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Publication Bans in Police Mr. Big Operations

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Case commented on:
R v NRR, 2013 ABQB 302.

NRR was a youth who was being charged with two counts of second degree murder, one count of possession of stolen property, and one count of break and enter. The Crown offered into evidence statements made by NRR during a Mr. Big undercover operation. This type of operation usually involves undercover members of the police posing as criminals, involving the suspect in what he or she thinks is a criminal gang in order to gain his or her trust and eventually obtain a confession for the actual crimes. The accused (NRR) objected to the admission of the RCMP evidence on the basis that his rights under *Charter* section 7 had been violated. The Crown applied for a publication ban on identifying information about the undercover police officers who participated in the investigation. The Crown argued that the publication ban should be for three years, and NRR and the Edmonton Journal argued that the ban should only be for one year.

Justice Brian Burrows considered the leading case on publication bans, *R v Mentuck*, [2001] 3 SCR 442. The trial judge in *Mentuk* refused to ban publication of the details on how the police conducted the Mr. Big operation, but did order a one-year ban on the publication of information that could identify the officers. The Supreme Court of Canada dismissed a Crown appeal of that order (see *NRR* at para 8). Specifically, the SCC rejected the Crown submission that the ban should be indefinite because "a free and democratic society does not react by creating a force of anonymous and unaccountable police" (*Mentuck,* at para 58, per Iacobucci, J, as cited in *NRR* at para 11).

Justice Burrows noted the importance of the competing interests in the *NRR* case. On the one hand is society's interest "in the police having access to efficient, economical, effective, and safe investigatory methods" (*NRR* at para 20). On the other hand, is "society's interest in unimpaired access to information about the investigatory methods used by police so their justness and fairness can be assessed in the public forum" (*NRR* at para 20). In the end, the "balance sought is one that promotes an effective but accountable police force" (*NRR* at para 20).

In this case, Justice Burrows was not convinced that specific public identification of the individual police officers was necessary to achieve the appropriate balance of the competing interests. While the specific actions of the undercover officers are open to public scrutiny and criticism, public identification of the specific officers could compromise ongoing and future investigations, and could expose the officers in question to significant danger (*NRR* at para 21).

While the danger may be no different than that inherent in all police work, that does not justify failing to take steps to reduce the danger, because it does not cause significant prejudice to the public's ability to examine, assess and criticize the actions of the unidentified police officers (*NRR* at para 21). This balancing does not approve a secret police unit or a force of anonymous and unaccountable police.

The issue of the three-year duration of the publication ban was best resolved by considering the cost to the public of the Crown applying every year for a renewal. The judge thus granted the Crown's application for the three-year publication ban (at para 25).

Perhaps of more significance is the related case in which the same judge found that the confession obtained during the Mr. Big operation was inadmissible as it violated NRR's *Charter* rights (See: *R v NRR,* 2013 ABQB 288). In addition, Kouri Keenan and Joan Brockman discuss Mr. Big operations in *Mr. Big: Exposing Undercover Investigations in Canada* (Vancouver, BC: Fernwood Publishing, 2010).

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