NOVA SCOTIA COURT OF APPEAL
Citation: ***A.B. v. Bragg Communications Inc.***, 2011 NSCA 26

Date: 20110304
Docket: CA 330605
Registry: Halifax

Between:

A.B. by her Litigation Guardian, C.D.

Appellant

v.

Bragg Communications Incorporated, a body corporate, The Halifax Herald Limited, a body corporate, and Global Television

Respondents

Restriction on publication: **Pursuant to the decision of Oland, J.A. (2010 NSCA 57)**

Judges: MacDonald, C.J.N.S.; Saunders and Oland, JJ.A.

Appeal Heard: December 7, 2010, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Saunders, J.A.; MacDonald, C.J.N.S. and Oland, J.A. concurring.

Counsel: Michelle C. Awad, Q.C. and Daniel W. Watt, for the appellant
Nancy G. Rubin and Maggie A. Stewart, for the respondent Halifax Herald
Alan V. Parish, Q.C. for the respondent Global Television

Reasons for judgment:

[1] This case requires us to consider the tension between a young person's claim to privacy following the posting of derogatory information on the social networking website, Facebook, and the constitutionally guaranteed right to freedom of the press in Canada, when viewed in the context of a planned action for defamation. It pits a teenager who finds herself the victim of on-line bullying against the public's right to be informed by a free and independent press given unrestricted access to open court proceedings.

[2] In a decision now reported at 2010 NSSC 215, Nova Scotia Supreme Court Justice Arthur J. LeBlanc refused the appellant's request that she be permitted to carry on with her intended litigation by concealing her identity through the use of a pseudonym, and rejected her plea that he impose a partial publication ban so that the public would be denied access to the words posted on Facebook, which the appellant claimed were defamatory.

[3] She appeals, claiming various errors by the judge in denying the sought-after relief. For the reasons that follow I would dismiss the appeal.

Background

[4] Most of the circumstances surrounding this unusual case may be gleaned from the affidavits filed at the hearing in the court below and the reported decision of the Chambers judge. To provide context I will refer to the material facts, summarily.

[5] Facebook is a social-networking web site, founded in 2004, that is operated and privately owned by Facebook Inc. Various Internet sites describe Facebook as a "social utility" which enables the user to "make new connections with others who share a common interest, thereby expanding one's personal network". Facebook's own web site says it "... helps you connect and share with the people in your life". It boasts that Facebook is accessed by "hundreds of millions of people" every day connecting them "... with the people they care about, whenever and wherever they want...".

[6] Its popularity and meteoric success is reflected in the slew of business articles reporting the untold wealth amassed by its creators; its current depiction in Hollywood film; and its recent emergence as a force of truly global proportions in mobilizing mass protest fixed on toppling ruling elites.

[7] The appellant, A.B., is 15 years of age. She is the daughter of C.D., her litigation guardian. These proceedings arise from the alleged creation of a fake Facebook profile by an unidentified perpetrator, which included a photograph of the appellant, a slightly modified version of her name, and other particulars which identified her. The fake profile also discussed the appellant's physical appearance, her weight, and allegedly included scandalous sexual commentary of a private and intimate nature.

[8] On March 4, 2010, A.B. became aware of this "new" Facebook profile. At least one person saved the page and forwarded it to A.B. She, in turn, printed the page and gave it to her father.

[9] The appellant told her father that she had not been involved in creating the fake profile, and that she did not know who had.

[10] A.B. and her father learned that the fake profile had been "taken down" from the Facebook site. They retained a lawyer to find out who was responsible. Ms. Michelle Awad, Q.C. started an investigation on behalf of her clients in an attempt to discover the identity of the author(s) and publisher(s) of the allegedly defamatory statements.

[11] Once notified of the situation, Facebook's counsel in Palo Alto, California provided the IP address associated with the account, as well as a print-out of the content of the account, which Facebook confirmed had "been disabled". The IP address, displayed as a numerical sequence, was said to be located in Dartmouth, Nova Scotia. The appellant's counsel determined that the fake profile originated at the IP address at around 6:00 p.m. on March 4, 2010, and that it was an "Eastlink address" in Dartmouth, Nova Scotia. Further inquiry confirmed that the respondent Bragg Communications Limited owns Eastlink, a Canadian cable television and telecommunications company and provider of Internet and entertainment services in Atlantic Canada.

[12] Armed with this information the appellant, by her guardian, applied in Chambers for an order requiring Bragg Communications to disclose the identity of the person(s) who used the IP address to perpetuate the alleged defamation. The appellant said she intended to unmask the anonymous poster, whom she claimed had authored the defamatory words. As additional relief, the appellant sought an order which would allow her to proceed by pseudonym (initials), and as well, a partial publication ban to prevent the public from knowing the words contained in the fake Facebook profile which she claimed harmed her reputation.

[13] Bragg Communications did not oppose the appellant's request for an abridgement of time, or her request that the company disclose the identity of the owner of the IP address.

[14] The respondents, Halifax Herald Limited and Global Television, first became aware of the appellant's Chambers application when notice of the request for a publication ban appeared as an automated advisory on the Nova Scotia Publication Ban Media Advisory Web Site. This prompted the respondents to advise the court that they would oppose the two discrete claims for relief which affected their rights, namely, the appellant's claim for an anonymization order, and a publication ban.

[15] The matter was heard in Chambers over the course of a four day hearing. Justice LeBlanc reserved judgment. On June 4, 2010, he filed a written decision granting only a portion of the relief sought by the appellant. He ordered Bragg Communications to disclose the identity of the owner of the IP address (which request had been unopposed). He refused the appellant's separate requests that she be permitted to advance the litigation with her identity concealed, or that she be granted a partial publication ban of the alleged defamatory words.

[16] A.B. appeals. She says the judge erred by failing to take into account the special vulnerability of children, and by ignoring an obvious and serious risk of harm. She asks that we allow the appeal, and grant the relief declined in the court below, such that she be permitted to sue by pseudonym, and that the allegedly defamatory words be banned from further publication.

[17] The appeal is strongly opposed by the Halifax Herald Limited, and by Global Television. Bragg Communication Inc. takes no position.

Issues

[18] Stripped to their essentials, the following issues emerge:

(i) What is the proper standard of review to apply to the Chambers judge's decision and confirmatory order?

(ii) What is the legal framework in which the judge was obliged to consider the matter?

(iii) Did the judge err by failing to exercise his *parens patriae* jurisdiction so as to take into account the distinctive vulnerability of children? and

(iv) Did the judge err by failing to find that the publication of the alleged defamatory statements constituted evidence of a serious risk of harm?

Analysis
Preliminary Matters

[19] Before I deal with the main issues on appeal there are certain preliminary matters to clear away first.

[20] As an initial objection, the Halifax Herald raises a question of jurisdiction. In this and all other matters Global Television endorses and relies upon each of the Herald's submissions. The objection is a narrow and technical one. Relying upon its assertion that the decision under appeal is an interlocutory one, the respondents say the appellant was bound to move for leave to appeal pursuant to **Rule** 90.09 and s. 40 of the **Judicature Act**, R.S.N.S. 1989, c. 240. While acknowledging that the appellant filed a form of Notice of Appeal (General) within ten days of the decision, as required, the respondents say that whereas under the old **Rules** leave was heard traditionally by the panel hearing the appeal, the new **Rule** 90.12 provides that an application for leave to appeal must be made to a *Judge* of the Court of Appeal. According to the new **Rule**, a judge who hears the application for leave may then refer the application to the Court. Thus, the respondents say the appellant's appeal is flawed because she failed to comply with the **Rules** by first seeking this Court's leave to appeal before a single judge of the Court.

Accordingly, the Herald and Global Television say that we are without jurisdiction to hear the appeal and that it ought to be dismissed summarily.

[21] With respect, I am not prepared to accede to the respondents' technical objection in this case. It was only first raised by counsel for the Herald in her factum. Had the Herald seriously intended to challenge the appellant's compliance with the **Rules**, it ought to have done so in Chambers and not waited until the appeal hearing to first raise it. While I make no comment on the merits, or otherwise, of the respondents' challenge, it seems to me beyond doubt that whatever authority lies with a single judge of this Court may be exercised by the Court itself, as well as a panel of the Court. I am satisfied that this appeal ought to be heard on its merits. No party has been prejudiced by the procedure adopted and every issue has been thoroughly canvassed by very able and experienced counsel on all sides. I see no obstacle to our disposing of the case.

[22] Another preliminary matter concerns the appellant's submission that the Chambers judge's ruling missed the mark because it was, in effect, premature. A.B.'s argument seems to be that all she was really after in this, the first round of litigation, was to seek the court's permission to pursue and unmask the person(s) who used the IP address to defame her. Once that was known, the appellant would then have to re-apply, a second time, for an anonymity order and publication ban if she wished to proceed with her action for defamation and damages.

[23] Respectfully, I see this as a distinction without a difference. It would achieve no purpose other than postponing the inevitable. Justice LeBlanc was required to dispose of the application before him and the only way he could consider A.B.'s request for relief was to address the expressed intention and concerns identified by the appellant in her application which read in part:

> 3. .... The Applicant seeks production of the requested information to assist her in identifying potential Defendants for an action in defamation; and
>
> 4. The Applicant has suffered harm and seeks to minimize the chance of further harm through the request for permission to proceed using initials and for the publication ban.

[24] It would make no sense to bifurcate this procedure, or risk contradictory decisions, one following the appellant's initial application for an anonymity order

and publication ban, and the other stemming from a separate and subsequent application for the very same relief.

[25] Having disposed of these preliminary matters, I will now turn to the first substantive issue on appeal.

(i) What is the proper standard of review to apply to the Chambers judge's decision and confirmatory order?

[26] In order to determine the appropriate standard of review, one must first characterize the nature of the proceedings before Justice LeBlanc which led to his decision and confirmatory order.

[27] The appellant says that while this appeal arises in the context of an interlocutory proceeding, the deference which ordinarily applies in such matters does not arise in this case. As expressed in her factum:

> Justice LeBlanc's decision had a final and terminating effect on the entire proceeding and disposed of all of the rights which were at issue.

Accordingly, the appellant says the appropriate standard of review here is whether there was an error in law resulting in an injustice. Ultimately the appellant says the Chambers judge's decision is reviewable for correctness.

[28] That position is challenged by the respondents. The Herald and Global Television say the judge's decision did not have a final and terminating effect on the proceedings. As such, a high degree of deference is required. Absent an error of law or an obvious injustice, we should refuse to intervene.

[29] I agree with the respondents. There is no common law right to confidentiality. A.B. sought a discretionary remedy. Justice LeBlanc rejected A.B.'s request for anonymity in a case seeking redress for defamation. His refusal to permit the appellant and her litigation guardian to proceed anonymously did not dispose of her rights in the litigation. As between the parties to the litigation – the appellant and Eastlink – the appellant was successful. She obtained a court order against Eastlink which will compel Eastlink to disclose all information in its possession regarding the identity of the person or persons who used that IP address at or about 6:00 p.m. (AST) on March 4, 2010. She retains the full right to

proceed. She is simply denied the privilege of doing so anonymously. The appellant is free, should she choose, to pursue an action in defamation against the poster of the fake profile.

[30] In the result, I would characterize Justice LeBlanc's decision as an interlocutory discretionary ruling to which deference is owed. Unless the applicant can show an error in principle or a patent injustice, we will not intervene. Before leaving this subject and turning to the second issue on appeal, I wish to add a few supplementary comments.

[31] My first point is historical and is intended to explain the rationale for the rule. While our standard of review for interlocutory discretionary orders is well known, one can often lose sight of the reasons that led to its adoption. The principles underlying its application are often forgotten. Clear error of law or a substantial injustice must be established. Let me elaborate on the reasons why this is so.

[32] Our jurisprudence recognizes that trial judges serve at the front lines of our justice system. They dispose of hundreds of cases in court rooms across the country every day. To do so they must act fairly, expeditiously, and decisively. They have broad powers to carry out the duties expected of them. One such power is the judicial exercise of discretion. Whenever a judge's decision springs from the exercise of discretion, an appellate court will be loathe to intervene. The reasons are obvious. First, judges are presumed to know the law. They have an acquired expertise in determining facts from the evidence, and ought to be accustomed to applying the law to the facts to achieve a just result. In practically every case, the application of discretion will permeate the decision-making process. On appeal such discretion will not be questioned lightly. Second, trial judges enjoy a special advantage in having presided over the proceedings, first hand. Their exposure to the witnesses and counsel is direct, and occurs in real time, a benefit not shared by appellate judges who are largely confined to reviewing a transcript, occasionally enhanced with the clarity of hindsight. Third, the cost of litigation is huge. Appeals from interlocutory matters incur delay and added expense to the parties, to say nothing of the burden upon the court's own resources and other proceedings in the system waiting to be tried.

[33] For these reasons, appellate courts are restrained in choosing to intervene. Absent an error in law or a manifest injustice we will decline to do so. The threshold for seeking reversal is high. It is not a soft or casual target. Any party seeking to set aside an interlocutory discretionary order has a heavy onus. Litigants should be reminded that it is not a burden which will be satisfied easily. See **Martell v. Robert McAlpine Ltd.** (1978), 25 N.S.R. (2d) 540(S.C.A.D.); **Exco Corp. Ltd. v. Nova Scotia Savings & Loan et al.** (1983), 59 N.S.R. (2d) 331(S.C.A.D.); **Nova Scotia (Attorney General) v. Morgantaler** (1990), 96 N.S.R. (2d) 54 (S.C.A.D.); **Nova Scotia (Attorney General) v. Foundation Co. of Canada**, [1990] N.S.J. No. 307 (Q.L.)(S.C.A.D.).

[34] My second point has to do with proof. There is a subtle but important, and to some perhaps, peculiar distinction between the varying standards of review applied to an interlocutory discretionary order, depending on whether it has a terminating effect, or not. If it does, then the question for our consideration is whether the ruling manifests an error of law and leads to a patent injustice. If it does not have such a final and terminating effect, the inquiry on appeal is whether the decision reveals an error of law or a patent injustice.

[35] The distinction seems counterintuitive. One would suppose that if the ruling were seen as putting an end to the proceeding, the threshold would be lower, thereby permitting the appellant to argue either an outcome caused by an error in principle, or leading to an injustice. Yet that lesser standard is only applied when the interlocutory discretionary ruling is not seen to have produced such a terminating result. A comprehensive analysis of this apparent anomaly may be found in Mike Madden's recent study, "Conquering the Common Law Hydra: A Probably Correct and Reasonable Overview of Current Standards of Appellate and Judicial Review", (2010) 36 The Advocate's Quarterly 269.

[36] That is not a matter I need to resolve for the purposes of this appeal. Whether it ought to be addressed by the Court on some future occasion can be left for another day. Having satisfied myself that LeBlanc, J.'s decision had no impact upon the appellant's right to pursue an action in defamation against the poster of the fake profile, should she choose to do so, I will evaluate his decision on the well-recognized standard applicable to interlocutory, discretionary decisions. Unless the appellant can demonstrate legal error or an obvious injustice, her appeal will fail.

[37] I will now turn to the second question which requires a consideration of the legal framework in which the issues arising in these proceedings were to be addressed.

(ii) What is the legal framework in which the judge was obliged to consider the matter?

[38] At the commencement of the Chambers hearing, Ms. Awad described her client A.B.'s application as follows:

> She's looking to proceed by way of initials and to ban publication of the actual words in the Facebook profile that gives rise to this application. The relief she is seeking is governed or permitted under rule 85.04 of the new Civil Procedure Rules. ...

[39] So the starting point begins with the **Rule**. **CPR** 85 reads:

> **Scope of Rule 85**
>
> **85.01** (1) This Rule recognizes the need for the court's records to be open to the public, and provides exceptionally for a record to be kept confidential.
>
> (2) The provisions for confidentiality in Part 13 - Family Proceedings, which are to protect a child, prevail over this Rule.
>
> (3) Court records must be made accessible to the public, directly and through the media, in accordance with this Rule.
>
> (4) A court record may be made the subject of an order for confidentiality, in accordance with this Rule.

[40] **CPR** 85.01(1) begins with an explicit recognition of the fundamental principle that a court and its records be open to the public. The **Rule** then provides "exceptionally" for when a judge "may" depart from the rule by introducing certain restrictions. This judicial discretion and the circumstances in which it might be exercised are explained in **CPR** 85.04. It provides:

Order for confidentiality

85.04 (1) A judge may order that a court record be kept confidential only if the judge is satisfied that it is in accordance with law to do so, including the freedom of the press and other media under section 2 of the Canadian Charter of Rights and Freedoms and the open courts principle.

(2) An order that provides for any of the following is an example of an order for confidentiality:

(a) sealing a court document or an exhibit in a proceeding;

(b) requiring the prothonotary to block access to a recording of all or part of a proceeding;

(c) banning publication of part or all of a proceeding;

(d) permitting a party, or a person who is referred to in a court document but is not a party, to be identified by a pseudonym, including in a heading.

(3) A judge who is satisfied that it is in accordance with law to make an order excluding the public from a courtroom, under Section 37 of the Judicature Act, may make an order for confidentiality to aid the purpose of the exclusion.

[41] As we see, **CPR** 85.04 provides that a judge "may" depart from the rule only if the judge is satisfied that it is in accordance with the law to do so. The "law" referenced in the rule is currently reflected in the test developed by the Supreme Court of Canada whenever one is required to balance the fundamental freedoms guaranteed to all Canadians under s. 2 of the **Charter** (which in this case implicate freedom of expression, and freedom of the press) against other important values or interests. The required analysis has evolved primarily from the Supreme Court's decisions in **Dagenais v. Canadian Broadcasting Corp.**, [1994] 3 S.C.R. 835 and **R. v. Mentuck**, 2001 SCC 76.

[42] The Court's directions are explicitly stated in what has now come to be known as the 2-pronged **Dagenais/Mentuck** test which must be satisfied by any party seeking to limit the principle of open courts. The test provides that a publication ban should only be ordered when:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the order, outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on right to free expression, the right of the accused to a fair and public trial and the efficacy of the administration of justice. (**Dagenais v. Canadian Broadcasting Corp.**, supra at p. 878; **R. v. Mentuck**, supra at para. 32).

[43] The "risk" in the first prong of the **Dagenais/Mentuck** test analysis as noted by Iacobucci J., must be:

> ... real, substantial, and well-grounded in the evidence; it must be "a risk that poses a serious threat to the proper administration of justice. In other words, it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained (**Mentuck**, supra, at para. 34).

[44] From this we know that in assessing the merits of the application before him, LeBlanc J. was required to begin his analysis with a recognition that open, unrestricted public access to the court's proceedings and records was to be the rule, and any limitation thereof, the exception. There was no burden upon the respondents, Global Television or the Halifax Herald, to show why the orders sought by the appellant ought to be declined. Rather, the appellant had the onus of producing sufficient evidence to persuade the judge that she deserved the court's protection, and that the judge ought to limit public access in order to achieve justice. That burden was significant. To even meet the first prong of the test, A.B. had to demonstrate, from solid evidence, that there was a real and substantial risk which posed a serious threat to the proper administration of justice and that her claim for relief was the only way to prevent the risk occurring.

[45] As explained below, subsequent pronouncements from the Supreme Court of Canada offer further assistance concerning the focus and approach taken when applying the law in such matters.

[46] In this case, the appellant applied in Chambers for both a publication ban and a confidentiality order. There are important similarities between the two. This

was recognized by Iacobucci, J., writing for a unanimous Court in **Sierra Club of Canada v. Canada (Minister of Finance)**, 2002 SCC 41. At para. 37:

> 37 ... there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

[47] In **Sierra Club**, the Court also described the flexibility of the **Mentuck/Dagenais** approach and how it could be adapted to accommodate the context of any given case. (See, for example, para. 48).

[48] To this legal matrix the Chambers judge was also required to address the law of defamation and its role in protecting a person's reputation from harm or unjustified assault.

[49] The Supreme Court's most recent consideration of the law of defamation may be found in **Bou Malhab v. Diffusion Métromédia CMI inc.**, 2011 SCC 9. Although the dispute arose in Quebec in the context of a class action following the broadcast of racist comments by a radio host concerning Montreal taxi-drivers, thereby inviting the Court's reconciliation of the right to the protection of reputation against the right to freedom of expression (as opposed to freedom of the press in this case), the Court's reasons are instructive.

[50] As Justice Deschamps observed, in writing for the majority, at para. 1:

> The law of defamation is a tool for protecting personal reputations. This right keeps pace with changes in society and in the importance attached by society to freedom of expression. ...

The words of Justice Abella, in dissent, also resonate:

> [95] Democracies cherish the right of their citizens to engage in public debate, and to express the widest possible range of views on the widest possible range of subjects. These views may be hugely unpopular. They may also be hugely influential. And they may be hugely hurtful. The right to express those views is not, however, tied to their popularity, influence, or insensitivity. It is tied to that

> most complicated of barometers: the nature and extent of their harmful impact. That is why we do not protect libellous statements. Or those promoting violence. Or hate.
>
> [96] The challenge lies in how to strike the balance between the need to provide the widest possible scope for freedom of expression, with the need for a narrow interventionist role in those rare circumstances when the words are so deeply harmful that they are no longer entitled to the benefit of the freedom's protective scope. Context and content matter: there is a difference between yelling "fire" in a crowded theatre and yelling "theatre" in a crowded fire station.
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> ...
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> [100] The law of defamation is one such limitation, as McLachlin C.J. pointed out in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640:
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> > . . . freedom of expression is not absolute. One limitation on free expression is the law of defamation, which protects a person's reputation from unjustified assault. The law of defamation does not forbid people from expressing themselves. It merely provides that if a person defames another, that person may be required to pay damages to the other for the harm caused to the other's reputation. [para. 2]
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> (See also *Prud'homme v. Prud'homme*, 2002 SCC 85, [2002] 4 S.C.R. 663, at para. 43; *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, at para. 2, per Binnie J.; *R. v. Keegstra*, [1990] 3 S.C.R. 697, per Dickson C.J.)

[51] Finally, attitudes linked to time, context and content are critical elements in any action for defamation and each must be evaluated. This point is well-stated by Peter A. Downard in *Libel*, 2nd ed., (LexisNexis: Canada Inc., 2010) at 34:

> The law of defamation is a creature of its time and social context, perhaps more than any other area of the common law. Whether words are defamatory must be viewed with today's eyes.

[52] This then was the analytical framework with which the Chambers judge was obliged to decide the matter. For reasons that will become apparent in the sections that follow, I am satisfied that the judge completed the task, correctly.

(iii) Did the judge err by failing to exercise his *parens patriae* jurisdiction so as to take into account the distinctive vulnerability of children?

[53] The appellant says the judge erred in law by failing "to exercise his *parens patriae* jurisdiction and take into account the distinctive vulnerability of children". She says the judge ought to have recognized his obligation to protect her and "... do what is necessary for the best interests of the child for whose benefit it is exercised."

[54] In my respectful opinion, the appellant's argument fails on a number of counts.

[55] First, it hardly behooves the appellant to complain that LeBlanc J. "failed" to exercise his *parens patriae* jurisdiction, when he was never invited to do so during the Chambers hearing.

[56] On appeal to this Court A.B.'s counsel acknowledged that the words "*parens patriae*" were never mentioned. I am at a loss to understand how fault can be laid at the feet of the judge of first instance for "failing" to initiate a form of relief which had never been raised in argument, and yet which now forms the basis of the appellant's principal ground of appeal.

[57] There are other more fundamental reasons for rejecting the appellant's submission. While it is trite law to observe that courts possess a residual *parens patriae* jurisdiction to shelter from harm those persons requiring such protection, the court's power is subject to express and implied limits.

[58] In support of her argument that the Chambers judge erred by failing to invoke *parens patriae* jurisdiction, the appellant refers to the decision of the Supreme Court of Canada in **Re Eve**, [1986] 2 S.C.R. 388. While I agree the reasons of LaForest, J. include a detailed consideration of *parens patriae* generally, I do not think the case assists the appellant here. In **Re Eve**, the respondent's daughter was a mentally challenged adult who suffered from a condition which made it extremely difficult to communicate with others. The respondent applied for permission to consent to the non-therapeutic sterilization of her daughter. The trial judge, McQuaid, J. (as he then was) denied the mother's application. He concluded that the court had no authority or jurisdiction to authorize a surgical

procedure on a mentally challenged individual, the purpose of which was solely contraceptive. On appeal to the Supreme Court of Prince Edward Island (Appeal Division), the appeal was allowed. Leave to appeal to the Supreme Court of Canada was then given to Eve's guardian *ad litem*. Intervenor status was granted to various parties including the Canadian Mental Health Association. Justice LaForest wrote for a unanimous Court. He allowed the appeal and restored the trial judge's decision. While his reasons considered a court's *parens patriae* jurisdiction in detail, it is important to emphasize that he *declined* to exercise it, in a case where extensive evidence *had* been presented. His Lordship observed that *parens patriae* jurisdiction "must at all times be exercised with great caution and only for the benefit and protection of persons under disability" (at paras. 77 and 82).

[59] I see no reason, whether in fact or in law, to characterize the appellant in this case as a party so marked by disability as to trigger the court's obligation to protect her through the exercise of its *parens patriae* jurisdiction.

[60] This Court has also declared that the exercise of *parens patriae* jurisdiction ought to be limited to filling in legislative gaps, or situations requiring judicial review. See, for example, **Children and Family Services of Colchester County v. K.T.**, 2010 NSCA 72, paras. 33; **Nova Scotia (Minister of Community Services) v. N.M.**, 2008 NSCA 69, para. 37 and **Beson v. Director of Child Welfare (Nfld.)**, [1982] 2 S.C.R. 716 at 724.

[61] In my opinion, our **Civil Procedure Rules** provide a comprehensive and complete framework in which the issues in this case may be resolved. There are no "gaps" to trigger the exercise of *parens patriae* jurisdiction.

[62] Finally, the Supreme Court of Canada has specifically ruled that *parens patriae* ought not to be invoked to circumscribe the rules of civil procedure. In **Van de Perre v. Edwards**, 2001 SCC 60, the Court overturned a decision of the British Columbia Court of Appeal which had allowed the spouse of a child's biological father to become a party during the appeal and to then award custody to the father and his wife. Bastarache J., writing for a unanimous court, stated:

> 47 The Court of Appeal relied upon its *parens patriae* jurisdiction to award custody to a new party together with Mr. Edwards; in my view, adding a party on the initiative of the Court of Appeal is unfair to other parties and does not fall

> within the court's supervisory role. *Parens patriae* jurisdiction does not justify the avoidance of the rules of civil procedure. ...

[63] For all of these reasons, I am not persuaded that any circumstances arise here which would call for the application of *parens patriae* jurisdiction.

[64] Quite apart from *parens patriae*, let me turn to the heart of the appellant's complaint, that the Chambers judge ignored the fact of her youth and ought to have seized upon her minority as a basis for imposing the anonymity order and publication ban.

[65] At the appeal hearing, counsel for A.B. urged us to apply a "best interests of the child" test. With respect, I cannot accept that such a universally recognized principle from family law is appropriate in these circumstances where the issues are driven by a planned action for defamation coupled with seeking the court's leave to limit press freedom and to sue anonymously.

[66] During argument, counsel for A.B. appeared to suggest that her age, 15 years old, and "vulnerability" as a minor should override or "trump" the open court principle, such that she ought to receive the court's protection in the form of relief sought. Respectfully, I am not persuaded by the appellant's arguments.

[67] First, the Chambers judge was well aware of her age. For example, he said:

> [8] ... I have taken the view that the applicant is clearly under 19 years of age and therefore, could not start the application on her own. She had to act through a guardian. ...

[68] The affidavits filed in support of the appellant's Chambers applications, the attached exhibits, and her counsel's submissions, all emphasized the fact that A.B. is a teenager. But the mere fact of A.B.'s age did not establish any kind of special vulnerability such that the court ought to intervene and place her interests above the constitutional rights of others. While context is always important, AB's age was simply a circumstance, among many other factors, for the judge to take into account when performing the necessary analysis to decide whether any kind of confidentiality order ought to be granted. Justice LeBlanc did just that.

[69] Neither am I persuaded by the appellant's references to cases arising in the family law or criminal law context as justifying relief here. See, for example, **Children and Family Services Act**, S.N.S. 1990, c. 5, s. 94(1)(2); **Rule** 59 - Family Division Rules; **Criminal Code of Canada**, 2005, c. 32, s. 486.5. This is not such a case.

[70] I recognize that there are occasions where judges may be persuaded that access to proceedings, or to records, or identities, ought to be limited, or protected. Everyone appreciates that children involved in *certain* types of proceedings require specific protections. However, the protections afforded to minors are neither uniform, nor absolute. For example, a 15 year old assaulted by a 17 year old, would have his name banned under the **Youth Criminal Justice Act**, 2002. The same 15 year old who was assaulted by a 19 year old charged under the **Criminal Code of Canada** would not have his name banned. If that 17 year old received a youth sentence, his name would be banned; if he were sentenced as an adult, his name would not be banned. Further, complainants in sexual assault charges – whether an adult or a child – regularly have their names protected. These are all legislative choices and are very specific to the proceedings to which they apply.

[71] Part 13 of the **Civil Procedure Rules** contains **Rules** 59-62 which pertain to proceedings in the Supreme Court (Family Division). The protections embedded in Part 13 of the **Rules** apply only to family proceedings. This case is not a family proceeding. Regardless, our family law rules are discretionary, (for example, **CPR** 59.60 respecting bans on a child's identity). The judge "may make an order". Any judicial exercise of discretion must remain faithful to the **Charter**. While new **Civil Procedure Rule** 85.04 is more precise regarding the balancing that is required in the analysis, and while Part 13 explicitly refers to children, in either case the judge is still obliged to conduct the necessary **Dagenais/Mentuck** evaluation. Such an analysis is recognized as being flexible and contextual. The age and interests of minors are merely parts of the contextual landscape. They are not dispositive of the result.

[72] As noted earlier, our **Rules** and the common law to which they refer start with the presumption that court proceedings will be open and accessible to the public. Public access to the courts guarantees the integrity of the judicial process by ensuring that justice is administered for all to see. Openness is necessary to safeguard judicial impartiality and independence. It is essential to preserving public confidence in the justice system while enriching the public's understanding

of the administration of justice. Openness is a hallmark of Canada's constitutional democracy and fundamental to all of its judicial proceedings. See **Edmonton Journal v. Alberta (Attorney General)**, [1989] 2 S.C.R. 1326.

[73] A litigant seeking damages for alleged injury or harm will often assert an interest in keeping his or her matters private. However, public embarrassment or a stated interest in privacy is not sufficient. In the seminal pre-**Charter** decision in **Attorney General (Nova Scotia) v. MacIntyre**, [1982] 1 S.C.R. 175, Dickson J. (as he then was) stated at pp. 185-187:

> Many times it has been urged that the 'privacy' of litigants requires that the public be excluded from court proceedings. 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. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings.
>
> ...
>
> In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. ...

[74] The application of the open court rules to *family law* matters, where privacy concerns are often paramount, was considered in one of the earliest articulations of the open court principle. Almost a century ago in **Scott v. Scott**, [1913] A.C. 417, the House of Lords gave strong effect to the open court rule in the context of a matter arising under the **Divorce Act**. Lord Atkinson recognized the privacy concerns which arise in divorce and matrimonial cases, but nevertheless re-affirmed the public interest in open court proceedings. He said at p. 463:

> The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.

[75] As a general rule, it is now well understood that the names of parties, the nature of the case, the issues, the evidence and the positions of the parties are all

part of the public domain. As Bastarache J. observed for the majority in **Named Person v. Vancouver Sun**, 2007 SCC 43 at para. 81:

> 81 ... In general terms, the open court principle implies that justice must be done in public. Accordingly, legal proceedings are generally open to the public. The hearing rooms where the parties present their arguments to the court must be open to the public, which must have access to pleadings, evidence and court decisions. Furthermore, as a rule, no one appears in court, whether as a party or as a witness, under a pseudonym.
>
> (Underlining mine)

[76] The open court principle is inextricably tied to the rights guaranteed by s. 2(b) of the **Charter**. Openness permits public access to information which then fosters informed dialogue and criticism of court proceedings, practices and outcomes. Such values are seen as hallmarks of our democracy. Section 2(b) protects listeners as well as speakers to ensure that the right to information about the administration of justice in Canada is real and not illusory. See, for example, **Edmonton Journal, supra**, at paras. 78-86.

[77] Freedom of the press is an essential cornerstone of a free and democratic society. Any measure which restricts the press in gathering information and disseminating it to the public, will, *prima facie*, be seen as an encroachment upon the freedom of the press. See, **Canadian Broadcasting Corp. v. New Brunswick (Attorney General)**, [1996] 3 S.C.R. 480.

[78] From these fundamental principles, enshrined in our constitution, we see that a factor to be weighed heavily in the required contextual analysis in this case must be the very nature of the claim A.B. intends to pursue. As I noted earlier, her expressed intention is to commence an action as soon as she unmasks whomever used the IP address to post the fake Facebook profile. Her application sought:

> ... production of the requested information to assist her in identifying potential Defendants for an action in defamation;

[79] An action for defamation is one of those unique proceedings where issues of fact must be tried with a jury. **Judicature Act**, R.S.N.S. 1989, c. 240, s. 34(i).

[80] Defamation is a claim that one's reputation has been lowered in the eyes of the public. To initiate an action for defamation, one must present oneself and the

alleged defamatory statements before a jury and in open court. To be able to proceed with a defamation claim under a cloak of secrecy, strikes me as being contrary to the quintessential features of defamation law. A.B. would wish to have her identity shielded from the public, and the fake Facebook profile banned from publication, apparently as a protection from further embarrassment and public scrutiny. But, when A.B. chose to avail herself of the court process in the pursuit of damages for defamation, she submitted to whatever public scrutiny attaches to civil litigation and must accept the attendant diminished expectation of privacy.

[81] Throughout her submissions here and in the court below, A.B. suggested that the use of sex-themed words in the fake Facebook profile, makes her quest for confidentiality analogous to applications brought to shield the identity of victims of sexual assault. To support her argument, the appellant relied upon such cases as **Jane Doe v. Church of Jesus Christ of Latter-Day Saints**, 2003 ABQB 794. With respect, the comparison is misplaced. A.B. is not herself a victim of sexual assault, seeking civil redress for crimes to which she was subjected. On the contrary, she is an intended plaintiff in a defamation case.

[82] I appreciate that testimony in this case will likely be distressful for the appellant. Yet embarrassment must be an unavoidable consequence of an open justice system. The disclosure of very personal information is typical in cases where a plaintiff seeks damages for harm. However, subjective feelings of discomfort cannot be the test for anonymity. If it were, our courts would be flooded with preliminary motions seeking anonymity orders. **B.(A.) v. Stubbs** (1999), 175 D.L.R. (4th) 370 (Ont. Sup. Ct. .J.).

[83] No matter how these proceedings are characterized by the appellant, there can be no doubt that this is a defamation case. The whole of these proceedings are targeted at and linked to alleged defamation. A.B. has chosen to defend her reputation in court. When one makes that election, one is bound by the rules. Actions are tried by judge and jury. The case is heard in open court. The pleadings are available for public inspection. When injury to reputation is alleged, it is hardly surprising that personal and potentially embarrassing details will be disclosed. But that is the reality of pursuing litigation in Canadian courts, where the open-court principle is enshrined.

[84] As Mr. Parish remarked during his submissions, suppose the appellant discovers the identity of the person who posted the fake Facebook profile poster,

and it turns out to be another 15 year old. Would he or she then apply for a similar anonymity protection order? An anonymous plaintiff, an anonymous defendant, and no words ever published. The prospect seems absurd, yet that is a foreseeable outcome if one were to accept the appellant's logic. To produce such a result would be anathema to an action in defamation. A statement of claim in a defamation case requires the pleader to refer explicitly to the published words which are said to have harmed the plaintiff's reputation. Precision in pleading is obligatory because those are the very words the jury will have to evaluate.

[85] In conclusion, on this issue, A.B., through her guardian, has instigated these proceedings, thereby choosing to participate in a public forum where the trial may be attended by an interested public, and reported on by a free and independent press. Restrictions which might otherwise apply in family law, or crimes of a sexual nature, have no application here. I agree with Ms. Rubin's very persuasive submission that it would be contrary to the public interest in a case of this kind to permit a plaintiff who had initiated such an action, to then pursue her claim anonymously, with her identity kept secret.

[86] I will turn now to a consideration of the last main issue on appeal.

(iv) Did the judge err by failing to find that the publication of the alleged defamatory statements constituted evidence of a serious risk of harm?

[87] A.B. says the judge erred by failing to find that the publication of the alleged defamatory information provided evidence of a serious risk of harm.

[88] In her submissions at the Chambers hearing, counsel for the appellant suggested that all she had to do in order to succeed with her motion was show that the words in the fake Facebook profile were *prima facie* defamatory. This – so it was argued – would establish a presumption that actual damage had occurred, such that the appellant was not obliged to produce evidence of actual harm at the hearing.

[89] The submission troubled Justice LeBlanc. We see this exchange in the transcript:

> **MS. AWAD**: ... Your Lordship is the person who has to decide if the words in that fake profile are prima facie defamatory. If they are, the evidentiary

> hurdle that my friends are speaking of, that they say I haven't met, is met. It's met by the legal presumption. ....
>
> **THE COURT**: ... but I'm saying does it - - just because she will be entitled to a pecuniary award, if you are successful to prove defamation before a jury, does that -- does that kind of get you over the - - over the hurdle of saying that it has to be proved that she's -- she's somehow sustained physical, emotional, mental injury as a result of the publication. Isn't that the issue? I mean, it's one thing to say, well, defamation will -- if she proves defamation, if that's proven, that's the presumption of damages. Does that -- does that really get you to where you have to be to get this appli -- to get this application?
>
> **MS. AWAD**: In my submission, it does, My Lord. ... You have actual damage that the law presumes ... We're saying the law presumes actual damage, compensable damage, to a defamation victim.
>
> **THE COURT**: Well, I don't know whether that's the same test when it comes to the determination of granting a publication ban and/or allowing you to proceed with pseudonyms.

[90] In her factum, the appellant describes what she says amounts to legal error, this way:

> **PUBLICATION OF DEFAMATORY STATEMENTS IS HARM.**
>
> 66. Even if evidence of actual harm to a child is strictly required by the *Dagenais* test, the Appellant says that such evidence was before the Court. The defamatory statements themselves were sufficient evidence that the minor Appellant was at serious risk of harm.

[91] I am not persuaded by the appellant's submission. Respectfully, it confuses the steps required to satisfy the prerequisites for a publication ban under the **Dagenais/Mentuck** test with the stages of proof when trying a defamation action before a jury.

[92] LeBlanc, J. recognized the distinction in his decision. He said:

> [37] ... I repeat that there is no evidence before the court of the harm that counsel for the applicant says will occur. While counsel suggests that no evidence of potential harm is necessary, I cannot agree. This conclusion does not depend entirely on the lack of evidence respecting future harm. The Facebook

> profile was published in March and this application was heard in late May, yet there was no evidence offered respecting any effects the publication had in the interim. I appreciate the contention by the applicant's counsel that if she were to proceed with a defamation suit and succeeded, she would be entitled to a presumption of damages that would follow from the finding of defamation. However, it is my view that this is not sufficient to establish the harm, actual or potential, required to grant for this type of order. I therefore, deny the application for a publication ban and the use of pseudonyms.

[93] It should have been a relatively easy thing for the appellant to produce evidence showing harm. A parent, a relative, a teacher, a nurse, or a doctor might easily have sworn an affidavit which would document the noticeable changes perceived in A.B. thereby offering evidence of past harm, which would then assist the court in predicting future harm or, at least, evaluating the risk of harm.

[94] In my opinion, the appellant's failure to lead any evidence of harm or risk of harm to herself is fatal to both her request for a partial publication ban and that she be given permission to advance this litigation anonymously.

[95] The current law pertaining to an action for defamation was described by Chief Justice McLachlin in **Grant v. Torstar Corp.**, 2009 SCC 61 at para. 28:

> [28] A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. <u>If these elements are established on a balance of probabilities, falsity and damage are presumed</u>, though this rule has been subject to strong criticism: see, e.g., R. A. Smolla, "Balancing Freedom of Expression and Protection of Reputation Under Canada's *Charter of Rights and Freedoms*", in D. Schneiderman, ed., *Freedom of Expression and the Charter* (1991), 272, at p. 282. (The only exception is that slander requires proof of special damages, unless the impugned words were slanderous per se: R. E. Brown, *The Law of Defamation in Canada* (2nd ed. (loose-leaf)), vol. 3, at pp. 25-2 and 25-3.) The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability.
>
> [29] If the plaintiff proves the required elements, the onus then shifts to the defendant to advance a defence in order to escape liability.

(Underlining mine)

To similar effect, *The Law of Defamation in Canada*, 2nd ed., (looseleaf: Toronto: Carswell, 2009):

> Where the words are defamatory, damages are presumed and awarded at large, except in cases of slander not actionable *per se*, where special damages must be shown. Harm to reputation is presumed from the mere publication of the defamatory falsehood. This presumption is irrebuttable. (Underlining mine)

[96] The fact that damage will be presumed at trial once the plaintiff has proved these three essential elements, does not serve as a substitute for producing evidence of harm when applying for a prohibition ban under the test established in **Dagenais/Mentuck**. The two situations are very different. One is a presumption which may arise at the end of the plaintiff's case in a defamation trial. The other is an obligation to meet a high standard for legal proof. In other words, presumed damage to reputation after the plaintiff has established the prerequisites for liability in a defamation trial, will not satisfy Justice Iacobucci's explicit directive that to obtain a publication ban or confidentiality order, the real and substantial risk of serious threat to the proper administration of justice must be "well-grounded in the evidence." Justice LeBlanc appreciated this important distinction. His rejection of the appellant's position was correct.

[97] To conclude my reasons on this aspect of the appeal, openness and public access to court proceedings is to be the rule, with any limitation thereof, the exception. In conducting the necessary analysis, Justice LeBlanc extracted the relevant legal principles from the Supreme Court of Canada's leading authorities, as well as Justice Oland's Chambers decision in **Osif v. College of Physicians and Surgeons (Nova Scotia)**, 2008 NSCA 113. Having done so, LeBlanc J. correctly observed that **CPR** 85.04 "encompasses the spirit of these principles". After applying those principles to the circumstances before him he declined to order a publication ban, finding:

> [32] ... . It appears to me that a total publication ban is not the least restrictive means available to deal with the applicant's request. It appears to me that the balance of whether to grant a publication ban weighs in favour of the public having access. I believe it is important for people to understand the positive and the negative aspects of chat rooms, social networking, and other such internet resources. A total publication ban would mean that the public would not be

> aware of how social networking programs work and how they can be destructive to the public and particularly to young persons.
>
> [33] I believe that bullying and this type of pernicious conduct should be exposed and condemned by society. Only if the public know the extent of such conduct and its likely result, will society speak up for better control of such conduct arising from free and unlimited ability to publish such material on internet sites. ...

[98] Justice LeBlanc recognized that while understandable of course, inconvenience or embarrassment to the appellant was not the test. Any "harm" to her in being required to pursue her action for defamation, fully identified and in public, was purely speculative. It did not qualify as a public interest. Rather, the public was entitled to know whether these words were defamatory. It was important for the public to be able to view the false Facebook profile in its entirety, and not by way of edited bits and pieces. Only then would the public be truly informed as to the nature of the alleged defamation. All of that was, as the Chambers judge found, very much in the public interest. I am satisfied that LeBlanc, J. had regard to these varying interests and took them into account when conducting the necessary balancing analysis as required by law.

[99] Finally, I am not persuaded by the appellant's argument that to dismiss this appeal will produce a chilling effect, such that people will be reluctant to complain about on-line Internet bullying. It would be speculative to suppose such a result. One could just as easily imagine a salutary result in being required to pursue an action in defamation, by name and in public. Such will serve the public interest by both alerting social networking players to the inherent risk of sharing very personal information among "friends", while at the same time deterring would-be bullies with the threat of retribution once unmasked.

[100] For all of these reasons I see no error on the judge's part in finding that the appellant had failed to establish, on the evidence, a sufficient basis to justify an anonymization order or publication ban in the manner the law requires. I am not persuaded that he erred in his analysis or in the exercise of his discretion. I see no reason to intervene.

Conclusion

[101] Justice LeBlanc identified and applied proper legal principles to the matter before him. He conducted the necessary balancing of interests required in the judicial exercise of his discretion. He recognized the privacy interests advanced by the appellant as contrasted with the constitutional right to freedom of the press and the long-established open court principle. Ultimately, he was not persuaded that the appellant had met her heavy burden of demonstrating, on the evidence, why such constitutional protections should be limited in her case.

[102] Let me conclude these reasons by suggesting that the effect of the judge's decision will be to produce a laudatory result. Whether attending court to watch the trial, or reading published reports of the proceedings, citizens will associate A.B.'s name with the words of the fake profile, but not in the way the bogus poster ever intended. Presumably, the fake Facebook page was created and posted with a view to persuading people that these were A.B.'s own words and expressions, or simply intended as a parody of a real profile. It will be for a jury to ultimately decide whether the impugned words are defamatory, or are defensible as truth, parody, fair comment or otherwise. But news reporting of A.B.'s efforts to unmask an anonymous poster and seek money damages for the harm to her reputation puts the story in a completely different light. There is no suggestion that these are her own words: quite the opposite. And so readers will be told that A.B. is taking legal action to obtain redress for the alleged lies that have been posted. Should she be successful, one might expect that she will be lauded for her courage in defending her good name and rooting out on-line bullies who lurk in the bushes, behind a nameless IP address. The public will be much better informed as to what words constitute defamation, and alerted to the consequences of sharing information through social networking among "friends" on a 21st century bulletin board with a proven global reach.

[103] The appellant has failed to show that Justice LeBlanc's decision is legally flawed or produces a manifest injustice. The respondents are entitled to costs. They were granted intervenor status at the Chambers hearing and are full parties to this appeal. At the hearing, Mr. Parish, counsel to Global Television acknowledged that the bulk of the work in defending this case was carried out by counsel for the Halifax Herald. This courteous recognition should be reflected in costs. Accordingly, I would dismiss the appeal with costs to the Halifax Herald of $2,000 plus disbursements as agreed or taxed, and costs to Global Television of $1,000 plus disbursements as agreed or taxed. To preserve any further rights of appeal, I would continue the publication ban issued by Oland, J.A. (2010 NSCA

57) for a period of sixty days or such further time as this Court or the Supreme Court of Canada may direct.

Saunders, J.A.

Concurred in:

MacDonald, C.J.N.S.

Oland, J.A.