In the Court of Appeal of Alberta

Citation: Aboriginal Peoples Television Network v Alberta (Attorney General), 2018 ABCA 133

Date: 20180406
Docket: 1501-0240-AC
Registry: Calgary

Between:

Aboriginal Peoples Television Network

Appellant (Applicant)

- and -

Her Majesty the Queen, Connie Oakes, and Wendy Scott

Respondents

The Court:

The Honourable Mr. Justice J.D. Bruce McDonald
The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Madam Justice Sheila Greckol

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice E. A. Hughes
Dated the 9th day of September, 2015
Filed on the 27th day of October, 2015
(Docket: 120064472Q1)

Memorandum of Judgment

The Court:

1. Introduction

[1] A witness in a murder trial was cross-examined using her videotaped statements to police. Only small portions of her statements were put to her during cross-examination. Neither the judge nor the jury watched the portions of the videos that were not played in court, or made any decisions based upon them, or otherwise considered them. However, the trial judge marked complete copies of the videotaped statements as an exhibit for identification. Does the open court principle apply to the entirety of these videos – or only the portions that were used during cross-examination? This is the difficult question raised on appeal.

[2] In this case, the appellant, Aboriginal Peoples Television Network (APTN), applied for an order authorizing the release and publication of videotaped interviews marked as exhibits in the second degree murder trial of the respondent, Connie Oakes. The trial judge allowed the application in part, granting APTN access to the portions of the videos that were played for the jury during cross-examination. She denied access to the remainder of the exhibits. APTN appealed, arguing that the trial judge should have granted it full access to the exhibits.

[3] In our view, the open court principle does not extend to the parts of the videos that were not actually used at trial, in the sense that they were never considered by the judge or jury nor did they play a role in the resolution of any legal, factual, or procedural issue. While access to these videos does not turn on whether the full videos were admissible under the rules of evidence, the trial judge did not err by refusing to release the exhibit. For the reasons that follow, the appeal is dismissed.

2. Background Facts

[4] Casey Armstrong was stabbed to death in May 2011. Connie Oakes and Wendy Scott were charged with his murder. In November 2012, Ms. Scott pled guilty to second-degree murder. In November 2013, after a jury trial, Ms. Oakes was convicted of second-degree murder.

[5] Ms. Scott was a key Crown witness in Ms. Oakes' trial. After arrest, Ms. Scott gave at least three videotaped statements to the police but unfortunately, not all of her statements were transcribed. When defence counsel cross-examined Ms. Scott, he played excerpts from these videotaped statements. Defence counsel pointed to inconsistencies between her statements to the police and her testimony at Ms. Oakes' trial. In the course of cross-examination, the jury watched only the portions of the statements played to highlight these inconsistencies. While there was some discussion about whether it would be possible to edit the videos down to the

passages put to Ms. Scott, two DVDs containing the full recordings of the videotaped statements were marked collectively as Exhibit F for identification. The trial judge made it clear that the full videos would not go to the jury, and the trial judge had no further reason to review or rule upon Exhibit F.

[6] Despite Ms. Scott's guilty plea, she appealed her conviction, arguing that the facts she admitted did not support a murder conviction. The Crown did not oppose her appeal, and on October 16, 2015, this Court ordered a new trial for Ms. Scott. Ms. Oakes also appealed, and on April 6, 2016, a majority of this Court ordered a new trial for Ms. Oakes: *R v Oakes*, 2016 ABCA 90, 616 AR 234. The Crown stayed the charges against Ms. Oakes on April 28, 2016 and stayed the charges against Ms. Scott on January 13, 2017.

3. Decision Below

[7] On March 26, 2015 – long after the conclusion of Ms. Oakes' murder trial but while her appeal was still outstanding – APTN applied for access to Exhibit F. The trial judge, sitting in chambers and in her capacity as the judge at Ms. Oakes' murder trial, heard APTN's application on September 9, 2015. She allowed APTN's application in part.[1] She agreed that the portions of Exhibit F used during the cross-examination of Ms. Scott could be released to APTN, but she delayed APTN's right to broadcast the videos until after this Court ruled upon Ms. Scott's application to extend time to appeal. These portions, about five to seven minutes of video tape, have now been disclosed to APTN.

[8] The chambers judge denied APTN's application to access the remainder of Exhibit F. She framed the issue on the application as follows: "... the question really is should the evidence that was not before me as the trial judge, counsel for the Crown, or counsel for the defence, and certainly did not get put before the jury, be released to the media for publication?" She noted that the jury had seen only brief excerpts from the videos during cross-examination. She also pointed out that cross-examination of a witness using a prior inconsistent statement does not make the statement admissible in evidence, and noted that the full statements contained on the DVDs were not admissible evidence that could be considered by the jury. In light of these factors, she was not satisfied that the open court principle applied, and she denied APTN access to the complete videos contained in Exhibit F.

4. Grounds of Appeal

[9] APTN seeks to have the entire contents of Exhibit F released, raising four grounds of appeal in support of its position:

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[1] Unfortunately, the transcript of the trial judge's reasons reproduced in the appeal record contains a number of passages marked "(indiscernible)". We are satisfied that we can discern the essence of her reasoning from the record, and the parties were content to proceed on this record.

a. the chambers judge failed to recognize and apply the open court principle to the request for Exhibit F;

b. the chambers judge failed to apply the test governing publication restrictions properly, as set out in *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835, 34 CR (4th) 269, and *R v Mentuck*, 2001 SCC 76, [2001] 3 SCR 442;

c. the chambers judge subjected the request to irrelevant considerations and restrictions, namely, the admissibility of Exhibit F; and

d. the chambers judge erred in failing to order the release of Exhibit F in its entirety.

5. Standard of Review

[10] Questions of law are reviewed for correctness, while the chambers judge's fact findings and inferences are reviewed for palpable and overriding error: *Dow Chemical Canada Inc v Shell Chemicals Canada Ltd*, 2010 ABCA 126 at para 10, 477 AR 112, leave to appeal denied, 2010 CanLII 62504 (SCC). Discretionary limits on public access that implicate the open court principle often raise legal issues that attract review on a correctness standard: *MEH v. Williams*, 2012 ONCA 35 at paras 35-37, 108 OR (3d) 321.

[11] Although the order now under appeal involves an exhibit in a criminal trial, APTN's application was advanced in chambers as an ordinary civil application. While Ms. Oakes' conviction was under appeal when APTN filed its application, the criminal proceedings against Ms. Scott and Ms. Oakes have since come to an end, and so APTN's request to access Exhibit F cannot have any effect on their right to a fair trial. No one questions our jurisdiction to hear this matter as an ordinary civil appeal: *CBC v Ontario*, 2011 ONCA 624, 107 OR (3d) 161.

6. Analysis

[12] All the APTN grounds of appeal involve the same threshold question: does the open court principle apply to *all* of Exhibit F – such that the *Dagenais/Mentuck* framework governs access to *the entirety* of these videos – or does the open court principle only apply to the portions of Exhibit F that were used during cross-examination?

[13] The open court principle is a central tenet of our justice system. Open courts are a hallmark of a democratic society: *Re Vancouver Sun*, 2004 SCC 43 at para 4, [2004] 2 SCR 332. The administration of justice "thrives on exposure to light and withers under a cloud of secrecy": *Toronto Star Newspaper Ltd v Ontario*, 2005 SCC 41 at para 1, [2005] 2 SCR 188. The open court principle is "multifaceted," and is best understood as an "ensemble of practices" that reflect the importance of transparent and accountable justice: *CBC v New Brunswick (AG)*, [1996] 3 SCR 480 at para 22, 139 DLR (4th) 385; *CBC v Canada (AG)*, 2011 SCC 2 at paras

1-2, [2011] 1 SCR 19; *Endean v British Columbia*, 2016 SCC 42 at para 83, [2016] 2 SCR 162. These transparency-enhancing practices help educate the public about the administration of justice, help enable informed criticism of the actors within the justice system, and help guarantee the integrity of the courts: *Edmonton Journal v Alberta (AG)*, [1989] 2 SCR 1326 at pp 1360-1361, 64 DLR (4th) 577; *CBC v Canada* at para 29. Few have expressed the importance of open courts as eloquently as Toulson L.J. in *Guardian News and Media Ltd. v City of Westminster Magistrates' Court* [2012] EWCA Civ 420 at para 1, [2012] 3 All ER 551:

> Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? It is an age old question. *Quis custodiet ipsos custodes* - who will guard the guards themselves? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse. Jeremy Bentham said in a well-known passage quoted by Lord Shaw of Dunfermline in *Scott v Scott*, [1913] AC 417 [at p 477]:
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> > Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.

[14] APTN is a media organization. Members of the media serve an important role in maintaining public access to the courts and the justice system. Journalists act as surrogates for the public. Reporters are the conduits through which members of the public learn about the justice system: *Edmonton Journal* at pp 1340, 1360. Canadian courts do not merely *permit* journalists in the courtroom, reporters are an essential feature within Canadian courts: *CBC v Canada* at para 96; *Endean* at para 85. At the heart of nearly every significant public debate about our justice system are journalists who report on the proceedings and help inform these debates.

[15] The public's ability to inspect trial exhibits is a "corollary to the open court principle": *CBC v The Queen and Dufour*, 2011 SCC 3 at para 12, [2011] 1 SCR 65 [*Dufour*]. Although trial judges have discretion to prohibit public access to an exhibit, or impose conditions on the public's use of an exhibit, they must apply the well-known *Dagenais/Mentuck* test when exercising a discretionary power that could infringe on the open court principle: *Dufour* at para 13. A trial judge considers whether:

> (a) a limitation on the public's ability to access the exhibit 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 limitation on the public's ability to access the exhibit outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on freedom of expression, the accused's right to a fair and public trial, and the efficacy of the administration of justice.
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> [See *Dagenais* at paras 73-74; *Mentuck* at para 32; *Vancouver Sun* at para 31]

[16] As with any limit on the open court principle, the party seeking to restrict the public's access to an exhibit must displace the presumption of openness. Public access is the rule; covertness the exception: *Nova Scotia (AG) v MacIntyre*, [1982] 1 SCR 175 at 185, 26 CR (3d) 193; *CBC v New Brunswick* at para 71; *Dufour* at para 13.

[17] Post-*Dufour*, the open court principle clearly extends to a videotaped statement marked as an exhibit and played at trial, such as a videotaped interrogation of an accused that is tendered as part of the Crown's case. More generally, *Dufour* stands for the proposition that the open court principle applies to trial exhibits. Despite this general rule, we conclude that, because of the limited way the videos were used in this case, it was unnecessary for the trial judge to perform a *Dagenais/Mentuck* analysis to decide whether APTN could have access to the complete videos of Ms. Scott's interviews. Although the videos were made an exhibit, none of the various rationales for protecting the public's access to court exhibits apply to the portions of these videos that neither the judge nor the jury watched or considered at any point during the trial. In our view, this brings the portions of the videos that were not viewed, and that did not form part of the trial record, outside the purview of the open court principle, despite their status as an exhibit for identification.

[18] To explain our conclusion, we begin with the context of how prior inconsistent statements are used in a criminal trial.

a) *When a witness is cross-examined using a prior inconsistent statement, what principles govern the use of the statement as an exhibit?*

[19] Ms. Oakes' position was that Ms. Scott was an unreliable and incredible witness. Defence counsel pointed out significant inconsistencies between Ms. Scott's statements to the police and her testimony at trial. He put these inconsistencies to Ms. Scott by playing portions of her earlier statements during cross-examination, in the presence of the jury. In doing so, he drew Ms. Scott's attention to the contradictory portions of her prior statements as required by s 10 of the *Canada Evidence Act*, RSC 1985, c C-5; see generally D.M. Paciocco & L. Stuesser, *The Law of Evidence*, 7th ed (Toronto: Irwin Law, 2015) at p 488.

[20] A witness's prior out-of-court statements do not stand on the same footing as his in-court testimony. Allowing the trier of fact to use a witness's prior statement for the truth of

its contents would offend the hearsay rule. There are, of course, exceptions. A witness can adopt her prior statement – that is, acknowledge the accuracy of her earlier statement, based on her present memory. If so, the witness's earlier statement effectively becomes part of her in-court testimony and can be relied upon for its truth: *R v McCarroll*, 2008 ONCA 715 at paras 39-42, 61 CR (6th) 353. Even if the witness has no present memory of the matters discussed in an earlier statement, her statement might be admissible as a past recollection recorded: *R v Fliss*, 2002 SCC 16 at para 63, [2002] 1 SCR 535. Or a witness's prior statement could be admitted for the truth of its contents pursuant to a common law hearsay exception (e.g. *res gestae*) or the principled exception to the hearsay rule. But in most cases where a cross-examining party impeaches credibility of a witness using her earlier inconsistent statement, the inconsistent statement itself is not evidence. Jurors must understand that merely confronting a witness with a prior inconsistent statement does not make her earlier statement admissible evidence in its own right: *R v Forsythe*, [1943] SCR 98 at pp 101-102, 79 CCC 129; *R v Deacon*, [1947] SCR 531 at pp 537-538, 3 CR 265; *R v Rowbotham* (1988), 25 OAC 321 at para 121, 41 CCC (3d) 1 at p 54 (CA).

[21] Because a prior inconsistent statement is not itself evidence, there is generally no need to mark a transcript of a prior oral statement as an exhibit, so long as the record reflects the passages that counsel put to the witness during cross-examination: Paciocco & Stuesser at p 489. The cross-examining lawyer simply directs the witness's attention to the relevant portions of the transcript and reads excerpts of the transcript aloud to the witness. The witness's prior statement is taken down by the court reporter and becomes part of the trial record: see e.g. the cross-examination reproduced in *R v Nygaard*, [1989] 2 SCR 1074 at pp 1090, 1105-1107, 72 CR (3d) 257, and *R v AGW*, 2017 ABCA 247 at paras 31-32. The trial judge retains discretion to mark relevant excerpts of a transcript as an administrative exhibit: *R v Rodney* (1988), 33 BCLR (2d) 280 at para 17, 46 CCC (3d) 323 (CA), aff'd on other grounds, [1990] 2 SCR 687; *R v Tyer*s, 2015 BCCA 507 at para 29, 381 BCAC 46. But the jury should understand that, even if marked as an exhibit, any out-of-court statements that are not adopted are not considered for the truth of their contents, and instead, are used only to evaluate the witness's reliability and credibility: *R v Campbell* (1977), 17 OR (2d) 673, 38 CCC (2d) 6 (CA).

[22] There are occasions when a witness's entire statement (or a full transcript of a statement) is marked as an exhibit even though counsel did not cross-examine the witness using the complete statement. For example, presenting only limited portions of a prior statement might leave the jury with a misleading impression about the witness's earlier statement: *R v Murray*, 2017 ONCA 393 at paras 151-154, 347 CCC (3d) 529. Or a witness may be extensively cross-examined using substantial portions of her earlier statement, and it may be necessary to mark the entire statement to help the trier of fact understand the extent to which the witness's evidence was truly impeached. In general, however, the party tendering a witness cannot introduce the *consistent* portions of a witness's earlier statement merely because the opposing party has cross-examined the witness using inconsistencies in her prior statement: *R v Ellard*, 2009 SCC 27 at para 31, [2009] 2 SCR 19; *Rodney* at paras 7, 17; *Murray* at para 153.

Marking a witness's entire statement as an exhibit is the exception, not the rule – subject to an important practical caveat that applies to audio- and video-recorded statements, discussed below.

[23] With these evidentiary principles in mind, we turn to whether the admissibility of the video statements should influence whether to conduct a *Dagenais/Mentuck* analysis.

b) *Does APTN's right to access the complete videos turn on whether the videos were admissible evidence at the trial?*

[24] The accused used the videos of Ms. Scott's police interviews to impeach her credibility during cross-examination. While they were exhibits, the videos were not themselves admissible evidence. But the public's ability to examine a court exhibit does not turn on whether the evidence was admissible under the rules of evidence.

[25] Some pre-*Dagenais* authorities suggest that admissibility was an important consideration when deciding whether the public should have access to an exhibit. For example, in *Vickery v Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 SCR 671, 64 CCC (3d) 65, the accused's videotaped confession was ruled inadmissible on appeal. The media sought access to the videotapes. The court registrar denied the CBC access to the exhibits. Stevenson J., writing for the majority of the Supreme Court, affirmed the registrar's decision. He agreed that the accused's "privacy interests as a person acquitted of a crime outweigh the public right of access to exhibits judicially determined to be inadmissible against him": p 679. In dissent, Cory J. disputed whether legal admissibility had bearing on the public's ability to access the video exhibit: pp 705-707.

[26] *Vickery* pre-dated *Dagenais* and *Mentuck*, and the majority in *Vickery* had specifically declined to consider the s 2(b) *Charter* implications of limiting public access to court exhibits – a factor that featured prominently in the Court's later decisions. More recently, in *Dufour*, the Supreme Court confirmed that the *Dagenais/Mentuck* test applies to all discretionary decisions that affect the openness of court proceedings, including applications to restrict access to court exhibits: para 13. While "some aspects of *Vickery* remain relevant", the reasoning in *Vickery* no longer strictly governs whether the public should have access to exhibits: *Dufour* at para 11.

[27] The majority in *Vickery* discussed a number of factors that can influence whether a trial judge should allow public access to a court exhibit, such as the nature of the exhibit, whether anyone has a proprietary interest in the exhibit, how the exhibit will be used by the party seeking access, whether the underlying proceedings have concluded, and the admissibility of the exhibit. Although the factors in *Vickery* remain relevant, judges now apply them within the *Dagenais/Mentuck* framework: *Dufour* at para 14. As a result, while the evidentiary admissibility of an exhibit remains a consideration when a judge decides whether to limit public access, inadmissibility alone is no reason to dispense with the *Dagenais/Mentuck* balancing

process. The fact that a videotaped statement is inadmissible under the rules of evidence – or is marked as an exhibit for identification rather than a full exhibit – does not settle the question of whether the open court principle applies, nor does it determine whether the public should be given access to an exhibit.

[28] Next, we turn to a practical question: *why* did counsel mark complete copies of the videotapes as an exhibit, even though the judge and jury did not review the entirety of Ms. Scott's witness statements?

c) *Is it practical to expect counsel to edit audio and video statements before marking them as exhibits?*

[29] As judges, we are aware that it is sometimes necessary for lawyers to play a witness's audio- or video-recorded statement during cross-examination. It may be because a witness who is confronted with an inconsistency using a transcript claims she does not remember making the transcribed statement and playing part of her recorded statement will jog her memory, while avoiding the need to call other witnesses to prove the witness made the statement. Or there may be no transcript of a recorded statement,[2] and playing a portion of the statement is the most practical way of putting the inconsistency to the witness. Or, in some cases, the cross-examiner might want the jury to listen to (or watch) the witness's earlier statement, so the trier of fact can assess the witness's tone of voice or demeanour when she made her earlier statement.

[30] Unlike transcripts of statements that counsel read into the record, court reporters do not transcribe audio or video recordings played during cross-examination. Counsel must take other steps to ensure that the trial record includes any portions of an audio or video statement put to a witness. When only a portion of an audio or video recording is used during cross-examination, counsel typically place on the record the digital time displayed on a video recording when they start and stop playing the recording and then mark a copy of the recording itself as an exhibit for identification. There is then a complete record for appellate review, and the trial judge is able to replay the same portions of a recording for the jury if necessary.

[31] The more difficult question is *how much* of the witness's recorded statement should be marked as an exhibit. As noted, transcripts used during cross-examination are not ordinarily marked as exhibits. When a transcript *is* marked as an exhibit, lawyers typically edit the transcript to include only the passages put to the witness during cross-examination. Ideally, counsel would similarly edit any audio- or video-recorded statement before marking the recording as an exhibit, but, as in this case, doing so is likely not feasible in the middle of a trial.

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[2] As the trial judge noted during the course of Ms. Oakes' trial, the failure to prepare transcripts often leads to inconvenience and delay as counsel struggles with audio/visual equipment instead of simply reading from a paper transcript. We share her concern that the failure to prepare transcripts may be a case of the Crown being "penny wise, pound foolish."

Nor can counsel perform such editing in advance of the trial since until a witness testifies, they do not know what portions of her evidence will be inconsistent with a prior statement.

[32] Here, the parties effectively agreed that, while the full audio or video recording would be marked as exhibit for identification, only the specific portions put to the witness form part of the trial record. Although full copies of the recordings were included in the DVDs marked as Exhibit F, for the sake of convenience, only those portions that defence counsel played during cross-examination were considered by the jury. Neither the judge nor the jury had any reason to review the remaining portions.

[33] These practical reasons for marking the full statements as Exhibit F do not answer all APTN's arguments about whether the open court principle should apply to the entire statements.

d) *Do the reasons for presuming public access to court exhibits extend to the portions of a witness's statement that were never considered by the judge or jury?*

[34] At the heart of this case is the issue of whether Exhibit F is caught by the general rule that exhibits are subject to the open court principle; or whether Exhibit F is distinguishable because of the limited way the videos were used at Ms. Oakes' trial.

[35] As discussed, the DVDs containing Ms. Scott's full statements were marked as an exhibit for convenience as it was impractical to edit them. As the Crown put it during oral argument, the full statements are effectively "there by mistake."

[36] Since the full videotapes were never considered by the trier of fact *or* the trier of law, they are part of the trial "record" only in the most literal sense that they were attached to the court file. Legally, however, they were *not* part of the record, in the sense that the full videos did not reflect the information the judge or the jury could have used to decide any questions of law or fact. Nor did they reveal anything about the court process, or explain how the charges against Ms. Oakes proceeded through the court system.

[37] We have acknowledged the importance of the open court principle; this principle informs our consideration of whether allowing access to the *entirety* of these videos advances any of the policy rationales that support it. The Supreme Court has recognized four broad rationales for the open court principle:

> (1) to maintain an effective evidentiary process; (2) to ensure a judiciary and juries that behave fairly and that are sensitive to the values espoused by the society; (3) to promote a shared sense that our courts operate with integrity and dispense justice; and (4) to provide an ongoing opportunity for the

> community to learn how the justice system operates and how the law being applied daily in the courts affects them.
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> [*Edmonton Journal* at p 1361 (per Wilson J.); *Endean* at para 66.]

[38] In our view, allowing public access to the portions of a videotaped statement that were not used during cross-examination, and were not otherwise considered by the judge or jury, does not meaningfully advance any of these goals.

[39] Doing so would not help ensure that the "judiciary and juries … behave fairly and … are sensitive to the values espoused by the society," nor would it "promote a shared sense that our courts operate with integrity and dispense justice". Because neither the judge nor the jury reviewed the full videotapes, the unused portions of the witness statements will tell the public nothing about how the judge or the jury behaved or decided the case. Likewise, the unused portions of the video could have no influence on how the judge or jury decided any point of law, fact, or procedure, nor would they reveal how the court operated or dispensed justice.

[40] The open court principle is also thought to maintain an "effective evidentiary process" because "open examination of witnesses 'in the presence of all mankind' [is] more conducive to ascertaining the truth than secret examinations": *Edmonton Journal* at p 1358, citing Blackstone's *Commentaries on the Laws of England* (1768), vol III, c 23, at p 373. Sunlight is a disinfectant; requiring witnesses to testify before the public helps expose perjury and helps ensure that the courts and lawyers treat witnesses fairly. But the Supreme Court has recognized that this rationale does not demand public access to *all* information that is logically connected to the justice system, no matter how tenuous its link to the in-court decision-making process. Testimony taken during examination for discovery remains presumptively confidential unless it is later used in court: *Juman v Doucette*, 2008 SCC 8 at paras 21-22, [2008] 1 SCR 157. In our view, the hope that transparency will encourage witnesses to give honest evidence does not justify shining a light on every part of a statement made before trial, regardless of whether it was used to decide a case. Limiting public access to information so far removed from the adjudicative process does not engage the interests protected by the *Dagenais/Mentuck* framework.

[41] We recognize that the open court principle has been defined expansively. For example, the presumption of public access extends not only to what happens within the courtroom or at the trial itself, but also to pre-trial proceedings and to documents filed with the court: *Vancouver Sun* at para 27. But courts' expansion of the open court principle to encompass information outside the physical courtroom is still grounded in concerns about judicial accountability and the need to inform the public about how courts operate. Courts allow public access to these broader sources of information largely to help the public make informed judgments about how judges and juries decide cases: *Edmonton Journal* at p 1340.

[42] Ensuring the public has the necessary information to make informed judgments about court proceedings is undeniably important – but there are limits on how far this logic extends. Not every piece of information related to the functioning of the justice system engages the open court principle and demands a *Dagenais/Mentuck*-style balancing exercise. The open court principle does not, for example, allow members of the public to read judges' draft reasons for judgment, or attend pre-trial conferences held within judges' chambers, or place a camera inside the jury room, or gain access to internal court memoranda. Nor does it extend to important pieces of evidence that are mentioned in an agreed statement of facts, but not filed with the court: see e.g. *Canadian Broadcasting Corporation v. Canada (AG)*, 2009 NSSC 400 at para 51, 286 NSR (2d) 186.

[43] The public has an interest in learning about what happened at Ms. Oakes' trial, and APTN has a legitimate interest in reporting on Ms. Scott's story. But denying access to the full exhibits does nothing to limit APTN's ability to report on this case as it was revealed, considered, and decided *through our court system.* The open court principle promises the public access to the courtroom and to the information judges and juries use to reach decisions. It is not, however, a free-standing right that allows the media to demand access to any information *about* the justice system, or about the people who are involved in it.

[44] Just as the "notion of accessibility protected by the open court principle is not typically concerned with whether a hearing is held within the boundaries of the province in which the matter originated" (*Endean* at para 69), the notion of accessibility protected by the open court principle is not typically concerned with records within the court file that reveal nothing about how the court system functions and nothing about how a judge or jury decided the case. Denying access to unused portions a witness's statement does not prevent the media from reporting on the court proceedings. The media can still review and report on the inconsistencies in a witness's evidence, as revealed in court. The media can still tell the public about all of the information the jury used to reach its verdict. The media can still tell the public everything the trial judge considered or ruled upon when deciding a question of law or admissibility. And the media can still tell the public about all of the parties' arguments and submissions to the court.

[45] As the Supreme Court acknowledged in *Dufour*, public access to a witness's videotaped statement can have salutary effects on the administration of justice. We agree that a presumption of public access to a complete copy of a recorded statement is justifiable when the witness's entire interview was considered by either the judge or jury – for example, where the trial judge reviewed a full video recording to rule upon its admissibility. In those cases, public education and judicial accountability often become the predominant concerns, and a *Dagenais/Mentuck* balancing of interests is appropriate. But where an entire video is included in the court file merely because it was impractical for counsel to produce an edited version, in our view, the policy considerations that trigger a presumption of public access do not apply.

[46] As we see it, the most principled place to draw the line is here: any portion of a witness's videotaped statement that does not truly form part of the trial record – because it was never considered by either the judge or jury when deciding *any* issue, factual or legal, substantive or procedural – does not fall within the ambit of the open court principle. The trial judge maintains discretion to make orders relating to the review, disposition, or release of exhibits. Here, the trial judge did not err by failing to apply the *Dagenais/Mentuck* framework when she decided whether to grant access to the recordings. The presumption of public access did not apply.

e) *Does access to the videos turn on whether the videos were played in open court?*

[47] Our decision hinges on how the trial court used these videos – or to be precise, how it *did not* use the videos. Our decision does not turn on the fact that counsel did not play the full videos inside the courtroom proper. The open court principle is not limited to what goes on inside the physical courtroom. If a videotaped statement is reviewed or considered by the trier of fact or law – even to determine the video's admissibility, or even during the judge's deliberations – then the video is part of the court record, and the open court principle is engaged.

[48] For example, in *R v Canadian Broadcasting Corporation*, 2010 ONCA 726, 102 OR (3d) 673, the CBC sought access to video exhibits the Crown had introduced at a preliminary inquiry. The preliminary inquiry judge refused the CBC access to the recordings. The superior court judge who heard the CBC's application for judicial review allowed the CBC access to only those portions of the recordings that the Crown had played in open court. The Ontario Court of Appeal allowed the CBC's appeal and granted access to the entirety of the videos. Sharpe J.A. explained why the failure to play the videos in open court was no impediment to public access:

> [42] In my view, the application judge erred by limiting CBC's right of access to only those portions of the exhibits that were played in open court.
> ...
>
> [43] When an exhibit is introduced as evidence to be used without restriction in a judicial proceeding, the entire exhibit becomes a part of the record in the case. While a party may choose to read or play only portions of the exhibit in open court, the trier of fact, whether judge or jury, is not limited to considering only those portions when deciding the case. A party who introduces an exhibit without restriction cannot limit the attention of the trier of fact to only portions of the exhibit that favor that party and that the party chooses to read out or play in open court.
>
> [44] As the entire exhibit is evidence to be used in deciding the case, I can see no principled reason to restrict access to only those portions played or

> read out in open court. When Dickson J. articulated and applied the open court principle to accord a journalist access to an affidavit filed in support of a search warrant application in *MacIntrye*, he was plainly confronted with material that had not been read out in open court. Yet he did not hesitate to order access. Absent some countervailing consideration sufficient to satisfy the *Dagenais/Mentuck* test, the open court principle and the media's right of access to judicial proceedings must extend to anything that has been made part of the record, subject to any specific order to the contrary.
>
> [Emphasis added.]

To similar effect, see: *Coltsfoot Publishing Ltd. v Foster-Jacques*, 2012 NSCA 83 at paras 72-94, 320 NSR (2d) 166; *Guardian News and Media Ltd.* at paras 76-87.

[49] We agree. But Sharpe J.A.'s reasoning reinforces our conclusion that the open court principle does not extend to the portions of these videotapes that went unused during cross-examination. Defence counsel did not introduce the videos as evidence the jury could review or use without restriction, and the jury did not use the entire exhibit to decide the case. We agree that "the open court principle and the media's right of access to judicial proceedings must extend to anything that has been made part of the record." But in this case, the full videos were not truly part of the record. Properly understood, only the portions played to Ms. Scott during cross-examination formed part of the record.

f) *If the open court principle does not apply to the complete videos, did the trial judge exercise her discretion unreasonably when she denied access to all of Exhibit F?*

[50] Even though the open court principle does not apply to Exhibit F, the trial judge had authority to regulate the access to, and use of, any exhibits. In these relatively narrow circumstances – where a complete video was marked as an exhibit but was not subject to the open court principle – the trial judge's inherent jurisdiction would, in theory, allow her to open the exhibit to review by third parties. When deciding whether to allow access, the trial judge would undoubtedly consider many of the same factors that she would consider under the *Dagenais/Mentuck* framework and the *Vickery* principles, including how the party intends to use the exhibit, whether any party has a proprietary interest in the exhibit, and the privacy interests implicated by the release of the exhibits. The two most significant differences would be the absence of any presumption of public access to the full recording, and the more limited public interest in gaining access to a recording that was not used to decide any legal or factual issue.

[51] On the record before us, we do not discern any error in the trial judge's decision to deny APTN access to the full recordings. She was entitled to consider the admissibility of the statement as a factor weighing against access, and her decision was both reasonable and correct in light of the underlying circumstances or the evidence.

7. Conclusion

[52] For these reasons, the appeal is dismissed.

Appeal heard on June 16, 2017

Memorandum filed at Calgary, Alberta
this 6th day of April, 2018

McDonald J.A.

Veldhuis J.A.

Greckol J.A.

Appearances:

B. Mescall
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for the Respondent, Her Majesty the Queen

M.A. McConaghy, Q.C.
for the Respondent, Wendy Scott

A. K. Seaman (No Appearance)
for the Respondent, Connie Oakes