SUPREME COURT OF PRINCE EDWARD ISLAND

Citation: In re CBC Application (R. v. Dingwell) 2012 PESC 14 Date: 20120424
Docket: S1-GC-841
Registry: Charlottetown

IN THE MATTER OF THE APPLICATION OF CBC and the Guardian Newspaper for release of exhibits from the trial of ***R. v. Dylan Alexander Dingwell***

Before: The Honourable Justice John K. Mitchell

Appearances:
David G. Coles, Q.C. for the Applicant, CBC and the Guardian Newspaper
Cyndria Wedge for the Crown
Joel Pink, Q.C. and Andrew Nielsen for the Defence

Place and Date of Hearing	Charlottetown, Prince Edward Island November 23, 2011
Place and Date of Judgment	Charlottetown, Prince Edward Island April 24, 2012

OPEN COURT PRINCIPLE - availability of exhibits to media

CASES CITED: ***Nova Scotia (Attorney General) v. MacIntyre,*** [1982] 1 S.C.R. 175; ***Dagenais v. Canadian Broadcasting Corporation***, [1994] 3 S.C.R. 835; ***R. v. Mentuck***, [2001] 3 S.C.R. 442; ***Canadian Broadcasting Corp. v. New Brunswick (Attorney General)***, [1996] 3 S.C.R. 480; ***Canadian Broadcasting Corp. v. Canada (Attorney General),*** 2011 SCC 2; ***Her Majesty the Queen v. Paul Bernardo***, [1995] O.J. No. 585; ***R. v. Canadian Broadcasting Corp***.(2010) O.N.C.A. 726; ***Canadian Broadcasting Corp. v. The Queen***, 2011 SCC 3

Mitchell J.:

[1] On Day 3 of the trial of Dylan Alexander Dingwell for second degree murder, the Applicants sought access to and copies of the following trial exhibits:

1. Tape recordings of two 911 calls and one call from police telecoms;
2. Video and audio tapes of three statements made by the accused;
3. Police video of crime scene at 5 Ridgemount Court, Charlottetown, PE.

[2] At the oral hearing, Mr. Coles for the Applicants extended his request to include other exhibits in which the media might be interested but of which they may be unaware as the exhibits had not yet been tendered.

[3] While the CBC had made a request by telephone for the 911 calls before the trial commenced, there was no notice given to any party who may have had an interest save the Crown and Defence, both of whom took no position on this application.

[4] As the video of the crime scene was a video of the area around 5 Ridgemount Court and the interior of 5 Ridgemount Court, the Court asked if Donna Dingwell wished to address the Court. Donna Dingwell advised the Court that she and her son Jarred were and are living at 5 Ridgemount Court. It is a duplex. Donna Dingwell did not want the video aired publicly as she felt it breached her privacy rights. She pointed out that the crime occurred outside the residence, not inside the residence. Defence counsel, Mr. Pink, helpfully pointed out to Mr. Coles that the body was found inside the residence by the paramedics and the police.

[5] I gave oral decisions in these matters over the course of the trial with a promise of written reasons to follow. Herein are those reasons, which I trust will provide some guidance to the media for the future.

> 'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.' '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.'[1]

[6] There is a long list of authorities over the past 30 years to the effect that the principle of open courts is of fundamental importance to our free and democratic society. It is not, however, a principle that trumps all other principles. One of the earliest Supreme Court of Canada cases dealing with the right of access to judicial records is the case of ***Nova Scotia (Attorney General) v. MacIntyre,*** [1982] 1 S.C.R. 175 (S.C.C.). This was a pre-Charter case that affirmed the right of the public to inspect a search warrant and the information on which it was based after the search warrant had been executed and the items found were brought before a justice of the peace pursuant to s. 490 of the ***Code***. The Court held that the curtailment of public accessibility is justified only where the need to protect other social values is of superordinate importance. One of those social values is the protection of the innocence (p. 187).

[7] In the post-Charter area, ***Dagenais v. Canadian Broadcasting Corporation***, [1994] 3 S.C.R. 835 involved an application for an injunction to restrain the CBC from broadcasting a fictional account of sexual and physical abuse of children in a Catholic institution in Newfoundland. The Applicants were former and present members of a Catholic religious order who were facing trial on charges of physical and sexual abuse of young boys in their care at training schools in Ontario. At the time of the Application, the trials of four of the Applicants were being heard or were scheduled to be heard before a judge and jury, one trial was in its final stage and another reached the stage where a trial judge had been appointed. The lower court followed the traditional common law rule which emphasized the right of a fair trial over the free expression interests of those affected by the ban. The lower court granted the injunction to prohibit publication.

[8] In lifting the publication ban, the Supreme Court of Canada found it necessary to balance the Charter interests in s. 2(b) (freedom of expression) with that of s. 11(d) (right to be presumed innocent until proven guilty according to law in a fair and public hearing). They reformulated the traditional common law rule to reflect a

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[1]Jeremy Bentham as quoted in ***Nova Scotia (Attorney General) v. MacIntyre,*** [1982] 1 S.C.R. 175 (S.C.C.).

balancing of these values and principles. They held that a publication ban should only be ordered where:

> (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.

[9] While ***Dagenais*** was concerned with the balancing of two ***Charter***-protected interests, being the freedom of expression and the right to a fair trial, the case ***R. v. Mentuck***, [2001] 3 S.C.R. 442 dealt with a case wherein the Crown sought to prohibit the publications of details of police practices. Iacobucci, writing for the Court, restated the ***Dagenais*** case more broadly. He states at para. 32:

> The Dagenais test requires findings of (a) necessity of the publication ban, and (b) proportionality between the ban's salutary and deleterious effects. However, while Dagenais framed the test in the specific terms of the case, it is now necessary to frame it more broadly so as to allow explicitly for consideration of the interests involved in the instant case and other cases where such orders are sought in order to protect other crucial aspects of the administration of justice. In assessing whether to issue common law publication bans, therefore, in my opinion, a better way of stating the proper analytical approach for cases of the kind involved herein would be:
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> A publication ban should only be ordered when:
>
> (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.

Iacobucci agrees with La Forest in ***Canadian Broadcasting Corp. v. New Brunswick (Attorney General)***, [1996] 3 S.C.R. 480, who noted that the burden of displacing the presumption of openness rests on the person applying for the ban on publication. There must also be a sufficient evidentiary basis on the record so that a trial judge can properly assess the application.

[10] The ***Dagenais-Mentuck*** test has been held by the Ontario Court of Appeal in ***R. v. Canadian Broadcasting Corp.*** (2010) 262 C.C.C. (3d) 455 (Ont.C.A.) to apply

not only to publication bans but also to media requests for copies of exhibits. In January 2011 the Supreme Court of Canada issued two decisions of importance to this case. The first is ***Canadian Broadcasting Corp. v. Canada (Attorney General),*** 2011 SCC 2. In this case, the Appellants, which included Groupe TVA Inc. and La Presse ltée wanted to take photographs and conduct interviews in the public areas of the courtroom and as well to broadcast official audio recordings of court proceedings. The court, however, had rules in place which limited the places in which the media could take photographs and conduct interviews and which absolutely prohibited the broadcast of official audio recordings. The media appellants asked the court to have those rules declared of no force and effect as breaching their rights to free expression (s. 2(b) ***Canadian Charter of Rights and Freedoms)***.

[11] The Supreme Court of Canada held that while the appellants' s. 2(b) rights were infringed, the infringement was reasonable and justifiable in a free and democratic society. They therefore dismissed the appeal. The objective in this case was to maintain the fair administration of justice by ensuring the serenity of hearings. The fair administration of justice is necessarily dependent on maintaining order and decorum in and near the courtrooms and in protecting the privacy of the litigants appearing before the courts. Therefore the limits on where photographs can be taken and interviews conducts were reasonable.

[12] As to the audio recordings of the hearings, they were made to conserve evidence. Journalists have a right to use those recordings to enhance the accuracy of the reports they are preparing but they cannot use them in a way that would have an impact on the testimony itself. This prohibition of the audio recordings preserves the integrity of the testimony. The court quotes M. D. Lepofsky at para. 67 as follows:

> Any new pressure introduced into the courtroom's subtly pressured environment can well affect what the witness says in the stand, how he or she says it, and how he or she looks while testifying. This in turn can influence how the judge or jury perceives the witness as he or she gives evidence. Every jury is instructed by the presiding judge that to assess a witness's credibility they should take into account the witness's testimonial demeanour. Juries and judges routinely interpret a witness's nervousness or reluctance as a possible sign of dishonesty, or dubious credibility.

[13] The second case is ***Canadian Broadcasting Corp. v. The Queen***, 2011 S.C.C. 3. In this case, the Crown produced as an exhibit a video recording of a statement made to the police by the accused. The court allowed journalists to view the statement in a separate room but prohibited them from broadcasting the recording on the statement. CBC and Groupe TVA applied for permission to broadcast the video recording of the statement.

[14] The Supreme Court of Canada held that the rules prohibiting broadcasting the audio recordings of a trial referred to in the previous case do not apply in the case of exhibits because exhibits are distinct from hearings. Exhibits, from the moment they are tendered at trial, become part of the record of the proceedings. As they are created independently of proceedings and prior to the proceedings, they cannot be equated with the proceedings (see para. 8).

[15] The court states at para. 12 that access to exhibits is corollary to the open court principle and that in the absence of an applicable statutory provision, it is up to the trial judge to decide how the exhibits can be used so as to ensure that the trial is orderly. The trial judge must do so in applying the ***Dagenais-Mentuck*** test. The trial judge always has a supervisory and protecting power over its own records. Trial judges may establish conditions for access to exhibits and control the timing of the access to exhibits (see paras. 12 through 18 ***Canadian Broadcasting Corp. v. The Queen***, 2011 S.C.C. 3).

Applicability to the Case At Bar
Official audio recordings of court proceedings

[16] While the applicants in this case have not asked to broadcast audio recordings of the court recordings, it is well to note that Practice Note 22 of the Prince Edward Island Supreme Court Rules of Court states in part as follows:

> 3. An audio recording of court proceedings may be used only:
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> (a) for the preparation of a typed transcript;
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> (b) to permit the solicitor or party of record to review the testimony; or
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> (c) to verify or supplement notes made for the purpose of preparation of material for broadcast or publication.
>
> 4. An audio recording of a court proceeding shall not, either in whole or in part, be used for broadcast, audio reproduction or re-taping.

[17] These Rules, while not as extensive as the Rules referred to in ***Canadian Broadcasting Corp. v. Canadian (Attorney General)*** are to the same effect. Rule 22 is constitutional on the authority of this Supreme Court of Canada case.

Audio Tape of 911 Calls and Audio Tape of Telecom Call

[18] I can see no danger to the proper administration of justice in releasing these tapes to the media. No one's rights appear to be adversely affected by its release. Copies of those tapes shall be released to the media.

Video of the Crime Scene

[19] Release of the video of the crime scene involves the privacy interests of Donna Dingwell and Jarred Dingwell, who live in the house, as well as their neighbours whose backyard, side yard and entrance way would be broadcast. Donna Dingwell had no notice, and no legal advice, although at the court's request she took the stand and expressed her thoughts. Her neighbours had no notice whatsoever.

[20] While privacy of the innocent is a factor (***R. v. Canadian Broadcasting Corp***.(2010) O.N.C.A. 726 at para 27), it doesn't trump the public's right to access. However, in this case it is, I believe, possible to fashion an order which will respect both the privacy of the innocent and the open court principle. There is no public interest in seeing the neighbour's backyard, side yard or entrance ways. These places have nothing to do with the crime. Likewise, the video of the second floor of the Dingwell residence has no relevance to the crime. The public does have a right however to see the scene which, broadly speaking, includes the driveway and front yard to 5 Ridgemount, the front door to 5 Ridgemount and the entire first floor including the landing.

[21] Therefore, a copy of Exhibit C-49, a video recording of the crime scene, shall be released to the Applicant under the following restrictions;

1. Only those portions of the video which show the crime scene; to wit, front yard, area around the cars, front steps, front entry, landing by the front stairs, front hallway, kitchen, dining room and living room may be broadcast/published.

2. For greater certainty, the video showing the second floor, the back yard and side yard are not to be broadcast.

The Video/Audio Statements of Dylan Dingwell

[22] The Crown has no objection to the release of copies of these exhibits, but I do have serious reservations. Dechamps, J., in ***Canadian Broadcasting Corp. v. The***

Queen, 2011 S.C.C. 3 at para. 17 states:

> 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. ...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.

[23] Mr. Coles states that this is merely ***obiter dictum*** and it amounts to the Supreme Court of Canada thinking out loud and saying "maybe/ maybe not".

Maybe/Maybe Not

[24] In this case, on at least two occasions the accused raised concerns about the media putting him on television. Had Dylan Alexander Dingwell been advised by his counsel that anything that he said to the police may be shown on the 6 o'clock news, I doubt very much whether the police would have obtained the statements they did on January 17 and 18. Those statements were invaluable to the Crown case.

[25] I cannot help but wonder what effect publication of this statement will have on future cases. Will not defence counsel advise their clients of their right to remain silent, how to exercise that right, and the fact that should they fail to exercise the right to remain silent, they're likely to end up on television for all to see? Will it be more difficult for police to get statements and hence more difficult to solve crimes? Will this adversely affect the administration of justice?

[26] Will the victims of such crimes as domestic violence and sexual assault be reluctant to give video/audio statements if they are told that should their statements be entered as an exhibit at trial–for example in a K.G.B. application–they could end up on television? Is this in the best interests of justice? In the final analysis, the Crown does not appear to have the concerns that I have and I therefore have no evidence or even argument upon which to deny the media requests for the statements. The media shall have copies of the statements.

Some Practical Concerns/Comments

[27] The Applicant's position on a go-forward basis appears to be that the law is so tilted towards the open court principle that when the media simply asks, it shall receive. I do not believe it is as simple as that. Trial judges still have the obligation

to control the proceedings. In applying the ***Dagenais-Mentuck*** test, trial judges are entitled to impose conditions which may preserve the integrity of the proceedings and the integrity of the exhibits. This may involve delay in releasing exhibits as for example where release of a statement might deter witnesses who are to testify later in the trial. Trial judges are entitled as well to consider such factors as privacy interests and protection of the innocent. No doubt, privacy interests and protection of the innocent no longer automatically trump the public's right to access; nonetheless, they are not to be ignored.

[28] In the 1995 trial of ***Her Majesty the Queen v. Paul Bernardo***, [1995] O.J. No. 585, Justice LeSage gave great weight to the privacy and the dignity of the victims when he banned publication of the graphic films which showed the violent and cruel rape, torture and murder of three young girls. While this might be an extreme case, it is an example, in my view, of a proper publication ban.

[29] The more recent case of ***The Queen v. Russell Williams*** is also a case on point. In that case, the Crown had hundreds, if not thousands, of exhibits. Included in those exhibits were photographs of some of Williams' victims. In that case, the media contacted the Crown and Defence, who appeared before the Judge. Between the media counsel, Crown counsel and Defence counsel, the parties agreed on what exhibits would be released to the media and the judge made his order based on that agreement.

[30] Should the media in the future wish copies of trial exhibits, in my view, the proper course would be to approach the Court, Crown and Defence. The Crown should be able to advise the Court whether there are other interests at stake. If none, and the Court can see no impediment to a media release, an exhibit will be released once it is tendered. There may well be occasions where the Court will put conditions on the release and in fact, this is one of those cases where the videotape was released on condition that the media show only those parts of the tape which were relevant to the crime and did not breach the privacy interests of the neighbours.

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J.

April 24, 2012.