SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Barrett*, 2016 NSSC 11

Date: 2016-01-08
Docket: *Syd.* No. 434006
Registry: Sydney

Between:

Her Majesty the Queen

v.

Thomas Barrett

Judge:	The Honourable Justice Robin C. Gogan
Heard:	January 4, 2016, in Sydney, Nova Scotia
Written Decision:	January 8, 2015
Counsel:	Brian F. Bailey, for the Applicant David G. Coles, Q.C., for the Respondent Canadian Broadcasting Corporation and the Cape Breton Post Kathryn Pentz, Q.C. and Diane McGrath, Q.C. for the Crown

By the Court:

Introduction

[1] On January 18, 2016, a trial by judge alone will commence against Thomas Barrett ("**the accused**") on a single count of second degree murder (the "**first trial**"). This trial involves the death of Brett Elizabeth MacKinnon. On September 12, 2016, the accused will begin a second trial on a charge of second degree murder involving the death of Laura Jessome (the "**second trial**"). The second trial is to proceed by way of judge and jury.

[2] The accused seeks a publication ban respecting the first trial until the conclusion of the second trial. The Crown takes no position on this application. The application is opposed by the Canadian Broadcasting Corporation and The Cape Breton Post (the "**media**"). Ultimately, the outcome of this application involves the balancing of conflicting rights. The accused has the right to a fair trial by an impartial tribunal and the public has the right to freedom of expression, including freedom of the press.

[3] For the reasons that follow, I dismiss the application for a publican ban.

Background

[4] As the introduction reflects, the background of this application can be summarized succinctly. The accused is scheduled to face 2 second degree murder trials in 2016. The first trial will begin on January 18, 2016 and the second trial will commence September 12, 2016. The trials, as currently scheduled, are roughly 9 months apart. The accused's second trial is by way of judge sitting with a jury. The accused is concerned that media coverage of the first trial will be viewed by potential jurors and could influence deliberations in the second trial.

Issues

[5] The main issue before the Court is whether a publication ban on the first trial should be granted until the conclusion of the second trial. If the application is unsuccessful, the media seek costs.

Position of the Parties

The Applicant/Accused

[6] The accused submits that publication of the evidence heard at his first trial "could unduly influence, affect or prejudice the jury" at his second trial. Consequently, a publication ban is necessary to ensure a fair second trial and the

right of the accused "to make full answer and defence is not unjustly impaired and infringed".

The Media

[7] The media vigorously oppose any publication ban. It is their position that the accused has not satisfied the evidentiary burden upon him to obtain the requested ban which would curtail the constitutional rights of the media and the public and conflict with the fundamental principle that Courts are open.

The Crown

[8] As noted above, the Crown takes no position on this application.

Analysis

The Law

[9] The parties agree that the relief sought is discretionary. They further agree that the applicable legal principles are set out in 2 decisions of the Supreme Court of Canada. The first is ***Dagenais v. Canadian Broadcasting Corp.***, [1994] 3 S.C.R. 835 and the second is ***R. v. Mentuck***, 2001 SCC 76. Since the decision in ***Mentuck***, *supra*, the test to be applied is well settled. Beginning at para. 22 of

Mentuck, Iacobucci J. explained the evolution of the law in this area and restated the applicable test for a publication ban:

> 22 In considering whether this publication ban ought to have been issued, the starting point is once again this Court's decision in Dagenais, supra. … There, as here, the ban was sought on the basis of the court's common law jurisdiction to order publication bans. However, the specific rationale for the publication ban in that case was, unlike in the instant case, the need to guard the fair trial interests of accused persons.
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> 23 Lamer C.J. found that the "pre-Charter common law rule governing publication bans emphasized the right to a fair trial over the free expression interests of those affected by the ban". (Dagenais, supra, at p. 877). Given the courts' obligation to develop the common law in a manner consistent with Charter values, however, he found that it was inappropriate to continue assigning this priority to the right of the accused to a fair trial, when s. 2(b) of the Charter recognized an equally important right to freedom of expression. Instead, he adopted a new approach to assessing whether a common law publication ban would be ordered. This new approach aimed to balance both the right to a fair trial and the right to freedom of expression rather than enshrining one at the expense of the other. The approach adopted was intended to reflect the substance of the Oakes test and its valuable function in determining what reasonable limits on the rights to be balanced might be…
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> …
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> 25 LaForest J. writing for a unanimous Court in New Brunswick, supra, found that the exclusion of the public and the media from the courtroom under s. 486(1) was a violation of the freedom of the press under s. 2(b)…However, LaForest J. also found that the violation was a reasonable limit demonstrably justified under s. 1 of the Charter, provided that the discretion was exercised in accordance with the Charter's demands in each individual case…
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> 26 LaForest J. also noted that the burden of displacing the presumption of openness rested on the party applying for the exclusion of the media and the public. Furthermore, he found that

there must be a sufficient evidentiary basis on the record from which a trial judge could properly assess the application (which may be presented in a voir dire), and which would allow a higher court to review the exercise of discretion…

27 Both Dagenais and New Brunswick set out a similar approach to be used in deciding whether to order publication bans, in view of the rights to freedom of expression and freedom of the press protected by s. 2(b) of the Charter. This approach, in ensuring that the judicial discretion to order publication bans is subject to no lower standard of compliance with the Charter than legislative enactment, incorporates the essence of s. 1 of the Charter and the Oakes test…

…

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 that case, it is now necessary to frame it more broadly….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 herein would be:

> A publication ban should only be ordered when:
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> (a) such an order is necessary to prevent a serious risk to the proper administration of justice because reasonable 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.

33 … This version encompasses the analysis conducted in Dagenais, and Lamer, C.J.'s discussion of the relative merits of the publication ban remain relevant. Indeed, in those common law publication ban cases where only freedom of expression and trial

> fairness issues are raised, the test should be applied precisely as it was in Dagenais…
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> …
>
> 34 …One required element is that the risk in question be a serious one, or as Lamer, C.J. put it in Dagenais, a "real and substantial" risk. That is, it must be a risk the reality of which is well grounded in the evidence…
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> …
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> 39 It is precisely because the presumption that courts should be open and reporting of their proceeding should be uncensored is so strong and so highly valued in our society that the judge must have a convincing evidentiary basis for issuing a ban…

[10] The foregoing analysis is now referred to as the ***Dagenais-Mentuck*** test which has been applied repeatedly and consistently since the decision in ***Mentuck***.

[11] The parties rely on a number of further authorities. The applicant relies primarily upon the decision of Cacchione J. in ***R. v. Shrubsall***, [2000] N.S.J. No. 315. In that case, a partial publication ban was ordered in circumstances involving 2 judge and jury trials of the same accused scheduled to commence less than 2 months apart (with approximately 2 weeks in between). A publication ban of the first trial was sought in order to reduce the risk that the accused's second trial might be rendered unfair by publication of adverse pre-trial publicity (including evidence from the first trial). The trial judge applied ***Dagenais***, *supra*, and found a real and substantial risk to the fairness of the second trial. He further found no

reasonable alternative measures existed in the circumstances. The ban permitted publication of the evidence heard by the jury with certain specific exceptions.

[12] The decision in ***Shrubsall*** came just over 1 year before the Supreme Court of Canada released its restatement in ***Mentuck***, *supra*. In the over 15 years since then, there have been many cases which have considered the relevant principles and conducted the required balancing in a variety of circumstances.

[13] A publication ban was ordered in the more recent decision in ***R. v. Ebanks v. Kelly***, 2010 ONSC 2086. In that case, 2 co-accused pleaded guilty to second degree murder on March 16, 2010. The guilty pleas were based upon an extensive Agreed Statement of Facts which presumed the guilt of a third co-accused. The third co-accused was scheduled to proceed to trial in the same district by judge with jury only a month later. The Crown applied for a publication ban respecting all information in support of the guilty pleas and sentencing of the first 2 co-accused. The purpose of the publication ban was to protect the fair trial rights of a co-accused. The Crown submitted that the ban should continue until the conclusion of the trial of the third co-accused.

[14] Fuerst J. relied upon the reasons in ***Degenais***, *supra*, and ordered a time limited publication ban until either the jury retired in the upcoming trial or June 1,

2010, whichever came first. Therefore, the period of the publication ban was, at most, approximately 2.5 months.

[15] In allowing the application, Justice Fuerst concluded that a publication ban was necessary to prevent a real and substantial risk to the fairness of the upcoming trial and that reasonably available measures would not prevent the risk. In reviewing the alternatives to the publication ban, she reasoned:

> [23] I am satisfied that while a challenge for cause is very often an effective response to concerns about pre-trial publicity, it may be less so where the publicity occurs in close proximity to the trial, as in this case. Further, to resort to a challenge for cause would lead to delay, because Ms. MacIntyre's counsel will require additional time to gather relevant materials to determine the appropriate challenge questions. It would also add to the length of the trial itself. I am also satisfied that judicial direction to the jury, no matter how strong, will not suffice given the nature of the information on which the guilty pleas are founded. The pre-trial publicity would likely create impressions in the minds of potential jurors that could not be consciously dispelled by judicial direction, a danger recognized in *Dagenais* at para. 88.

[16] By contrast, the media provided a number of authorities in which publication bans were declined. Reference is made to oft-quoted reasons in ***R. v. Kossyrine*** [2011] O.J. No. 4495, as well as the following: ***Pearson v. Metroland Media Group Limited*** [2011] O.J. 5534; ***National Bank Financial Ltd. v. Potter***, 2012 NSSC 90; ***M.E.H. v. Williams***, 2012 ONCA 35; ***R. v. Larue***, [2012] YKSC 15;

and ***R. v. Justin Bourque***, 2014 NBQB 263. In both ***Pearson***, *supra* and ***R. v. Larue***, *supra*, publication bans were denied in cases where there was a 5 month gap between related jury trials. In ***Pearson***, the first and second trial involved separate murder charges against the same accused. In dismissing that application, Glass J. reasoned:

> **Analysis**
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> **19** Mr. Pearson's second trial is scheduled to commence on November 7, 2011. The gap of five months is significant. If the second trial were following the first one immediately, there would be a greater concern for a fair trial for Mr. Pearson.
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> **20** Open courts are found at the core of democratic societies. In Toronto Star v. Ontario, [2005] 2 S.C.R. 188 at paragraph 1, the Supreme Court commenced the decision with the observation that the administration of justice thrives on exposure to light and withers under a cloud of secrecy.
>
> **21** With the separation of time between the two trials, I conclude that the application should be dismissed. Reporting the Ottley trial will not create an unfair trial for Mr. Pearson in that trial. The benefit of prohibiting the publication of the Ottley trial would have a more harmful impact on the concept of freedom of expression than is justified.

[17] More recently, Kennedy, C.J. of our Court dealt with the Crown's request for a publication ban in ***R. v. Joseph James Landry*** (unreported NSSC decision dated November 4, 2014). In that case, the Crown submitted that publicity of the trial would taint the jury pool in the subsequent trial of co-accused Sampson which was then 6 months away. In considering the application, Chief Justice Kennedy

noted the particularly notorious nature of the related proceedings in the community and the amount of pre-trial publicity already in existence. Ultimately however, the application for a publication ban was dismissed.

[18] In concluding that a publication ban was not necessary in the Landry trial, Kennedy, C.J. highlighted the reasonable alternative measures available including challenges for cause and "proper and consistent and repeated" jury instruction by the trial judge. He concluded by adopting the reasons of Justice Nordheimer in ***R. v. Kossyrine***, *supra* at para. 20:

> 20 I agree with counsel for the media that the accused are entitled to an impartial jury not an uninformed jury. The fact that members of the jury may have read about this case, and the allegations in it, is only problematic if they have formed fixed opinions that they cannot disabuse themselves of. That is precisely what the challenge for cause process is designed to reveal. That process coupled with jury instructions regarding the need to decide the case based only upon evidence heard in the courtroom and not on any other information are the type of reasonable alternative measures that are capable of preventing the risks that the applicant's identify.

[19] In keeping with the reasons in ***R v. Kossyrine***, Chief Justice Kennedy found that although the Crown had established some risk existed, such a risk was not a real and substantial one that could not be addressed by the measures available.

Determination on the Publication Ban

[20] I turn now to a determination of the present application. The ***Dagenais-Mentuck*** test directs a 2 part analysis. It requires, (1) that the applicant demonstrate that the publication ban is necessary to prevent a serious risk to the proper administration of justice and (2) that the salutary effects of the ban outweigh the deleterious effects on the rights of the parties and the public.

[21] In the present case, the accused submits that the publication ban on his first trial is necessary to ensure his right to a fair second trial. In order to succeed, he must prove a real and substantial risk well grounded in the evidence. The reason for such a burden on the applicant is well explained by the Ontario Court of Appeal in ***M.E.H. v. Williams***, *supra*, at para 34:

> [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.

[22] The applicant provided the affidavit of counsel which noted the existence of the first and second trials presently scheduled to commence just under 9 months apart. Although the first trial is by way of judge alone, the second is by way of judge sitting with jury. The first trial has been the "subject of media attention" but no particulars are provided.

[23] In assessing whether the required risk has been established, consideration was also given to the evidence provided by the media. This evidence included the fact that 2 other proceedings bearing some relationship to the present proceedings were not the subject of publication bans and were reported on by the media. In my view however, the simple fact of the absence of publication bans in related proceedings does not drive the result in the present case. This evidence is therefore accorded little weight in the analysis.

[24] I do conclude however, that there is no basis in the evidence provided to ground a finding that there is a real and substantial risk to the accused by virtue only of the fact that there are 2 trials presently scheduled in the same year, one of which has been the subject of media attention. In coming to this conclusion, I have not considered those portions of the affidavit evidence which I find inadmissible for a variety of reasons.

[25] That said, I have considered the applicant's submission that the publication of the first trial "could" influence potential jurors or influence juror deliberations given the proximity of the trials. I find it reasonable to conclude that there is some risk to the fair trial of the accused established by the circumstances alone but that the evidence fails to establish that it is a real and substantial risk. This conclusion is based mainly upon the fact that the trials are scheduled to commence just under 9 months apart. This period of time distinguishes the facts in this case from those in ***R. v. Shrubsall***, *supra* and ***R. v. Ebanks and Kelly***, *supra* where the subsequent trials were in very close proximity.

[26] Further, I find that any risk created by the publication of the details of the first trial and the proximity to the second trial can be alleviated by the measures available. I am satisfied that the challenge for cause process in conjunction with the appropriate jury instruction will prevent the risk to the accused's right to a fair second trial. Given the efficacy of the reasonably available measures, I find that the requested publication ban is not necessary to protect the accused at this time.

[27] For the foregoing reasons, I find that the applicant has failed to satisfy the first part of the ***Dagenais-Mentuck*** test. Accordingly, it is not necessary to consider the second part of the test.

[28] The application for a publication ban is therefore dismissed.

Determination of Costs

[29] In the event of a dismissal of the application, the media seek costs. It was their view that the application had no basis and their participation was necessary for the relevant authorities to be placed before the court for consideration. In their fervent submission, the application "cries out for some sort of costs sanction". Implicitly, I interpret that to mean that such applications should be discouraged unless they are sure to succeed.

[30] The applicant responded that the application was appropriate and costs should not be awarded. It was also submitted that the accused had been in custody for an extended period. I took that to support a plea of impecuniosity.

[31] I have reviewed the authorities relied upon by the media on this point. I refer and adopt the reasons of LeBlanc J. in ***A.B. v. Bragg Communications Inc.***, 2010 NSSC 356. In that case, Justice LeBlanc concluded at para. 14:

> Although the Herald and Global argue that the principle that costs should follow the results also applies to them as intervenors, I find no general rule of law that suggests that to be the case. **It appears to me that the general rule that applies to the intervenors should not be an award of costs in their favour, nor should costs be awarded against them unless there is very good reason to deviate from this practice.** Therefore, the issues that must be

> addressed are whether the nature of this application modifies the general rule regarding costs and intervenors, and whether the Herald and Global Television have demonstrated a very good reason to deviate from the general rule, modified or otherwise. (emphasis added)

[32] In this case, I find no good reason to deviate from the general rule. The applicant in this case is an accused facing one of the most serious charges in the ***Criminal Code of Canada***. He has a right to a fair trial that must be balanced with the right to freedom of expression. The rights are conflicting in this case, but they are equally protected. The application, although unsuccessful, was not frivolous. In my view, the decision of the accused to pursue and protect his constitutional rights was *bone fide* and advanced with appropriate regard for the jeopardy he faces. This should not be discouraged by the possibility of a costs sanction in the absence of very good reason. I find no reason in this case.

[33] I have specifically considered the submission that the media are not true intervenors in the sense that their interests are recognized by the *Civil Procedure Rules* which direct that they be given notice of such applications. I find that although they are entitled to notice they are not obligated to respond. The Rules provide an expedient mechanism for notice but do not change the character of the parties. Further, although their response was of considerable assistance, it was not

necessary in the sense that Justice LeBlanc noted at para. 16 of his decision in ***A.B. v. Bragg Communications***, supra.

[34] Accordingly, no costs shall be payable by either party.

Conclusion

[35] The application is dismissed without costs.

Gogan, J.