IN THE PROVINCIAL COURT OF SASKATCHEWAN

Citation: 2016 SKPC 089

Date: June 30, 2016
Information: Y368612
Location: La Loche

Between:

Her Majesty the Queen

- and -

R.D.F.

- and –

Postmedia Network Inc., Canadian Broadcasting Corporation, CTV, a Division of Bell Media, and the Globe & Mail

Applicants

- and -

The Attorney General for Saskatchewan

Respondent

In the matter of an application by the prosecutor for a publication ban pursuant to sections 486.4(2.2) and 486.5 of the *Criminal Code of Canada*

- and -

In the matter of a Notice under *The Constitutional Questions Act*, dated March 17th, 2016, challenging the constitutional validity of section 486.4(2.2) of the *Criminal Code of Canada*

Appearing:

Sean Sinclair — For the Applicants
Lloyd Stang and Alan Jacobson — For the Attorney General for Saskatchewan

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Decision **M. Martinez, J**

Introduction

[1] On January 25, 2016, subsequent to a tragic mass shooting at a school in the northern village of La Loche, Saskatchewan, the prosecutor applied for, and obtained, on what can be described as an emergency basis, a discretionary publication ban of any information that could identify any of the victims named in the attempted murder charges the accused, R.D.F., faces. The presiding judge ordered the ban under s. 486.5 of the *Criminal Code of Canada*. The judge's order specifically left the door open for media outlets to apply for her order to be lifted.

[2] On February 16, 2016, under s. 486.4(2.2) of the *Criminal Code*, the prosecutor applied for a mandatory publication ban of any information that could identify the victims who were young persons at the time of the incident.

[3] A number of national media organizations oppose the prosecutor's application for the discretionary publication ban under s. 486.5 of the *Criminal Code* and challenge the constitutionality of s. 486.4(2.2). For the sake of convenience, in this decision, I refer to the group of media organizations as the "Applicants", whether or not they technically are the applicants in the respective applications before me.

[4] I heard argument on April 12, 2016. On that day, the prosecutor renewed his application for the discretionary publication ban so that there would be no question about my jurisdiction to hear it as the presiding judge on the day the application was made.

[5] The Applicants seek the following relief in relation to the two publication bans:

- a declaration that s. 486.4(2.2) is unconstitutional as it unjustifiably infringes the Applicants' right to freedom of expression protected under s. 2(b) of the *Canadian Charter of Rights and Freedoms*, and

- that I deny the prosecutor's application for the broad publication ban under s. 486.5.

In this decision, I deal with the two matters in that order.

Constitutionality of s. 486.4(2.2)

Jurisdiction

[6] As a provincial court judge I do not have the power to declare that s. 486.4(2.2) of the *Criminal Code* is not constitutionally valid. Provincial court judges are not empowered to make such declarations under s. 52(1) of the *Constitution Act, 1982*. However, as the question is properly before me, I can decline to apply the law if I consider the section to be unconstitutional.

[7] What this means is that if I find that s. 486.4(2.2) does not pass constitutional muster, my decision about the validity of the law applies only to the case before me and does not bind any other judge of any other court. Ultimately, the decision about whether s. 486.4(2.2) is of no force or effect lies with, and must be made by, superior court judges of inherent jurisdiction; see *R v Lloyd*, 2016 SCC 13, at paras 15 and 19. This may be the reason why, despite receiving notice of the application, the Attorney General of Canada did not participate in the hearing before me.

Section 486.4(2.2) and Freedom of Expression

[8] Before turning to the question whether s. 486.4(2.2) justifiably infringes freedom of expression, it is important to understand what this *Charter*-protected right means.

[9] Freedom of expression is one of the fundamental freedoms protected under s. 2(b) of the *Charter*:

> 2. Everyone has the following fundamental freedoms:
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication

[10] The freedoms protected by s. 2(b) encompass, among other things, the Applicants' freedom to publish information and the public's freedom to receive the information from the Applicants. These freedoms are important for maintaining, and are intrinsic to, the principle of open courts in Canada:

> *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 SCR 480, 1996 CanLII 184 (SCC), at para 23
>
> "The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place. Cory J. in *Edmonton Journal* described the equally important aspect of freedom of expression that protects listeners as well as speakers and ensures that this right to information about the courts is real and not illusory. At pages 1339-40, he states:
>
> > "That is to say as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role. It is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples nor mothers or fathers house-bound with young children, would find it possible to attend court. Those who cannot attend rely in large measure upon the press to inform them about court proceedings -- the nature of the evidence that was called, the arguments presented, the comments made by the trial judge -- in order to know not only what rights they may have, but how their problems might be dealt with in court. It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media."
> >
> > [Emphasis in original]

[11] Subsection 486.4(2.2) came into force on July 22, 2015, as part of a broad amendment of s. 486.4 and other sections of the *Criminal Code*. Before this amendment, if a victim of crime, or the prosecutor, applied for it, s. 486.4 provided for mandatory publication bans of the names of victims in sexual offence cases and in certain offences involving victimization of vulnerable persons. Subsection (2.2) added a mandatory publication ban

of an underage victim's name, no matter the nature of the crime, upon application by the victim or by the prosecutor:

> 486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (a) any of the following offences:
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
>
> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
>
> (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
>
> (b) on application made by the victim, the prosecutor or any such witness, make the order.
>
> (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.
>
> (3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

> (4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.
>
> [Emphasis added]

[12] The Applicants submit that because the publication ban under s. 486.4(2.2) leaves no room for judicial discretion, it unjustifiably limits the right to freedom of expression guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The Attorney General for Saskatchewan concedes that the impugned subsection limits the rights of the Applicants and of the public protected by s. 2(b), but argues that it is a reasonable limit that is demonstrably justified in a free and democratic society.

Analytical Framework

[13] Because s. 486.4(2.2) infringes rights protected by s. 2(b) of the *Charter*, it cannot be constitutionally valid unless it is shown to be a reasonable limit on freedom of expression under s. 1 of the *Charter*, which reads as follows:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[14] The proponent of the offending legislation – in this case, the Attorney General for Saskatchewan – bears the burden of demonstrating that s. 486.4(2.2) is a reasonable limit on freedom of expression. The measure of proof required to meet this burden is the civil standard of a preponderance of probability. Because the Attorney General seeks to justify limiting a *Charter*-guaranteed right, the degree of probability required of it is high; see *R v Oakes*, [1986] 1 SCR 103, 1986 CanLII 46 (SCC):

> "The onus of proving that a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the *Charter* are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the

exceptional criteria which justify their being limited. This is further substantiated by the use of the word "demonstrably" which clearly indicates that the onus of justification is on the party seeking to limit"

[CanLII, at para 66]

"The standard of proof under s. 1 is the civil standard, namely, proof by a preponderance of probability..."

[CanLII, at para 67]

"Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the *Charter* was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion".

[CanLII, at para 68]

[15] In order to establish that s. 486.4(2.2) is a reasonable limit on freedom of expression, the Attorney General must show that the reasons for the limitation are sufficiently important to warrant overriding a constitutionally protected right, that the means chosen is proportionate to the concern it is intended to address, and that the positive impact of the law outweighs its negative effects. In practice this means that the Attorney General must convince me that:

- the concerns the law is designed to address are "pressing and substantial",
- the measure chosen is rationally connected to its objective and minimally impairs the rights of those affected by it, and
- the salutary effects of the law outweigh its deleterious effects

[*Oakes*, supra, at CanLII paras 69-71]

[16] These are the components of what is commonly referred to as the *Oakes* test. It is a test that I must apply flexibly with close attention to its context; namely, the balance between the nature of the right that is infringed and the competing societal values the state seeks to protect; see *Ross v New Brunswick School District No. 15*, [1996] 1 SCR 825, at para 78, 1996 CanLII 237 (SCC).

Are the concerns of the impugned law "pressing and substantial"?

Argument

[17] The Attorney General submits that the objective of s. 486.4(2.2) is the "protection of the privacy of underage victims of crime whose age and immaturity make them particularly vulnerable." As s. 111 of *Youth Criminal Justice Act*, SC 2002, c 1 [*YCJA*], already provides for an automatic publication ban of the names of young victims and witnesses of crime, the Attorney General argued that the impugned section simply fills an obvious legislative gap between how young crime victims are treated under the *Criminal Code*, when the accused is an adult, and under the *YCJA*, when the accused is under 18 years of age.

[18] The Applicants counter that, as s. 486.5 of the *Criminal Code* already allows the Court to impose publication bans to address privacy concerns, the purpose of the mandatory publication ban under s. 486.4(2.2) is to prefer the privacy interests of young persons over the rights of others, and a law that places one set of rights above others is unconstitutional.

[19] Alternatively, if the purpose of s. 486.4(2.2) is not the unconstitutional purpose described above, the Applicants submit that the mere protection of privacy, while important, is insufficient reason to justify infringing the *Charter*-protected rights of others. The Applicants argue that "only where the infringement of the privacy of the victims or witnesses may cause significant harm that such infringement may justify a limitation on *Charter* rights" and a mandatory publication ban does not achieve this balance.

[20] Unless it is self-evident, the party seeking to justify a *Charter*-infringing law must provide evidence to support its contention about the objective of the law and about why the objective is "pressing and substantial":

> "Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the court the consequences of imposing or not imposing the limit... I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self- evident."
>
> [*Oakes*, supra, CanLII at para 68]

[21] In the case before me, the Attorney General argued that the need to protect the privacy of underage victims of crime obviously is "pressing and substantial".

Analysis

[22] Section 486.4(2.2) applies to *any* crime involving an underage victim. The effect, rather than the purpose, of the impugned section is to prefer the privacy interests of young crime victims over the rights of the Applicants.

[23] The clear purpose of the law is to protect the privacy of young victims of crime. What is not self-evident is that there is a pressing and substantial need to do so in *every* case involving an underage victim of a crime committed by an adult.

[24] The Attorney General did not present any evidence to support its contention that the privacy of children must be protected in every case in which they are victims of a crime. The Attorney General did, however, refer to an academic paper and to a relatively recent Supreme Court of Canada decision in support of its submission that the need for such protection is self-evident.

[25] The Attorney General noted that, in *A.B. v Bragg Communications Inc.*, [2012] 2 SCR 567, 2012 SCC 46, at para 17, Madam Justice Abella observed that "[r]ecognition of the *inherent* vulnerability of children has consistent and deep roots in Canadian law." Although I agree wholeheartedly with Madam Justice Abella, her observation does not goes so far as to support the Attorney General's contention that there is an obvious, pressing, and substantial need to protect the privacy of children in every case in which they are the victims of a crime committed by an adult.

[26] *Bragg* involved an application by the litigation guardian of a 15 year old female victim of sexualized cyberbullying. The application was to ban publication of her name. The applicant did not present evidence of her personal emotional vulnerability or of the harm she would suffer if her name was published. However, the applicant did rely on the conclusions of the Report of the Nova Scotia Task Force on Bullying and Cyberbullying, chaired by Prof. A. Wayne MacKay; see *Bragg* at para. 20. While Madam Justice Abella accepted the conclusions contained in that report, she also relied on common sense to find that the need to protect the privacy of young victims of sexualized bullying was patently obvious. She went on to conclude that, in the context of sexualized cyberbullying, if the Court did not protect A.B.'s anonymity, other victims might be dissuaded from reporting such conduct, and that the importance of protecting the privacy of young victims of cyberbullying outweighed society's interest in the open court principle and freedom of the press; see *Bragg*, supra at paras 23, 27, and 29.

[27] The report in *Bragg* provided empirical evidence of the very harm from which the young applicant wanted the Court's protection. It contained conclusions about the harm generally suffered by victims of bullying, which conclusions were based on the empirical evidence. In contrast, the study to which the Attorney General referred me in this case does not contain such evidence or conclusions.

[28] The academic article relied on by the Attorney General is entitled *Protecting victims' identities in press coverage of child victimization* and was published in 2010 in an online journal published by sagepub.com. The authors are a psychologist, a social worker, and the director of the Crimes Against Children Research Centre at the University of New Hampshire. Their study analyzed how frequently the names of young victims, or other identifying information about them, appeared in American media reports about sexual offences against underage victims and in child abuse cases. What the authors did not do, and what they admitted they could not do, is say anything about the impact on child

victims of being identified in such media reports:

> "This study demonstrates that identifying information about child victims appears in media reports with considerable regularity. *What we do not know and cannot say with authority, however, is how frequently or seriously this impacts on victims.*"
>
> [at p 358; emphasis added]

[29] Long ago, Parliament, and the courts, recognized the value of protecting the privacy of sexual assault victims and victims of child exploitation offences. In *Bragg*, the Supreme Court of Canada affirmed the importance of protecting the privacy of an underage victim of cyberbullying. However, simply because children are inherently more vulnerable than adults, in the absence of any supporting evidence, I am not persuaded that young victims of other criminal offences will suffer any harm or will be deterred from coming forward if their identity is known.

[30] This leaves the question whether, before the enactment of s. 486.4(2.2), there was a "pressing and substantial" need to fill an apparent legislative gap between how youthful victims of youthful offenders are treated in the *YCJA* and how these same victims were treated under the *Criminal Code,* when the offender was an adult.

[31] Section 111 of the *YCJA* automatically bans publication of the names, or other identifying information, of underage victims and witnesses of crime. The publication ban can be lifted if:

- after reaching 18 years of age, the child or young person wants the information published,
- the child or young person is younger than 18 and wants the information published, they can do so if they have parental consent, or
- the child or young person is deceased, their parents can consent to publication.

[32] Prior to the enactment of s. 486.4(2.2), the only recourse available to a youthful victim of

a crime committed by an adult offender was to apply for a discretionary publication ban under s. 486.5 of the *Code*. Although this difference existed between the *Criminal Code* and the *YCJA*, there is no evidence that there was a pressing need to change the *status quo*, or that closing the apparent legislative gap was the purpose for enacting s. 486.4(2.2). If the purpose was to close the apparent legislative gap, in my opinion, the *Criminal Code* amendment would have mirrored the *YCJA* and created an automatic publication ban of identifying information about young victims *and* witnesses, and would have included the same opt-out provisions as s. 111 of the *YCJA*.

Conclusion

[33] The Attorney General has not demonstrated that s. 486.4(2.2) addresses a "pressing and substantial" need. For this reason, I find that it infringes the freedom of expression rights protected by s. 2(b) of the *Charter* and is not saved by s. 1. Consequently, s. 486.4(2.2) does not apply in the case before me.

[34] This leaves the discretionary publication ban, which I address next.

Application for Discretionary Publication Ban

Introduction

[35] As I noted earlier, the prosecutor applied to ban publication of the names of everyone, adult and youth alike, who was injured in the mass shooting, and of any other information that might identify them. The application was made pursuant to s. 486.5 of the *Criminal Code*. The prosecutor, as agent for the Attorney General, applied for the publication ban and carries the burden of proving that the ban is needed. Once again, the Attorney General must establish an evidentiary foundation for the publication ban.

[36] Although the application for the publication ban is brought under the *Criminal Code*, it is important to note that, before s. 486.5 was enacted, the Supreme Court of Canada set out

a number of principles applicable to such applications. In *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835, at p 878, 1994 CanLII 39, Chief Justice Lamer said the following:

> "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."
>
> [Emphasis in original]

Later, in *R v Mentuck*, 2001 SCC 76, at para 32, Justice Iacobucci reformulated the *Dagenais* approach somewhat by saying that the "salutary effects of the publication ban must 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 trail, and the efficacy of the administration of justice."

[37] These principles came to be known as the *Dagenais/Mentuck* test. This test applies to all discretionary orders that seek to limit freedom of expression, freedom of the press, and the open court principle; see *Toronto Star Newspapers Ltd. v Ontario*, 2005 SCC 41, at para 7.

[38] In general, s. 486.5 codifies the *Dagenais/Mentuck* test. However, the Attorney General submits that amendments made to s. 486.5 on July 20, 2015, materially change the standard by which I must assess the application. Prior to July 20, 2015, s. 486.5(1) provided that a publication ban should be ordered only when it was *necessary* for the proper administration of justice – necessity being the standard articulated by the Supreme Court of Canada in *Dagenais* and *Mentuck*. The language of the amended section allows

me to order a publication ban if I think the ban *is in the interest of* the proper administration of justice. The Attorney General submits that this amendment lowers the threshold for ordering publication bans. However, the Attorney General did not offer me any guidance about how, in practice, the phrase "is in the interest of" differs from the word "necessary".

[39] On the face of it, I do not see any practical difference between "is necessary" and "is in the interest of". It seems to me that a publication ban will be in the interest of the administration of justice if, after considering and balancing the relevant factors and interests, I believe it is necessary for the proper administration of justice. In addition, assuming that such a purpose might withstand constitutional scrutiny, if Parliament intended to lower the threshold for infringing a constitutional right, in my opinion, Parliament would have used much clearer language to make its purpose clear.

[40] In addition to the general framework of the *Dagenais/Mentuk* test, subsection 486.5(7) sets out several specific factors I must consider when deciding whether to grant the publication ban application. Those factors are:

- the right to a fair and public hearing
- whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed
- whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation
- society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process
- whether effective alternatives are available to protect the identity of the victim, witness or justice system participant
- the salutary and deleterious effects of the proposed order
- the impact of the proposed order on the freedom of expression of those affected by it, and
- any other factor that the judge or justice considers relevant.

The right to a fair and public hearing

[41] The accused took no position on the application for the publication ban and I see no reason why the fairness of his trial would be affected adversely if I grant the prosecutor's application.

[42] As any member of the public may attend his trial, a publication ban will not affect the public nature of the hearing itself. However, as relatively few people actually will attend, the publication ban will attenuate the broader public nature of the proceedings to some degree.

Is there a real and substantial risk that the victims would suffer harm if their identities were disclosed?

[43] During the hearing of this application, none of the victims were present. The Attorney General did not file affidavits of the adult victims or affidavits of the young victims' parents. Instead, the Attorney General relied on evidence given by an RCMP officer who asked the victims, or their parents, for their feelings about continuing the publication ban.

[44] The RCMP officer testified that he spoke to each of the adult victims and to the parents of the underage victims. None of the adult victims expressed concerns about any specific harm, physical or psychological, that would befall them if their identities were widely known. The same applies to what the parents said on behalf of their children.

[45] According to the officer's testimony, all of the adult victims simply wanted to be left alone. Similarly, the parents of the young victims wanted their children to be left alone. Most expressed a desire for the case to be over with. Two of the adults told him that they were worried about how their loss of privacy might affect their use of social media, such as Facebook and Snapchat.

[46] The Attorney General also entered into evidence a letter to the prosecutor from the mother of one of the young victims. In it, she said that the reason she and her daughter do not want her daughter's name published is that they do not want the media to contact them.

[47] Leaving aside the question whether the prosecutor can rely on hearsay evidence to justify a publication ban, none of the evidence before me shows that any of the victims will suffer any physical or psychological harm if I do not continue the publication ban.

[48] After suffering the trauma of the shooting itself, and experiencing the subsequent disruption of their lives and of their community by hordes of police investigators, news reporters, and politicians, I am not surprised that the victims in this case just want to be left alone. However, I cannot reasonably infer that any of them suffered any specific harm as result of the attention they have received, or that any will suffer harm of any kind in the future if I lift the publication ban.

[49] The desire to be left alone is understandable but it does not, in and of itself, justify issuing a publication ban. To steal a quote from The Honourable Judge Dunnigan of the Provincial Court of Alberta, '[w]ere it otherwise, virtually every criminal proceeding in Canada would be shrouded in secrecy, contrary to the public interest in open court processes and to the rights of free expression enshrined in the *Charter*."; see *R v Gieschen*, 2014 ABPC 273, at para 71.

Do the victims, or any of them, need the order for their security or to protect them from intimidation or retaliation?

[50] When prompted by the RCMP officer who interviewed them, two of the adult victims said that they were worried about their safety if their names are published. However, neither gave him any reason for their fears.

[51] This was not a gangland shooting. There is no evidence that anyone other than R.D.F.

was involved. There is no evidence that any of the victims will face intimidation or risk retaliation from anyone inside or outside the community of La Loche if their names are made public. In fact, just the opposite appears to be the case.

[52] The victims have received wide support in the community as is evidenced by the affidavit of Heather Persson, the editor of the Saskatoon StarPhoenix, filed by the Applicants, to which is attached a copy of a screen grab from a Facebook posting by a local radio station advertising a fundraising initiative for the victims of the mass shooting and for their families, and in which each of the victims is named.

Society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process

[53] There is no evidence that failing to protect the anonymity of the victims in this case will discourage other victims of similar crimes from reporting that someone shot them or shot at them.

Whether effective alternatives are available to protect the identity of the victim, witness or justice system participant

[54] The Attorney General seeks a broad publication ban. The Applicants oppose it. Neither offered any alternatives for me to consider.

The salutary and deleterious effects of the proposed order

[55] The salutary effect of the proposed order would be that it would respect the victims' wishes to be anonymous to the public at large.

[56] The reason I refer to the public at large is that, in the small community of La Loche and in the nearby Clearwater River Dene Nation, it is very likely that the victims' identities are well-known.

[57] Balanced against the wishes of the victims is the deleterious effect that the publication ban would have on the open court principle, and on the *Charter*-protected right to freedom of expression of the Applicants and of the public at large.

[58] Except in the case of the offences enumerated in s. 486.4 of the *Criminal Code*, and in other cases where disclosing a victim or witness's name may risk harm befalling them, or where publication might deter others from reporting similar incidents, there is no general right to privacy for those involved in the criminal justice system.

[59] Finally, the Attorney General submitted that the *Canadian Victims Bill of Rights*, SC 2015, c. 13, s. 2 [the *Victims Bill of Rights*], raises the privacy rights of victims virtually to the level of a constitutionally protected right.

[60] The *Victims Bill of Rights* contains the following relevant provisions:

> s. 11 Every victim has the right to have their privacy considered by the appropriate authorities in the criminal justice system.
>
> s. 12 Every victim has the right to request that their identity be protected if they are a complainant to the offence or a witness in proceedings related to the offence.
>
> s. 19(1) The rights of victims under this Act are to be exercised through the mechanisms provided by law.
>
> s. 21 To the extent that it is possible to do so, every Act of Parliament enacted – and every order, rule or regulation made under such an Act – before, on or after the day on which this Act comes into force must be construed and applied in a manner that is compatible with the rights under this Act.

[61] In addition, s. 22 states that if there is an inconsistency between the *Victims Bill of Rights* and the provisions of any other Act, order, rule or regulation, the provisions of the *Victims Bill of Rights* prevail.

[62] Although the provisions of the *Victims Bill of Rights* prevail over conflicting legislation, it does not rise to the level of constitutional law. The *Charter*, however, *is* a constitutional

document.

[63] Historically, the courts have used the terms "right to privacy", "expectation of privacy", and "privacy interests" interchangeably, when referring to intrusion into the personal privacy of individuals or into their private places by state authorities. However, there is a very real distinction between something that one might refer to in everyday language as a right and an enumerated right under the *Charter*. Although, several sections of the *Canadian Charter of Rights and Freedoms* recognize privacy interests and protect individuals from unauthorized state intrusion into their privacy – for example: s. 8 (protection from unreasonable search and seizure), and s. 7 (protection of life, liberty, and security of the person) – privacy itself is not protected as a free-standing right.

[64] In addition, in my opinion, the *Victims Bill of Rights* does not change the law respecting applications for publication bans in the criminal law context. Sections 11 and 12 of the Act simply affirm and codify a crime victim's pre-existing common law right to apply for an order protecting their privacy. As required by s. 19(1) of the Act, s. 486.5 of the *Criminal Code* provides the mechanism by which a victim may implement their right.

The impact of the proposed order on the freedom of expression of those affected by it

[65] The Attorney General argued that the proposed order has little impact on the Applicants' freedom of expression in that they still can report about the proceedings even if they must leave out identifying information about the victims. As the Attorney General put it, the information banned from publication is just a "sliver" of information. The Applicants counter that the proposed order has a much broader effect in that the information they must leave out of their reporting would provide contextual background for their readers, listeners, and viewers, and for this reason help their readers make better sense of what the Applicants are reporting to them.

[66] Although both arguments have merit, what is most important is that the freedoms

protected by s. 2(b) of the *Charter* are central to the administrations of justice as they are designed to preserve the open and public nature of our system of justice. Mr. Justice Reilly's answer to a similar argument for banning the publication of the name of a witness in *R v Haffner*, 2003 CarswellOnt 6592, at para 20, [2003] OJ No 6027, eloquently expresses the appropriate response to the Attorney General's submission:

> "In all candor, speaking somewhat unjudicially, one is almost tempted in this case to say – I'll ban publication of her name, what's the big deal, let's get on with the trial and get to the merits. It's not going to affect anything. However, it does. It offends the principle of freedom of expression."

Any other factor that the judge or justice considers relevant

[67] An additional relevant factor is that, to some extent, the prosecutor's application seeks to close the stable door after the horse has bolted. The names of the victims appeared in the Facebook notice for the fundraising event which I referred to earlier. Ms. Persson's affidavit also included a copy of an article about an interview with one of the adult victims that appeared in the Cumberland News Now, a Nova Scotia newspaper. In addition, the Applicants entered into evidence, copies of Facebook posts by two of the underage victims, and by one of the adult victims, which clearly reveal that they were victims of the shooting. Notably, the adult victim was one of those who said she was worried about how publishing her name might affect her use of Facebook and other social media.

[68] Admittedly, the newspaper article was published, and the Facebook posts were posted, before the interim publication ban was in place. However, the fact that much of the information about the victims is widely known in their community, the fact that some of the victims posted identifying information on social media – a far from private place – and that information about one of the victims already is known as far away as Nova Scotia, weakens the Attorney General's position that the victims' identities should remain hidden.

[69] For these reasons, I am not convinced of the need for, or the effectiveness of, imposing an *ex post facto* publication ban.

Conclusion

[70] For all of the foregoing reasons, in my opinion, the requested publication ban is not in the interest of the proper administration of justice. Consequently, I deny the Attorney General's application under s. 486.5 of the *Criminal Code* for a continuing publication ban of the names of, and identifying information about, the victims. However, the automatic publication ban under s. 111 of the *YCJA* remains in place. For practical purposes, this means that the Applicants now may publish the names of the adult victims, but still cannot publish identifying information about the underage victims.

M. Martinez, J.