S.C.C. File No. 37574

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

VICE MEDIA CANADA INC. AND BEN MAKUCH

APPELLANTS
(Appellants)

- and –

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

- and –

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PART I - OVERVIEW

A. Overview

1. When is an indefinite publication ban appropriate and is it a less restrictive substitute for a sealing order? How is such a restriction consistent with the open court principle and freedom of expression? To the extent such a ban is appropriate, in what limited circumstances is it available and what evidence is required to justify its imposition? This appeal deals with these important questions.

2. The Canadian Civil Liberties Association ("**CCLA**") submits that an indefinite publication ban is not an appropriate substitute for a sealing order when banned material has already had wide publication, is in the public domain and is easily accessible. In this context, the public's, including the accused's, interest in the open court principle far outweighs any detriment to the accused's fair trial rights.

3. Further, a sealing order must be justified with supporting evidence and reasons detailed enough to allow for meaningful appellate review. Bald allegations do not meet this threshold and cannot outweigh the public's interest in the open court principle.

B. The Facts

4. The CCLA relies on the following uncontested facts.

5. The accused, Farah Shirdon ("**Shirdon**"), left Canada in March, 2014, and travelled to Syria.[1]

6. In April, 2014, the National Post published an article about an Islamic State video featuring Shirdon, who made threats against the West and ripped up his passport (the "**Passport Video**"). As a result, the RCMP began investigating Shirdon.[2] Ben Makuch ("**Makuch**"), a journalist with Vice Media Inc. ("**Vice Media**"), also began investigating

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[1] Appellants' Record ("**Vice AR**"), tab 11, p. 145, Redacted Information to Obtain ("**Redacted ITO**") at para 7.

[2] Vice AR, tab 11, p. 145, Redacted ITO at para 8.

Shirdon's social media accounts. In May, 2014, he began communicating with Shirdon through KIK messenger, an online messaging service.[3]

7. In June, 2014, the CBC broadcast and published stories identifying Shirdon as the individual in the Passport Video.[4] Thereafter, numerous newspaper articles were written about Shirdon, including articles authored by Makuch based on conversations he had with Shirdon through KIK messenger.[5]

8. In August, 2014, Makuch authored an article about Shirdon entitled "The Islamic State's Internet-Famous Canadian Is Likely Dead".[6] Shirdon was not dead. In September, 2014, he agreed to a Skype interview with one of the founders of Vice Media, Shane Smith.[7] That interview, among others, remains available online.

9. Existing media coverage relating to Shirdon made it unquestionably clear that Shirdon had joined a terrorist organization, the Islamic State, as a jihadist and was fully committed to its cause.[8]

10. On September 24, 2015, the RCMP charged Shirdon *in absentia* with six different terrorism related offences under the *Criminal Code*. Parts of its press release stated that Shirdon had left Canada to "allegedly join and fight with the Islamic State" and that he "served in a combat role" as well as "recruiting, fundraising, encouraging others to commit violence, and spreading propaganda".[9] Shirdon has not been arrested and his precise whereabouts remain unknown. He may be dead. It appears unlikely that his prosecution will ever occur.

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[3] Vice AR, tab 9, p. 85, Affidavit of Ben Makuch sworn December 22, 2015 ("**Makuch Affidavit**") at paras 6-8.
[4] Vice AR, tab 9, p. 86, Makuch Affidavit at para 9 and Exhibit A at p. 91.
[5] Vice AR, tab 9, p. 86, Makuch Affidavit at paras 9-10.
[6] Vice AR, tab 9, Makuch Affidavit, Exhibit D at p. 107.
[7] Vice AR, tab 9, p. 86, Makuch Affidavit at para 11.
[8] See, for example, Vice AR, tab 9, Makuch Affidavit, Exhibit C at p. 104, Exhibit D at p. 110, Exhibit E at p. 119, Exhibit F at pp. 126, 133.
[9] Vice AR, tab 9, Makuch Affidavit, Exhibit G, pp. 136-137.

PART II - CCLA'S POSITION ON THE ISSUES

11. This appeal concerns a production order and sealing order granted by the Ontario Court of Justice on February 13, 2015 (the "**Production Order**" and the "**Sealing Order**"),[10] and a publication ban issued by the Ontario Superior Court of Justice on March 29, 2016 (the "**Publication Ban**").[11] The CCLA only makes submissions in respect of the Publication Ban and the Sealing Order.

12. The CCLA makes the following submissions:

(a) Consistent with the open court principle and freedom of expression, a publication ban is not a substitute for a sealing order and must be justified on its own merits; and

(b) An information to obtain ("ITO") must be made public when the evidence is insufficient to justify a sealing order and when the reasons for a sealing order are not detailed enough to allow for meaningful appellate review.

PART III - ARGUMENT

A. The Open Court Principle

13. The open court principle is entrenched as a fundamental aspect of our judicial system and the fabric of democracy.[12] Public access to the courts and the principle of openness guarantee the integrity of judicial processes and maintain the independence and impartiality of courts. It inspires confidence in, and public understanding of, the justice system and the administration of justice. It "is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of the courts."[13]

14. The open court principle is also "inextricably linked to the freedom of expression protected by s. 2(b) of the *Charter* and advances the core values therein" insofar as it

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[10] Vice AR, tab 1, p. 5, Production and Sealing Order of Justice Nadelle dated February 13, 2015 at para 8.
[11] Vice AR, tab 3, pp. 9-43, *R v Vice Media Canada Inc.*, 2016 ONSC 1961 ("***R v Vice***").
[12] *Vancouver Sun Re*, 2004 SCC 43 at paras 23-27 ("***Vancouver Sun***").
[13] *Vancouver Sun* at para 25.

protects both the "freedom of the press to report on judicial proceedings" and "the right of the public to receive information."[14] Consequently, the Supreme Court has observed that "the open court principle, to put it mildly, is not to be lightly interfered with."[15]

15. This principle applies at every stage of proceedings, including pre-trial proceedings.[16] Therefore it applies at the "pre-charge or 'investigative stage' of criminal proceedings", including in relation to warrant application materials.[17]

16. Moreover, the Supreme Court has repeatedly stressed that "the press plays a fundamentally important role" in upholding the open court principle because, as a practical matter, court information can only be obtained through the media.[18] The role of the press is as important to pre-trial court documents as it is to trial proceedings.[19]

B. When a Publication Ban is Appropriate

(i) The Basis for the Publication Ban

17. The Publication Ban was ordered as a less restrictive alternative to a sealing order because wide dissemination of the allegations against Shirdon could stigmatize him, taint a jury and threaten his fair trial rights.[20]

18. In order to grant a discretionary publication ban to protect an accused's fair trial rights, the Crown must satisfy the test set out in *Dagenais v Canadian Broadcasting Corp.*, and modified by *R v Mentuck*, by demonstrating that:

(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and

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[14] *Vancouver Sun* at para 26.
[15] *Vancouver Sun* at para 26.
[16] *Vancouver Sun* at para 27.
[17] *Toronto Star Newspapers Ltd. v Ontario*, 2005 SCC 41 at paras 5, 7, 30.
[18] *Edmonton Journal v Alberta (Attorney General)*, 1989 CanLII 20 at paras 85, 86 (SCC) ("***Edmonton Journal***").
[19] *Edmonton Journal* at para 86 (SCC).
[20] Vice AR, tab 3, pp. 33-34, *R v Vice* at paras 97, 100.

(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.21

19. In this case, the *Dagenais*/*Mentuck* test raises several considerations that ought to be examined when determining whether a publication ban is appropriate:

(a) a publication ban is ineffective if prejudicial information is already in the public domain;

(b) a publication ban is not a reasonable alternative, or less restrictive, measure to a sealing order;

(c) public scrutiny of an investigation is critical and enhances the accused's fair trial rights;

(d) other alternative measures exist that could sufficiently protect the accused's fair trial rights; and

(e) considering all of the above, the deleterious effects of a publication ban outweigh any salutary effects.

(ii) The Publication Ban Must Be Effective

20. Effectiveness informs every aspect of the *Dagenais*/*Mentuck* test.[22] The Court must consider whether the publication ban would be effective at preventing stigmatization and jury tainting. An ineffective ban does not meet the first stage of the *Dagenais*/*Mentuck* test and provides no salutary effect at the second stage.

21. In addition, a publication ban fails the *Dagenais*/*Mentuck* test when the material that is subject to the ban is widely available online. In this case, the Publication Ban was ordered to prevent dissemination of allegations that Shirdon had left Canada to join, and

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[21] *Dagenais v Canadian Broadcasting Corp.*, 1994 CanLII 39 at paras 77, 102(c) (SCC) ("***Dagenais***"); *R v Mentuck*, 2001 SCC 76 at paras 32, 33 ("***Mentuck***"); collectively referred to as the *Dagenais*/*Mentuck* test.

[22] *Dagenais* at para 94, see also para 95.

his involvement with, the Islamic State.[23] However, the RCMP's own news release stated that it had charged Shirdon and detailed these allegations against him.[24] The RCMP broadcast the very allegations that the Publication Ban was intended to prevent being made public. In such circumstances, the genie is out of the bottle and the potential for prejudice that the publication ban was intended to prevent already exists.[25]

22. The permanent and recallable nature of anything online means information is as available today as it was when originally published. In 1994, the Supreme Court recognized the illusory effectiveness of publication bans in a "global electronic age" and noted "the actual effect of bans on jury impartiality is substantially diminishing".[26] These concerns have only been exacerbated in the subsequent 24 years.[27]

23. A publication ban that seeks to prevent dissemination of information that has already been widely disseminated is ineffective and should not be ordered.

(iii) A Publication Ban Is Not a Reasonable Alternative Measure

24. A publication ban must be justified on its own merits. It should not be considered reasonable or justified simply because permitting access to court materials, while prohibiting publication, is less intrusive than a sealing order. For the reasons set out in Nordheimer J.'s decision in *Canadian Broadcasting Corp. v Canada* ("***CBC***"), the prior existence of a sealing order cannot make an otherwise unjustified or unconstitutional publication ban a reasonable alternative.[28]

25. In *CBC*, the accused faced widely-publicized drug and extortion charges. The accused argued that a publication ban over "the contents of non-consensual intercepted private communication" in an ITO was necessary to protect his right to a fair trial.[29]

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[23] Vice AR, tab 3, p. 33, *R v Vice* at para 97.
[24] Vice AR, tab 9, Makuch Affidavit, Exhibit G, pp. 136-137.
[25] See, e.g., *Ottawa Citizen (The) v R*, 2007 CarswellOnt 6502 at para 27 (Sup Ct) ("***Ottawa Citizen***").
[26] *Dagenais* at para 93 (SCC).
[27] *R v S (J)*, 2008 CanLII 54303 at para 60 (Sup Ct) ("***S (J)***").
[28] *Canadian Broadcasting Corp. v Canada*, 2013 CanLII 75897 at paras 56-65 (Ont SC) ("***CBC***").
[29] *CBC* at paras 1-5, 34.

Nordheimer J. rejected the contention that mere access to the information, without allowing publication of it, would achieve the objective of public scrutiny. Therefore, it would not be a reasonable alternative measure because it defeated the core purpose for which the information was given.[30]

26. The Ontario Court of Appeal found that *CBC* was wrongly decided and followed a line of authority pre-dating *CBC* in which access to the information was permitted but a publication ban was ordered.[31] The CCLA submits that the Court of Appeal erred, and that *CBC* was correctly decided.

27. The Court of Appeal's decision detracts from the open court principle. It also calls into question subsequent cases that followed and were decided on the basis of Nordheimer J.'s decision in *CBC*.[32] Nordheimer J.'s reasoning in *CBC* appropriately balances the competing interests that come into play when police seek access to a journalist's work product. It accords with the freedom of the press to report on judicial proceedings, the right of the public to receive information and the open court principle. *CBC* should be adopted and followed by this Court.

(iv) Public Scrutiny of Investigations Is Critical

28. That the open court principle preserves the integrity of the judicial system benefits the accused as well as the public. As stated by Iacobucci J. in *R v Mentuck*:

> This public scrutiny is to the advantage of the accused ..., it ensures that the judicial system remains in the business of conducting fair trials, not mere show trials or proceedings in which conviction is a foregone conclusion. The supervision of the public ensures that the state does not abuse the public's right to be presumed innocent, and does not institute unfair procedures.[33]

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[30] *CBC* at para 65, see also paras 56-64; Vice AR, tab 3, pp. 34-35, *R v Vice* at para 104, citing to *CBC*.
[31] For example: *Ottawa Citizen Group Inc. v Ontario*, 2005 CanLII 18835 (Ont CA) ("***Ottawa Citizen Group***"); *R v Flahiff*, 1998 CanLII 13149 (QC CA). See Vice AR, tab 7, pp. 76-77, *R v Vice Media Canada Inc.*, 2017 ONCA 231 at para 51.
[32] *Toronto Star Newspapers Ltd. v Ontario*, 2014 ONSC 2131 at paras 9, 34; *R v Cabero*, 2016 ONSC 3844 at para 51 ("***Cabero***").
[33] *Mentuck* at para 53; see also *Dagenais* at para 86.

29. This case involves an issue of significant public notoriety and interest. Charging Canadians abroad, for alleged terrorist acts, that may have no effect on Canada or Canadians, is an issue deserving of scrutiny and media attention. How to combat terrorism, and how to balance that important goal while protecting democratic principles, is a current Canadian dilemma.

30. The court must not automatically revert to secrecy because of an alleged connection to terrorism. The public's confidence in its institutions is not satisfied by simply being asked to trust that the police are exercising good judgment and are not engaging in fishing expeditions or laying charges for political purposes.

31. The rationale behind allegations in an ITO is not so shocking or surprising as to deserve secrecy. Allegations on their own may actually be more prejudicial to the accused as the public is left to speculate as to their foundation. Publication of an ITO in these circumstances allows the public to scrutinize for itself whether the allegations are adequately supported.[34]

32. Publication of the details in an ITO also informs the appropriateness of any judicial decisions rendered. The public will not be able to evaluate the reasons allowing or quashing the Production Order without seeing the ITO made in support of that order.[35]

(v) Reasonable Alternative Measures Need to Be Considered

33. Other measures, such as the rules on admissibility of evidence, the challenge-for-cause system and jury instruction, need to be considered before finding that a publication ban is necessary.[36] Such measures can mitigate the concerns that justify a publication ban. For example, jurors are routinely asked to disregard inadmissible

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[34] *Ottawa Citizen* at para 27.
[35] *S (J)* at para 66.
[36] *Dagenais* at para 102(d); *S (J)* at paras 45, 68, 69; *Cabero* at para 51.

evidence to which they have been exposed, or are asked to consider evidence for one purpose but not for another, all without impairing the fair trial rights of the accused.[37]

(vi) The Salutary Effects Cannot be Outweighed by the Deleterious Effects

34. The overall effects of a proposed publication ban must be carefully scrutinized. The salutary effects of a publication ban evaporate when the proposed ban is ineffective. Moreover, the deleterious effects are enhanced when a lack of public scrutiny detracts from an accused's fair trial rights and when alternative measures exist that could protect those rights without offending the open court principle.

35. The length of the proposed ban is also a factor to be weighed at this final stage of the *Dagenais*/*Mentuck* test. Where an accused is not in Canada and is unlikely to ever face charges, an indefinite publication ban, or a temporary publication ban pending trial, is effectively a permanent ban. A judge ordering that the publication ban can be addressed after a lengthy time does not resolve this problem, as it presumes that someone with standing is willing to undergo the time and expense of re-challenging the ban in the future.

C. When an Order Should Be Sealed

36. The Sealing Order was not appropriate in the circumstances. Contrary to paragraph 122 of the Respondent's Factum, the CCLA made submissions on both specific portions of the ITO and in general in the Court of Appeal.

(i) Bald Allegations Are Insufficient Reasons for a Sealing Order

37. A judge must provide reasons for upholding a sealing order sufficiently detailed to enable meaningful appellate review.[38] A bald allegation regarding national security or public safety is insufficient reason to justify a sealing order. As a sealing order offends the constitutional presumption of open courts, there is an onus to give some indication as to why national security or public safety is invoked in the first place. Otherwise, one

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[37] *S (J)* at para 40.
[38] *R v Canadian Broadcasting Corp.*, 2008 ONCA 397 at para 56.

cannot make submissions in response and parties and the public cannot know why the order was made.

(ii) Proposed Investigative Steps

38. Proposed investigative steps must be assessed on their own merits under the *Dagenais/Mentuck* test. There is no rule that they be automatically sealed.[39]

39. Proposed investigative steps do not warrant any secrecy when they are neither novel nor surprising and when they merely mimic past police operations, the details of which are already public. Revealing investigative steps that, for example, involve no more than monitoring public reports and social media cannot, in this day and age, be considered secret or create risks to police operations.

(iii) Witness's Identity

40. Failure to consider alternative measures to the sealing of a witness's identity is an error of law.[40]

PART IV - SUBMISSIONS REGARDING COSTS

41. The CCLA does not seek costs and asks that no costs be awarded against it.

PART V - ORDER REQUESTED

42. The CCLA makes no submissions on the merits of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7TH DAY OF MAY, 2018

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[39] *Mentuck* at paras 43, 45.
[40] *Ottawa Citizen Group* at para 48.

PART VI - TABLE OF AUTHORITIES

TAB NO. **PARAS:**