LITIGATION - CANADA

The ineffectiveness of publication bans

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Introduction

The widespread adoption of social media in the 21st century provides for the almost instantaneous dissemination of news and information to the public. While historically such information was published or broadcasted only after a rigorous screening process by an editor or producer, social media allows live, unfiltered and user-generated content to infiltrate the public domain. For example, the Osama bin Laden raid in 2011 was live-tweeted by an individual in Abbottabad, Pakistan more than 10 hours before any North American news outlet could verify its accuracy or report the story.(1) While the utility of social media is clear, such uncontrolled information poses a significant threat to privacy and confidentiality.

The Ontario judiciary has begun grappling with the consequences of social media and its impact on trial fairness. While the tension between freedom of expression and the right to a fair trial has often been the subject of litigation, the prevalence of social media has placed the courts in the unenviable position of having to find an appropriate remedy that balances these interests effectively. Unfortunately, previous remedies – such as confidentiality orders – have become increasingly ineffective. Ontario courts have determined that the effectiveness of discretionary publication bans has been significantly narrowed as a result of new media, and they have therefore implicitly designated them as ineffective. As such, it remains to be seen how Ontario courts intend to balance a litigant's right to a fair trial with the public's right to freedom of expression. Seemingly, if historically a court would have ordered a publication ban, a more stringent confidentiality order is now required to achieve the same effect.

This update provides a brief overview of common law confidentiality orders in civil proceedings and delineates why discretionary publication bans are no longer acceptable.

Confidentiality orders

Common law confidentiality orders are discretionary court orders that are granted in limited circumstances pursuant to Section 135 of the Courts of Justice Act.(2) Generally, litigants request such orders to protect:

- trial fairness;
- the administration of justice;
- confidential business information; or
- personal privacy.(3)

The courts can order a wide variety of discretionary confidentiality orders as they see fit, such as sealing orders, publication bans and *in camera* (ie, private) hearings. In making such an order, the court must balance the competing interests of the litigant with the public's interest in maintaining openness in judicial proceedings pursuant to Section 2(b) of the Charter of Rights and Freedoms.

Section 2(b) of the charter seeks to protect the "freedom of thought, belief, opinion and expression, including the freedom of the press and other media of communication". In *Canadian Broadcasting Corp v New Brunswick (Attorney General)* Justice La Forest for the Supreme Court recognised that the openness of court proceedings is critical to the protection of these rights:

> *"The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place...*
>
> *That the right of the public to information relating to court proceedings, and the corollary right to put forward opinions pertaining to the courts, depend on the freedom of the press to transmit this information is fundamental to an understanding of the importance of that freedom. The full and fair discussion of public institutions, which is vital to any democracy, is the* raison d'être *of the s. 2(b) guarantees. Debate in the public domain is predicated on an informed public, which is in turn reliant upon a free and vigorous press. The public's entitlement to be informed imposes on the media the responsibility to inform fairly and accurately. This responsibility is especially grave given that the freedom of the press is, and must be, largely unfettered."*(4)

Confidentiality orders are clearly an affront to the deeply rooted principles contained in Section 2(b) of the Charter of Rights and Freedoms. Nonetheless, as with any charter-protected right, these rights are not absolute and may be infringed on where the salutary effects of doing so outweigh the deleterious effects on the rights and interests of the parties and the public. In *Dagenais v Canadian Broadcasting Corp*,(5) and subsequently *R v Mentuck*,(6) the Supreme Court formulated the test (referred to as the '*Dagenais/Mentuck*' test) for when a discretionary confidentiality order may be ordered, holding that a publication ban should be ordered only when:

- such an order is necessary to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not do so; and
- 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.(7)

When applying this test, there must be a sufficient evidentiary basis to allow the judge to assess the application for a confidentiality order, otherwise no such order will be granted.(8) While the test is applicable to confidentiality orders generally,(9) the remainder of this update is limited to an analysis of publication bans.

When are publication bans necessary?

When applying the *Dagenais/Mentuck* test the court must carry out an inherently fact-specific analysis. A publication ban will be necessary when there is a real and substantial risk to the administration of justice without it.

To demonstrate necessity, a litigant generally must prove that:

- the publication ban will be effective; and
- there is no alternative remedy.

In *Dagenais* Chief Justice Lamer provided that:

> *"The efficacy of some publication bans fit into the analytical approach under the common law rule... it is necessary to consider how efficacious a publication ban will be before deciding whether a ban is necessary, whether alternative measures would be equally successful at controlling the risk of trial unfairness."*(10)

When considering the effectiveness of publication bans in Ontario, a review of Ontario jurisprudence

over the past 19 years depicts an inversely proportional relationship between the efficacy of publication bans and the rise in social media and other technological advancements.

In 1994 Lamer provided in *Dagenais* that:

> *"Recent technological advances have brought with them considerable difficulties for those who seek to enforce bans. The efficacy of bans has been reduced by the growth of interprovincial and international television and radio broadcasts available through cable television, satellite dishes, and shortwave radios. It has also been reduced by the advent of information exchanges available through computer networks. In this global electronic age, meaningfully restricting the flow of information is becoming increasingly difficult. Therefore, the actual effect of bans on jury impartiality is substantially diminishing."*(11)

In 2008 Justice Sproat for the Ontario Superior Court in *R v Y(N)* further developed Lamer's proposition:

> *"In the 1994* Dagenais *decision Chief Justice Lamer made the point that recent technological advances made it increasingly difficult to meaningfully restrict the flow of information. This difficulty has markedly increased since 1994. The starting point, therefore, is that in 2008 no publication ban is likely to be completely effective."*(12)

Also in 2008 Justice Nordheimer for the Ontario Superior Court observed in *R v S(J)* that:

> *"[The] concern [that publication bans are likely ineffective] has only been exacerbated in the almost fifteen years since* Dagenais *was decided. We can now add to the list of holes through which information can slip the realities of blogs, podcasts, satellite radio, specialty television channels, websites such as "YouTube" and "Facebook", and the ever increasing number of personal websites. Most, if not all, of these outlets lie outside any effective control by this court."*(13)

Most recently, in 2013, Justice Durno for the Ontario Superior Court summarised in *R v CTV* the jurisprudence with respect to the ineffectiveness of publication bans:

> *"In the global electronic age, placing meaningful restrictions on the flow of information is becoming increasingly difficult, substantially diminishing the actual effect of the bans.* Dagenais, *at para. 89. As Sproat J. held in* R. v. Y. (N.), *[2008] O.J. No. 1217 (Ont. S.C.J.), at para. 51, 'The starting point, therefore, is that in 2008 no publication ban is likely to be completely effective'. In 2013-14, the challenges posed from the global electronic age are even more pronounced than in 2008. How effective a ban would be is a relevant consideration in determining whether to impose a ban.* Dagenais, *at para. 90. However, while it is possible that a ban will have no influence on trial fairness, such a case would be rare.* Dagenais, *at para. 91."*(14)

Given that the Ontario courts have clearly determined that publication bans are now almost always ineffective and unenforceable, it is difficult to envision a situation where a publication ban can be considered a necessary order.

In addition to the Ontario courts' undermining of the effectiveness of publication bans, the Canadian government has done the same by virtue of legislative amendment. In 2014 the federal government amended the Elections Act to remove the restriction on transmitting election results in one electoral district to the public in another district where polling stations are yet to close.(15) When announcing the amendment, it emphasised that the publication ban on revealing election results was unenforceable given the prevalence of social media – in a three-hour period during the previous election in 2011, more than 4,800 tweets had breached the publication ban.(16)

Ultimately, information on social media can be disclosed anonymously and untraceably, thereby defeating the enforceability of any publication ban.

Are *in camera* hearings inevitable?

As publication bans have unfortunately become ineffective, it seems that where a court may have previously ordered a publication ban, the only equally effective alternative in today's society may be an *in camera* proceeding. An *in camera* proceeding is completely closed to the public and is the most intrusive restriction on the open-court principle enumerated in Section 2(b) of the Charter of Rights and Freedoms. Nonetheless, where a court concludes that a publication ban would have been appropriate but for the prevalence of social media, there appears to be no confidentiality order available, other than an *in camera* hearing, that is as effective and less intrusive. Should the use of *in camera* proceedings increase, the scope of the charter-protected right to the freedom of expression will correspondingly decrease. If the public loses its ability to scrutinise the trial process, its confidence in the administration of justice will be significantly jeopardised. Ultimately, although confidentiality orders are rare, social media has presented the courts with a significant threat to the proper administration of justice.

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Endnotes

(1) Doug Gross, "Twitter user unknowingly reported bin Laden attack", CNN News, May 2 2011.

(2) Section 135(2) of the Courts of Justice Act empowers courts to exclude the public from a hearing where the possibility of serious harm or injustice to any person justifies a departure from the general principle that court hearings should be open to the public. Section 135(3) provides that where a proceeding is heard in the absence of the public, disclosure of information relating to the proceeding is not in contempt of court unless the court expressly prohibited the disclosure of the information.

(3) James Rossiter, *Law of Publication Bans, Private Hearings and Sealing Orders*, Rel-2 (Toronto: Carswell, 2015) at 2-1.

(4) (1996) 3 SCR 480, 1996 CarswellNB 462 at paragraph 23.

(5) (1994) 3 SCR 835, 1994 CarswellOnt 112 (*Dagenais*).

(6) 2001 SCC 76, 3 SCR 442 (*Mentuck*).

(7) *Mentuck* at paragraph 32; *Dagenais* at paragraph 77.

(8) *Dagenais* at paragraph 72.

(9) *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, 2 SCR 522.

(10) *Dagenais, supra* note 4 at paragraph 94.

(11) *Ibid* at paragraph 93.

(12) 2008 CarswellOnt1705 at paragraph 51, 77 WCB (2d) 279.

(13) (2008) 236 CCC (3d) 519, 2008 CarswellOnt 6310 at paragraph 60.

(14) 2013 ONSC 5779, 2013 CarswellOnt 13556 at paragraph 32.

(15) Elections Act, SC 2000, Clause 9, Section 329 (Repealed, 2014, Clause 12, Section 73).

(16) Misty Harris, "Twitterverse rebels flout Elections Canada ban" *Vancouver Sun*, January 5 2011.