NOVA SCOTIA COURT OF APPEAL
Citation: R. v. G.D.S., 2007 NSCA 94

Date: 20070927
Docket: CAC 284818
Registry: Halifax

Between:

GDS

Appellant/Applicant

v.

Her Majesty the Queen

Respondent (appeal)

v.

The Halifax Herald Limited, Transcontinental Nova Scotia Media Inc., CTV and the Canadian Broadcasting Corporation

Respondents (application)

Judge: The Honourable Justice Joel E. Fichaud

Application Heard: September 20, 2007, Nova Scotia, In Chambers

Held: Application for publication ban is dismissed.

Counsel: Chandra Gosine for the appellant/applicant
Peter Rosinski, for the respondent Her Majesty the Queen
Alan Parish, Q.C., for Transcontinental Nova Scotia Media Inc.
Nancy Rubin, for The Halifax Herald Limited
James Boudreau, for CTV
David Coles, Q.C. and Nicole Godbout, for Canadian Broadcasting Corporation

Decision:

[1] The appellant GDS applies for a publication ban of his identity until the release of the decision of the Court of Appeal on his sentence appeal.

Background

[2] GDS murdered Kenneth James Purcell, a Dartmouth taxi driver, on Christmas Day 2005. He stabbed Mr. Purcell repeatedly in the chest. GDS was four months shy of his 18th birthday. The following are extracts from the agreed statement of facts submitted at the sentencing hearing (appended to sentencing decision 2007 NSSC 250):

> On December 24th, 2005 in the afternoon, G.D.S. came to Amanda Stroud's apartment and asked Ms. Stroud for money. They talked. She gave him a beer. He was acting differently, as if he was on something, other than the beer, she did not see him consume drugs or any other alcohol. G.D.S. said "he is waiting for someone to cross him the wrong way because he wanted to shoot or stab somebody. He liked the sound of the knife going in and out of the cab driver". Referring to G.D.S. 2002 conviction of aggravated assault, he said "people don't ever take him seriously". Ms. Stroud noted him to be wearing a black puffy jacket later identified by her as his.
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> . . .
>
> <u>December 25, 2005</u>
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> . . .
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> At about 8:14 a.m., there was a bang at the door of apartment 316-14 Churchill Court, the residence of Amanda Stroud. She peeked out the door, saw G.D.S., who she knew, down the hallway by the elevator. He moved quickly into her apartment saying,
>
> "Amanda, you don't even know. I just killed somebody, just stabbed somebody".
>
> He repeated the phrase that he had killed somebody over and over again. G.D.S. took a knife out, when he was inside the apartment. It had a black handle, silver blade with a reddish substance on it, at the tip. He had the knife, blade pointing up, as we walked around her apartment.

> G.D.S. was talking fast and was described as hyper. He told her "that he got a drive by someone and the driver pissed him off. He stabbed him". G.D.S. did not say a "cab/driver". "He shouldn't have pissed me off. Why did he have to piss me off?".

On May 18, 2007 GDS pleaded guilty to second degree murder (s. 235(1) of the *Criminal Code*). Because GDS was under 18 at the time of the offence, his prosecution was subject to the *Youth Criminal Justice Act*, S.C. 2002, ch. 1 ("*YCJA*"). Second degree murder is a presumptive offence under s. 2(1) of the *YCJA.*

[3] A young person within the *YCJA*, convicted of a presumptive offence, receives an adult sentence unless he applies and satisfies the sentencing judge that a youth sentence is appropriate. GDS applied to Justice Coughlan of the Supreme Court of Nova Scotia for imposition of a youth sentence. GDS also applied to Justice Coughlan for an order that ss. 62, 63, 64(1) and (5), 72(1) and (2), 73(1), 75 and 110(2)(b) of the *YCJA* violate s. 7 of the *Charter of Rights* because they shift the onus to the young person to disprove aggravating sentencing factors and for maintenance of a publication ban.

[4] Justice Coughlan issued a decision on May 14, 2007 dismissing GDS' *Charter* application (2007 NSSC 159).

[5] On August 21, 2007 Justice Coughlan issued a sentencing decision (2007 NSSC 250). He sentenced GDS to an adult sentence of life imprisonment without parole eligibility for seven years. His decision said that he would impose an adult sentence even without the statutory reverse onus: (¶ 26)

> . . . if I was in error [in his ruling of May 14, 2007] in finding the onus did not violate s. 7 of the *Charter* and the onus of satisfying the Court a youth sentence did not have sufficient length to hold a young person accountable for his or her offending behaviour is on the Crown, the Crown has satisfied the onus that a youth sentence would not have sufficient length to hold G.D.S. accountable for his offending behaviour.

[6] Justice Coughlan's decision of August 21, 2007 banned publication of GDS' identity for 30 days pending further order of either the Supreme Court or the Court of Appeal. This was an interim publication ban. The ban was returnable on August 31, 2007 because GDS had not properly notified the public and media further to

the Protocol for Notice of Application for Publication Ban. The protocol notice instructions are set out on the *Courts of Nova Scotia* website: http://www.courts.ns.ca.

[7] On August 27, 2007 GDS filed a notice of appeal and application for leave to appeal to the Nova Scotia Court of Appeal. He appeals his sentence, and seeks substitution of a youth sentence under the *YCJA*. Included in his grounds of appeal are challenges, under s. 7 of the *Charter*, to ss. 62, 63, 64(1) and (5), 72(1) and (2), 73(1), 75 and 100(2) of the *YCJA*. Though his notice of appeal refers to s. "100(2)", I assume this is a misprint and that GDS intended to refer to s. 110(2) which was the provision he challenged before Justice Coughlan.

[8] On August 31, 2007 Justice Coughlan heard counsel for GDS and for several media organizations respecting the continuation of the publication ban. Justice Coughlan then continued the publication ban until September 20, 2007.

[9] GDS then followed an unorthodox path to seek a publication ban in the Court of Appeal.

[10] The Court of Appeal's practice directive respecting publication bans dated November 8, 2005 is available on the *Courts of Nova Scotia* website. The directive says that an applicant for a publication ban must file with the Court his notice of application, affidavit and supporting material at least three clear days before his application. He must comply with the application procedure in *Rule* 62.31 that governs chambers applications generally, and expressly requires filings and service with three clear days notice. In addition he should post an electronic notice by following the instructions on the *Courts of Nova Scotia* website. On the website, under "Notices to the Bar" immediately before the reference to the Practice Directive, the following (referring to electronic notice) appears in bold face:

> **It is only a way of notifying the media that you have applied for a ban or similar order. It is not a substitute for the usual rules for Interlocutory Applications. Unless otherwise directed by the Court, a Notice of Application, supporting Affidavit, and draft Order must be filed.**

[11] On September 4, 2007, GDS posted the electronic notice to the media that an application for a publication ban would be made to the chambers judge in the Court of Appeal on September 6, 2007. On September 4, 2007, counsel for GDS

attempted to file a notice of application, not for a publication ban, but to schedule a hearing date for his application. Because the notice was submitted for filing less than three clear days before the proposed chambers date of September 6th, the court's staff rejected the filing. So the matter was not docketed for September 6th. GDS did not then file a notice of application for a publication ban for a later date. Rather GDS filed a notice of application returnable on September 13, 2007, not for a ban, but again to secure a date for the hearing of the ban. There is no requirement to apply to a chambers judge to secure a date for the hearing of the application. At the eventual chambers hearing on September 20th, counsel for GDS said that he had believed the posting of the electronic notice satisfied the requirement to file his application for the ban with the court.

[12] On September 13, 2006 in chambers, after hearing counsel for GDS (Mr. Joseph Cameron substituting for Mr. Gosine who was on vacation), the Crown and the media respondents, I scheduled the application for the ban to be heard in chambers on Thursday, September 20, 2007. That was the date requested by GDS and was the expiry date of Justice Coughlan's ban. Normally, with the three clear days notice required for service of supporting documents, this would have required GDS to file and serve his supporting material by Friday, September 14, (Saturday and Sunday being excluded by the *Rules* from the calculation of clear days notice). As an accommodation to GDS and over the objection of the media respondents, I extended his filing deadline to Monday, September 17, 2007. I directed the respondents to file their materials by September 18, 2007.

[13] By the end of September 18th, GDS had filed nothing for the application. He had not even filed a notice of application for a publication ban.

[14] Counsel for the respondents then filed memoranda discussing in general their clients' position on the publication ban. Later on September 19, GDS for the first time tendered for filing a notice of application for a publication ban returnable on September 20th . Court staff declined to stamp the notice for filing because the document was submitted after the deadline under both the *Rules* and my extension of September 13th. Counsel for GDS enclosed a memorandum of argument, a pre-sentence report and several reports from psychologists. The notice of application said that on September 20th GDS would apply "for a ban on publication, under s. 74(2) of the *YCJA* and alternatively, under the common law powers of the court". There was no reference to an application for an interim ban for the period beginning with the expiry of Justice Coughlan's ban on September 20 and

continuing to the release of my judgment on the application for the principal ban. Nor was there reference to *Civil Procedure Rule* 62.31(9) that expressly authorizes a chambers judge of this court to issue publication bans.

[15] At the hearing on September 20, counsel for the CBC and CTV, and the publishers of two Halifax newspapers, the Chronicle Herald (The Halifax Herald Limited) and Daily News (Transcontinental Nova Scotia Media Inc.), submitted that GDS had failed to follow the appropriate procedure for the hearing on September 20th of an application for a publication ban. Their memoranda and oral submissions asked that the application should be dismissed, or adjourned to a later date to allow the respondents time to digest GDS' late filed materials. Media counsel also submitted that, if there was an adjournment, there should be no interim publication ban from September 20th to the resumed date of the adjourned hearing, notwithstanding that Justice Coughlan's publication ban would expire on September 20th. Counsel for the media said their clients would publish GDS' identity immediately upon the expiration of Justice Coughlan's ban. So any adjourned application for a publication ban would be pointless by September 21st.

[16] Counsel for the Crown, the respondent on GDS' appeal, acknowledged that a chambers judge has jurisdiction to issue a publication ban under *Rule* 62.31(9) and said the judge should exercise that discretion to avoid an injustice. Otherwise, the Crown took no active position in the dispute respecting the publication ban.

[17] On September 20, after hearing all counsel on the procedural issues, I ruled as follows:

1. Despite the procedural deficiencies, I declined to dismiss GDS' application. The underlying rights, if any, belong to the parties - the media organizations and GDS – not to counsel. The failure of GDS' counsel to follow the appropriate procedures for this application should not prejudice the parties' rights, if it is possible (as it was) to minimize any prejudice through an adjournment or rearranged schedule.

2. I accepted GDS' notice of application of September 19 as an initiating document, notwithstanding its late filing.

3. I said I would hear counsel for GDS on September 20th. On September 13th, GDS' counsel had requested the hearing date of September 20th. So I presumed GDS' counsel would be prepared to proceed on September 20th. I ruled that, after the submission by GDS' counsel, any counsel for a respondent who wished to respond on September 20th could do so. Any counsel for a respondent who wished more time to digest GDS' late filed material could present argument on the morning of Tuesday, September 25th at a resumption of the hearing.

4. I issued an interim ban on publication of GDS' identity from September 20th (when Justice Coughlan's publication ban expired) until the date of release of my decision on the principal application for the publication ban. I gave brief reasons and told counsel that this decision would outline in more detail my reasons for the interim ban. I will set out those reasons later while discussing the application of the principles for the issuance of a ban. This interim ban was embodied in a formal order dated September 20, 2007.

5. A condition of the interim ban was that, by September 21, 2007, counsel for GDS file an amended notice of application that would (1) include a request for an interim ban and (2) cite *Civil Procedure Rule* 62.31(9) as authority for his applications for the principal and interim bans. GDS' notice of application of September 19th omitted both these points. (GDS filed this amended notice on September 21, 2007.)

[18] After delivering this ruling on the morning of September 20th I heard from counsel for GDS in support of his principal application for the publication ban. I then asked counsel for the media respondents and the Crown whether they wished to respond on September 20th or wait until an adjourned hearing date on Tuesday, September 25th . Counsel for the respondents and the Crown, after having heard the submissions for GDS, decided to proceed with their response on September 20th. All counsel made all their submissions on September 20th, after which I reserved a decision on GDS' application for a publication ban of his identity until the decision of the Court of Appeal after the hearing of his sentence appeal.

Issues

[19] Is GDS entitled to a publication ban of his identity pending the release of the decision of this court after his sentence appeal?

Jurisdiction

[20] Section 110(1) of the *YCJA* prohibits publication of the identity of a young person being dealt with under that *Act.* Section 110(2)(a) says that the statutory publication ban of s-s. (1) does not apply "where the information relates to a young person who has received an adult sentence".

[21] Section 117 of the *YCJA* provides that restrictions on access to records in ss. 118-129 do not apply once, "if an appeal is taken, all proceedings in respect of the appeal had been completed and the appeal court has upheld an adult sentence".

[22] GDS' application is not covered by these two statutory bans. He has received an adult sentence, so the statutory ban in s. 110(1) is inapplicable because of s. 110(2)(a). The extension of the confidentiality to the expiry of the appeal by s. 117 applies to the release of records, not to the publication of identity.

[23] Section 74(2) of the *YCJA* says that a finding of guilt becomes a "conviction" once the appeal period is expired or, after the completion of the appeal if the appeal court has upheld the adult sentence. But section 74(3) says:

> This section does not affect the time of commencement of an adult sentence under subsection 719(1) of the *Criminal Code*.

Section 719(1) says:

> A sentence commences when it is imposed, except where a relevant enactment otherwise provides.

Because of s. 74(3), GDS has received the adult sentence on August 21, 2007, which triggers the expiry of the statutory publication ban under s. 110(2)(a). GDS' notice of application cited s. 74(2) as authority for a publication ban. At the hearing on September 20th, counsel for GDS acknowledged that s. 74(2) offers no basis for this application and he withdrew that submission.

[24] Based on the above provisions, GDS does not today enjoy a statutory publication ban of his identity.

[25] Neither does the *YCJA* expressly give a chambers judge of this court jurisdiction to hear this application for a discretionary publication ban of identity. Section 75 of the *YCJA* entitles a youth court justice, who imposes a youth sentence, to ban publication of information that would identify the young person "if the court considers it appropriate in the circumstances, taking into account the importance of rehabilitating the young person and the public interest". As GDS received an adult sentence, this discretionary power to issue a publication ban does not assist him. I note that the burden imposed by s. 75 on the young person to establish the basis for non-publication has been successfully challenged under s. 7 of the *Charter*: *Quebec (Minister of Justice) v. Canada (Minister of Justice)* (2003), 228 D.L.R. (4th) 63 (Q. C.A.); *R. v. B(D)* (2006), 206 C.C.C. (3d) 289 (O.C.A.), leave to appeal granted 210 C.C.C. (3d) vi (S.C.C.) scheduled to be heard by the Supreme Court of Canada in October 2007; contra *R. v. K.D.T.*, [2006] B.C.J. No. 253 (C.A.).

[26] My jurisdiction to hear this application is sourced outside the *YCJA*. Section 482 of the *Criminal Code* authorizes superior courts of criminal jurisdiction to enact rules of court that are not inconsistent with the *Criminal Code* or with other *Acts* of Parliament. *Rule* 65.03, respecting criminal appeals, says that the *Civil Procedure Rules*, particularly *Rule* 62, govern criminal appeals when not inconsistent with the express provisions of *Rule* 65. *Rule* 62.31(9) states that a chambers judge may exercise any jurisdiction or authority of the Court of Appeal to allow the use of pseudonyms and to "issue a publication ban".

[27] A court of appeal has jurisdiction to issue publication bans in the interest of justice for the orderly management of the appeal: e.g. *R. v. White*, 2006 ABCA 65, 380 AR 188 at ¶ 30; *R. v. F.M.* 2007 BCCA 393 at ¶ 5-6. I am satisfied that this principle is embodied by *Rule* 62.31(9), and that I have jurisdiction to hear applications for both the interim ban, that I issued on September 20, 2007, and for the principal ban on publication until the decision of the Court of Appeal on the sentence appeal.

The Governing Principles

[28] This is not an application for a civil stay of execution under *Rule* 62.10(2). There is no application for a stay of GDS' adult sentence. The governing principles are not those in the test for a stay (arguable case, irreparable harm, balance of convenience): *Fulton Insurance Agencies Ltd. v. Purdy* (1990), 100 N.S.R. (2d) 341 (C.A.) per Hallett, J.A. On this point, I respectfully differ from the view of the British Columbia Court of Appeal in *R. v. F.M.*, *supra*, at ¶ 6. Rather, the principles derive from the authorities governing the balance of the open court principle against a young person's privacy interests codified by a purposive interpretation of the *YCJA*.

[29] The open court principle pre-dated the *Charter*. In *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175, Justice Dickson (pp. 185, 189) said:

> . . . It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. . . .
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> Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.

[30] In *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, Justice Cory (pp. 1337-40) reiterated the principles in the *Charter* context and said (p. 1339):

> The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

[31] In *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *R. v. Mentuck*, [2001] 3 S.C.R. 442, the Supreme Court formulated the principles to govern applications for publication bans in criminal proceedings. In *Mentuck*, Justice Iacobucci for the Court refined the test:

> 32. . . . In assessing whether to issue common law publication bans, therefore, in my opinion, a better way of stating the proper analytical approach for cases of the kind involved herein would be:

> A publication ban should only be ordered when:
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> > (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.

[32] In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at ¶ 67-76, Justice LaForest for the Court reviewed the principles to govern the manner of exercise of discretion to issue a publication ban. Referring to *Dagenais*, and whether a restriction on publication is necessary for the "proper administration of justice", Justice LaForest noted the onus of proof:

> 71 The burden of displacing the general rule of openness lies on the party making the application. As in *Dagenais*, *supra*, the applicant bears the burden of proving: that the particular order is necessary, in terms of relating to the proper administration of justice; that the order is as limited as possible; and, that the salutary effects of the order are proportionate to its deleterious effects. In relation to the proportionality issue, if the order is sought to protect a constitutional right, this must be considered.

[33] More recently in *Re Vancouver Sun*, [2004] 2 S.C.R. 332, at ¶ 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). 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.

[34] Similarly, in *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188, Justice Fish for the Court said:

> 1 In any constitutional climate, the administration of justice thrives on exposure to light -- and withers under a cloud of secrecy.
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> 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.
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> 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.
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> 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.
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> 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.
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> 6 The Court of Appeal for Ontario held that it does and the Crown now appeals against that decision.
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> 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.*
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> 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.
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> 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.
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> 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.

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

[36] *Re F.N.*, [2000] 1 S.C.R. 880 discussed these principles under the former *Young Offenders Act*, R.S.C. 1985, ch. Y-1. Justice Binnie for the Court said:

> 10 It is an important constitutional rule that the courts be open to the public and that their proceedings be accessible to all those who may have an interest. To this principle there are a number of important exceptions where the public interest in confidentiality outweighs the public interest in openness. This balance is dealt with explicitly in the relevant provisions of the *Young Offenders Act*, which must be interpreted in light of the Declaration of Principle set out in s. 3. These

> principles were described in *R. v. T. (V.)*, [1992] 1 S.C.R. 749, per L'Heureux-Dubé J., as "attempting to achieve disparate goals" (p. 767). A certain ambivalence created by these disparate goals (or competing objectives) is inherent in the scheme of the Act itself, as L'Heureux-Dubé J. explained at p. 766, quoting Bala and Kirvan in *The Young Offenders Act: A Revolution in Canadian Juvenile Justice* (1991), at pp. 80-81:
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> > It is apparent that there is a level of societal ambivalence in Canada about the appropriate response to young offenders. On the one hand, there is a feeling that adolescents who violate the criminal law need help to enable them to grow into productive, law-abiding citizens... . On the other hand, there is a widespread public concern about the need to control youthful criminality and protect society.
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> 11 The non-disclosure provisions of the Act reflect this ambivalence. Confidentiality assists rehabilitation, but the safety of society must be protected, and those involved in the youth criminal justice system (or with the young offender in other settings) must be given adequate information on a "need-to-know" basis to do their jobs.
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> 12 The youth courts are open to the public, and their proceedings are properly subject to public scrutiny. The confidentiality relates only to the "sliver of information" that identifies the alleged or convicted young offender as a person in trouble with the law.
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> . . .
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> 14 Stigmatization or premature "labelling" of a young offender still in his or her formative years is well understood as a problem in the juvenile justice system. A young person once stigmatized as a lawbreaker may, unless given help and redirection, render the stigma a self-fulfilling prophecy. In the long run, society is best protected by preventing recurrence. Lamer C.J., in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, pointed out in another context that non-publication is designed to "maximize the chances of rehabilitation for 'young offenders'" (p. 883).

To the same effect: *R. v. R.C.*, [2005] 3 S.C.R. 99 at ¶ 42.

[37] In *F.N.* (¶ 18-57) Justice Binnie drew from the *legislation* (the former *Young Offenders Act*) to assist his analysis of the appropriate balance between the open court principle and the young person’s justified need for confidentiality. He summarized the approach:

> 13 This Court's general approach to the *Act* was also affirmed in *R. v. M. (J.J.)*, [1993] 2 S.C.R. 421, where Cory J. observed that "the *Act* does specifically recognize that young offenders have special needs and require careful guidance. Each disposition should strive to recognize and balance the interests of society and young offenders" (p. 429). The non-disclosure provisions were amended in 1986 to "readjust the balance between the rights and interests of young persons and the interests of society by favouring more disclosure, albeit in limited circumstances", *per* Prowse J.A. in *R. v. M. (E.H.B.)* (1996), 106 C.C.C. (3d) 535 (B.C.C.A.), at para. 49. The process of adjustment continues, with Bill C-3 (*The Youth Criminal Justice Act*) presently under consideration by Parliament.

Justice Binnie concluded:

> 58 The present practice of the Youth Court in St. John's is *not sanctioned by the Act* and the appeal is therefore allowed, the order of the Court of Appeal is set aside, and a prohibition will issue against continuation of the present practice of the Youth Court of St. John's to distribute the docket to both school boards in the St. John's area. The prohibition is issued, of course, without prejudice to the making of an appropriately tailored regulation *under s. 44.1(1)(h) of the Act*, or to such further or other arrangement that may be made by the provincial director, a youth worker, a peace officer or other official *identified in s. 38(1.13)* that *conforms to the Act* and recognizes the valid interest of the school boards in the promotion of school safety. . . . [emphasis added]

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

[39] In the *YCJA*, Parliament has enacted the provisions, discussed earlier, that terminate the statutory publication ban of identity upon the imposition of an adult sentence. Parliament has seen fit to continue the confidentiality of records pending the result of an appeal, but has enacted no such continuing restriction for the identity of the convicted defendant who has received the adult sentence. Parliament has not established a statutory process to empower a judge to issue a discretionary ban for a recipient of an adult sentence, as exists after a youth sentence by s. 75.

[40] This policy choice by Parliament does not prevent a young person who has received an adult sentence from applying to a court for a publication ban on his identity pending the result of his appeal. But there is no legislated presumption that the balance of interests dictates a publication ban. Rather the applicant must satisfy the *Dagenais/Mentuck* test and its onus of proof. As noted in *F.N.* (¶ 14) and in *Dagenais* (p. 883), premature publicity may hamper rehabilitation. The question on the application before me is whether GDS has satisfied his onus to show his rehabilitation would be hampered by publication of his identity. If he can show this, then I would be satisfied that a publication ban would be appropriate under the two-pronged *Dagenais/Mentuck* test.

[41] It is not unusual that a sentence-only appellant must satisfy an onus in order to suspend his sentence pending his appeal. Section 679 of the *Criminal Code* enacts this as a principle of release pending appeal. Section 679(4) says that a judge of the court of appeal may order that an appellant, who appeals only his sentence, may be released pending his appeal "if the appellant establishes" that his appeal has sufficient merit, that he will surrender into custody and that his detention is not necessary in the public interest. At the trial level, the accused has no such onus to obtain bail. Section 679(4) acknowledges that the trial conviction has replaced the initial presumption of innocence with the status quo of guilt. Unlike a pre-trial bail applicant, a convicted sentence-only appellant who seeks bail must prove the conditions for his release. See *R. v. Barry*, 2004 NSCA 126, at ¶ 8 and cases there cited; *R. v. Smith*, 2005 NSCA 45, at ¶ 10*; R. v. Shaw*, 2007 NSCA 91, at ¶ 7.

[42] Parliament has made a similar policy determination with s. 110(2)(a) of the *YCJA*. A young person who has received an adult sentence loses the statutory publication ban that applied during his trial. Parliament has enacted no statutory process for a discretionary ban. It is not for a judge effectively to legislate by legally *presuming* an entitlement to a continued publication ban. Rather, it is for the applicant to satisfy his onus to show, as a fact, that publication of his identity would hamper his rehabilitation, as a component of the *Dagenais/Mentuck* test. I am not saying that the rehabilitation issue is the only possible consideration on such an application by a young person. But it is the crux of GDS's submission on this application.

Application of Principles

[43] As noted earlier, on September 20, 2007 I granted an interim publication ban of GDS' identity from September 20th until the release of this decision on the application for the principal publication ban. I told counsel that this decision would elaborate on my reasons for the interim ban. GDS' application for an interim ban, in my view, is governed by the *Dagenais/Mentuck* principles. There is no automatic interim ban upon the filing of an application for a principal ban. But the functioning of the *Dagenais/Mentuck* principles supports the issuance of an interim ban in the present circumstances. To deny the interim ban would mean that GDS' application for the principal ban, argued on September 20th, would be moot by publication on September 21st, before I could issue a decision on the application. To render the court application pointless with such disingenuity would jeopardize "the proper administration of justice" under the first prong of the test. An interim publication ban for several days, until my decision on the principal application is issued, would have a minimal deleterious effect on the rights and interests of the media respondents. Any deleterious effect would be outweighed by the salutary effect of having the application for the principal ban dealt with in an orderly manner.

[44] Next I will consider the functioning of the *Dagenais/Mentuck* test to the application for the principal publication ban until the decision of the Court of Appeal on the sentence appeal.

[45] At the hearing on September 20th, GDS submitted his pre-sentence report of January 27, 2007, an assessment report of March 20, 2006 by Stephen Gouthro (Clinical Psychologist) and Mark Johnston (Psychiatrist), a psychological assessment report of October 27, 2006 by Dr. May Ann Campbell (Psychologist) and an update dated May 7, 2007, and an assessment report dated April 24, 2007 by Harpeet Aulakh (Psychologist), Kimberly Brennan (Social Worker) and Aileen Brunet (Psychiatrist). I have carefully read these documents. At the hearing on September 20th I asked counsel for GDS to point out any particular passages in those documents upon which he relied to support his view that the publication ban should issue to assist GDS' rehabilitation. Counsel for GDS pointed to several passages, to which I have paid special attention, but I have analyzed the full documents.

[46] There is nothing in the reports to satisfy me that GDS' rehabilitation would be assisted by a publication ban on his identity, or hampered by publication of his identity.

[47] According to these reports, in the three and one half years before committing the current offence, GDS committed three violent offences, three weapons related offences, two offences of uttering threats, one break and enter, one cocaine possession and seven offences related to non-compliance with undertakings and probation orders. One of the violent offences involved a stab wound to the chest of another taxi driver in September 2002. The wound was five inches deep, and lacerated the victim's liver. GDS reminisced about this stabbing on the day before he stabbed Mr. Purcell (Agreed Statement of Fact, above ¶ 2). These events happened during GDS' tenure with the youth criminal justice regime. Rehabilitation was not evident.

[48] The reports repeatedly say that GDS is at a high risk to re-offend. The Gouthro Report notes that GDS' parents say GDS "has not been accountable in the past, and requires consequences for his actions". The reports say that GDS' behaviour has been manageable only under the strict supervision and safety offered by custody. When he is released from custody, he has reconnected with criminal associates and resumed his violent behaviour that converges with his alcohol and drug abuse to increase the risk that he will dangerously re-offend. The Gouthro report says:

> At present GDS also appears to have little insight into the need for personal change. He portrays himself as a victim. He offers little in the way of personal decisions or behaviours that have led him to this point in his life. His primary goals at present involve building up muscle mass and eventually transferring to an adult facility where there are family, friends and fewer demands placed upon him.

[49] I have reviewed the reports particularly from the perspective of potential rehabilitation. I see no indication that GDS' prospect of rehabilitation is connected to either the publication or non-publication of his identity. My conclusion from the evidence is that GDS' most rehabilitative course is to face the consequences of his actions.

Conclusion

[50] As noted earlier, on September 20, 2007 I granted an interim publication ban until the release of this decision on the application for the principal publication ban.

[51] In my view, there is no basis for a publication ban of identity pending the result of this appeal. I dismiss the application for the principal publication ban.

Fichaud, J.A.