Judicial College of Victoria

Recent Cases on Suppression Orders

Recent decisions from the Supreme Court and the Court of Appeal emphasise the exceptional nature of suppression orders and the limits on when orders are, or remain, necessary.[1] The courts have also considered what processes sit outside the *Open Courts Act 2013*, including pseudonym orders, the operation of other Acts, and redactions from the court file or transcript.[2]

PQR v Secretary Department of Justice and Regulation (No 1) (2017) 53 VR 45

- A great amount of Victorian legislation prohibits, restricts, or authorises a court to prohibit or restrict the publication of information from proceedings before it or to close the proceedings. These Acts generally relate to certain categories of people and certain kinds of proceedings, and the *Open Courts Act 2013* does not limit or affect their operations.[3]
- A pseudonym order is not a suppression order.[4]
- The legislative purpose of the *Open Courts Act's* procedures is to ensure that a suppression order is not made until after interested parties, including the media, are given notice and have been heard if they appear. This enhances a court's capacity to have regard to all relevant considerations including the interests of open justice and free communication.[5]
- When making a suppression order a court must properly evaluate the competing rights and interests involved, and the values they represent.[6]
- An application for suppression order must be supported by evidence or other credible information supporting a need for the order.[7]

Chaarani v The Queen [2018] VSCA 299

- The onus is on the applicant to persuade the court that a suppression order is necessary.[8]
- The *Open Courts Act* does not require that *all* possible risks of prejudice to the administration of justice be eliminated. If possible, a court must take other measures, such as jury directions, to ameliorate the risk rather than making a suppression order.[9]
- If a trial has been fully reported, that is significant to determining whether a suppression order should be made. Here, suppressing verdicts in a first trial, so as not to prejudice a second trial, was likely to undermine public confidence in the criminal justice system

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[1] See *Chaarani v The Queen* [2018] VSCA 299 ('*Chaarani*'); *AB v CD* [2019] VSCA 28 ('*AB*'); *Neil v The Queen* [2019] VSCA 64; *The Chairperson of the Royal Commission into the Management of Police Informants v Chief Commissioner of Victoria Police* [2019] VSCA 154.

[2] See PQR v Secretary Department of Justice and Regulation (No 1) (2017) 53 VR 45 ('*PRQ*'); *Cargill Australia Ltd v Viterra Malt Pty Ltd* [2019] VSC 417.

[3] *PQR* (n 2) 52 [21].

[4] Ibid 53 [24], citing *ABC-1 v Ring* [2014] VSC 5.

[5] *PQR* (n 2) 55 [28].

[6] Ibid 61 [42].

[7] Ibid 64-65 [53].

[8] *Chaarani* (n 1) [41]; *PQR* (n 2) 60 [40], 62 [46].

[9] *Chaarani* (n 1) [42].

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as the public might correctly be concerned at not knowing what the highly anticipated outcome of the first trial was.[10]

AB v CD [2019] VSCA 28

- There is a presumption in favour of disclosure that a court must consider in determining whether to make a suppression order.[11]
- Section 18(1) empowers the making of a suppression order only where necessary to further one of the purposes identified in the *Open Courts Act.* And use of the word 'necessary' imposes a high standard of satisfaction, it is not sufficient that a suppression order might be reasonable.[12]
- Publication of the informer's name and identity is warranted by the unique circumstances of this case to further the administration of justice. In an ordinary case, the ordinary principles protecting informants would tend to support the making of a suppression order.[13] But there is high public interest here in seeing that anyone whose case might have been affected by the informer's conduct be identified, and the publication of her name and image are necessary for this purpose.[14]

Neil v The Queen [2019] VSCA 64

- Suppression order was not 'necessary' because the co-accused who made an undertaking to assist had already been placed under protection, so the order had no more role to play.[15]

The Chairperson of the Royal Commission into the Management of Police Informants v Chief Commissioner of Victoria Police [2019] VSCA 154

- A party claiming that a suppression order remains necessary bears the burden of persuading the court that this is so. On an application for review, a court must be satisfied that continuation of the order is necessary by reference to the same considerations that would apply on an initial application for the order.[16] Unless the court is satisfied for one of the reasons given in s 18 of the *Open Courts Act* that the need for a suppression order continues, it should be revoked or varied to reflect the circumstances at the time of review.[17]

[10] Ibid [46].
[11] *AB* (n 1) [65].
[12] Ibid [68]. See also *Chaarani* (n 1) [41].
[13] *AB* (n 1) [69]–[70].
[14] Ibid [71].
[15] *Neil v The Queen* [2019] VSCA 64 [52].
[16] *The Chairperson of the Royal Commission into the Management of Police Informants v Chief Commissioner of Victoria Police* [2019] VSCA 154 [106].
[17] Ibid [107].

- The principles established before enactment of the Act remain relevant. The test is one of necessity and the Act consolidates the previous law and provides for criteria on review.[18]
- There was no need for the Court of Appeal to vary existing suppression orders because a Royal Commission already has authority to do so under the legislative regime established by the *Inquires Act* and *Witness Protection Act*.[19]

Cargill Australia Ltd v Viterra Malt Pty Ltd [2019] VSC 417

- Suppression orders do not interfere with the court processes from which information is derived or becomes available but instead deal with the way that information is disseminated by third parties.[20]
- The *Open Courts Act* does not apply to an order that restricts the availability of information derived from court process.[21] An application seeking a 'confidentiality order' which redacts references from the transcript is akin to this type of order and does not seek a suppression order governed by the *Open Courts Act.*[22]
- However, the fundamental common-law principle of open justice is applicable to making an order sought by such an application. That principle serves the administration of justice and is not absolute. Where public scrutiny or access would detract from the administration of justice, the principle of open justice may have to give way. But this will be an exceptional circumstance that must be justified by the party seeking the departure, and if justified, the departure will be no greater in scope and time than strictly required.[23]
- The court then identified the requirements necessary to justify a confidentiality order in a commercial context.[24]

[18] Ibid [102]-[106].
[19] Ibid [117], [121]-[124].
[20] *Cargill Australia Ltd v Viterra Malt Pty Ltd* [2019] VSC 417 [41].
[21] Ibid [42]-[43].
[22] Ibid [45]-[46], [53].
[23] Ibid [63]-[64].
[24] Ibid [66]-[73].