**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *R. v. Melvin*, 2020 NSSC 356

**Date:** 20201211
**Docket:** 447189
**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

James Bernard Melvin

**Decision on Interim Common Law Publication Ban**

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|---|---|
| **Judge:** | The Honourable Justice Peter P. Rosinski |
| **Heard:** | December 4, 2020, in Halifax, Nova Scotia |
| **Counsel:** | Sean McCarroll for the Crown<br>Raymond Kuszelewski for Mr. Melvin<br>Sean Moreman for the CBC |

## Introduction

[1] On October 5, 2017, Mr. Melvin was convicted of having attempted the murder, and conspiracy to commit the murder, of Terry Marriott Junior, on December 2, 2008. He has been in custody on those charges since July 2015.[1]

[2] The Crown has applied to have him designated a dangerous offender.

[3] The hearing evidence for that sentencing commenced on July 6, 2020 and ended on November 2, 2020.

[4] On September 26, 2020, Mr. Melvin seriously assaulted another inmate at the Atlantic Institution, in Renous, New Brunswick.

[5] The Crown wrote in its October 7, 2020 letter that:

> "The incident is currently under investigation by the RCMP, and charges are expected. The victim remains in hospital with serious injuries."

[6] To date, no criminal charges have been laid. The Crown counsel in Nova Scotia, although not responsible for that decision, did say in this hearing that he "fully expects" charges will be laid in New Brunswick.[2]

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[1] Insofar as publicity goes, Mr. Melvin was also charged with having murdered Terry Marriott Junior on February 21, 2009. After a jury trial in early 2017, he was acquitted.

[2] This incident having occurred in New Brunswick, will be investigated by police there, and then be considered for criminal charges by the provincial Crown Attorneys in New Brunswick.

[7] The Crown presented evidence of the underlying facts of the September 26 incident on November 2, 2020. It asserts that Mr. Melvin's actions on September 26 are part of a "pattern" of behaviour by Mr. Melvin, which falls within s. 753(1) of the *Criminal Code* ("*CC*"), and should properly lead to his designation as a "dangerous offender". Thereafter, the Crown closed its case – Mr. Melvin presented no evidence.

[8] Submissions regarding the September 26 incident, and the dangerous offender hearing outcome were heard on November 3, 2020. The court reserved its decision on both matters, and set January 18, 2021 to render its penultimate decision on the dangerous offender application.

[9] Before the September 26 incident can be characterized as "pattern" evidence in Mr. Melvin's dangerous offender hearing, the Crown must prove beyond a reasonable doubt that during that incident he committed a relevant criminal offence.

[10] The Crown presented *viva voce* testimony from witnesses and videotaped surveillance of the area where the assault occurred.

[11] Mr. Melvin's counsel initially raised a concern that my findings, regarding whether I conclude beyond a reasonable doubt that he on September 26, 2020,

committed serious criminal offences, and any publication of the September 26, 2020 videotaped evidence tendered before me, will have significant prejudicial impact on his fair trial rights if he is charged with criminal offences as a result of the September 26, 2020 incident. I initially imposed an interim common-law publication ban on all evidence relating to the September 26 incident, pending a full hearing of the matter on December 4, 2020. Notice to the media was provided through the court's website.

[12] The issue before the court is whether the publication ban should be continued, and if so, in what form. CBC opposes any continuation of the ban. The Crown is taking no position. Mr. Melvin asserts that it should continue, but now limits his arguments only to requesting a ban on the transmission to the public domain of any portion of that videotaped evidence tendered before me.

[13] I conclude that no further ban is justified – albeit, I provide an extension of the ban for 20 calendar days from the release of my decision to allow Mr. Melvin the opportunity to file an appeal, and request a stay of my order.

**Position of the parties**

**Mr. Melvin**

[14] He says that criminal charges are a real possibility, and that publicity about the evidence called (ie. transmission of the videotape) regarding September 26, 2020 incident will prejudice his right to a fair trial, contrary to sections 7 and 11(d) of the Charter of Rights.

[15] He says that a high level of publicity can be expected given his past notoriety, even if the trial on the expected charges is not heard for some time - the effect of such publicity about the September 26, 2020 incident would persist and irreparably predispose potential jurors to ultimately find him guilty beyond a reasonable doubt of any criminal charges arising from the September 26 incident.[3]

[16] He seeks an ongoing publication ban until any criminal trial associated with the September 26, 2020 incident has concluded.[4]

**CBC**

[17] CBC counters that:

1. there is no evidence of "irreparable harm";

[3] While not directly argued, I recognize that unfettered pre-trial publicity may result in potential jurors being *aware* of the evidence heard by me during the attempted murder trial *and* the dangerous offender application, which *could* make some of them predisposed to his conviction and unable to disabuse themselves of that knowledge when hearing the facts of any criminal charges arising from the September 26 incident.

[4] This would include any appeals of the outcome of such trial(s) - and any ordered retrials and appeals thereof.

2. no criminal charges have been laid, (thus any "right to fair trial" concerns presently are speculative) and charges may never be laid;

3. any trial may be months or years away, thus any present potential prejudicial effect will have dissipated, by then;

4. potential jurors' mere awareness of such facts, while relevant, is not determinative because the prejudice can be prevented at trial (by challenges for cause - s. 638 *CC*) and mitigated, *inter alia*, by proper instructions that direct them to not seek out any information about the case or Mr. Melvin on the Internet or otherwise, and to decide Mr. Melvin's criminal culpability *only* on the evidence heard and nothing they have seen or heard beforehand or outside of the court.

**The applicable law**

[18] I have the benefit of two recent decisions from our Court of Appeal regarding the governing law, namely the so-called *Dagenais/Mentuck* test: *United Kingdom of Great Britain and Northern Ireland (Atty. Gen.) v LA*, 2020 NSCA 75; and *R v Verrilli*, 2020 NSCA 64.

[19] Mr. Verrilli had been the target of a criminal investigation which did not result in charges. Three search warrants had been executed at his home, business

and in relation to his motor vehicles. He applied for access to the search warrants ITO (information to obtain). The appeal court agreed with the reviewing judge that once the warrant had been executed there was a presumption that the ITO would become accessible to the public, unless the party wishing to limit that access could justify the limitation sought. As this was a discretionary decision, the principles from the *Dagenais/Mentuck* cases were applicable.

[20] Chief Justice Wood stated in *Verrilli*:

> *Dagenais/Mentuck*
>
> 23 In Canada, the open court principle is essential for public confidence in the courts and the administration of justice. Judicial proceedings are presumed to be open to the public and the media and should only be restricted where the party seeking to do so can provide sufficient justification. This principle was described by the Supreme Court of Canada in *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 as follows:
>
> > 1 In any constitutional climate, the administration of justice thrives on exposure to light -- and withers under a cloud of secrecy.
> >
> > 2 That lesson of history is enshrined in the *Canadian Charter of Rights and Freedoms*. Section 2 (b) of the *Charter* guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.
> >
> > 3 The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.
> >
> > 4 Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the

> appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice* or *unduly impair its proper administration*.

24 In the *Dagenais/Mentuck* decisions, the Supreme Court of Canada considered applications for publication bans in the context of criminal proceedings. In *Dagenais*, the ban was directed at a television program which the applicant alleged would be prejudicial to the fairness of his jury trial then under way. In *Mentuck*, the request was for a temporary ban over the identity of certain undercover police officers and the operational methods used in investigating the accused. The test for assessing whether to issue such common law publication bans was first set out in *Dagenais*, but modified in *Mentuck* to provide:

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

25 In *Mentuck*, the Crown argued the identity of the undercover officers and the details of their operations should be banned in order to ensure officer safety as well as protect the integrity of ongoing and future undercover operations. The concern was that persons becoming aware of the details of the operation might be less susceptible to similar investigative techniques in the future. After applying the balancing test noted above, the Court imposed a temporary ban on publication of the identity of undercover officers but not with respect to investigative techniques.

26 Although both *Dagenais* and *Mentuck* involved applications which were opposed by the media, it is not necessary for the media to be involved in order for the principles to apply. Even if the application is made *ex parte* and there is no person present to argue against the publication ban, a judge must still take into account the interests of the press and public (*Mentuck*, para. 38).

27 In *Toronto Star*, the Supreme Court of Canada considered a challenge to sealing orders issued under s. 487.3 of the *Code* and concluded that the *Dagenais/Mentuck* analysis applies. The Court described the scope of these principles in very broad terms:

5 This criterion has come to be known as the *Dagenais/ Mentuck* test, after the decisions of this Court in which the governing principles were established and refined. The issue in this case is whether that test, developed in the context of publication bans at the time of trial, applies as well at the pre-charge or "investigative stage" of criminal proceedings. More particularly, whether it applies to "sealing orders" concerning search warrants and the informations upon which their issuance was judicially authorized.

6 The Court of Appeal for Ontario held that it does and the Crown now appeals against that decision.

7 I would dismiss the appeal. In my view, the *Dagenais/Mentuck* test applies to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings. Any other conclusion appears to me inconsistent with an unbroken line of authority in this Court over the past two decades. And it would tend to undermine the open court principle inextricably incorporated into the core values of s. 2 (b) of the *Charter*.

8 The *Dagenais/Mentuck* test, though applicable at every stage of the judicial process, was from the outset meant to be applied in a flexible and contextual manner. A serious risk to the administration of justice at the investigative stage, for example, will often involve considerations that have become irrelevant by the time of trial. On the other hand, the perceived risk may be more difficult to demonstrate in a concrete manner at that early stage. Where a sealing order is at that stage solicited for a brief period only, this factor alone may well invite caution in opting for full and immediate disclosure.

9 Even then, however, a party seeking to limit public access to legal proceedings must rely on more than a generalized assertion that publicity could compromise investigative efficacy. If such a generalized assertion were sufficient to support a sealing order, the presumption would favour secrecy rather than openness, a plainly unacceptable result.

[21] Therefore, I have to ask myself the following questions:

1. 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?

2. Do 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?

[22] I bear in mind that the burden throughout is on the applicant – Mr. Melvin.

**1 - Is there a serious risk to the proper administration of justice, if no publication ban is ordered?**

[23] I conclude that there is an air of reality to the risk of prejudice argued by Mr. Melvin - I have heard a great deal of evidence in relation to the September 26 incident during the dangerous offender application. There is a sufficient factual foundation here to legitimately be concerned about a real risk of prejudice to Mr. Melvin's fair trial rights, should he become charged with an offence(s) arising from the September 26 incident. I am satisfied it is more likely a question of when, not if, he will be criminally charged in relation to the September 26, 2020 incident.

[24] Some courts have decided that no publication ban is justified in arguably analogous circumstances:

1. *R v Barrett*, 2016 NSSC 11 - the same accused was charged separately in the same judicial district with the murder of two women with trials nine months apart (the first being by judge alone and the second by jury) – no publication ban was ordered in relation to the first trial.

2. *National Bank Limited v Potter*, 2012 NSSC 90 - in these civil proceedings for fraud, one of the witnesses who was also criminally charged sought a common law confidentiality order to preserve his right to a fair trial in the criminal proceedings - his request was denied by Justice Warner:

> Tainting of the jury pool
>
> 38 It is not enough to merely speculate that the jury pool may be contaminated. Per the *Dagenais/Mentuck* test, there must be some evidence of a "serious risk" that the jury pool will be contaminated. Mr. Clarke provides no explanation for why the jury pool will be contaminated, let alone evidence to establish a "serious risk."
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> 39 On at least two occasions, the Supreme Court of Canada has commented on the ability of jurors to properly deal with publicity surrounding a case.
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> 40 In *Dagenais* at 884, Lamer CJC stated:
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> > To begin, I doubt that jurors are always adversely influenced by publications. There is no data available on this issue. However, common sense dictates that in some cases jurors may be adversely affected. Assuming this, I nevertheless believe that jurors are capable of following instructions from trial judges and ignoring information not presented to them in the course of the criminal proceedings.

41 In *Phillips v. Nova Scotia (Commissioner, Public Inquiries Act)*, [1995] 2 S.C.R. 97 (S.C.C.), at paras 130-134, Cory J noted:

> 130. Further, the examination of the effects of publicity cannot be undertaken in isolation. The alleged partiality of jurors can only be measured in the context of the highly developed system of safeguards which have evolved in order to prevent just such a problem. Only when these safeguards are inadequate to guarantee impartiality will s.11(*d*) be breached. This simple determination requires the resolu- tion of two difficult questions. First, what is an impartial juror? Second, when do the safeguards of the jury system prevent juror prejudice?
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> 131. The difficulties inherent in defining an impartial jury were pointed out by Newton N. Minow and Fred H. Cate in "Who is an Impartial Juror in an Age of Mass Media?" (1991), 40 American Univ. L. Rev. 631. The authors note (at pp. 637-38) that in the early days of the jury system, jurors were required to be familiar with the facts and parties to a case in order to be eligible to serve. An accused was literally "judged by his peers". Juries and trials became more sophisticated, and it was no longer seen as necessary that individual jurors be familiar with the case. As concern for the individual rights of the accused developed, it became preferable for jurors to be objective, and this was facilitated if they had no previous knowledge of the facts. However, even before the days of television and mass media coverage, this ideal was criticized by the American writer Mark Twain, as quoted in Minow and Cate, supra, at p. 634:
>
> > [when juries were first used] news could not travel fast, and hence [one] could easily find a jury of honest, intelligent men who had not heard of the case they were called to try — but in our day of telegraph and newspapers [this] plan compels us to swear in juries composed of fools and rascals, because the system rigidly excludes honest men and men of brains.
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> 132 The objective of finding twelve jurors who know nothing of the facts of a highly-publicized case is, today, patently unrealistic. Just as clearly, impartiality cannot be equated with ignorance of all the facts of the case. A definition of an impartial juror today must take into account not only all our present methods of communication and news reporting techniques, but also the heightened protection of individual rights which has existed in this country since the introduction of the *Charter* in 1982. It comes down to this: in order to hold a fair trial it must be possible to find jurors who, although familiar with the case, are able to discard any

previously formed opinions and to embark upon their duties armed with both an assumption that the accused is innocent until proven otherwise, and a willingness to determine liability based solely on the evidence presented at trial.

133. I am of the view that this objective is readily attainable in the vast majority of criminal trials even in the face of a great deal of publicity. The jury system is a cornerstone of our democratic society. The presence of a jury has for centuries been the hallmark of a fair trial. I cannot accept the contention that increasing mass media attention to a particular case has made this vital institution either obsolete or unworkable. There is no doubt that extensive publicity can prompt discussion, speculation, and the formation of preliminary opinions in the minds of potential jurors. However, the strength of the jury has always been the faith accorded to the good will and good sense of the individual jurors in any given case. The confidence in the ability of jurors to accomplish their tasks has been put in this way in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, at p. 761:

> Today's jurors are intelligent and conscientious, anxious to perform their duties as jurors in the best possible manner. They are not likely to be forgetful of instructions. The following passage from *R. v. Lane and Ross* (1969), 6 C.R.N.S. 273 (Ont. S.C.), at p. 279, approved in *R. v. Corbett*, [1988] 1 S.C.R. 670, at p. 695, is apposite:
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> > The danger of a miscarriage of justice clearly exists and must be taken into account but, on the other hand, I do not feel that, in deciding a question of this kind, one must proceed on the assumption that jurors are morons, completely devoid of intelligence and totally incapable of understanding a rule of evidence of this type or of acting in accordance with it. If such were the case there would be no justification at all for the existence of juries .... [Emphasis in original.]

134. The solemnity of the juror's oath, the existence of procedures such as change of venue and challenge for cause, and the careful attention which jurors pay to the instructions of a judge all help to ensure that jurors will carry out their duties impartially. In rare cases, sufficient proof that these safeguards are not likely to prevent juror bias may warrant some form of relief being granted under s. 24(1) of the *Charter*. The relief may take many forms. It may be the enjoining of hearings at a public inquiry, a publication ban on some of the evidence given at the inquiry, a staying of the criminal charges, or the imposition of additional

> protections for the defence at the stage of jury selection: see, as an early example, *R. v. Kray* (1969), 53 Cr. App. R. 412 (C.A.), referred to with approval in *R. v. Hubbert* (1975), 29 C.C.C. (2d) 279 [31 C.R.N.S. 27], affirmed [1977] 2 S.C.R. 267. As this court has held in the past, this type of relief will not be granted on the basis of speculation alone.
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> Normally the time for assessing whether or not an accused's fair trial rights have been so impaired that s. 24(1) relief is required will be at the time of jury selection: *R. v. Vermette*, supra; *R. v. Sherratt*, [1991] 1 S.C.R. 509.

42 There is already significant publicity in this case over several years that identifies Mr. Clarke as one of the key players. There have been a number of media reports. There is also a publicized settlement agreement wherein Mr. Clarke admits to some level of wrongdoing. The agreed upon statement of facts in that agreement may not be caught by s 13 of the *Charter* since, on the reasoning of *R. v. Baksh* (2005), 199 C.C.C. (3d) 201 (Ont. S.C.J.), Mr. Clarke was not "testifying directly or indirectly" in that agreement. In these circumstances, it is also hard to understand the need to proceed by way of a pseudonym (See eg *Cahuzac v. Wisniowski*, 2010 NSSC 258 (N.S. S.C.)). In any event, the test is not publicity, but rather a "serious risk" of jury contamination. That, in my view, has not been established

43 There is simply not enough evidence presented on this motion to discharge the onus on Mr. Clarke that the jurors in a possible jury trial that may be held at some distant time in the future (at least not in the immediate future) would be tainted by Mr. Clarke's evidence in this litigation, or that the existing safeguards for culling and instructing jurors are not reasonable alternative protections; nor is there non-speculative evidence that the possibility of evidence in the criminal proceeding from one or more of the plaintiffs in this litigation would be changed by his evidence (presumably any such evidence has been disclosed by the Crown before now).

3. *R v Pearson*, 2011 ONSC 1910 - the trials of two co-accuseds facing the same murder charges, were severed leaving a gap of five months between the first trial ending in the second trial beginning - publication ban denied;

4. *R v LaRue,* 2012 YKSC 15 - two co-accuseds facing separate trials after severance were scheduled only six months apart, the latter requesting a publication ban of the first trial - publication ban denied.

[25] If Mr. Melvin is charged, he will be entitled to a preliminary inquiry hearing - which provides for a statutory ban on publication of the evidence heard by the court - s. 539 *CC*.

[26] As is any offender charged with such offences and detained on those charges, after a bail hearing, Mr. Melvin is entitled to have the protection of a statutory publication ban upon the evidence heard at the bail hearing and in any subsequent bail review - ss. 517, 520(9) and 521(10) *CC*. Parliament has decided that, *once charges are laid*, evidence that is publicly available before trial should be banned from publication in analogous contexts to that facing Mr. Melvin.[5] Should he be treated differently merely because charges have *not yet* been laid?

[27] It must be borne in mind that his circumstances are different from those in the cases cited above by the CBC - the evidence of what Mr. Melvin did on September 26, 2020, and specifically the videotape thereof, is precisely the same evidence that will be tendered against him if he is charged with a criminal offence.

[5] I suggest it is so for good reasons - including, because there has not been a full airing of the evidence for a reliable hearing and determination of the merits.

[28] Should someone like Mr. Melvin not be protected from such pre-trial publicity *before* he is charged, when I accept that criminal charges are "fully expected" to be laid? At first blush, an argument for such protection from pre-trial publicity may seem attractive - however, a closer look reveals that the argument sits on a shaky foundation of generalized concerns. Each case must be decided on its own facts.

[29] Typically, the outcomes of a dangerous offender hearing (designation, and sentence) are not subject to publication bans. By their nature, such hearings reveal many disturbing and negative aspects about an offender. That information will be available in the public domain in advance of Mr. Melvin's trial on any criminal charges arising from the September 26, 2020 incident.[6]

[30] Is the videotaping of the September 26 incident, so material, in terms of the prejudice it potentially adds if it is seen by potential jurors, that Mr. Melvin needs a publication ban in order to get a fundamentally fair trial, should he be charged criminally for what he did on September 26, 2020, *and* elects trial by jury? I do not find that they are.

[6] Mr. Melvin has repeatedly stated he will be appealing his conviction herein. If his conviction appeal is successful, any findings underlying the sentence that is imposed (e.g. that he was designated a "dangerous offender", and why) would thereby also be negated. He may face a retrial. I bear in mind these potential outcomes as well.

[31] While the watching of the videotape could arouse a person's emotions, anyone who is a potential juror that would see the videotape, if in the absence of a publication ban it is transmitted to the public domain, would presumably also be seeing the very same video at a trial regarding the September 26 incident, if they are selected as a juror (and they would have access to it as an exhibit during deliberations). The difference at trial presumably is that the videotape and the circumstances surrounding the incident would be contextualized, based on the evidence presented by the Crown, and possibly the Defence.

[32] The entire September 26 incident is continuously and fully captured on the videotape. In spite of there being no audio available, it is compelling objective evidence that reliably implicates Mr. Melvin. There was no physical interaction between Mr. Melvin and Mr. Preeper in the 30 minutes immediately preceding the assaults. There is no indication of any significant conversation between them around the material times. The attack appears to be concerted, and without any warning. These three inmates were cleared as "compatible" by the responsible staff at the institution - which process involves asking the inmates if they are compatible with the proposed other inmates they would have to spend time with in the recreation yard. These circumstances are not comparable to the those in *R v Chan*, 2005 NSCA 61.

[33] There are no apparent significant veracity/reliability issues for jurors to decide in relation to Mr. Melvin's culpability, which might otherwise present an opportunity for the improper injection of their emotions, rather than a strict reliance on their reason in deciding the case.

[34] Nevertheless, let me presume that I have found it provisionally "necessary" at this point to impose a publication ban to prevent a serious risk to the proper administration of justice. I will continue the analysis.

[35] The stated goal of a publication ban is the avoidance of "a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk".

**2 - Could reasonably alternative measures sufficiently reduce the risks of prejudice that Mr. Melvin has argued will otherwise exist?**

[36] Yes, they could.

[37] CBC argues that Mr. Melvin's fair trial rights can be preserved by virtue of the mere passage of time until the trial begins, screening of jurors by challenges for cause (publicity and otherwise), and directions during the trial - that jurors must disabuse themselves of any information they have acquired about Mr. Melvin or

the case, and only decide it on the basis of what they see and hear in the courtroom, according to the instructions of the presiding Justice.[7]

[38] Even presuming that some jurors may undertake pre-trial investigations and learn things about Mr. Melvin on the Internet or otherwise, I cannot foresee how jurors, who are screened by a challenge for cause (*inter alia*, for pretrial publicity), and instructed against taking into account improper considerations by a presiding Justice, would not be positioned to fundamentally fairly assess Mr. Melvin's potential culpability for his actions on September 26, 2020 - should he be charged and proceed to trial by jury. Our courts have repeatedly stated that we should start with the proposition (i.e. presumptively), that jurors will follow the instructions they receive from a presiding Justice. One must remember as well that a criminal jury must be unanimous in its verdict. This also gives some guarantee to the hoped-for "just" verdict.

[39] I am not satisfied that it is "necessary" for there to be a wholesale or partial (or conditional) publication ban regarding the September 26, 2020 incident, in

[7] Although a number of cases have suggested that the mere passage of time can negate the potential prejudicial impact of pre-trial publicity, that may be true in many cases, but I seriously question it to be the case here, given Mr. Melvin's well established public notoriety. Even if Mr. Melvin's notoriety was not significant in New Brunswick, it would not be entirely unexpected for potential New Brunswick jurors to be curious enough to "Google" Mr. Melvin's name. If they did, the passage of time argument would become largely immaterial in light of what they would find, if no publication ban were in place.

order for Mr. Melvin to have a fundamentally fair trial, should he be criminally charged and proceed to trial by jury.

[40] Let me nevertheless continue on with the analysis.

**3 - Do the salutary effects of the proposed publication ban outweigh the deleterious effects on the rights and interests of the parties and the public?**

[41] The salutary effects of publication bans are that they attempt to preserve to an accused person a fundamentally fair trial, which may not otherwise be afforded to them.

[42] The deleterious effects of a publication ban in the case of criminal matters, are that they suppress information about the functioning of our justice system generally (regarding policing, prosecution, and judicial determinations of those vital interests), and specifically in relation to the particular offender and offence. More specifically, it is argued that a publication ban on the transmission of any portion of the videotape to the public domain will inhibit reporting fully on the evidence regarding, and the outcome of, Mr. Melvin's dangerous offender application.

[43] An independent and impartial justice system is one of the cornerstones of a modern democracy. Its ongoing proceedings and outcomes are the most obvious

and available lens through which the public may inform itself about, and have confidence in, the workings of the justice system.

[44] As Chief Justice Wood stated in *United Kingdom of Great Britain and Northern Ireland (Atty. Gen.) v LA*, and in *Verrilli* respectively:

> 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 (S.C.C.), the Supreme Court of Canada described the open court principle:
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> > 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.
>
> And-
>
> 23 In Canada, the open court principle is essential for public confidence in the courts and the administration of justice. Judicial proceedings are presumed to be open to the public and the media and should only be restricted where the party seeking to do so can provide sufficient justification. This principle was described by the Supreme Court of Canada in *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 (S.C.C.) as follows:
>
> > 1 In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy.
> > …

[45] The deleterious effects of a publication ban outweigh the salutary effects in the circumstances of this case.

**Conclusion**

[46] I reject Mr. Melvin's application for a publication ban of the videotaped evidence presented at his dangerous offender hearing regarding his actions in relation to Joshua Preeper on September 26, 2020.

[47] However, I order that the interim ban be continued for 20 calendar days after the release of my decision, should Mr. Melvin wish to file an appeal and request a stay of my decision pending the appeal.

Rosinski, J.