



SUPREME COURT OF CANADA

CITATION: Canadian Broadcasting Corp. v. Canada, 2011 SCC 3

DATE: 20110128

DOCKET: 32987

BETWEEN:

Canadian Broadcasting Corporation

Appellant

and

Her Majesty The Queen and Stéphan Dufour

Respondents

- and -

**Attorney General of Canada, Attorney General of Quebec,
Attorney General of New Brunswick, Attorney General of Alberta,
British Columbia Civil Liberties Association and
Canadian Civil Liberties Association**

Interveners

OFFICIAL ENGLISH TRANSLATION

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron,
Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 20)

Deschamps J. (McLachlin C.J. and Binnie, LeBel, Fish,
Abella, Charron, Rothstein and Cromwell JJ. concurring)

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CANADIAN BROADCASTING CORP. v. CANADA

Canadian Broadcasting Corporation

Appellant

v.

**Her Majesty The Queen and
Stéphan Dufour**

Respondents

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**Attorney General of Canada,
Attorney General of Quebec,
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Indexed as: Canadian Broadcasting Corp. v. Canada

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File No.: 32987.

2010: March 16; 2011: January 28.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE SUPERIOR COURT OF QUEBEC

Criminal law — Procedure — Broadcasting ban — Open court principle — Video recording of statement made to police by accused tendered in evidence at trial — Media organizations applying for permission to broadcast recording of statement — Expressive activity protected by freedom of expression — Order within discretion of trial judge — Whether motion must be decided by applying Dagenais/Mentuck test.

Courts — Superior Court — Broadcasting ban — Rules of practice prohibiting any broadcasting of recording of hearing — Whether prohibition applies to broadcasting of exhibit tendered in evidence — Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division, 2002, SI/2002-46 (am. SI/2005-19), ss. 8, 8.A.

At S's trial, the Crown produced as an exhibit a video recording of a statement he had made to the police before being charged. The Superior Court authorized journalists to view the statement in another courtroom and to film the screen on which the statement was being played back, but prohibited them from broadcasting the recording of the statement. The CBC and Groupe TVA applied to

the Superior Court for permission to broadcast the video recording of the statement, but their motion was dismissed. The CBC appealed that decision.

Held: The appeal should be dismissed.

The prohibition on broadcasting provided for in ss. 8 and 8.A of the *Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division, 2002* does not apply to a video recording tendered in evidence. It applies only to recordings of proceedings. Because exhibits are created independently of and prior to the proceedings at the hearing, they cannot be equated with those proceedings. Access to exhibits is a corollary to the open court principle, and in the absence of an applicable statutory provision, it is up to the trial judge to decide, in accordance with the analytical approach developed in *Dagenais* and *Mentuck*, how exhibits can be used. Before making an order on an application to broadcast a statement, the trial judge must weigh the factors at stake and ensure that the serenity of the hearing, trial fairness and the fair administration of justice are preserved.

In this case, S's trial is now over and he has been acquitted. The appeal as framed has become moot. However, should a motion to broadcast the statement be made even though the judicial proceedings are over, the judge would have to assess the impact that broadcasting the statement might have on the trial of a co-accused or on the accused personally. S argues that the impact on him of broadcasting the statement would be particularly dire because of his intellectual disability. There are cases in which the protection of social values must prevail over openness. A situation

requiring the protection of vulnerable individuals, especially after they have been acquitted, is one such case.

Cases Cited

Applied: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; **referred to:** *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2; *Société Radio-Canada v. Québec (Procureur général)*, 2008 QCCA 1910, [2008] R.J.Q. 2303; *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927; *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671; *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *R. v. Canadian Broadcasting Corporation*, 2010 ONCA 726 (CanLII); *Société Radio-Canada v. Bérubé*, [2005] R.J.Q. 1183; *R. v. Giroux*, 2005 CanLII 12396; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332; *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188; *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253; *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 2(b).

Criminal Code, R.S.C. 1985, c. C-46, s. 241(b).

Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division, 2002, SI/2002-46, ss. 8, 8.A [ad. SI/2005-19, (2005) 139 Can. Gaz. II, 417, s. 1], 8.B [*idem*].

Supreme Court Act, R.S.C. 1985, c. S-26, s. 40.

Authors Cited

Béliveau, Pierre, et Martin Vauclair. *Traité général de preuve et de procédure pénales*, 15^e éd. Montréal: Thémis, 2008.

APPEAL from a decision of the Quebec Superior Court, [2008] J.Q. n° 24110 (QL), 2008 CarswellQue 14365, dismissing a motion for permission to broadcast a statement of the accused. Appeal dismissed.

Sylvie Gadoury, Geneviève McSween and Anne-Julie Perrault, for the appellant.

Dominique A. Jobin and Denis Dionne, for the respondent Her Majesty the Queen and the intervener the Attorney General of Quebec.

Pascale F. Tremblay and Michel Boudreault, for the respondent Stéphan Dufour.

Pierre Salois and Claude Joyal, for the intervener the Attorney General of Canada.

Gaétan Migneault, for the intervener the Attorney General of New Brunswick.

Donald B. Padget, for the intervener the Attorney General of Alberta.

Simon V. Potter and *Michael A. Feder*, for the intervener the British Columbia Civil Liberties Association.

Mahmud Jamal and *Jason MacLean*, for the intervener the Canadian Civil Liberties Association.

English version of the judgment of the Court delivered by

DESCHAMPS J. —

[1] In this case, as in the companion appeal *Canadian Broadcasting Corporation v. Canada (Attorney General)*, 2011 SCC 2, the judgment in which is being released concurrently, the Court must consider the interrelationship of freedom of the press, the open court principle and the fair administration of justice. The challenge in the companion appeal concerns rules on broadcasting recordings of hearings and on conducting interviews, filming and taking photographs. In the case at bar, the challenge relates instead to the broadcasting of a video recording tendered in evidence at trial.

1. Facts

[2] The respondent Stéphan Dufour, who was charged with aiding suicide under s. 241(b) of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Cr. C.*”), elected to be tried by judge and jury. The trial began on November 25, 2008 before Lévesque J. of the Quebec Superior Court. On November 27, 2008, the Crown produced as an exhibit a video recording of a statement Mr. Dufour had made to the police before being charged. The parties, the jury and members of the media were present in the courtroom. No general or specific restrictions were placed on the openness of the hearing. Lévesque J. authorized the journalists to view the statement. For this purpose, portions of the recorded statement selected by the journalists were shown on a screen in another courtroom, and the journalists were allowed to film the screen as these portions were being played back. However, the court clerk and Lévesque J. told the journalists that they were prohibited from broadcasting the recording of the statement. This limit on the use of the recording gave rise to this litigation.

2. Judicial History

[3] On December 1, 2008, the appellant, the Canadian Broadcasting Corporation (“CBC”), and Groupe TVA applied jointly to Lévesque J. for permission to broadcast the video recording of the statement. The motion was dismissed: [2008] Q.J. No. 24110 (QL). The judge considered that since ss. 8 and 8.A of the *Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division, 2002*, SI/2002-46, am. SI/2005-19, s. 1 (“RPCr” or “Rules of Criminal Practice”), prohibit

any broadcasting of a recording of a hearing, the broadcasting of a video recording introduced in evidence should also be prohibited (para. 21). In his opinion, [TRANSLATION] “the effect of [concluding otherwise] would be to indirectly authorize the applicants to do something that is directly prohibited” (para. 22). Relying on the Quebec Court of Appeal’s judgment in *Société Radio-Canada c. Québec (Procureur général)*, 2008 QCCA 1910, [2008] R.J.Q. 2303, Lévesque J. held that ss. 8, 8.A and 8.B of the Rules of Criminal Practice were constitutionally valid.

[4] The CBC appealed that order to this Court under s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26.

3. Issues

[5] On June 29, 2009, the Chief Justice stated two questions concerning the constitutionality of ss. 8 and 8.A RPCr under s. 2(b) of the *Canadian Charter of Rights and Freedoms* (“*Charter*”). The CBC, the Crown and the Attorney General of Quebec (“AGQ”), together with Stéphan Dufour and the Attorney General of Canada (“AGC”), submit that these questions should not be answered, because in their view ss. 8 and 8.A RPCr are not applicable in this case. As will be shown in the reasons that follow, this submission is well founded. I would therefore restate the issues as follows:

1. Do ss. 8 and 8.A RPCr prohibit the broadcasting of the statement?

2. If not, what are the rules applicable to the broadcasting of an exhibit tendered in evidence at trial?

4. Analysis

[6] I will begin by considering the impact of the Rules of Criminal Practice on the broadcasting of exhibits tendered in evidence before discussing the test for determining whether a discretionary publication ban is valid.

4.1 *Scope of Sections 8 and 8.A of the Rules of Criminal Practice*

[7] The relevant excerpts from ss. 8 and 8.A of the Rules of Criminal Practice read as follows:

8. . . .

. . .

The media may nevertheless record proceedings before the court on audiotape, including any decision rendered, unless the judge orders otherwise. The broadcasting of any such recording is prohibited.

8.A Any broadcasting of a recording of a hearing is prohibited.

[8] The prohibition established in ss. 8 and 8.A RPCr applies only to the broadcasting of recordings of proceedings, that is, of sounds (including voices) heard during hearings. Exhibits are distinct from the hearings. From the moment they are tendered at trial, exhibits become part of the record of the proceedings. Because they are created independently of and prior to the proceedings at the hearing, however,

they cannot be equated with those proceedings. Although the factors that proved to be applicable in the analysis of the constitutional validity of the Rules of Criminal Practice in the companion case may also be relevant to the determination of whether the appellant is entitled to broadcast the exhibits, it does not follow that those rules can serve as a basis for resolving the issue in the case at bar.

4.2. *Rules Applicable to the Broadcasting of an Exhibit*

[9] The Crown and the AGQ argue that Lévesque J.'s order cannot be equated with a publication ban. They submit, as does Stéphan Dufour, that the protection of s. 2(b) of the *Charter* does not extend to the broadcasting of an exhibit such as a statement tendered in evidence. The CBC disagrees, contending that that constitutional guarantee does in fact apply to the broadcasting of the statement.

[10] Because the CBC wishes to inform its viewers of the message contained in the video recording, broadcasting that recording is clearly an expressive activity to which the protection of s. 2(b) of the *Charter* might apply (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927).

[11] Stéphan Dufour, the Crown, the AGQ and the AGC also submit that the rule applicable to the conditions for broadcasting was established in *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671, and not in *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442. I cannot agree with this position. Although some

aspects of *Vickery* remain relevant, that case is not determinative, as the Court declined at that time to rule on whether access to exhibits was protected by the Constitution — that argument had not been raised in the courts below. In the instant case, however, the constitutional guarantee argument has been expressly raised.

[12] Access to exhibits is a corollary to the open court principle. In the absence of an applicable statutory provision, it is up to the trial judge to decide how exhibits can be used so as to ensure that the trial is orderly. This rule has been well established in our law for a very long time. As long ago as in *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 189, Dickson J. (as he then was) wrote:

Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose.

(See also P. Béliveau and M. Vauclair, *Traité général de preuve et de procédure pénales* (15th ed. 2008), at pp. 499-500; *R. v. Canadian Broadcasting Corporation*, 2010 ONCA 726 (CanLII); *Société Radio-Canada v. Bérubé*, [2005] R.J.Q. 1183 (Sup. Ct.); *R. v. Giroux*, 2005 CanLII 12396 (Sup. Ct.))

[13] The analytical approach developed in *Dagenais* and *Mentuck* applies to all discretionary decisions that affect the openness of proceedings. In *Vancouver Sun*

(*Re*), 2004 SCC 43, [2004] 2 S.C.R. 332, Iacobucci and Arbour JJ. wrote the following:

While the [*Dagenais/Mentuck*] test was developed in the context of publication bans, it is equally applicable to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings. Discretion must be exercised in accordance with the *Charter*, whether it arises under the common law, as is the case with a publication ban (*Dagenais, supra; Mentuck, supra*); is authorized by statute, for example under s. 486(1) of the *Criminal Code* which allows the exclusion of the public from judicial proceedings in certain circumstances (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General), supra*, at para. 69); or under rules of court, for example, a confidentiality order (*Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC 41). The burden of displacing the general rule of openness lies on the party making the application: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, at para. 71. [para. 31]

(See also *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at para. 7; *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253, at para. 35; *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721, at paras. 15-16; *R. v. Canadian Broadcasting Corporation*, at para. 21)

[14] Thus, there is no need to determine whether the facts in the case at bar are analogous to those in *Dagenais* or *Mentuck*. The findings that the activity in issue is protected by s. 2(b) of the *Charter* and that the order was within the discretion of Lévesque J. will suffice. The issue must accordingly be resolved by applying the test from *Dagenais* and *Mentuck*. Requiring the judge to apply this test does not mean that it is necessary to conduct a lengthy or elaborate review of the evidence, although all the relevant facts must be considered. Nor is there anything new about trial judges being responsible for establishing conditions for access to exhibits. Judges have always been required, in exercising their discretion, to balance factors that might

seem to point in opposite directions. With this in mind, the factors listed in *Vickery* remain relevant, but they must be considered in light of the framework developed in *Dagenais* and *Mentuck*.

[15] In the instant case, given that the trial judge interpreted the Rules of Criminal Practice too broadly, he failed to conduct the analysis required by *Dagenais* and *Mentuck*. If the trial were still under way, it would be appropriate to remand the case to him to decide the issue on the basis of the relevant facts. However, not only is the trial over — Mr. Dufour was acquitted — but the Court of Appeal has dismissed the Crown's appeal from that verdict since this Court took the instant case under advisement. The circumstances have therefore been altered fundamentally and the appeal as framed has become moot. Nevertheless, since this is a question of interest, I should mention a few considerations that might prove to be relevant should a motion to broadcast the statement be made even though the judicial proceedings are over.

[16] The weighing involved in the analysis required by *Vickery*, *Dagenais* and *Mentuck* is based on considerations that include the specific context of the case before the judge. How crucial this context is can be seen from the facts in the case at bar.

[17] The context of a statement made by an accused person or a suspect in the course of a police investigation is different from that of testimony given in a courtroom. A person who testifies at a hearing usually does so under compulsion of law, pursuant to a subpoena. Witnesses must, to the extent possible, be protected from any external pressure that could influence their testimony. The controlled

environment of the courtroom contributes to this objective. The circumstances specific to compelled testimony do not exist in the case of an out-of-court statement. But if the person who makes the statement knows that it could end up as the lead story on the local or national television news, this could cause him or her to think carefully before deciding whether to make it. Thus, the possibility that the statement will be broadcast could have a negative effect on the search for the truth, but it could also have a salutary effect on the voluntariness of the statement and, consequently, on the administration of justice.

[18] Moreover, since an exhibit already exists when it is introduced at trial, the judge's decision can always be made at the appropriate time. It will therefore be possible for the trial judge, before making an order on an application to broadcast a statement, to weigh the factors at stake and ensure that the serenity of the hearing, trial fairness and the fair administration of justice are preserved.

[19] At the end of the trial of the person who made the statement, the judge may have to assess the impact that broadcasting the statement might have on the trial of a co-accused or on the accused personally. In his factum, Mr. Dufour argues that the impact on him of broadcasting the statement would be particularly dire because of his intellectual disability. The fact that Mr. Dufour has been acquitted and his particular vulnerability are factors that give full meaning to Dickson J's comment in *MacIntyre*, at pp. 186-87, that there are cases in which the protection of social values

must prevail over openness. In my view, a situation requiring the protection of vulnerable individuals, especially after they have been acquitted, is one such case.

[20] For these reasons, I would dismiss the appeal, but without costs.

Appeal dismissed.

*Solicitor for the appellant: Canadian Broadcasting Corporation,
Montréal.*

*Solicitor for the respondent Her Majesty the Queen and the intervener
the Attorney General of Quebec: Attorney General of Quebec, Ste-Foy.*

*Solicitors for the respondent Stéphan Dufour: Boudreault Tourangeau
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*Solicitor for the intervener the Attorney General of Canada: Attorney
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Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the British Columbia Civil Liberties Association: McCarthy Tetrault, Montréal.

Solicitors for the intervener the Canadian Civil Liberties Association: Osler, Hoskin & Harcourt, Toronto.

