 In *Canadian Broadcasting Corp. v. Dagenais et al.*, supra, the Court considered the matter of a discretionary publication ban, and its impact on section 2(b) Charter rights. The Court concluded that the right to freedom of expression was impacted by a publication ban, and that the applicant seeking the ban had to justify the infringement of that Charter right. Lamer, C.J.C., speaking for the majority of the Supreme Court of Canada, said at pp. 59-60:

"In order to provide guidance for future cases, I suggest the following general guidelines for practice with respect to the application of the common law rule for publication bans:

- (a) At the motion for the ban, the judge should give the media standing (if sought) according to the rules of criminal procedure and the established common law principles with regard to standing.
- (b) The judge should, where possible, review the publication at issue.
- (c) The party seeking to justify the limitation of a right (in the case of a publication ban, the party seeking to limit freedom of expression) bears the burden of justifying the limitation. The party claiming under the common law rule that a publication ban is necessary to avoid a real and serious risk to the fairness of the trial is seeking to use the power of the state to achieve this objective. A party who uses the power of the state against others must bear the burden of proving that the use of state power is justified in a free and democratic society. Therefore, the party seeking the ban bears the burden of proving that the proposed ban is necessary, in that it relates to an important objective that cannot be achieved by a

reasonably available and effective alternative measure, that the proposed ban is as limited (in scope, time, content, etc.) as possible, and there is a proportionality between the salutary and deleterious effects of the ban. At the same time, the fact that the party seeking the ban may be attempting to safeguard a constitutional right must be borne in mind when determining whether the proportionality test has been satisfied.

(d) The judge must consider all other options besides the ban and must find that there is no reasonable and effective alternative available.

(e) The judge must consider all possible ways to limit the ban and must limit the ban as much as possible; and

(f) The judge must weigh the importance of the objectives of the particular ban and its probable effects against the importance of the particular expression that will be limited to ensure that the positive and negative effects of the ban are proportionate."

36 In the case at Bar, the paper upon which the witness wrote his name was marked as an exhibit, shown to counsel, and immediately sealed. No member of the public attending the trial knew of its contents. The press was in no worse position than any other member of the public, and was able to report everything that was public in the courtroom. However, that still leaves the matter of the sealed exhibit, and the issue of whether the news media's section 2(d) Charter rights were infringed by the sealing order.

37 The question becomes: should the press, by virtue of section 2(b) of the Charter, be able to object to the sealing of the exhibit?

38 I agree that the sealing of an exhibit so that it may not be viewed by the press or the public is similar in nature to a ban on publication (at least in respect of that exhibit)¹¹. Further, I am mindful that there are judgments, with which I am in respectful agreement, which consider *Canadian Broadcasting Corp. v Dagenais et al.*, supra, and conclude that the logical result of that decision is that notice must be given to the press of an application for a ban on publication¹². It is certainly arguable that similar notice should be given to the press when an application is made to seal an exhibit. For example, in *R. v. K.S.Y.*, [2001] O.J. No. 3207, the Ontario Court of Appeal ordered the sealing of an affidavit, but also ordered that notice be given to the news media so that an application to unseal the affidavit could be made by members of that group. I hasten to add that, in my view, it would be so cumbersome as to be unworkable if a trial had to be adjourned while notice was given to the news media of a pending application to seal an exhibit. The better practice, I think, is the one followed by the Ontario Court of Appeal in *R. v. K.S.Y.*, supra: if a prima facie case is made to seal the exhibit, a temporary order sealing the exhibit should be granted, notice should then be given to the news media of what has occurred, and the news media should then be left to determine if any one of them wishes to bring an application to unseal the exhibit. This permits the

trial to continue while notice is given to the news media, and members of that group decide whether to bring an application in respect of the sealed exhibit. If no application to unseal the exhibit is made, then the court can make the order permanent. In those rare occasions when a party does not wish to proceed until it is known whether the sealing order will be successfully challenged, then an adjournment of the trial may be unavoidable, but that should be the exception, not the rule.

39 I am satisfied that my order sealing the exhibit infringed the section 2(b) Charter rights of the news media. In *R. v. McArthur*, supra, the Court held that any such infringement was justified. While that conclusion initially seems reasonable to me in the case at Bar (particularly in light of the linkage between the sealing order and the order permitting the witness to testify under a pseudonym), I am also satisfied that the news media must be given notice of the order so that they may reach their own conclusion about any possible challenge to the order. That was not done in *R. v. McArthur*, supra, but in fairness, it should be noted that Dupont, J. did not have the benefit of the Supreme Court of Canada's decision in *Canadian Broadcasting Corp. v. Dagenais et al.*, supra.

40 My decision to give notice to the news media may be somewhat academic. The *Calgary Herald* has already indicated that it does not intend to challenge the sealing order. In the circumstances of this case, I should be surprised if other members of the media took a different view. However, they are entitled to notice, and in this case I think that is best achieved through the Case Management Office of this Court. There is a practice in this Court that copies of written decisions are deposited with the Case Management Office so that members of the media can have equal, and timely access to them. It is the responsibility of the various media outlets to regularly check with that office to view the decisions. In accordance with the usual practice, a copy of these Reasons will be deposited with the Case Management Office of the Provincial Court of Alberta, 5th Floor, 323 - 6 Avenue, S.E., Calgary, and that will constitute adequate notice to the members of the media of my decision.

CONCLUSION

41 A trial court has common law jurisdiction to permit a witness to testify under a pseudonym, but applications to do so should only be granted when there are sufficient grounds to justify such a departure from the norm. Amongst those grounds is a witness's reasonable fear for his or her safety. The exercise of that jurisdiction does not engage section 2(b) Charter values. However, if, as part of the order, the witness records his or her name on a piece of paper which is then marked as an exhibit and sealed, there is then an infringement of section 2(b) of the Charter. Notice of that sealing order should be given to the media.

FRADSHAM PROV. CT. J.

cp/i/qlrds/qltl/qlcas

1 The provisions of the Criminal Code apply to provincial offences unless those provisions are inconsistent with the Provincial Offences Procedure Act, S.A. 1988, Chap. P-21.5, as amended: section 3, Provincial Offences Procedure Act, *supra*.

2 In *Re Regina and Unnamed Person* (1985), 22 C.C.C. (3d) 284 (Ont. C.A.), an order had been granted banning publication of the name of an accused. The basis of the application which led to the order was that the accused and her family would suffer embarrassment and detrimental effects with respect to employment if her name were publicized. In setting aside the order, Zuber, J.A. held that the Court did not have jurisdiction to issue an order which would in effect create, and then protect, a discretionary right of privacy to be extended to those caught up in the criminal process. The case did not deal with testifying under a pseudonym.

3 The concept of reasonable and probable grounds under section 450(1) was explained in *R. v. Storrey* (1990) 53 C.C.C. (3d) 316 (S.C.C.) at p. 324:

In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest.

The Supreme Court of Canada reiterated that analysis in *R. v. Latimer* (1997) 112 C.C.C. (3d) 193 at 204, and in *R. v. Stillman* (1997) 113 C.C.C. (3d) 321 at 338.

4 This type of application gives rise to a unique evidentiary problem: how does the Court receive the evidence in support of the application? Two methods are possible: (1) The Court can hear the unsworn representations of the person who wishes to give his or her evidence under a pseudonym with the witness confirming those representations under oath if the application is granted. If that confirmation is not forthcoming, then the order granting the application can be rescinded. (2) The witness can be sworn under a pseudonym in a *voir dire* held for the purpose of determining whether he or she may be sworn under a pseudonym in the trial proper. Though I chose the first method in this case, upon reflection, the second method might be preferable because it allows the Court to base its decision on sworn

evidence which is ostensibly more reliable.

5 As I will explain later in these Reasons, I am of the view that while the news media may have standing to challenge a sealing order, neither they nor any other member of the public not a party to the proceedings have standing with respect to the issue of whether a witness testifies under a pseudonym.

6 Exhibits, while part of the court record, are different from other parts of the record. In *Vickery v. Prothonotary*, Supreme Court (N.S.) (1991) 124 N.R. 95 (S.C.C.), Stevenson, J., speaking on behalf of the majority, said, at p. 105: An exhibit is not a court record of the same order as records produced by the court, or pleadings and affidavits prepared and filed to comply with court requirements. Exhibits are frequently the property of non-parties and there is, ordinarily, a proprietary interest in them. When they have served the purpose for their filing they are ordinarily at the disposition of the person who produced them. While they remain in its custody, the court has a duty to pass upon any request for access. The exhibit in the case at Bar is somewhat unique in that it is not the property of the parties, or of non-parties, but was created in the courtroom at the direction of the Court.

7 In *Calgary Sun et al. v. Joudrie et al.* (1996) 186 A.R. 313 (Q.B.), Lutz, J. noted, at p. 317, that ...the open court principle is not absolute. Regard must be had to interests including any propriety interests in the exhibits, the integrity of the exhibits, the right of the accused (and the Crown) to a fair trial, and respect for the privacy interests of the various parties.

8 The English rule (The Supreme Court Practice, Order 35, r. 13) which is similar to the Alberta Rule 199, reads as follows:

(1) Documents impounded by order of the Court shall not be delivered out of the custody of the Court except in compliance with an order made by a Judge on an application made by motion:

Provided that where a Law Officer or the Director of Public Prosecution makes a written request in that behalf, documents so impounded shall be delivered into his custody.

(2) Documents impounded by order of the Court, while in the custody of the Court, shall not be inspected except by a person authorised to do so by an order signed by a Judge.

9 The act of sealing an exhibit is the act of limiting or preventing public access to that portion of the court record.

10 Through this practice, the witness realizes that he or she is not testifying as a completely anonymous entity, and that assists in underscoring for the witness the gravity of testifying.

11 The situation before me differs significantly from that which was before Lutz, J. in *Calgary Sun et al. v. Joudrie et al.* (1996), 186 A.R. 313 (Q.B.). In that case, the press had access to the exhibits, but sought permission to reproduce them. Lutz, J. said that in those circumstances ...I do not accept the applicants' proposition that the effect of a denial of the applications in this instance would be tantamount to ordering a partial publication ban with respect to the trial Exhibits. The media has had and will continue to have every opportunity to report on the proceedings and the content of the Exhibits as entered into evidence at trial. In the case before me, the public has not had access to the exhibit because it was sealed immediately after being entered into evidence.

12 The issue remains a controversial one, and might be conclusively decided by the Supreme Court of Canada. In *Sun Media (Toronto) Corporation v. United States of America and D.J.M.* (Supreme Court of Canada Court File No. 28688, [2001] S.C.C.A. No. 352, application filed July 12, 2001) the applicant is seeking leave to appeal on several issues, including whether 'there is an obligation on a judge to ensure that the media is provided notice if an application for a discretionary publication ban, and/or any other order affecting the rights of the media, is brought before the court.

---- End of Request ----

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