SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Garnier*, 2017 NSSC 238

Date: 2017 09 07
Docket: CRH No. 454738
Registry: Halifax

Between:

Her Majesty the Queen

v.

Christopher Garnier

DECISION: *VOIR DIRE 1*
Application for VD3 and VD4 be held *in camera*

Restriction on Publication: Section 486.5 CC
Oral decision of Justice Joshua M. Arnold of December 15, 2017,
to allow the publication ban on the identity of V.H.

Judge:	The Honourable Justice Joshua M. Arnold
Heard:	September 5, 2017, in Halifax, Nova Scotia
Oral Decision:	September 7, 2017
Written Decision:	April 12, 2018
Counsel:	Carla Ball and Christine Driscoll, for the Crown Joel Pink, Q.C. and Nicola Watson, for the Defence David Coles, Q.C. and Allison Reid, for the Respondents

By the Court:

Overview

[1] This decision deals with whether the two pre-trial *voir dires* that either directly or indirectly involve Catherine Campbell's prior sexual conduct (as well as V.H.'s prior sexual conduct) should be heard *in camera* or be dealt with as pre-trial *voir dires* open to the public.

[2] Christopher Garnier stands charged that he:

> On or about September 11, 2015 at, or near Halifax, in the County of Halifax in the Province of Nova Scotia, did unlawfully cause the death of Catherine Campbell, and did thereby commit second degree murder, contrary to Section 235(1) of the *Criminal Code*.
>
> And further, that he at the same time and place aforesaid, did improperly interfere with the human remains of Catherine Campbell, contrary to Section 182(b) of the *Criminal Code*.

[3] During the course of the preliminary inquiry held July 11 to 14, 2016, before Her Honour Judge Anne Derrick (as she was then), a hypothetical question was posed to Crown witness Dr. Matthew Bowes, the forensic pathologist who conducted the autopsy, as to whether Ms. Campbell could have died at the hands of Mr. Garnier during erotic asphyxiation gone wrong.

[4] The defence has given notice that they wish to call evidence from V.H., a former sexual partner of Ms. Campbell's, to discuss her prior sexual conduct in support of the defence claim that Ms. Campbell would have suggested or participated in erotic asphyxiation with Mr. Garnier. The Crown asks for this application to be heard *in camera.*

[5] By way of a separate *voir dire* involving an *O'Connor* Application, the defence wishes to access Ms. Campbell's personnel records from her place of employment. The materials provided on the application suggest that some of the personnel records could reference prior sexual conduct. The Crown also asks for this application to be heard *in camera.*

[6] Two media outlets, CBC and CTV, oppose the Crown's application to have these two *voir dires* held *in camera.* They ask that the applications be heard as *voir dires* in the normal course, with full public access, but with a temporary

publication ban to insulate potential jurors. The media says that once the trial is complete, the subject matter of those two *voir dires* (which would include any prior sexual conduct of Ms. Campbell and V.H.), and any associated decision, should be made public.

[7] Some of the material in question was published by *Frank* magazine prior to a publication ban being put in place at the preliminary inquiry stage. The Crown says that the information already published was provided to the defence through the regular disclosure process and that someone with the disclosure then improperly leaked it to *Frank* magazine. In my opinion, the fact that some of the information in question was already published, in these very specific and unusual circumstances, is not of significance to my determination of the matter on a go-forward basis.

[8] For the reasons that follow I have determined that the two *voir dires* involving Ms. Campbell's prior sexual conduct will be held *in camera*.

The Open Court Principle

[9] Section 2(b) of the *Canadian Charter of Rights and Freedoms* states:

> 2. Everyone has the following fundamental freedoms:
>
> …
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

[10] In *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175, in the context of *in camera* applications for search warrants, Dickson J. (as he then was) stated for the majority at p. 183:

> By reason of the relatively few judicial decisions it is difficult, and probably unwise, to attempt any comprehensive definition of the right of access to judicial records or delineation of the factors to be taken into account in determining whether access is to be permitted. The question before us is limited to search warrants and informations. The response to that question, it seems to me, should be guided by several broad policy considerations, namely, respect for the privacy of the individual, protection of the administration of justice, implementation of the will of Parliament that a search warrant be an effective aid in the investigation of crime, and finally, a strong public policy in favour of "openness" in respect of judicial acts. The rationale of this last-mentioned consideration has been eloquently expressed by Bentham in these terms:

> 'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has 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 exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.'

The concern for accountability is not diminished by the fact that the search warrants might be issued by a justice *in camera. On* the contrary, this fact increases the policy argument in favour of accessibility. Initial secrecy surrounding the issuance of warrants may lead to abuse, and publicity is a strong deterrent to potential malversation.

In short, what should be sought is maximum accountability and accessibility but not to the extent of harming the innocent or of impairing the efficiency of the search warrant as a weapon in society's never-ending fight against crime.

[11] The majority went on to state at p. 184:

> Although the rule is that of "open court" the rule admits of the exception referred to in *Halsbury,* namely, that in exceptional cases, where the administration of justice would be rendered impracticable by the presence of the public, the court may sit *in camera.* The issuance of a search warrant is such a case.
>
> In my opinion, however, the force of the 'administration of justice' argument abates once the warrant has been executed, *i.e.* after entry and search. There is thereafter a "diminished interest in confidentiality" as the purposes of the policy of secrecy are largely, if not entirely, accomplished. The need for continued concealment virtually disappears. The appellant concedes that at this point individuals who are directly 'interested' in the warrant have a right to inspect it. To that extent at least it enters the public domain. The appellant must, however, in some manner, justify granting access to the individuals directly concerned, while denying access to the public in general. I can find no compelling reason for distinguishing between the occupier of the premises searched and the public. The curtailment of the traditionally uninhibited accessibility of the public to the working of the courts should be undertaken with the greatest reluctance.

In Camera **Hearings**

[12] Section 276 of the *Criminal Code* states:

> Evidence of complainant’s sexual activity
>
> 276 (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether

with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

> (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
>
> (b) is less worthy of belief.

(2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence

> (a) is of specific instances of sexual activity;
>
> (b) is relevant to an issue at trial; and
>
> (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

> (a) the interests of justice, including the right of the accused to make a full answer and defence;
>
> (b) society's interest in encouraging the reporting of sexual assault offences;
>
> (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
>
> (d) the need to remove from the fact-finding process any discriminatory belief or bias;
>
> (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
>
> (f) the potential prejudice to the complainant's personal dignity and right of privacy;
>
> (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
>
> (h) any other factor that the judge, provincial court judge or justice considers relevant.

[13] Section 276.1 of the *Criminal Code* states:

276 (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271,

272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

> (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
>
> (b) is less worthy of belief.

[14] Section 276.2 of the *Criminal Code* states:

276 (2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence

> (a) is of specific instances of sexual activity;
>
> (b) is relevant to an issue at trial; and
>
> (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

[15] Section 276.3 of the *Criminal Code* states:

276 (3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

> (a) the interests of justice, including the right of the accused to make a full answer and defence;
>
> (b) society's interest in encouraging the reporting of sexual assault offences;
>
> (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
>
> (d) the need to remove from the fact-finding process any discriminatory belief or bias;
>
> (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
>
> (f) the potential prejudice to the complainant's personal dignity and right of privacy;
>
> (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

> (h) any other factor that the judge, provincial court judge or justice considers relevant.

[16] Because Mr. Garnier is charged with offences under sections 235(1) and 182(b), which are not enumerated within s. 276, sections 276, 276.1, 276.2 and 276.3 are not applicable to this situation. In my opinion, however, although not applicable, these provisions are instructive.

[17] Because s. 276 does not govern this application due to the charges facing Mr. Garnier, the Crown refers me to s. 486 of the *Criminal* Code, which states:

> 486 (1) Any proceedings against an accused shall be held in open court, but the presiding judge or justice may, on application of the prosecutor or a witness or on his or her own motion, order the exclusion of all or any members of the public from the court room for all or part of the proceedings, or order that the witness testify behind a screen or other device that would allow the witness not to be seen by members of the public, if the judge or justice is of the opinion that such an order is in the interest of public morals, the maintenance of order or the proper administration of justice or is necessary to prevent injury to international relations or national defence or national security.
>
> (1.1) The application may be made, during the proceedings, to the presiding judge or justice or, before the proceedings begin, to the judge or justice who will preside at the proceedings or, if that judge or justice has not been determined, to any judge or justice having jurisdiction in the judicial district where the proceedings will take place.
>
> (2) In determining whether the order is in the interest of the proper administration of justice, the judge or justice shall consider
>
> (a) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process;
>
> (b) the safeguarding of the interests of witnesses under the age of 18 years in all proceedings;
>
> (c) the ability of the witness to give a full and candid account of the acts complained of if the order were not made;
>
> (d) whether the witness needs the order for their security or to protect them from intimidation or retaliation;
>
> (e) the protection of justice system participants who are involved in the proceedings;
>
> (f) whether effective alternatives to the making of the proposed order are available in the circumstances;
>
> (g) the salutary and deleterious effects of the proposed order; and

> (h) any other factor that the judge or justice considers relevant.
>
> (3) If an accused is charged with an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.3 and the prosecutor or the accused applies for an order under subsection (1), the judge or justice shall, if no such order is made, state, by reference to the circumstances of the case, the reason for not making an order.
>
> (4) No adverse inference may be drawn from the fact that an order is, or is not, made under this section.

[18] Despite the open court rule, the *Criminal Code* provides for the possibility of excluding the public from the courtroom if certain exceptional criteria, as outlined in s. 486, are met. Even if s. 486 does not allow for an exclusion order, the court does have the inherent jurisdiction to make an exclusion order as noted in *R. v. Moo*, 2004 CarswellOnt 3431, [2004] O.J. No. 2224:

> 11 Now, Mr. Carew has argued as well that Section 486 does not include the charge of murder. It includes all sorts of other offences dealing with prostitution and bawdy-houses and assault and sexual assault and so on. I frankly have some difficulty understanding the logic of using a device, a screen, to sort of give some comfort to a witness in that type of charge and not in the most of serious of charges under the *Criminal Code*. There possibly is some reason for that exclusion. I frankly don't understand it.
>
> 12 It is clear, though, that the Court has inherent jurisdiction and has, in the past, exercised inherent jurisdiction to control the processes of the trial and of the courtroom, as to where people sit and who should be excluded and even having the accused excluded from the courtroom when there is serious disruption. That inherent jurisdiction has always existed under our law. I think it is clear, even from a cursory reading of the case of *R. v. Letourneau and Tremblay* at Tab 7 of the book of authorities, that the Court in that case, in a murder charge, exercised its inherent jurisdiction. I am satisfied that that inherent jurisdiction continues even though the offence of murder is not included in Section 486 of the *Criminal Code*.

[19] In *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188, 2005 SCC 41, Fish J. speaking for the court, discussed the open court policy:

> 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***.**

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.

> 10 In this case, the evidence brought by the Crown in support of its application to delay access amounted to a generalized assertion of possible disadvantage to an ongoing investigation. The Court of Appeal accordingly held that the Crown had not discharged its burden. As mentioned earlier, I would not interfere with that finding and I propose, accordingly, that we dismiss the present appeal. [Emphasis added]

[20] The *Dagenais/Mentuck* test, which must be applied in this case, was restated by Fish J. in *Toronto Star*:

> 26 The *Dagenais* test was reaffirmed but somewhat reformulated in *Mentuck*, where the Crown sought a ban on publication of the names and identities of undercover officers and on the investigative techniques they had used. The Court held in that case that discretionary action to limit freedom of expression in relation to judicial proceedings encompasses a broad variety of interests and that 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. [para. 32]
>
> 27 Iacobucci J., writing for the Court, noted that the "risk" in the first prong of the analysis 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" (para. 34).

[21] Justice Chipman also discussed the *Dagenais/Mentuck* test in *R. v. Assoun*, 2014 NSSC 381:

> [40] In *Re Vancouver Sun*, 2004 SCC 43 (CanLII), [2004] 2 S.C.R. 332, at para 23-31 Justices Iacobucci and Arbour reiterated the primacy of the *Dagenais/Mentuck* test:
>
> > 31 While the test was developed in the context of publication bans, it is equally applicable to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings. Discretion must be exercised in accordance with the *Charter*, whether it arises under the common law, as is the case with a publication ban *(Dagenais, supra*; *Mentuck, supra*); is authorized by statute, for example under s. 486(1) of the *Criminal Code* which allows the exclusion of the public from judicial proceedings in certain circumstances (*Canadian*

> *Broadcasting Corp. v. New Brunswick (Attorney General), supra*, at para. 69); or under rules of court, for example, a confidentiality order (*Sierra Club of Canada v. Canada (Minister of Finance),* [2002] 2 S.C.R. 522, 2002 SCC 41 (CanLII)). The burden of displacing the general rule of openness lies on the party making the application: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General),* at para. 71.

Evidence of Prior Sexual Conduct

[22] In *R. v. Seaboyer,* [1991] 2 S.C.R. 577, McLachlin J. (as she was then), speaking for the majority, struck down the earlier version of s. 276 of the *Criminal Code*. In doing so, she set out some of the guidelines for judges in dealing with an accused attempting to raise prior sexual conduct during the course of a trial:

> 99. In my view the trial judge under this new regime shoulders a dual responsibility. First, the judge must assess with a high degree of sensitivity whether the evidence proffered by the defence meets the test of demonstrating a degree of relevance which outweighs the damages and disadvantages presented by the admission of such evidence. The examples presented earlier suggest that while cases where such evidence will carry sufficient probative value will exist, they will be exceptional. The trial judge must ensure that evidence is tendered for a legitimate purpose, and that it logically supports a defence. The fishing expeditions which unfortunately did occur in the past should not be permitted. The trial judge's discretion must be exercised to ensure that neither the *in camera* procedure nor the trial become forums for demeaning and abusive conduct by defence counsel.
>
> 100. The trial judge's second responsibility will be to take special care to ensure that, in the exceptional case where circumstances demand that such evidence be permitted, the jury is fully and properly instructed as to its appropriate use. The jurors must be cautioned that they should not draw impermissible inferences from evidence of previous sexual activity. While such evidence may be tendered for a purpose logically probative of the defence to be presented, it may be important to remind jurors that they not allow the allegations of past sexual activity to lead them to the view that the complainant is less worthy of belief, or was more likely to have consented for that reason. It is hoped that a sensitive and responsive exercise of discretion by the judiciary will reduce and even eliminate the concerns which provoked legislation such as s. 276, while at the same time preserving the right of an accused to a fair trial.
>
> 101. I would summarize the applicable principles as follows:
>
> > 1. On a trial for a sexual offence, evidence that the complainant has engaged in consensual sexual conduct on other occasions (including past sexual conduct with the accused) is not admissible solely to support the inference that the complainant is by reason of such conduct:

> (a) more likely to have consented to the sexual conduct at issue in the trial;
>
> (b) less worthy of belief as a witness.
>
> 2. Evidence of consensual sexual conduct on the part of the complainant may be admissible for purposes other than an inference relating to the consent or credibility of the complainant where it possesses probative value on an issue in the trial and where that probative value is not substantially outweighed by the danger of unfair prejudice flowing from the evidence.
>
> By way of illustration only, and not by way of limitation, the following are examples of admissible evidence:
>
> …
>
> (D) Evidence of prior sexual conduct which meets the requirements for the reception of similar act evidence, bearing in mind that such evidence cannot be used illegitimately merely to show that the complainant consented or is an unreliable witness;
>
> (E) Evidence tending to rebut proof introduced by the prosecution regarding the complainant's sexual conduct.
>
> 3. Before evidence of consensual sexual conduct on the part of a victim is received, it must be established on a *voir dire* (which may be held *in camera*) by affidavit or the testimony of the accused or third parties, that the proposed use of the evidence of other sexual conduct is legitimate.
>
> 4. Where evidence that the complainant has engaged in sexual conduct on other occasions is admitted on a jury trial, the judge should warn the jury against inferring from the evidence of the conduct itself, either that the complainant might have consented to the act alleged, or that the complainant is less worthy of credit. [Emphasis added]

[23] Clearly, the Supreme Court of Canada allowed for the possibility of an *in camera* hearing when dealing with an application involving prior sexual conduct.

The Evidence

[24] The Crown's position is that despite the comments of the Supreme Court of Canada in *Degenais*, *Mentuck* and *Toronto Star,* they are not required to present actual evidence in these particular circumstances because the court is dealing with an application in relation to prior sexual conduct. The Crown suggests that policies emphasizing the need to safeguard a witness' privacy in these

circumstances are well-known. As a fall back position, the Crown did file three affidavits in support of their application.

[25] The first affidavit, that of V.H., explains that he was a former partner of Ms. Campbell. V.H. explains that he contacted the police when he heard Ms. Campbell was the subject of a missing persons investigation. He states in his affidavit:

> 9. I also provided this information to be upfront because I would not have wanted the police to become suspicious of me in any way in something I was not involved in.
>
> 10. Had I known that my personal relationship with Ms. Campbell would be made public I would have reconsidered providing that information to the police.
>
> 11. I was doing what I thought to be a civic duty – to report to the police anything I knew about a missing person case.
>
> 12. I understand that the defence wishes to have admitted evidence about Catherine's sexual history.
>
> 13. Unless my relationship with her is relevant evidence, I would not want my personal history made public.

[26] The second affidavit, that of Jim Flemming, the Deputy Chief of the Truro Police Force, contained objectionable material that was the subject of an application to strike brought by the defence and supported by CBC/CTV. I struck portions of that affidavit.

[27] Deputy Chief Flemming states in some of the remaining portions of his affidavit:

> 18. I provided information to the Halifax Regional Police at the time Ms. Campbell was a "missing person" in order to assist them in their search for her.
>
> 19. I understand that the defence wishes to have admitted evidence about Catherine's sexual history and personnel records at the Truro Police Services.
>
> 20. [Struck out]
>
> 21. If the evidence is not ultimately relevant to her trial, I would very much regret having divulged this information to the police, and would think twice before I shared a personnel file in any future case.
>
> 22. I would never have said the personal information that I knew of Catherine if I thought it would be put before the court – not to mention the public.

[28] Similarly, but to a greater extent, the defence and CBC/CTV objected to much of the third affidavit put forward by the Crown, that of Amanda Wong, Ms.

Campbell's aunt. Significant portions of Ms. Wong's affidavit were excised, and there was little left of any significance to this application.

Analysis

[29] As noted, s. 276 of the *Criminal Code* does not apply to this application as the charges facing Mr. Garnier are not enumerated offences in accordance with that section.

[30] As Chipman J. noted in *Assoun*:

> [42] On the other side of the continuum, the Supreme Court has recognized a critical difference between cases where the open court principle enhances public awareness of judicial proceedings and cases where it could distort the ability of the court to achieve justice as between the Crown and the accused. In *Named Person v. Vancouver Sun*, 2007 SCC 43 (CanLII), [2007] 3 S.C.R. 253, Justice Bastarache noted at para 3:
>
> > "Open courts are undoubtedly a vital part of our legal system and our society, but their openness should not be allowed *to fundamentally compromise the criminal justice system*." (emphasis added)

[31] Whether proceeding by way of s. 486 of the *Criminal Code* or under the inherent jurisdiction of the court to control its own process, s. 486 is instructive.

[32] CBC and CTV cite a number of cases where courts have clarified that mere embarrassment is not sufficient to support a publication ban (*R. v. Bourque*, 2014 NBQB 263; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; and *A.B.C. v. Nova Scotia (Attorney General)*, 2011 NSSC 476). In my opinion, in these circumstances, the admission of evidence of prior sexual conduct that the defence wishes to elicit on the two upcoming *voir dires* would not only result in mere embarrassment.

[33] In *Canadian Newspapers Co. v. Canada (A.G.)*, [1988] 2 S.C.R. 122, Lamer J. (as he was then), dealt with an appeal based on the following facts:

> 2. A man was tried in Ontario for committing a sexual assault, contrary to s. 246.2(*a*) of the *Criminal Code*, R.S.C. 1970, c. C-34. At the outset of the trial, the complainant, who was the accused's wife, applied through counsel for an order under s. 442(3) of the *Code*, directing that the identity of the complainant and any information that could disclose it not be published in any newspaper or broadcast. At the time, that is in October 1983, s. 442(3) read as follow:

> 442. ...
>
> (3) Where an accused is charged with an offence mentioned in section 246.4, the presiding judge, magistrate or justice may, or if application is made by the complainant or prosecutor, shall, make an order directing that the identity of the complainant and any information that could disclose the identity of the complainant shall not be published in any newspaper or broadcast.

…

4. Respondent, appearing at the accused's trial, opposed the application on the basis that s. 442(3) violated s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. …

5. The trial judge adjourned the proceedings to a later date, and, for reasons irrelevant to this appeal, eventually ordered a mistrial. At the time of the adjournment, he granted the application under s. 442(3) on an interim basis.

6. In the meantime, respondent made a civil application for a declaration that s. 442(3) is unconstitutional, returnable before the trial judge at the date the trial was to resume. Respondent also asked to be granted leave to intervene in the criminal proceedings. At trial, counsel for the accused adopted respondent's position and expanded its argument by emphasizing the accused's right to a fair and public hearing. The judge dismissed the civil application, refused leave to intervene in the criminal proceeding and ordered a publication ban.

7. I should say right now that at no time did the accused make an application under s. 24(1) of the *Charter* invoking a violation of his right to a fair and public hearing, as guaranteed by s. 11(*d*) of the *Charter*, nor did he attack the validity of s. 442(3) claiming an unjustified restriction of his right to a fair and public trial. The accused merely raised the matter in argument when he was called upon to make submission. As a result, at trial level, s. 11(*d*) was not formally invoked to challenge the constitutional validity of s. 442(3).

8. Respondent appealed the dismissal of the civil application and the refusal of leave to intervene in the criminal proceeding, and both appeals were heard together. Asked whether they wanted to be heard on the merits, counsel for the accused and for the complainant advised the Court of Appeal that they did not wish to make submissions in ether of the appeals. The Attorney General for Ontario moved to have both appeals quashed. The Court quashed the appeal in the criminal proceeding and allowed the appeal in part in the civil proceeding. The Crown now comes to us in the civil proceeding, but not in the criminal proceeding.

[34] The parties conceded that s. 442 infringed s. 2(b) of the *Charter*. The court then went on to conduct an *Oakes* analysis and stated:

> 15. The test to be applied has been set out in *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, and restated in *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713. In order to justify a limitation of a *Charter* right in a free and democratic society, two requirements must be met. The first one is related to the importance of the legislative objective which the limitation is designed to achieve. In the present case, the impugned provision purports to foster complaints by victims of sexual assault by protecting them from the trauma of wide-spread publication resulting in embarrassment and humiliation. Encouraging victims to come forward and complain facilitates the prosecution and conviction of those guilty of sexual offences. Ultimately, the overall objective of the publication ban imposed by s. 442(3) is to favour the suppression of crime and to improve the administration of justice. This objective undoubtedly bears on a "pressing and substantial concern" and respondent conceded that it is of sufficient importance to warrant overriding a constitutional right. The first requirement under s. 1 is thus satisfied and we must now turn to the second part of the *Oakes* test. [Emphasis added]

[35] The Supreme Court of Canada considered other issues during the course of its analysis:

> 18. When considering all of the evidence adduced by appellant, it appears that, of the most serious crimes, sexual assault is one of the most unreported. The main reasons stated by those who do not report this offence are fear of treatment by police or prosecutors, fear of trial procedures and fear of publicity or embarrassment. Section 442(3) is one of the measures adopted by Parliament to remedy this situation, the rationale being that a victim who fears publicity is assured, when deciding whether to report the crime or not, that the judge must prohibit upon request the publication of the complainant's identity or any information that could disclose it. Obviously, since fear of publication is one one of the factors that influences the reporting of sexual assault, certainty with respect to non-publication at the time of deciding whether to report plays a vital role in that decision. Therefore, a discretionary provision under which the judge retains the power to decide whether to grant or refuse the ban on publication would be counterproductive, since it would deprive the victim of that certainty. Assuming that there would be a lesser impairment of freedom of the press if the impugned provision were limited to a discretionary power, it is clear, in my view, that such a measure would not, however, achieve Parliament's objective, but rather defeats it.
>
> 19. With respect, there seems to be a certain inconsistency in respondent's position. While it concedes the importance of the objective and the existence of a rational link between that objective and s. 442(3), respondent argues that the judge should retain a discretion. It is difficult to reconcile these submissions, because once these concessions are made, one is forced to admit that an absolute ban on publication is the only means to reach the desired

> objective. Respondent goes even further by contending that a case-by-case approach should be adopted to ensure that publication will not be banned, except where the social values competing with freedom of the press are of superordinate importance. If we were to adopt this submission, the legislative objective embodied in s. 442(3) would never be met, because publication would be the rule and a sexual assault victim could rarely predict whether the circumstances of the case would be viewed as an exception warranting a non-publication order. As a result, while it might impair less the freedom of the press, the discretionary ban is not an option as it is not effective in attaining Parliament's pressing goal.
>
> 20. While freedom of the press is nonetheless an important value in our democratic society which should not be hampered lightly, it must be recognized that the limits imposed by s. 442(3) on the media's rights are minimal. The section applies only to sexual offence cases, it restricts publication of facts disclosing the complainant's identity and it does not provide for a general ban but is limited to instances where the complainant or prosecutor requests the order or the court considers it necessary. Nothing prevents the media from being present at the hearing and reporting the facts of the case and the conduct of the trial. Only information likely to reveal the complainant's identity is concealed from the public. Therefore, it cannot be said that the effects of s. 442(3) are such an infringement on the media's rights that the legislation objective is outweighed by the abridgement of freedom of the press.

[36] *Canadian Newspapers* was decided in 1988. In 1991, in *Seaboyer*, McLachlin J. (as she then was) commented:

> 24. Three subsidiary purposes of such legislation may be discerned. The first, and the one most pressed before us, was the preservation of the integrity of the trial by eliminating evidence which has little or no probative force but which unduly prejudices the judge or jury against the complainant. If we accept, as we must, that the purpose of the criminal trial is to get at the truth in order to convict the guilty and acquit the innocent, then it follows that irrelevant evidence which may mislead the jury should be eliminated in so far as possible. There is no doubt that evidence of the complainant's sexual activities has often had this effect. Empirical studies in the United States suggest that juries often misused evidence of unchastity and improperly considered "victim-precipitating" conduct, such as going to a bar or getting into a car with the defendant, to "penalize" those complainants who did not fit the stereotype of the "good woman" either by convicting the defendant of a lesser charge or by acquitting the defendant: H. Galvin, "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade" (1986), 70 *Minn. L. Rev.* 763, at p. 796. It follows that society has a legitimate interest in attempting to eliminate such evidence.
>
> 25. The second rationale cited in support of rape-shield legislation is that it encourages the reporting of crime. Despite the fact that the statistics do not demonstrate with any certainty that reporting of sexual offences has increased in

> Canada as a consequence of rape-shield provisions, I accept that it is a legitimate legislative goal to attempt to encourage such reporting by eliminating to the greatest extent possible those elements of the trial which cause embarrassment or discomfort to the complainant. As time passes and the existence of such provisions becomes better known, they may well have some effect in promoting reporting. Certainly failure to consider the position of the complainant in the trial process may have the opposite effect.
>
> 26. A third and related reason sometimes offered for rape-shield legislation is protection of the witness's privacy. This is really the private aspect upon which the social interest in encouraging the reporting of sexual offences is based. In addition to furthering reporting, our system of justice has an interest in preventing unnecessary invasion of witnesses' privacy.
>
> 27. The goals of the legislation -- the avoidance of unprobative and misleading evidence, the encouraging of reporting and the protection of the security and privacy of the witnesses -- conform to our fundamental conceptions of justice. The concern with the legislation is not as to its purpose, which is laudable, but with its effect. The reasons for these concerns emerge from a consideration of the appellants' position, to which I now turn.

[37] Justice McLachlin went on to add:

> 75. I conclude that the operation of s. 276 of the *Criminal Code* permits the infringement of the rights enshrined in ss. 7 and 11(*d*) of the *Charter*. In achieving its purpose -- the abolition of the outmoded, sexist-based use of sexual conduct evidence -- it overshoots the mark and renders inadmissible evidence which may be essential to the presentation of legitimate defences and hence to a fair trial. In exchange for the elimination of the possibility that the judge and jury may draw illegitimate inferences from the evidence, it exacts as a price the real risk that an innocent person may be convicted. The price is too great in relation to the benefit secured, and cannot be tolerated in a society that does not countenance in any form the conviction of the innocent. Support for this conclusion is found in other rules of evidence which have adapted to meet the dangers of arbitrarily excluding valuable evidence, as well as the law in other jurisdictions, which by one means or another rejects the idea that rape-shield legislation, however legitimate its aims, should be cast so widely as to deprive the accused of the tools with which to build a legitimate defence.

[38] More recently, in allowing evidence of prior sexual conduct to be elicited following a s. 276 application, Greene J. stated in *R. v. Black-Gentles*, 2017 ONCJ 344:

> [19] The more invasive the cross-examination and the greater intrusion into a victim’s privacy during a trial, the greater the likelihood that victims will not come forward and report incidents of sexual violence. No matter how relevant the

> proposed evidence is, where it involves exploring the sexual past of a witness, it will inevitably have a chilling effect on a victim's willingness to report a sexual assault. There is a strong societal interest in victims of crimes reporting such crimes to the police.
>
> …
>
> [24] There can be no doubt that cross-examination of witnesses about personal private acts will affect the witnesses privacy interests and runs the real risk of interfering with his/her personal dignity. This is particularly true of acts that are sexual in nature and that take place in private between two people. While the court can take pro-active steps to reduce the impact of admitting such evidence by making it clear that no moral judgment attaches to it and by limiting the scope of cross-examination, the reality of the potential and real impact of this evidence and/or line of cross-examination cannot be ignored.

[39] If the matters proceed by way of a *voir dire* as suggested by CBC/CTV, even if I rule against permitting the defence to call part or all of the prior sexual conduct evidence, once the jury retires the public will have full access to that evidence. Relevant or not to the trial, the evidence of Ms. Campbell's prior sexual activity could be published.

[40] If the matter proceeds *in camera* as suggested by the Crown, and if the prior sexual activity evidence is deemed relevant and is called at trial, it will of course be heard by the jury, and by any members of the public who attend court for that aspect of the evidence, and it will be subject to publication by any interested media outlet. If I rule that the evidence is not relevant or admissible, it remains private, subject to a potentially different outcome if appealed. However, as CBC/CTV points out, if I deem matters irrelevant, none of what happens during the *in camera* hearing will ever be reported.

[41] V.H. says that he might not have reached out to assist the police if he had known that his prior sexual conduct would be made public. He adds that he does not want his prior sexual conduct to be made public if it is not relevant to the trial.

[42] Deputy Chief Flemming also suggests that if Ms. Campbell's personnel file, which contains information touching on her prior sexual conduct, is made public, this could have a chilling effect on such information being shared in future missing persons investigations.

[43] The comments of the Supreme Court of Canada in *Canadian Newspapers* and in *Seaboyer* would have allowed for a finding that permitting the publication of evidence about a complainant's, a witness's, or a deceased's prior sexual

conduct, when such conduct was deemed irrelevant to the trial process, would have a chilling effect on justice participants. However, in this case, we have evidence of this potential impact firmly established through the affidavits presented by the Crown.

[44] Relying on the principles outlined in s. 486, I believe that an *in camera* hearing should be held in relation to the two *voir dires.* I am of the opinion that such an order is necessary in the interest of the proper administration of justice considering: 1) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; and 2) there is no other effective alternative to the making of the proposed order available in the circumstances. I also consider the need to assure the public, in an effort to encourage victims of crime to report, that the criminal justice system continues to allow for protection against the release of their prior sexual conduct unless it is relevant to the trial process.

[45] Applying the *Degenais/Mentuck* test I find that the *in camera* hearings are necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk. If the matter does not proceed *in camera*, and if the matters are eventually deemed irrelevant, then the irrelevant prior sexual conduct of a deceased person would be made public as would the irrelevant prior sexual conduct of a witness who was merely trying to assist the police with a missing person's case. Similarly, there is a risk that potentially irrelevant personnel records of a deceased person that reference some aspect of her prior sexual conduct would be made public. Again, if that material is deemed relevant and used in the trial in open court it will be subject to publication.

[46] 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. If the prior sexual conduct of Ms. Campbell is deemed relevant and comes out during the course of the trial then such testimony will be heard in open court, in public and be subject to publication. If such evidence is deemed irrelevant then the irrelevant prior sexual conduct of a deceased person will not be in the public realm. The salutary effect of such a publication ban and *in camera* hearing will reassure witnesses reporting crimes. It will reassure members of the public that the justice system is sensitive to this issue. The salutary effect of such a discretionary safeguard that can allow for this protection far outweighs the deleterious effect of restricting the media from

publishing sensitive irrelevant information or merely temporarily delaying the publishing of relevant information.

Conclusion

[47] The *O'Connor* Application and the Prior Sexual Conduct Application will be heard *in camera*. Should any of the evidence the defence wishes to elicit be deemed relevant and be called during the course of the trial proper then it will be heard in open court and subject to publication by all media outlets.

[48] Various *voir dires* regarding the admissibility of evidence in Christopher Garnier's trial were held on July 31; August 1, 2, 3, 4, 8, 9, 10, 11; September 5, 7, 8, 15; and October 4, 5, 24, 25, and 26, 2017. The five week trial started on November 20, 2017. In the meantime I was involved in other time sensitive criminal matters. Therefore, in keeping with the principles outlined in *R. v. Jordan*, 2016 SCC 27, and *R. v. Cody*, 2017 SCC 31, I determined that it was more efficient to provide counsel with bottom-line decisions in relation to certain admissibility issues, with detailed reasons to follow.

[49] Although this hearing proceeded *in camera*, there is no longer a reason to ban the publication of this decision as specific details from the *O'Connor* Application are not listed here, and I determined that the defence is able to call V.H. at trial to give evidence of prior sexual conduct. As no evidence was called during the trial proper in relation to the *O'Connor* Application that was held *in camera*, the two decisions regarding that application will remain sealed.

Arnold, J.