PRACTICE DIRECTION – APPLICATIONS FOR DISCRETIONARY PUBLICATION BANS (PC Rule 2)

Applicable Provincial Court Rule

Applications are governed by Rule 2 of the Provincial Court Rules. This Rule, and Rule 3 – Service of Documents, must be followed in preparing an application for a discretionary ban on publication.

Guiding Principles

The leading authority on discretionary publication bans are the Supreme Court of Canada decisions in *R. v. Dagenais, [1994] S.C.J. No. 104 and R. v. Mentuck, [2001] S.C.J. No. 73*.

Section 2 of the *Canadian Charter of Rights and Freedoms* guarantees freedom of communication and expression. The administration of justice operates on the open courts principle. The *Degenais/Mentuck* test applies to "all discretionary orders that limit freedom of expression and freedom of the press in relation to legal proceedings." *(Toronto Star Newspapers Ltd. v. Ontario, [2005] S.C.J. No. 41)*

Where the rights to be balanced are fair trial rights and freedom of expression, the *Degenais* test applies:

> 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
>
> The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. (*Degenais, paragraph 73*)

Where there are broader interests in issue, the test formulated in *Mentuck* is applicable:

> 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 reasonable alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects on the rights and interest 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. (*Mentuck, paragraphs 32 and 33*)

The party seeking the publication ban bears the onus of justifying the order being sought. A sufficient evidentiary basis must be established.

In *Degenais* the Supreme Court of Canada held that "motions for publication bans made in the context of criminal proceedings are criminal in nature" and therefore governed by the applicable provincial court rules and relevant case law.

Degenais and *Mentuck* contemplate notice being given to the media when an application is made for a discretionary publication ban.

Practice Direction

1. A party who makes an application for a discretionary publication ban on the evidence to be given or that has been given must give reasonable notice to representatives of the media, unless the judge before whom the application has been made orders otherwise.

2. Unless otherwise ordered, notice to the media representatives shall be given by filling in and submitting the electronic notice of an application for a publication ban on the Nova Scotia Courts' website: http://www.courts.ns.ca (click on the Media Information tab on the left under Resources and then scroll down to Publication Bans and click on Notice to the Bar and then

click on Notify Media of Publication Ban Application and then, How To – Publication Ban Notification Service)

3. The Provincial Court will not have jurisdiction over applications for bans on publication brought in relation to the fair trial rights of accused persons who are not before the Provincial Court. For example, where the targeted evidence is being heard in a trial in the Provincial Court and the applicant for the publication ban has been committed to trial in the Supreme Court, the application to ban publication of the Provincial Court trial evidence must be brought in the Supreme Court. *(see, for example: R. v. B.T., [2012] N.S.J. No. 363 (P.C.))* As explained in *Degenais*:

> **16** …To seek a ban under a judge's common law or legislated discretionary authority, the Crown and/or the accused should ask for a ban pursuant to that authority. This request should be made to the trial judge (if one has been appointed) or to a judge in the court at the level the case will be heard (if the level of court can be established definitively by reference to statutory provisions such as ss. 468, 469, 553, 555, 798 of the Criminal Code, R.S.C., 1985, c. C-46, and s. 5 of the Young Offenders Act, R.S.C., 1985, c. Y-1). If the level of court has not been established and cannot be established definitively by reference to statutory provisions, then the request should be made to a superior court judge (i.e., it should be made to the highest court that could hear the case, in order to avoid later having a superior court judge bound by an order made by a provincial court judge)…