W A R N I N G

The court hearing this matter directs that the following notice should be attached to the file:

This is a case under the *Youth Criminal Justice Act* and is subject to subsections 110(1) and 111(1) and section 129 of the Act. These provisions read as follows:

> **110. Identity of offender not to be published.**—(1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.
>
> . . .
>
> **111. Identity of victim or witness not to be published.—**(1) Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.
>
> . . .
>
> **129. No subsequent disclosure.—** No person who is given access to a record or to whom information is disclosed under this Act shall disclose that information to any person unless the disclosure is authorized under this Act.

Subsection 138(1) of the *Youth Criminal Justice Act*, which deals with the consequences of failure to comply with these provisions, states as follows:

> **138. Offences.—**(1) Every person who contravenes subsection 110(1) (identity of offender not to be published), 111(1) (identity of victim or witness not to be published) . . . or section 129 (no subsequent disclosure) . . .
>
> (*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or
>
> (*b*) is guilty of an offence punishable on summary conviction.

COURT FILE Nos.: 10 YO 022660 and 10 YO 022661
January 11, 2012.
Citation: *Toronto Star Newspaper Ltd. v. Ontario*, 2012 ONCJ 27

ONTARIO COURT OF JUSTICE

sitting under the provisions of the *Youth Criminal Justice Act*, S.C. 2002, c. 1

B E T W E E N :

TORONTO STAR NEWSPAPER LTD.

v.

HER MAJESTY THE QUEEN

— AND —

G. (J.)

— AND —

TORONTO STAR NEWSPAPER LTD.

V.

HER MAJESTY THE QUEEN

— AND —

D. (A.)

— AND —

TORONTO STAR NEWSPAPER LTD.

V.

HER MAJESTY THE QUEEN

— AND —

I. (E.)

Before Justice Marion Cohen
Released on January 11, 2012.
Ruling

Mr. Daniel Stern ..... for the Applicant
Ms. Amy Barkin ..... for the Provincial Crown
Mr. Scott Graham ..... for the Federal Crown
Ms. Mary Birdsell Amicus Curiae

COHEN, J.:

[1] This application is brought by the Toronto Star (the "Applicant") at the suit of David Bruser. Mr. Bruser is a reporter with the Toronto Star, and, during the summer and fall of 2011, he spent several months observing youth court matters in this courthouse. Over this period he observed proceedings involving D.(A.), I.(E.), and G.(J.), all of whom are young persons as defined in the *Youth Criminal Justice Act*, and all of whom were found guilty of serious criminal offences. The applicant seeks access to pre-sentence reports and a victim impact statement filed as exhibits in the three proceedings. The application is supported by the federal crown attorney, and opposed by the provincial crown attorney.

[2] The young persons affected by this application have an interest in this proceeding and I found they were entitled to notice of the application. Mr. Bruser endeavoured to serve them, and was assisted by the federal and provincial crown attorneys. Two of the young persons appeared on the hearing and both testified. Both opposed the application. The third young person

did not appear although I am advised that he had notice of the application. The young persons who appeared were unrepresented, their trial counsel taking the position that their retainers did not extend to assisting the young persons in this type of application. None of the young persons could afford to independently retain counsel, and accordingly, on consent, I appointed Justice for Children and Youth, a legal aid clinic specializing in representing young persons in a variety of legal contexts, to act as *amicus*.

[3] Mr. Bruser completed his observations of the Youth Court in October, 2011, and he authored a series of articles on the subject which subsequently appeared in the Toronto Star. This application had not been completed at the time of publication. Having considered the evidence and the submissions of counsel, I am dismissing the application. The following are my reasons:

Youth Court Records

[4] A young person dealt with under the *Youth Criminal Justice Act* becomes the subject of numerous records. "Records" are broadly defined in the *Act* to include "…anything containing information regardless of its physical form or characteristics…" Access to all *Youth Criminal Justice Act* records is strictly controlled. Part 6 of the *Act*, entitled "Protection of Privacy of Young Persons", specifies who may have access to such records, the purposes for which access may be permitted, and the conditions under which it may be exercised. In some cases access is granted as of right. In other cases, access will only be granted by order of the Youth Justice Court. The three exhibits requested in this application are youth court records as defined in section 114 of the *Act*, and the applicant requires an order of the court to gain access to them.

[5] The Toronto Star seeks access to the exhibits under section 119(1)(s)(ii) of the *Act*. This section provides that

> 119. (1) Subject to subsections (4) to (6), from the date that a record is created until the end of the applicable period set out in subsection (2), the following persons, on request, shall be given access to a record kept under section 114, and may be given access to a record kept under sections 115 and 116:
>
> …
> (s) any person or member of a class of persons that a youth justice court judge considers has a valid interest in the record, to the extent directed by the judge, if the judge is satisfied that access to the record is

…
(ii) Desirable in the interest of the proper administration of justice.

[6] Access should not be confused with publication, which in some instances is subject to a prohibition under the *Act*. The applicant states that he wishes access to the records "in order to allow him to accurately describe what he heard in court and to properly report on the cases, including the bases upon which the court made its sentencing decisions." It is clear that some form of publication is envisioned, although clearly not publication that would breach the prohibitions under section 110 of the *Act*. Presumably the extent to which the information could be published could be regulated by the Court under section 119(1)(s) and section 129 of the *Act.*

[7] It is not disputed in this case that the applicant reporter is a member of a class of persons that has a valid interest in the record. What is disputed is whether it is desirable in the interests of the proper administration of justice that the applicant be granted such access. The applicant maintains that it is entitled to access to the records as an aspect of the right to freedom of the press, an open court, and the right of the public to receive information about the working of the courts, all of which are rights protected by section 2(b) of the *Charter*. The federal crown supports this position. *Amicus* and the provincial crown argue that access should be denied in order to protect the privacy rights of young persons, rights which form a cornerstone of the *Youth Criminal Justice Act*. Since the *Act* provides that the public is protected from crime by the rehabilitation of young persons , and since the privacy rights of young persons are understood in Canadian law as being essential to their rehabilitation, amicus and the provincial crown argue that there is a strong public interest in protecting the privacy of young persons.

The Test to be Applied

[8] Section 119 (1)(s)(ii) neither mandates access to the media, nor prohibits access to the media. The determination of whether to grant or refuse access is left to the discretion of the court. How is this discretion to be exercised? The applicant argues that, since section 119(1)(s)(ii) provides for discretionary judicial orders which could limit media access to youth

court records, the *Dagenais/Mentuk*[1] test must be applied. Where a judicial discretion exists to limit the openness of court proceedings, the *Dagenais/Mentuk* test ensures that the discretion is exercised in a manner that conforms to the *Charter*.

[9] In the case of *Dagenais v. Canadian Broadcasting Corp.*, an order was sought by four accused persons prohibiting the broadcast of a fictional television series depicting the abuse of young boys at religious training institutions. The factual circumstances in the series were similar to the facts in issue in the trials. A publication ban was granted based on the court's common law jurisdiction to make orders to protect trial fairness. The Supreme Court noted that, like the right of an accused to a fair trial, protected by s. 11(d) of the *Charter*, freedom of expression and the press, was protected by section 2(b) of the *Charter*, and both were fundamental values in Canadian society. The Court questioned whether the common law rule governing publication bans provided "sufficient protection for freedom of expression in the context of post-Charter Canadian society"(par. 69). Lamer, J. held that

> 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.

[10] The Court concluded that it was necessary to reformulate the common law rule governing the issuance of publication bans in a manner that reflected the principles of the Charter. Given that publication bans curtail freedom of expression, the common law rule had to be adapted so as to require a consideration both the objectives of the publication ban, and the proportionality of the ban to its effect on protected Charter rights. In *Dagenais*, the court held that a court should only order a publication ban where

[1] *Dagenais v. Canadian Broadcasting Corp* [1994] S.C.J. No. 104 (S.C.C.); *R. v. Mentuck* [2001] S.C.J. No. 73 (S.C.C)

> (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.

[11] This was the more narrowly conceived *Dagenais* test, a test which stood unqualified until the decision in *R. v. Mentuck* was handed down.

[12] In *R. v. Mentuck*,[2] the *Dagenais* test was expanded to apply to all discretionary decisions of a court which limit the openness of judicial proceedings. In *Mentuck*, the trial court had ordered a time limited publication ban at the request of the Crown, to protect the safety of police officers and preserve the efficacy of undercover police operations. The accused and the media intervenors had opposed the ban. According to the judgment, "…the accused's right to a fair trial was never in issue." Iacobucci, J. found that a "literal application" of the test in *Dagenais* would not properly account for the interests to be balanced, and stated that

> … while *Dagenais* framed the test in the specific terms of the case, it is now necessary to frame it more broadly so as to allow explicitly for consideration of the interests involved in the instant case and other cases where such orders are sought in order to protect other crucial aspects of the administration of justice. (par.32)

[13] The reconfigured *Dagenais/Mentuck* 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 publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[2] [2001] S.C.J. No. 73 (S.C.C.), at par.23

[14] As the Court noted in *Mentuck,* this reconfigured test is not restricted to cases where two *Charter* rights are in conflict, "any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right."(*Mentuck,* par. 31) A claim for an order limiting freedom of expression in relation to judicial proceedings may encompass a broad variety of interests: *Toronto Star Newspapers Ltd. v. Ontario*.[3] The protection of privacy of young persons dealt with under the *Youth Criminal Justice Act* may be seen as one such interest.

[15] *Amicus* and the Crown argue that the *Dagenais/Mentuk* test has no application in youth court proceedings, because the *Youth Criminal Justice Act* is "parliament's complete response to the question of the open courts, access to, disclosure of, and publication of youth court records." Despite their able and comprehensive arguments, I disagree with this submission.

[16] Section 119(1)(s)(ii) of the *Youth Criminal Justice Act* allows the youth court to restrict access to court records by the media. This is a legislated discretion which permits the court to limit freedom of the press. The *Act* does not provide express direction, or stipulate criteria, for how the discretion is to be exercised. While the principles and provisions of the *Act* will be relevant, the *Dagenais/Mentuck* test must be applied to ensure that the discretion will be exercised "in a constitutionally sound manner.[4]"

[17] In Toronto Star Newspapers v. Ontario,[5] Fish, J, stated that

> In my view, the Dagenais/Mentuck test applies to all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings. Any other conclusion appears to me inconsistent with an unbroken line of authority in this Court over the past two decades. And it would tend to undermine the open court principle inextricably incorporated into the core values of s. 2(b) of the Charter.

[3] [2005] 2 S.C.R. 188 (S.C.C.), at par. 26

[4] *Mentuck,* supra, par.37

[5] [2005] SCJ No. 41 (S.C.C., at par. 7)

[18] More recently, In *CBC v. The Queen*[6] ("CBC 2011"), the Supreme Court reaffirmed that

> The analytical approach developed in *Dagenais* and *Mentuck* applies to *all* discretionary decisions that affect the openness of proceedings. (par. 13 – emphasis mine)

[19] Finally, I would point out that the *Dagenais/Mentuk* test has been applied in youth court proceedings in many parts of Canada, including Ontario[7]. Thus, to again quote Fish, J. in *Toronto Star Newspapers v. Ontario*, the arguments of the Crown and *amicus* are

> doomed to failure by more than two decades of unwavering decisions in this Court: the Dagenais/Mentuck test has repeatedly and consistently been applied to all discretionary judicial orders limiting the openness of judicial proceedings.(par. 30)

[20] Before proceeding to the first step in applying the *Dagenais/Mentuck* analysis, I will make one further observation. This touches on the specific material to which access is sought in this case, namely access to documentary exhibits. *Amicus* and the provincial crown submit that in the youth justice context, the media's ability to be present while these documents are considered is all that is necessary to satisfy the open court principle. Setting aside the youth justice context for a moment, I wish to emphasize that there is no principled distinction between exhibits and other forms of evidence in the open court. While at its most fundamental level, the open court requires that members of the public, including members of the media, be permitted to attend and observe the proceedings of a Court, the media's entitlement under the open court principle is not limited to this "bare right.[8]" The open court principle also entails, subject to certain exceptions, that the media will have broad access to court records, documents and exhibits, and to documents produced before court proceedings and not actually referred to in court.

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[6] 2011 SCC 3 (S.C.C.)

[7] See: *R. v. J.K.E.* [2005] Y.J. No. 21Yukon Territorial Court, per Lillies, J; *R. v. T.C.* [2006] N.S.J. No. 531 (N.S. Prov. Ct.); *R. v. A.A.B.* [2006] N.S.J. No. 226 (N.S. Prov. Ct.); *R. v. R.D.S. (Re Halifax Herald Ltd.)*, [1995] N.S.J. No. 207*; R. v. Canadian Broadcasting Corp*. [2006] O.J. No. 1685(Ont. S.C.); *R. v. J.S.R.* [2008] O.J. No. 4160(Ont. S.C.); *R. v. G.C.* [2009] O.J. No. 6331(Ont. S.C.) contra: *R. v. A.Y.D.* [2011] A.J. No. 1031(Alta. Q.B)

[8] *R. v. Canadian Broadcasting Corp* [2010] O.J. No. 4615; 2010 ONCA 726 (Ont. C. A., par. 25)

[21] In the case of *R. v. Canadian Broadcasting Corp* (*"CBC 2010")*[9], where the media's right to access and copy exhibits filed at a preliminary inquiry was at issue, the Ontario Court of Appeal found that access to the exhibits used to make a judicial determination was a well-recognized aspect of the open court principle, and included the right to copy exhibits. Similarly, in *Canadian Broadcasting Corp. v. The Queen*[10] ("CBC 2011"), the court held that access to exhibits is a corollary to the open court principle. Thus I reject the submission that the ability of a reporter to be present, to observe and to make notes of youth court proceedings satisfies the requirements of the open court principle.

The First Step in Applying the *Dagenais/Mentuck* Test

The Open Court Principle

[22] The first step for the court in applying the *Dagenais/Mentuck* test is to determine which values, rights and interests are in conflict. In this application, society's interests in the open court, and freedom of the press, appear to conflict with society's interests in protecting the privacy of young people dealt with under the *Youth Criminal Justice Act*.

[23] I wish to deal first with the value of the open court and freedom of the press. In *Toronto Star Newspapers Ltd. V. Ontario*[11], Abella, J. (in dissent on other grounds), made the following observations:

> This Court has a long pedigree in protecting the public's right to be aware of what takes place in the country's courtrooms. It is based on the premise that to maintain public trust in the justice system, the public must be able to see the judicial process at work. The public's ability to engage in meaningful discussion about what a judge decides depends primarily on knowing why the particular decision is made. The jurisprudence has, as a result, consistently attempted to enhance both the visibility of the system and the confidence of the public. This emphasis on transparency is known as the open court principle.

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[9] *supra*, footnote 14

[10] [2011] S.C.J. No.3 (SCC)

[11] [2005] 2 S.C.R.188 (S.C.C.)

[24] The open court principle, which permits the public to scrutinize the workings of the courts, is a value of paramount significance in the Canadian democracy. Preserving democracy requires strong courts which are independent, impartial and not arbitrary, which are guardians of the *Charter* and of democratic values, and which administer justice according to the rule of law. In *R. v. Kang-Brown*, Lebel, J. observed that

> The Constitution does not belong to the courts, as McLachlin J. (as she then was) wisely said in her dissent in Cooper, but courts must remain alive and sensitive to the fact that they are ultimately the guardians of constitutional rules, principles and values when all else fails (Cooper v. Canada (Human Rights Commission), [1996] 3 S.C.R. 854, at para. 70).

[25] The open court permits the public to understand and evaluate the functioning of a critical democratic institution.

[26] It has long been observed that public scrutiny of the courts is necessary to maintain the independence and impartiality of courts, and guarantees the integrity of judicial processes. Our highest courts have repeatedly stated that publicity is the the soul of justice. The open court ensures public confidence in the justice system, and respect for the rule of law.[12]As Cory, J. observed in *Edmonton Journal*, *supra*, at p. 1336, "The vital importance of the concept cannot be over-emphasized."

[27] The democratic function of public criticism of the courts depends on an informed public[13]. The open court and freedom of the press are inextricable. Section 2(b) of the *Charter*, which guarantees Canadians freedom of thought, belief, opinion and expression, includes freedom of the press and other media of communication. While the *Charter* does not refer to the open court principle, the open court has come to be regarded as a fundamental aspect of the rights guaranteed by s. 2(b) of the *Charter*[14]("*CBC 2010*", par. 23).

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[12] *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 187; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at paras. 21-22; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Vancouver Sun (Re)* [2004] S.C.J. No. 41 pars. 23 - 25, (S.C.C.)

[13] *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)* [1996] S.C.R. 480 (S.C.C.) par. 17

[14] *R. v. Canadian Broadcasting Corp* [2010] O.J. No. 4615 (Ont. C. A. par25)

[28] In *Edmonton Journal v. Alberta (Attorney General)*[15] Cory, J. famously explained how freedom of expression "protects listeners as well as speakers:

> That is to say as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role. It is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples nor mothers or fathers house-bound with young children, would find it possible to attend court. Those who cannot attend rely in large measure upon the press to inform them about court proceedings -- the nature of the evidence that was called, the arguments presented, the comments made by the trial judge -- in order to know not only what rights they may have, but how their problems might be dealt with in court. 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] The media are the means by which the vast majority of Canadians "see the judicial process at work."

[30] Publicity serves important interests in the fair trial process. For example, in the context of publication bans connected to criminal proceedings, this interest includes the accused's interest in public scrutiny of the court process, and of the participants in the court process. (*Dagenais*, par. 87). Young persons dealt with under the *Youth Criminal Justice Act* have an interest in freedom of the press and the open court for the same reasons, and derive many of the same benefits, as adults involved in the criminal justice system.

[31] I cannot conclude, however, without pointing out that, notwithstanding the paramount and constitutional importance of the open court principle and freedom of the press, it is also the case that the public's right of access to the courts has never been unfettered. Bans on publication are made at preliminary inquiries and bail hearings. The identity of undercover officers and their methods of operation are protected. Publication bans may be found necessary to protect

[15] *Edmonton Journal*, supra, at par. 10

vulnerable individuals (*Dagenais*, par. 83; "*CBC 2011*", par. 19) [16]. Subject to some exceptions, child protection proceedings are closed and the privacy of litigants protected. National security hearings are closed.

[32] The youth court is an open court, open to the media. This fact was confirmed in 1983 when the Ontario Court of Appeal held that the requirement that juvenile trials under the *Juvenile Delinquents Act*[17] be held in camera was unconstitutional, because it conflicted with the guarantee of freedom of expression in s. 2(b) of the Charter. The right of free access by the public to the court trying juvenile matters was held to be an integral and implicit part of the *Charter* guarantee of freedom of opinion and expression, which includes freedom of the press: (*Re Southam Inc. and The Queen (No.1)).*[18] The recognition that the youth court is an open court is fundamental to the determination of this application.

The Privacy of Young Persons

[33] In this application it is argued that the "proper administration of justice" requires that the privacy of young persons be protected from media access and publication. Thus the second value that requires discussion in this application is the privacy of young persons. Privacy is a varied and wide-ranging concept. The elaboration of this concept for the purposes of the *Dagenais/Mentuck* test must begin with reference to the *Youth Criminal Justice Act.*

[34] As the Ontario Court of Appeal has pointed out, there is a premium placed on the privacy interests of all young persons involved in youth court proceedings[19]. The *Youth Criminal Justice Act* protects the privacy of young persons in many ways: by prohibiting publication of the names of young persons, or any other information related to them, if it would identify them as having been dealt with under the *Act*; by restricting or prohibiting access to youth records; and

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[16] *supra* footnote 16

[17] R.S.C. 1970, c. J-3

[18] (1983), 41 O.R. (2d) 113 (C.A.), at p. 119

[19] *S.L. v. N.B.,* [2005] O.J. No. 1411

by restricting disclosure of information in those records.[20] In contrast to the adult criminal justice system, subject to certain specified and regulated exceptions, a youth dealt with under the *Act* has his or her privacy maintained from the moment that police involvement commences, through the entire process of trial or resolution, sentencing, and archiving or destruction of records. In *S.L. v. N.B.*[21], Justice Doherty stated that similar protections in the predecessor legislation

> demonstrate beyond peradventure Parliament's intention to maintain tight control over access to records pertaining to young offender proceedings whether those records are made and kept by the court, the Crown, or the police. Generally speaking, access to those records is limited to circumstances where the efficient operation of the young offender system, or some other valid public interest is sufficiently strong to override the benefits of maintaining the privacy of young persons who have come into conflict with the law. ..
>
> Even where access is permitted, Parliament seeks to protect young persons' privacy interests by limiting dissemination of the information in the records even after access is granted. (pars. 42 - 43)

[35] The reason why parliament has erected these formidable barriers is explained in the *Act* itself, and in the jurisprudence.

[36] The long-term protection of the public is the objective of the *Youth Criminal Justice Act.* The Declaration of Principles at section 3 of the *Act* states this directly. Section 3(a)(ii) specifies that one of the means by which this objective is to be achieved is through the rehabilitation and reintegration into society of young persons who commit offences. Section 3 (1)(b)(iii) states that the youth justice system must emphasize enhanced procedural protection to ensure that young persons are treated fairly, and that their rights, including their right to privacy, are protected. Section 3(1)(d), states that young persons have “special guarantees” of their rights and freedoms in proceedings against them, By virtue of Section 3 (1)(b)(iii), one of the rights which enjoys this special guarantee is the right to privacy.

[37] The Declaration of Principles applies to the interpretation of the entire youth Criminal

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[20] ss. 110, 118 – 120 and 122 – 129

[21] Supra footnote 20, par. 42

Justice *Act*.[22] The sections which I have enumerated draw a connection between the means of achieving the objective of the *Youth Criminal Justice Act* - the long term protection of the public, the goal of rehabilitation and reintegration, the protection of privacy of young persons.

[38] The Supreme Court of Canada[23] and the Ontario Court of Appeal[24], have declared that the protection of privacy of young persons is inextricably connected to their rehabilitation. In D.B. the Supreme Court, referencing the Ontario and Quebec Courts of Appeal, recognized

> the impact of "stigmatizing and labeling" the young person, which can "damage" the offender's "developing self-image and his sense of self-worth" (para. 76).
>
> (R. v. D.B., *supra*, at par.86)

[39] In *D.B.*, Abella, J. states that this concern with the deleterious effect of labelling is grounded in an international consensus among scholars that publication "increases a youth's self-perception as an offender, disrupts the family's abilities to provide support, and negatively affects interaction with peers, teachers, and the surrounding community[25]" She points out that this concern with the harmful effects of stigma and labelling has found expression in international legal instruments:

> International instruments have also recognized the negative impact of such media attention on young people. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules") (adopted by General Assembly Resolution A/RES/40/33 on November 29, 1985) provide in rule 8 ("Protection of privacy") that "[t]he juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labeling" and declare that "[i]n principle, no information that may lead to the identification of a juvenile offender shall be published".
> (R. v. D.B., *supra*, at par.85)

[40] The concern to avoid labeling and stigmatization is essential to an understanding of why the protection of privacy is such an important value in the *Act*. However it is not the only

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[22] section 3(2)

[23] *R. v. D.B.*, [2008] S.C.J. No. 25); *F.N. (Re)*, [2000] S.C.J. No. 34;

[24] *Re Southam Inc. and The Queen* (1984), 48 O.R. (2d) 678 (H.C.); at p. 697, aff'd (1986), 53 O.R. (2d) 663 (C.A.), leave to appeal refused, [1986] 1 S.C.R. xiv); *S.L. v. N.B.*, [2005] O.J. No. 1411

[25] Nicholas Bala, Young Offenders Law (1997), at p. 215, cited in *R. v. D.B.*, supra at par. 84

explanation. The value of the privacy of young persons under the *Act* has deeper roots than exclusively pragmatic considerations would suggest. We must also look to the Charter, because the protection of privacy of young persons has undoubted constitutional significance.

[41] Privacy is recognized in Canadian constitutional jurisprudence as implicating liberty and security interests. In *Dyment*, the court stated that privacy is worthy of constitutional protection because it is "grounded in man's physical and moral autonomy," is "essential for the well-being of the individual," and is "at the heart of liberty in a modern state" (par. 17). These considerations apply equally if not more strongly in the case of young persons.[26]. Furthermore, the constitutional protection of privacy embraces the privacy of young persons, not only as an aspect of their rights under section 7 and 8 of the Charter, but by virtue of the presumption of their diminished moral culpability, which has been found to be a principle of fundamental justice under the *Charter*.

[42] In. *R. v. D.B.,* the Supreme Court held that "the principle that young people are entitled to a presumption of diminished moral culpability throughout any proceedings against them, including during sentencing" is a principle of fundamental justice under section 7 of the *Charter*. In *D.B.,* the Court addressed the onus cast on young persons to demonstrate why they remain entitled to the ongoing protection of a publication ban, when they are sentenced as adults under the *Act*. Abella, J. found that "lifting a ban on publication makes the young person vulnerable to greater psychological and social stress," and therefore significantly increases the severity of a sentence. She concluded that

> A publication ban is part of a young person's sentence (s. 75(4)). It is therefore subject to the same presumption as the rest of his or her sentence. Losing the protection of a publication ban renders the sentence more severe. The onus should therefore be, as with the imposition of an adult sentence, on the Crown to justify the enhanced severity, rather than on the youth to justify retaining the protection to which he or she is otherwise presumed to be entitled. The reversal of this onus too is a breach of s. 7.

[43] In this passage Abella, J. states that the publication ban is subject to the presumption of diminished moral culpability as a principle of fundamental justice under section 7 of the

[26] Even in a school environment the privacy of young persons is protected by the *Charter R.*. *v. A.M.*, [2008] 1 S.C.R. 569

Charter. The statutory ban on publication exists to protect the privacy of young persons. In my view, the decision in *D.B.* confirms the constitutional significance of the protections of privacy of young persons found in the *Youth Criminal Justice Act.*

[44] In addition, I agree with the submission of *amicus* that the protection of the privacy of young persons fosters respect for dignity, personal integrity and autonomy of the young person. This submission is consistent with the statement of the Supreme Court in *R. v. Dyment*[27], that informational privacy, which is at stake in this application,

> … is based on the notion of the dignity and integrity of the individual. As the Task Force put it (p. 13): "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit." (par. 22)

[45] The submission of *amicus* is also consistent with Article 40 of the *United Nations Convention on the Rights of the Child*, which is recognized in the preamble to the *Youth Criminal Justice Act*, and which provides that

> 1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
>
> 2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that: …
>
> (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
> …
> (vii) To have his or her privacy fully respected at all stages of the proceedings

[46] The *Convention on the Rights of the Child* has been described by the Supreme Court of Canada as the most universally accepted human rights instrument in history.[28]

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[27] [1988] S.C.J. No. 82 (S.C.C.)

[28] R. v. Sharpe, [2001] 1 S.C.R. 45 177 (S.C.C.)

[47] Finally, I wish to comment on pre-sentence reports in the context of this discussion of privacy. While pre-sentence reports are not entirely "private documents", they are comprised of the very private information of young people and their families. This information is, in a sense volunteered, and in a sense compelled by the state. There can be no doubt that the privacy of these reports touches upon the liberty and security interests of young persons. see *R. v. O'Connor*[29] where the Court stated that "Respect for individual privacy is an essential component of what it means to be "free,"' and that

> when a private document or record is revealed and the reasonable expectation of privacy therein is thereby displaced, the invasion is not with respect to the particular document or record in question. Rather, it is an invasion of the dignity and self-worth of the individual, who enjoys the right to privacy as an essential aspect of his or her liberty in a free and democratic society. (par. 119)

[48] In the result, I conclude that the protection of privacy of young persons dealt with under the *Youth Criminal Justice Act* is a legal value rooted in the privacy provisions of the *Youth Criminal Justice Act*, in the underlying policy of the *Act*, which embraces both pragmatic and principled considerations, in the human rights of young persons, as articulated in *Charter* jurisprudence and international instruments, and in the constitutionally protected legal rights of young persons under section 7 of the Charter.

The Analytical Framework

[49] Having identified the values which must be balanced in this application, I move to the analytical framework which must be applied. In *Dagenais,* the Court stressed that the analysis must begin with the principle that a hierarchical approach to rights, which places some rights over others, must be avoided. The "clash" model was rejected. As I have indicated, Charter principles require that a balance be achieved that fully respects the importance of both sets of rights or interests. (*Dagenais,* (par.72).

[50] In the case at bar, the privacy rights of the young persons appear to be conflict with the expressive rights of the media. The *Dagenais/Mentuck* analysis must be applied "in a manner

[29] [1995] 4 S.C.R. 411 113

that reflects the fact that two fundamental rights are in jeopardy," and that both are "matters of exceptional importance". The court must bear in mind the value of protecting the privacy of young persons in the youth justice system when there may be reasonably alternative measures available. It must thus ascertain whether any reasonably alternative measures exist which protect the right of the young persons to privacy, while impairing free expression to the least extent necessary. Also, when considering the proportionality of the deleterious impact of the ban on free expression in relation to its salutary effects, it will be necessary to bear in mind the fundamental importance of the privacy right, both to the young people and to society. (*Dagenais*, par. 97)

[51] The Supreme Court has also warned against applying the *Dagenais/Mentuck* test mechanistically. The weighing involved in the test is based on considerations that include the specific context of the case before the judge. (*CBC 2011*, par. 16). The test should be seen as flexible and contextual. (*Toronto Star, supra*, at par. 31)

The Evidence on the Hearing

[52] I turn then to a brief review of the evidence at the hearing.

[53] In this application the crown called an expert in youth justice and children's mental health, two probation officers and a youth court counsellor. *Amicus* called two of the three young persons affected, and the applicant called Mr. Bruser, the reporter. I will briefly review the evidence.

[54] The most important evidence on behalf of the respondents came from Dr. Alan Leschied. Dr. Leschied's a registered psychologist and a professor in the Faculty of education at the University of Western Ontario. He has testified as an expert on numerous occasions in various courts, has extensive clinical experience in the forensic assessment of young persons, and is a researcher and consultant to the provincial and federal governments in the area of youth justice policy and law.

[55] In addressing the question of why the protection of privacy of young persons is regarded by psychologists as important to promote rehabilitation, Dr. Leschied described three

concerns: “fragility of the self”, “secondary deviance”, and the relevance of stigmatization. “Fragility of self” refers to the fragile nature of the youth’s developing sense of self. Dr. Leschied stated that young persons, particularly those in conflict with the law, are impressionable, and susceptible to the views of others, at a time when they lack a fully formed set of personal values. They have poor judgment. Secondary deviance occurs when young persons are identified as anti-social, and, in an effort to fulfill the behavioural expectations of others, typically their primary peer group, they behave in ways that are consistent with expectations. This self-fulfilling prophecy begins when a young person is identified in his or her community in a specific and exceptional way, for example, as an offender, or a person with mental health or learning related problems. In Dr. Leschied’s words, “If you’re a young person that’s known to be of a certain inclination to commit crime, people will treat you as such, and this treatment increases your risk for re-committals of crime”. Stigmatization is relevant to rehabilitation because in the view of adolescents, being acknowledged as a person who requires formal assistance, treatment, counseling, or intervention, isa sign of weakness and vulnerability. This perception in turn becomes a barrier to treatment or services.

[56] Dr. Leschied expressed concern about the publication of the contents of a pre-sentence report in the media. He stated that the most intimate details about a young person are revealed in pre-sentence reports, including family conflict, divorce, domestic violence, involvement of child protection agencies, and mental health status. He stated that 40% of all youth in the youth justice system in Canada have an identified diagnosable mental health disorder. This is twice the rate of the general population. He stated that “Upwards of two-thirds of young people who come through the system have learning disabilities –average I.Q. but significant discrepancies in their ability to read, write, produce memory and things such as that.” These types of factors would inevitably be described in a pre-sentence report and publication would thus drastically increase the prospect of stigmatization and secondary deviance. It is apparent that in this evidence, Dr. Leschied’s opinions are amply expressed in the case law and the authorities I have noted.

[57] Dr. Leschied also expressed the view that allowing the media access to pre-sentence reports would adversely affect the quality of information provided to the probation officer by young persons and their families. In his view, the type of information young people and their families share with probation officers, other community agencies and schools, is dependent on

their trusting that the information is largely confidential. He concluded that, since probation officers require accurate information to make the most appropriate recommendations to the court, if the young person and others are not assured of confidentiality,

> I can tell you from 34 years of experience any young person will be perhaps less – not perhaps, less than forthcoming if their worry is that somebody else is going to find out who they are and what they do so the quality of their information may suffer as a result.
> …
> …So it's very hard to engage young people at a moment of crisis when they're before the court, decisions are being made and the stakes are high and you want to be able to develop that relationship to the greatest extent possible. I can tell you as a clinician it would be yet one more barrier that that information's going to come through…

[58] Dr. Leschied expressed concern that a judge may not make the decision that most fits the needs and circumstances of the young person because of the absence of important information in the pre-sentence report. He stated flatly that no one has studied the issue of whether young people would be more or less likely to participate in the pre-sentence report process if they knew some of the details could be published in the media, but "I can't find a country where there is not exclusion of the media to youth court records." I find Dr. Leschied's conclusions reasonable and I accept them.

[59] Dr. Leschied agreed that it was important that the community have information about youth sentencing. In this he aligns with the preamble to the *Youth Criminal Justice Act*, which states that "information about youth justice, youth crime and the effectiveness of measures taken to address youth crime should be publicly available."

[60] He stated that one of the best ways to rehabilitate young people was

> to enlist the support of the community, so we need an informed community, but we need to do that in a way that balances the need to know from the community with the need for privacy as young people and their families proceed through the youth court.

[61] He suggested that the one way to inform the community was not by talking about individual cases but by talking about the "general issues that we understand as a result of a case", and this can be done by reporting on social science research.

[62] The evidence of the two probation officers, who were not qualified as experts, was to

the same effect as Dr. Leschied's. Both believed based on their experience that if the young persons, their families, and others in the community were aware that the media could have access to their reports, their ability to obtain accurate information would suffer. They felt some might refuse to participate or would be less honest. For example, if the youth had a substance abuse problem, or a family member in trouble with the law which may be having a negative impact on him, and these facts are not disclosed, the probation officer would be unable to assess the full situation and arrange appropriate services. They stressed that although the court orders the report, the level of participation and co-operation by the youth and his family is voluntary.

[63] One probation officer described the potential contents of pre-sentence reports: personal and family background, course of mother's pregnancy, the youth's behaviour growing up, his behaviour now, peers, substance use, mental health issues, family trauma, sick family member, family history of criminal involvement, education and employment of the parents and the youth, school records, involvement with community agencies, child welfare history, school issues, counselling, religion and religious activities, recreational activities, plans, comments by collateral sources including counsellors, therapists, agencies, their personal information, their intimate details, their secrets, and their feelings about things that have happened in their families, as well as information from the victim.

[64] The two young people affected by this application spoke in dramatic, and I find sincere, terms about the difficulties media access to their reports would create. One said he was "desperate" to stop the access to his pre-sentence report and that it would be "tragic" if it were permitted. He said his report had a "lot of really personal information," and that he was unable to sleep at night worrying about what will happen if his information was in the newspapers. Both expressed concern about the effects on their families of publication, and that their parents would be humiliated, disgraced and ashamed. They both expressed fear of "dangerous people" who might decide to come after them or target their families. Both resisted the notion that their identities could be protected through redactions. Both young persons stated that they were trying very hard to change their lives, and that if the newspapers printed information about them, their rehabilitation would be set back.

[65] The reporter from the Toronto Star, David Bruser, testified on the hearing. He stated

that he wanted access to the records to further his research for an article or series of articles examining the sentencing regime under the *Youth Criminal Justice Act*. He also testified that access would enable him to enhance transparency and public oversight of the proceedings, and he considered this responsibility fundamental to his role as a journalist. He stated that he intended to comply with the restrictions on publication in the *Act*, and that the Star's editors and lawyers would review the articles to ensure compliance.

[66] Mr. Bruser stated that he attended the sentencing hearings of the young people in this application and heard the victim impact read out in its entirety in court and some of the pre-sentence reports. He stated that the limitations on access to the records restrict his ability to accurately report on what happened in the courtroom. He said that access would enable him to accurately describe what he heard to properly report on case, including the basis for a sentencing decision. He felt that in his role as a witness to the proceedings he wanted to give a full and fair picture. He stated that the "other side of the story" doesn't always come out in court proceedings, and that the "young person doesn't always have a lot of opportunity to speak." Mr. Bruser stated that it was a matter of public interest how the court deals with accused persons and those found guilty. He stated that

> The public's right to know is fundamental…
> In my time as a reporter I'm not sure that I've seen a topic that I've reported on that's more in the public interest than youth court.

[67] I was advised counsel for the applicant, and it is not disputed, that all Toronto Star staff are trained in the in the disclosure restrictions in the *Act*, that there is a policy manual containing this information, and that the Star has never been charged with publishing identifying information about a youth dealt with under the *Act*.

[68] I have reviewed the victim impact statement and the pre-sentence reports which were filed in this application. The pre-sentence reports contain the kinds of information described by the probation officers. The reports describe learning difficulties, mental health issues, involvement with child protection agencies, parental illness and instability in the lives of the young persons. The victim impact statement was read in court by the vice-principal of the school where one of the youths was arrested. The report describes particular nature of the school, trauma caused to the staff and students in the school by the offences and the arrest, changes that

were implemented as a result of the events, and the response of the surrounding community. The report stated that the circumstances surrounding the arrest have had a lasting negative impact on the school.

[69] None of the evidence was seriously disputed. I accept, as argued by the applicant, that the evidence of the probation officers with regard to the possible chilling impact of publication on the pre-sentence process was based on speculation.

[70] Since the victim impact statement was read out in its entirety in court, I need not address it in this application. The reporter had complete access and that aspect of the application is moot.

Application of the Dagenais/Mentuck Test in this Application

[71] I turn then to the application of the *Dagenais/Mentuck* test to the facts in this case. For convenience I repeat the test here: A publication ban should only be ordered when:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[72] The first branch of the test requires the court to consider whether the 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

[73] To assess the necessity of the order, the court must consider its objective. Because the presumption that the courts should be open and that reporting of their proceedings should be uncensored is so strong and so highly valued, the court will not find a ban necessary unless there is a risk to the proper administration of justice which is serious and well-grounded in the evidence. (*Mentuck, par. 39*).

[74] In this case, the objective of the order sought by *amicus* and the Crown is the protection of the privacy of the young persons involved. This objective, as I have endeavoured to demonstrate, is consonant with the objective of the *Youth Criminal Justice Act*, which is the legal context for this application.

[75] On the part of the young persons, the order is sought out of their professed fear of disclosure of their identities to former associates who might seek to harm them and their families, and a concern for the embarrassment that they and their families will suffer, and their fear that their rehabilitation will be harmed. Their fear, which I accept as sincere, is based on speculation, and I do not rely on it as a basis for supporting the limitation. Avoiding embarrassment is an advantage that accrues to young people and their families by virtue of the privacy provisions of the *Act.* In the adult context embarrassment has been rejected as a basis for a publication ban. In the youth context, given the immaturity and dependency of young people, embarrassment has deeper implications. The stress occasioned by publication was recognized in *D.B.* as rendering a sentence more severe. Embarrassment may be seen as one factor in the labelling dynamic articulated by Dr. Leschied.

[76] On the part of *amicus*, and the provincial crown, the order is sought because the protection of privacy of these records is necessary to conform with the objectives of the *Act*, and the special guarantee of privacy to which young people are entitled under the *Act*, and to promote the rehabilitation of young persons. I am satisfied that labelling is a serious issue, and that publication has been found to implicate secondary deviance. The psychological explanation for the seriousness of the risk to privacy in this application has been recognized in the case law for decades.[30] The risks articulated by Dr. Leschied are neither remote nor speculative, and the evidence is convincing.

[77] Amicus and the Crown argue that the proper administration of justice in this case embraces the protection of privacy of young people dealt with under the Act, and I so find. The protection of privacy is a cornerstone of the *Act*, and, as I have argued, is recognized as having a critical relationship to rehabilitation which promotes the long-term protection of society, the

[30] e.g. *Re Southam Inc. and The Queen* , supra. Footnote 23

stated objective of the *Act*. This pragmatic function is augmented by what I have found to be the constitutional dimension to the young persons' privacy interests, and the recognition of privacy as a human right of children.

[78] Having been satisfied by the evidence that a serious risk exists, I turn to the question of reasonably alternative measures. When examining alternative measures, the jurisprudence directs that both rights at issue be considered, in order to ensure that any alternative measures that impair free expression to a lesser degree than a publication ban, also reasonably protect the other interests engaged. Having considered this question I find there are no reasonably alternative measures available that would address the risk without circumscribing the expressive rights of the applicant beyond recognition. I cannot find a means of redaction or judicial summary that would leave the essential content of the reports intact, while satisfying the need for accurate reporting and the public's desire or "right to know." At the same time, to permit access to the reports with minimal redaction would fail to ameliorate the risk to the privacy interests of the young persons.

[79] Accordingly I find that refusing access to the presentence reports is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk.

[80] I now turn to the second part of the *Dagenais/ Mentuck* analysis, which requires that the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[81] The denial of access has both salutary and deleterious effects on the rights and interests of the parties and the public. What is sought to be concealed in this case are intimate details of the lives of these young persons and their families. Denying access to the report has the obvious salutary effects for the young person and his family which I have already described. Furthermore, a considerable amount of information in the reports is provided by community sources. For these persons, many of whom are bound by their own legislated or professional requirements of confidentiality, denial of access is also salutary.

[82] There is also a salutary effect on the right of the young persons to a fair trial. The probation officer obtains information exclusively for the purposes of assisting the court with sentencing. The information should be as ample and as accurate as possible to enable the court to impose a sentence which addresses proportionate accountability, and rehabilitation, and which is informed by an understanding of the underlying causes of the offending. A more complete report enables the court to make a fairer decision on sentencing. It is reasonable to suppose that that the information in the presentence report may be more complete because the participants will be less fearful of the consequences of publicity[31]. This is a salutary effect on the fair trial right.

[83] The ban also has a salutary effect on the efficacy of the administration of justice, since, as the court observed in *Dagenais*, publication bans may "maximize the chances of rehabilitation for "young offenders"(*Dagenais*, par 83).

[84] The ban also has important deleterious effects, which I acknowledge, on the right to a fair and public trial, and on freedom of the press. Public scrutiny of the sentencing process is intended to ensure fairness. Denial of access may have a deleterious effect on trial fairness because the public is less able to scrutinize the sentencing process. Denial of access to the records has deleterious effects on the right to a public trial. The trial is less public because the public has less information about the reasons behind the sentence, which may be related to the reports, and which may not be expressed by the judge. Although the public is able to hear the arguments and oral evidence on sentencing, and the reasons the judge gives in open court, the judgment may reveal only the most important, but not the entirety, of the basis for the sentence.

[85] The right of the public, through the press, to scrutinize the workings of the court is dependent on the information revealed in court. As Mr. Bruser said, the public may only see one side of the story. Because the reporter cannot access the records, he or she may be unaware that strong mitigating factors have been detailed in the pre-sentence report, or that a victim has expressed sympathy for a young person in a victim impact statement. The converse may also be true. The public may not be able to make an informed judgment as a result. The public may feel that a sentence is too lenient or too severe and lose confidence in the justice system through

[31] *Mentuck*, supra, par. 39

misunderstanding. The efficacy of the justice system is thereby negatively affected. These are compelling arguments.

[86] Nevertheless, the deleterious effects of the limitation on access in this case should not be over-stated. It is my view that the rights of the press have been impaired no more than is necessary in this case. Public access and public accountability have been preserved. Notwithstanding the limits to accessibility under the *Act*, in this case the reporter was free to be present in the courtroom, to observe the proceedings of the court, and to report on all aspects of the court proceedings. He observed and was free to comment on, the arguments of counsel. He was free to interview whomever he chose to outside the courtroom. He was granted access to, and did in fact, photograph trial exhibits. He had access to the entire victim impact statement which was read out in court. It was open to the applicant to apply for transcripts to ensure the accuracy of the reporter's notes, which I would have granted. The judges in each case gave reasons for their decisions, which he was free to report. Reports of judges' decisions are also available through on-line legal reporting services. No part of any public proceeding was closed to the reporter. Considering these factors, I find that negative effects on freedom of the press in this instance are outweighed by the salutary effects that I have described.

[87] The public interest in freedom of the press is strong. In *A.G. (Nova Scotia) v. MacIntyre*[32], Dickson J. stated that "At every stage the rule should be one of public accessibility and concomitant judicial accountability" and "curtailment of public accessibility can only be justified where there is present the need to protect social values of "superordinate importance." However, the public interest in the protection of privacy of young persons dealt with under the *Youth Criminal Justice Act* is also extraordinarily strong. That interest was described, in a in a proceeding somewhat analogous to this application under the *Young Offenders Act*,[33] as a matter of "superordinate importance". The public has always understood the need to protect minors from the harm of publicity.

[88] Limitations on access require a balancing of interests and a respect for the importance

[32] [1982] 1 S.C.R. 175 at p. 184, 186-7

[33] *Re Southam Inc. and The Queen*, supra, footnote 23, par. 77

of both values engaged. In this application, in my view, matters of exceptional importance are engaged on both sides. The nature of the order I have found necessary in this case is a proportionate response. At the end of my consideration of the difficult questions raised in this application, I find that the salutary effects of denying access to the records, outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice. Accordingly it is not desirable in the interest of the proper administration of justice that access be granted.The application is dismissed.

[89] Amicus also argued that where youth proceedings are concerned, the onus should shift in *DagenaisMentuck* applications from the person who seeks to limit publication to the person who seeks access. In light of my ruling in this case I do not find it necessary to rule on that question.

[90] I wish to thank all counsel for their assistance to the court in this matter.

Released: January 11, 2012.

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Justice Marion Cohen