SUPREME COURT OF YUKON

Citation: *R. v. Larue*, 2012 YKSC 15

Date: 20120301
S.C. No.10-01510A
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

NORMAN ELI LARUE

Before: Mr. Justice L.F. Gower

Appearances:

David McWhinnie	Counsel for the Crown
Raymond G. Dieno	Counsel for the Applicant
Fred Kozak	Counsel for the Canadian Broadcasting Corporation

RULING ON APPLICATION FOR PUBLICATION BAN

INTRODUCTION

[1] This is an application by the accused, Norman Larue, for a common law publication ban on all proceedings and evidence in the trial of Christina Marie Asp (the "Asp trial"), until the end of Mr. Larue's trial. Ms. Asp's trial is scheduled to commence on March 12, 2012 and is expected to last approximately three months. Mr. Larue's trial is expected to commence in October or November 2012.

[2] The Crown supports the application, although it would be content with a modified or restricted publication ban, as opposed to a complete ban on all of the evidence.

[3] Pursuant to my earlier direction, I understand that notice of this application was provided to all the major media outlets in Whitehorse. The only media outlet that responded is the Canadian Broadcasting Corporation ("CBC"), whose counsel on this application is Mr. Fred Kozak. No issue was taken by the accused or the Crown that the CBC is entitled to standing on this application.

[4] The issue here is whether the accused has satisfied the two-part test for a publication ban set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835. That case states, at para. 73:

> "… A publication ban should only be ordered when:
>
> (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. …"

APPLICANT'S POSITION

[5] [redacted]

[6] No affidavit, nor any other evidence, was proffered by the Mr. Larue in support of his application.

[7] At the hearing, the accused's counsel submitted that there would be "overwhelming prejudice" to Mr. Larue if a total ban is not imposed. Further, any restricted or "piecemeal" publication ban would be too burdensome for the Court to administer.

[8] The accused's counsel submitted that 60% to 70% of the Yukon population resides in Whitehorse, where both trials are scheduled to take place. Murder trials are not that common in the Yukon; accordingly, if “salacious details” become public, it is reasonable to expect that they would be of extreme interest to many Yukon citizens, especially those in Whitehorse.

[9] [redacted]

[10] Further, Mr. Larue’s counsel expects that his trial will start within only a few months of the conclusion of Ms. Asp's trial.

[11] Thus, the accused’s counsel submits that this is a "rare and exceptional" case, because of the small population of the Yukon (I can take judicial notice that this is approximately 35,000 people, about 26,000 of whom reside in Whitehorse), because of the fact that this is the only "Mr. Big" case in Yukon history, and because the decision to have separate trials was made by the Crown. Therefore, it would be “safer” for Mr. Larue if there were a total, but temporary, ban on the publication of the evidence and verdict from Ms. Asp’s trial.

CROWN’S POSITION

[12] The Crown agrees that there should be a publication ban of some kind but says that the question is whether it needs to be a complete or a modified/restricted ban. The Crown is also concerned about the relatively small population of the Yukon and expects that publication of evidence from the Asp trial would likely reach a large percentage of the jury pool for the Larue trial. See *R. v. Tutin*, 2004 NWTSC 46, at para. 22.

[13] In considering the alternatives to a full publication ban which might be employed to ensure Mr. Larue receives a fair trial, the Crown raised the following:

1) *A change of venue from Whitehorse to another Yukon community*. This is not considered a realistic option, given that the trial is expected to last between 2 ½ months to 4 months, and will involve between 65 and 80 Crown witnesses. Further, the residents of the two other communities in which Mr. Larue's trial could most conveniently be held (Dawson City or Watson Lake) would, in any event, also likely be exposed to published evidence from Ms. Asp's trial. The logistical possibility of alternatively moving jurors from either of those two communities into Whitehorse to sit for a trial lasting a number of months is unfeasible. See *R. v. Tutin*, cited above, at paras. 21-23.

2) *An adjournment*. Theoretically, this Court might consider an adjournment of Mr. Larue's trial to allow any adverse impacts arising from the publicity of Ms. Asp's trial to dissipate before it begins. However, given that Mr. Larue has been in custody on this charge since August 2009, this is unrealistic.

3) *Instructions to the jury*. A strong instruction could be given to the jury to disregard any information they may have seen or heard outside of the evidence in Mr. Larue's trial and to presume his innocence. I will discuss this further below.

4) *Challenge for Cause*. Potential jurors in Mr. Larue's trial could be made subject to an appropriate challenge for cause, pursuant to s. 673 of the *Criminal Code*. I will also discuss this option further below.

[14] The Crown submits that timing is "always a concern", and that the closer the end of Ms. Asp's trial is to the beginning of Mr. Larue's, the greater the risk that there may be an adverse effect of publicity on the second trial. Again, see *R. v. Tutin*, cited above, at para. 37.

[15] The Crown suggested that some consideration might be given to a restricted publication ban which would come into effect a week or so after the end of Ms. Asp's trial. However, even here there would still be a danger that information could be "re-published" via electronic media and the internet. Therefore, some consideration would need to be given to the possible removal of published information from media websites.

[16] The Crown also suggested that some consideration might be given to a restricted ban which prohibits naming or otherwise identifying Mr. Larue in the coverage of Ms. Asp's trial. However, the Crown seems to acknowledge that this might cause more problems than it solves. Potential Larue jurors may learn of the rather unique allegations in this case through publication of details of Ms. Asp's trial. If the media are prohibited from identifying Mr. Larue in any such publications, then that may preclude a challenge for cause premised upon the jury pool’s awareness of Mr. Larue's involvement in the alleged offence. If any such jurors are sworn, and then hear of the same unique circumstances in Mr. Larue's trial, there is a significant risk that they might correctly conclude that the unidentified male co-accused in the Asp trial and Mr. Larue are the same person. In the worst case scenario, a sworn juror might realize their bias once evidence in the trial has commenced.

[17] The remaining concerns of the Crown had to do with the type of evidence which might be led in the Asp trial. For example, if a videotape of an alleged confession by Ms. Asp is filed as an exhibit, and the media obtain a copy and broadcast such a videotape, this could be very prejudicial to Mr. Larue's fair trial rights.

CBC’S POSITION

[18] Essentially, CBC’s counsel relies upon the case law as establishing that an application for a publication ban must have an evidentiary foundation and not simply be based on speculation. In particular, it is no longer sufficient for an applicant to suggest that it would be "safer" to have a ban, or that a court should "err on the side of caution". Rather, the applicant has a “high burden” to meet. Accordingly, publication bans are now viewed as exceptional and rarely granted.

[19] Further, CBC’s counsel submitted that there are many examples of sequential trials which have involved a great deal of publicity, but where the actual empanelling of juries was achieved with relatively little difficulty. Counsel gave the specific example of an unpublished case in which he also represented the CBC, *R. v. Ferguson* (January 29, 2004), docket no. 005547997Q1 (ABQB).

[20] According to Mr. Kozak, *Ferguson* was a case involving an accused RCMP officer in Lethbridge, Alberta, a city with a population of just over 50,000. The first and second jury trials each resulted in a hung jury. The Crown sought a third trial and applied for a change of venue, arguing that the prior publicity had tainted the jury pool in Lethbridge. The Crown also sought a publication ban on the change of venue application, because all the previous media reports were introduced as evidence on the application. The Crown called an expert witness who opined on the expected negative impact of the publicity on prospective jurors. The CBC called its own expert, who said that neither the application nor the material relied upon by the Crown's expert would have an adverse impact upon potential jurors at a future trial, and the jurors were quite capable of setting aside any impact that negative reporting may have had upon them.

[21] Hawco J. dismissed the application. In doing so, he referred to the two-part test in *Dagenais*, and concluded that the Crown had failed to establish, firstly, that there was a real and substantial risk that the accused would not get a fair trial and, secondly, that there was no reasonable alternative measure which would protect his right to a fair trial. Hawco J. relied in part upon *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 ("*Westray*"), which I will discuss below.

[22] According to Mr. Kozak, the third trial in *Ferguson* was ultimately held in Lethbridge and the jury was empanelled in less than two hours.

[23] As for the prospect that the media might apply for access to and use of certain exhibits, Mr. Kozak submits that such decisions are not automatic but in the discretion of the trial judge, and that any such applications can be addressed when the specific exhibits are tendered. In other words, it is premature to consider this as an issue on the present application.

LAW

Fair Trial Right and Freedom of the Press

[24] In *R. v. Mentuck*, 2001 SCC 76, Iacobucci J. affirmed the *Dagenais* test at para. 23. Although he broadened the test to take into account the potential impact upon the administration of justice generally, at para. 33, Iacobucci J. stated:

> "… [I]n those common law publication ban cases where only freedom of expression and trial fairness issues are raised, the test should be applied precisely as it was in *Dagenais*…."

[25] In *Dagenais*, at para. 72, Lamer C.J. addressed the need to balance the *Charter* right to a fair trial in s. 11(d) and the enshrined freedom of expression in s. 2(b):

> "[72] The pre-*Charter* common law rule governing publication bans emphasized the right to a fair trial over the free expression interests of those affected by the ban. In my view, the balance this rule strikes is inconsistent with the principles of the *Charter*, and in particular, the equal status given by the *Charter* to ss. 2(b) and 11(d). It would be inappropriate for the courts to continue to apply a common law rule that automatically favoured the rights protected by s. 11(d) over those protected by s. 2(b). A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights."

[26] In *R. v. Vancouver Sun*, 2004 SCC 43, the Supreme Court emphasized the importance of freedom of expression and the open court principle:

> "[26] The open court principle is inextricably linked to the freedom of expression protected by s. 2(*b*) of the *Charter* and advances the core values therein: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General), supra*, at para. 17. The freedom of the press to report on judicial proceedings is a core value. Equally, the right of the public to receive information is also protected by the constitutional guarantee of freedom of expression…"

[27] In *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, Fish J., for the Supreme Court, eloquently opened the Court's reasons with the following observation:

> "[1] In any constitutional climate, the administration of justice thrives on exposure to light -- and withers under a cloud of secrecy."

[28] In *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, Cory J. spoke of the critical role of the media in disseminating information to the public regarding events taking place within the court system. At paras. 9 and 10, he said:

> "[9] It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. 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.
>
> [10] …It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media."

[29] In *R. v. White*, 2005 ABCA 435, at para. 6, the Alberta Court of Appeal commented on the importance of the press being able to publish information about court processes as they occur:

> "News is a perishable commodity. Because "[n]ews, as the word implies, involves something new - something fresh." (*Triple Five Corp. v. United Western Communications Ltd*. (1994), 19 Alta. L.R. (3d) 153 at 155 (C.A.)), unjustified delay in permitting full public access will have a deleterious effect on the ability of the media to report, and, in the result, for the public to be informed. Contemporaneous access to court documents and processes allows the media to fulfil their legitimate role as the eyes and ears of the public. As Kerans, J.A. noted in *Triple Five Corp.*, "time [for the media] is always of the essence.""

[30] The accused's right to a fair trial is guaranteed by sections 7 and 11(d) of the *Charter*. However, it must be remembered that, while the accused is entitled to a “fair” trial, he is not entitled to the most favourable trial possible. In *R. v. O'Connor*, [1995] 4 S.C.R. 411, L’ Heureux-Dube J. wrote about this at para. 107:

> "[107] Much has been written about the right to a fair trial. An individual who is deprived of the ability to make full answer and defence is deprived of fundamental justice. However, full answer and defence, like any right, cannot be considered in the abstract. The principles of fundamental justice vary according to the context in which they are invoked. For this reason, certain procedural protections might be constitutionally mandated in one context but not in another: *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 361. Moreover, though the Constitution guarantees the accused a fair hearing, it does not guarantee the most favourable procedures imaginable: *Lyons*, supra, at p. 362. Finally, although fairness of the trial and, as a corollary, fairness in defining the limits of full answer and defence, must primarily be viewed from the point of view of the accused, both notions must nevertheless also be considered from the point of view of the community and the complainant: *E. (A.W.)*, supra, at p. 198…" (my emphasis)

[31] Further, as Lamer C.J. said in *Dagenais*, at para. 76, "the *Charter* does not always guarantee the 'ideal'" result for an accused:

> "… [W]hile the *Charter* provides safeguards both against actual instances of bias and against situations that give rise to a serious risk of a jury's impartiality being tainted, it does not require that all conceivable steps be taken to remove even the most speculative risks. As I noted in *R. v. Lippé*, [1991] 2 S.C.R. 114, at p. 142, "the Constitution does not always guarantee the 'ideal'". This must be borne in mind when the objective of a publication ban imposed under the common law rule is specified, since one of the primary purposes of the common law rule is the protection of the constitutional rights of the accused. As the rule itself states, the objective of a publication ban authorized under the rule is to prevent real and substantial risks of trial unfairness -- publication bans are not available as protection against remote and speculative dangers." (my emphasis)

The Evidentiary Burden and the Onus

[32] In *Mentuck*, Iacobucci J. referred to *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, where La Forest J. wrote for a

unanimous Supreme Court of Canada and stressed the importance of placing the evidentiary burden on the applicant for a publication ban:

> "[26] La Forest J. also noted that the burden of displacing the presumption of openness rested on the party applying for the exclusion of the media and public. Furthermore, he found that there must be a sufficient evidentiary basis on the record from which a trial judge could properly assess the application (which may be presented in a *voir dire*), and which would allow a higher court to review the exercise of discretion: *New Brunswick*, at para. 69. In considering the various factors, La Forest J. found that the order granted to protect the complainants was improperly granted. The evidence of potential undue hardship to the complainants, which primarily rested on the Crown's submission that the evidence to be brought was of a '"delicate' nature", did not displace the presumption in favour of an open court." (my emphasis)

[33] Iacobucci J. continued with this theme at paras. 34 and 39:

> "[34] I would add some general comments that should be kept in mind in applying the test. The first branch of the test contains several important elements that can be collapsed in the concept of "necessity", but that are worth pausing to enumerate. One required element is that the risk in question be a serious one, or, as Lamer C.J. put it at p. 878 in *Dagenais*, a "real and substantial" risk. That is, it must be a risk the reality of which is well-grounded in the evidence. It must also 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.
>
> …
>
> [39] It is precisely because the presumption that courts should be open and reporting of their proceedings should be uncensored is so strong and so highly valued in our society that the judge must have a convincing evidentiary basis for issuing a ban. Effective investigation and evidence gathering, while important in its own right, should not be regarded as weakening the strong presumptive public interest, which may go unargued by counsel more frequently as the number of applications for publication bans increases, in a transparent

> court system and in generally unrestricted speech on [page 466] matters of such public importance as the administration of justice." (my emphasis)

[34] In the Supreme Court's decision in *R. v. O.N.E.*, 2001 SCC 77, which was released concurrently with *Mentuck,* Iacobucci J. referred to the *Dagenais* test as restated and again returned to the importance of the evidentiary burden:

> "[9] … The burden of displacing the presumption of openness rests on the party bringing the application for the publication ban. <u>There must also be a sufficient evidentiary basis in favour of granting the ban</u> to allow the judge to make an informed application of the test, and to allow a higher court to review that decision (*Mentuck*, supra, at para. 38; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at paras. 71-72)." (my emphasis)

[35] The burden on the applicant was originally addressed in *Dagenais*, at para. 98, as one of the general guidelines set out by Lamer C.J.. For the sake of completeness, I will quote the entire paragraph:

> "[98] In order to provide guidance for future cases, I suggest the following general guidelines for practice with respect to the application of the common law rule for publication bans:
> (a) At the motion for the ban, the judge should give the media standing (if sought) according to the rules of criminal procedure and the established common law principles with regard to standing.
> (b) The judge should, where possible, review the publication at issue.
> (c) The party seeking to justify the limitation of a right (in the case of a publication ban, the party seeking to limit freedom of expression) bears the burden of justifying the limitation. The party claiming under the common law rule that a publication ban is necessary to avoid a real and serious risk to the fairness of the trial is seeking to use the power of the state to achieve this objective. <u>A party who uses the power of the state against others must bear the burden of proving that the use of state power is justified in a free and democratic society.</u> Therefore, the party seeking the ban

> bears the burden of proving that the proposed ban is necessary, in that it relates to an important objective that cannot be achieved by a reasonably available and effective alternative measure, that the proposed ban is as limited (in scope, time, content, etc.) as possible, and there is a proportionality between the salutary and deleterious effects of the ban. At the same time, the fact that the party seeking the ban may be attempting to safeguard a constitutional right must be borne in mind when determining whether the proportionality test has been satisfied.
> (d) The judge must consider all other options besides the ban and must find that there is no reasonable and effective alternative available.
> (e) The judge must consider all possible ways to limit the ban and must limit the ban as much as possible; and
> (f) The judge must weigh the importance of the objectives of the particular ban and its probable effects against the importance of the particular expression that will be limited to ensure that the positive and negative effects of the ban are proportionate." (my emphasis)

[36] The standard for the first branch of the *Dagenais* test relating to the risk of trial unfairness was addressed by Lamer C.J. at para. 76:

> "[76] In most cases where publication bans are sought, including the case at bar, attention is focused on a particular potential source of trial unfairness -- the possibility that adverse pre-trial publicity might make it <u>difficult or impossible</u> to find an impartial jury." (my emphasis)

[37] I emphasize that Lamer C.J. states that the adverse pre-trial publicity must make it "difficult or impossible" to subsequently find an impartial jury. This high threshold for an applicant for a publication ban was also referred to by McLachlin J. in her separate but concurring reasons in *Dagenais*:

> "[226] The common law test for whether a ban should be ordered is that there is a real and substantial risk that a fair trial would be <u>impossible</u> if publication were not restrained…." (my emphasis)

[38] In *Westray*, at para. 128, Sopinka J. referred to the onus on a publication ban applicant this way:

> "… What must be found in order for relief to be granted is that there is a high probability that the effect of publicizing inquiry hearings will be to leave potential jurors so irreparably prejudiced or to so impair the presumption of innocence that a fair trial is impossible. Such a conclusion does not necessarily follow upon proof that there has been or will be a great deal of publicity given to the hearings. Evidence establishing the probable effects of the publicity is also required." (my emphasis)

[39] With this background, it is not surprising that Nordheimer J. in *R. v. Kossyrine*, 2011 ONSC 6081, at para. 15, observed that the Supreme Court of Canada has set "a very high bar" for the granting of publication ban orders. At para. 16, he continued that the test is if it is "necessary" to impose a ban, and not simply if it would be "the safer route".

Alternative Measures

[40] The measures which *Dagenais* directs me to consider as an alternative to a publication ban have been variously referred to in the authorities, but include:

1) Reliance upon the juror’s oath to try the case according to the evidence;
2) Reliance upon the judge's instructions to the jury;
3) A more exacting jury selection process, including reliance upon challenges for cause;
4) An adjournment to allow for the adverse impacts of publicity to dissipate; and
5) A change of venue.

[41] The first two measures relate to the confidence courts have in the integrity of juries and their ability to follow a judge's instructions. In *R. v. Corbett*, [1988] 1 S.C.R 670, Dickson, C.J.C. said at p. 693 (para. 39 QL):

> "… the fundamental right to a jury trial has recently been underscored by s. 11(f) of the *Charter*. If that right is so important, it is logically incoherent to hold that juries are incapable of following the explicit instructions of a judge."

[42] In *Westray*, the Supreme Court affirmed its confidence in juries at para. 133:

> "… The jury system is a cornerstone of our democratic society. The presence of a jury has for centuries been the hallmark of a fair trial. I cannot accept the contention that increasing mass media attention to a particular case has made this vital institution either obsolete or unworkable. There is no doubt that extensive publicity can prompt discussion, speculation, and the formation of preliminary opinions in the minds of potential jurors. However, the strength of the jury has always been the faith accorded to the good will and good sense of the individual jurors in any given case. The confidence in the ability of jurors to accomplish their tasks has been put in this way in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, at p. 761:
>
> > Today's jurors are intelligent and conscientious, anxious to perform their duties as jurors in the best possible manner. They are not likely to be forgetful of instructions.…" (my emphasis)

[43] In *Kossyrine*, Nordheimer J. was addressing an application for a publication ban relating to a guilty plea by a co-accused. The applicants and the co-accused were all jointly charged with first-degree murder. Just prior to their joint trial, the co-accused entered a plea of guilty. The applicants argued that the publication of the guilty plea may taint prospective jurors and colour their attitudes towards the applicants. At para. 10, Nordheimer J. succinctly rejected the proposition that prospective jurors would be unduly influenced by knowledge of the guilty plea:

> "It is contended that if Mr. Ross's plea of guilty is published, along with the surrounding facts that he acknowledged, it will be impossible for the applicants to get a fair trial. I do not agree. To accede to that contention, is to accept the proposition that the jurors selected to decide this case will not honour their duties and obligations as jurors. That proposition has been consistently rejected by all levels court, most especially by the Supreme Court of Canada. *Dagenais* is one such case. Another is *[Westray*]…" (my emphasis)

[44] The fact that prospective jurors may have been exposed to pre-trial publicity does not necessarily mean that they will be incapable of deciding the case solely on the evidence and the judge's instructions. This was eloquently put by Nordheimer J. in *Kossyrine*, at para. 20:

> "[20] I agree with counsel for the media that the accused are entitled to an impartial jury not an uninformed jury. The fact that members of the jury may have read about this case, and the allegations in it, is only problematic if they have formed fixed opinions that they cannot disabuse themselves of. That is precisely what the challenge for cause process is designed to reveal. That process coupled with jury instructions regarding the need to decide the case based only on the evidence heard in the courtroom and not on any other information are the type of reasonable alternative measures that are capable of preventing the risks that the applicants identify." (my emphasis)

Juries Have Been Empanelled in Many Similar Cases

[45] It is important to remember that there are numerous examples of serious cases where juries have been successfully empanelled despite significant pre-trial publicity. This is recognized by Oppal J. in *R. v. Murrin*, [1997] B.C.J. No. 3182 (SC):

> "[18] It should also be noted that in the past, in this jurisdiction and in this country, there have been some noteworthy cases that involved an inordinate amount of pretrial publicity followed by multiple trials. The cases are *R. v. Huenemann* (1993), 38 B.C.A.C. 20, *R. v. Pesic* (1993), 22 B.C.A.C. 170 (C.A.), *R. v. Charalambous*, New Westminster

> Registry No. X035780, (January 1994 (S.C.) *R. v. Bernardo* (1995) 38 C.R (4th) 229 (Ont. Gen. Div.) are some examples of cases that have preceded apparently in an uneventful manner in spite of extensive pretrial publicity and overlapping evidence."

See also *R. v. Violette*, 2008 BCSC 1154, at para. 13.

ANALYSIS

[46] It is telling in this application that the accused's counsel initially made the submission that, given the risks of the prospective Larue jurors learning of the evidence and the outcome of Ms. Asp's trial, it would be "safer" to impose a temporary, but complete, ban on everything associated with that trial. It was only in his reply to CBC's submissions that the accused's counsel attempted to portray this case as one of the "rare and exceptional" situations where a total publication ban is justifiable. Counsel even went so far as to suggest that, in the absence of a ban, it will be "impossible" to impanel twelve impartial jurors for Mr. Larue. I disagree with these submissions for the following reasons.

[47] First, the application is seriously lacking in terms of the evidence required of a party seeking a publication ban. The Notice of Application paints no more than a thumbnail sketch of its context. No affidavit evidence was filed and no witnesses were called. While this may not be fatal to the applicant in every case, it is a significant factor in this case.

[48] Second, the accused's counsel was perfunctorily dismissive of the potential alternative measure of challenging Mr. Larue's prospective jurors for cause. Indeed, I understood him to say that counsel can never be sure whether the answers from a prospective juror on a challenge for cause can be relied upon. In effect, what the

accused's counsel seemed to suggest was that one could not "trust" a jury to try the case solely on the evidence and the judge's instructions, even where all 12 jurors successfully withstood their respective challenges for cause.

[49] This type of submission has been repeatedly rejected by the Supreme Court of Canada and other courts. I have already quoted Nordheimer J. in *Kossyrine*, where he indicated that the challenge for cause process is "precisely…designed" to weed out prospective jurors who cannot disabuse themselves of negative pre-trial publicity. Nordheimer J. also put it well earlier in his reasons:

> "[11] In addition, the contention that there needs to be a publication ban in order to protect the fair trial rights of the applicants ignores, or at least gives little effect to, the challenge for cause process. The fundamental rationale for that challenge process is to identify persons who have been exposed to publicity about the case, and who have formed opinions as a consequence, that they are not prepared to put aside in deciding the case. The situation here would appear to be the preeminent example of why we permit challenges for cause based on publicity. <u>If we do not believe in the efficacy of the challenge process, then we should cease to engage in it. Until such a result is decreed, however, I consider the effectiveness of that process coupled with the recognized effectiveness of jury instructions as sufficient to ensure that a fair and impartial jury can be empanelled</u> in this case…." (my emphasis)

[50] Thus, like Hawco J. in *Ferguson*, I find that the accused has not succeeded in getting past the first branch of the *Dagenais* test. Specifically, Mr. Larue has not persuaded me that a publication ban is necessary in order to prevent the "real and substantial risk" that he will not receive a fair trial, especially when there are available alternative measures which, in my view, are reasonably capable of significantly ameliorating any risk which does arise. I am speaking here of:

1) The availability of the challenge for cause procedure in empanelling the Larue jury;

2) This Court's confidence in the oath of each sworn juror to try the case "according to the evidence"; and

3) This Court's confidence that the jury will conscientiously follow the judge's instructions to disregard any information they may have acquired outside of the trial and to presume Mr. Larue's innocence.

[51] As Sopinka J. said in *Westray*, at para. 132:

> "It comes down to this: in order to hold a fair trial it must be possible to find jurors who, although familiar with the case, are able to discard any previously formed opinions and to embark upon their duties armed with both an assumption that the accused is innocent until proven otherwise, and a willingness to determine liability based solely on the evidence presented at trial."

In the case at bar, the accused has not persuaded me that this objective is not attainable.

CONCLUSION

[52] Mr. Larue's application is dismissed. However, the publication ban I imposed in Ms. Asp's case will remain in place until the jury is put in charge of the accused at her trial. Further, I remind the media that the s. 539 publication ban regarding the evidence from the preliminary inquiry remains in place and, out of an abundance of caution, in order to protect Ms. Asp's fair trial rights until the commencement of her trial, the publication of paras. 5 and 9 of these reasons will also be banned.

Gower J.