

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: Hyde (Re), 2009 NSPC 37

Date: July 24, 2009

Registry:Halifax

Re An Inquiry Under the *Fatality Investigations Act*, S.N.S. 2001, c. 31 into the death of Howard Hyde

**DECISION ON THE ISSUE OF NOTICE TO THE MEDIA
IN THE CONTEXT OF AN APPLICATION
BY THE ATTORNEY GENERAL OF NOVA SCOTIA
TO LIMIT THE WEBCASTING OF
VIDEO SURVEILLANCE EVIDENCE
FROM THE CENTRAL NOVA SCOTIA CORRECTIONAL FACILITY**

Judge: The Honourable Judge Anne S. Derrick

Heard: July 23, 2009

Decision: July 24, 2009

Counsel: Daniel MacRury, Q.C., Inquiry Counsel

Edward Gores, Q.C., and Dana MacKenzie, Counsel for
the Attorney General

Kevin C. MacDonald, Counsel for Joanna Blair and Dr.
Hunter Blair

David Roberts, Counsel for the Nova Scotia Government
Employees' Union

Sandra MacPherson, Q.C., and Elizabeth Buckle,
Counsel for the Halifax Regional Police

Rory Rogers, and Matthew Pierce, Counsel for Capital

District Health Authority

Thomas Donovan, Q.C., and Loretta Manning, Counsel
for Dr. Janet MacIntyre

Michael Wood, Q.C., and Jennifer Ross, Counsel for Dr.
Stephen Curry

Blair Mitchell, and Angela Byrne, Counsel for the
Schizophrenia Society of Nova Scotia

Carol Tooton, Executive Director,
Canadian Mental Health Association, and Simon Li and
Mallory Treddenich, *pro bono* students at law

By the Court:

Introduction

[1] This decision addresses the issue of whether it is necessary or even appropriate to require the Attorney General of Nova Scotia (AGNS) to provide notice to the media of its application to have the webcasting of the Inquiry not include certain video surveillance images from the Central Nova Scotia Correctional Facility (CNSCF). Some background for this issue will be helpful.

Webcasting the Inquiry's Proceedings

[2] In my previous two decisions, (*Hyde Re, 2009 NSPC 32* and *Hyde Re, 2009 NSPC 34*), I described the live streaming of the Inquiry and the filming by the webcast cameras in the courtroom of the video surveillance evidence. As I noted, the webcasting of the Inquiry is an initiative of the Executive Office of the Nova Scotia

Judiciary and is cost-shared with Court Services. There are no media cameras in the courtroom filming the proceedings: all the filming is being done by the Executive Office with its equipment and expertise.

The Video Surveillance Evidence

[3] The evidence before the Inquiry includes video surveillance of Mr. Hyde. To date, the video footage that has been played at the Inquiry has been from the Halifax Regional Police Service (HRPS) booking area. This evidence has been live streamed to the internet along with witness testimony associated with it. There is also video surveillance of Mr. Hyde in custody at the Nova Scotia Correctional Facility although this footage has not been seen by the Inquiry yet.

[4] In my earlier decisions I prohibited direct downloading of video surveillance from the HRPS and the CNSCF to the internet outside of the webcasting of the Inquiry proceedings themselves and denied an application by the Canadian Broadcasting Corporation (CBC) for access to the DVD's of the video surveillance for duplication for broadcast and internet purposes. The Inquiry has maintained control over the DVD's containing the video footage, DVD's which are exhibits in the Inquiry.

The Impending Application by the Attorney General of Nova Scotia

[5] The Inquiry has been advised by Inquiry Counsel that the video surveillance footage from the Central Nova Scotia Correctional Facility will be relevant to the next

phase of the Inquiry scheduled to commence on August 4. The AGNS and the Nova Scotia Government Employees' Union (NSGEU) have indicated that they will be proposing that some of the CNSCF video surveillance not be live streamed because of security concerns. I have directed the AGNS to file an application supported by Affidavit evidence so that interested parties at the Inquiry can respond to the proposal to limit the live streaming. It has been indicated to me that Inquiry Counsel and the Blairs will be making submissions in response to the AGNS' application. The Halifax Regional Police Service has reserved the right to do so.

[6] Until the application is filed I do not know what portions of the CNSCF video surveillance are the subject of the concerns being raised by the AGNS and the NSGEU relating to security. The AGNS has indicated that the footage of Mr. Hyde's struggle with correctional officers just before his death while not engaging security concerns, raises issues of dignity, privacy and propriety and also should not be live streamed.

[7] The AGNS has indicated that he is not opposed to the CNSCF video surveillance being played in open court. Therefore the issue is not one of closing the courtroom or prohibiting the media from reporting on the evidence and the testimony that will accompany it. The issue is whether the video surveillance, identified as sensitive due to security or propriety considerations, should be webcast as the Halifax Regional Police Service booking video surveillance has been. If restrictions are placed on the webcasting, the media will still be entitled to attend the proceedings and report on them to the public.

The Privacy Rights of Non-Witnesses

[8] I will note for the sake of completeness that the issue of the privacy of individuals depicted on the CNSCF surveillance footage who will not be appearing as witnesses - employees at the CNSCF and prisoners - was dealt with in my earlier decisions. I understand the footage will be modified so that the video surveillance containing such images can be played in the courtroom with the identity of these individuals obscured, and live streamed to the internet, subject to a determination of the security and propriety issues, if there are any for those segments.

Live Streaming of the Inquiry and the Charter

[9] In *Hyde Re, 2009 NSPC 32*, I addressed the *Dagenais/Mentuck* test that was relied on by parties arguing in favor of direct downloading of the video surveillance to the internet. The CBC also relied on the “open court” principle in its application. In my decision, I reached the conclusion that:

[36] The argument for applying the *Dagenais/Mentuck* test to an application for access to court exhibits seeks to draw persuasive strength from Fish, J.’s disapproval in *Toronto Star* of limitations on “public access to legal proceedings.” (*paragraph 9*) However there is nothing to indicate that Fish, J. had in mind a court’s prohibition on courtroom cameras and internet live streaming when he was speaking about section 2(b) applying to “all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings.” (*paragraph 7*) There is no suggestion that the exercise of judicial discretion prohibiting the use of television cameras in the courtroom or refusing a request to live stream proceedings on the internet would conflict with the constitutional imperatives established by

Dagenais and Mentuck.

[37] If freedom of expression guarantees under section 2(b) of the *Charter* required internet downloading of court hearings so that the broadest possible access could be achieved, then courts would be obligated to webcast all their proceedings. The decisions of the Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corporation*, [1994] S.C.J. No. 104; *R. v. Mentuck*, [2001] S.C.J. No. 104 and *Toronto Star* cannot be stretched to mean this. Indeed, media applications to broadcast trials have failed. (*see, for example: R. v. Pilarinos*, [2001] B.C.J. No. 1936 (B.C.S.C.))

[10] The live streaming of this Inquiry is not the result of a constitutional mandate. No court in Canada has determined that live streaming is required to satisfy section 2(b) of the *Charter*. To the contrary, as indicated above, I have expressly found that the live streaming is not constitutionally required. I have acknowledged that “...webcasting is offering meaningful access to the general public as an aid to the media reports on the proceedings that are utilizing the live streaming and its archive.” (*Hyde Re*, 2009 NSPC 34 at paragraph 21) The webcasting of the Inquiry’s proceedings is providing the public and media greater access to the proceedings, the merits of which are readily identifiable: (1) enhancing the public aspect of the Inquiry in keeping with the Inquiry’s mandate; (2) promoting public interest in and public discussion of important issues arising from the Inquiry; and (3) allowing people to follow the proceedings without having to attend them. There are likely other benefits as well that are emerging as this unprecedented exercise of webcasting the proceedings unfolds, including the potential for live streaming to assist in improving accuracy in reporting.

[11] The live streaming of the Inquiry is an enhancement of the openness and transparency of the proceedings. In addition to accessing the proceedings on the internet, the media and general public can attend the Inquiry. The media are entitled to report on and publish what occurs at the hearings. The media right to report and thereby inform the public is protected by section 2(b) of the *Charter*. Section 32 of the *Fatality Investigations Act* mandates that a fatality inquiry be open to the public subject to a judge's decision that access be restricted. The exercise of judicial discretion to close fatality inquiry proceedings is structured by the legislated considerations under section 32 (a) and (b) and applicable open court principles.

The Issue of Notice to the Media

[12] The AGNS' application to have certain video surveillance exempted from the webcasting of the Inquiry's proceedings raises the issue of whether there is a requirement for notice to be provided to the media. The notice entitlement arises where the media's section 2(b) *Charter* rights are engaged. (*Dagenais v. CBC*, [1994] S.C.J. No. 104) Judicial discretion that limits media freedom of expression must be exercised in accordance with the *Charter*, whether it is pursuant to common law (*Dagenais/Mentuck* style publication bans); statutory authority (e.g. section 486(1) of the *Criminal Code*); or rules of court. (*Vancouver Sun (Re)*, [2004] S.C.J. No. 41 at paragraph 31)

[13] Notice to the media serves to inform media outlets that their constitutional rights are in play and could be subject to restriction as a consequence of the exercise of judicial discretion. Informed media can then decide to seek standing to be heard

before a judicial determination is made. Where freedom of expression rights are in the mix, standing should be given to media who wish to be heard on how the rights being implicated in the case should be balanced in the exercise of judicial discretion. (*Dagenais, supra, paragraph 58*)

[14] Media notice is therefore directly connected to the entitlement to standing to defend the constitutional right to freedom of expression.

[15] The media and the general public are benefitting from the live streaming of the Inquiry's proceedings. Both the media and the general public are no doubt interested, with good reason, in this enhanced access continuing. This interest is not a right. The application by the Attorney General of Nova Scotia relates to whether, in the context of an open court proceeding that is being live streamed to the internet, certain video surveillance evidence should not be webcast due to security and propriety concerns. As the media have no constitutional right to require the Inquiry to live stream its proceedings, there can be no entitlement to standing to address a live streaming issue. If there is no entitlement to standing there is no entitlement to notice. The issue of what webcasting should include is not a matter that engages the media's constitutional rights. Consequently I find that it is neither required nor appropriate to provide notice so that standing can be applied for.

[16] Given what I have found about the live streaming not being mandated by any section 2(b) *Charter* guarantees, requiring notice would lead to an inconsistent and illogical result. Notice would lead to a standing application or applications with their only purpose being to assert a constitutional right in the webcasting of the Inquiry. I

have already determined that the media enjoy no such constitutional right. The media's constitutional entitlements guarantee the right to attend the proceedings and report on them which they can do whether there is webcasting or not.

[17] Yesterday, during brief oral submissions on this notice issue by counsel, I noted that the media will have notice of the Attorney General's impending application via the live streaming. Having applied greater clarity of analysis to this issue, I can say that this kind of incidental notice of what is happening in these proceedings is of a different character than the formal notice that would have to be given to the media if section 2(b) *Charter* rights were being weighed in the exercise of judicial discretion. That not being the case, I find that the Attorney General of Nova Scotia is not obliged to give formal notice to the media of his application and, for the reasons I have given, I will be considering the application without hearing from the media.

Anne S. Derrick, P.C.J.