



[3] A second issue raised in the application is whether the Justice of the Peace committed jurisdictional error in permitting counsel for the crown to cross-examine the informant on his evidence.

[4] There were however preliminary issues the court was asked to consider. Some of these were settled on consent; the issue of whether the present hearing should be open to the public, in camera or held with some limited publication ban was not settled.

[5] On consent notice was given to the impugned parties and we reconvened at a further date to hear argument.

[6] This issue is one which has seldom arisen in the courts and on which there are few and conflicting authorities.

[7] I intend to deal with those authorities and in the course of that I will deal with what in my view are the important policies and principles to be considered.

[8] I will begin with the useful judgment of McWatt, J. in the case of **R. v. Friesen**, **229 CCC (3d) 47** judgment given March 26, 2008.

[9] The case arose out of a private prosecution where the issuing of process was denied. The parties sought directions on a number of issues one of which was, and I quote: *“Should mandamus reviews of pre-enquete hearings be held in camera or should there be a publication ban of the proceedings?”*

[10] Section 507.1 of the Criminal Code is the governing section.

[11] It is clear that under section 507.1 the person or persons impugned would have no role and no standing.<sup>1</sup>

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<sup>1</sup> See **R. V. Friesen**, *supra*, Quicklaw, paragraph 21.

[12] This is important for the issue of divulgation or to what degree pre-enquetes and applications for mandamus arising from them should be open or closed, or should publication be banned.

[13] In regards to the issue of whether the proposed accused should be served on the mandamus application, the court in **R. v. Friesen, supra** said at paragraph 29 (Quicklaw), *“In any event, I do not believe that an outright rule that the proposed accused should or should not be served .....is prudent. Although it appears to be wise to do so, there may be some cases where he or she need not be entitled to notice. Each case should be assessed according to its particular facts and an appropriate order made by the presiding judge for service of the proposed accused where it would serve the ends of justice or the proposed accused could be served at the option of the crown if it felt that procedural fairness demanded it.”*

[14] I have set this out at length because although here on consent the crown has given notice still the fact that notice has been given or will be given in my view will be important on the issue of divulgation.

[15] Indeed the interconnectedness of the two issues is conceded in **R. v. Friesen, supra** I refer to at paragraph 30, *“I note that if the mandamus proceedings were held, as the pre-enquete is, in camera, then the proposed accused’s privacy interests would be protected and they would be less likely to be entitled to notice. That might also be the case if there were a publication ban on the proceedings.”*

[16] At paragraph 33, the justice points out the authority for in camera pre-enquetes, - although section 507 has never contained any explicit reference to this requirement. The authority is a case from the Ontario Court of Appeal **Southam Inc. v. Coulter,**<sup>2</sup> to which I will turn to momentarily. The reasoning from that case is set out in **R. v. Friesen, supra** at paragraph 33:

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<sup>2</sup> **Southam Inc. v. Coulter,** 60 C.C.C. (3d) 267

*“The proceedings with which s. 507.1 of the Code is concerned is held ex parte. The person named in the information has no opportunity to make full answer and defence because, there being no prosecution in existence, there is nothing to answer or defend. It would be anomalous, to say the least, if as some of the respondents would have it, the hearing under s. 507.1 of the Code is one which everyone has a right to attend except the person most affected by its potential outcome, that is, the person alleged in the information to have committed an offence. I have concluded that, in light of the purpose of s. 507.1 of the Code, the only reasonable interpretation that can be given to it is that it requires that the hearing be in camera. Any other construction would often lead to harmful consequences to the person named in the information. It must be not be forgotten that the outcome of the pre-inquiry may well be that no prosecution will ensue. Yet during the hearing unfounded, even outrageous, allegation of misconduct may be made against the absent target of the information. These allegations would be made on an occasion of privilege. If the argument were accepted that the hearing must be conducted in open court, what was said at it could be reported in the media without fear of the consequences. Section 4(1) of the **Libel and Slander Act, R.S.O. 1980, c. 237**, cloaks the media with immunity with respect to a fair and accurate report of proceedings heard before a court of justice if published contemporaneously with the proceedings.*

*The rational connection between an in camera requirement and the objectives enumerated earlier – protecting the innocent, the efficient administration of the criminal justice system, protecting the right to a fair trial and privacy – needs little elaboration. The procedure in S. 507.1 of the Code is the first judicial supervision of the initiation of prosecutions to protect persons from subjection to prosecution where there is no basis for one. A public pre-inquiry would expose the named innocent individual to publication of baseless allegations against him or her, allegations which he or she had no opportunity to answer. The necessarily ex parte nature of the proceedings makes it impossible for the affected person to seek a ban on publication and, in any event, there seems to be no authority for such a ban. I can think of no other means than an in*

*camera hearing to avoid these read dangers. With respect to the interest of the efficient administration of the system, publication of the proceedings at the pre-inquiry would give notice to the person who, in the result, becomes the accused and who might then take steps to avoid process.*

*In a case in which the justice of the peace properly exercises his or her discretion to refuse to issue process because the allegation are groundless, no social purpose is prejudiced by non-publication of the proceedings. If, on the other hand, the justice of the peace improperly exercises his or her discretion in refusing to issue process, there is a remedy. Mandamus, the application for which is, of course, heard in open court, will lie in an appropriate case.”*

[17] I note that the last line of that quotation though it is obiter dicta in that case states categorically that the mandamus application will be heard in “open court”.

[18] To return to **R. v. Friesen, supra**, the judge at paragraph 34 sets out that logic would dictate that if the pre-enquete should be held in camera to protect the privacy and reputation of persons subject to private prosecutions so should the mandamus application.

[19] This may be seen as the holding of **R. v. Friesen, supra**.

[20] Section 2(b) of the **Canadian Charter of Rights and Freedoms**<sup>3</sup> sets out as “fundamental freedoms”, freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication. It is generally accepted that this includes public access to judicial proceedings and that openness of courts fosters necessary public confidence and understanding in the administration of justice. In the case of **Southam Inc. v. Coulter, supra**, the court reasoned in regards to the pre-enquete: “*The infringement of s. 2(b) of the **Charter** is proportionate to the legitimate*

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<sup>3</sup> Being Part I of the **Constitution Act, 1982**, See also S. 11.

*objectives of protecting the innocent and preventing frustration of the administration of justice, and it minimally impairs the right to freedom of expression.”*

[21] In **Southam Inc. v. Coulter**, *supra* again cited in the the **R. v. Friesen**, *supra*, the court drew heavily on a comparison between search warrant applications and pre-enquete proceedings. See **Nova Scotia (Attorney General) v. MacIntyre**, [1982] 1 S.C.R. 175 and also **Toronto Star Newspapers Ltd. V. Ontario**, [2000] O.J. No. 2398, Trafford J., - again both cited in the **R. v. Friesen**, *supra*. This statement at paragraph 44 of **R. v. Friesen**, *supra* referring to Trafford, J. is important. The judge said: “...Trafford J. also cautioned that as soon as it becomes apparent, even during the hearing, that the initial rationale for holding the hearing in camera is no longer relevant, the proceedings should be opened immediately.”

[22] In dealing with that judgement, the court in **R. v. Friesen**, *supra*, stated at paragraph 51: “...the decision to hold a mandamus application such as this one is very fact specific and depends on the nature and extent of the potentially harmful information. Where the risks to the reputations of innocent people and the administration of justice are capable of being contained through the operation of a sealing order or publication ban, these measures are preferred over an outright exclusion of the public.”

[23] In my view, that reasoning though in regard to other circumstances is useful here.

[24] The test formulated for the application of a common law publication ban after an extensive review of the Charter Rights engaged is set out in the case of **Dagenais v. Canadian Broadcasting Corp.**, [1994] S.C.J. No. 104.

[25] The test referred to is set out in **R. v. Friesen**, *supra*, at paragraph 48: “Aside from the publication bans in respect of certain enumerated offences in ss. 486.4 and 486.5, superior courts can order publication bans pursuant to their inherent jurisdiction

to control their own processes. In **Dagenais v. Canadian Broadcasting Corp., [1994] S.C.J. No. 104.** at para. 73, Lamer C.J. for the majority, formulated the following test for the application of a common law publication ban:

*A publication ban should only be ordered when:*

(a) *Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and*

(b) *The salutary effect of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.*

*If the ban fails to meet this standard (which clearly reflects the substance of the **Oakes, [1986] 1 S.C.R. 103,** test applicable when assessing legislation under s. 1 of the **Charter**), then, in making the order, the judge committed an error of law and the challenge to the order on this basis should be successful.*

[26] In my view, because of the great importance of all judicial proceedings being open to the public, matters should generally be held in open court.

[27] The test from **Dagenais v. Canadian Broadcasting Corp., supra** should then be applied it seems in all these cases. This is clear from **Dagenais v. Canadian Broadcasting Corp., supra.**

[28] In paragraph 83 of **Dagenais v. Canadian Broadcasting Corp., supra**, the court deals with the “much richer” analysis that is now required specifically the paragraph indeed: “*preserve(ing) the privacy of individuals involved in the criminal process (for example, the accused and his or her family as well as the victims and the witnesses and their families)....*”

[29] In passing, my view contrary to the position taken in **R. v. Friesen**, *supra*, the considerations set out in **Dagenais v. Canadian Broadcasting Corp.**, *supra* should thus come into play.

[30] Having said that, and applying the test set out by the Supreme Court, I am of the view that there should here be a publication ban in regards to the officers' names. Otherwise, the matter should be entirely public.

[31] I have covered many of the points to be considered. Each case will be different. Here in an application for mandamus. The possible accused have had notice and the opportunity to appear. Aside from the important common law interests in open courts such as overseeing all the participants and the system, the charter interests must also be considered.<sup>4</sup>

[32] This particular matter is an important one. Private prosecutions such as this "are necessary because they enable citizens to bring even the police or government officials before the criminal courts where the government is unwilling to make the first move."<sup>5</sup>

[34] Finally, it seems appropriate to take judicial notice that matters concerning policing in the county are of great public interest now and for the benefit of everyone proceedings need be as open as is possible.

[35] Here, because no process has yet issued against the alleged accused, I would open the hearings but order that there be a publication ban in respect to the names of the officers.

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Marshall, J.

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<sup>4</sup> See **Dagenais v. Canadian Broadcasting Corp.**, *supra*, generally.

<sup>5</sup> See **R. v. Friesen**, *supra*, para. 21, quoting from working paper 52 at pp 19-20, 1986 working paper, Private Prosecutions at page 5 (Ontario).

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