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IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

WILLMAR EUGENIO OVANDO RENDEROS

RULING ON APPLICATION
OF THE
HONOURABLE JUDGE J. F. PALMER

Counsel for the Crown:	P. Tomasson
Counsel for the Defendant:	P. Morrow
Counsel for the Applicant:	D. Burnett
Place of Hearing:	Vancouver, B.C.
Date of Hearing:	December 21, 2012
Date of Judgment:	January 21, 2013

Introduction

[1] During the sentencing of Mr. Ovando Renderos an application was brought by the CBC for release of an exhibit filed by Crown counsel. Since that initial application was filed two other media outlets had also filed similar applications. The exhibit in question, Exhibit 2, is an audio recording of three calls, labeled “2a1”, “2a2” and “2a3”, made by different civilians to 911 seeking police assistance during the course of the 2011 Stanley Cup riot. Submissions by Crown counsel and Mr. Burnett, on behalf of all the Applicants, were heard on December 21, 2012, prior to the sentencing of Mr. Ovando Renderos and two other rioters. Counsel for Mr. Ovando Renderos had previously notified the Court, by letter dated December 19, 2013, that the defence would not be taking a position on these applications. Decision on the applications was reserved until Thursday January 10, 2013, with the caveat that written reasons might not be available until a later date.

[2] On that date counsel were advised that written reasons were not available. Counsel were also advised that having considered the submissions of counsel and the cases they had relied upon that my decision was against the release of the audio file but in favor of the release of the transcripts of these various calls to the interested parties. The following are my reasons for that decision.

The Law

[3] The Applicant relies on a total of fourteen decisions from various jurisdictions and levels of court across Canada in support of their argument that the rights enshrined in s. 2(b) of the *Canadian Charter of Rights and Freedoms*, hereafter the *Charter*, support a presumption of openness and access to all court documents upon the conclusion of a

proceeding if not during. Counsel submitted that the test for issuing a publication ban, as enunciated in two cases, *Dagenais v. Canadian Broadcasting Corp.,* [1994] 3 S.C.R. 835 and *R. v. Mentuck,* [2001] 3 S.C.R. 442, which is now known as the *Dagenais/Mentuck* test, is the measure by which courts must determine how to exercise their discretion on applications to obtain court documents and exhibits.

[4] In paragraph 2 of the outline filed on behalf of the CBC counsel submits that

> The controlling statement of the law on access to court documents from the Supreme Court of Canada, appears in *Toronto Star Newspapers v. Ontario,* [2005] 2 S.C.R. 188 at paras. 26-29, confirming that there is a presumption of access to court documents, and an order limiting access should only be made when:
>
> (a) "such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably available 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 public, including
>
> the effects on the right of free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice."
>
> "…the 'risk' in the first prong of the analysis must be *real, substantial and well grounded in the evidence*…
>
> …this Court has recently held that the test applies to *all* discretionary actions which have that limiting effect: … it is equally applicable to *all* discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings."

[5] In developing the Applicant's argument in favor of release of the audio exhibit counsel has taken excerpts from many cases where the excerpt appears to underscore counsel's point. The cases offer decisions touching on the various elements of the test

to be applied. Consideration of the entire context in which each decision was made is required in order to assess the decision's applicability to the case at bar.

[6] The appeal brought before the Supreme Court of Canada (SCC) in *Toronto Star Newspapers Ltd. v. Ontario,* hereinafter *Toronto Star*, was a Crown appeal from the decision of the Ontario Court of Appeal upholding a Superior Court decision to unseal search warrants and the information and documents relied upon to obtain the search warrants. The sealing orders had been obtained in open court after the search warrants had been granted and executed. Editing of the warrants and supporting material had been done both at the Superior Court level and more extensively by the Court of Appeal. The Court of Appeal had found that at the initial application the presiding justice had exceeded her jurisdiction by failing to grant a brief adjournment to allow the media an opportunity to attend and speak to the application for a sealing order. In paragraphs 8 and 9 of the SCC's decision Mr. Justice Fish said:

> The *Dagenais/Mentuck* test, although applicable at every stage of the judicial process, was from the outset meant to be applied in a flexible and contextual manner. A serious risk to the administration of justice at the investigative stage, for example, will often involve considerations that have become irrelevant by the time of trial. On the other hand, the perceived risk may be more difficult to demonstrate in a concrete manner at that early stage. Where a sealing order is at that stage solicited for a brief period only, this factor alone may well invite caution in opting for full and immediate disclosure.
>
> Even then, however, a party seeking to limit public access to legal proceedings must rely on more than a generalized assertion that publicity could compromise investigative efficacy. If such a generalized assertion were sufficient to support a sealing order, the presumption would favour secrecy rather than openness, a plainly unacceptable result.

The Crown appeal was dismissed.

[7] The context in *Toronto Star* was an investigation commenced by an agricultural investigator with the Ministry of Natural Resources and the search warrants were sought under the *Provincial Offences Act*. The investigator's concern was irregular practices in the slaughter of cattle giving rise to concerns over the suitability of the resultant meat for human consumption. Five days after the execution of the last search warrant a criminal investigation was commenced by the Ontario Provincial Police. The following week the Crown brought an ex parte application to have the warrants and supporting documents sealed. In such a scenario it is difficult to conceive how, given the public interest in food safety, it could be successfully argued that the salutary effects of suppression outweighed the negative effect of non-disclosure.

[8] Counsel for the Applicant relied particularly on paragraphs 26 through 29 of *Toronto Star* which begin with a consideration of how the test formulated in *Dagenais*, in 1994, was "somewhat reformulated" in *Mentuck,* in 2001. In *Mentuck* the issue was the Crown's application for a publication ban on identification of undercover officers and of their investigative techniques.

[9] In paragraph 26 of his reasons Mr. Justice Fish noted that in *Mentuck,* Mr. Justice Iacobucci, for the Court, articulated the circumstances in which a publication ban would serve the public interest:

> (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, [para. 32]

[10] In paragraph 27 Mr. Justice Fish quoted Mr. Justice Iacobucci's elucidation of the "risk" in subparagraph (a) of the test as one that must be:

> "*real, substantial, well grounded in the evidence*: it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained" (para. 34).

[11] In the subsequent paragraphs Mr. Justice Fish confirmed that the *Dagenais/Mentuck* test is applicable in a variety of settings where a party seeks to limit freedom of the press at any stage of legal proceedings including the pre-trial stage.

[12] The context in *Dagenais* (1994) was an application by four accused to stop the CBC from airing a movie entitled "The Boys of St. Vincent". The story line bore a striking resemblance to the crimes with which the accused were charged. The application was to have the airing banned throughout Canada. Ultimately the ban was limited to the Province of Ontario and the City of Montreal. The risk to the administration of justice was the very real possibility of tainting a jury pool.

[13] The context in *Mentuck* was a second trial on a charge of second degree murder. The first trial was judicially stayed. The second trial proceeded on the basis of evidence obtained during an undercover "sting" operation. During the trial the Crown sought a ban on publication of information that would identify the undercover officers and any information regarding the techniques used in the course of the undercover operation. The Crown succeeded with respect to the identity of the officers but not with respect to the investigative techniques employed by the officers.

[14] The context in *R. v. Hogg [re CTV Television Inc.]* [2006] M.J. No. 403 (CA), hereinafter *Hogg*, was an application for a copy of the accused's videotaped statement to the police which was admitted into evidence during a preliminary inquiry. The trail judge correctly decided that the accused had no privacy considerations but incorrectly determined that disclosure would have a negative impact on the administration of justice. The determination was made in the absence of evidence supporting the conclusion.

[15] The context in *R. v. Canadian Broadcasting Corporation,* 2010 ONCA 726, is the prosecution of four correctional officers with criminal negligence following the death of a young woman in their custodial care at the Grand Valley Institution for Women. During the preliminary inquiry Crown counsel adduced videotaped evidence including footage of the young woman's death. Later during the proceeding Crown counsel decided not to continue the prosecution and the four accused were discharged. In furtherance of an intended investigative documentary about the case the CBC brought an application to obtain copies of the filed exhibits. CBC was granted access to and the right to copy exhibits subject to limitations on any of the material that was not played at the preliminary inquiry. The CBC was allowed to view but not copy the footage of the young woman's death. Upon appeal the CBC was supported by the mother of the deceased.

[16] On appeal the Correctional Service of Canada (CSC) argued that the test to be applied was not the *Dagenais/Mentuck* test. The CSC relied on an earlier decision of the SCC, *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671, hereinafter (*Vickery)*, and argued that the onus should be on the CBC to demonstrate why it should be granted access to and copies of the exhibits. In that case the Charter

was not argued as it had not been raised as an issue before the application judge. The context of Vickery was an application for access to an alleged confession, ruled inadmissible, after the accused had been acquitted at trial. The ONCA held that the *Dagenais/Mentuck* test applied. The ONCA, at paragraph 20, discussing the applicability of *Vickery* approved the application judge's observation that the case "did not purport 'to formulate a general rule for regulating access to audio and video recordings which were made court exhibits'".

[17] The Applicant provided *MEH v. Williams*, 2012 ONCA 35, hereinafter *MEH,* as further support for the proposition that a court, in determining an application like the one before this Court, must have convincing evidence that establishes first that there is a public interest at stake and second that the party opposing disclosure would suffer significant harm if disclosure and publication occurred.

[18] The context in *MEH* was an application by Mrs. Williams for a sealing order of the entire record in a divorce proceeding she intended to commence. Her husband was a former member of the military who pled guilty to two charges of first degree murder, two counts of sexual assault and 84 other crimes. The criminal case was well publicized. A civil suit brought by one of the victims alleged that there had been a fraudulent conveyance of the marital home to the wife. That action was also the subject of media attention. Prior to her application the wife had been identified in the media both by name and picture. The evidence submitted by the wife in support of her application was an affidavit from her psychiatrist. The ONCA ruled that the affidavit was admissible but was of little evidentiary weight as, without evidence from Mrs. Williams, it "is properly characterized as speculation and assumption".

[19] The one case provided by both counsel for the Applicant and Crown counsel, *Global BC, A Division of Canwest Media Inc. v. British Columbia,* 2010 BCCA 169, hereinafter *Global BC*, involved an application, post conviction, for release and duplication of a videotape and transcript of Mr. Fry's inculpatory statements to an undercover police officer whom Mr. Fry believed to be a "crime boss". The application was denied by the trial judge. On appeal it was held, at paragraph 78,

> …it is not necessary to deny access to the two exhibits in order to prevent any serious risk to the proper administration of justice. With respect to the second branch of the test, the salutary effects of denying access (as discussed by the majority in *Vickery*) do not outweigh the very strong presumption given by the Supreme Court of Canada in recent cases to the right of the public to have access to information of this kind. This presumption is especially strong given that the information in this case has already been publicized in the course of the trial.

[20] The appeal in *Global BC* was allowed to the extent that the applicants, through counsel, were allowed access to duplicates of the exhibits subject to stringent requirements that the duplicates be altered to ensure absolute protection of the identities of the undercover officers and others involved or mentioned on the videotape. The alterations were to be to the satisfaction of the RCMP. Distribution of the duplicated exhibits was prohibited without further leave of the Court.

[21] Counsel for the Applicant advanced *R. v. A.A.B.,* 2006 NSPC 16, hereinafter *A.A.B.*, as authority for the proposition that withholding exhibits from the media and the public in the context of a sentencing proceeding would cause harm to the proper administration of justice. The context in this case was a sentencing hearing of a young

offender, as an adult, for criminal negligence causing death. At the outset the presiding judge had ruled and later quoted himself in paragraphs 2 and 3:

> …in my view, an exhibit filed at these proceedings does not fall within the definition of record, as such is defined by the Youth Criminal Justice Act. Record, is defined very broadly indeed by the Act, but in my view, cannot be intended to include essentially, what is evidence called at the trial…..at least during the course of the trial. Our courts are open courts and generally speaking, the public should have the right to access the courts, to hear the evidence read and it would be ludicrous to conclude that having read a document in court a member of the public could not then have access to it, to review it in order to check for accuracy.
>
> Therefore during……the documents and exhibits may very well become records at the conclusion of the case and I will not rule on that point, but during the course of these proceedings I will permit access to any exhibits that are filed, by members of the media or public so that they can review the evidence that has been called at the proceedings.

[22] At paragraph 16 of *A.A.B*. the judge found as follows:

> In the present case A.B. was convicted and sentenced. The exhibits were all documents prepared for the court so that it could discharge its' duty. There is no evidence that access is sought for any improper purpose or that access would subvert the ends of justice. Any proprietary interest in the exhibits rests with the court itself. The media and public should be granted access to these exhibits so that they could have the ability to engage in a discussion of the courts decision on sentencing. To withhold the exhibits from scrutiny as soon as sentence was passed in my view would only cause uncertainty and concern with regard to the court's process. It would lead to less respect for the rule of law and the proper working of the courts. Parliament in considering whether there was a societal need to protect the identities and records of Young Persons charged with crimes chose not to extend such protection to those who receive an adult sentence. As such parliament's decision is entitled to due consideration by this court.

[23] I have considered three other cases submitted by Counsel for the Applicant in which audio or video exhibits were released to the media:

(i) *R. v. Dingwell* , 2012 PESC 14, the context - a trial for second degree murder;
-the exhibits in question were tape recordings of two 911 calls, a call from police telecoms, video and audio tapes of statements made by the accused and police video of the crime scene;
-the application was not opposed by Crown counsel;
-access was granted with a restriction on the police video so that the showing did not breach the privacy interests of neighbours.
(ii) *R. v. Stephen Stark*, BCSC No. CC 950109, Vancouver Registry, March 2, 1995, the context - a jury trial on a charge of second degree murder;
-the exhibit in question was a videotaped statement made by the accused to a member of the RCMP;
-the jury was deliberating and had possession of the exhibit;
-the application was not opposed by Crown counsel;
-access was granted with the limitation that any reference to the co-accused, who was facing a separate trial, must be expunged.
(iii) *R. v. CTV Television Inc.* [2005] M.J. No. 245, the context - a trial for first degree murder;
-the exhibits in question were video and audio recordings of conversations between the accused and an undercover police officer;
-the application for access and distribution was not opposed by Crown counsel so long as distribution did not violate the publication ban granted on commencement of the proceedings;
-the application was granted.

[24] Counsel for the Applicant cited four other cases but failed to provide sufficient context for the excerpts to be of assistance to this Court.

[25] At the outset of the hearing Crown counsel filed written submissions and an Affidavit, sworn by Inspector Laurence Rankin of the Vancouver Police Department.

[26] The Crown's opposition to this application is articulated in paragraphs 3 and 4 of the Crown's written submissions:

> 3. In the Crown's submission the third party privacy interests of the victims of the Riot (hereinafter referred to as the "Victims") and the potential harm to the Victims must take precedence over the media's right to freedom of expression.

> 4. In the Crown's submission a ban on publication of the audio recordings of the 911 calls is necessary to protect the Victims from the potential harm of further trauma and/or re-victimization.

[27] The Crown's Book of Authority contains nine cases predominantly from the SCC or the superior courts of British Columbia. Only one case *R. v. Dagenais,* 2009 SKQB 104, is from a jurisdiction that would not be considered binding authority on this Court.

[28] The thrust of the Crown's argument is that, since the SCC decision in *Vickery*, courts have balanced the interests of innocent people against the s.2 rights of the media when exercising their discretion in deciding applications for access to and publication of exhibits. The Crown submitted that a ban on the publication of the audio recordings was necessary to shield the callers and other victims from potential harm through retraumatization as publication would include postings to media sites on the Internet. Crown counsel argued that publication in that manner puts the content of the audio recordings forever beyond the control of the Court or the media and leaves the Victims at the mercy of any who might choose to rebroadcast the recordings for purposes contrary to the Victims' best interests.

[29] Crown counsel argued, based on the authority of *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, that this Court has a supervisory power to exercise in determining if and how the media may access exhibits. The context of this case is a trial for assisting suicide where the suspect gave a videotaped statement to the police before he was charged. When the exhibit was adduced into evidence, at trial, the media was allowed to view and film it from another courtroom. The media application for leave

to broadcast their own video was denied. The *Rules of Practice of the Superior Court of The Province of Quebec, Criminal Division, 2002* precluded such a broadcast.

[30] The appeal to the SCC was deemed moot, as framed, by the time of the hearing as the trial was over and the accused had been acquitted. The Crown and the acquitted person were Respondents on the appeal. The SCC considered the possibility of such a motion being brought before the trial judge and found the judge would have to consider the impact of publication on a co-accused or the acquitted party personally. The Court, after reviewing the individual Respondent's argument that both his acquittal and his intellectual disability were factors that supported a ban on publication, held at the end of paragraph 19:

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

[31] Writing for the entire Court Mr. Justice Deschamps, at paragraph 12 held:

> 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 [page 72] *Attorney*
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> *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.

[32] Paragraph 14 of the judgment is most instructive.

> 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 Levesque 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 all 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.*

[33] The factors in *Vickery,* are found at paragraph 19 of Mr. Justice Stevenson's judgment for the majority:

> In my view, the chambers judgment fails to recognize four significant factors that come into play in deciding whether the appellant should be given access to (and thus the ability to copy and disseminate) these exhibits. (I note that these points may not have been put to the chambers judge in argument). The factors are:
>
> 1) The nature of exhibits as part of the court "record".
> 2) The right of the court to inquire into the use to be made of access, and to regulate it.
> 3) The fact that the exhibits were produced at trial and open to public scrutiny and discussion so that the open justice requirement had been met.
> 4) That those subjected to judicial proceedings must undergo public scrutiny of what is said at trial or on appeal and contemporaneous discussion is protected, but different considerations may govern when the process is at an end and the discussion removed from the hearing context.

[34] In paragraphs 32 and 35 of *Vickery* Stevenson J. also quotes Dickson J. from *MacIntyre*, supra, first at p.184 and later at p.186-87

> In short, what should be sought is maximum accountability and accessibility but not to the extent of harming the innocent…

> In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is protection of the innocent.

[35] Crown counsel provided the Court with the following cases in which the privacy interests of innocent third parties were given greater weight than the s.2(b) rights of the media and publication of trial exhibits was denied:

> (i) *R. v.* Dagenais [2009] S.J. No. 150, the context – trials on charges of on a charge of first degree murder and attempt murder;
> -the exhibit in question an audiotape of a police pursuit during which two officers were murdered, a third officer was wounded and the tape captured th e last words of the deceased and the trauma of the third officer upon locating them and also being shot;
> - the families of the deceased opposed the application;
> - the application was dismissed as the trial judge, having heard and viewed the deceased's family members during the application, found at paragraphs 46 and 47 that their concerns were:
>
> > ""an important societal interest which must be considered in the D*agenais/Mentuck* analysis. There is little doubt that the "evidence" to which I have earlier referred…demonstrates that the applicants suffer from post traumatic disorder, …I am of the view that this reaction would be a continuing one and would be aggravated by any broadcast of the audiotape. While no psychological evidence has been provided to me in the form of expert opinion, I have concluded that the most compelling evidence was what I observed in the courtroom during the trial proceedings.
> > The requirement of course exists that this risk to the re-victimization of the applicants must be real and substantial. For the reasons I have briefly alluded to, I am satisfied that such a risk is indeed real and substantial. Further, what I consider to be an important interest is one which can be expressed as a public interest".
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> (ii)*R. v. Schoenborn* , 2010 BCSC 40, the context - trial on three charges of the first degree murder of the accused's infant children;
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> > - the exhibits in question were audio recordings of conversations the children's' mother had with the accused while he was in custody;
> > -Crown counsel opposed the application on the basis that publication would re-victimize the mother;

-the Crown relied on the submissions of counsel as evidence of the likelihood of re-victimization of the mother given counsel's conversations with her;
- the applications were denied, the Court, having heard the audio-recordings and the submissions of counsel, held at paragraph [53]
"I am also satisfied that the salutary effects of the publication restriction or the denial of the right to copy the exhibits outweighs any deleterious effects on the rights and interests of the parties and the public, including the right to free expression.

(iii) *R. v. Panghali*, 2011 BCSB 422, the context - trial for second degree murder of the accused's wife;
- the exhibits in question were a series of video-recorded interviews of the accused, a surveillance video from a convenience store and extracts from the deceased's journals and other writings;
- Crown counsel and defence counsel opposed the applications;
- the application for release of the surveillance video was granted as the Court held the salutary effect of protecting the deceased's daughter at some time in the future did not outweigh the deleterious effects on the media's Charter rights to freedom of expression as the content of the video was an important part of the evidence considered at trail;
-the other applications were denied on the basis that publication would subvert the proper administration of justice by infringing on the privacy interests of innocent third parties;

The Evidence

[36] Exhibit 2, the subject of this application, is a compilation of calls to 911 from three different individuals. The Court listened to the audio recording of the calls to 911 and read the transcript of those calls. Other evidence to be considered in determining this application is another exhibit on the sentencing proceeding - the Admissions of Fact. There are ten paragraphs in that document which set out the impact of the riot on the City of Vancouver, the businesses in the downtown core, victims and citizens.

[37] Additional evidence to consider in deciding this application, is the affidavit of Inspector Rankin, who has been a member of the Vancouver Police Department for 25

years and is currently the Inspector in charge of the Integrated Riot Investigation Team, hereafter "IRIT". This unit continues to investigate the Riot of June 15, 2011. Constable Nash, another member of IRIT, was tasked with identifying the individuals who made the calls recorded on Exhibit 2. Identification was attempted in order to advise the callers of the media application and to seek their views on the broadcast of the calls they made to 911 during the Riot.

[38] Of the three callers only two were identified by Constable Nash. In paragraphs 6b) and 6c) of his affidavit Inspector Rankin reports Constable Nash's findings with respect to the first two callers:

> b) He spoke with C.B. the caller on 911 call "2a1" who told him that she had no concern with the audio recording of her call being released to the media as long as she was not identified;
> c) He spoke with A.S., a loss prevention officer for the Hudson's Bay Company (hereinafter referred to as "The Bay") who was working the night of the riot, and was the caller on 9911 call "2a2". A.S. had no concern with the audio recording of his call being released to the media but did not want to express a view on how other employees who were present at The Bay on the night of the Riot may be affected by these recordings being broadcast in the media. A.S. spoke with head office at The Bay. The Bay head office informed A.S. that head office does not want the audio of the 911 calls released to the media. A.S. was told the reason The Bay does not want the audio of the 911 calls released is to protect their employees who were trapped inside The Bay from being re-victimized;

[39] The evidence at the sentencing hearing included Victim Impact statements from another loss prevention officer at The Bay the night of the Riot, D.M., and a store director, D.H., also present that night. Those Victim Impact statements speak to the extreme distress people inside The Bay experienced during the Riot and afterwards. The Victim Impact Statements support the position taken by head office at The Bay with respect to this application.

[40] The transcript of call "2a3" makes it perfectly clear that the third caller was under significant stress at the time. The caller related the presence of approximately one hundred people inside the Bay, both staff and customers, who were feeling trapped between a hostile and indiscriminately violent crowd outside and fire burning within the store.

[41] Constable Nash also spoke to another caller to 911 during the Riot, M.D., who was trapped in a different store, the Blenz outlet in the 600 block of Georgia Street, and whose call to 911 is not part of Exhibit 2. M.D.'s current experience is related in paragraph 6 d) of Inspector Rankin's affidavit:

> d) He spoke with M.D. who was trapped inside a Blenz coffee shop during the Riot. He explained the application by the media for the 911 calls. M.D. told Constable Nash that she still tries to avoid anything that would remind her of the Riot. She refuses any interviews with the media, and avoids news on television, in print or online that mentions the Riot. She stated any mention of the Riot continues to upset her, and that her healing is depending on avoiding any reminders of her experiences on June 15, 2011. She said it would be upsetting to hear her own calls or anyone else's calls from the Riot. Constable Nash did not press her further as he felt that to so would contribute to her ongoing anxiety and distress regarding the Riot.

[42] This Court has, in another sentencing hearing, heard the audio recording of M.D.'s call to 911 during the Riot, and has read the transcript of that call as well as statements made subsequently the police by M. D. Not only was M.D. traumatized living the experience but her children were exposed to that trauma through television coverage of the Riot. That audio recording is one example of the subjective experience of a person caught in the Riot.

[43] Counsel for the Applicant submitted that the Crown had not met the burden of convincing evidence required to displace the presumption of openness. Counsel argued further that the affidavit of Inspector Rankin is not evidence the Court can consider in deciding this application as it is not evidence directly from the witnesses or victims whose privacy the Crown seeks to protect.

[44] Counsel for the Applicant argued that the audio recording was "news" and that timeliness is a vital aspect of openness regarding the news as it relates to the currency of court proceedings. Counsel relied on *R. v. White* [2005] A.J. No. 727, a decision of the Alberta Court of Appeal, as authority for the proposition that delay in disclosure is contrary to the policy of openness. The context in *White*, was a Crown application to have the accused's bail reviewed and an application by the accused for a ban on publication pursuant to s. 517 of the Criminal Code. The ban on publication was challenged by a number of media outlets. Justice Berger at paragraph 6 of his reasons said:

> News is a perishable commodity. Because "[n]ews, as the word implies, involves something new – something fresh" ….unjustified delay in permitting full public access will have a deleterious effect on the ability of the media to report, and, in the result, for the public to be informed. Contemporaneous access to court documents and processes allows the media to fulfil their legitimate role as the eyes and ears of the public. As Kerans, J.A. noted in Triple Five Corp., 'time is always of the essence'…[para.6].

[45] However, s. 517 is a mandatory ban at the instance of the accused.

Analysis

[46] In submissions the Crown has agreed with the defence position that the *Dagenais/Mentuck* test must be applied in deciding this application. The Crown has provided the Court a broader perspective on the applicable and binding jurisprudence than that provided by Mr. Burnett. There is a presumption of openness but it is a rebuttable presumption.

[47] The context of this case is a sentencing proceeding on a charge of participating in a riot. The evidence before the Court was that there were 297 separate Riot events. Some of the events involved hundreds of rioters. Mr. Ovando Renderos was among the throng involved in rioting at the Hudson's Bay Department store, at Sterling Shoes and in damaging the Audi located in the 600 block of Seymour Street while other rioters were trying to light the vehicle on fire.

[48] During the course of the Riot there were approximately 150,000 people in the downtown area of Vancouver. Thousands were witness to what occurred. It is not possible to quantify how many were victimized by the Riot. The mere fact that a person making such a call does not object to the audio recording being released, so long as they are not identified, does not begin to address the scope of the potential impact on victims in the context of a massive riot. The fact that the first caller did not want to be identified is of concern to the Court because the underlying concern in being identified is not articulated and because it is not possible in the electronic age to guarantee that the caller will not subsequently be identified.

[49] Counsel for the Applicant objected to the affidavit of Inspector Rankin as it related information indirectly from two of the callers and from persons not directly

involved in the Riot, head office of The Bay. Both Inspector Rankin and Constable Nash are experienced police officers and officers of the court. They are still involved in the investigation of the Riot and the pursuit of those directly involved in rioting. It would be an unsupportable proposition to task the Vancouver Police Department with the identification of all the victims involved at The Bay and then canvas their opinion on the release of an audio recording which carries the sounds of the Riot as background noise.

[50] The *Shorter Oxford English Dictionary* defines information as "training, instruction; communication of instructive knowledge" and sensation as "an operation of the senses; mental apprehension, sense, or 'realization' of something". Release of the audio recordings on Exhibit 2 will not provide the public any more factual information about the Riot than the transcripts convey. The audio recordings provide sensation, the sounds of the Riot and the fear and sense of panic it engendered.

[51] I have considered the law as argued by counsel. I have assessed the evidence, before the Court on the sentencing proceeding and adduced for the purpose of this application. I find the affidavit of Inspector Rankin to be both reliable and necessary in the context of the Riot. I have asked myself whether the risk of harm to the victims is substantial and real.

[52] In applying the *Dagenais/Mentuck* test, as I must, I have also considered the four factors articulated in *Vickery.* I have considered as well the provisions of the Criminal Code that apply to sentencing, in particular s. 718 **Purpose**.

> 718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just,

> peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> a) to denounce unlawful conduct;
> b) to deter the offender and other persons from committing offences;
> c) to separate offenders from society, where necessary;
> d) to assist in rehabilitating offenders;
> e) to provide reparations for harm done to victims or to the Community; and
> f) to promote a sense of responsibility in offenders and acknowledgment of the harm done to victims and the community. (emphasis added)

[53] I find that there is, in the circumstances of this case, a conflict between the societal interests advanced in the legislation and in the policy of openness with respect to court documents and exhibits.

[54] The protection of the privacy interests of innocent persons and victims is an important social value as recognized by the SCC in cases prior to and since *Vickery*. Access to exhibits has been denied in cases where to release the exhibit(s) in question was found likely to prolong the suffering of innocent parties. The context of the cases relied on by counsel for the Applicant is generally trial on extremely serious charges where the exhibits in question were integral in the courts' process.

[55] Sentencing is a process which requires a judge to balance many considerations and craft a sentence which will meet the purposes of sentencing in accordance with prescribed principles. The legislation set out above requires a judge to incorporate reparation to the victim or the community into a sentence if possible. It is reasonable to infer the judge is therefore not to do that which may cause further harm to the victim or the community. I have considered all the evidence before the Court. In addition to consideration of the evidence I am entitled to employ reason and logic to the exercise of balancing the competing rights of the media and the public to freedom of the press and

freedom of expression and the privacy rights of the victims of the Riot. Reason and logic dictate that persons victimized in the Riot, especially those subjected directly or indirectly, to the threat of physical violence, can be understood as traumatized by that experience. It is impossible to ascertain for how many victims the trauma remains or is at risk of being triggered by an evocative audio recording.

[56] Given the impact of the Riot on the City of Vancouver, its citizens generally and all the victims, those identified and those who are known only to their employers, I find that it would be unacceptable for the Court to resolve the conflict between legislative duty and a policy of openness by granting this application. Deciding the application in favour of the media would not, I find, create respect for the law. I am satisfied that publication of the transcript of any call to 911, included in Exhibit 2, would sufficiently inform the public of the Riot's impact in a manner that could easily be avoided by any victim. It is common ground that the publication of the audio recordings in electronic form abandons control of that content for all time. Therefore I find that the balancing of salutary effects and deleterious effects mandates the denial of this application. The resultant protection of the privacy interests of victims and the community outweighs any deleterious effects on either freedom of the press or freedom of expression.

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The Honourable Judge J. Palmer
Provincial Court of British Columbia