Federal Court  Cour fédérale

Date: 20201117

Docket: T-35-20

Citation: 2020 FC 1064

Ottawa, Ontario, November 17, 2020

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

CORUS ENTERTAINMENT INC.

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS AND JUDGMENT

[1] This is an application seeking judicial review of a October 4, 2006, decision of an adjudication board [Adjudication Board or Board] convened pursuant to Part IV of the *Royal Canadian Mounted Police Act*, R.S.C., 1985. C. R-10, as that legislation existed in 2006 [RCMP Act].

[2] More specifically, as a result of a Notice of Disciplinary Hearing concerning six alleged contraventions of the RCMP Code of Conduct by Constable J.P. Harris [Constable Harris], a

hearing before the Adjudication Board starting on October 2, 2006. The disciplinary proceedings arose from allegations that Constable Harris obtained sexual services for money and for other consideration and engaged in inappropriate sexual contact and/or sexual touching for a sexual purposes with female persons who were, at the material times, under 18 years of age. It was also alleged that he applied force against a female person without legal justification. More generally, that it had come to the attention of the RCMP that Constable Harris had been implicated in allegations of police officers having sexual contact with underage sex workers.

[3] At the disciplinary hearing, various motions were raised and addressed. Ultimately, the Adjudication Board granted a motion brought by the Member Representative, on behalf of Constable Harris, to dismiss the allegations against Constable Harris on the basis that the disciplinary hearing had not been initiated within the time limit specified by s 43(8) of the RCMP Act, as it read at the time of the proceedings. Before hearing the motion to dismiss, the Adjudication Board also dealt with a motion by the Appropriate Officer Representative, on behalf of the RCMP, requesting a publication ban as to the identity of the complainants and a motion by the Member Representative, on behalf of Constable Harris, requesting a publication ban pertaining to him. Both motions were granted.

[4] Corus Entertainment Inc., the Applicant in this matter, is the owner of Global News. The Applicant seeks to have the publication bans as regards to Constable Harris and one of the complainants set aside by way of this application for judicial review so that Global may publish a news story including information and images subject to the publication bans.

Decision under review

[5] For the purposes of this application, the relevant aspects of the Adjudication Board's decision are its findings concerning the publication bans. These are as follows:

> *3. Publication ban for the complainants*
>
> The Appropriate Officer Representative requested a publication ban on the publication and broadcasting of information disclosed at the hearing that might identify the complainant C.C., J.H., K.C. The grounds in support of the motion were that the names of the complainants had been fully disclosed to the member and the right to a fair hearing would not be affected. The interest of the public and of the media would not be affected as the facts of the case would be known and the names of the complainants did not matter. He submitted that the witnesses were compelled to appear before the board. They were engaged in an underground activity (prostitution). Their testimonies would cause them embarrassment and the absence of a publication ban would cause reluctance to testify. At the time of the facts giving rise to the allegations, C.C. was a minor; K.C. and J.H. were under the age of 18.
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> The Member Representative consented to the motion.
>
> The motion was granted based on the grounds submitted by the Appropriate Officer Representative. In addition, the safety of the complainants was a concern given the implication in an underground activity in a small community.
>
> *4. Publication ban for the member*
>
> The Member Representative requested a publication ban on the publication and the broadcasting of videos, photographs, illustrations or written descriptions of the person of the member. [redacted]. The requested ban would not interfere with the proceedings. The Appropriate Officer Representative did not take [*sic*] position.
>
> The board indicated that it had to balance the interests of justice, of the public, of the media, of the complainants and those of Constable Harris. We were satisfied that justice would not be impaired by granting the ban and it would not affect the rights of all concerned. The personal safety of Constable Harris and of others including members of the public would be preserved. The ban was granted.

Preliminary Observations – Jurisdiction of the Court

[6] This is an unusual set of circumstances. The evidence before me includes an affidavit filed by Ms. Jane Gerster, a journalist with Global News, sworn on January 7, 2020 in support of the Applicant's application for judicial review [Gerster Affidavit]. An email from Constable Harris is attached as an exhibit to the Gerster Affidavit. The email states that "[w]ith respect to your inquiry concerning the publication ban and your efforts to obtain a Court Order to have it lifted so that you may publish any videos, photographs, illustrations and/or written descriptions of me, I am not opposed and hereby provide you with my informed consent".

[7] Also included in the Applicant's record is an affidavit of Robert Sandbach, sworn on February 4, 2020. Mr. Sandbach identifies himself as the father of "C.C.", one of the young women whose identity was anonymized by the publication ban pertaining to the complainants/victims. He states that after his daughter's death he took steps to have the publication ban relative to her identity in a related criminal proceeding set aside as he wanted to be able to discuss his daughter's life and untimely passing with a view to helping other at-risk youth. He states that he was not aware of the Adjudication Board publication ban and has openly discussed his daughter's life with the media as part of his advocacy work. He does not agree with any ongoing publication ban relative to the Adjudication Board's decision. He states that he supports the Applicant's efforts to have the ban relative to his daughter's identity lifted.

[8] The parties are both of the view that this represents a change of circumstances from the time that the publication bans were ordered. The Respondent does not oppose lifting the

publication bans as they pertain to Constable Harris and "C.C.". The Respondent agrees that the reasons justifying the bans with respect to Constable Harris and "C.C." at the time of the Adjudication Board hearing no longer exist.

[9] However, the Respondent submits that although the RCMP agrees that the bans should be lifted with respect to Constable Harris and "C.C.", the RCMP cannot do so. According to the Respondent, the provisions of the RCMP Act that were in force at the time of Constable Harris' disciplinary hearing required an adjudication board to preside over formal disciplinary hearings for allegations of contraventions of the Code of Conduct (s 43(1) and (2)). Under the current provisions of the RCMP Act, hearings are now held before a Conduct Board, (s 41(1), s 43(1)). The Respondent states that the Adjudication Board that was in place at the time of Constable Harris' disciplinary proceeding is now *functus officio* and, therefore, the RCMP cannot lift the bans. When appearing before me, counsel for the Respondent submitted that nothing in the RCMP Act permits the striking of a Conduct Board for the purpose of lifting the publication bans. I note that this issue was not before me and that there were no submissions on the point.

[10] In the result, the Respondent submits that it is not opposed to the bans being lifted by this Court on the basis that the bans are no longer justified. However, on the merits of the Adjudication Board's decision, the Respondent submits that the Adjudication Board did not err in ordering the publication bans.

[11] Neither party has provided authority to support the proposition that this Court can simply "lift" the publication bans ordered by the Adjudication Board because the parties agree that there

has been a change of circumstances such that the bans are no longer justified. And, in my view, the Court has no jurisdiction to do so.

[12] Sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985 c F-7 set out the jurisdiction of this Court:

> **18(1)** Subject to section 28, the Federal Court has exclusive original jurisdiction
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> > **(a)** to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and
> >
> > **(b)** to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.
> >
> > …..
>
> **(3)** The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.
>
> **18.1 (1)** An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.
>
> **(2)** An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.
>
> **(3)** On an application for judicial review, the Federal Court may
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> > **(a)** order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

> **(b)** declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.
>
> **(4)** The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal
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> **(a)** acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
>
> **(b)** failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
>
> **(c)** erred in law in making a decision or an order, whether or not the error appears on the face of the record;
>
> **(d)** based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
>
> **(e)** acted, or failed to act, by reason of fraud or perjured evidence; or
>
> **(f)** acted in any other way that was contrary to law.
>
> …….

[13] In its Notice of Application, the remedies that the Applicant seeks are *certiorari*, "quashing and setting aside the Publication Bans imposed by the Adjudication Board as they pertain to Constable Harris and 'C.C.'". In the alternative the Applicant seeks *mandamus*, ordering the RCMP to convene an Adjudication or Conduct Board to reconsider the request for the publication bans, with notice to the media, and to make available an unredacted copy of the Adjudication Board's decision. The Applicant also seeks any other relief that the Court considers just. However, the Applicant has not challenged the RCMP's refusal to lift the publication bans on the basis that it has no authority or ability to do so.

[14] Generally speaking, the role of the Court on judicial review of an administrative decision is to review the subject decision to determine if the duty of procedural fairness owed to an applicant was breached and/or if the decision was reasonable based on the law and the evidence that was before the decision maker when the decision was made. The relief that this Court can grant pursuant to s 18(1) and s 18.1(3), such as *certiorari*, is only available if the decision maker erred on the grounds set out in s 18.1(4).

[15] The mere fact that there has been a change of circumstances subsequent to the subject decision being made – in this case 16 years after the decision was made – does not render an otherwise reasonable decision unreasonable. Nor does the Court have the jurisdiction to simply "lift" the publication bans on the basis that the reasons justifying the bans at the time of the hearing no longer exist.

[16] I also note that the Applicant was not a party to the disciplinary hearing but seeks to set aside the Adjudication Board's decision as to the publication bans. When appearing before me the Applicant submitted that it brings the application as a party directly affected by the matter in which relief is sought, pursuant to 18.1(1) of the *Federal Courts Act*. The Respondent did not challenge the Applicant's standing.

Preliminary Issue – Extension of time

[17] Pursuant to s 18.1(2) of the *Federal Courts Act*, an application for judicial review must be filed within 30 days of the decision being communicated to the party affected by it. The

Applicant submits that while the publication bans were issued in October 2006, the bans only came to the Applicant's attention in June 2019. Between June and December 2019, the Applicant attempted the resolve the matter with the RCMP. The Applicant submits that it was not advised by the RCMP of its "definitive position" that it would not agree to the lifting of the publication bans until December 17, 2019, and that the Applicant promptly brought this application for judicial review on January 10, 2020. Further, considering the four established criteria for granting a time extension, it is in the interest of justice that the requested extension be granted. In that regard, the Applicant makes a footnote citation to *MacDonald v Canada (Attorney General)*, 2017 FC 2 at para 8.

[18] The Respondent does not oppose the requested extension of time.

[19] The four part test to grant an extension of time is set out in *Larkman v Canada (Department of Indian Affairs and Northern Development)*, 2012 FCA 204:

> [61] The parties agree that the following questions are relevant to this Court's exercise of discretion to allow an extension of time:
>
> (1) Did the moving party have a continuing intention to pursue the application?
>
> (2) Is there some potential merit to the application?
>
> (3) Has the Crown been prejudiced from the delay?
>
> (4) Does the moving party have a reasonable explanation for the delay?
>
> See *Grewal v. Canada (Minister of Employment & Immigration)*, [1985] 2 F.C. 263 (C.A.); *Muckenheim v. Canada (Employment Insurance Commission)*, 2008 FCA 249 at paragraph 8.
>
> [62] These questions guide the Court in determining whether the granting of an extension of time is in the interests of

> justice: *Grewal*, *supra* at pages 277-278. The importance of each question depends upon the circumstances of each case. Further, not all of these four questions need be resolved in the moving party's favour. For example, "a compelling explanation for the delay may lead to a positive response even if the case against the judgment appears weak, and equally a strong case may counterbalance a less satisfactory justification for the delay": *Grewal*, at page 282. In certain cases, particularly in unusual cases, other questions may be relevant. The overriding consideration is that the interests of justice be served. See generally *Grewal*, at pages 278-279; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 at paragraph 33; *Huard v. Canada (Attorney General)*, 2007 FC 195, 89 Admin LR (4th) 1.(see also *Chan v Canada (Minister of Public Safety and Emergency Preparedness*), 2013 FCA 130 at para 405).

(See also *Chan v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FCA 130 at paras 4-5.)

[20] When appearing before me, the Applicant submitted that the Gerster Affidavit demonstrated that Ms. Gerster first became aware of the publication bans in June 2019. She then engaged with the RCMP in an effort to determine how the publication bans could be lifted and to have the bans lifted at the RCMP level. The affidavit also indicates that on September 20, 2019, counsel for the Applicant wrote to the RCMP requesting its position on an application that Global News was in the process of preparing to have the publication bans pertaining to Constable Harris and one of the complainants/victims, "C.C.", set aside. Various follow ups followed, including a letter of December 11, 2019 wherein counsel for the Applicant advised that he was of the view that the 2006 publication bans were no longer justified and formally requested that the bans be set aside by the RCMP prior to the Applicant bringing a judicial review application seeking to have the bans quashed. By email of December 17, 2019, counsel

for the RCMP responded and advised that the RCMP was not in a position to consent to the lifting of the adjudication board publication bans.

[21] Based on the Gerster Affidavit, I am satisfied that the Applicant has demonstrated an intention to pursue the matter since learning of the publication bans. I am also satisfied that the application has some merit in light of the import of the open court principle and the Applicant's s 2(b) *Charter* rights. Further, the application puts in issue the Adjudication Board's authority to impose the publication bans, whether the Adjudication Board was required to apply the *Dagenais/Mentuck* test, and whether the media should have been given notice of the motions seeking the publication bans. While it is plausible that the Respondent would be prejudiced given that the decision to impose the publication bans was made 16 years ago, the Respondent does not oppose the extension of time. The Applicant's explanation for the delay includes the fact that Global News only became aware of the publication ban when investigating the matter for a story and that they first sought to address the matter though the RCMP. This is a reasonable explanation.

[22] The request for an extension of time is accordingly granted.

Issue

[23] In my view, the sole issue in this matter is whether the Adjudication Board's decision to impose publication bans was reasonable.

Standard of review

Applicant's Position

[24] The Applicant submits that the appropriate standard of review is correctness. Its written submissions cite generally *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] in support of this but offer no further explanation. When appearing before me the Applicant submitted that the decision of the Ontario Court of Appeal in *Canadian Broadcasting Corporation v Ferrier*, 2019 ONCA 1025 [*Ferrier*] supports its view that the correctness standard applies, in particular paragraphs 24, 32, 33, 35 and 36.

Respondent's Position

[25] The Respondent submits that reasonableness standard of review applies. In *Vavilov* the Supreme Court held that reasonableness is the presumptive standard of review and none of the reasons for derogating from the reasonableness standard apply in this case. The former provisions of the RCMP Act did not set out an explicit standard of review or provide for a statutory appeal to a court. According to the Respondent, the former s 45.16(7) of the RCMP Act states that a decision of the Commissioner on an appeal is final and binding and, except for judicial review under the *Federal Courts Act*, is not subject to appeal or review by any court. Nor does the current s 45.16(9) of the RCMP Act provide for statutory appeal. Further, the decision to impose the publication bans did not involve constitutional questions, general questions of law of central importance to the legal system, or issues of jurisdictional boundaries.

Analysis

[26] The Supreme Court of Canada in *Vavilov* held that the standard of reasonableness presumptively applies whenever a court reviews an administrative decision (*Vavilov* at paras 16, 23, 25). That presumption may be rebutted in two circumstances. The first is where the legislature has prescribed the standard of review or has provided a statutory appeal mechanism thereby signalling the legislature's intent that appellate standards should apply (*Vavilov* at paras 17, 33). The second circumstance is where the rule of law requires the application of the correctness standard. This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies (*Vavilov* at paras 17, 53).

[27] As to the category of constitutional questions, the Supreme Court held that questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982,* and other constitutional matters require a final and determinate answer from the courts and therefore these questions attract the correctness standard (paras 55-56).

[28] In my view, the issue raised by the Applicant in this application for judicial review is not a constitutional question that attracts the correctness standard of review. The issue in this matter concerns two specific publication bans imposed over 16 years ago. The Applicant argues that the

Dagenais/Mentuck test applied but was not considered or, in the alternative, that to maintain the publication bans would infringe its s 2(b) *Charter* rights. In my view, the Applicant's arguments concern the effect of an administrative decision on the Applicant's *Charter* rights.

[29] In *Doré v. Barreau du Québec*, 2012 SCC 12 [*Doré*], the Supreme Court distinguished between circumstances where an administrative decision maker was required to determine the constitutionality of a law, in which case the standard of review is correctness, and where the Court is considering whether an administrative decision maker has taken sufficient account of *Charter* values in making a discretionary decision (para 43). In the latter circumstance, the reasonableness standard applies:

> [57] On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. As LeBel J. noted in *Multani*, when a court is faced with reviewing an administrative decision that implicates *Charter* rights, "[t]he issue becomes one of proportionality" (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives.
>
> [58] If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.

(See *Doré* at paras 43-58; see also *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at paras 3-4, 37 – 41 [*Loyola*].)

[30] It is noteworthy that in *Vavilov* the Supreme Court did not displace this distinction in *Doré*, stating:

> [57] Although the *amici* questioned the approach to the standard of review set out in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, a reconsideration of that approach is not germane to the issues in this appeal. However, it is important to draw a distinction between cases in which it is alleged that the effect of the administrative decision being reviewed is to unjustifiably limit rights under the *Canadian Charter of Rights and Freedoms* (as was the case in *Doré*) and those in which the issue on review is whether a provision of the decision maker's enabling statute violates the *Charter* (see, e.g., *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 65). Our jurisprudence holds that an administrative decision maker's interpretation of the latter issue should be reviewed for correctness, and that jurisprudence is not displaced by these reasons.

[31] Under *Doré*, where a discretionary administrative decision engages the protections enumerated in the *Charter* – both the *Charter*'s guarantees and the foundational values they reflect – the discretionary decision maker is required to proportionately balance the *Charter* protections to ensure that they are limited no more than is necessary given the applicable statutory objectives that she or he is obliged to pursue. On judicial review, the task of the reviewing court applying the *Doré* framework is to assess whether the decision is reasonable because it reflects a proportionate balance between the *Charter* protections at stake and the relevant statutory mandate (*Loyola* at paras 3-4, 40-42).

[32] The Applicant, however, relies on *Ferrier* to support the application of the correctness standard. There the Ontario Court of Appeal held that:

> [34] If the *Charter* rights are considered by the administrative decision maker, the standard of reasonableness will ordinarily apply. In *Doré*, the Disciplinary Council of the Barreau du Québec considered and rejected the argument that the *Code of ethics of*

advocates requirement that advocates conduct themselves with "objectivity, moderation and dignity" infringed the s. 2(b) *Charter* right to freedom of expression. Similarly, in *Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry*, 2007 ONCA 20, 278 D.L.R. (4th) 550, the commissioner of inquiry considered the *Dagenais/Mentuck* test and rejected the argument that he should issue a publication ban regarding an alleged wrong-doer. In both cases, a reasonableness standard of review was applied when the decisions were challenged.

[35] On the other hand, the refusal or failure to consider an applicable *Charter* right should, in my opinion, attract a correctness standard of review. As the Supreme Court explained in *Dunsmuir*, at para. 60, citing *Toronto (City) v. C.U.P.E.*, Local 79, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62: "where the question at issue is one of general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise' … uniform and consistent" answers are required. See also *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555, at paras. 20-21. This is confirmed by *Vavilov*, at para. 17: "[T]he presumption of reasonableness review will be rebutted…where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies".

[36] The s. 2(b) *Charter* right to freedom of expression and freedom of the press relied upon by the appellants is both a matter of central importance to the legal system and a constitutional question. As confirmed by *Vavilov*, at para. 53, the application of the correctness standard to "constitutional questions, general questions of law of central importance to the legal system as a whole…respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary".

[37] The issue before the decision maker was *whether* the *Dagenais/Mentuck* test had a bearing on the discretionary decision he had to make. That is not the same as the issue presented in *Doré* and *Episcopal* of *how* the s. 2(b) *Charter* right impacted or affected the discretionary decision he had to make. The decision maker did not reach the point of factoring the *Dagenais/Mentuck* test into his discretionary decision because he decided that it did not apply. A reasonableness standard assumes a range of possible outcomes all

> of which are defensible in law: see *Vavilov*, at para. 83. That standard is inappropriate here. The *Dagenais/Mentuck* test either applied or it did not.
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> [38] I refer here to a passage in *Episcopal* which, in my view, has a direct bearing on this issue. In that case, the inquiry commissioner applied the *Dagenais/Mentuck* test when declining to order an *in camera* hearing. This court held that his decision was reviewable on a reasonableness standard because he did consider the impact of the *Charter* right on the decision he had to make. However, we noted, at para. 36, that in *Dagenais* itself, the judge who made the challenged decision did not have available the new test enunciated when the case went to the Supreme Court. That meant that his "failure to arrive at a result that could be supported under the new test … amount[ed] to an error of law", reviewable on a standard of correctness. The same applies here. As I will explain, the decision maker did not have the benefit the decision of this court in *Langenfeld v. Toronto Police Services Board*, 2019 ONCA 716, 437 D.L.R. (4th) 614, an authority that bears directly upon the discretionary decision he was asked to make.

[33] The Ontario Court of Appeal concluded that the administrative decision maker did not err in finding that the *Dagenais/Mentuck* test did not apply to the decision of whether to hold an open hearing. However, that the test did not exhaustively define the application of the s 2(b) *Charter* right to freedom of expression and freedom of the press in the context of that case, which included consideration of a statutory test to be applied if an *in camera* hearing was being considered. The Court set aside the decision on the basis that the decision maker had failed to consider recent jurisprudence confirming that s 2(b) *Charter* rights protect the right of members of the public to attend meetings of police service boards (paras 52-59). And, while it reached that conclusion on a correctness standard, it also stated that even if the reasonableness standard of review applied, a decision resulting from an unexplained refusal or failure to consider an applicable *Charter* right could not be considered reasonable (para 60).

[34] Unlike in *Ferrier*, the issue before the Adjudication Board in this matter was not "whether the *Dagenais/Mentuck* test had a bearing on the discretionary decision". The subject publication bans were imposed at the request of the respective parties and were not opposed. Accordingly, and unlike *Ferrier*, the Adjudication Board was not asked to, and did not make, any decision as to the applicability of the *Dagenais/Mentuck* test, and it did not refuse to apply the test. Nor did it refuse or fail to consider argued *Charter* rights. Indeed, as will be discussed below, it implicitly considered the media's s 2(b) *Charter* rights. And, while the Applicant asserts the Adjudication Board's failure to explicitly address the test can be attributed to a lack of notice given to the media, the fact remains that in the circumstances actually before it, the Adjudication Board did not make the errors identified in *Ferrier* which attracted the correctness standard.

[35] Ultimately, as will be discussed below, the issue in this case is whether the Adjudication Board properly balanced the various interests at stake, including the media's s 2(b) *Charter* rights, the complainants' interest in their safety and privacy, and the personal security concerns of undercover officers. As the Supreme Court noted in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 [*Sierra Club*], the purpose of the flexible *Dagenais/Mentuck* test is to "ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles" (at para 48). That is, the test for granting a publication ban engages a proportionate balancing of *Charter* rights and other principles, most prominently the proper administration of justice. The *Dagenais/Mentuck* test reflects the *Charter* principles relevant to determining whether a publication ban should be imposed. Here, the question of

whether the Board reasonably balanced the principles underlying the *Dagenais/Mentuck* test, including the media's s 2(b) *Charter* rights, is subject to reasonableness review.

[36] In sum, as the Applicant has not rebutted the presumptive standard of reasonableness, that standard of review applies to reviewing the merits of this application.

[37] On the reasonableness standard, a reviewing court must determine whether the decision as a whole is reasonable. To make that determination, the reviewing court "asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at paras 15, 99). When a decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and the law that constrain the decision maker, it is reasonable and is to be afforded deference by a reviewing court (*Vavilov* at para 85).

Was the Adjudication Board's decision to impose the publication bans reasonable?

Applicant's position

[38] The Applicant submits that judicial and quasi-judicial proceedings are presumptively open and that public access will only be restricted where disclosure would subvert the ends of justice or unduly impair its proper administration (*Toronto Star Newspapers Ltd. v Ontario*, 2005 SCC 41 at para 4 [*Toronto Star*]). Further, that the Adjudication Board hearings are judicial in nature (*Southam Inc v Canada (Attorney General)*, [1997] O.J. No 4533 (ONSC) at para 26

[*Southam Inc*]) and the test to be applied in determining whether public access to a file or proceeding should be restricted is the *Dagenais/Mentuck* test (*Toronto Star* at para 26). The Applicant states that it is a requirement that the media be given notice of requests for discretionary publication bans (*Toronto Star* at para 13).

[39] The Applicant submits that it does not appear from the decision that the Adjudication Board gave media notice or considered the *Dagenais/Mentuck* test and that the authority by which the publication bans were issued is not clear. The Applicant submits that in this case the *Dagenais/Mentuck* test could not be met and, therefore, the publication bans are not correctly or reasonably in place and should be quashed.

[40] Alternatively, if the Adjudication Board's proceeding is characterized as administrative in nature, as opposed to judicial or quasi-judicial such that the *Dagenais/Mentuck* test does not apply, then to maintain the publication bans would be an unjustified intrusion the Applicant's s 2(b) rights under the *Charter* (*Ferrier* at paras 53, 57).

Respondent's position

[41] The Respondent submits that the Adjudication Board did not err in imposing the publication bans and that the decision was reasonable. The Adjudication Board was empowered to impose the publication bans pursuant to Rule 4 of *The Commissioner's Standing Orders (Practice and Procedure,)* SOR/88-367 [Standing Orders] which states that "[w]here any matter arises during the course of a proceeding before a board, not otherwise provided for in these Rules, the board may take whatever steps it considers necessary to settle the matter".

[42] Further, the Adjudication Board was not required to give media notice of the motions for publication bans. There was no statutory obligation to do so nor is there such a requirement at common law. Rather, in the context of court proceedings the requirement to provide media notice is subject to judicial discretion (*Dagenais v Canada Broadcasting Corporation*, [1994] 3 SCR 835 at para 51 [*Dagenais*]; *M.A. v Toronto Police Service*, 2015 ONSC 5684 at para 5 [*Toronto Police Service*]). In the absence of a statutory requirement or rule stating otherwise, the Adjudication Board could not have been under a stricter obligation than a court to provide notice to the media.

[43] The Respondent submits that the *Dagenais/Mentuck* test was developed in the context of criminal court proceedings and cannot be identically applied in all contexts (*Ferrier* at paras 15, 66). Further, although the Adjudication Board did not explicitly refer to that test in its reasons, the Board identified the principles underlying the test and reasonably balanced the salutary effects of the publication bans with its deleterious effects on the public's right to open proceedings. Written reasons given by an administrative body must not be assessed against a standard of perfection, and failure to recite the name of a test will not make the decision unreasonable where the test is implicitly applied (*Vavilov* at para 91, 128).

[44] Further, the Adjudication Board's decision to impose the publication bans was reasonable as its reasons set out a justified, transparent and intelligent line of analysis (*Vavilov* at paras 15, 86, 102 and 106).

Analysis

i. Authority of Adjudication Board

[45] The totality of the Applicant's submission on the Adjudication Board's authority to issue the publication bans is that their authority "is not clear". The Applicant does not respond to the Respondent's position that the Adjudication Board was empowered to impose the publication bans pursuant to Rule 4 of the Standing Orders.

[46] Generally, an administrative decision maker is the "master of its own procedure" (*Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at p. 685). Most administrative decision makers have the implied power to "fashion procedures necessary to discharge their express legislative mandates, as long as they are consistent with the legislation and any requirements of fairness" (*Hillier v. Canada (Attorney General*), 2019 FCA 44 at para 10). On its face, Rule 4 of the Standing Orders would appear to be consistent with this approach.

[47] And while the Adjudication Board did not state the source of its authority for imposing the publication bans, it was not required to do so (*Guérin v. Canada (Attorney General)*, 2018 FC 94 at para. 40). In that regard, it is of note that the decision states that it was the Appropriate Officer Representative, on behalf of the RCMP, who requested the publication and broadcasting ban on information disclosed at the hearing that might identify the complainants. Constable Harris consented to that motion. Further, Constable Harris' representative sought the publication ban pertaining to Constable Harris and the Appropriate Officer Representative did not take a position on Constable Harris' motion. The transcript of the Adjudication Board hearing reveals

that when the motions for the publication ban with respect to the complainants was raised, in the context of submissions from the parties on the point, the Adjudication Board stated:

> If there's no objection in light of defence with respect to the jurisdiction of the Board and the authority of the Board to make such a ruling, I guess you could avoid, you know, making submissions on the right of the Board to make such a – such an order because we do that that authority.

As the parties did not take issue with the Adjudication Board's authority, which the Adjudication Board stated it had, the Board likely did not feel it necessary to recite the source of its authority when granting the motions sought.

[48] In short, in the absence of any submission or authority by the Applicant to suggest that Rule 4 of the Standing Orders did not provide the necessary authority for the Adjudication Board to issue the publication bans, I am not persuaded that it lacked the authority to impose the bans.

ii. Media notice

[49] The Applicant submits that it does not appear that the media was given notice of the Adjudication Board hearing. Further, that it is a requirement on requests for discretionary publication bans that the media be given notice of the request so that members of the media can make submissions.

[50] The Applicant relies on *Toronto Star* at para 13 in support of its view that media notice is a requirement, however, that paragraph is uninformative on this point.

[51] In *Toronto Police Service*, referenced by the Respondent, the Ontario Superior Court stated:

> [4] It is a fundamental principle of our court system that its proceedings, in all of their various facets, are open to the public. This is a principle that has been stated and re-stated by the Supreme Court of Canada. It was clearly enunciated in *Dagenais v. Canadian Broadcasting Corp.,* 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835 where the forerunner to the ultimate *Dagenais/Mentuck* test for the granting of publication bans was set out. On the subject of notice to the media, it was stated in *Dagenais* that, where a common law publication ban was being sought, the judge "should give the media standing (if sought)" (p. 890). Obviously the media cannot seek standing if they do not have notice of the matter.
>
> [5] That said, I recognize that the decision on whether to give notice to the media appears to be a discretionary one. There is no absolute rule that the media must be informed of a motion seeking a publication ban. As Lamer, C.J.C. said in *Dagenais* at p. 869:
>
> > The judge hearing the application thus has the discretion to direct that third parties (e.g., the media) be given notice. Exactly who is to be given notice and how notice is to be given should remain in the discretion of the judge to be exercised in accordance with the provincial rules of criminal procedure and the relevant case law.
>
> [6] Even though that discretion exists, there is, in my view, a presumption that the media will be given notice of any motion where relief is sought that will have the effect of restricting the public's, and thus the media's, right to access court proceedings. That presumption flows from a combination of the open court principle and the salient fact that the media is the mechanism by which members of the public are informed of the activities that take place in the courts. In that regard, I repeat the observation made in *Ottawa Citizen Group Inc. v. Canada (Attorney General)* (2005), 2005 CanLII 38578 (ON CA), 75 O.R. (3d) 590 (C.A.) where MacPherson J.A. said, at para. 65:
>
> > Because of the centrality of a free press and open courts in Canadian society and in the Canadian constitution, there is almost a presumption against any form of secrecy in all aspects of court proceedings in Canada.

> …..
>
> [16] To summarize, whenever a party is seeking to restrict access to a court proceeding, whether by way of seeking permission to use a pseudonym or initials, notice ought to be given to the media of that request……
>
> [17] Consequently, absent a court order dispensing with the requirement to give notice, notice ought to be given to the media of any application or motion for such relief. Put more simply, the default position is that notice is to be given…...

[52] In my view, *Toronto Police Service* demonstrates that while notice to the media may be a best practice, it is a discretionary, not mandatory requirement.

[53] The Applicant points to no requirement in the RCMP Act or the Standing Orders that the media be given notice of an intended publication ban. Absent a statutory requirement, I agree with the Respondent that the Adjudication Board could not be under a stricter notice obligation than the discretion afforded to the Courts at common law. Accordingly, a reviewable error does not arise from a lack of notice to the media of the intended publication bans.

iii. Dagenais/Mentuck test

(a) Does the test apply?

[54] The Applicant submits that RCMP Adjudication Board hearings are judicial in nature, relying on *Southam Inc.* at para 26. Therefore, as a judicial body, the Adjudication Board was required to apply the *Dagenais/Mentuck* test, as described in *Toronto Star*, when the Board was deciding whether to impose the publication bans. The Applicant submits that the Board failed to consider the test, which in any case could not have been met.

[55] It is perhaps helpful to first explain that the *Dagenais/Mentuck* test holds that restrictions on the open court principle and freedom of the press in relation to judicial proceedings can only be ordered where the party seeking such a restriction establishes through convincing evidence that:

> (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.

(*Dagenais* at p 878; *Mentuck* at para 32; *Sierra* at para 45.)

[56] In the criminal law context, the Supreme Court of Canada in *Toronto Star* stated that it is well established that court proceedings are presumptively "open" in Canada. Further, "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" (at para 7, emphasis in original. See also *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3 at para. 13).

[57] And, although the *Dagenais/Mentuck* test was developed in the context of criminal proceedings, the Supreme Court of Canada in *Sierra Club* held that the test also applies to civil proceedings:

> [48] *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with Charter principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where

> the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding.

[58] As to administrative law decisions, *Southam Inc*, which is relied upon by the Applicant, was in fact a constitutional challenge. There the applicants sought a declaration that the then s 45.1(14) of the RCMP Act was invalid and of no force or effect because it violated the freedom of the press aspect of s 2(b) of the *Charter*. Section 45.1(14) required an adjudication board to hold a hearing into an alleged breach of the Code of Conduct to be held in private. In assessing that provision, the Ontario Court of Justice held that:

> Parliament has provided for a very formal, court-like procedure for alleged breaches of the Code of Conduct to be examined by an adjudication board. The rights of the member whose conduct is in question, are determined by the adjudication board, subject to appeal to the commissioner. The member faces very serious sanctions, including in the case of a member who is not an officer (as was the case here), dismissal from the Force.
>
> Because of the public nature of a peace officer's duties and the broad powers given by law to a peace officer in the execution of those duties, and because formal adjudication board proceedings can affect an R.C.M.P. member's rights so significantly, the public has a very strong interest in such a hearing. The role of the adjudication board is clearly a judicial one.
>
> While I would not necessarily want to endorse that proposition in a sweeping or unqualified way, nor do I need to, it seems to me that the judicial proceedings contemplated in s. 45.1 of the Royal Canadian Mounted Police Act involve matters of such public importance that it cannot be said that the principle of openness is not raised or engaged. The provision excluding the public would prevent the media from being able to gather information about the proceedings. A conclusion that s. 2(b) of the Charter is engaged by s. 45.1(14) is, in my opinion, inescapable.

[59] The Ontario Court of Justice held that the blanket privacy provisions contained in s 45.1(14) were not saved as a reasonable limit under s 1 of the *Charter* and declared that section

invalid. What is relevant to this matter, however, is the characterization of the role of an RCMP adjudication board as judicial in nature.

[60] The Respondent does not make submissions regarding the nature of the Adjudication Board's function. It does not suggest that the Adjudication Board did not engage any judicial or quasi-judicial decision making on the basis that the Adjudication Board did not actually consider whether disciplinary action should be taken against Constable Harris as the hearing was solely concerned with procedural motions (see *Ferrier* at paras 46-52). Nor does the Respondent suggest that the *Dagenais/Mentuck* test does not apply, stating only that it cannot be applied identically in all contexts, referencing *Ferrier* (at para 66).

[61] The parties do not point to any decisions of this Court as to the nature of RCMP adjudicative board when determining disciplinary matters. I note, however, that in another context the Federal Court of Appeal has held that the test was not properly applied by an administrative decision maker, in the course of a disciplinary hearing, with respect to the redaction of names (see *Attorney General of Canada v Philps*, 2019 FCA 240 at paras 22-29).

[62] And, while not determinative, it is clear from the transcript that the Adjudication Board considered its function to be judicial in nature.

[63] In my view, it is probable that the Adjudication Board was acting in a judicial or quasi-judicial role when it decided the motions seeking the publication bans and seeking to dismiss the charges against Constable Harris based on the limitation period.

[64] However, based on the limited arguments before me, I am reluctant to make a definitive finding regarding the nature of the Adjudication Board's role when responding to the publication ban motions and, in any event, it is also unnecessary for me to do so. This is because I have concluded that the Adjudication Board reasonably applied the principles enunciated by the *Dagenais/Mentuck* test, as discussed below.

(b) Did the Adjudication Board reasonably consider the principles underlying the *Dagenais/Mentuck* test?

[65] The Applicant submits that it does not appear that the Adjudication Board considered the *Dagenais/Mentuck* test, and in any case, the test could not have been met in this circumstance.

[66] As I have noted above, the Adjudication Board did not identify the *Dagenais/Mentuck* test by name when conducting its analysis, however, this is not fatal. Its decision was also brief, but nor is this fatal, particularly because the motions for the publication bans were brought by the parties and were uncontested. Further, it is well established that the sufficiency of reasons alone will not render a decision unreasonable (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). Nor are written reasons of an administrative decision maker to be assessed against the standard of perfection (*Vavilov* at para 91).

[67] As stated by the Supreme Court in *Sierra Club*, although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching

Charter principles in order to balance freedom of expression with other rights and interests, and therefore can be adapted and applied to various circumstances (at para 38).

[68] In that regard, and as noted by the Respondent, the *Dagenais/Mentuck* test was developed in the context of criminal proceedings, and it cannot be identically applied in all contexts. This is reflected in *Ferrier*, where the Ontario Court of Appeal stated that "The particular institution and circumstances of the particular case may require the most stringent application of the *Dagenais/Mentuck* test or a modified and more relaxed version of the test" (*Ferrier* at para 21) and that "[t]here is no 'one size fits all' application of the openness principle" (*Ferrier* at para 66). The Courts have also consistently held that the test is a flexible one (*Sierra Club* at para 48).

[69] The Adjudication Board's decision is to be considered against this jurisprudential background. Accordingly, in my view, the question is whether the Adjudication Board was alive to the issues – in this case the principles underlying the *Dagenais/Mentuck* test including the media's s 2(b) *Charter* interests and other interests – and if its decision reflects a proportionate balancing of those interests (*Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at paras 53-56 ; *Robinson v. Canada (Attorney General)*, 2020 FC 942 at para 58).

[70] With respect to the publication ban concerning the complainants, the Adjudication Board accepted that the risk was that their identities might be disclosed. However, it found that their names had been disclosed to Constable Harris and, therefore, his right to a fair hearing was not affected. The Adjudication Board found that the rights of the public and the media would not be affected as the facts of the case would be known and the names of the complainants did not

matter. Further, at the time giving rise to the complaints, “C.C.” was a minor and “K.C.” and “J.H.” were under the age of 18. They were involved in underage sex work. The Board accepted that their testimony would cause them embarrassment and that they would be reluctant to testify in the absence of a ban. And, significantly, the Adjudication Board found that the safety of the complainants was a concern given their implication in an underground activity in a small community.

[71] The decision also states that the motion was granted based on the grounds submitted by the Appropriate Officer Representative. The transcript of the disciplinary hearing reveals that the Appropriate Officer Representative’s submissions referred to the weighing of the interests at stake, including the public interest in seeing that the proceedings were properly conducted and the parties treated fairly; the interest of the press and the public in free expression; the right of Constable Harris to a public and fair hearing given that his personal rights were significantly affected; and the privacy of the individuals who would be compelled appear as witnesses. With respect to the press, the RCMP was not seeking an *in camera* proceeding, but a less restricted means to protect the identity of the witnesses, all of whom were young persons, and consequently the RCMP had an obligation to protect their interest and not to cause them more harm by way of the proceedings. Full disclosure of their identities had been given to Constable Harris who had been able to make a full answer in defence. Further, that the ban would not significantly affect the right of the public to know the facts of the case. Knowing the facts of the case was distinguishable from knowing the names of the young persons, which had little bearing on the public’s understanding of the case.

[72] In my view, it is clear from the Adjudication Board's reasons and the record that the Adjudication Board was alive to not only the media's s 2(b) *Charter* rights but to all of the competing interests at stake. The Board considered that the publication ban on information that could disclose the identities of the complainants was necessary as the complainants were of a very young age, vulnerable and, should their identities become known, their safety would be at risk. Moreover, the ban was narrowly tailored to anonymizing the complainants' names; all other aspects of the hearing would be available to the public. The Board thereby implicitly found that the publication ban was necessary in order to prevent a serious risk to the proper administration of justice and that the ban was minimally infringing, or proportional. This establishes compliance with the first branch of the *Dagenais/Mentuck* test.

[73] The Adjudication Board also engaged in a balancing exercise similar to the second branch of the *Dagenais/Mentuck* test. At the second stage of the *Dagenais/Mentuck* test, the decision maker must be satisfied that the salutary effects of the publication ban outweighed 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. The Adjudication Board considered the risk to the complainants and weighed this risk against the lack of deleterious effects of the ban, being that the interests of the public and the media would not be affected as the facts of the case would still be public and Constable Harris' right to a fair trial would not be negatively impacted. This, in my view, satisfied the second branch of the test.

[74] As to the publication ban requested on behalf of Constable Harris, in its decision the Adjudication Board explicitly recognized that it "had to balance the interests of justice, of the public, of the media, of the complainants and those of Constable Harris". It stated that it was satisfied that justice would not be impaired by the publication ban and the broadcasting of videos, photographs, illustrations or written descriptions of Constable Harris and that the ban would not affect the rights of all concerned. Further, that the personal safety of Constable Harris and of others including members of the public would be preserved. The transcript of the hearing indicates that Constable Harris' RCMP duties involved covert operations and that Constable Harris was concerned that his ability to do his job, his personal safety and the personal safety of his RCMP colleagues would be jeopardized without the publication ban.

[75] Again, the Adjudication Board identified the risk to the safety of Constable Harris and others, noted that the publication ban was of limited scope as it prohibited publication of visual images or descriptions of Constable Harris. The Board recognised and balanced the competing interests at stake, noted the lack of deleterious effects including that there would be no impairment to the interests of justice, and that it would not affect the rights of all concerned. In my view, this addresses the principles of the *Dagenais/Mentuck* test.

[76] In sum, the Adjudication Board took into consideration all of the relevant principles underlying the *Dagenais/Mentuck* test when considering the proposed publication bans, applied the facts to those considerations and, in my view, its decision was reasonable.

[77] In its written submissions, the Applicant did not dispute the reasonableness of any of the Adjudication Board's findings. Its position was simply that the Board had failed to apply the *Dagenais/Mentuck* test. However, when appearing before me, the Applicant raised a number of additional issues. The Applicant submitted that the Board failed to include a provision indicating that the bans on publication would end "at the earliest possible time consistent with removing the risk of an unfair trial" (*Dagenais* at para 26). I am not persuaded that the publication bans were unreasonable on this basis. Moreover, the identities of the complainants were protected in part because of their young age and the present and future harm that disclosing their identities and their involvement in the sex trade could cause them. It is difficult to see why the protection should be temporal in these circumstances.

[78] When appearing before me the Applicant also submitted that the Adjudication Board had failed to base its assessment of risk on clear evidence. The Applicant relies on the statement in *Dagenais* that the risk "must be real, substantial and well grounded in the evidence" (*Dagenais* at para 34; *Toronto Star* at para 27), and submitted that the Board's findings on risk were purely speculative. I acknowledge that the Board did not refer to evidence that was before it in support of the publication ban during the disciplinary hearing. And while the Notice of Application includes a request under Rule 317 of the *Federal Court Rules* for a certified copy of the Adjudication Board's record in respect to its decision, if a record was provided it is not in the Court's file nor has the Applicant included any Adjudication Board materials in its motion record, other than the decision and the transcript of the disciplinary hearing record. Thus, I have no way of knowing what, if any, evidence was before the Board when it made its decision 16 years ago.

[79] However, viewed in context and considering that the *Dagenais/Mentuck* test is not to be applied mechanistically but is flexible and contextual (*Toronto Star* at para 31), I am not persuaded that the Adjudication Board's reference only to the parties' submissions as to risk is a reviewable error. Notably, the RCMP's Representative identified and requested the publication ban to protect the identities of the complainants and the publication bans were not opposed by either party. I also note that the Applicant does not dispute that the identified risks existed at the time the publication bans were issued and that the record indicates that a ban on publishing "C.C"'s name was imposed in related criminal proceedings. Further, given the inherent vulnerability of children, there can be circumstances where objective harm, established by way of applying reason and logic, will suffice (see *A.B v Bragg Communications Inc.*, 2012 SCC 46 at paras 12 – 17).

[80] The Applicant also submitted that the Adjudication Board's decision was procedurally unfair because it did not provide for a means by which it could be challenged. In my view, there is no merit to this submission, which was not developed in the Applicant's written submissions. The motions were requested by the parties and were granted in accordance with those requests. The parties could make use of whatever internal or other appeal routes were available to them to challenge the decision by way of the RCMP Act or otherwise. And, the Applicant has challenged the decision by way of this application for judicial review.

[81] Finally, as to the Applicant's alternate submission that, if the *Dagenais/Mentuck* test has no application, then to maintain the publication bans would be an unjustified intrusion into its s 2(b) *Charter* rights (referencing *Ferrier* at paragraphs 53 and 57), given my finding that the

Adjudication Board implicitly considered the media's 2(b) *Charter* rights in the context of its assessment of the principles underlying the *Dagenais/Mentuck* test, I need not address this argument.

Conclusion

[82] In conclusion, the Adjudication Board did not err in its consideration of whether to issue the publication bans. The decision was reasonable because it applied the principles underlying the *Dagenais/Mentuck* test, and the bans imposed limited and proportional publication restrictions.

[83] I recognize that this outcome is unsatisfactory in that Global News wishes to publish a story involving Constable Harris and "C.C."'s and Constable Harris and "C.C"'s father have indicated that they wish to have the publication bans, in relation to Constable Harris and "C.C.", lifted. However, that is a change of circumstance subsequent to the Adjudication Board's decision and this Court does not have the jurisdiction to simply lift the bans on that basis.

[84] That said, the Gerster Affidavit attaches as exhibits several communications from the RCMP indicating that if a RCMP member wishes to have a publication ban lifted, then the Member can make that request to the RCMP. This seems contradictory to the Respondent's position in this judicial review that there is no authority under the RCMP Act to strike a Conduct Board to lift the bans. The Gerster Affidavit also does not indicate if that information was relayed to Constable Harris. Presumably, Constable Harris can directly approach the RCMP and make the request. Mr. Sandbach could similarly directly approach the RCMP.

[85] Should they do so and should the RCMP consider lifting the bans, its consideration must also consider whether the disclosing of the identity of “C.C.” would inadvertently lead to the identification of the other two complainants.

[86] As to the Applicant, it is still able to publish its intended news story and is restricted only to the extent of the limited publications bans. And, if the Applicant does not agree with the RCMP’s decision that it lacks the authority to lift the publication bans, it may be open to it to challenge that decision. I make no finding in that regard.

JUDGMENT IN T-35-20

THIS COURT'S JUDGMENT is that

1. The Application for Judicial Review is dismissed; and

2. There shall be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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