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"Amended Amended Redacted Document" Ordered Released to the Press and Public Fifteen Days after Judgment

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Cases Considered:
Globe & Mail v Alberta, 2011 ABQB 363 ("*Globe and Mail*")

When the police want to obtain a search warrant, they file a document with a justice of the peace or judge called an "Information to Obtain a Search Warrant" or "ITO". In this case, Judge J.D. Bascom had sealed the contents of an ITO filed on a case with respect to an "Unnamed Company". The Globe and Mail applied to the Court of Queen's Bench for access to the ITO (subject to some redactions).

Justice William Tilleman dealt with the application for access to the ITO, and noted that he had to "face the difficult task of balancing the sometimes competing rights to freedom of expression and the press, with the administration of justice, the protection of innocent persons, and the right to a fair trial" (*Globe and Mail* at para 2).

Judge Bascom had sealed the ITO on the following five grounds (Globe and Mail at para 6):

1. Disclosure would compromise the nature and extent of an ongoing investigation;
2. Disclosure would harm the reputations of those who are currently being investigated;
3. Disclosure would harm the interests of innocent share holders of the corporation under investigation as public disclosure of the extent of this investigation would likely result in a loss of investor confidence and would have a negative impact on the share price of the corporation;
4. Disclosure would harm the financial integrity of the corporation under investigation; [and]
5. And that some of the information used in this investigation may be subject to the provisions of Section 38 of the *Canada Evidence Act* and public disclosure may result in an offence contrary to the *Canada Evidence Act.*

The Globe and Mail sought access to the ITO, subject to the following redactions (blacked out portions):

1. Any material over which a s. 38 *Canada Evidence Act* claim is asserted [national security and national defence issues];
2. Any credit card, bank account or other personal financial information;
3. Any information which could identify the Named Person referred to in para. 38 of the Crown's submissions; and
4. Any information which could identify employees of corporations in the Information

> to Obtain who are not subject to an ongoing investigation, unless their identity [sic] is necessary to provide context to the balance of the information (*Globe and Mail* at para 3).

The Unnamed Company argued that the file should remain sealed to prevent risk to the proper administration of justice. They also argued that the release of the information in the ITO to the public would harm the reputations of innocent people and would generate much media coverage, which would make a future trial unfair (*Globe and Mail* at para 4).

The Crown argued that a redacted version of the ITO be released that protected the names of innocent persons, persons in danger, or any information that could identify these persons. The Crown argued that this would balance the need to protect innocent persons, ensure a fair trial, and yet allow the justice system to be as open as possible without restricting free expression (*Globe and Mail* at para 5).

Justice Tilleman looked at the caselaw surrounding restricting public access to information, innocent persons, commercial interests, and the right to a fair trial. Section 487.3 of the *Criminal Code* (RSC 1985, c C-46) lists four possible "serious risks to the proper administration of justice" that would justify the sealing of search warrants. These include that the disclosure of the information would (*Globe and Mail* at para 11):

> (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 further investigations in which similar techniques would be used, or
> (iv) prejudice the interests of an innocent person;…

The first three justifications seem to be aimed at protecting the nature of a police investigation, whereas the fourth one is aimed at protecting the interests of innocent persons. The Crown argued that the sealing of the ITO would protect innocent people and ensure that any future trial would not be "tainted by media scrutiny." The Globe and Mail agreed that individual names should be redacted because they are innocent persons but that the Unnamed Company's identity should be disclosed because much of the information had already been made public in a variety of ways (*Globe and Mail* at para 12).

Justice Tilleman assumed that the Unnamed Company fell within the classification of "person" and that the interest of innocent persons may justify redaction. He held that since persons are to be presumed innocent until proven guilty, they should not be subject to intense media scrutiny that might tarnish their reputation (*Globe and Mail* at para 15). Justice Tilleman concluded that the nature of the allegations in the ITO were such that disclosure of identifying information about these persons would be extremely harmful to their reputations, and, therefore it would not be released (*Globe and Mail* at para 18).

With respect to commercial interests, the Unnamed Company argued that disclosure would harm share value or impact shareholders in a commercial way. Justice Tilleman held that the public interest in disclosure outweighed any claim by the Unnamed Company to secrecy with respect to share value (*Globe and Mail* at para 20).

Noting that the Crown had not yet decided whether the target or associated parties would be charged with an offence, Justice Tilleman held it would be appropriate to the interests of a fair trial to release a redacted version of the ITO. This would also allow the Canadian public to be "prudently informed" of a police investigation of a matter that is "of great relevance to the health of their society" (*Globe and Mail* paras 25 and 27).

Justice Tilleman then ordered the delayed release of an "amended amended redacted" version of the ITO (subject to some of his edits). He noted that he had delayed the release of the redacted ITO and the release of the judgment (dated June 8, 2011) until no sooner than June 23, 2011, because he believed that extending the release until September 2011 as requested by the Unnamed Company would have the paradoxical effect of increasing the sensationalism surrounding a trial, should charges be laid, and could actually delay the trial (*Globe and Mail* at para 32). Thus, he said that he had delayed the release a little but he could have delayed it longer. However, he seems to have delayed the release of the "amended amended redacted" ITO because charges had not been laid against the Unnamed Company, and because he wanted to ensure that there would be a fair trial, should one be held.