Court of Queen's Bench of Alberta

Citation: R v Clark, 2015 ABQB 729

Date:
Docket: 141436865U1
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

Jennifer Lynn Clark and Jeromie James Clark

Accused

Reasons for Judgment
of the
Honourable Madam Justice J. Strekaf

I. Introduction

[1] Global Television, Shaw Media a division of Shaw Communications Inc, CTV Bell Media, Canadian Broadcasting Corporation and Calgary Herald, a division of Postmedia Network Inc (collectively "Media Outlets") have applied to quash the November 2, 2015 decision of a preliminary inquiry Judge to impose a publication ban. The ban was imposed in connection with the preliminary inquiry on charges against Jennifer and Jeromie Clark that they caused the death of their son John Clark by criminal negligence by failing to obtain necessary

medical care contrary to section 220(B) and that they failed to provide the necessaries of life contrary to sections 220(B) and 215 respectively of the Criminal Code.

II. The Publication Ban

[2] At the outset of the preliminary inquiry, Crown Counsel advised that Mr. Fagan QC, who had been identified as counsel for Mr. Clark, would be making an application under section 539 of the Criminal Code. The Judge asked if he was looking for the usual statutory order to ban publication of any of the evidence pending trial. Mr. Fagan QC stated:

> I am, and in addition to that, the Crown has been kind enough to agree to join me in this regard, but if the Court could issue an order prohibiting the publication of any evidence or any information arising from these proceedings that might identify the accused. This case involved the death of a child and there are two surviving children, and the order, that would be primarily issued to protect those children.

[3] After a brief exchange, the Judge stated:

> All right. I'm going to – first of all, there are two different aspects here. The ban on publication, which is the normal ban under 539 which has to do, there's a ban on publication of any evidence arising out of the preliminary hearing until such time as trial is finished. Secondly, as a result of the submissions of Crown in the not in consent, I'm sorry, submissions advanced not in consent of the Crown, there will be a ban on publication on any evidence that would tend to identify the named victim, and because of the relationship, the two accused, until such time as the matter gets to trial and jurisdiction will be taken over by a Court of Queen's Bench judge.

[4] Later in the proceedings, the Judge agreed to hear from an unidentified speaker who was apparently a member of the media. He asked if the ban was under section 539 or 486.4. The Judge advised that there were two bans. The unidentified speaker indicated that they were only concerned with naming the identity of the accused. Another unidentified speaker stated that it was his understanding that the charges faced by the accuseds were not listed as offences that would trigger a mandatory ban under section 486.4 and that if it was a discretionary the media require two working days' notice.

[5] The Judge then recited section 486.4(2.1), which is reproduced below.

[6] In response to a query that because the victim is deceased, it may have an impact on the protection of the victim, the Judge stated:

> Well, we can argue philosophically about whether the deceased have rights of privacy or privacy interests. In my view, it does not necessarily end at the time of death, but where I have an alleged victim under 18, I'm required, at least statutorily, to consider protecting that privacy interest. Because in this case it's clear that the parents of that child are alleged to have committed offences in respect of that child, I cannot allow the publication of the parent's name because that would immediately and by implication and necessarily identify the name of, identify the victim under 18.

[7] He also went on to say:

> There are other children at play in terms of the factors of their privacy, and in my view, in order to protect – well arguably the other two children....are also arguably victims here, and I'm required to protect their identity.
>
> In my view in order to protect the privacy interest of victims under 18, I need to prohibit the publication of information that would tend to identify them, which would include the name of Jennifer and Jeromie Clark.

III. Analysis

[8] Sections 486.4(2.1) and (2.2) are new provisions in the Criminal Code that came into effect in 2015. They expand the ability of the court to grant a publication ban on information that could identify the victim or a witness in certain designated sexual offences to banning information that could identify a victim who is under the age of 18 years, regardless of the nature of the offence. Sections 486.4(2.1) and (2.2) state:

> (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 in 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 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
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> (a) as soon as feasible, inform the victim of their right to make an application for the order; and
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> (b) on application of the victim or the prosecutor, make the order.

[9] The Supreme Court of Canada in *Dagenais v CBC*, [1994] 3 SCR 835 set out the procedure to be followed if the media wishes to oppose or challenge a provincial court publication ban at paragraph 56:

> If the media wish to oppose a motion for a ban brought in provincial court, they should attend at the hearing on the motion, argue to be given status, and if given status, participate in the motion. To challenge a ban once ordered, the media should make an application for certiorari to a superior court judge.

[10] The Court in *Dagenais* also noted at paragraph 49 that the procedure for giving notice to the media when a publication ban is sought in the context of criminal proceedings "is to be found in the provincial rules of criminal procedure and the relevant case law". In the Alberta Provincial Court, Criminal and Family and Youth Divisions, this is addressed in the Notice to the Profession, Publication Bans (#2) which states in part:

> 2. This Practice Note applies to members of the Law Society of Alberta who intend to apply for a court Order which restricts public access to, or the media's ability to fully report on, court documents or proceedings (made pursuant to a judge's common law or legislated discretionary authority) and includes without limitation restrictions on publication or rights of access, such as:
>
> (a) Publication bans under s. 486 of the Criminal Code
>
> ...
>
> 6. Except with leave of the Court, counsel, on behalf of an accused, a witness or a justice system participant (as referred to in s. 486 of the Criminal Code) **must** file a written copy of the Notice of the Application and provide the notice required pursuant to paragraphs 8 & 9 herof at least **three clear days** before the beginning of the trial, application or proceeding or matter to which the ban or Order is to apply. In appropriate circumstances, the Court may direct that notice of any Application be given to such additional parties as the Court deems necessary. (Emphasis in original)

[11] These provisions had not been complied with in the case of the publication ban at issue on this application. No explanation was provided as to why the notice contemplated in the Practice Note was not provided to the media. The preliminary inquiry presumably had been scheduled well in advance. The notice requirements are intended to ensure that the media have the opportunity to make submissions at the time a publication ban is sought.

[12] In *Dagenais*, the Supreme Court of Canada outlined at paragraph 73 the test to be applied following the introduction of the Canadian Charter of Rights and Freedoms when a common law publication ban is sought:

> It is open to this Court to "develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution": Dolphin Delivery, supra, at p. 603 (per McIntyre J.). I am, therefore, of the view that it is necessary to reformulate the common law rule governing the issuance of publication bans in a manner that reflects the principles of the Charter. Given that publication bans, by their very definition, curtail the freedom of expression of third parties, I believe that the common law rule must be adapted so as to require a consideration both of the objectives of a publication ban, and the proportionality of the ban to its effect on protected Charter rights. The modified rule may be stated as follows:
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> A publication ban should only be ordered when:
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> (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
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> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.
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> If the ban fails to meet this standard (which clearly reflects the substance of the Oakes test applicable when assessing legislation under s. 1 of the Charter), then, in making the

order, the judge committed an error of law and the challenge to the order on this basis should be successful.

[13] The Court went on at paragraph 98 to provide some general guidelines to be applied when issuing common law publication bans:

> In order to provide guidance for future cases, I suggest the following general guidelines for practice with respect to the application of the common law rule for publication bans:
>
> (a) At the motion for the ban, the judge should give the media standing (if sought) according to the rules of criminal procedure and the established common law principles with regard to standing.
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> (b) The judge should, where possible, review the publication at issue.
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> (c) The party seeking to justify the limitation of a right (in the case of a publication ban, the party seeking to limit freedom of expression) bears the burden of justifying the limitation. The party claiming under the common law rule that a publication ban is necessary to avoid a real and serious risk to the fairness of the trial is seeking to use the power of the state to achieve this objective. A party who uses the power of the state against others must bear the burden of proving that the use of state power is justified in a free and democratic society. Therefore, the party seeking the ban bears the burden of proving that the proposed ban is necessary, in that it relates to an important objective that cannot be achieved by a reasonably available and effective alternative measure, that the proposed ban is as limited (in scope, time, content, etc.) as possible, and there is a proportionality between the salutary and deleterious effects of the ban. At the same time, the fact that the party seeking the ban may be attempting to safeguard a constitutional right must be borne in mind when determining whether the proportionality test has been satisfied.
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> (d) The judge must consider all other options besides the ban and must find that there is no reasonable and effective alternative available.
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> (e) The judge must consider all possible ways to limit the ban and must limit the ban as much as possible; and
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> (f) The judge must weigh the importance of the objectives of the particular ban and its probable effects against the importance of the particular expression that will be limited to ensure that the positive and negative effects of the ban are proportionate.

[14] In *Southam Inc and Deveney v R* (1989), 47 CCC (3d) 21, the Ontario Court of Appeal provided some procedural guidance when dealing with applications for discretionary publication bans under the predecessor of section 486, stating at paragraph 12:

> Where evidentiary support is required for discretionary orders under s. 442(3) [s. 486(3)], counsel for the Crown and the appellant submitted that it could be provided either by viva voce evidence, affidavit, or submissions of counsel. I agree. It is unnecessary to lay down any restriction on the type of information or the manner in which it may be put before a judge on this type of application.

[15] The Media Outlets submit that the preliminary inquiry Judge committed an error of jurisdiction in granting the ban on the following grounds:

- the application was purportedly brought to protect the siblings of the deceased child, which individuals do not fall within the definition of a "victim" for the purpose of section 486.4(2.1);
- there wasn't an appropriate exercise of discretion as there was no evidence before the Court nor did the Court perform the balancing of interests outlined in *Dagenais*; and
- Mr. Clark, as the accused, did not have standing to seek a publication ban under section 486.4 and it was not established that Mr Clark's counsel had standing to seek a ban on behalf of the deceased victim or the deceased victim's siblings.

[16] At the certiorari application before me, Mr. Clark's counsel, who was not the same counsel who appeared at the preliminary inquiry, submitted:

- that certiorari is an extraordinary remedy and should not be granted lightly;
- that the definition of "victim" includes the deceased child and the deceased child's siblings and that application at the preliminary inquiry had been brought on both of their behalf by Mr. Clark's counsel and that, therefore, a publication ban was mandatory pursuant to section 486.4(2.2); and
- that the application had been "joined in" by the Crown and, therefore, granting a publication ban was mandatory pursuant to section 486.4(2.2).

[17] The Crown advised that they take the position that they had not brought the application for a publication ban but merely consented and submitted that the preliminary inquiry Judge had made a jurisdictional error in granting the order as there was no evidentiary record before him to enable him perform the required balancing exercise contemplated in *Dagenais*.

[18] "Victim" is defined in section 2 of the Criminal Code:

> "victim" means a person against whom an offence has been committed, or is alleged to have been committed, who has suffered, or is alleged to have suffered, physical or emotional harm, property damage or economic loss as the result of the commission or alleged commission of the offence and includes, for the purposes of section 672.5, 722 and 745.63, a person who has suffered physical or emotional harm, property damage or economic loss as the result of the commission of an offence against another person

[19] The grammatical construction of this section, and the limited inclusion of persons who suffer loss as a result of an offence against another person for the purpose of only three sections of the Criminal Code, makes it clear that for someone to qualify as a "victim" under any other section of the Code that they must be:

1. a person against whom an offence has been committed or is alleged to have been committed; and

2. a person who has suffered or is alleged to have suffered physical or emotional harm, property damage or economic loss as a result.

[20] Under this definition, the siblings of the deceased child do not qualify as "victims" for the purposes of section 486.4 and, therefore, no application was properly before the Court on their behalf, nor was there jurisdiction to grant an order on their behalf.

[21] With respect to the deceased child, I am not satisfied that an application was properly brought before the preliminary inquiry Judge on his behalf. Mr. Fagan QC was identified at the outset of the preliminary inquiry as counsel for the Accused Jeromie Clark, who is charged with causing the death of John Clark. There is nothing on the record to indicate that he had any standing to represent the deceased child whose death his client was charged with causing.

[22] I accept the Crown's position (which is consistent with my reading of the transcript) that they were simply consenting to Mr. Clark's application and that they were not applying for a publication ban on behalf of the deceased child. As a result, no application was properly before the Judge under section 486.4(2.2) and he was not required to grant a mandatory order pursuant to that provision.

[23] Under section 486.4(2.1), the Judge had the jurisdiction on his own motion to make an order in respect of the deceased child directing that any information that could identify him not be published, broadcast or transmitted. However, in doing so, the Judge would have been required to perform a balancing exercise analogous to that contemplated in *Dagenais*.

[24] I note that the *Dagnenais* test would need to be modified as the interest potentially justifying the ban in *Dagenais* related to maintaining trial fairness as that case involved a publication ban restraining the CBC from broadcasting a fictional program dealing with child abuse at a religious orphanage until some criminal trials of members of a religious order charged with abusing young boys in their care were completed. In the case of a publication ban under section 486.4(2.1), the rationale for the ban is not to maintain trial fairness but to protect the interests of a young victim under the age of 18 years.

[25] In this case, the Judge was required to determine whether the salutary effects of the publication ban in protecting the interests of the deceased child outweighed the deleterious effects to the free expression of the Media Outlets affected by the ban.

[26] There was no evidence before the Judge of any harm that could be sustained by the deceased child as a result of possibly identifying him by publishing the names of his accused parents or any balancing performed by the Judge of how such harm might be weighed against the deleterious effects of the ban on the free expression of those affected by the ban.

Conclusion

[27] The preliminary inquiry Judge made an error of jurisdiction in granting the publication ban. The application for certiorari is granted and the publication ban prohibiting the identification of Jennifer and Jeroromie Clark as the accuseds in this case is set aside.

Heard on the 10th day of November, 2015.
Dated at the City of Calgary, Alberta this 17th day of November, 2015.

J. Strekaf
J.C.Q.B.A.

Appearances:

Mr. R. Beeman
Ms. J. Biernaskie
for the Applicants

Mr. S. Parker, Q.C.
for the Crown

Mr. G. Sirois
for the Accused Jennifer Lynn Clark

Ms. K. Fagan
for the Accused Jeromie James Clark