QUEEN'S BENCH FOR SASKATCHEWAN

Date: **2016 01 15**
Docket: QBG 1640 of 2015
Judicial Centre: Saskatoon

BETWEEN:

OFFICE OF THE CHIEF CORONER

Applicant / Respondent

- and -

CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES
and THE ELIZABETH FRY SOCIETY OF SASKATCHEWAN

Respondents / Applicants

Counsel:

Charita N. Ohashi	for the applicant/respondent, Office of the Chief Coroner
Gillian E. Gough	for the respondents / applicants Canadian Association of Elizabeth Fry Societies and The Elizabeth Fry Society of Saskatchewan
Bruce W. Gibson	for the interested party, Attorney General for Canada on behalf of Correctional Service Canada
Russell T. Hart	for the interested parties, CTV News, CBC News, Global News, Rawlco Radio and Postmedia Network Canada Corporation

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FIAT
January 15, 2016

ACTON J.

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[1] The applicant, Office of the Chief Coroner, is seeking two orders:

1. An order that the document "Board of Investigation into the Death by Unknown Cause of a Woman Offender at the Regional Psychiatric Centre, Prairie Region, on January 20, 2013"

authored by the Board of Investigation appointed by the Commissioner of Corrections pursuant to ss. 19 and 20 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [BOI Report] and any other documents filed with the Court which reference or pertain to the BOI Report, once filed, be sealed and removed from the general court file; and

2. An order that the judicial review application brought by the Canadian Association of Elizabeth Fry Societies and the Elizabeth Fry Society of Saskatchewan [collectively Elizabeth Fry] be heard *in camera* to allow for reference to the BOI Report be made in argument (which was later withdrawn).

The Facts

[2] The BOI Report is a document prepared by a three-person Board of Investigation appointed by the Commissioner of Corrections pursuant to ss. 19 and 20 of the *Corrections and Conditional Release Act*. It was provided to the Office of the Chief Coroner by the Department of Justice Canada on the following trust conditions:

(a) that it only be used as background information and for preparation leading up to the coroner's inquest into the death of Kinew James;

(b) that it not be further distributed, copied or used in any way other than for informational purposes;

(c) that it is not to form part of the documents that will be made exhibits during the course of the inquest unless varied by the presiding coroner; and

(d) that it may be distributed to counsel representing parties with standing on the same trust conditions.

[3] A coroner's inquest into the death of Ms. James is presently scheduled for the week of April 25, 2016.

[4] Elizabeth Fry applied to the inquest coroner for standing at the inquest. The inquest coroner denied standing by way of a letter to Elizabeth Fry's counsel dated November 18, 2015.

[5] Elizabeth Fry commenced an application for judicial review with respect to the denial of their application for standing, which has been adjourned to February 4, 2016, to be heard in Chambers.

[6] The Office of the Chief Coroner is the respondent to the judicial review application and, on December 2, 2015, was served with a Notice to Obtain Record of Proceedings in that regard.

[7] The BOI Report is among the documents properly filed with the Court as part of the Certified Record of Proceedings in accordance with Rule 3-58 of *The Queen's Bench Rules* as it falls within the category of "anything else in our possession relevant to the decision or act".

The Law

[8] Counsel for each of the parties represented agree that the law respecting the issues before the Court in regard to publication bans and sealing orders in Canada is what has become known as the "*Dagenais/Mentuck* test" set forth by the Supreme Court of Canada in *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835 [*Dagenais*], and *R v Mentuck*, 2001 SCC 76, [2001] 3 SCR 442 [*Mentuck*], which has been adopted in its entirety by the Saskatchewan Court of Appeal in *101114386*

Saskatchewan Ltd. v Saskatchewan (Financial and Consumer Affairs Authority), 2013 SKCA 122, 427 Sask R 25 [*101114386 Saskatchewan Ltd.*]. The *Dagenais/Mentuck* test has been set forth concisely by Ottenbreit J.A. in *101114386 Saskatchewan Ltd.*, wherein he stated at paragraphs 10-12:

> **10** In Canada there is a constitutional right to the dissemination of information about judicial proceedings. In *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, at para. 32, the Supreme Court of Canada established that the constitutional right to disseminate information about judicial proceedings can only be restricted when:
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> (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
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> (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.
>
> This is called the *Dagenais/Mentuck* test.
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> **11** In a more recent decision, *CBC v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19, the Supreme Court of Canada noted:
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> > 1 The open court principle is of crucial importance in a democratic society. It ensures that citizens have access to the courts and can, as a result, comment on how courts operate and on proceedings that take place in them. Public access to the courts also guarantees the integrity of judicial processes inasmuch as the transparency that flows from access ensures that justice is rendered in a manner that is not arbitrary, but is in accordance with the rule of law.
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> **12** That Court has also long recognized that there are exceptions to this principle:
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> > The general principles are as follows: (1) Every court has a supervisory and protecting power over its own records. (2) The presumption is in favor of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right. (3) Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. Curtailment of public accessibility can only be justified where there is present the need

> to protect social values of superordinate importance. One of these is the protection of the innocent.
>
> *(A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175)

The onus is therefore on the person seeking the publication ban to prove that it is warranted in the circumstances by convincing evidence.

[9] Ottenbreit J.A. goes on further at paragraphs 18-20 to set out how the *Dagenais/Mentuck* test is applied, wherein he states:

> **18** ... How the *Dagenais/Mentuck* test is applied has been outlined in *M.E.H. v. Williams*, 2012 ONCA 35, 346 D.L.R. (4th) 668. There must be a public interest at stake. Personal concerns of a litigant standing alone will not satisfy the necessity branch of the *Dagenais/Mentuck* test:
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> > 25 *Mentuck* describes non-publication and sealing orders as potentially justifiable if "necessary in order to prevent a serious risk to the proper administration of justice". A serious risk to public interests other than those that fall under the broad rubric of the "proper administration of justice" can also meet the necessity requirement under the first branch of the *Dagenais Mentuck* test: *Sierra Club of Canada*, at paras. 46-51, 55. The interest jeopardized must, however, have a public component. Purely personal interests cannot justify non-publication or sealing orders. Thus, the personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test: *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185; *Sierra Club of Canada*, [2002] 2 S.C.R. 522, at para. 55; *A.B. v. Bragg Communications Inc.*, 2011 NSCA 26, 301 N.S.R. (2d) 34, at paras. 73-75.
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> **19** The Court went on to say:
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> > 31 The necessity branch focuses exclusively on the existence of a serious risk to a public interest that can only be addressed by some form of non-publication or sealing order. The potential benefits of the order are irrelevant at this first stage of the inquiry: *Mentuck*, at para. 34. Unless a serious risk to a public interest is established, the court does not proceed to the second branch of the inquiry where competing interests must be balanced.
> >
> > 32 As there is no balancing of competing interests at the first stage, it is wrong at that stage to consider the extent to which the societal interests underlying and furthered by freedom of expression and the open court principle are engaged in that particular case. Even if those values are only marginally engaged (the respondent's submission in this case), restriction on media access to and publication in respect of court

> proceedings cannot be justified unless it is necessary to prevent a serious risk to a public interest. A court faced with a case like this one where decency suggests some kind of protection for the respondent must avoid the temptation to begin by asking: where is the harm in allowing the respondent to proceed with some degree of anonymity and without her personal information being available to the media? Rather, the court must ask: has the respondent shown that without the protective orders she seeks there is a serious risk to the proper administration of justice?
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> **20** With respect to freedom of expression and the open court principle, the Court stated:
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> > 33 In approaching the necessity branch of the inquiry, the high constitutional stakes must be placed at the forefront of the analysis. Freedom of expression, including freedom of the press and other media communications, is a constitutionally protected fundamental freedom. The constitutional right to freedom of expression protects the media's access to and ability to report on court proceedings. The exercise of this fundamental freedom in the context of media coverage of court proceedings is essential to the promotion of the open court principle, a central feature of not only Canadian justice, but Canadian democracy: *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19, at paras. 1-2; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at para. 26; *Ottawa Citizen Group Inc. et al. v. R.* (2005), 75 O.R. (3d) 590 (C.A.), at paras. 50-55; *R. v. Canadian Broadcasting Corporation*, 2010 ONCA 726, 102 O.R. (3d) 673, at paras. 22-24.
> >
> > 34 Limits on freedom of expression, including limits that restrict media access to and publication of court proceedings, can be justified. However, the centrality of freedom of expression and the open court principle to both Canadian democracy and individual freedoms in Canada demands that a party seeking to limit freedom of expression and the openness of the courts carry a significant legal and evidentiary burden. Evidence said to justify non-publication and sealing orders must be "convincing" and "subject to close scrutiny and meet rigorous standards": *R. v. Canadian Broadcasting Corp.*, at para. 40; *Toronto Star Newspapers Ltd. v. Ontario* (2003), 67 O.R. (3d) 577 (C.A.), at para. 19, aff'd 2005 SCC 41, [2005] 2 S.C.R. 188, at para. 41; see also *Ottawa Citizen Group*, at para. 54.
>
> ... [Emphasis added]

[10] It is noted that the applicant must satisfy both arms of the *Dagenais/Mentuck* test before a sealing order or publication ban will be ordered.

[11] In summary, the Saskatchewan Court of Appeal has established in *101114386 Saskatchewan Ltd.* the two requisites which are required before granting the requests of the applicant, namely, (a) is such an order 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.

Position of the Applicant

[12] The applicant cites three risks to the proper administration of justice if the sealing order is not granted; namely:

1. The applicant would be placed in a position of having to file the BOI Report contrary to trust conditions imposed by the Department of Justice Canada;

2. The filing of the unsealed BOI Report may prejudice the inquisitorial process of the inquest through its potential impact on the jury and hinder the inquest coroner's ability to control these proceedings; and

3. It would result in the publication of personal information related to the deceased and others which is irrelevant to the judicial review application and probably irrelevant to the inquest.

[13] With respect to the first ground, the applicant argues that by failing to seal the BOI Report if the order is not granted, the Office of the Chief Coroner is in violation of the trust conditions agreed to with Correctional Service Canada [CSC] respecting the BOI Report and puts the receipt of further such reports being received from the Department of Justice Canada for the purpose of information and preparation in advance of a coroner's inquest in jeopardy. Failure to file the report puts the applicant in violation of Rule 3-58 of *The Queen's Bench Rules*.

[14] With respect to the second ground, the applicant argues that the purpose of an inquest is for the jury to inquire into the circumstances of a person's death and make recommendations that it considers to be of assistance in preventing similar deaths. It is not the purpose of the inquest to find fault. The inquest coroner may summon or permit any person to give oral evidence or produce any document or thing in the person's control that is relevant to the subject matter of the inquest. The applicant argues that by releasing the BOI Report in advance of the inquest, such action could taint the jury pool and might impact on the jury's view of the evidence that will be presented at the inquest and any recommendations to be made. The applicant argues that evidence presented at the inquest may differ from what is reflected in the BOI Report, which was not taken under oath but is, rather, a summary of recommendations by the investigative committee as to their conclusions as to how the internal operation of a CSC facility failed, why and what may be rectified to avoid further similar incidents.

[15] The applicant argues that the inquest is controlled by the coroner, who may exclude the public from all or part of the inquest and order that all or part of the evidence not be published or broadcast where the coroner is of the opinion that national security may be endangered or the possibility of serious harm or injury to any person justifies excluding the public and making of the order.

[16] To not seal the BOI Report could remove this ability from the coroner and hinder his management of the inquest procedure.

[17] With respect to the third ground, being publication of restricted and irrelevant information, the applicant argues that the BOI Report may contain irrelevant information and opinions of the authors, which is not relevant to the issues before the inquest.

[18] With respect to the second part of the *Dagenais/Mentuck* test, the

applicant argues that the Chief Coroner is not seeking to limit public access to the inquest itself. However, he does have the power to make such a ruling under s. 32(2) of *The Coroners Act, 1999*, SS 1999, c C-38.01. Subject to this limiting power, the public will have access to all the evidence presented at the inquest as well as the findings and recommendations of the jury.

[19] The inquest includes first person accounts of witnesses, tested by cross-examination, as well as documentation admitted into evidence, and the findings of the jury and recommendations thereof; whereas, the BOI Report, as previously stated, does not have statements under oath and cross-examination but, rather, interviews of individuals, a compiling of information and the making of possible recommendations.

Position of Elizabeth Fry

[20] Elizabeth Fry counters the argument of the applicant:

(a) that it must demonstrate that a sealing order is necessary to prevent a serious risk to the proper administration of justice; and

(b) that the salutary effects of the publication ban outweigh the deleterious effects.

(a) Publication of restricted and irrelevant personal information

[21] Elizabeth Fry argues that personal privacy concerns alone will not satisfy the necessity branch of the *Dagenais/Mentuck* test as the interests jeopardized must have a public component. See *M.E.H. v Williams*, 2012 ONCA 35, 346 DLR (4th) 668 (Ont CA), affirmed by the Saskatchewan Court of Appeal in *101114386 Saskatchewan Ltd.*

[22] It is argued that the applicant has not made any links between the

personal privacy concerns and larger issues relating to the proper administration of justice. As well, the applicant has acknowledged that the BOI Report would be available to individuals through an access to information request in a redacted form.

[23] It is also argued that much of the information obtained from the BOI Report will be made public by the witnesses and cross-examination of witnesses disclosed in the inquest, which is a public proceeding.

[24] For these reasons, Elizabeth Fry alleges that the applicant's concern with personal and private information, much of which is irrelevant, should be given no weight.

(b) Trust conditions

[25] With respect to the trust conditions argument, Elizabeth Fry argues that the applicant's position of conflict was a position created entirely of their own making when they chose to accept the trust conditions. It is accepted that this breach of trust conditions could lead to repercussions to further use of this practice between CSC and the Office of the Chief Coroner. However, this alone is not a valid justification for the issuance of a sealing order.

(c) Prejudice to the integrity of the inquest

(i) Tainting the jury

[26] With respect to the third issue, being potential prejudice to the integrity of the inquest, Elizabeth Fry argues that with respect to the tainting of the jury, there are other mechanisms available far less deleterious than a publication ban or sealing order which may be used to protect against the tainting of the jury. Some of these involve examination of potential jurors for taint and a strong direction to the jury as to

their duties, obligations and the evidence that they are to consider or not to consider in making their decision.

(ii) Usurpation of the role of the Coroner

[27] With respect to the issue of the usurpation of the role of the coroner, Elizabeth Fry argues that there was no new evidence provided to the Court by the applicant nor the CSC to suggest that there is any material in the BOI Report that could in any way affect national security or have the possibility of creating serious harm or injury to any person, which are the only grounds on which the coroner may limit public access to the information presented during the inquest.

[28] The Court is not to give credence to remote and speculative dangers in applying the test.

[29] Elizabeth Fry argues that the applicant has not satisfied the first stage of the *Dagenais/Mentuck* test in that a sealing order is necessary in order to prevent serious risk to the administration of justice because reasonably alternative measures will not prevent the risk.

[30] Even if the first arm of the test has been met, the salutary effects of a publication ban do not outweigh the deleterious effects on the rights and interests of the parties and the public.

Position of the Media

[31] Counsel for the media argues in paragraph 6 to 10 of their brief as follows:

> 6. In *Dagenias* [*sic*] *v. CBC* [1944] 3 SCR 835; (1994), 120 DLR (4th) 12. The Supreme Court of Canada established that the freedom of the press provided in Section 2(b) of the Canadian Charter of Rights and Freedoms ("**The Charter**") is a policy

objective of equal value to the right to a fair trial provided by section 11(d) of the Charter.

7. Freedom of the press and expression are freedoms to be enjoyed by the Canadian public which freedoms should not be impaired except in strict compliance with the proper judicial test.

8. The judicial test, as established by Dagenias [*sic*], *supra*, and subsequently modified in *R v. Mentuck* [2001] 3 SCR 442, and as adopted in *101114386 Saskatchewan Ltd. v. Saskatchewan (Financial and Consumer Affairs Authority)*, 2013 SKCA 122, 427 Sask R 25 and referred to in paragraph 10 of the Memorandum of Law submitted by the Applicant, is:

    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.

9. The onus [is] on the Applicant to [justify denying the] public access to the open court. See *R v. Mentuck*, *supra*, at paragraph 38 where Iacobucci, J. says:

> "...The consideration of unrepresented interests must not be taken lightly, especially where *Charter*-protected rights such as freedom of expression are at stake. It is just as true in the case of common law as it is of statutory discretion that, as La Forest J. noted, "[t]he burden of displacing the general rule of openness lies on the party making the application": New Brunswick, *supra*, at para. 71; Dagenais, *supra*, at p. 875. ..."

10. The exercise of judicial discretion should be based on sworn facts sufficiently cogent to establish an evidence based determination that a real and substantial risk exists. In *R v Mentuck*, *supra*, Iacobussi [*sic*], J. said at paragraph 39:

> "It is precisely because the presumption that courts should be open and reporting of their proceedings should be uncensored is so strong and so highly valued in society that the judge must have a convincing evidentiary basis for issuing a ban."

[32] With respect to the irrelevant personal information argument, counsel argues that the operation of the coroner's inquest, which has not as yet been held, does not determine relevance of evidence in this Court proceeding and reminds the Court that the BOI Report is not claimed to be a privileged report.

[33] Counsel also refers the Court to a number of cases wherein innocent parties would suffer financial loss if information was disclosed and the police officer who had previously been under investigation, which investigation was discontinued, sought to continue a prohibition order to protect his innocence, both of which were rejected by courts as insufficient reasons to impair the "open court" principle or the freedom of the press.

Position of Correctional Service Canada

[34] Counsel for CSC reminded the Court that the BOI Report was not taken under oath. It involved a discussion with various individuals within the CSC and is a review of the functioning of the CSC in various portions of its facilities and operations, which is looking quickly for reasons for the failure in the operation of a portion of their facilities with a view to providing quick recommendations to rectify the situation.

[35] The inquest, on the other hand, is not to assess blame and does involve the use of witnesses and cross-examination under oath. CSC is concerned that members of the jury may be unduly influenced by the report and that it may affect the ability of the coroner to control the process involved in the inquest.

Decision

[36] As stated previously, the applicant must satisfy both arms of the *Dagenais/Mentuck* test before the sealing order or publication ban are to be ordered.

[37] There is a high evidentiary standard set by the Supreme Court of Canada in *Mentuck*, wherein Iacobucci J. stated at paragraph 43:

> **43** It is my view that, on balance, the appellant does not, at this first stage of the test, make out a case that the ban as to operational methods should have issued. The serious risk at issue here is that the efficacy of present and future police operations will be reduced by publication of these details. I find it difficult to accept that the publication of information regarding the techniques employed by police will seriously compromise the efficacy of this type of operation. There are a limited number of ways in which undercover operations can be run. Criminals who are able to extrapolate from a newspaper story about one suspect that their own criminal involvement might well be a police operation are likely able to suspect police involvement based on their common sense perceptions or on similar situations depicted in popular films and books. While I accept that operations will be compromised if suspects learn that they are targets, I do not believe that media publication will seriously increase the rate of compromise. The media have reported the details of similar operations several times in the past, including this one. In spite of this publicity, Sgt. German, in his affidavit, was only able to positively identify one instance in which media reports arguably resulted in the compromise of an operation.

[38] In *Stanford v Ontario (Eastern Regional Coroner)* (1989), 33 OAC 241 (WL) (Ont H Ct J), the Court commented on the importance of the public nature of an inquest, wherein it stated:

> **101** One of the functions of an inquest into a death in a prison or other institution not ordinarily open to public view is to provide the degree of public scrutiny necessary to ensure that it cannot be said, once the inquest is over, that there has been a whitewash or a cover-up. There is no better antidote to ill-founded or mischievous allegations and suspicions than full and open scrutiny. The granting of standing to the applicants in this case will provide added reassurance that the inquest has the benefit of all the evidence and perspectives necessary to ensure the fullest scrutiny.

[39] In the Ontario Court of Appeal decision in *Toronto Star Newspapers Ltd. v Ontario* (2003), 232 DLR (4th) 217 (Ont CA), Justice Doherty stated at paragraphs 26 and 27:

> **26** I reject the first argument advanced in support of the sealing order. The necessity standard described in *Mentuck* is a high one. The Crown must demonstrate, based on evidence, viewed through the lens of judicial experience, that absent a sealing order there is a serious risk to the proper administration of justice. No doubt, in a given case, early disclosure of material contained in an information to obtain a search warrant may significantly impair the ability of the police to obtain accurate statements from potential witnesses. Again, in a given case, that impairment may be such as to result in a serious risk to the proper administration of justice. The Crown must, however, demonstrate the risk in a particular case. It is not enough to rely on the general proposition that pre-trial publication of the details of a police investigation risks the tainting of statements taken from potential witnesses. If that general proposition was enough to obtain a sealing order, the presumptive rule would favour secrecy and not openness prior to trial. A general assertion that public disclosure may distract from the ability of the police to get at the truth by tainting a potential witness's statement is no more valid than the equally general and contrary assertion that public disclosure enhances the ability of the police to get at the truth by causing concerned citizens to come forward with valuable information.
>
> **27** Detective Sergeant Clelland offers no specific basis for his concern that potential witnesses will be tainted if the contents of the information are revealed. He points to no specific information and to no specific individual. He very candidly acknowledges that disclosure would do no more than "make it more difficult for the Ontario Provincial Police to gather the best evidence in respect of the investigation". I can accept that the police might have an advantage in questioning some individuals if those individuals were unaware of the details of the police investigation. Fundamental freedoms, like the freedom of expression and freedom of the press, cannot, however, be sacrificed to give the police a "leg up" on an investigation. As Iacobucci J. observed in *R. v. Mentuck*, *supra*, at para. 34, access to court documents cannot be denied solely because maintaining the secrecy of those proceedings would give the police an advantage in the conduct of their investigation.

[40] The grounds presented by the applicant are somewhat speculative. The suggestion that the jury may shirk their duty in the inquest by rubberstamping recommendations made in the BOI Report is conjecture without evidence before the Court.

[41] Our judicial system has been using juries made up of an individual's peers for generations. It is an accepted principle that when jurors are provided with

proper instruction as to their duties and what evidence they are to consider and what they are to ignore, they carry out their duties in a responsible manner. The Court has been provided with no evidence that the jury at this inquest would act otherwise.

[42] With respect to the issue of trust conditions between CSC and the Office of the Chief Coroner, this Court does note the applicant's concern. However, this Court does accept the position that trust conditions between two parties cannot trump the proper administration of justice nor create a serious risk to the proper administration of justice. These trust conditions do not justify curtailing public access to information and the constitutional right to dissemination of information about judicial proceedings. If this has a negative effect on the exchange of information between CSC and the applicant in the future, providing a redacted copy of a BOI report may solve the trust condition issue.

[43] With respect to the argument that irrelevant information would be released, the Court does find no merit in this reason for granting a sealing order. The information is irrelevant and has no bearing on the inquest, nor are personal concerns of relatives of the deceased nor concerns of members of the BOI committee sufficient to satisfy the first part of the test.

[44] The Court finds the statement that to not seal the BOI Report could remove the ability of the coroner to manage the inquest procedure as speculative and without foundation.

[45] The application fails on the first step of the *Dagenais/Mentuck* test. It has not established sufficient necessity for a publication ban or sealing order, as a serious risk to a public interest has not been established. The onus is on the applicant to provide convincing evidence of the need for a publication ban. This has not been done. Cogent evidence must be provided, not mere conjecture and speculation.

[46] Even if the applicant had succeeded on the first step, leading to a consideration of the second step, a clear instruction to the jury would be sufficient to mitigate any anticipated danger created as a result of the release of the BOI Report to the public. The application would have failed on the second step.

[47] With respect to the second step of the test, the Court adopts the words of Ottenbreit J.A. in *101114386 Saskatchewan Ltd.* at paragraphs 24-26, wherein he states:

> **24** However, I am also not convinced that even if necessity were proven that the salutary effects of the publication ban outweigh the deleterious effects within the meaning of the *Dagenais/Mentuck* test:
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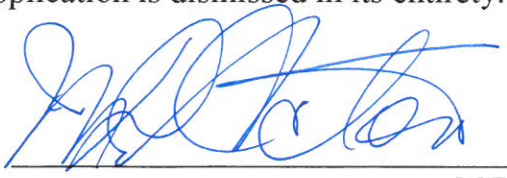
> > 24 The core values of freedom of expression that the *Charter* seeks to protect were articulated by the Supreme Court in *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927, at para. 53:
> >
> > > [53] ... (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed ... .
>
> **25** The ability of the media to report on the administration of justice is important to collective rights. The public would benefit from a full and accurate reporting of this case. Such reporting serves to improve the public's understanding of the court process.
>
> **26** There is a high value placed on an open courtroom and the media's ability to disseminate information on what happens in the administration of justice. The open court principle is "inextricably linked to the freedom of expression protected by s. 2(b) of the *Charter* and advances the core values therein" (*Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, para. 26).

[48] For the above reasons, the application is dismissed in its entirety.



J.
M.D. Acton