ONTARIO COURT OF JUSTICE

DATE: 2023 06 29
COURT FILE No.: Muskoka 22-24100556

B E T W E E N :

KENNETH JACKSON

— AND —

HIS MAJESTY THE KING

— AND —

RONNIE TAYLOR

— AND —

SCOTT ANTHONY

Before Justice Cecile Applegate
Heard on June 20, 2023
Reasons for Judgment released on June 29, 2023

Kenneth Jackson ..... **on his own behalf**
W. Barnes ..... **counsel for the Crown**
J. Herbert ..... **counsel for the defendant Ronnie Taylor**
K. Stein ..... **counsel for Scott Anthony**

APPLEGATE J.:

Overview

[1] Mr. Taylor is charged with assault, mischief under $5000 x2, utter threats and fail to comply with probation alleged to have occurred June 21, 2022. The matters are set for trial on March 14, 15, and April 2, 2024.

[2] On May 2, 2023, Mr. Taylor filed a s. 7 *Charter* application alleging excessive use of force by the police while he was in custody. He seeks a stay of the charges against him. Attached to his affidavit in support of the application was a USB key containing cell video footage of the interaction between Mr. Taylor and the police while he was under arrest at the Bracebridge OPP.

[3] PC Scott Anthony is one of the officers involved in the arrest of Mr. Taylor and is depicted in the video. He is the officer believed to have assaulted Mr. Taylor. He asserts a privacy interest given that he is captured in the video. He currently faces criminal charges where it is alleged that he used excessive force during the arrest of another individual in an unrelated matter. This other matter is expected to proceed to trial, perhaps in the Superior Court of Justice with a judge and jury, and civilians are anticipated be called as witnesses.

[4] Mr. Jackson is a journalist affiliated with APTN. On May 2, 2023, shortly after the *Charter* application was filed, he requested release of the materials. All materials but the USB key were released to him.

[5] Court Services Division sought direction from Justice Carlton regarding the release of the USB key. On May 18, 2023, Justice Carlton ordered that Mr. Jackson file a formal application for the release of the USB key with notice to the Crown and Mr. Taylor which Mr. Jackson did on May 19, 2023. This application was argued before me on June 20, 2023, at which time I granted standing to PC Anthony's counsel to make submissions.

[6] The USB key has not been made an exhibit in any proceedings in the Ontario Court of Justice ("OCJ") but is expected to be made an exhibit at trial. On May 19, 2023, Mr. Taylor brought a bail review in the Superior Court of Justice ("SCJ"). The cell footage video was played at the hearing and made an exhibit. Justice Christie sealed the exhibit pending the determination of this application.

[7] In order to properly consider the interests at stake on this application, I reviewed the *Charter* materials filed including the cell video footage.

Position of the Parties

[8] Mr. Jackson seeks the release of the materials contained on the USB key to complete his research. He has yet to decide whether he will write a story and whether it will be published or aired on TV. He was not aware that the video had been played in the SCJ or he would have sought to retrieve it there. His position is that this court has delayed his access to what he is entitled to have pursuant to the open court principle. He points out that, every day, courts release materials filed including unsealed ITO's (Informations to Obtain a search warrant), statements of claim and defence, etc. Further, he argues that PC Anthony has not demonstrated a serious risk to the administration of justice that is real, substantial, and well grounded in the evidence. As such, PC Antony has not rebutted the presumptions that the USB key should be released and that a publication ban should not be imposed.

[9] The Crown does not oppose the release of the USB key to Mr. Jackson. However, Mr. Barnes submits that the proper procedure is that it should only be released once it has been made a formal exhibit in the OCJ (ie. at trial). This would allow the trial judge to view it in the appropriate context and resolve any admissibility issues. He argues that I have no jurisdiction to release an exhibit filed in the SCJ. He submits that Mr. Jackson is free to bring his application to unseal the exhibit that was filed in the SCJ. Mr. Barnes argues that the current application and materials are incomplete and may not go ahead. At most, they are a "placeholder" for a future exhibit that may or may not be filed at trial.

With respect to arguments about other types of materials that have been released prior to trial, the Crown points out that these items are usually released after a hearing has started and in situations where there has been some judicial oversight. Mr. Barnes submits that the open court principle is meant to apply to what is happening in the courtroom not what is happening in the court filing office.

[10] Ms. Stein opposes the release of the USB key altogether. If I am inclined to release it, she urges me to consider imposing a publication ban. She argues that releasing the video to the public may compromise PC Anthony's rights to privacy and to a fair trial. Civilians who may form part of a jury or who are witnesses may be influenced. Further, she joins the Crown in their argument that filing these materials does not make them an exhibit and that the release of materials should occur after they are made exhibits at trial. She points to the fact that many items filed are not automatically released to the public including presentence or psychiatric reports.

[11] Mr. Taylor does not oppose the release of the USB key.

Legal Principles

The Open Court Principle

[12] The Supreme Court of Canada recently revisited the open court principle in *Sherman Estate v. Donovan.*[1] Justice Kasirer, speaking for the Court, began with the following comments:

> "**1** This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press -- the eyes and ears of the public -- is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.
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> **2** Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.
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> **3** Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought -- for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order – the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to

[1] 2021 SCC 25.

maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects."

[13] Courts have repeatedly stated that the open court principle "is not to be lightly interfered with". Any party attempting to limit it "must be subject to close scrutiny and meet rigorous standard".[2]

The Test to Place Limits on the Presumptive Court Openness

[14] "The *Dagenais/Mentuck* test[3] applies to all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings"[4].

[15] "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 the 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 may well invite caution in opting for full and immediate disclosure".[5]

[16] The *Dagenais/Mentuck* test requires anyone seeking to limit the open court principle to first prove that such limitation is necessary to prevent a serious risk to the administration of justice. This risk must be "*real, substantial* and *well-grounded in the evidence*: it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained".[6]

[17] Under the first branch of the *Dagenais/Mentuck* test, a court must consider reasonably alternative measures. For example, in an effort to strike a balance between press freedom/open courts and protection of the innocent, some courts have permitted the press to have access to the information but prohibited the press from publishing some or all of that information until the completion of the proceedings.[7]

[18] Once a serious risk to the proper administration has been identified and there are no reasonable alternative measures to prevent the risk, the *Dagenais/Mentuck* test requires a "balancing between the salutary and deleterious effects of any order that would impinge on freedom of the press". As stated by MacPherson, J.A., "[t]he word 'balancing' conjures images of neutrality or even-handedness. In my view, this image is misplaced. Because of the centrality of free press and open courts in Canadian society and in the

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[2] See *Vancouver Sun (Re),* [2004] 2 SCR 332, para 26, *R. v. Toronto Star Newspapers Ltd.,* [2003] O.J. No. 4006 (C.A.), para 19.

[3] From the decisions of *Dagenais v. Canadian Broadcasting Corp.,* [1992] 3 SCR 835 and *R. v. Mentuck,* 2001 SCC 76

[4] *Toronto Star Newpapers Ltd v. Ontario,* 2005 SCC 41, paras 7, 28

[5] *Toronto Star Newpapers Ltd v. Ontario,* para 8

[6] *Mentuck,* para 34; *Toronto Star Newpapers Ltd v. Ontario,* para 27.

[7] *R. v. Vice Media Canada Inc.,* 2017 ONCA 231; *R. c. Flahiff,* (1998) 123 CCC (3d) 79 (QCA); *Ottawa Citizen*

Canadian constitution, there is almost a presumption against any form of secrecy in all aspects of court proceedings in Canada".[8]

[19] *Sherman Estate v Donovan* reformulated the *Dagenais/Mentuck* test into a three-part test. Anyone now seeking to place limits on the presumptive court openness (ie. a sealing order, a publication ban, an order excluding the public from a hearing, a redaction order or other limits on court openness) must establish that:[9]

1. Court openness poses a serious risk to an important public interest.

2. The order sought is necessary to prevent serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

3. As a matter of proportionality, the benefits of the order outweigh its negative effects.

[20] Over time, various interests have justified a discretionary exception to open courts including the risk to the "fairness of the trial"[10], a risk affecting "the proper administration of justice"[11], or a serious risk to "an important interest, including a commercial interest, in the context of litigation"[12].

Legal Issues and Analysis

Issue #1: Has PC Anthony demonstrated that his privacy interest justifies an exception to the open court principle?

[21] In *Sherman Estate v Donovan,* the Court recognized that privacy may be justify an exception to the open court principle where "the proceedings in open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity". Justice Kasirer identified this narrow dimension of privacy as rooted in the public interest in protecting human dignity and, where it is shown to be at serious risk, it may justify an exception to open court principle.[13]

[22] At para 77, Justice Kasirer cited a non-exhaustive list of examples of sensitive personal information that may give rise to a serious risk if exposed. These examples included information related to stigmatized medical conditions, stigmatized work, sexual orientation, and subjection to sexual assault or harassment. The issue to determine is "whether the information reveals something intimate and personal about the individual, their lifestyle or their experience". Further, it is appropriate to consider whether this information is already in the public domain.

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[8] *Ottawa Citizen*, para 65
[9] *Sherman Estate v Donovan,* para 38.
[10] *R. v. Dagenais,* p. 878.
[11] *R. v. Mentuck,* [2001] 3 SCR 442, par 32
[12] *Sierra Club v. Canada,* 2002 SCC 41, para 53
[13] *Sherman Estate v Donovan,* para 7

[23] Justice Kasirer summarized the privacy exception as follows[14]:

> "...the important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, to be sure, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. Although measured by reference to the facts of each case, the risk to this interest will be serious only where the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. Recognizing this interest is consistent with this Court's emphasis on the importance of privacy and the underlying value of individual dignity, but is also tailored to preserve the strong presumption of openness."

[24] PC Anthony has failed to establish the risk to his privacy is a serious risk to an important public interest. The video captures PC Anthony's actions at his place of work in the police station where he knew that he was being videotaped. PC Anthony would know that this video forms part of disclosure and others would see it. There is nothing particularly private about what is depicted in the video. Its contents are not sufficiently sensitive to "strike at the biographical core" of PC Anthony. I accept that it may very well cause PC Anthony inconvenience and embarrassment if the video is disseminated. However, as noted in *Sherman Estates,* this is insufficient to overturn the presumption of openness.

Issue #2: Has PC Anthony demonstrated a risk to his fair trial rights justifying an exception to the open court principle?

[25] Trial fairness is a concept that can be interpreted in different ways and includes, among other things: (a) pretrial publicity and potential jury bias; (b) protecting the fundamental rights of the accused; and (c) the public's right to be confident that justice has been done.[15]

[26] "[T]he question is whether the ban is necessary in order to protect the proper administration of justice, not specifically to protect the fair trial rights of the accused although those fair trial rights are part of the proper administration of justice".[16]

[27] "What must be shown is a high probability that the effect of publicity will be to leave potential jurors so irreparably prejudiced or to so impair the presumption of innocence that a fair trial is impossible... Evidence of the probable effects is required. Accused persons enjoy the right to a fair trial, not the right to be free from excessive adverse publicity before his or her trial. Negative publicity alone does not preclude a fair trial. While the nexus between publicity and its lasting effects is not susceptible of scientific

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[14] *Sherman Estate v Donovan,* para 85

[15] *Toronto Star Newspapers Ltd v. Canada,* 2010 SCC 21, para 22 (citations omitted).

[16] *Mentuck,* para 40; *R. v. CTV ("Esseghaier"),* 2013 ONSC 5779, para 26; and *R. v. Postmedia Network Inc. ("Wettlaufer"),* 2017 ONSC 1433, para 11.

proof, the focus must be on that link, not the mere existence of publicity. Any alleged impartiality of jurors can only be measured in the context of the safeguards that have evolved in order to prevent such problems".[17]

[28] "Direct evidence of a serious risk is not required where the circumstantial evidence is sufficient to persuade the court to draw an inference of that risk".[18]

[29] Cases where "the effect of publicity would be to leave potential jurors so irreparably prejudiced or to impair the presumption of innocence that a fair trial is impossible" have included *Wettlaufer* (first-degree murder of eight nursing home residents), *Esseghaier* (terrorist plot attack to derail a train), and *R. v. N.Y.*[19] (allegations of terrorist activities involving attacks on politicians and public buildings). In each of those cases, the media attention was significant and included national and international coverage. As such, other reasonable alternative measures, such as challenges for cause or a change of venue, would not have alleviated the risks to a fair trial.

[30] The impact of pretrial publicity on jurors was reviewed by Chief Justice Lamer in *Dagenais* where he stated that "...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".[20]

[31] However, the Court went on to say that in the case of sustained pretrial publicity concerning matters that will be the subject of the trial, impressions may be left in the minds of the jurors that cannot be dispelled. In those cases, pre-trial publicity may pose a threat to the right to a fair trial.[21]

[32] PC Anthony asserts that his right to a fair trial would be compromised if the video was released to the media. He submits that a publication ban should be imposed if I allow the video to be released. The risks argued at the hearing include the potential tainting of witnesses and impacting potential jurors. At this stage, I have no evidence substantiating the risks argued. There is nothing before me to show that there is a high probability that the dissemination of the video will leave potential jurors and witnesses so irreparably prejudiced or to so impair PC Anthony's presumption of innocence that a fair trial is impossible. There is no indication before me that this case will garner national or international media coverage such as in *Wettlaufer* or *Esseghaier*.

[33] Further, there are reasonably alternative measures that can prevent or alleviate the risks raised by PC Anthony. Firstly, I note that witnesses have already provided their statements to police. If their evidence changes at trial, Ms. Stein will be well-positioned to cross-examine them on the inconsistencies and the reasons for same. Secondly, strong jury instructions and challenges for cause could alleviate any jury tainting concern.

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[17] *Phillips v. Nova Scotia (Commissioner, Public Inquiries Act),* (1995), 98 CCC (3d) 20 (SCC), paras 128-130; *Esseghaier,* para 27; *Wettlaufer,* para 11.
[18] *Esseghaier,* para 98; *Wettlaufer,* para 15
[19] [2008] O.J. No. 1217 (SCJ)
[20] Para 87
[21] *Dagenais,* para 88

[34] On the record before me, I cannot infer that the dissemination of the video would pose a serious risk to PC Anthony's right to a fair trial including his right to be presumed innocent. All I have are simple or bare assertions that it would. PC Anthony has failed to establish a serious risk to an important public interest in this regard.

Issue #3: Can the exhibit be released prior to being made an exhibit in the OCJ trial?

[35] Courts have recognized that "the presumption of openness extends to the pre-trial stage of judicial proceedings. The open court principle applies at every stage of proceedings.[22]

[36] Further, "the open court principle and the rights of the media under s. 2(b) of the *Canadian Charter of Rights and Freedoms* are not limited to attending court and observing and reporting on what transpires in the courtroom. Absent the proof of some countervailing interest sufficient to satisfy the *Dagenais/Mentuck* test, the right to access to exhibits includes the right to make copies". This includes exhibits used to make a judicial determination and exhibits introduced in the course of pre-trial proceedings.[23]

[37] In *Canadian Broadcasting Corp. v. R.,* the Ontario Court of Appeal reviewed dicta from the Supreme Court of Canada which stated that "s. 2(b) provides that the state must not interfere with an individual's ability to 'inspect and copy public records and documents, including judicial records and documents'".[24]

[38] Justice Rosenberg in *R. v. Ahmad* (in dissent) made the following comments regarding the timing of reporting newsworthy items: "Freedom of the press encompasses not just the freedom to decide what to report but also the timing of the reporting. If, by the time the trial is finished, what transpired at a bail hearing is no longer deemed newsworthy, the Canadian public as consumers of the news are the poorer for it. Immediacy is the essence of news: *Dagenais* at p. 929". And further, "[t]he open court principle would be slender if it did not apply to documents that had not been tested as to their factual probity. Similarly, the open court principle and the right of freedom of expression would be weak if the media could only report on information after it had been fully tested and contested at a full trial".[25]

[39] I find that the open court principle does not only apply to what occurs "on the record" in a courtroom. It also pertains to materials filed in a court proceeding or court records. As noted in *Sherman Estate v. Donovan,* "as a general rule, the public can attend hearings and consult court files…". There may be times (as in this case) where the court may decide that a *Dagenais/Mentuck* hearing will be necessary to determine what, if any, interests are impacted and to what extent. The fact that the USB key has not been made an exhibit in the OCJ does not, on its own, prevent the media from having access to it. Further, in this case, the USB key has been made an exhibit in the proceedings, albeit in the SCJ.

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[22] *Toronto Star Newpapers Ltd v. Ontario,* para 28 citing *Vancouver Sun (Re),* 2004 SCC 43, para 31
[23] *Canadian Broadcasting Corp. v. R.,* 2010 ONCA 726
[24] *Canadian Broadcasting Corp. v. R,* para 33
[25] *R. v. Ahmad [Toronto Star Newspapers Ltd v. Canada],* 2009 ONCA 59, paras 127, 131.

[40] I find that the USB key can be released prior to it having been made an exhibit in the OCJ court.

Conclusion

[41] PC Anthony has failed to demonstrate that court openness poses a serious risk to an important public interest. There is no basis to limit the open court principle in this case. A copy of the USB key sealed by Justice Christie is to be released to Mr. Jackson.

Released: June 29, 2023

Justice Cecile Applegate