# NOVA SCOTIA COURT OF APPEAL

**Citation:** *United Kingdom of Great Britain and Northern Ireland (Attorney General) v. L.A.*, 2020 NSCA 75

**Date:** 20201117
**Docket:** CA 491151
**Registry:** Halifax

**Between:**

United Kingdom of Great Britain and Northern Ireland (Attorney General)
Appellant

v.

L.A.
Respondent

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| **Judge:** | The Honourable Chief Justice Michael J. Wood |
| **Appeal Heard:** | October 15, 2020, in Halifax, Nova Scotia |
| **Subject:** | Civil Procedure – Confidentiality Order – C.P.R. 85.04 |
| **Summary:** | L.A. commenced legal proceedings against the U.K. for vicarious liability for an alleged sexual assault by its employees. The assault resulted in criminal charges which were ultimately dismissed. In the criminal proceedings the court ordered a ban on information that might identify L.A. under s. 486.4 of the *Criminal Code*.<br><br>In the civil proceeding, L.A. obtained a confidentiality order under C.P.R 85.04 allowing her to be identified by initials. |
| **Issues:** | (1) Should leave be granted to appeal the interlocutory decision of the hearing judge dated July 31, 2019?<br><br>(2) In granting the confidentiality order, did the hearing judge commit a reviewable error in principle or did the decision result in a patent injustice? |

**Result:** Leave was granted and the appeal allowed. The application for the confidentiality order was governed by the *Dagenais/Mentuck* test for common law publication bans. The first part of the test requires a finding that a ban be necessary to prevent a serious risk to the administration of justice due to a lack of reasonable alternative measures that would prevent the risk.

The hearing judge erred by not properly considering all of the circumstances including the effect of the criminal publication ban which remains in place and would prevent L.A. being identified as the alleged victim in the criminal proceeding. The two proceedings were interrelated because of the allegations in the statement of claim which referred to the criminal charges.

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| | |
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| **Judges:** | Wood, C.J.N.S.; Beveridge and Bourgeois, JJ.A. |
| **Appeal Heard:** | October 15, 2020, in Halifax, Nova Scotia |
| **Held:** | Leave granted and appeal allowed, per reasons for judgment of Wood, C.J.N.S.; Beveridge and Bourgeois, JJ.A. concurring |
| **Counsel:** | Leanne N. Fisher, for the appellant<br>Michael Dull, for the respondent |

**Reasons for judgment:**

[1] L.A. alleges that on April 9, 2015 she was sexually assaulted by members of Great Britain's Royal Navy hockey team while they were in Nova Scotia. As a result of her complaint, four members of the team were charged with sexual assault causing bodily harm contrary to s. 272 of the *Criminal Code* (the "Criminal Proceeding"). On March 7, 2018, L.A. commenced civil proceedings against the United Kingdom of Great Britain and Northern Ireland ("U.K.") alleging vicarious liability for the actions of the members of the team.

[2] On April 9, 2019, L.A. brought a motion pursuant to *Civil Procedure Rule* 85.04 for an order permitting her to substitute the pseudonym L.A. in place of her legal name in the litigation and providing that her identity not be published or broadcast (the "Confidentiality Order").

[3] L.A.'s motion was opposed by the U.K., and following a hearing on July 31, 2019, the Honourable Justice Darlene Jamieson issued an oral decision granting the motion (2019 NSSC 289).

[4] The U.K. appeals the Confidentiality Order on the basis that the hearing judge misapplied the legal test and principles governing the granting of common law publication bans including the Confidentiality Order. For the reasons which follow, I agree with the appellant and would allow the appeal.

**Motion record and hearing judge's decision**

[5] The only evidence filed by L.A. in support of her motion was the affidavit of her counsel, Michael Dull, deposed to on April 9, 2019. The operative paragraphs are as follows:

> [...]
>
> 4. I have discussed this matter with my client and she advised me of her belief that she will suffer serious harm if her identity is publicized in connection with this action. I verily believe this to be true.
>
> 5. The assaults at issue in this action were also the subject of a criminal investigation and a resulting criminal trial, which concluded on January 18, 2019. Those criminal proceedings received high-profile coverage in media outlets across Canada and the United Kingdom. Select examples of such media coverage are attached as Exhibit "A". I am advised and do verily

> believe that to date the Plaintiff has not been identified by name in the media, due to a publication ban in relation to the criminal proceedings.
>
> 6. The Plaintiff is a native and current resident of the Halifax area. She is currently undertaking graduate education and I am advised and I do believe that she hopes to pursue a career in a professional community in the Halifax area upon graduation.
> 7. The Plaintiff has advised me, and I do verily believe, that she has genuine concerns that continuing to prosecute this action under her own name would bring unwanted attention that would follow her throughout her personal and professional life.
> 8. I have provided appropriate notice of this confidentiality motion to the media, in accordance with Civil Procedure Rule 85.05(1). Confirmation of such notice is attached to this affidavit as Exhibit "B".
> 9. I provided written notice to the Defendant by e-mail on April 03, 2019. Leanne Fisher, solicitor for the Defendant, acknowledged receipt of his (sic) correspondence on April 3, 2019. Copies of this correspondence are attached as Exhibit "C".

[6] A number of media reports with respect to the Criminal Proceeding were attached as exhibits to counsel's affidavit. These were dated between October 2018 and January 2019.

[7] The hearing judge was also provided with a copy of the decision of the Honourable Justice Patrick J. Duncan (as he then was) dated January 18, 2019, following trial in the Criminal Proceeding (*R. v. Smalley*, 2019 NSSC 32). Justice Duncan acquitted Darren Smalley of all charges. His decision indicates that a publication ban was ordered under s. 486.4 of the *Criminal Code* prohibiting publication of any information that could identify the victim of the alleged sexual assault which was the subject of the Criminal Proceeding.

[8] The parties and the hearing judge agreed that the motion for the Confidentiality Order was governed by the *Dagenais/Mentuck* test which comes from the Supreme Court of Canada's decisions in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *R. v. Mentuck*, 2001 SCC 76. The test is found at para. 32 of *Mentuck*:

> 32 [...]
>
> A publication ban should only be ordered when:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[9] With respect to part one of the *Dagenais/Mentuck* test, the hearing judge identified the serious risks to the proper administration of justice which required protection:

> [18] In the circumstances of the present case, I find there is sufficient evidence to meet part one of the test. The prior criminal proceeding garnered significant media attention both in Canada and in the United Kingdom, as is illustrated by the media articles attached to the affidavit. Intimate details of the alleged assaults are reported. **It is logical to infer that the Plaintiff's fear of future harm to her professional/employment life and personal life that could result from intense media attention is very real. This could potentially result in losses over and above those alleged losses claimed in the civil proceeding.**
>
> [...]
>
> [21] I do not take Justice Abella's comments in *AB v. Bragg*, *supra*, to mean those alleging sexual assault are excused from meeting the *Dagenais/Mentuck* test. It means, in the circumstances of each particular case, the Court can determine whether there is harm under part one of the test by applying reason and logic. **It is logical to infer that victims of sexual assault may suffer harm by re-traumatization as a result of their identity being linked to court proceedings related to the very sexual assault(s) which is (are) the subject of the proceeding, whether they are in the context of criminal or civil proceedings.**
>
> [22] The Plaintiff's action alleges sexual assault by "several of the Defendant's employees." The Plaintiff's concern here is not simply one of embarrassment; hers is a privacy concern that intensely private information about incidents of personal sexual violation will make their way into the public sphere and follow her throughout her life. **It is logical to infer that the type of media attention this matter garnered under the criminal proceeding would follow in the civil proceeding and have the very real potential to exacerbate any trauma suffered by the Plaintiff.**
>
> [Emphasis added]

[10] As to the necessity for a publication ban to prevent these risks to the administration of justice, the hearing judge said:

> [25] While the publication ban in the prior criminal proceedings certainly does not flow through to the civil proceeding, **without the use of a pseudonym this Plaintiff will be publicly connected, in perpetuity, not only to the details that will arise through the civil allegations of sexual assault but also to the details previously published in the media concerning the prior criminal proceedings and contained in the decision of the Court in the prior criminal proceedings**.
>
> [26] The Plaintiff was a 21-year-old university student at the time of the alleged sexual assaults in 2015 with aspirations of medical school (per *R. v Smalley*, *supra*). She is now 25 years old, with a lifetime ahead of her. The media articles attached to the Solicitor's Affidavit illustrate the level of publicity this matter has garnered. Attaching the Plaintiff's name to this litigation will mean the **intimate details reported upon in the prior criminal proceeding, and those very likely to be reported upon in this civil proceeding, will be available to all on the internet**. Access to the court should not have to come at such a high price for this Plaintiff. The use of a pseudonym will remedy these privacy concerns.
>
> [Emphasis added]

[11] With respect to the second part of the *Dagenais/Mentuck* test, the hearing judge said the salutary effect of the publication ban was to ensure access to justice for alleged victims of sexual assault:

> [34] Freedom of the press is constitutionally protected. Media access to the court and coverage of its proceedings is absolutely fundamental and essential to the proper functioning of our justice system, particularly the promotion of transparency through our open court principle. However, there is societal interest in ensuring that legitimate privacy risks do not prohibit people from accessing our courts. If the significant risk to the privacy of sexual assault victims means they are fearful of accessing the courts, this becomes an access to justice issue. **Protecting the privacy of a Plaintiff who is alleged to be a victim of sexual assault, in circumstances where there is a legitimate concern of harm, facilitates access to justice.**
>
> [...]
>
> [38] Sexual assault proceedings involve intensely-personal information. **There is a real potential for dissuading similarly-situated Plaintiffs from accessing the court for fear of having the intimate details of the alleged sexual assault connected to their names, in perpetuity, on the internet.** Such information could be easily accessed by prospective employers, a litigant's children, other family members, friends, etc.
>
> [Emphasis added]

[12] As for any deleterious effect of the publication ban, the hearing judge said:

> [45] There is very little public benefit to naming the Plaintiff in the present circumstances. The Plaintiff is not seeking to close the court. She is seeking a measure by which the intimate details of her allegations of sexual assault will not be associated with her name forever in the internet world in which we reside. The request to proceed by pseudonym would only minimally affect the public interest. The level of openness of the court will still be significant. The impact on the open court principle will be minimal in comparison to the potential for harm to the Plaintiff. I fail to see any real impact on the rights and interests of the Defendant in this matter and none was raised at the motion. The use of a pseudonym in the present case will not impair the Defendant's ability to properly defend its interests.

[13] The hearing judge concluded that permitting the use of a pseudonym in this proceeding was necessary and would only minimally impair the open court principle which underlies the *Dagenais/Mentuck* analysis.

## Issues

[14] The grounds set out by the appellant in the Notice of Appeal are:

1. That the Motion Judge erred in law, and unjustifiably limited the constitutionally enshrined open court principle, by misapplying the legal test and principles applicable to the granting of a Publication Ban ["**The Ban**"] in the context of the Plaintiff's civil claim seeking damages for sexual assault allegedly perpetrated on her by one of more members of an ice hockey team "organize[d] and co-ordinat[ed]" by the Defendant.
2. The Motion Judge erred in law in granting the Ban when there was no evidence from the Plaintiff on the Record whatsoever and, in particular, no evidence from the Plaintiff that proceeding without the Ban would/could cause her harm of a nature that would interfere with her access to the courts and/or interfere with the administration of justice.
3. The Motion Judge erred in law by improperly relying on hearsay evidence contained in the Plaintiff's Counsel's Affidavit, which evidence was the sole evidence on the Record, and which hearsay evidence speculated about "unwanted attention" that [Plaintiff Counsel] "verily believed" would "follow [the Plaintiff] throughout her personal and professional life" if the Ban was not granted.
4. The Motion Judge erred in law in determining that she could objectively discern that harm would flow to the Plaintiff, if the Ban was not granted, and/or by misinterpreting and/or misapplying the legal principles and/or doctrines under which objective harm may be discerned in the context of granting a Publication Ban.

> 5. The Motion Judge erred by applying the wrong principles of law and failing to properly consider relevant factors in determining that the Ban was Constitutionally justified in the circumstance of the herein case.
>
> [...]

[15] In light of the standard of review I would restate the issues as follows:

1. Should this Honourable Court grant leave to appeal the interlocutory decision of the hearing judge dated July 31, 2019?
2. In granting the Confidentiality Order, did the hearing judge commit a reviewable error in principle or did the decision result in a patent injustice?

## Standard of review

[16] This Court described the applicable standard of review in *A.B. v. Bragg Communications Inc.*, 2011 NSCA 26 (partially overturned on other grounds 2012 SCC 46):

> [30] In the result, I would characterize Justice LeBlanc's decision as an interlocutory discretionary ruling to which deference is owed. Unless the applicant can show an error in principle or a patent injustice, we will not intervene. Before leaving this subject and turning to the second issue on appeal, I wish to add a few supplementary comments.
>
> [...]
>
> [33] [...] Absent an error in law or a manifest injustice we will decline to do so. The threshold for seeking reversal is high. It is not a soft or casual target. Any party seeking to set aside an interlocutory discretionary order has a heavy onus. Litigants should be reminded that it is not a burden which will be satisfied easily. [authorities omitted]

## Analysis

[17] The open court principle is a hallmark of a democratic society and applies to all judicial proceedings. It is based upon constitutional principles and a party seeking to impinge on it bears a heavy burden. In *Vancouver Sun (Re)*, 2004 SCC 43, the Supreme Court of Canada described the open court principle:

> 25 Public access to the courts guarantees the integrity of judicial processes by demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law": *Canadian Broadcasting Corp. v. New Brunswick (Attorney*

> *General)*, *supra*, at para. 22. Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.
>
> 26 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: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 17. The freedom of the press to report on judicial proceedings is a core value. Equally, the right of the public to receive information is also protected by the constitutional guarantee of freedom of expression: *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Edmonton Journal*, *supra*, at pp. 1339-40. The press plays a vital role in being the conduit through which the public receives that information regarding the operation of public institutions: *Edmonton Journal*, at pp. 1339-40. Consequently, the open court principle, to put it mildly, is not to be lightly interfered with.

[18] The *Dagenais/Mentuck* test was developed to ensure that the burden remains on the party seeking a publication ban to justify their request. In addition, any limitation on openness of the courts must be minimized to the extent possible. In *Mentuck*, the Supreme Court of Canada said:

> 36 The third element I wish to mention was recognized by La Forest J. in *New Brunswick*, *supra*, at para. 69, when he formulated the three part test discussed above. La Forest J.'s second step is clearly intended to reflect the minimal impairment branch of the *Oakes* test, and the same component is present in the requirement at common law that lesser alternative measures not be able to prevent the risk. **This aspect of the test for common law publication bans requires the judge not only to consider whether reasonable alternatives are available, but also to restrict the order as far as possible without sacrificing the prevention of the risk.**
>
> [Emphasis added]

[19] There are two parts to the Dagenais/Mentuck test and both must be met before a publication ban can be ordered. Even where the proposed ban is a minimal impairment on the open court principle (as was found by the hearing judge) the applicant must still establish it is necessary to prevent a serious risk to the administration of justice before it can be granted.

[20] The assessment of whether to grant a common law publication ban will depend upon the particular circumstances which exist. It is a case-by-case analysis. As noted in *Mentuck*:

> 37 **It also bears repeating that the relevant rights and interests will be aligned differently in different cases, and the purposes and effects invoked by the parties must be taken into account in a case-specific manner**. Where the accused is seeking the publication ban on the basis that his trial will be compromised, a judge would improperly apply the test if he relied on the right to a public trial to the disadvantage of the accused. This test exists to ground the exercise of discretion in a constitutionally sound manner, not to command the same result in every case. Trial judges must, at the outset, use their best judgment to determine which rights and interests are in conflict. In most cases this will not be overly onerous. The parties will frame their arguments in terms that make clear the interests they feel are threatened by the issuance or refusal of a publication ban and those they are ready to sacrifice in the face of the threat.
>
> [Emphasis added]

[21] There is no general rule to be applied in a civil claim for alleged sexual assault when there is an existing publication ban in a related criminal proceeding. The effect of the criminal ban is simply one of the factors to be taken into account in deciding whether to order a common law publication ban within the *Dagenais/Mentuck* framework.

[22] The case-specific circumstances which were before the hearing judge included:

- The details of the Criminal Proceeding and the alleged sexual assault involving four members of the Royal Navy hockey team were set out in the trial decision of Justice Duncan and widely reported in the media.
- The factual circumstances underlying the criminal and civil proceedings were essentially identical with respect to the alleged sexual assaults. L.A. made this connection clear by referencing the Criminal Proceeding in her statement of claim.
- L.A. commenced the civil proceeding in March 2018 without the use of a pseudonym and continued the litigation in that form until the motion for the Confidentiality Order was filed in April 2019.
- In the Criminal Proceeding a publication ban was ordered pursuant to s. 486.4 of the *Criminal Code* which prohibited publication of any information that could identify L.A. as the victim of the alleged assault.

[23] The first part of the *Dagenais/Mentuck* test requires identification of a serious risk to the administration of justice which needs to be prevented. In this case, the hearing judge described it as the potential for further harm and re-traumatization of L.A. resulting from public identification of her as the victim in the alleged sexual assault. At paras. 25 and 26 of her decision (noted above at paragraph 10) , the hearing judge discussed how this harm would result from publicly associating L.A. with the civil proceeding because of the interconnection with the Criminal Proceeding. The fundamental basis for the decision was the judge's conclusion that publicly linking L.A. to the sexual assault allegations, which were common to both proceedings, would lead to harm and re-traumatization. She concluded the Confidentiality Order was necessary to protect L.A. from this harm because there were no reasonable alternative measures to prevent this risk.

[24] The publication ban under s. 486.4 of the *Code* prohibits disclosure of information that could identify L.A. as the complainant in the Criminal Proceeding. This is the same information sought to be protected by the Confidentiality Order and, with respect, the hearing judge made an error in principle by not recognizing this. If she had done so, she should have concluded that the necessity for the Confidentiality Order had not been established by L.A. because of the protection afforded by the existing publication ban.

[25] The hearing judge observed that a publication ban in a criminal proceeding does not "flow through" to a related civil proceeding. That may be technically correct however that does not mean that it has no potential application to the civil case. When information in a civil matter could identify the complainant in a criminal case a ban under s. 486.4 of the *Code* would prevent its publication. That is so in this proceeding because of the express linkage to the widely publicized criminal trial in which a publication ban had been ordered.

[26] The existence of a ban under s. 486.4 of the *Code* does not preclude imposing a common law publication ban such as the Confidentiality Order. It depends on the circumstances. The judge will assess whether disclosing the name of the civil plaintiff will lead to their identification as the alleged victim in a sexual assault prosecution in which case the criminal ban would apply. If connection to the allegations in the prosecution is unlikely, the judge may exercise their discretion to issue a common law publication ban under the *Dagenais*/*Mentuck* test provided the record supports that result.

[27] The failure to consider the effect of the publication ban made in the Criminal Proceeding undermines the hearing judge's entire analysis. She was wrong to conclude that the *Dagenais/Mentuck* test, when applied to the circumstances before her, justified the Confidentiality Order. At a minimum, the criminal publication ban was a reasonable alternative measure to prevent public disclosure of L.A.'s identity.

**Conclusion**

[28] I would grant leave to appeal and, for the above reasons, allow the appeal and set aside the Confidentiality Order.

[29] The appellant is entitled to costs in the amount of $1500.00 inclusive of disbursements and payable forthwith.

Wood, C.J.N.S.

Concurred in:

Beveridge, J.A.

Bourgeois, J.A.