

REASONS FOR DECISION OF THE TORONTO LICENSING TRIBUNAL

Date of Hearing: January 17, 2019

Panel: Melina Laverty, Hearing Panel Chair;
Anu Bakshi and Daphne Simon, Members

Re: KH (Report No. 6967)
Applicant for a Vehicle-For-Hire Driver's Licence,
(Application No. B757001)

Counsel for Municipal Licensing and Standards: Ms Brennagh Smith

Paralegal for Applicant: Mr. Robert Stewart,

Chedmount Investments Inc., operating as Taxi News: Mr. John Duffy

Bengali Interpreters: Mr. Aowrangzeb Chowdhury/
Ms Shukla Datta

SUMMARY OF DECISION

After hearing the evidence and submissions of Taxi News, Municipal Licensing and Standards (MLS), and KH, the Tribunal ordered that the full hearing on the merits of KH should proceed in camera and the documents for the matter should continue to be sealed as originally ordered on July 19, 2018. The Tribunal also ordered that the time for MLS to serve and bring its' motion to hear the matter in camera be abridged, and any notice requirements are waived.

BACKGROUND

1. In October 2010, KH was charged with numerous offences under the Criminal Code (CC) as a result of alleged sexual assaults of a minor in 2009 and 2010.
2. In October 2017, MLS advised KH his Taxicab Owner's Licence would be the subject of a Tribunal hearing, as a result of a March 2017 conviction for assault arising out of those charges.
3. In December 2017, KH applied for a Vehicle-for-Hire Driver's Licence.
4. In February 2018, MLS sent KH several letters outlining the grounds for denying his application for a Vehicle-for-Hire Driver's Licence, as well as the grounds for not renewing his Taxicab Owner's Licence. In February 2018, KH requested a Tribunal hearing.
5. On March 29, 2018, the hearing regarding KH was adjourned to no specific date.
6. On July 19, 2018, the Tribunal heard an MLS motion to hold the hearing in camera and to seal documents. After hearing the motion, the Tribunal ordered the documents in this matter be sealed. KH was asked to surrender his MLS

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photo card on July 20, 2018 at 5:00 pm, and the matter was adjourned to no specific date.

7. As set out in the summary of decisions, on November 22, 2018, the Tribunal ordered that preliminary motions be scheduled on January 17, 2019, and that the applicant file all motion materials by January 7, and the respondent must file all motion materials by January 14. The full hearing was adjourned to February 7, 2019.

PRELIMINARY MATTERS

1. On November 22, 2018, the parties thought the Tribunal had already ordered on July 19, 2018 that the hearing proceed in camera. At the outset of this motion hearing on January 17, 2019, the Panel agreed that the current summary of decisions from July 19, 2018 was ambiguous and clarified that on July 19, the Tribunal only sealed the documents and had made no decision with regard to whether the full hearing should proceed in camera. As a result, the Tribunal was not just hearing a motion from Taxi News to reverse the July 19 order; the Tribunal was also prepared to hear a motion by MLS to hold the full hearing in camera. Therefore, the two motions on January 17, 2019 were as follows:
 - a. Taxi News' motion to unseal the documents; and
 - b. MLS's motion to hold the hearing in camera.
2. MLS and KH did not oppose Taxi News's request for standing on the motions. As set out by the Supreme Court of Canada (SCC) in *Dagenais*¹, the decision maker "should give the media standing (if sought)" on a motion for a common law publication ban. The Tribunal ordered that Taxi News should have standing on the motions.
3. All parties agreed that given the evidence and submissions on both issues were essentially the same, that the motions should be heard together. None of the parties expressed a preference as to who would proceed first. The Tribunal ordered that Taxi News would call its witnesses first, followed by MLS and the Applicant, then each party would give closing submissions.
4. Some material was not filed on time, and the Tribunal waived any filing requirements under the Tribunal Rules or previously ordered. No party raised any concern about the late filing of material nor did they express the need for additional time to review any material that was filed late. The Tribunal also ordered that the time for MLS to serve and bring the motion to hear the matter in camera would be abridged. All parties consented to this abridgement.
5. Finally, the Tribunal ordered that the motions before it be heard in public, though the only member of the public present for the motions was Mr. Duffy.

¹ *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC) at p. 890 as cited in *A.M. v. Toronto Police Services Board et al.* 2015 ONSC 5684 at para. 4

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ISSUES

6. The issues before the Tribunal were whether the matter of KH should proceed in camera and whether the documents for the matter should be sealed.

EVIDENCE AND SUBMISSIONS

Taxi News and MLS both submitted motion records with relevant case law, along with affidavits in support of their position on the motions (Taxi News affidavit and motion were marked Exhibit 1 and 2; MLS affidavit and motion were marked Exhibit 3 and 6). Mr. Stewart did not submit a motion record or case law, but did submit an affidavit in support of the motion (Exhibit 5). In addition, the August 2018 edition of Taxi News was marked Exhibit 4.

The evidence and submissions of the parties' is summarized briefly below.

TAXI NEWS

Mr. Duffy was affirmed and testified as follows:

7. He has been a reporter and owner of Taxi News for 30 years. He regularly attends Tribunal hearings. His paper is a main source of information for the public to know what is going on in the taxi industry in Toronto. Most of the public do not look at the Tribunal website, but the public and the media industry know about Taxi News.
8. He recognizes that media has the power to damage a person's reputation. He takes his role as a reporter seriously, and always tries to report fairly and accurately.
9. Once a hearing is held in camera, there is no way to know what is going on or why. It is not possible to ensure the Tribunal or the City is being fair and held accountable. In his experience, once issues are discussed in camera people come up with wild speculation.
10. At the same time, he recognizes children should be protected but he has not been provided with enough background about this case to know if there is sufficient reason to hold the hearing in camera.

Upon cross-examination, Mr. Duffy indicated that:

11. Once he was aware of a publication ban, he would respect it.
12. MLS has provided him notice that it may be seeking an in camera hearing and/or sealing order on two other occasions. Regarding the email of July 9 from MLS, KH's full name was included when MLS informed him they may seek an in camera hearing and/or sealing order. He can only assume the name was included as there had not been an order before the email was sent to him. He

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did not follow up at the time or make further inquiries about it. He had a scheduling conflict and was not able to attend.

13. He could not recall if he wrote about the case of KH, but if he did so he likely would have used initials.

Mr. Duffy did not call any other witnesses. Mr. Duffy submitted that:

14. There is a public interest in knowing if a taxi driver has been charged and convicted of a criminal offence, or of a sexual offence.
15. Courts should be open to the public as part of a free and democratic society unless they meet certain exceptions. He is not satisfied that any of the exceptions apply in this case. If any of the exceptions do apply, he asks the Tribunal consider if there is a compromise that is less restrictive than a full in camera hearing and sealing order, such that there could be limited public and media access either to the hearing or the materials.
16. In his view, justice should not just be done but seen to be done.
17. He questions why it took MLS so long to bring this matter forward. The public should know if MLS has a valid case. He can only speculate now as to why charges against KH were dropped and a guilty plea to assault accepted.

MLS

Ms Smith called Ms Andrea DiMatteo, MLS Supervisor Vehicle for Hire and Acting MLS Supervisor Tribunal Reports, as a witness. Ms Smith asked the Tribunal to rely on the full affidavit submitted and only asked a few questions. Ms DiMatteo was affirmed and testified as follows:

18. KH's full name appeared on some Tribunal agendas. This occurred prior to July 19, 2018, when a sealing order was put in place.

Upon cross-examination, Ms DiMatteo indicated that:

19. MLS learned of charges against KH via various databases, including ICON (Integrated Courts Offences Network). Also, licensees periodically submit criminal records. She has also seen the police occurrence report. She was not sure if she has seen the information, indictment and summons for the offences, but she has seen various documents about the charges.
20. KH was charged with various sexual offences, but pled guilty and was convicted only of assault. The sexual offences that he was charged with were all withdrawn.
21. She does not know exactly why the charges were withdrawn or why the Crown accepted the guilty plea. MLS may have concerns with the conduct even if there was not a conviction.

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22. She is aware there is a publication ban regarding the KH criminal matter but she does not know the specific terms of the ban, and did not look at the ban. A police officer involved in the case advised her that the ban had been put in place.

Ms Smith did not call any other witnesses.

In her closing submissions, Ms Smith, on behalf of MLS, submitted that:

23. The Tribunal should reaffirm the sealing order, hold the entire proceeding in camera, and abridge any notice requirements on the motions.
24. MLS's case rests in part on the underlying conduct that led to the charges against KH, which were later dropped. MLS is not limited to relying only on convictions in making its case. MLS needs to consider the victim's interests.
25. The Tribunal should rely on the tests set out in section 9 of the Statutory Powers Procedure Act (SPPA) and the Dagenais decision in deciding whether it is necessary to close the hearing and seal documents.
26. The Tribunal is unable to issue a publication ban. The only way to achieve the same effect is by a sealing order and an in camera hearing.
27. A sealing order alone is not sufficient to protect the minor victim because information from the proceeding could be published, and the nature of the allegations are such that the identity of the victim would be revealed. Similarly, due to certain facts in this case, a sealing order is required because anonymizing or redacting the name, would not be enough to prevent disclosing the victim's identity. Disclosing the victim's identity would harm them.
28. MLS's witness, after reviewing the relevant material, believes that revealing the allegations could harm the minor victim. KH also told Mr. Mitchell (Exhibit 5) that should the victim's identity be revealed it would harm KH and the minor victim both in the City, and in KH's ethnic and religious community.
29. There is a public interest in ensuring all the relevant facts are presented, and this would not be possible if the hearing were public.
30. The positive effects of a closed hearing and sealed documents outweigh the negative ones. MLS would like to present the recorded victim statements. By protecting the victim's identity, the victim's well-being will be protected. If the hearing is public, there is no way to stop the information from being distributed and no way to protect the minor victim.
31. In MLS's view, there is not a broader public interest in this particular case, which only relates to one licensee in the City.
32. The accused's name is not revealed as it may risk identifying the victim. Steps can be taken after the full hearing in terms of what orders and reasons the Tribunal issues, and whether there are public and non-public decisions released.

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KH

Mr. Stewart called Mr. Paul Mitchell, Paralegal, as a witness. He was affirmed and testified as follows:

33. KH told him that should the victim's identity be revealed it would seriously harm KH and the minor victim both in the City, and in KH's ethnic and religious community.

Ms Smith cross-examined Mr. Mitchell and he testified as follows:

34. He was retained by Mr. Stewart not KH.
35. He said he met with KH a few days ago. [When Ms Smith asked him to be more specific he then stated he met KH yesterday morning.] He did not require a certified interpreter when speaking with KH. KH spoke to him in English and he fully understood KH.
36. He did review documents but could not recall which ones he reviewed. He relied, in part, on information from KH for the affidavit. Mr. Stewart also relayed information to him, and also provided information about KH. He has no direct knowledge of any of the court proceedings against KH and has not seen those documents.

Panel members questioned Mr. Mitchell and he testified as follows:

37. KH told him that KH and the victim would be seriously harmed in their ethnic and religious community if the hearing were to be public. He does not know exactly how as he does not know enough about KH's belief or his ethnic or religious community.

It was unclear during the course of the motion what position Mr. Stewart was taking, and even when Tribunal members asked what his client's position was on the motion, he indicated he was not sure. However, in his closing submissions, Mr. Stewart, on behalf of KH, submitted that:

38. He opposes a public hearing and wishes the documents for the matter to remain sealed.
39. While the primary purpose of holding the hearing in camera and sealing documents is to protect the victim, these steps may also protect the accused.
40. KH recognizes that an open hearing will affect the alleged victim, and will impact him as well.
41. While he supports the same position as MLS he believes their evidence is unreliable, and the Tribunal should only rely on Mr. Mitchell's affidavit. Ms DiMatteo's evidence is flawed and her statements were ambiguous. He contends that the MLS obtained information without authority.

ANALYSIS

42. Open courts that are accessible to the public and the press are fundamental principle to democracies². At the same time, it is also recognized that the principle of open and accessible courts is not absolute.³ This is contemplated by section 9 of the Statutory Powers Procedure Act (SPPA) which sets out that oral hearings shall be public, except where in the Tribunal's opinion:
- a. matters involving national security may be disclosed; or
 - b. intimate financial or personal matters may be disclosed, such that the interests of the person affected or the public interest outweighs the desirability of adhering to the principle that hearings be public.
43. The Panel concluded that, in this case, a closed hearing was necessary to prevent intimate and personal matters from being disclosed that would impact the privacy, safety and well-being of the victim, who was a minor at the time of the alleged offences. KH was charged with various sexual offences under the CC, and the alleged victim was a minor (Exhibit 3). MLS's case rests in part on the underlying conduct that led to these charges. Even if the minor victim was not named, certain alleged facts would necessarily identify the victim whether by MLS in making its case or by KH in an effort to respond to the case against him. A public hearing would impact the parties' ability to freely give evidence required to make a fully informed decision.
44. In addition, if this matter was to be heard in public and/or the documents unsealed, the minor victim and KH may be stigmatized by their cultural and religious community (Exhibit 5).
45. A publication ban under section 486.4 of the CC is in place with respect the 2010 CC charges and 2017 conviction against KH (Exhibit 3), which further supports a closed hearing in our view, as that the court determined that a ban was required to protect the minor victims and/or witnesses. By proceeding in camera and with a sealing order a Tribunal may safeguard against inadvertent breaches of a publication ban⁴.
46. There is also a public interest in protecting victims of sexual offences and child witnesses. In *DC v. 371158 Ontario Ltd.*⁵, the court recognized the need to protect victims of sexual assault "...there is a need to protect them from the fear of coming forward because of the trauma and embarrassment of widespread publication.

² See for example, *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 SCR 1326, 1989 CanLII 20 (SCC); *A.G. Nova Scotia v. MacIntyre*, [1982] 1 SCR 175, 1982 CanLII 14 (SCC)

³ *Ibid.*

⁴ See *F.G. v. Scarborough (City) Board of Education*, [1994] OJ No. 240, where the Board of Education held an *in camera* hearing to ensure confidentiality due to a publication ban under the *Young Offenders Act*.

⁵ *DC v. 371158 Ontario Ltd.*, 1994 CanLII 7494 (ON SC) at para. 14

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47. The Panel agreed with MLS's submission that there is limited broader public interest in this particular case, which only relates to one licensee in the City of Toronto. Aside from Mr. Duffy of Taxi News, there was no member of the public present or expressing interest in this hearing.
48. The victim's interest, along with the public interest in protecting victims of sexual offences and child witnesses, outweighs any public interest in an open hearing and/or right to free expression in this case.
49. The Dagenais/Mentuck⁶ test set out by the SCC is also relevant and applies to orders where freedom of expression or freedom of the press is limited in a legal proceeding. The test requires that an order limiting openness:
 - c. be necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk; and
 - d. the salutary effects outweigh the deleterious effects on the rights and interests of the parties and the public, including the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.
50. As already noted, the Panel concluded that the salutary effects of a closed hearing outweighed any deleterious effects on the rights and interests of the parties and the public.
51. The Panel agreed with the submissions of MLS that a sealing order to prevent public access to documents is also necessary, and it was insufficient to only close the hearing. There is a risk to the privacy, safety and well-being of the victim if information in the record is publicly available. The positive effects of a sealing order in protecting the rights and interests of the victim and the public, outweighs any negative effects.
52. The Panel also considered if there were other reasonable alternatives to a closed hearing or sealing the documents that could be put in place.
53. In our view there are not. Publication bans issued in criminal proceedings do not necessarily extend to civil or administrative proceedings.⁷ The Tribunal has no clear authority to issue a publication ban either under the SPPA or any other legislation, and thus if there is a public hearing, the Tribunal would have no mechanism to prevent the disclosure of the information heard. As with the public hearing, other measures, such as anonymizing or redacting names in the material, are insufficient to protect the victim's identity. Given the nature of the alleged conduct, their identity could be revealed, and thus a sealing order is also required.
54. Mr. Stewart indicated in his submissions and during the course of the motion that in his view MLS had obtained material improperly either from the Toronto Police

⁶ Ibid; R. v. Mentuck, [2001] 3 S.C.R. 442, 2001 SCC 76, see also Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41.

⁷ Loveridge v. HMTQ, 2005 BCSC 1068 (CanLII) at para 28

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Service or the Crown, and also that prior MLS counsel had improperly disclosed KH's full name to the media (e.g., Taxi News). MLS counsel responded that Mr. Stewart seemed to misunderstand the meaning of a s. 486.4 Publication Ban under the Criminal Code, which relates to non-disclosure of victim and complainant names, not to the disclosure of the name of the accused, and that MLS has provided Mr. Stewart with the information regarding how MLS obtained material from TPS and the Crown, and it was in compliance with R. v. Wagg⁸. The Tribunal did not make any determination on these matters, nor did they consider the issues relevant as to whether or not the matter should be heard in camera or documents be sealed. In any event, the Tribunal has not seen anything to suggest MLS or MLS counsel acted improperly.

55. The Tribunal did not consider if after the full hearing on the merits, KH will need to be identified and/or whether that Panel will issue a public and a non-public decision.

DECISION

For the reasons set out above:

The Tribunal orders the hearing in KH to proceed in camera.

The Tribunal reaffirms the sealing order put in place on July 19, 2018. All documents filed, all exhibits entered, and all court recordings of the matter, are to be sealed. This sealing order does not apply to the motion materials or exhibits filed for the motions heard on January 17, 2019, because these materials do not reveal the name of the Applicant or disclose the identity of the alleged victim.

Originally Signed

Melina Laverty, Hearing Panel Chair

Panel Members, Anu Bakshi and Daphne Simon concurring.

Reference: Minute No. 14/19

Date Signed: January 29, 2019

⁸ DP v. Wagg, 2004 CanLII 39048 (ON CA)