IN THE YOUTH CRIMINAL JUSTICE COURT OF NOVA SCOTIA
Citation: *R. v. M.M.*, 2017 NSPC 12

Date: 20170303
Docket: 3014984-3015000
Registry: Bridgewater

Between:

Her Majesty the Queen

Crown

- and –

M.M., B.S., C.M., L.W., N.W. and M.S.

Accused

- and –

The Canadian Broadcasting Corporation Inc.

Applicant

- and-

Her Majesty the Queen, M.M., B.S., C.M., L.W., N.W. and M.S.

Respondents

Restriction on Publication: By Court Order, there is a ban on publishing information that could disclose the identity of the victim and/or complainant, pursuant to s. 486.4 of the Criminal Code of Canada and further any information that may identify a person who's identity is protected under s. 110 and s. 111 of the Youth Criminal Justice Act.

Judge:	The Honourable Judge Paul Scovil, JYC
Heard:	December 12, 2016, December 19, 2016 and January 11, 2017
Decision	March 3, 2017 at Bridgewater, Nova Scotia
Charge:	163.1(3), 163.1(4) and 162.1 of the Criminal Code of Canada
Counsel:	Peter Dostal, for the Public Prosecution Geoff Franklin, Defence for M.M. Victor Goldberg, Defence for L.W. Stanley MacDonald, Q.C., Defence for C.M. Alan Ferrier, Q.C., Defence for M.S. Nicholas Fitch, Defence for N.W. Joshua Nodelman, Defence for B.S. Nancy Rubin, Q.C., for the Applicant

The original text of this decision has been changed according to the Erratum dated September 28, 2022

By the Court:

Introduction:

[1] Media scrutiny of the various branches of Canadian Government is essential to ensuring that we live in a free and democratic society. This holds true for the Judicial Branch as well as the Executive and Legislative. The ordinary citizen has neither the opportunity nor the ability to spend time observing the workings of our busy court but our media does. As a consequence, the media should be unfettered in their ability to view and comment on matters before our courts, unless there are very strong legal reasons to limit that access.

[2] In the matter before me, the interplay between the concept of an open court and the legislated ability for a Court to ban publication of documents become front and center. In addition, the over arching principles enshrined in the **Youth Criminal Justice Act (YCJA)** must be considered regarding the protection of young persons privacy, as well as publication bans under the **YCJA**.

[3] For the reasons below, I am ordering that an un-redacted version of the ITO in this matter be made available to the applicant as well as other members of the

media following procedures I will provide in this decision and subject to both statutorily and judicially imposed publication bans.

Facts

[4] Six young persons in the Bridgewater area have been charged under Section 163.1(3), 163.1(4) and 162.1 of the **Criminal Code** from between the 1st day of February, 2015 to the 12th day of May, 2016.

[5] The allegations arose after a student at a local Bridgewater high school advised the principal of students sharing nude photos of other students utilizing the software program, "Dropbox". Bridgewater Police Services were contacted and an investigation commenced. Police obtained a Search Warrant, pursuant to Section 487 of the **Criminal Code,** to search a variety of electronic devices which had been handed over to, and then seized by, the police.

[6] Search Warrants are obtained by providing an affidavit to the presiding Judge or Justice commonly known as an "Information to Obtain a Search Warrant" or an "ITO". In this matter, an ITO was sworn to by Detective Constable Mathew Bennett and then used to obtain the search warrant for the electronic devices held by the police. In addition, the police filed an affidavit asking that the contents of the ITO and search warrant be sealed. This request for a Sealing Order, as well as

the Search Warrant, was granted. Subsequently, the accused in the matter were charged.

[7] The Bridgewater Police Service issued several media releases on the matter. These releases garnered a great deal of media attention, including the attention of Ms. Angela McIvor. Ms. McIvor is a well known and respected journalist employed with the Canadian Broadcasting Corporation.

[8] Ms. McIvor attended the first court appearance for the accused in this matter. At that time, she requested to view the information that had been sworn. Ms. McIvor was advised by court staff that she would have to schedule a hearing before the Court to access that material. As a consequence, Ms. McIvor has applied to have access to the sworn informations, together with a request to view the sealed search warrant and the accompanying ITO in the matter.

[9] Subsequent to the application, the Crown, accused's counsel and the applicant, adjourned to consider their respective positions which resulted in the Crown providing to the applicant a redacted ITO. The redacted portions obscured the names of the accused, alleged victims, serial numbers and the IP addresses of the electronic devises and a student's name, who had reported to school authorities

what was occurring but was not directly involved in the exchange of intimate photos.

[10] After reviewing the redacted ITO, the applicant appeared back before this Court and requested that the ITO in its entirety be un-redacted and made available to the media. The Crown and accused opposed any further un-redactions of the ITO.

Law

[11] The issue of the public, and consequently the media, having access to the Courts and to documents placed before the Courts, has a long history in Canadian Jurisprudence.

[12] In *AG (Nova Scotia) v. MacIntryre*, [1982] 1 SCR 175, Justice Dickson held what once a Search Warrant has been executed and a report to the issuing Justice having been made, Court records are presumably open and should be made available to the public and the press. Justice Dickson quoted the legal philosopher, Jeremy Bentham in his decision as follows:

> 'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has a place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.' 'Publicity is the very soul of justice. It is the keenest spur to the exertion and the surest of all

> guards against improbity. It keeps the judge himself while trying under trial.'

[13] Thus, only in media scrutiny can society know that a fulsome light has been shown on the workings of justice.

[14] Subsequent to *MacIntyre*, Section 487.3 of the **Code** was enacted. 487.3 provides when a court may prohibit access to and disclosure of, any information relating to a warrant, order or authorization. 487.3(1) sets out as follows:

> **487.3(1)** On application made at the time an application is made for a warrant under this or any other Act of Parliament, an order under any of sections 487.013 to 487.018 or an authorization under section 529 or 529.4, or at a later time, a justice, a judge of a superior court of criminal jurisdiction or a judge of the Court of Quebec may make an order prohibiting access to, and the disclosure of, any information relating to the warrant, order or authorization on the ground that
>
> (a) the ends of justice would be subverted by the disclosure of one of the reasons referred to in subsection (2) or the information might be used for an improper purpose; and
>
> (b) the reason referred to in paragraph (a) outweighs in importance the access to the information.
>
> **Reasons**
>
> (2) For the purposes of paragraph (1)(a), an order may be made under subsection (1) on the ground that the ends of justice would be subverted by the disclosure
>
> (a) if the disclosure of the information would
>
> (i) compromise the identity of a confidential information,
>
> (ii) compromise the nature and extent of an ongoing investigation,

(iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used, or

(iv) prejudice the interests of an innocent person; and

(b) for any other sufficient reason.

Procedure

(3) Where an order is made under subsection (1), all documents relating to the application shall, subject to any terms and conditions that the justice or judge considers desirable in the circumstances, including, without limited the generality of the foregoing, any term or condition concerning the duration of the prohibition, partial disclosure of a document, deletion of any information or the occurrence of a condition, be placed in a packet and sealed by the justice or judge immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in any other place that the justice or judge may authorize and shall not be dealt with except in accordance with the terms and conditions specified in the order or as varied under subsection (4).

Application for variance of order

(4) An application to terminate the order or vary any of its terms and conditions may be made to the justice or judge who made the order or a judge of the court before which any proceedings arise out of the investigation in relation to which the warrant or production order was obtained may be held.

Upon whom does the burden lie to provide for or against disclosure of an ITO?

[15] The Crown has argued that once a redacted version of the ITO has been provided to an applicant, the burden would then shift to the applicant to provide

grounds for further production of un-redacted portions of the ITO. The applicant argues the burden remains on the Crown.

[16] In *Application by the Winnipeg Free Press*, [2006] MBQB 43, Justice McKelvey of the Manitoba Queens Bench held at paragraph 10, that due to the presumption in favour of access the party seeking to deny access bears the burden of establishing the necessity of maintaining the sealing order. Likewise, in *Canadian Broadcasting Corporation and Others v. HMQ*, 2013 ONCS No. 6983, the Court held that any editing of ITO rests solely with the Crown, subject to challenges made by those who have legitimate and recognized right of access to the material.

[17] In my mind the burden of maintaining non-disclosure of material ordinarily accessible to the public and the medial remains on that party wishing to maintain non-disclosure. That burden does not shift at any point in the process.

Procedure

[18] Argument was made was before me regarding procedure in this matter. The applicant set out that the sealing order covering the ITO and the search warrants in these matters was, itself, sealed. The applicant, as well, made objection to court administration not allowing media an initial ability to view the informations

against the accused. It would, therefore, be advantageous to set out the procedures that should be followed in these types of application in the **Youth Justice Court**.

[19] First, as to the sealing orders in matters in all courts. These orders are normally attached to the outside of the packet of sealed material and available to view by the public. Normally, in the administration of this Court, this is the case. If the sealing order itself in this matter was sealed, it would have likely been an administrative anomaly. What is clear is that any order directing the sealing of a court file should, itself, be available for public inspection (see, *R. v. Toronto Star Newspapers Ltd.*, [2006] O.J. No. 5533 (Ont. Sup. Ct. Justice), see also, *R. v. C.B.C.*, 2008 ONCA 397.)

[20] The process in which the Crown is responding to an application for unsealing or the ability to view otherwise undisclosed material, was reviewed in *R. v. Canadian Broadcasting Corporation*, 2008 ONCA 397 at para. 47 to 53. There the Court held:

> **47** … The different procedure the Crown used in that case **[Toronto Star]** enabled the court to deal with the matter efficiently and to indicate the basis of its decision.
>
> **48** Before the hearing, the Crown reviewed the search warrant materials and redacted those portions about which it had specific concerns. The Crown prepared a table setting out its position in an organized format. The table contained three columns: the page numbers of the warrant material, the grounds for redacting any of those pages, and a description of the edited information. The

Crown consented to a preliminary order permitting it to provide the actual sealing order and the edited version of the information used to obtain the warrants to each of the media applicants. The edited version and the table setting out the Crown's position provided the basis for the submissions to the application judge. To facilitate the judge's review of the material, the Crown provided him with a copy of the warrant materials, with the edited portions identified by highlighter, thus eliminating the need to compare the edited version with the original.

49 The application judge then made specific rulings regarding each of the Crown's proposed edits, which are found in an appendix to his reasons. This appendix incorporates the table provided by the Crown and includes an additional column indicating whether the application judge accepted or rejected the Crown's proposed edits with a brief explanation of the basis for each decision. Had an appeal been pursued in that case, the appellate court could have reviewed each of these conclusions, deferring or interfering where appropriate.

51 … The Crown should set out its position in an organized format, such as the table prepared by the Crown and incorporated in Nordheimer J.'s reasons in **Toronto Star**. This document should be provided to the other parties to allow them to make effective submissions. The Crown should provide an unedited copy of the warrant materials to the court, with the edited information identified by highlighting or otherwise, to clearly indicate what portions it seeks to have sealed.

52 …

53 Placing the onus on the Crown to perform the burdensome task just described reflects the presumption that once a search warrant has been executed, the warrant and the information upon which it is based must be made available to the public unless it is demonstrated that the ends of justice would be subverted by disclosure of the information. The Crown, as the only party with access to all of the information, is in the best position to perform this task.

[21] A similar approach was described in *Application by the Winnipeg Free Press* (Supra):

> **12** With the assistance of counsel, the Court adopted a procedure for determining this application which would ensure confidentiality balanced by an ability to review the evidence relied upon. The process adopted was:
>
> 1. The R.C.M.P. provided the sealed material to the Court with its position as to:
>
> a) What if anything could be publicly released in whole or in redacted form;
>
> b) What, if anything, could be released in summary form; and
>
> c) What, if anything, could be released to counsel on suitable undertakings as to confidentiality;
>
> 2. R.C.M.P. counsel made submissions to the Court with respect to its position on the sealed material. Those submissions were made ex parte and in camera. The proceedings were monitored;
>
> 3. The Court reviewed the material and determined what documentation would be released to the Winnipeg Free Press and to Mr. Stobbe and on what conditions. The materials were "vetted" by the R.C.M.P. with reasons given in the margin where information was blacked out;
>
> 4. The "vetted" materials were released and reviewed by counsel for the respective parties. The information released to the Winnipeg Free Press and to Mr. Stobbe was substantially the same. However, any information touching upon Mr. Stobbe's privacy was not released to the Winnipeg Free Press;
>
> 5. Argument was then heard from counsel on behalf of the parties with respect to the material that was released and their respective positions on the substantive issues related to the undisclosed material which had been viewed by the Court.

Both of the above cases are what amounts to variations on a theme. It would be difficult to set out a definitive procedure relating to the unsealing and disclosure of material to media applicants or others. Given that matters factually are often very

different in these matters there should be some fluidity on procedure. The cases cited above are useful guidelines.

Procedure of YCJA Matters

[22] Under the **Youth Criminal Justice Act**, procedures relating to young persons after differs from those used in adult court. This hold very true for court records. The publication of records and information related to young persons are governed under Part 6 of the **Act**.

[23] A record is defined under s. 2 of the **YCYA** as follows:

> "record" includes any thing containing informations, regardless of its physical form or characteristics, including microform, sound recording, videotape, machine-readable record, and any copy of any of those things, that is created or kept for the purposes of this At or for the investigation of an offence that is or could be prosecuted under this **Act**.

[24] This definition clearly encompasses all the documents that are involved in the application before this court, including sworn Informations, the ITO, the Sealing Order and other documents sought.

[25] Section 114 of the **YCJA** authorizes a court to keep a record of any case that comes before it under the Act.

[26] Section 118 of the **YCJA** states:

> **118 (1)** Except as authorized or required by this Act, no person shall be given access to a record kept under sections 114 to 116, and no information contained in it may be given to any person, where to do so would identify the young person to whom it relates as a young person dealt with under this Act.
>
> **(2)** No person who is employed in keeping or maintaining records referred to in subsection (1) is restricted from doing anything prohibited under subsection (1) with respect to any other person so employed.

[27] Section 119 goes on to set out what persons are authorized, on request, to be given access to a Youth Justice Court record. In relation to the matter now before this Court, the applicable portions of the sections states:

> **119 (1)** Subject to subsections (4) to (6), from the date that a record is created until the end of the applicable period set out in subsection (2), the following persons, on request, shall be given access to a record kept under section 114, and may be given access to a record kept under sections 115 and 116:
>
> (s) any person or member of a class of persons that a youth justice court judge considers a valid interest in the record, to the extent directed by the judge if the judge is satisfied that access to the record is
>
> (i) desirable in the public interest for research or statistical purposes, or
>
> (ii) desirable in the interest of the proper administration of justice.

[28] Any person seeking Youth Court records of any kind who fall under the category of a person or number of a class of persons, that has a valid interest in the

record must make a request, as set out in s. 119, for access to the Court. This would include requesting something as mundane as an ordinary information charging a young person with an offence.

[29] With regards to procedure for this type of request, I have instructed Court Administration to maintain at the court office an application form which can be quickly filled out by an individual, particularly media, that sets out the records sought and why. Further, that the application can be brought to the attention of a Judge of the **Youth Criminal Justice Court**, who can either direct that the documents requested be shown to the applicant or in the alternative court staff can be directed to set the matter down for hearing with all relevant parties being given notice.

Test for Denying Access to Court Records

[30] The test for limiting the openness of Judicial proceedings has been developed in the light provided by the Supreme Court of Canada in *R. Dagensais*, [1991] 3 S.C.R. 442 and *R. Mentuck*, [2001] SCC 76. Canadian jurisprudence has come to recognize from these two cases as "the *Dagenais/Mentuck* test". This test provides that access to Court proceedings should only be denied when:

(a) Such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk: and

(b) The salutary effects of the publication 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.

[31] In *Toronto Star Newspapers Ltd. v. Ontario,* [2005] 2 S.C.R. 188, Justice Fish of the Supreme Court of Canada held that the *Dagenais/Mentuck* test applies to the investigative stage of criminal proceedings as well. He further indicated the test was meant to be applied in a flexible and contextual manner. *Toronto Star Newspaper*, as well, confirmed that the first prong of the D*agenais/Mentuck* test must involve risk that is real, substantial and well grounded in the evidence.

Does *Dagenais/Mentuck* apply to matters under the **YCJA**?

[32] The conceptual paradigm of Courts that are open to the public and therefore the media in my opinion clearly applies to matters under the **YCJA**. This was also considered by our Court of Appeal in *R. v. G.D.S.*, 2007 NSCA 94.

[33] After review of the test in *Dagenais/Mentuck*, Justice Fichard stated:

> **35** On the other side of the scale, the Supreme Court has recognized that a young person, under the youth criminal justice legislation, has a special interest in confidentiality. In particular, the premature disclosure of the young person's identity may retard his rehabilitation. Rehabilitation through sentencing is integral to the administration of the youth criminal justice system. So the recognition of the young person's interest in confidentiality, to foster rehabilitation, inheres in the analysis of the "proper administration of justice" under the *Dagenais/Mentuck* test.

He went onto say in paragraph 38:

> **38** The **Y.C.J.A.** itself is the primary source for guidance as to the appropriate balance between G.D.S.'s need for confidentiality and the open court principle. The court should interpret the **Y.C.J.A.** purposively and not extol etymological niceties (*F.N. para.* 23-27). The analysis is undertaken "through the lens of the applicable youth criminal justice legislation": (*R. v. R.C.* at para. 45)

[34] I conclude that the provisions of *Dagenais/Mentuck* and in particular the refinement of that test relating to sealing orders as set out in *Toronto Star* apply equally to matters under the **YCJA** with the proviso that any analysis be done “through the lens” of applicable Youth Criminal legislation”.

<u>The Media, The YCJA and the Principle under *Dagenais/Mentuck*</u>

[35] As s indicated earlier, the ITO sought to be un-redacted by the applicant, is clearly a record under the **YCJA**. Further, the question then presents itself as to whether the applicant, as a member of the media, is a class of persons who under s.

119 of **YCJA** has a valid interest in the record is desirable in the interests of proper administration of justice.

[36] The principles that were important in the formulation of the test in *Dagenais/Mentuck* are equally meaningful in an analysis of whether the media is a class of persons with a valid interest in a record under the **YCJA**. That the media is such a class of persons with a valid interest under. S. 119 is clear from *R. v. S. (R.D.),* [1995] N.S.J. No. 207 (N.S.S.C.). In addition, the role of the media in scrutinizing how the courts deal with youth is just as critical to the administration of justice as with adult matters. Here, I find the media is clearly a class of persons with a valid interest in the record sought.

Is disclosure desirable in the interests of the proper Administration of Justice?

[37] The applicant argues, that in this case, the charges before the Court regarding these young persons is one of the first in the country which in turn has resulted in greater public interest. Further, that there is national dialogue regarding teens sharing intimate images and its effect. As an aside, in Nova Scotia, we do not have to look far to see the devastating effect that the sharing of intimate images can have on a young person.

[38] The applicant also points out that responsible journalists such as herself, are well familiar with the publication bans inherent in matters under the YCJA. Also, that extensive media coverage has been generated by the investigating police who provided media releases on this matter and that young persons had been charged, what the charges were, that Dropbox software was involved and that F.B.I. assistance had been sought in the investigative stage of this matter. Ms. McIvor also indicated the names of the accused would needed to be viewed to give proper referencing for how the scenario played out in the matter before the court. Ms. McIvor acknowledged the importance of publication bans and that those bans must be followed.

[39] Having reviewed Ms. McIvor's affidavit as well as the ITO, I find that the arguments of the applicant are well founded to a large extent and I am prepared to order that an un-redacted ITO in this matter be made available to the applicant and other members of the press, with one proviso.

[40] In the redacted ITO at page 9, certain source individuals among the student body came forward and advised school administrators of information that intimate pictures were being shared. That source or sources wanted to remain anonymous. I am very mindful of the difficulty such a source would have at a school where their identity might somehow be disclosed at this point. Courts have often seen

how young people can be detrimentally judgemental of the youths who ‘do the right thing’ and assist authorities. Being mindful of that, I would order that item © on page 19 of the ITO continue to be redacted, as it currently is. As I said, then the remainder is to be un-redacted and provided to the media. Providing the name of this source could very likely create a chilling effect on other students who may wish to come forward anonymously.

What is the Media?

[41] In todays landscape of social media, individual blogger and traditional journalism and self publication results in the determination of who is “media”, becoming blurred. Ms. McIvor and other journalists such as Keith Corcoran, of the local weekly Lighthouse Now/Progress Bulletin, are well known and respected media personal. What, however, about someone who appears at court administration saying they are ‘Jane Cronkite’ of the ‘Newcombville News’ and that they publish executive on Facebook where they consider all their readers “friends”. In cases of doubt as to whether an individual fits as “media” under s. 119 of the YCJA, it is useful to employ the use of application forms that are able to be quickly filed out, brought to a judge for approval for individual in the media to view requested youth records. When presented with someone like ‘Ms. Cronkite’,

the Court can schedule a quick hearing to determine if the applicant fits within s. 119.

Conclusion

[42] As indicated above, I am ordering a complete un-redaction of the ITO involved, save and except the single source. As always, the public can be assumed that publication of names of the young person, complainants and witnesses remain under a ban pursuant to s. 110(1), together with any other judicially imposed publication bans.

Paul B. Scovil, JYC

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ERRATUM

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Erratum	September 28, 2022 Paragraph 41 in the original decision shows spelling of reporter as Keith Cochrane it should be KEITH CORCORAN.