

CANADA / JUDGMENT

R. v. Arfmann

2020 BCSC 56

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Supreme Court of British Columbia

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2020 BCSC 56 R. v. Arfmann

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Arfmann,

2020 BCSC 56

Date: 20200122

Docket: 67330

Registry: Chilliwack

Regina

v.

Oscar Ferdinand Arfmann

Restriction on Publication:

Pursuant to s. 486.5(1) C.C.C.

Pursuant to s. 486.5(1) of the Criminal Code there shall be no publication, broadcast or transmission in any way of any information that could identify any undercover police officers including any pseudonyms used by the undercover police officers involved in the investigation of the Accused.

A publication ban has been further imposed pursuant to the inherent jurisdiction of the court prohibiting the publication, broadcast or transmission in any way, of any reference made in the course of submissions to the content of exhibits B, C, D and E of affidavit No. 1 of S. Lowe, sworn November 22, 2019, which are sealed.

These publication bans applies until further order of the Court.

These reasons for judgment comply with this publication ban.

Before: The Honourable Madam Justice Ross

Reasons re Media Applications for Access to Exhibits

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Place and Date of Hearing:

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January 22, 2020

Table of Contents

Introduction. 4

Positions of the Parties. 6

The Test. 7

The Evidentiary Foundation. 9

Necessity - Have the respondents identified a serious risk to the administration of justice?. 13

Necessity - Are there reasonable alternative measures that will address the risk?. 17

Balancing the Rights and Interests. 18

Conclusion. 20

Introduction

- [1] Oscar Arfmann was charged with the first degree murder of Constable John Davidson, a member of the Abbotsford Police Department (the "APD"). Constable Davidson was shot and killed on November 6, 2017. Mr. Arfmann's trial commenced on May 27, 2019. Closing submissions were delivered on August 1 and 2, 2019. The reasons for judgment finding Mr. Arfmann guilty of first degree murder were delivered on October 10, 2019. They are indexed at 2019 BCSC 1618.
- [2] Following delivery of the verdict, the defence applied for an order for the assessment of Mr. Arfmann's mental condition pursuant to s. 672.11 of the Criminal Code, R.S.C. 1985, c. C-46. Mr. Arfmann is currently being assessed pursuant to that order. His trial in relation to the issue of his mental status is set to commence in February 2020.
- [3] The evidence with respect to the events that culminated in the shooting of Constable Davidson and the arrest of Mr. Arfmann for that offence began with a confrontation involving gun shots between Mr. Arfmann and two civilian witnesses in front of the Quiznos restaurant at the Mt. Lehman business complex in Abbotsford, British Columbia (the "Lehman Complex"). Several 911 calls were made to the police to report the incident and officers responded, including Constable Davidson.
- [4] After firing the shots, Mr. Arfmann left the mall driving a black Mustang with Alberta plates. He then returned to the Lehman Complex minutes later where he shot and killed Constable Davidson. He then left the centre and was apprehended minutes later by members of the APD.
- [5] In the present application CTV Vancouver, CBC News and Global News (the "Applicants") seek copies, for unlimited use, of the following exhibits that were introduced at trial: Exhibit 31 (Disc), Exhibit 32 (Transcript), Exhibit 34 (Transcript) and Exhibit 35 (Disc) (collectively, the "Application Exhibits").
- [6] Exhibits 31 and 32 record the transmissions over the police radio in the minutes immediately before and shortly after Constable Davidson was shot. The recording includes Constable Davidson's words moments before he was shot, the officers responding to the reports of shots fired at the Lehman Complex, and then to the reports that Constable Davidson had been shot.

- [7] Exhibits 34 and 35 record the audio and video recordings of dash cam footage recorded by a civilian witness, Larry Siefert, including the audio recordings of his conversation with the 911 operator. Mr. Siefert was in his truck getting his lunch at the Lehman Complex on the day of the incident when he observed Mr. Arfmann with a rifle outside the Quiznos. He called the 911 operator to report his observations and then followed Mr. Arfmann when he left the centre in his vehicle. Minutes later, Mr. Arfmann returned followed by Mr. Siefert in his vehicle and by that point Constable Davidson in his unmarked police vehicle. Moments later Mr. Arfmann shot and killed Constable Davidson.
- [8] The original requests by the Applicants were filed on May 31 and June 17, 2019, the days that the Application Exhibits were introduced at trial. The trial was conducted in an open courtroom. The Application Exhibits were played without editing during the trial and their contents were reported in the media at the time.
- [9] At the time the original requests were made, the Applicants took the position that the requests were a matter of routine and that the matter should proceed immediately and summarily given the open court principle and the lack of what the Applicants characterized as a credible basis for refusal. The Crown and defence took the position that given trial fairness concerns, and third party interests, the matter needed to proceed by way of formal application. In addition, it was their position that the application should be heard at the conclusion of the case, after the verdict had been rendered.
- [10] I provided a brief oral ruling directing that the matter would proceed by way of formal application to be heard after the delivery of the verdict with reasons to follow. Those reasons are indexed at 2019 BCSC 1343.

Positions of the Parties

- [11] The Crown, the APD, the Davidson family and Mr. Siefert oppose the present application. The ADP and the Davidson family were represented on this application by the same counsel making joint submissions (the "Abbotsford Respondents"). When discussing all the respondents collectively, I have referred to them as the "Application Respondents".
- [12] The Abbotsford Respondents consented to the release of Exhibit 32 with the names of and any identifying information about the police officers redacted in order to protect the identities of undercover police officers.
- [13] The Abbotsford Respondents filed two affidavits. The affidavit of Kyle Gough attached as exhibit copies of the results of internet searches for social media commentary of police shootings in Canada and the reporting on the Arfmann case. The affidavit of Serena Lowe attached as exhibits the statements of members of the Davidson family and an email from Inspector Tom Chesley, who is the officer in charge of the Criminal Investigations Branch of the APD and responsible for all plainclothes investigation units.

- [14] Counsel for the Abbotsford Respondents seeks a sealing order with respect to the statements of Davidson family members together with a publication ban with respect to references to the contents of those statements that were referred to in the course of submissions. The Applicants oppose both the sealing order and publication ban.
- [15] Counsel for Mr. Siefert relied upon conversations with Mr. Siefert with respect to the level of trauma that he experienced and continues to experience. She proposed an alternative measure of the release of the video dash cam footage without the audio.
- [16] The Crown supported the positions of the other Application Respondents. The Crown submitted with respect to the dash cam footage that if released, there should be pixilation of any third parties who are visible together with any licence plates of vehicles other than the vehicle Mr. Arfmann was driving.
- [17] The Application Respondents submitted that the Court is entitled to have regard to the statements of the Davidson family members, and Inspector Chesley even though they were not sworn. Further, the Court is entitled, in considering the matter, to have regard to counsel's submissions with respect to what Mr. Siefert had reported to her. Finally, a court is entitled to consider harm discernable by the application of reason and logic, citing *A.B. v. Bragg Communications Inc.*, 2012 SCC 46 at para. 16.
- [18] The Applicants submitted that any restriction to the open court principles requires a convincing evidentiary foundation which is entirely absent in the circumstances of the present application. Counsel was critical of the absence of sworn statements and expert evidence. Counsel submitted further that, in general, even if all of the material relied upon by the respondents is considered by the Court, the respondents have not made out their onus to justify any curtailment of the open court principle.
- [19] Mr. Arfmann took no position on the application. In addition, an amicus curiae was involved in Mr. Arfmann's trial and remains involved, however, has taken no position on the present application.

The Test

- [20] It was common ground that in addressing the matters at issue in this application, the Court is to apply the Dagenais/Mentuck analysis. The applicable principles were summarized in *R. v. Blackmore*, 2018 BCSC 1225, as follows:
- [39] Several years later, the Supreme Court was asked to revisit the analytical framework established in Dagenais in *R. v. Mentuck*, [2001] 3 S.C.R. 442. The Court determined that it was necessary to broaden the Dagenais framework to make it more applicable to a broader set of factual circumstances. Iacobucci J. wrote at para. 32:

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.

[40] In *Global BC, A Division of Canwest Media Inc. v. British Columbia*, 2010 BCCA 169 [Global BC], our Court of Appeal confirmed the *Dagenais/Mentuck* analysis applies to applications for access to court exhibits and endorsed a summary of the applicable principles outlined by the trial judge:

[13] [Quoting from the trial decision: *R. v. Fry*, 2008 BCSC 1485 at para. 11.]

1. There is a rebuttable presumption that judicial proceedings are open and public: *Toronto Star*, para. 14.
2. Section 2(b) of the Charter guarantees freedom of communication and freedom of expression, fundamental freedoms which depend for their vitality on public access to information of public interest including access to that which goes on in the courts: *Toronto Star*, para. 2.
3. If public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice then a temporary or permanent denial of access may be warranted: *Toronto Star*, para. 3.
4. The circumstances in which access may be denied are limited:

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 the justice or unduly impair its proper administration: *Toronto Star*, para. 4

5. The *Dagenais/Mentuck* test is applicable at every stage of the judicial process but must be applied in a flexible and contextual manner: *Toronto Star*, para. 8.
6. A limitation on access should only be ordered when the salutary effects of the order outweigh its negative impact on the freedom of expression of those affected by the ban. As stated in *Dagenais* and modified in *Mentuck*, restrictions on access 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: *Toronto Star*, para. 26.

7. Finally, the *Dagenais/Mentuck* test should not be applied mechanistically:

Regard must always be had to the circumstances in which a sealing order is sought by the Crown, or by others with a real and demonstrated interest in delaying public disclosure. The test, though applicable at all stages, is a flexible and contextual one. Courts have thus tailored it to fit a variety of discretionary actions, such as confidentiality orders, judicial investigative hearings, and Crown initiated applications for publication bans: *Toronto Star*, para. 3.

- [41] More recently, the Supreme Court reaffirmed that the *Dagenais/Mentuck* approach applies to all discretionary decisions that affect the openness of proceedings in *Canadian Broadcasting Corp. v. The Queen and Dufour*, 2011 SCC 3 at para. 13 [Dufour]. There, the Court also confirmed that the public's ability to inspect trial exhibits is a "corollary to the open court principle": para. 12.

The Evidentiary Foundation

- [21] The first major issue in contention was with respect to the evidentiary record. As noted above, the Applicants stressed that the parties seeking to limit the open court principle bear an onus to satisfy the court that there would be a serious risk to the proper administration of justice if the application were to be granted. In the Applicants' submission, an evidentiary foundation is required to discharge this onus, which is absent in the present case.
- [22] In support of their position with respect to the evidentiary foundation that is required, the Applicants note that with respect to the first branch of the *Dagenais/Mentuck* test the risk "must be a risk the reality of which is well-grounded in the evidence": *R. v. Mentuck*, 2001 SCC 76 at para. 34. Counsel also cited *Canadian Broadcasting Corporation and Others v. HMQ*, 2013 ONSC 7309 at para. 30, [2013] O.J. No. 5422, in which Nordheimer J. noted with respect to the evidentiary standard that is required that:

Finally, on this point, it is worth reiterating the evidentiary standard that is to be applied in deciding the proper application of the *Dagenais/Mentuck* test. It is not sufficient for a party who is seeking to restrict public access to simply make generalized statements of concern regarding the negative impacts of permitting such access. Rather the concerns expressed as warranting a restriction on public access must be "real, substantial, and well-grounded in the evidence". [see *R. v. Mentuck*, 2001 SCC 76 at para. 34]

To the same effect is *R. v. Bourque*, 2014 NBQB 263 at para. 10.

- [23] In *H. (M.E.) v. Williams*, 2012 ONCA 35 at para. 34, another case cited by the Applicants, the court noted that evidence to justify non-publication and sealing orders must be "convincing" and "subject to close scrutiny and meet rigorous standards". In that case, the court did have

an affidavit from the applicant's treating psychologist, who was subject to cross examination on his affidavit. However, the court agreed with the media's submission that without evidence from the applicant, much of what the doctor said is "properly characterized as speculation and assumption" (at para. 53).

- [24] With respect to this issue, the Applicants also cited *CTV Television Inc. v. R. et al.*, 2006 MBCA 132. The Manitoba Court of Appeal was critical of the trial judge for concluding, based on common sense and logic, that releasing the videotaped statement would hamper the process of obtaining such statements generally, and hinder the administration of justice. The court criticized this conclusion because there was no evidence on which the trial judge could apply logic and common sense (at paras. 32-34). The court concluded (at paras. 43, 45-46) that such reasoning amounted to an impermissible form of judicial notice and that the factual foundation necessary to meet the *Dagenais/Mentuck* test was not present.
- [25] The Application Respondents, as noted above, took the position that the Court is entitled to consider all of the information they relied upon in support of their position.
- [26] The Application Respondents cited *Bragg* in support of their position. In *Bragg*, a 15-year-old victim of cyberbullying was applying to proceed anonymously in her disclosure application seeking the identity of persons who had published a fake and allegedly defamatory Facebook profile of her and a related publication ban on the contents of the fake profile. Justice Abella, for the Court noted:
- [15] The amicus curiae pointed to the absence of evidence of harm from the girl about her own emotional vulnerability. But, while evidence of a direct, harmful consequence to an individual applicant is relevant, courts may also conclude that there is objectively discernable harm.
- [16] This Court found objective harm, for example, in upholding the constitutionality of Quebec's Rules of Practice that limited the media's ability to film, take photographs, and conduct interviews in relation to legal proceedings (in *Canadian Broadcasting Corp. v. Canada* (Attorney General), [2011] 1 S.C.R. 19), and in prohibiting the media from broadcasting a video exhibit (in *Canadian Broadcasting Corp. v. The Queen*, [2011] 1 S.C.R. 65). In the former, *Deschamps J.* held (at para. 56) that the *Dagenais/Mentuck* test requires neither more nor less than the one from *R. v. Oakes*, [1986] 1 S.C.R. 103. In other words, absent scientific or empirical evidence of the necessity of restricting access, the court can find harm by applying reason and logic: *RJR-MacDonald Inc. v. Canada* (Attorney General), [1995] 3 S.C.R. 199, at para. 72; *Thomson Newspapers Co. v. Canada* (Attorney General), [1998] 1 S.C.R. 877, at para. 91.
- [27] Counsel for the Application Respondents also cited a series of British Columbia cases starting with *R. v. Schoenborn*, 2010 BCSC 40. Mr. Schoenborn was charged with the first degree murder of his three infant children. After his arrest he spoke with Ms. Clark, the children's mother, on two occasions, both of which were audio recorded. The recordings were made exhibits at the trial. The media applied for access to the tapes, including the right

to publish and broadcast them. In the course of submissions, the Crown relied upon conversations with Ms. Clark and communicated her concerns about the request to the court. The media applicants argued that there was no evidence before the court to justify a denial of access because no affidavits had been filed.

[28] Justice Powers rejected this argument, stating at para. 51:

The applicants argue that no evidence has been presented in opposition to their application; that is no affidavits have been provided. However, I am entitled in this case to accept the submissions of counsel, including Crown counsel who have dealt with the children's mother in the preparation of this case and in her giving evidence. As Ms. Mark, one of the Crown counsel, pointed out, she has spoken directly to the children's mother and submits it would be extremely difficult or impossible for her to provide an affidavit. It was also Ms. Mark's position that it would not be reasonable to put the children's mother in the position of having to provide such an affidavit in this case. I agree.

[29] In *R. v. Panghali*, 2011 BCSC 422, the accused was charged with the second degree murder of his wife and interfering with her remains by burning her body. The media applied for access, in the broadest scope, to a series of exhibits including video recordings of the accused's interviews with police and extracts from Ms. Panghali's journals and other writings. Justice Holmes, as she then was, rejected an argument that the court was bound to consider only evidence filed or tendered by a party in addressing the Dagenais/Mentuck factors stating:

[33] Nor am I persuaded that the Dagenais/Mentuck approach can take no heed of judicial determinations made without evidence tendered or filed by a party.

[34] Sharpe J.A. concluded that the personal opinion of the application judge in *R. v. Canadian Broadcasting Corp.* that the public did not need to see the "gruesome image" did not satisfy the Dagenais/Mentuck test for restriction. In the context of that conclusion, Sharpe J.A. spoke of the responsibility of a party seeking to restrict access to "demonstrate through convincing evidence" that the Dagenais/Mentuck approach justifies the restriction (para. 40). However, I do not take these remarks as indicating that never may a presiding judge make an assessment of the interests at play without an evidentiary foundation presented by a party. As I discuss below, such a conclusion would be inconsistent with the court's responsibilities both to control its process and to protect the interests of vulnerable persons affected its proceedings. The court bears a responsibility to exercise supervisory and protecting power over exhibits surrendered into its care independent of the positions of the parties in the instant case.

[38] For these and other reasons, the legally-protected interests at play in the application of the Dagenais/Mentuck test where, as here, copies are sought to be released "to the infinity of the internet" may therefore require the court to consider factors outside the scope of the filed or tendered evidence in a parties-driven process.

- [30] Justice Donegan, in *Blackmore*, considered and rejected a similar argument advanced by the media applicants. After citing *Schoenborn* and *Panghali* she said:
- [107] I agree with the reasoning and conclusions of all of these courts. As they have held, the court bears a responsibility to exercise supervisory and protecting powers over its exhibits, not only exhibits surrendered into its care, but exhibits generated by its orders. This responsibility exists independent of the positions of the parties in a given case. Where appropriate, a court is entitled to consider matters of general human nature and prediction and is also entitled to accept the submissions of counsel or factors outside the scope of tendered evidence in considering the legally protected interests at play in its application of the *Dagenais/Mentuck* test. This is a case where all of these types of considerations come into play.
- [108] To require these identified vulnerable and innocent third parties to provide affidavits or attend court to testify about their fears of reprisal, lack of awareness they could be published if they spoke to the probation officer and/or the effects an infringement on their reasonable expectations of privacy if published, in the circumstances of this case would only further aggravate their personal fears and concerns and would only further deepen the chilling effect on those upon whom courts rely to provide valuable information in the future. These concerns and interests go well beyond mere embarrassment. To require their attendance at court or the provision of affidavits in the circumstances of this case would be to abdicate the court's function to protect its process and to prevent avoidable harms to innocent third parties whose interests are negatively affected by that process.
- [31] In *R. v. Ferguson*, 2018 BCSC 1539 at paras. 59, 64, Justice DeWitt-Van Oosten, as she was then, after considering *Schoenborn*, *Panghali* and *Blackmore*, concluded that affidavit evidence from the respondents was not required to find a "potential harm or injury to a legally protected interest" sufficient to override the s. 2(b) constitutional guarantee and the *Dagenais/Mentuck* analysis could rely on the submissions of counsel.
- [32] I too am persuaded by the analysis in *Schoenborn*, *Panghali*, and *Blackmore*. In addressing the *Dagenais/Mentuck* analysis, I am entitled to consider the submissions of counsel with respect to interactions with Mr. Siefert, the exhibits to the affidavit of Ms. Lowe, and to apply reason and logic to the relevant circumstances.

Necessity - Have the respondents identified a serious risk to the administration of justice?

- [33] At the outset, before any balancing of the principles and interests at stake, the respondents must establish that there would be a serious risk to the administration of justice if the application is granted.
- [34] The Applicants stressed that mere personal interest including distress, however severe, and embarrassment are not sufficient since the serious risk must be to the administration of justice. In that regard the Applicants cited *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175 at 185, in which Dickson J., in rejecting the argument that the privacy rights of individuals

who have been the object of searches would be impermissibly violated if reporters were permitted to inspect the warrants, stated, "As a general rule the sensibilities of the individuals involved are no basis for exclusion from judicial proceedings."

- [35] Counsel for the Applicants also cited *Canadian Broadcasting Corporation and Others v. HMQ*, 2013 ONSC 7309 at para. 27, [2013] O.J. No. 5422, in which Nordheimer J. noted:

Courts have, for a very long time, made it clear that the personal privacy interests of individuals must generally yield to the principle of public access to legal proceedings.

To similar effect, see *R v. Minassian*, 2019 ONSC 4455 at para. 81.

- [36] The Abbotsford Respondents submitted that privacy is a constitutionally protected right as an aspect of the s. 7 liberty and security of the person interests, see *Blackmore* at paras. 92-94. Parliament has expressly recognized the security and privacy rights of victims of crime, which is defined broadly as any individual who has suffered harm as the result of an offence, not merely the person against whom the offence was committed, see *Criminal Code*, s. 2. Authorities in the criminal justice system are required to consider the security of victims. Victims have the right to be protected from intimidation and retaliation and to have "reasonable and necessary measures" taken by appropriate authorities to achieve their protection, see *Canadian Victims Bill of Rights*, S.C. 2015, c.13, ss. 2, 9-14.
- [37] Counsel for the Application Respondents submitted, citing *Bragg*, that privacy interest in the internet age with the recognized phenomena of cyber bullying, may be sufficiently compelling to restrict open access. Further, publication bans have been found necessary to protect the interests of the vulnerable. Counsel submitted that the safety of undercover officers is also a well recognized ground for restrictions on publication.
- [38] Turning first to Exhibits 31 and 32, the police radio transmissions, Inspector Chesley states that, having reviewed the audio recording and associated transcript marked as Exhibits 31 and 32, he can confirm that three APD members whose voices are heard on the audio recording and identified on the transcript have performed undercover duties within the last year, or are expected to be performing undercover duties within the next year. He states that the APD is concerned that the publication, broadcast, or transmission of any information that could be used to identify any of these members could compromise their safety and would compromise the investigations that they are or will be performing. He stated further that in his experience apparently harmless information such as nicknames and sound and speech patterns can be distinctive enough to identify a police officer.
- [39] It is clear that both the safety of undercover officers and the risk of compromising police investigations are matters that constitute a serious risk to the administration of justice. Counsel for the Applicants did not suggest otherwise. A publication ban is already in effect in this matter with respect to the names and identities of undercover officers.

- [40] In my view, that is sufficient to deal with the identification of a serious risk to the administration of justice in relation to Exhibits 31 and 32. However, I will also address the statements from members of the Davidson family.
- [41] In that regard, the Applicants submitted that the concerns expressed are purely personal and therefore do not amount to a risk to the administration of justice. Citing Williams at para. 25, they noted that purely personal concerns including concerns about very real emotional distress and embarrassment will not, standing alone, satisfy the necessity branch of the test.
- [42] Members of the Davidson family articulated the trauma of hearing the radio broadcast when it was played in open court and the impact on their mental health that would result if the broadcast were to be released and published. In particular, they highlighted the trauma associated with having their husband and father's last words broadcast and posted on the internet.
- [43] Citing Schoenborn at paras. 50-52; Panghali at paras. 51-52 counsel for the Abbotsford Respondents submitted that the psychological harm to the families of murder victims from publication goes beyond embarrassment. Publication of the Application Exhibits is likely to prolong existing significant suffering and is likely to cause pain and anguish over and above the initial trauma due to the crime. Families of murder victims are themselves victims and a court order permitting publication or broadcast of these exhibits would re-victimize them. Publication of Constable Davidson's last recorded words on the internet also constitutes an intrusion into the privacy and dignity of Constable Davidson. Such a result would undermine, not enhance, the administration of justice.
- [44] I am satisfied that the concerns of the Davidson family and their privacy interests go beyond embarrassment and that the publication of the radio transmission, in particular posting of the transmissions on the internet would cause them further trauma and would amount to a re-victimizations that would bring the administration of justice into disrepute. In addition, the publication engaged the privacy and dignity interests of Constable Davidson, see Panghali at para. 52. Such re-victimization would pose a serious risk to the administration of justice.
- [45] I note that in MacIntyre at 186-87, Justice Dickson stated:

In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent.

- [46] Turning to Exhibits 34 and 35, the dash cam audio and video, I note first that there are third parties who were not witnesses at the trial whose privacy interests are implicated in the video. Mr. Siefert was a witness who can fairly be described as traumatized and vulnerable. He testified using the accommodation of giving his evidence in another room via closed circuit. His counsel expressed the concern that publication, and in particular posting on the internet, will further traumatize him and set back his recovery.
- [47] I note that in Blackmore, Justice Donegan based the restriction she imposed in part on the courts function to prevent avoidable harms to innocent third parties whose interests are negatively affected by that process. In my view, witnesses such as Mr. Siefert fall within that category. While there is clearly a level of loss of privacy and distress, and in some cases trauma, associated with testifying as a witness in a proceeding, the court must be vigilant with respect to avoidable harms. In my view, as with Exhibits 31 and 32, publication of these exhibits would constitute a serious risk to the administration of justice as the re-victimization of a vulnerable witness would bring the administration of justice into disrepute.
- [48] Finally, with respect to exhibits B, C, D and E of affidavit No. 1 of Serena Lowe, sworn November 22, 2019, I note the observations of Justice Donegan in Blackmore at para. 108, that requiring the provision of affidavits would only further aggravate the fears and concerns of these vulnerable persons. In the present case counsel submitted that the Davidson family should not be in a worse position having submitted statements which were exhibited to an affidavit. As noted above, the things that the Davidson family have expressed in their statements go beyond mere embarrassment. I am satisfied that publication of these statements would amount to a re-victimization of the Davidson family, which would bring the administration of justice into disrepute.

Necessity - Are there reasonable alternative measures that will address the risk?

- [49] The next inquiry is whether there are reasonable alternative measures that will address the risk. I have concluded in the case of Exhibits 31 and 32 that release for publication of the transcript with the names of the officers removed would provide the public with the information necessary to serve the open court principle while protecting the safety of the undercover officers and the integrity of the investigations they are pursuing. This would also address the concerns of the Davidson family and respect the privacy and dignity of Constable Davidson.
- [50] With respect to Exhibits 34 and 35, I have concluded that publication of the dash cam footage, with the audio removed, the images of persons other than Mr. Arfmann and licence plates visible other than the vehicle Mr. Arfmann was driving being pixilated, would prevent the risks that have been identified.

- [51] There are no reasonable alternative measures that would prevent the risks in relation the Davidson family members' statements, being exhibits B, C, D and E of the affidavit of Ms. Lowe.

Balancing the Rights and Interests

- [52] The next inquiry is whether the salutary effects of the publication ban outweigh the deleterious effects of the rights and interests of the parties and the public. In this regard as noted above, the test is to be applied in a flexible and contextual manner.
- [53] In that regard, I note first that with respect to the Application Exhibits, the evidence was introduced in open court with no restrictions on the reporting by the media of that evidence. Indeed, the media did report on that evidence at the time that it was introduced at trial.
- [54] Pursuant to the court's policy on use of electronic devices in courtrooms, accredited members of the media are permitted to use electronic devices to audio record a proceeding for the purpose of verifying their notes and to transmit and received text so long as it does not interfere with the proceedings. The media also had the opportunity to request a more limited access to the exhibits, to copy but not publish or to view only. In this case, only unlimited access, which provided for viewing, copying and publication, was requested.
- [55] The Applicants submit that when a portion of the evidence on which the court has rendered its decision is withheld from media scrutiny and publication, it limits the ability of the media to fulfil its constitutionally enshrined function. In this case, however, whether or not the application is granted, none of the trial exhibits at issue have been withheld from media scrutiny. The media has been able to report on that evidence.
- [56] It is the case that access to and the ability to publish exhibits is an aspect of the open court principle. However, in the circumstances of the present case, the restrictions to the application of that principle that are being entertained are limited in scope.
- [57] Justice Holmes, in Panghali at para. 38, noted that:

For these and other reasons, the legally-protected interests at play in the application of the Dagenais/Mentuck test where, as here, copies are sought to be released "to the infinity of the internet" may therefore require the court to consider factors outside the scope of the filed or tendered evidence in a parties-driven process.

- [58] One such additional factor is the permanence of material posted on the internet in contrast to the more transitory nature of reporting in traditional formats. This permanence aspect was illustrated in the exhibits to the affidavit of Kyle Gough in which, for example, comments are still being posted to media accounts of the shooting of RCMP officers in Moncton, New Brunswick in 2014 and the shooting of RCMP officers near Mayerthorpe, Alberta in 2007.

[59] Another significant factor is that once the exhibits are posted on the internet there are no practicable limits which can be placed on the further downloading, reproduction, editing and possible distortion of that content.

[60] I am satisfied that the salutary effects of the publication restrictions outweigh any deleterious effects on the rights and interest of the parties and the public, including the effects on the right to free expression. With respect to the Application Exhibits, the restrictions are modest while the harms associated with publication, significant. In the case of the statements of the Davidson family members, I can see no salutary effect to publication and significant harms if the statements are reported.

Conclusion

[61] In the result:

- a) The application for a sealing order and publication ban with respect to exhibits B, C, D and E of affidavit No. 1 of Serena Lowe, sworn November 22, 2019, (the "Lowe Exhibits") is granted:
 - i. The Lowe Exhibits will be sealed; and
 - ii. There will be a ban on publication of any reference made in the course of submissions to the contents of the Lowe Exhibits.
- b) The application for copies of Exhibits 31 and 34 for the purposes of broadcast and placing the exhibits on media websites is dismissed;
- c) The application for copies of Exhibit 32 is granted with the restriction that the names of the officers shall be redacted from the transcript before it is published or broadcast in whole or in part;
- d) The application for copies of Exhibit 35 is granted with the following restrictions:
 - i. The Applicants are entitled to publish and/or broadcast only the video portion of Exhibit 35 with the audio portion of the disc removed; and
 - ii. The faces of any persons other than Mr. Arfmann and any licence plates other than the plate of the vehicle driven by Mr. Arfmann (Alberta plate BXP6220), shall be pixilated before the video portion of the Exhibit 35 is published or broadcast, in whole or in part.

"Ross J."

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