QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2016 SKQB 300**

Date: **2016 09 13**
Docket: QBG 862 of 2016
Judicial Centre: Saskatoon

IN THE MATTER OF JUDICIAL REVIEW PURSUANT TO 3-56(2) OF THE RULES OF THE COURT OF QUEEN'S BENCH

BETWEEN:

CTV, A Division of Bell Media Inc. and the Saskatoon StarPhoenix, Division of Postmedia Network Inc.

APPLICANTS

- and -

Kaylon Stonne, Her Majesty the Queen as Represented by the Attorney General of Saskatchewan, the Provincial Court of Saskatchewan and His Honour Judge P. Carey

RESPONDENTS

Counsel:

Sean M. Sinclair	for CTV and the StarPhoenix
Michael W. Owens	for Kaylon Stonne
Leslie E. Dunning	for the Crown

JUDICIAL REVIEW
September 13, 2016

ACTON J.

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[1] This was an application for an order of *certiorari*:

(a) quashing the order of The Honourable Judge Carey dated May 13, 2016 that prohibits publication of any information that might identify the deceased victim of the offence for which the respondent Kaylon Stonne is charged;

(b) dispensing with the requirement under Rule 3-57 of *The Queen's Bench Rules* to serve a notice to obtain a record of proceedings on the Provincial Court of Saskatchewan; and

(c) a further order allowing the applicant to file the record being the materials received from the Provincial Court of Saskatchewan.

[2] The applicants submit that the judge failed to apply the *Dagenais* test as set forth by the Supreme Court of Canada in *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835 [*Dagenais*].

[3] In *Dagenais*, the Supreme Court outlined at pages 878 and 890-91 the test and guidelines to be applied when a common law publication ban is sought:

> It is open to this Court to "develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution": *Dolphin Delivery*, supra, at p. 603 (per McIntyre J.) [*RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573]. I am, therefore, of the view that it is necessary to reformulate the common law rule governing the issuance of publication bans in a manner that reflects the principles of the *Charter*. Given that publication bans, by their very definition, curtail the freedom of expression of third parties, I believe that the common law rule must be adapted so as to require a consideration both of the objectives of a publication ban, and the proportionality of the ban to its effect on protected *Charter* rights. The modified rule may be stated as follows:
>
> > 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 effects 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* [*R v Oakes*, [1986] 1 SCR 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.

...

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.

[4] Rule 3-57 allows the court to dispense with the requirement to serve notice to obtain record of proceedings from the Provincial Court. In the current circumstances, all the relevant material has been filed by the applicant and the record of proceedings likely contains information irrelevant to the issue of production of a publication ban and the applicants argue that the court should grant standing to the media when considering issues regarding publication bans as stated by the Supreme Court in *Dagenais.*

[5] The court does accept that this is a proper circumstance in which the applicants should be, and are granted standing. In addition, the court accepts that there is no need for an order under Rule 3-57 to serve a notice to obtain a record of Provincial Court proceedings as the material which the applicants request permission to file is sufficient for this application and there has been no objection to these requests.

[6] Therefore, the court does grant the orders requested in para. 1(b) and (c) hereof.

[7] The applicants allege that Judge Carey erred in granting the publication ban for the following reasons:

a) The application of the accused granting the publication ban pursuant to s. 486.4(2.1) of the *Criminal Code*, RSC 1985, c C-46, does not allow the accused standing to make such an application under this section. The prosecution or the complainant victim may make the application but not the accused.

b) If the publication ban was granted pursuant to common law authority, the granting of the ban exceeded the court's jurisdiction given that criminal

proceedings must be heard in the highest court in which the trial may occur which would be the Court of Queen's Bench. *Dagenais* (pages 869-70):

c) Failing to abide by Saskatchewan Provincial Court Practice Directive XII or the Saskatchewan Court of Queen's Bench General Application Practice Directive #3, both of which require three days' notice.

d) Failing to follow the *Dagenais* and *R v Mentuck,* 2001 SCC 76, [2001] 3 SCR 442 [*Mentuck*] test with respect to publication bans; and

e) Granting a publication ban without any evidentiary foundation as to the benefits of such a ban to the victim.

Ground a) The granting of a publication ban upon the application of the accused who did not obtain standing to seek such relief.

[8] Section 486.4(2.1) and (2.2) of the *Criminal Code* states as follows:

> **486.4**(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.
>
> (2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall
>
> (a) as soon as feasible, inform the victim of their right to make an application for the order; and
>
> (b) on application of the victim or the prosecutor, make the order.

[9] Section 486.4(2.2) of the *Criminal Code* is very clear that the victim or the prosecutor may make the application for a ban on publication. This does not include the accused.

[10] This issue was dealt with in an almost identical situation involving the death of a child for whom the parents have been charged and a publication ban which was issued at the preliminary inquiry. This is the very recent Alberta decision from November 2015 of *R v Clark*, 2015 ABQB 729 [*Clark*].

[11] The court in *Clark* dealt in detail with these issues and set forth the law in this regard in paras. 21 to 27 inclusive which state as follows:

> **21** With respect to the deceased child, I am not satisfied that an application was properly brought before the preliminary inquiry Judge on his behalf. Mr. Fagan QC was identified at the outset of the preliminary inquiry as counsel for the Accused Jeromie Clark, who is charged with causing the death of John Clark. There is nothing on the record to indicate that he had any standing to represent the deceased child whose death his client was charged with causing.
>
> **22** I accept the Crown's position (which is consistent with my reading of the transcript) that they were simply consenting to Mr. Clark's application and that they were not applying for a publication ban on behalf of the deceased child. As a result, no application was properly before the Judge under section 486.4(2.2) and he was not required to grant a mandatory order pursuant to that provision.
>
> **23** Under section 486.4(2.1), the Judge had the jurisdiction on his own motion to make an order in respect of the deceased child directing that any information that could identify him not be published, broadcast or transmitted. However, in doing so, the Judge would have been required to perform a balancing exercise analogous to that contemplated in *Dagenais*.
>
> **24** I note that the *Dagnenais* [*sic*] test would need to be modified as the interest potentially justifying the ban in Dagenais related to maintaining trial fairness as that case involved a publication ban restraining the CBC from broadcasting a fictional program dealing with child abuse at a religious orphanage until some criminal trials of members of a religious order charged with abusing young boys in their care were completed. In the case of a publication ban under section 486.4(2.1), the rationale for the ban is not to maintain trial fairness but to protect the interests of a young victim under the age of 18 years.
>
> **25** In this case, the Judge was required to determine whether the salutary effects of the publication ban in protecting the interests of

> the deceased child outweighed the deleterious effects to the free expression of the Media Outlets affected by the ban.
>
> **26** There was no evidence before the Judge of any harm that could be sustained by the deceased child as a result of possibly identifying him by publishing the names of his accused parents or any balancing performed by the Judge of how such harm might be weighed against the deleterious effects of the ban on the free expression of those affected by the ban.
>
> **Conclusion**
>
> **27** The preliminary inquiry Judge made an error of jurisdiction in granting the publication ban. The application for *certiorari* is granted and the publication ban prohibiting the identification of Jennifer and Jeroromie [*sic*] Clark as the accuseds in this case is set aside.

The court accepts this as an accurate statement of the law in the current circumstances before this court.

Ground b) Did the order originate from a court of competent jurisdiction?

[12] As stated the accused could not have standing under s. 486.4 to seek the publication ban on the name and identity of the child. The accused could seek such an order under the common law but such publication ban would have to be sought at the highest level of court that potentially could hear the trial. This would be the Queen's Bench Court. This is substantiated by the Supreme Court of Canada in *Dagenais* at pages 869-70:

> I now proceed with some general guidelines for practice for the Crown, the accused, the media, and the courts in turn.
>
> (ii) For the Crown and the Accused
>
> To get a publication ban issued under a judge's common law or legislated discretionary authority, the Crown and/or the accused should make a motion for a ban pursuant to that authority. This motion should be made before the trial judge (if one has been appointed) or before a judge in the court at the level the case will be heard (if the level of court can be established definitively by reference to statutory provisions such as ss. 468, 469, 553, 555 and 798 of the *Criminal Code* and s. 5 of the *Young Offenders Act*). If the

> level of court has not been established and cannot be established definitively by reference to statutory provisions, then the motion should be made before a superior court judge (i.e., it should be made before the highest court that could hear the case, in order to avoid later having a superior court judge bound by an order made by a provincial court judge). To seek or challenge a ban on appeal, the Crown and the accused should follow the regular avenues of appeal available to them through the *Criminal Code* (Parts XXI and XXVI).

[13] Therefore any request by the accused for a publication ban should be to the Court of Queen's Bench as the Provincial Court lacks jurisdiction in this regard.

Ground c) The learned trial judge erred by failing to follow Practice Directive XII.

[14] Practice Directive XII provides procedure for obtaining such a ban:

> An applicant for a discretionary order restricting media reporting of, or media or public access to, a proceeding shall, at least three clear days before the hearing of the application, complete the electronic *Notice of Application for a Publication Ban* … .

[15] The evidence before the court is that such notice was not provided with respect to the May 13, 2016 application.

[16] Judge Carey could have decided not to follow the practice directive. However there is no indication that he had contemplated Practice Directive XII, or that it was brought to his attention. The learned trial judge therefore failed to comply with Practice Directive XII as no reasons were given as indicated by the transcript of proceedings for the Provincial Court on the morning of May 13, 2016, which states commencing at line 32 on page T1 down to and including line 9 on page T2:

> MR. OWENS: I'd ask for a publication ban, please.
>
> THE COURT: Agreed?
>
> MS. HUMPHRIES: Pursuant to identifying the complainant or?

MR. OWENS: Identifying the complainant or anything that may identify the – the complainant, and – and there's also safety issues involved.

THE COURT: Publication ban identifying the complainant agreeable?

MS. HUMPHRIES: That's fine, Your Honour.

MR. OWENS: Thank you.

This was the total discussion respecting the publication ban.

Ground d) Was the proper test followed in granting a publication ban?

[17] It is noted that a publication ban should only be ordered when it complies with the rules set forth by the Supreme Court of Canada in *Mentuck* which states at para. 32:

> **32** The *Dagenais* test requires findings of (a) necessity of the publication ban, and (b) proportionality between the ban's salutary and deleterious effects. However, while *Dagenais* framed the test in the specific terms of the case, it is now necessary to frame it more broadly so as to allow explicitly for consideration of the interests involved in the instant case and other cases where such orders are sought in order to protect other crucial aspects of the administration of justice. In assessing whether to issue common law publication bans, therefore, in my opinion, a better way of stating the proper analytical approach for cases of the kind involved herein would be:
>
> A publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a

> fair and public trial, and the efficacy of the administration of justice.

[18] As established by the conversation involving the application for the publication ban before Judge Carey on the morning of May 13, 2016, there was no evidence provided respecting the need for the publication ban, nor reference to the *Dagenais/Mentuck* test which must be observed, nor anything to suggest that Judge Carey was exercising his common law right and what evidence he considered in that regard.

[19] As noted by the Supreme Court of Canada in *R v O.N.E.*, 2001 SCC 77 at para 9, [2001] 3 SCR 478:

> … The burden of displacing the presumption of openness rests on the party bringing the application for the publication ban. There must be a sufficient evidentiary basis in favour of granting the ban to allow the judge to make an informed application of the test, and to allow a higher court to review that decision … .

[20] No evidence was tendered. No reference was made to the test.

[21] Counsel for Mr. Stonne, although not having filed a brief respecting the judicial review application, nor providing the court with any case law, did argue that the definition of victim includes the deceased child's siblings as did counsel for Mr. Clark in the *Clark* application.

[22] The judge in *Clark* dealt with this issue appropriately wherein he stated in paras. 16 to 20:

> **16** At the *certiorari* application before me, Mr. Clark's counsel, who was not the same counsel who appeared at the preliminary inquiry, submitted:
>
> * that *certiorari* is an extraordinary remedy and should not be granted lightly;

> * that the definition of "victim" includes the deceased child and the deceased child's siblings and that application at the preliminary inquiry had been brought on both of their behalf by Mr. Clark's counsel and that, therefore, a publication ban was mandatory pursuant to section 486.4(2.2); and
>
> * that the application had been "joined in" by the Crown and, therefore, granting a publication ban was mandatory pursuant to section 486.4(2.2).
>
> **17** The Crown advised that they take the position that they had not brought the application for a publication ban but merely consented and submitted that the preliminary inquiry Judge had made a jurisdictional error in granting the order as there was no evidentiary record before him to enable him perform the required balancing exercise contemplated in *Dagenais*.
>
> **18** "Victim" is defined in section 2 of the *Criminal Code*:
>
> > "victim" means a person against whom an offence has been committed, or is alleged to have been committed, who has suffered, or is alleged to have suffered, physical or emotional harm, property damage or economic loss as the result of the commission or alleged commission of the offence and includes, for the purposes of section 672.5, 722 and 745.63, a person who has suffered physical or emotional harm, property damage or economic loss as the result of the commission of an offence against another person
>
> **19** The grammatical construction of this section, and the limited inclusion of persons who suffer loss as a result of an offence against another person for the purpose of only three sections of the *Criminal Code*, makes it clear that for someone to qualify as a "victim" under any other section of the *Code* that they must be:
>
> 1. a person against whom an offence has been committed or is alleged to have been committed; and
> 2. a person who has suffered or is alleged to have suffered physical or emotional harm, property damage or economic loss as a result.
>
> **20** Under this definition, the siblings of the deceased child do not qualify as "victims" for the purposes of section 486.4 and, therefore, no application was properly before the Court on their behalf, nor was there jurisdiction to grant an order on their behalf.

The court went on at para. 21 to confirm as is the current situation that the accused has no standing to represent the deceased child as he is charged with causing the child's death.

[23] For all these reasons, the Provincial Court judge made an error in granting the publication ban.

[24] The application for *certiorari* is granted and the publication ban is set aside.

J.
M.D. ACTON