



**SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

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From:	Julia Bryan	Date:	May 3, 2006
Re:	File #55/06	Pages	11
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Please find attached the Reasons for Judgment with regards to file #55/06.

Thank you.

.....

K.B. (by his litigation guardian R.N.)
and T.M. (by his litigation guardian P.A.)

Applicants

- and -

TORONTO DISTRICT SCHOOL BOARD, et al.
Respondents

(Short title of proceeding)

Court File Nos.: 06-CV-304058 and 55/06

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

*May 3/06
In accordance with written reasons released this day,
this motion is dismissed pertaining to a sealing order and
allowed as to other relief requested. No costs.
Approved, J*

AMENDED MOTION RECORD
of the respondents on the motion returnable
April 28, 2006

Name, address and telephone number of solicitor or party

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COURT FILE NOS.: 55/06
and 06-CV-304058
DATE: 20060503

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

B E T W E E N:

K.B. (by his litigation guardian R.N.) and
T.M. (by his litigation guardian P.A.)

Applicants/Responding Parties

- and -

TORONTO DISTRICT SCHOOL BOARD
and LOUIE PAPATHANASAKIS,
PRINCIPAL, EMERY COLLEGIATE
INSTITUTE

Respondents/Moving Parties

INTERVENERS

TORONTO STAR NEWSPAPERS LIMITED
THE ALLEGED VICTIM AND WITNESSES
C.D. ALLEGED PARTICIPANT
JUSTICE FOR CHILDREN AND YOUTH

)
)
) Lora M. Patton for the responding party,
) K.B.
)
) Selwyn Pieters for the respondent party,
) T.M.
)
) Thomas McRae and Jennifer Trépanier for
) the moving parties
)
) Tony S.K. Wong for Toronto Star
)
) Craig A. Lewis for The Alleged Victim
) and Witnesses
)
) Donald F. McLeod for C.D. Alleged
) Participant
)
) Lee Ann Chapman for Justice for Children
) and Youth
)
) **HEARD at Toronto:** April 28, 2006

CHAPNIK J.

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[1] In December 2005, an alleged violent incident took place at Emery Collegiate Institute which resulted in *Youth Criminal Justice Act* proceedings being brought against four students of the school, two of whom are applicants in this proceeding.

[2] The applicants seek judicial review of the respondents' decisions to exclude and then transfer them from the school. The pleadings and evidence on the application make reference to the four students, as well as to the victim and witnesses to the alleged incident and the circumstances surrounding it.

[3] Initially, a motion was brought by the respondents to have the judicial review hearing conducted as an *in camera* proceeding, as a result of the respondents' concerns relating to the provisions of the *Education Act*, R.S.O. 1990, c.E.2, and the *Youth Criminal Justice Act*, S.C. 2002, c.1 (the "YCJA"). Subsequently, the respondents withdrew their application to bar the public from the courtroom and to have a publication ban imposed.

[4] However, on February 1, 2006, by order of Perell J. made on consent of all parties, the court's public record of this matter was ordered sealed subject to the exemption of permitting the parties and the Attorneys General of Ontario and Canada to access and use the information in the record for the purpose of the application. Perell J. made orders substituting all applicants' names with their respective initials, amending the style of cause accordingly, and sealing the court's public record in its entirety until the hearing of this application on its merits.

[5] The said order has been continued by further orders of the court pending the release of these reasons.

[6] In this motion, the respondents seek orders continuing the sealing of the court's public record, requiring that no student be referred to in oral argument by name or actual initials but rather by pseudonymous initials, and banning the publication of the name and any information that would tend to identify a student referred to in oral argument.

[7] On February 27, 2006, Epstein J. granted the Canadian Foundation for Children, Youth and the Law ("Justice for Children") leave to intervene on terms that preserved the confidentiality of the evidentiary record.

[8] The alleged victim and witnesses who are students at the school have consented, through counsel, to their information being provided in a redacted version with non-identifying initials, to Justice for Children, the Ontario Human Rights Commission, the Toronto Police Services Board and certain named officers. They specifically do not consent to the Toronto Star's having access to the court file. Further, while they consent to have the matter proceed in an open forum, provided they are referred to by arbitrary initials, they have requested that the court record be sealed from the general public.

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[9] By letters dated April 13, 2006, they set out the respondents' position as follows:

...these individuals have indicated that they still fear for their safety and it is their unshakable position that no mention shall be made of their names or their actual initials. Furthermore, they want the court record to be sealed from the public...

With respect to excluding the public from the hearing of the application, it is more important to them that their identity is protected and thus, provided their names or initials are not used, they do not care about the public being excluded. Also, they do not have a particularly strong interest regarding a publication ban provided that the limitations on disclosure as contained in the *Youth Criminal Justice Act* and the *Education Act* are observed.

[10] Further, by letter dated April 20, 2006, they stated the following:

... provided that the materials in the file are properly redacted to remove any and all names, as well as anonymizing their names and initials, they are content to allow the interveners, with the exception of the Toronto Star, access to the court file.

However, they still maintain that they do not wish to have this court file available to the general public.

[11] The applicants and at least one of the other students involved in the alleged incident have waived their right to privacy and consented to the release of their student records to the public.

[12] At the outset of the proceedings before me, Toronto Star Newspapers Limited (the "Toronto Star") brought a motion for leave to intervene and, if granted, to make submissions opposing the granting of the relief sought by the respondents, and in particular, the request for an order sealing the court file. Leave was granted and the Toronto Star was given full rights to intervene and make submissions at the hearing of the motion.

[13] I am advised that there are no cases considering the provisions of the *Education Act* and the *YCJA* in the context of court proceedings where a sealing order has been requested by a party.

The Position of the Parties

[14] The respondents (as well as the victim and witnesses) contend that the sealing order and other relief should be granted, particularly in light of the provisions of the *Education Act* pertaining to a student's records and the restrictions on publication contained in the *YCJA*.

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[15] The applicants and the interveners, the Toronto Star and Justice for Children, take the position that the respondents have not discharged the onus of justifying a confidentiality order in this case. They argue that the court file should be open, with the usual proviso that the names of the applicants, witnesses and victim who are under 18 years of age "shall not be published".

The Statutory Framework

(a) *The Education Act*

[16] One of the duties imposed on a principal of a school is to collect information for inclusion in a record for each pupil enrolled in the school and to "establish, maintain, retain, transfer and dispose of the record." (s.265(1)(d))

[17] Pursuant to s. 266(2), an Ontario student record (known as an OSR) is "privileged for the information and use of supervisory officers and the principal and teachers of the school for the improvement of instruction of the pupil."

[18] Moreover, subject to limited exceptions, the OSR "is not available to any other person" and is "not admissible in evidence for any purpose in any trial, inquest, inquiry, examination, hearing or other proceeding," without the written permission of the parent or guardian of the pupil or, when the pupil is an adult, the written permission of the pupil.

[19] Section 266(9) provides that, except where the OSR is introduced as provided in s. 266, no person shall be required in any trial or other proceeding to give evidence in respect of the content of the record.

[20] Section 266(10) provides as follows:

266 (10) Except as permitted under this section, every person shall preserve *secrecy* in respect of the content of a record that comes to the person's knowledge in the course of his or her duties or employment, and no such person shall communicate any such knowledge to any other person except,

- (a) as may be required in the performance of his or her duties; or
- (b) with the written consent of the parent or guardian of the pupil where the pupil is a minor; or
- (c) with the written consent of the pupil where the pupil is an adult.

[Emphasis added]

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(b) *The Youth Criminal Justice Act*

[21] The *YCJA* prohibits the publication of the identity of persons charged under the *YCJA* or victims of or witnesses to *YCJA* offences or other information that would lead to the identification of a person charged, victims or witnesses. Section 110(1) reads:

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.

[22] Pursuant to s. 111(1), subject to the 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."

[23] Information that would serve to identify a child or young person as a victim or witness may, however, be published after he or she attains the age of 18 years or with consent of his or her parents. (s. 111(2))

Analysis

[24] This motion raises issues of public importance in that it involves young persons under the age of eighteen, a publicly funded institution, and statutory and constitutionally protected rights.

[25] The respondents rely on the above provisions of the *Education Act* and the *YCJA* to support their motion to seal the documents and the information contained therein. By analogy, they note that s. 266(2.1) of the *Education Act* makes it plain that this was the intention of the Legislature, since an express exemption was necessary to permit the principal to provide basic information about a pupil, such as name, address and birth date, to the medical officer of health.

[26] Moreover, though there is no regulation governing OSRs, a Ministry of Education Guideline confirms that privilege; and where there are restrictions on the use of the information contained in an OSR, the only exception is for the collection of information conducive to the improvement of the instruction of the student.

[27] The specific information and documents required in the OSR include:

- The full name, grades and birth date of the student
- The student's address and home telephone number
- The name of each school the student attended
- The student's report card which includes the student's attendance record; and

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- A Violent Incident Form.

The Violent Incident Form is a product of the Ministry's *Violence-Free Schools Policy, 1994*; and is required where a violent incident occurs in a school. This policy pertains not only to the perpetrators or violence but also to the victims and witnesses, and it speaks of their safety, need for support and ensuring confidentiality. As stated in the introduction to the Framework for School Boards' Violence-Prevention Policies, "[v]iolence has a contaminating effect. It affects not only the victim and the perpetrator, but also friends and families of both, witnesses, the school, and the broader community".

[28] Though no formal Violent Incident Form was prepared in this case, the incident was promptly recorded in the students' files and hence, the court record. I agree with the respondents that the information contained therein, attracts the same privilege and restrictions in use as any similar information ordinarily contained in a formal OSR.

[29] According to the respondents, since the victim and witnesses have consented to the sealing order sought by the respondents, no broader order should be made without their consent.

[30] I am aware that, given the specific prohibition on publication, courts have held, under provisions of this type in young offenders' legislation that it was appropriate for hearings concerning student discipline or other education-related matters to be held *in camera* or for the court file to be sealed. See, for example, *F.G. v. Scarborough (City) Board of Education*, [1994] O.J. No.240 (Div.Ct.).

[31] Indeed, in this case, the parties' suspension appeals will be heard *in camera*.

[32] However, that poses a different situation than the one here, where the applicants have brought an application for judicial review of certain decisions and the respondents seek an order sealing the court's public record in its entirety, with limited exceptions.

[33] In advancing the interests of the press and the public, the Toronto Star relied on the well settled principle of open courts in Canada, under the common law and the *Charter*. See, for example, *R. v. Toronto Star Newspapers Limited* (2003), 67 O.R. (3d) 577 (C.A.); and *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 at 496.

[34] The Supreme Court of Canada in two decisions: *Dagenais v. C.B.C.*, [1994] 3 S.C.R. 835 and *R. v. Mentuck*, [2001] 3 S.C.R. 442 (at para. 32), established a two-pronged test to be satisfied by a party seeking to limit the principle of open courts:

- (a) that 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) 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

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right to free expression, the right of the accused to a fair and public trial, and the efficacy to the administration of justice.

While the test arose in the context of publication ban applications, it has been extended to apply to all discretionary orders that seek to limit freedom of the press during judicial proceedings. *Vancouver Sun (The)*, [2004] 2 S.C.R. 332 at para.31.

[35] The first prong of the *Dagenais/Mentuck* test requires that the moving party show not only that the order limiting openness is necessary to prevent a serious risk to the administration of justice, but also proof that the order sought is as narrowly circumscribed as possible and there are no other effective means available to achieve that objective. The respondents have not satisfied that onus in this case.

[36] In my view, although given the statutory imperative, sealing of information from pupil records contained in the court file may be justified, under the *Dagenais/Mentuck* test, a less intrusive and reasonable alternative is available, that being the editing of the record removing identifying information of the victim and witnesses such as to render the information therein anonymous. In that regard, I make the following observations and findings:

1. While the *Education Act* creates a privilege and obligations of secrecy with respect to “pupil records”, once that information becomes part of the public record, it is subject to the common law and the constitutional principle of open courts.
2. Once the name and identifying information with respect to a pupil is removed from the OSR, the anonymous information being disclosed is consistent with the objectives of the *Education Act*.
3. In this case, though the victim and witnesses have indicated through counsel, that “they still fear for their safety,” no particulars as to the underlying basis for that fear were provided; and accordingly, the risk is speculative in nature.
4. The applicants K.B. and J.M. have consented to the release of their pupil records. Moreover, they have access to the entire court file and, according to counsel for Justice for Children, the identity of the victim and witnesses may be generally known, in any event.
5. While sections 110 and 111 of the *YCJA* represent a statutory exception to the presumption of openness in court proceedings, they do not preclude public access to the information in the file. These provisions only restrict publication of the names and identifying information relating to the accused, victim and witnesses. The *Act* does not require that the proceedings involving young persons be held *in camera*, or that the names of the accused, witnesses or victims not be spoken in the course of the proceeding.

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Conclusion

[37] In summary, I find that disclosure of anonymous information in this case would not be contrary to the *Education Act* or the *YCJA*.

[38] The courts have stressed the heavy evidentiary burden on the party seeking to limit the principle of open courts. The risk must be real and substantial, that is, it must be a risk, the reality of which is well grounded in the evidence. That is not the case here.

[39] More importantly, there are reasonably available, alternative measures to a complete sealing order that are less violative of freedom of expression. It is, therefore, not necessary to seal the entire court file to prevent serious risk to the administration of justice.

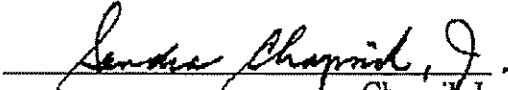
[40] Accordingly, the application of the respondents is dismissed in part. The sealing order imposed by the order of Perell J., dated February 1, 2006, and continued by order of Wilson J., dated April 21, 2006, is hereby rescinded. The court file is to be open to the media and the public subject to its being edited to remove the names of the accused, the victim and the witnesses and any identifying information relating to them. For further clarification, the media can fully report on the evidence of witnesses or refer to exhibits so long as such a report does not violate sections 110 and 111 of the *YCJA*.

[41] The other relief requested by the respondents that no student be referred to in oral argument by name or actual initials, is granted.

[42] In its costs submission, counsel for the Toronto Star stated:

This motion raised complex legal issues including the delicate balance to be struck between the protection of the common law and constitutional principle of open courts and the protection of the privacy interests of young persons and information contained in student records.

I agree; as this application involved a rather novel point of law, I make no order as to costs.


Chapnik J.

Released: May 3, 2006

COURT FILE NOS.: 55/06
and 06-CV-304058
DATE: 20060503

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

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C.D. ALLEGED PARTICIPANT
JUSTICE FOR CHILDREN AND YOUTH

REASONS FOR JUDGMENT

CHAPNIK J..

Released: May 3, 2006