COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Moazami*,

2020 BCCA 350

Date: 20201209

Dockets: CA43308, CA43857

Between:

Regina

Respondent

And

Reza Moazami

Appellant

Restriction on publication: A publication ban has been mandatorily imposed under s. 486.4 of the *Criminal Code* restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness, referred to in this judgment. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Chief Justice Bauman

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Hunter

On appeal from: Orders of the Supreme Court of British Columbia, dated September 15, 2014 and February 11, 2016 (*R. v. Moazami*, 2014 BCSC 1727, Vancouver Docket 26108 and *R. v. Moazami*, 2016 BCSC 99, Vancouver Docket 26423).

Counsel for the Appellant:	T.M. Arbogast A. Grewal
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Counsel for the Applicants Postmedia Network Inc. and the	S.A. Dawson

Canadian Broadcasting Corporation:	
Counsel for the Intervenors Canadian Media Lawyers' Association, CTV, Global News, and The Globe and Mail:	D.W. Burnett, Q.C.
Counsel for the Attorney General of British Columbia:	J.D. Hughes J.M. Patrick
Place and Date of Hearing:	Vancouver, British Columbia November 3-4, 2020
Place and Date of Judgment:	Vancouver, British Columbia December 9, 2020

Written Reasons by:

The Honourable Chief Justice Bauman

Concurred in by:

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Hunter

Summary:

Postmedia Network Inc. and the Canadian Broadcasting Corporation challenge the constitutionality of sections of the Court of Appeal for British Columbia's "Record and Courtroom Access Policy" that apply to criminal appeal records, on the basis that they subvert the open court principle and are unjustifiably contrary to s. 2(b) of the Canadian Charter of Rights and Freedoms. Held: The constitutional challenge is dismissed. The impugned sections of the Court's policy do not infringe s. 2(b) rights. Public access to court records absent administrative procedure is not the promise of the open court principle; access is subject to supervision by the court.

Reasons for Judgment of the Honourable Chief Justice Bauman:

I. Overview

[1] This case concerns the constitutionality of sections of this Court's "Record and Courtroom Access Policy" (the "Access Policy") that address access to criminal appeal records. It requires the Court to consider its supervisory power over its records in the context of the open court principle and freedom of expression.

[2] The open court principle is part of the bedrock founding our judicial institutions and the rule of law. Courts must be seen to function openly. Public access to court proceedings permits public scrutiny of judicial processes and enhances public confidence in the justice system and an understanding of how justice is administered in Canada.

[3] The open court principle is inextricably linked to the freedom of expression and the freedom of the press, as protected by s. 2(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]: *Vancouver Sun (Re)*, 2004 SCC 43 at para. 26. The public must be able to access information pertaining to judicial proceedings in order to meaningfully exercise the right to express ideas and opinions about the courts. The public's right to be informed depends on the freedom of the press to gather and transmit this information. When court openness is restricted, so too is freedom of expression and freedom of the press: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 [*New Brunswick*] at para. 26.

[4] Court records are one source of information that the public may rely on to exercise their freedom of expression. However, the right to access court records is not absolute. That access is also subject to the court's supervisory and protecting power over its own records: *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175 [*MacIntyre*] at 189. This case tests the scope of that power in the context of s. 2(b) of the *Charter*.

[5] The Court's Access Policy requires media and the public to provide the Court Registry with a written request for access to certain criminal appeal materials and sets out guidelines for how those requests may be processed.

[6] The constitutionality of the Access Policy is challenged by Postmedia Network Inc. and the Canadian Broadcasting Corporation ("Media Applicants"). They are joined by several intervenors: the Canadian Media Lawyers' Association, CTV, Global News, and the Globe and Mail ("Intervenors").

[7] The Media Applicants take the essential position that the Access Policy, in effect, creates restrictions on access to material filed with the court without anyone having applied for those restrictions, thereby infringing the open court principle and their s. 2(b) rights.

[8] The Media Applicants say that restrictions on access may only be imposed by application of the test developed in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 [*Dagenais*], and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442 [*Mentuck*], and that the onus in that application rests on those who seek to restrict access.

[9] The Media Applicants posit this expansive proposition:

The open court principle mandates that members of the public may attend the court registry during business hours and inspect any court file, except where a sealing order has been applied for and granted.

[10] I have concluded that the Media Applicants significantly overreach here and that they impugn a simple administrative mechanism that invokes the court's well-established supervisory role over its own records: *MacIntyre* at 189.

II. Background

[11] Reza Moazami appeals to this Court from convictions on 30 sexual and prostitution-related offences (CA43308) and convictions for wilfully attempting to obstruct justice and breach of a no-contact order (CA43857). The circumstances of the former conviction are described in the reasons for conviction indexed as 2014 BCSC 1727. The circumstances of the latter are described in the reasons for conviction indexed as 2016 BCSC 99. Mr. Moazami also sought leave to appeal the decision of a summary conviction appeal judge who refused to grant an extension of time to appeal his conviction for assault (CA45510). That application was dismissed by the court in *R. v. Moazami*, 2020 BCCA 20.

[12] James Fisher, a former member of the Counter-Exploitation Unit of the Vancouver Police Department, was involved in investigating both the prostitution and obstruction matters and testified for the Crown at both of Mr. Moazami's trials. After the trials, Mr. Fisher was charged with various offences. He pleaded guilty to two counts of breach of trust and one count of sexual exploitation. The sexual exploitation conviction and one of the breach of trust convictions involved a potential Crown witness in an unrelated matter concerning prostitution-related charges brought against another person. The remaining breach of trust conviction concerned a complainant who testified for the Crown at Mr. Moazami's prostitution trial.

[13] Mr. Moazami's position in his prostitution and obstruction appeals is that his convictions should be set aside, in part on the basis that Mr. Fisher's misconduct with complainants and witnesses has given rise to a miscarriage of justice and an abuse of process.

[14] The Crown provided Mr. Moazami with post-conviction disclosure from the investigation into the misconduct of Mr. Fisher ("Fisher Disclosure") for the purpose of his prostitution and obstruction appeals. Mr. Moazami also applied for an order compelling the Crown to produce a complete inventory of all materials relating to the investigation into Mr. Fisher's misconduct. That application was dismissed in *R. v. Moazami*, 2020 BCCA 3.

[15] Mr. Moazami filed approximately 3,500 pages of Fisher Disclosure in support of his application for bail pending appeal. That application was heard by Justice Frankel on 6 May 2019 and dismissed on 20 June 2019 with reasons for judgment indexed as 2019 BCCA 226.

[16] On 7 May 2019, a Canadian Broadcasting Corporation reporter sought access to Mr. Moazami's appeal files (CA43308, CA43857, and CA45510) by filing the form required by the Access Policy. On 27 May 2019, a Vancouver Sun reporter sought access to the same files. After the access requests were filed, counsel for the Media Applicants communicated with counsel for Mr. Moazami, Crown appeal counsel, and this Court's Registrar on the question of access. Mr. Moazami's counsel and Crown counsel took the position that the reporters should not have complete access to the files. Crown counsel particularly objected to access being granted to the Fisher Disclosure that Mr. Moazami filed on his bail application, which they said contains the names and identifying information of vulnerable young victims of sexual crimes and information that could compromise the integrity of pending litigation.

[17] On 8 July 2019, the Media Applicants filed a notice of motion in the three Moazami appeal files, seeking an order vacating or, in the alternative, varying every order made in the appeals so far that is in the nature of a sealing order or publication ban, or otherwise limits the openness of the appeal proceedings, including by limiting access to material filed with the registry. They also sought an order seeking notice of any future application for the same. The Media Applicants clarified in their notice of motion that they did not seek to displace any order that protects the identity of any victim of the appellant or any minor witnesses. Their position was that access to material filed with this Court should be *prima facie* available to the public without application—the onus is on those who would restrict access to apply for that relief.

[18] On 13 September 2019, the Media Applicants filed a notice of constitutional question pursuant to s. 8(2) of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, challenging this Court's Access Policy with respect to criminal files. They say that it infringes s. 2(b) of the *Charter* (freedom of expression and freedom of the press and other media of communication) and s. 11(d) (the right of an accused to a fair and public hearing). I now note that the s. 11(d) argument was not pursued.

[19] As Chief Justice, I directed that a division of the Court hear the constitutional challenge to the policy.

[20] On 20 November 2019, the Canadian Media Lawyer's Association, CTV, Global News, and the Globe and Mail appeared at a case-management hearing and indicated their intention to seek

intervenor status on the constitutional challenge. Justice Frankel allowed this application, on the basis that the applicants are in a position to make a valuable contribution to the resolution of the issues. In addition, counsel for the Attorney General of British Columbia ("AGBC") indicated she would be participating as a quasi-*amicus curiae* by virtue of s. 8(6) of the *Constitutional Question Act*.

III. The Access Policy

[21] The Access Policy is included as Appendix "A" to these reasons. It begins with a section dedicated to the "Presumption of Access" with these paragraphs:

The Court of Appeal recognizes openness and accountability to the public as critical to democracy and the rule of law. As the Supreme Court of Canada stated in *Canadian Broadcasting Corp. v. Canada (Attorney General),* 2011 SCC 2 at paragraph 1:

> *The open court principle is of crucial importance in a democratic society. It ensures that citizens have access to the courts and can, as a result, comment on how courts operate and on proceedings that take place in them. Public access to the courts also guarantees the integrity of judicial processes inasmuch as the transparency that flows from access ensures that justice is rendered in a manner that is not arbitrary, but is in accordance with the rule of law.*

A right of access to certain court records is thus presumed. However, presumed rights of access must be balanced with protecting the privacy rights of individuals involved in court proceedings and with ensuring the proper administration of justice.

[22] The Access Policy sets out guiding principles in these terms:

. . . the Court of Appeal:

> (1) Recognizes the open court principle as a fundamental constitutional protection by providing a presumptive right of access to most records;
>
> (2) Recognizes that restrictions on access are justified where serious risks to privacy or other important interests such as the proper administration of justice outweigh a presumptive right of access; and,

(3) Recognizes that where restrictions on access are necessary, such restrictions should minimally impair that presumptive right of access.

[23] The Access Policy defines the "court record" as including (at s. 1.2):

- records filed or sent to the court;
- records of the court or tribunal under appeal;
- orders made or granted by the court, and supporting or related documents, such as reasons for judgment;

- scheduling or other internal court records, such as those used for case management or through case tracking systems;
- transcripts of proceedings if prepared;
- audio recordings of court proceedings; and

- clerks' notes from court proceedings.

[24] The document expressly states that the policy "is founded on the principle that the court has a common law supervisory power over its records": at s. 1.2.

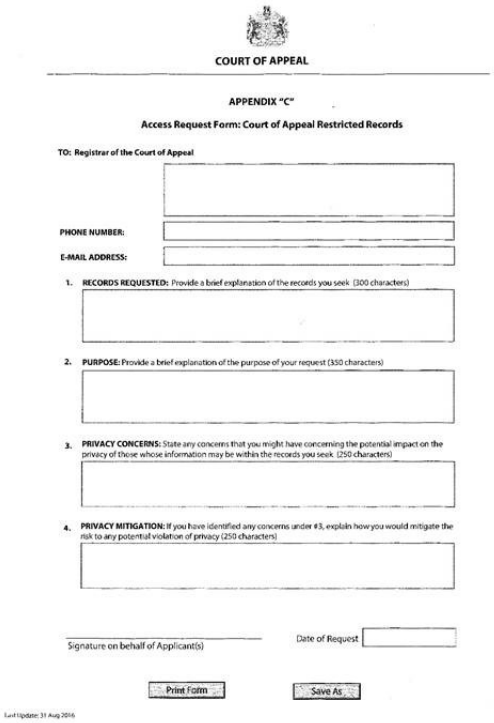
[25] Section 1.7 is the focus of these proceedings. It deals with obtaining access to criminal court records.

[26] Access may be requested (without written application) for a notice of appeal, notice of application for leave to appeal, reasons for judgment and any order other than a bail order in a criminal appeal file.

[27] An "access request form" is required to be completed for a criminal factum or sentence statement (filed after 1 October 2012).

[28] If one seeks access to any other criminal court record held by the Court of Appeal, one must submit a written request form to the Registrar of the Court using the form located in Appendix "C" of the Access Policy ("Access Request Form"). This is the provision relevant to the Media Applicants' applications at bar.

[29] The Access Request Form is quite straight forward and it is convenient to set it out in full:



COURT OF APPEAL

APPENDIX "C"

Access Request Form: Court of Appeal Restricted Records

TO: Registrar of the Court of Appeal

PHONE NUMBER:

E-MAIL ADDRESS:

1. RECORDS REQUESTED: Provide a brief explanation of the records you seek (300 characters)

2. PURPOSE: Provide a brief explanation of the purpose of your request (350 characters)

3. PRIVACY CONCERNS: State any concerns that you might have concerning the potential impact on the privacy of those whose information may be within the records you seek (250 characters)

4. PRIVACY MITIGATION: If you have identified any concerns under #3, explain how you would mitigate the risk to any potential violation of privacy (250 characters)

Signature on behalf of Applicant(s)

Date of Request

Print Form

Save As

Last Update: 31 Aug 2016

[30] The Access Policy qualifies the purpose of the Access Request Form and provides insight into how the request may be processed:

Though a written request must be made, the governing legal principle remains that access is presumed. The request process is in place because the court recognizes that criminal court records may contain information the disclosure of which is harmful to innocent parties. Once the request is received, the Registrar may refer the request to the Chief Justice for consideration, who may seek the input of the parties to the appeal to provide their positions on the request.

[31] This is consistent with the following statement at s. 1.2 of the Access Policy:

This access policy does not have the force of law. It is produced by the Registrar of the court to provide guidance to members of the public and the court registry on rights of access. Final determinations on access rights are always at the discretion of the Chief Justice, Justice(s) or Registrar and nothing in this policy prevents court-ordered redactions or withholding of records to protect privacy interests or the interests of justice.

[32] The Media Applicants note the practice that has grown up around the application of the Access Policy whereby the Registrar receives the Access Request Form and, acting on behalf of the Chief Justice, asks the parties for their positions on access. If the matter cannot be resolved at this informal stage, a hearing before a judge may be arranged. Failing resolution of the request at that stage, a formal application would be necessary, at which time a final determination on access rights would be made. That application is normally brought by the parties opposing access.

IV. Issues

[33] The Media Applicants have not pursued the s. 11(d) submission.

[34] The parties raise these issues:

1. Should this constitutional challenge to the Access Policy be heard together with the access application?

2. Does the process for obtaining access to criminal appeal records in the Access Policy infringe s. 2(b) of the *Charter*?

3. If the process for obtaining access to criminal appeal records in the Access Policy infringes s. 2(b) of the *Charter*, is it saved by virtue of s. 1 of the *Charter*?

V. Analysis

Issue #1: Timing of the Access Application

[35] The Court advised the Crown that while the constitutional challenge to the Access Policy would proceed independent of the access requests, when the challenge is heard before a division, it

would be open to the Crown to request to have the challenge and access requests heard at the same time.

[36] The Crown submits that the substantive access requests and the constitutional challenge should be heard together. The access requests are essential context for the constitutional challenge, establish the adjudicative facts, and provide concrete examples to which the Access Policy can be applied.

[37] I disagree. The constitutional challenge addresses a discrete issue—does the Access Policy unjustifiably infringe s. 2(b) of the *Charter*?

[38] Of course, constitutional challenges ought not to be based on the unsupported hypotheses of counsel or decided absent a proper factual foundation: *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 at 1100. However, that is not the case here. Here the record contains the limited facts necessary to dispose of the narrow issue before us. It includes the affidavits of the reporters who sought access to the court file, correspondence between the parties, and the Access Policy itself.

[39] The issue is focussed on whether the media's s. 2(b) rights are infringed by virtue of the procedure established in the Access Policy. The Media Applicants have provided a record of how their s. 2(b) rights have been allegedly affected. In my view, this is sufficient for the purposes of this constitutional challenge.

[40] I would not give effect to this submission.

Issue #2: Does the Access Policy Infringe s. 2(b) of the *Charter*?

[41] This is the central issue before the Court.

[42] The principles and nuances underlying and corollary to the open court principle have been discussed in many cases and in the context of access requests for different types of court records at various stages of judicial proceedings. In this case, I discuss them in the context of an appellate administrative policy guiding access to court records.

[43] I begin by addressing how these principles interact with the court's supervisory power over its records in the context of the Access Policy. Next, I turn to a discussion of how s. 2(b) *Charter* rights are to be balanced with other rights and interests when they come into conflict. Finally, I provide an analysis of how the process provided for in the Access Policy serves to protect the administration of justice within the parameters established by the *Charter*.

The Open Court Principle and the Court's Supervisory Power

[44] Freedom of expression is at the heart of the open court principle. According to Justice Cory for the majority in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1339:

It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

[45] The rights conferred by s. 2(b) of the *Charter* constitutionally enshrine the open court principle and protect the media's right to collect information on the proceedings, their right to broadcast that information, and the right of the public to receive the information. These rights are integral to the accountability of the courts because the right of the public to information relating to court proceedings depends on the freedom of the press to transmit this information: *New Brunswick* at para. 23.

[46] In *MacIntyre*, the applicant sought access to search warrants and supporting materials issued by a Justice of the Peace. The majority of the court held that after a search warrant has been executed and the objects found during a search are brought before a justice, members of the public are entitled to inspect the warrant and the information upon which it was issued.

[47] For the majority, Mr. Justice Dickson, as he then was, endorsed the following quotation of eighteenth-century philosopher Jeremy Bentham (at 183):

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.

[48] This was prefaced by Justice Dickson stating (at 183):

By reason of the relatively few judicial decisions it is difficult, and probably unwise, to attempt any comprehensive definition of the right of access to judicial records or delineation of the factors to be taken into account in determining whether access is to be permitted. The question before us is limited to search warrants and informations. The response to that question, it seems to me, should be guided by several broad policy considerations, namely, respect for the privacy of the individual, protection of the administration of justice, implementation of the will of Parliament that a search warrant be an effective aid in the investigation of crime, and finally, a strong public policy in favour of "openness" in respect of judicial acts.

[49] The broad principle of "openness" is applicable to judicial proceedings, whatever their nature, and in the exercise of judicial powers: at 185. It follows that "at every stage the rule should be one of public accessibility and concomitant judicial accountability": at 186. But it is not unqualified accessibility, there will be exceptions (at 186-187):

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 the protection of the innocent.

[50] The exceptions, however, are limited. Justice Dickson wrote (at 189):

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. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercice of the right.

[Emphasis Added.]

[51] Inherent in this exercise is the notion that the court is supervising access and making a determination in any given case whether to grant it.

[52] It is very common for courts across Canada to adopt policies regulating access to court records in order to facilitate access in a protective manner. For instance, all of the provincial superior courts and courts of appeal that have issued access policies require members of the public and the media to make an application to the presiding judge or submit an application form to the registry before providing access to trial exhibits. The sections of the Access Policy that are impugned by the Media Applicants apply to criminal appeal records and appeal books—both of which will often include trial exhibits.

[53] The Media Applicants and the Intervenors say that the Access Policy contains blanket restrictions on access to material filed with the Court, without any application for access restrictions by the parties or any order restricting access. In their view, the Access Policy is a *de facto* sealing order.

[54] The Crown's position is that the Access Policy does not create "blanket restrictions on access" and merely describes a process which respects the open court principle. The Crown says that the Court has a supervisory and protective role over its records.

[55] The AGBC largely adopts the position of the Crown. It further submits that the presumption of access to court proceedings does not equate to access to court files unfettered by procedure and the Access Policy does not in any way limit the substantive right of access.

[56] While the broad principle of openness cannot be doubted, it is important to our discussion here to stress that the court has "a supervisory and protecting power over its own records". Unfettered public access to court records is not the promise of the open court principle. That access is subject to supervision by the court, in recognition of the need to protect social values of superordinate importance. Judges have the discretion to order restrictions on access, exercised within the boundaries set by the principles of the *Charter*: *Dagenais* at 875.

[57] I conclude that the Access Policy does not have the effect of displacing a judge's discretion to limit court openness. It describes a process by which the factors that may inform a decision on access are put before the court. It does not, at any point, purport to prescribe a result.

[58] Certainly, where there are barriers that prevent the media from gathering information about court processes, freedom of the press and freedom of expression are restricted by those limitations on court openness: *New Brunswick* at para. 26. However, the Access Policy does not have the effect of denying access. A request made pursuant to the Access Policy simply triggers a process by which access may be provided, subject to the Court's supervision.

[59] While court openness is presumed and proper deference is given to the open court principle, to favour accessibility by providing automatic access to court records in all cases would be to thwart the court's jurisdiction and obligation to protect social values of superordinate importance, which is specifically provided for in the jurisprudence.

Access to the Court Record Requires a Balancing of Interests

[60] This brings us to *Dagenais*, where the judicial balancing exercise required on an access application is further developed.

[61] *Dagenais* involved a publication ban of a fictional television program until the end of criminal trials in Ontario involving sex abuse of the precise nature covered by the program. A majority in the Supreme Court of Canada set aside the ban in championing the open court principle. At issue were two competing *Charter* rights: freedom of expression under s. 2(b) and the fair trial rights of an accused person under s. 11(d).

[62] The majority held that a hierarchal approach to rights, placing some over others, must be avoided (at 877):

When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.

Freedom of expression as embodied in the open court principle does not automatically trump the protected rights of other individuals. The supervisory role of the court is rather engaged and a balancing of those rights is required.

[63] The majority in *Dagenais* then turned to establishing the common law rule governing publication bans "in a manner consistent with the fundamental values enshrined in the Constitution": at 878. This rule was modified in *Mentuck* to take into account other interests beyond the fair trial interests of the accused (at para. 32):

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.

The test, now commonly referred to as the "*Dagenais*/*Mentuck* test", reflects the substance of s. 1 of the *Oakes* test and its function in determining what reasonable limits on the rights to be balanced might be: *Mentuck* at para. 23. The burden of displacing the general rule of court openness lies on the party seeking to restrict access: *Mentuck* at para. 38; *Dagenais* at 875.

[64] *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 3 [*CBC 2011*], is an example of an access application involving a video recording of an accused's statement to police, exhibited at trial, where the accused was acquitted.

[65] The court began its analysis by noting that access to exhibits is a corollary of the open court principle—it is up to the trial judge to decide how exhibits can be used so as to ensure that the trial is orderly (at para. 12) and the trial judge does so by applying the *Dagenais/Mentuck* framework:

[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]

[66] The court continued at para. 14:

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*.

(The reference is to *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671. See also in this regard *R. v. Esseghaser*, 2017 ONCA 970).

[67] As I have mentioned, the Media Applicants are of the view that the open court principle mandates that members of the public may inspect any court file at any time, except where a sealing order has been applied for and granted. As the Access Policy requires the use of an Access Request Form and imposes a procedure, it erects barriers that infringe the open court principle.

[68] In oral argument, the Media Applicants supplemented this proposition with the submission that the court's supervisory and protecting power over its records is only exercisable on an application of the *Dagenais/Mentuck* test, which occurs on a case-specific basis after an application to restrict access to certain records has been made.

[69] The effect of the Media Applicants' propositions is that a party seeking to restrict access to materials (that are not already the subject of a publication ban) would have to make an application before or at the time of filing their material with the court. Should they fail to do so, the entirety of the materials would be accessible to the public at the registry counter until that application is brought.

[70] The Crown cautions that if no access request is made in the court below, this Court will be adjudicating an access request in the first instance, which means that the litigants and third parties will have yet to put their views on access before the court. Their views may pertain to privacy, administration of justice, personal security factors, and other factors, which must be known before a decision on access can be made. The Access Policy merely facilitates the communication of information that may be essential to the balancing exercise set out in *Dagenais* and *Mentuck*.

[71] The AGBC submits that there is no constitutionally protected right to automatic access to court files. That right would not be required to give effect to freedom of expression or the open court principle and would expose individuals and the administration of justice to significant harm.

[72] Once again, unfettered access to exhibits is not the rule—the jurisprudence belies the suggestion that the public and the media have an automatic and immediate right of access to court records. There is a presumption of openness and access but that does not mean there cannot be a process put in place by which *Charter* rights are exercised and the interests competing with openness are properly weighed in a judicial determination.

[73] In any given case, there may be factors that must be considered in order to give full meaning to Justice Dickson's comment in *MacIntyre* that there are cases in which the protection of social values must prevail over openness.

[74] When the protected rights of individuals come into conflict, a balance between them must be struck by applying the *Dagenais*/*Mentuck* framework.

[75] Given that there is no hierarchy of rights, and that these rights continue to exist regardless of whether they have been put before the court, the court's supervisory and protecting power over its records must be operative at all times, contrary to the Media Applicants' submission.

[76] The case before us is a stunning illustration of the potential perils inherent in the Media Applicants' argument.

[77] Mr. Moazami's counsel filed more than 3,000 pages of material in support of his application for bail pending appeal. According to the Crown, some of this material is identical to another set of documents that is already subject to a sealing order and implied and express undertakings that protect the identities and privacy of innocent parties and impugned persons. The documents include the details of an investigation into whether the vulnerable victims of Mr. Moazami were also victims of police misconduct. These documents, in addition to other materials in the records requested by the Media Applicants, are subject to a number of interrelated publication bans. In order to comply with these bans, transcripts, exhibits, or appeal records may need to be redacted. Where there is a s. 486.5 publication ban restricting the publication of identifying information of complainants or witnesses, even redaction may be insufficient to protect their identities.

[78] The proposition that the media and any member of the public may approach the registry counter and receive immediate access to these unvetted records clearly exposes potential privacy, security of person, and administration of justice concerns.

The Substantive Burden

[79] As noted above, the burden of displacing the general rule of court openness lies on the party seeking to restrict access: *Mentuck* at para. 38; *Dagenais* at 875.

[80] The Media Applicants state in their opening:

These steps create a default rule of secrecy and shift the burden of justification away from the party seeking to restrict access. The access policy tests the resolve and the resources of those seeking access

to *prima facie* public records. All of that turns the open court principle on its head and sidesteps the *Dagenais/Mentuck* test for discretionary orders restricting court openness.

[81] Respectfully, this borders on hyperbole.

[82] The Access Policy prompts the submission and review of an Access Request Form.

[83] The form asks for the applicant's phone number and email address.

[84] It asks for a brief explanation of the records sought (to a maximum 300 characters) and the purpose of the request (to a maximum of 350 characters).

[85] Contrary to the submission of the Media Applicants that the Access Policy requires the applicant to "speculate whether others might object to the access sought and, if necessary, fashion a mitigation plan for imagined privacy concerns…", the form simply asks that one state "concerns <u>that you might have</u> …" about the potential impact on privacy rights and it invites the applicants to "explain how <u>you</u> would mitigate the risk".

[86] This is calling on the applicants to simply and minimally participate in the process to assist the court in exercising its supervisory and protecting role. Indeed, it is something that the Media Applicants did themselves on these particular access request applications. The form does not, on any fair reading, require the "journalist [to] plead for access to presumptively public records", as the Media Applicants posit.

[87] Persons requesting access under the form are not required to provide affidavit evidence, enter exhibits, provide testimony, submit written argument, or even appear in court. The requirement to complete and submit the short form in no way amounts to the reversal of the legal or evidentiary burden in these matters.

[88] The Media Applicants appear to conflate the substantive burden that applies to the *Dagenais*/*Mentuck* test and the question of the procedural burden that applies in bringing an application to restrict access before the court.

[89] Whether an application to restrict access is triggered by the request of those who seek access, or those who would seek to restrict it, is a procedural matter. Depending on the circumstances, either may occur. What cannot change, and what the Access Policy does not purport to change, is the burden of justification in the substantive matter to be decided, which is properly on those who would seek to restrict access.

The Nature of the Applicant's Participation

[90] It is important to remember that the purpose of the open court principle is to facilitate public scrutiny of court proceedings. Is a member of the public's ability to scrutinize court proceedings compromised if they must submit an access request form for certain records?

[91] I conclude it is not. It is the administrative mechanism offered to the public so that they may access that right.

[92] The simple request for a brief explanation of the purpose of the access may give one pause; the media have the right to determine what to write about and the courts have little to say in that regard, if anything, in most circumstances. Whether the publication or broadcast of the materials sought to be accessed will be of use or interest to the public is for the media to decide or discover: *Global BC, A Division of Canwest Media Inc. v. British Columbia*, 2010 BCCA 169 at para. 75.

[93] However, the purpose of the applicant's request may be relevant in determining what countervailing interests may exist respecting access, if any, and what protections may be considered. The level of protection will vary with the nature of the proposed expression. The further that expression is from the core values of this right, the easier it will be for the party opposing access to justify a restriction: *New Brunswick* at para. 63.

[94] As an example, there are profound differences between reporting and simply placing the content on the Internet: *R. v. Arfmann*, 2019 BCSC 1343 at para. 17. The placement of court files and evidence on the Internet gives them permanence and immediacy in the public domain: *R. v. Panghali*, 2011 BCSC 422 [*Panghali*] at para. 51. There may be no s. 2(b) protected right to access for the purposes of directly downloading evidence to the Internet (*Hyde (Re)*, 2009 NSPC 32); filming court proceedings (*R. v. Pilarinos*, 2001 BCSC 1332); televising an inadmissible videotape that was played in open court (*Her Majesty the Queen v. Ellard*, 2001 BCSC 470); or making copies of exhibits (*Panghali* at para. 32). Since the materials are in the court's custody, there is no automatic right of the media to take possession of them in order to reproduce them; the relevant factors will always have to be balanced: *R. v. Black*, 2006 BCSC 2040 at para. 20.

[95] I do not say that these lower court decisions on access are invariably correct. I simply conclude that the purpose of the access request and the intended use of the material disclosed may well be essential context in the balancing exercise contemplated by the *Dagenais/Mentuck* framework. The third and fourth questions posed by the Access Request Form (regarding perceived privacy concerns) perform a similar role—they invite information that may provide context about the potential risk to privacy interests in light of proposed efforts to mitigate that risk.

[96] As I have discussed, the court's supervisory and protecting powers over its records are burdened by constitutional imperatives, such as the requirement to balance constitutional rights when they are in conflict. In order for the courts to meaningfully exercise their supervisory power, the weighing of interests at stake is essential before permitting access (as emphasized in *CBC 2011*). In order to engage in that weighing, the scope of the subject matter and the interests must be known. Such an important decision warrants the informed attention of both the court and affected parties. The information required by the Access Request Form facilitates the satisfaction of the court's legal obligations and the safeguarding of protected interests.

Procedural Delay

[97] The Media Applicants complain of the delay inherent in the application of the Access Policy. They submit that access delays are comparable to temporary sealing orders, "and should only be granted where an applicant can establish by cogent evidence that the delay is necessary in accordance

with the *Dagenais/Mentuck* framework". In their view, inherent in the process established by the Access Policy are exercises of discretion that restrict access.

[98] The Intervenors also submit that delayed access is an infringement of s. 2(b) rights, citing *R. v. White*, 2005 ABCA 435 [*White*] at para. 6:

News is a perishable commodity. Because "[n]ews, as the word implies, involves something new - something fresh." (*Triple Five Corp. v. United Western Communications Ltd.* (1994), 19 Alta L.R. (3d) 153 at 155 (C.A.)), 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 [for the media] is always of the essence."

They say that the experience of the Media Applicants' journalists, as evidenced by their affidavits and the timeline of proceedings, illustrates the delay and efforts required to obtain access.

[99] In my view, *White* has little persuasive value here. In *White*, a discretionary decision on access timing was not before Justice Berger of the Alberta Court of Appeal, nor was any constitutional question. He was prevented from granting access to the desired materials because a legislated mandatory publication ban had been issued by the judge below pursuant to s. 517 of the *Criminal Code*. Absent a challenge to the constitutional validity of s. 517, he was unable to exercise his discretion on the access issue: at para. 20. Therefore, his comments on access delays are *obiter* and made in a different context.

[100] I find more helpful the decision of Holmes J. (as she then was) in *Panghali*. There, as here, it was argued that timeliness is vital for media access to contemporaneously illuminate court proceedings; any impediment to contemporaneous access must be based on solid evidentiary ground that, for the reasons described in each branch of the *Dagenais/Mentuck* test, requires that access be delayed. Justice Holmes rejected this proposition, stating:

[74] In my view, the submission has weaknesses both in principle and practice.

[75] It is often said, in the context of media access, that news is a perishable commodity and media access therefore meaningless if not near-immediate. But the constitutional principle that animates entitlement to access does not guarantee a right to generate fresh news: it protects the right to inform the public, and the public's right to information, to facilitate public scrutiny of the Court's proceedings. The timeliness of the access in question must be assessed in that context.

[76] This is apparent from the Supreme Court of Canada's decision in *CBC v. Canada*, 2011 SCC 3. There, distinguishing the concerns that arise in relation to publication of testimony given in the courtroom, Deschamps J. noted at para. 18 that "since an exhibit already exists when it is introduced at trial, the judge's decision can always be made at the appropriate time." Potentially relevant factors for consideration before ruling on an application such as this include, "the serenity of the hearing, trial fairness and the fair administration of justice" (para. 18).

[77] The practical weakness of Mr. Burnett's submission relates to the timing of applications for access to exhibits, which often does not allow for the proper consideration of the *Dagenais/Mentuck* test without serious disruption to the trial.

[101] This was said in the context of access to exhibits during a trial, but the sentiment—that there are inherent delays in the proper consideration of the *Dagenais/Mentuck* test—applies in applications like that at bar which effectively seek instant access to entire court files. It is self-evident that if the court is to exercise a meaningful supervisory role in permitting access to its records, there will be inherent time delays in the process. These are not delays caused by discretionary judicial decisions on access, and as such the *Dagenais*/*Mentuck* test does not apply to them. The decision on access will be properly put before a judge if access is opposed or countervailing rights are exposed. Administrative decisions made in order to properly put that matter before a judge are distinguishable.

[102] Unwarranted delay, essentially intended to thwart timely access, would be another matter. Where access is delayed to the point that any information to be had from the materials is no longer relevant to the scrutiny of our judicial processes, the objectives of the open court principle may well be defeated.

[103] While the Media Applicants refer to the access delay in this case as an example of an infringement of their s. 2(b) rights, I note the exceptional intervening event of this constitutional challenge. The Access Policy itself is silent on the issue of timing, except to the extent that it does not permit immediate access to some files. I have concluded that automatic and immediate access is not the promise of the open court principle. Given that the Access Policy has no bearing on timing beyond that, if unwarranted delay in access were to occur it would not be on account of a term of the Access Policy that is the subject of this challenge.

[104] The complaints of the Media Applicants and the Intervenors of delays in access and burdensome costs and inconvenience in pursuing their applications must be considered in the context of both the actual experience in our court and processes put in place by other Canadian courts. I have dealt with the latter above. Processes similar to the Access Policy are common in courts across the country. As for the former, the Access Policy provides an opportunity to facilitate access to records in an efficient manner.

The Policy in Action

[105] In this case, the Media Applicants sought access to all of the materials filed in three appeals. Counsel for the Crown and the appellant provided their written positions on access to the Registrar, which were forwarded to the Media Applicants after redactions were made in compliance with existing publication bans. The Crown and the appellant provided descriptions of the specific records to which they opposed access. Many of these records are described as containing photographs of faces or identifying marks, financial information, and proof of identification. The Crown indicated their willingness to apply for a sealing order with respect to these items, if necessary. All that was asked of the Media Applicants at this point was an answer to whether they wished to seek access to the records the parties seek to withhold now that they were aware of the nature of the materials. If they had not, no further action would have been required of the parties.

[106] In this way, information provided by members of the media and the public through an Access Request Form and their participation in the process established by the Access Policy assists in identifying competing interests and the extent to which those interests are engaged by the request. This in turn provides the court with an opportunity to facilitate collaborative dialogue between the parties, narrow the issues, and avoid contentious (and therefore lengthy and expensive) proceedings such as this. The parties may be of the opinion that their rights would not be affected if access is granted and may consent to the request for access. Without the details included in an Access Request Form, parties would be unlikely to consent to access, as they would have no way of knowing whether or to what extent their rights, and the rights of third parties, would be affected.

[107] The contents of an Access Request Form may also provide the parties with sufficient information to assess whether they could meet the considerable burden of displacing the presumption of access, should they decide to oppose access. They may conclude that they will inevitably be unable to meet this burden. If this is their conclusion, they may consent to access, which again considerably reduces both delay and expense.

[108] The AGBC has helpfully collated what statistical information exists on the number of criminal case record access requests made in the recent past and their disposition.

[109] In the period 2015 to 2020, 58 requests were made through an Access Request Form. The AGBC continues:

29. Of the Appendix "C" requests, only three have resulted in a formal court application, two of which may be the applications underlying this constitutional challenge. The remaining 55 applications had the following results:

Number of requests where the applicant received access to all requested records	38	69 %
Number of requests where the applicant received access to some requested records	15	27 %
Number of requests where the applicant received no access to requested records	0	0%
Number of requests where result is unrecorded	2	4%

30. More than two thirds of the applicants who submitted Appendix "C" requests were granted access to all the records they sought. Of those who received only some access, the data further suggests this was sometimes because the requested record did not exist or was not available, and not necessarily because access was denied. In no case was access denied completely.

[110] This data underlines the efficacy of the somewhat informal process of consultation with the affected parties that the Registrar of the court embarks on upon receipt of a request. The vast majority of the applications for access are resolved without resorting to more expensive and time consuming formal court proceedings.

[111] In oral argument, Mr. Dawson for the Media Applicants proposed improvements to the Court's access procedure whereby members of the public and media would submit access requests through an online service. The submission of a request would send a "push notification" to the parties of record, who would then have a suggested two-day period to apply to restrict access to the requested materials, should they choose. Presumably, if the parties are unable to make an application to restrict access within that time, they could apply to the court for an extension of time. Failing that, the requested materials would be released.

[112] While this suggestion is certainly innovative, it is also contradictory to the Media Applicants' theories that materials which are not subject to publication restrictions should be provided automatically and that an application for access reverses the burden that the *Dagenais*/*Mentuck* prescribes. In any event, the procedural mechanisms that Mr. Dawson suggests are not required to bring the current Access Policy into *Charter* compliance.

Conclusion

[113] The Access Policy does not, in my view, engage s. 2(b) of the *Charter*. Freedom of expression and the press is not compromised by the requirement of an inquiring journalist to file an application essentially identifying for the court what records they seek so as to enable the court to conduct a proper assessment of the request and possibly sanction limits on access in the proper application of the *Dagenais/Mentuck* framework.

[114] Throughout the process the open court principle is acknowledged and the onus of "closing" the court is never shifted from those who would seek it.

Issue #3: If the Policy Infringes s. 2(b) of the *Charter*, is it Saved by s. 1?

[115] The Media Applicants' position is that the Access Policy cannot be justified under s. 1 of the *Charter* because the infringement is not "prescribed by law". They add that in any event, it cannot be justified under the *Dagenais/Mentuck* formulation of the *Oakes* test.

[116] The Crown submits that the Access Policy can be justified under s. 1 of the *Charter*. The Crown says that the Access Policy shares the characteristics of policies enacted by a government entity with a rule-making power, some of which have been categorized as "law". In addition, s. 1 may nevertheless be available to support any order of this Court which follows the Access Policy as it forms part of the common law.

[117] The AGBC adopts the Crown's position on the application of s. 1 of the *Charter* to the Access Policy and the application of the *Oakes* test.

[118] I have concluded that in the context of the particular aspect of the Access Policy before the court, no breach of s. 2(b) has been made out.

[119] In the circumstances here, I do not think it necessary to embark on a s. 1 analysis.

Disposition

[120] In the result, I would dismiss the constitutional challenge of the Access Policy based on the breach alleged here of s. 2(b) of the *Charter*.

"The Honourable Chief Justice Bauman"

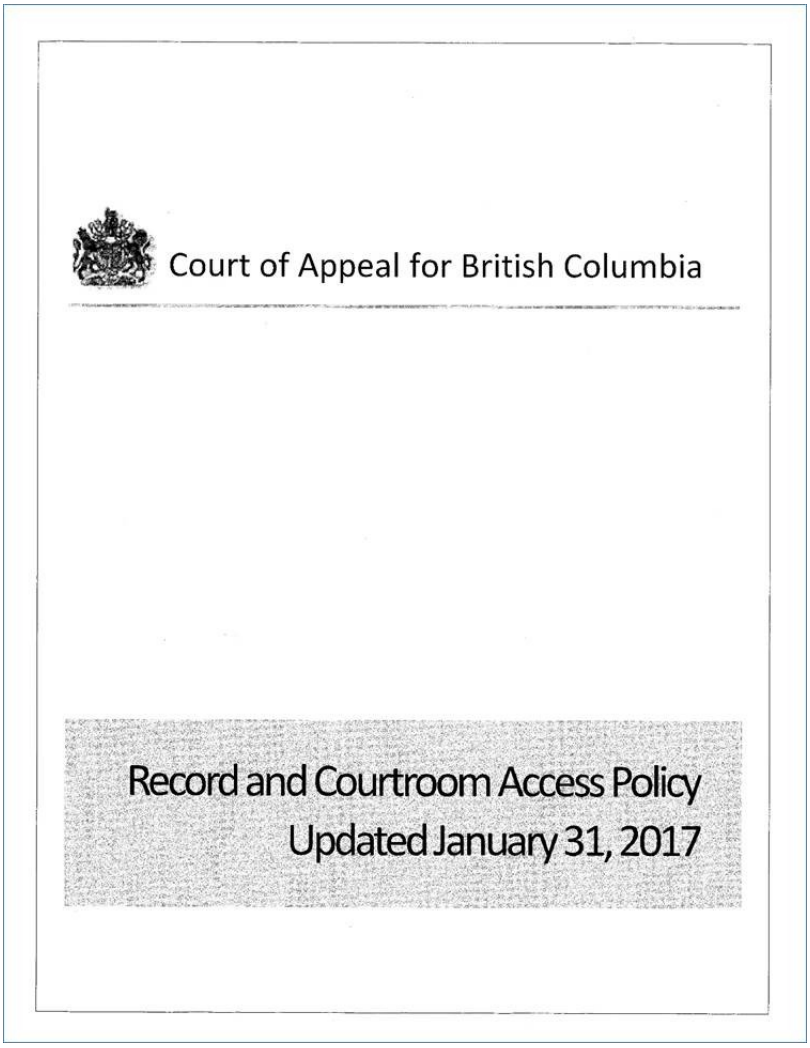
I agree:

"The Honourable Madam Justice Fenlon"

I agree:

"The Honourable Mr. Justice Hunter"

APPENDIX A



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Notice: The Court of Appeal's Access Policy is a living document and is subject to intermittent updates and amendments. Please check back frequently.

Last Revised on January 31, 2017: Section 1.6 updated to clarify cost exceptions and reflect change in procedure for requesting access to records. Section 1.7 updated to clarify record types and cost exceptions, and reflect change in procedure for requesting access to records. Embedded links tested throughout to ensure all operational.

1.0 ACCESS TO THE COURT RECORD

1.1 Presumption of Access

The Court of Appeal recognizes openness and accountability to the public as critical to democracy and the rule of law. As the Supreme Court of Canada stated in *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2 at paragraph 1:

> *The open court principle is of crucial importance in a democratic society. It ensures that citizens have access to the courts and can, as a result, comment on how courts operate and on proceedings that take place in them. Public access to the courts also guarantees the integrity of judicial processes inasmuch as the transparency that flows from access ensures that justice is rendered in a manner that is not arbitrary, but is in accordance with the rule of law.*

A right of access to certain court records is thus presumed. However, presumed rights of access must be balanced with protecting the privacy rights of individuals involved in court proceedings and with ensuring the proper administration of justice.

Advances in technology make the instantaneous transmission and wide dissemination of personal information possible. Commercial data mining, identity theft, and other potential breaches to personal privacy and security are risks that may require the restriction or denial of access to court records in certain circumstances.

In summary, as guiding principles the Court of Appeal:

> (1) Recognizes the open court principle as a fundamental constitutional protection by providing a presumptive right of access to most records;
>
> (2) Recognizes that restrictions on access are justified where serious risks to privacy or other important interests such as the proper administration of justice outweigh a presumptive right of access; and,
>
> (3) Recognizes that where restrictions on access are necessary, such restrictions should minimally impair that presumptive right of access.

1.2 Definition of the Court Record

The Court of Appeal's access policy is founded on the principle that the court has a common law supervisory power over its records. Pursuant to s. 32 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, the Court Services Branch of the Ministry of Justice is responsible for administering court records and enforcing directions given by the Court of Appeal concerning management of court records.

This access policy does not have the force of law. It is produced by the Registrar of the court to provide guidance to members of the public and the court registry on rights of access. Final determinations on access rights are always at the discretion of the Chief Justice, Justice(s) or Registrar and nothing in this policy prevents court-ordered redactions or withholding of records to protect privacy interests or the interests of justice.

For greater certainty, the court record includes anything on or by which information is stored that relates to proceedings before the Court of Appeal. The court record includes, but is not limited to:

- records filed or sent to the court;
- records of the court or tribunal under appeal;
- orders made or granted by the court, and supporting or related documents, such as reasons for judgment;
- scheduling or other internal court records, such as those used for case management or through case tracking systems;
- transcripts of proceedings if prepared;
- audio recordings of court proceedings, and
- clerks' notes from court proceedings.

There are two additional types of records beyond the court record:

1. **Court Administration Records:** The *Freedom of Information and Protection of Privacy Act,* R.S.B.C. 1996 c. 165 ("FIPPA") regulates court administration records. Court administration records include information gathered or produced for the purpose of managing programs and services of the Court Services Branch of the Ministry of Justice. You may access these records by making an access request under FIPPA to the Ministry of Justice.

2. **Judicial Administration Records:** FIPPA defines judicial administration records as those records relating to a judge. Judicial administration records, including records created by judges, or those records that relate to support services provided to judges may be accessible at the discretion of the Chief Justice of British Columbia.

Court statistics may be found in the Court of Appeal's Annual Reports.

1.3 Restrictions of Rights of Publication

Restrictions on rights of publication in relation to court records or information:

1. are usually in the form of a publication ban; and

2. usually allow access to court records, but restrict how that information may be communicated to others.

If court records are subject to restrictions on rights of publication, those restrictions are in place to protect privacy rights and ensure the proper administration of justice. Many publication bans that originate in the Supreme or Provincial Courts of British Columbia remain in effect during and frequently after an appeal.

Publication Bans: Where there is a publication ban in effect, a publication restriction notice will usually appear on the front page of the court's reasons for judgment. While access to records containing the restricted information is usually permitted, those obtaining access are responsible for obeying the publication bans by not publishing or broadcasting that information.

Registry staff will inform you of publication bans that have come to their attention. However, if you request access, you are responsible for observing and complying with publication bans in both the Court of Appeal and the courts below. Failure to do so may result in serious sanctions, including contempt proceedings. A list of common publication bans and their effects are listed in Appendix "B".

Statutory or Common Law Restrictions: In rare cases, federal or provincial statutes may restrict how information in a court record may be published. There may also be common law (non-statutory) restrictions or restrictions ordered by a court in a particular case.

Copyright Considerations: Appeal factums are prepared by or on behalf of the parties to proceedings. Those requesting factums filed in the Court of Appeal should contact the author directly to obtain information concerning potential copyright ownership and restrictions on reproduction. Contact information for the parties of record appears on the front cover of each factum.

1.4 Restrictions on Rights of Access

Restrictions on rights of access:

1. are usually in the form of a court order sealing the court file; and

2. restrict access to court records in the first place.

If court records are subject to restrictions on rights of access, those restrictions are in place to protect privacy rights and ensure the proper administration of justice. Many restrictions on rights of access that originate in the Supreme or Provincial Court of British Columbia remain in effect during and frequently after an appeal.

Sealing orders: If you would like access to a sealed file or record, you will have to apply before a Justice in chambers for an order permitting access. For instructions on how to bring an application and model forms, please see Appendix "A".

Statutory or Common Law Restrictions: In rare cases, federal or provincial statutes may restrict how information in a court record may be accessed. There may also be common law (non-statutory) restrictions or restrictions ordered by a court in a particular case. See also the restrictions in Section 1.13.

Closed proceedings: In extremely rare cases, the Court of Appeal may conduct proceedings "in camera," closing the courtroom to the public. If you would like access to records from a closed proceeding, you will have to apply before a Justice in chambers for an order permitting access. For instructions on how to bring an application and model forms, please see Appendix "A".

There is a presumptive restriction on access to bail terms within orders and reasons for judgment because they may contain sensitive personal information, such as the names and addresses of victims and witnesses.

1.5 Use of Personal Information in Reasons for Judgment

The Court of Appeal makes all of its reasons for judgment available to the public on its website, except some oral reasons decided in chambers that are not of precedential value. More information about judgments may be found on the "About Judgments" section of the Court's website.

With the publication of reasons for judgment online comes the necessity to protect personal information of litigants and witnesses, when such protection does not interfere with the open court principle.

Other than a person's name, reasons for judgment generally do not include personal data identifiers such as date and month of birth, social insurance numbers, telephone numbers or financial information.

In some cases, reasons for judgment may be subject to a publication ban. As described in Section 1.3, a publication ban is an order of the Court that restricts how information about a person may be communicated to others. In obeying its own publication bans, the Court may use initials instead of full names or may redact certain information in its reasons. Reasons for judgment posted on the Court's website will always indicate on the front cover if the judgment is conforming to a publication ban.

In other cases, a Justice or Justices may use their discretion to initial or redact party names in reasons for judgment to protect innocent parties, such as children, from being identified in the absence of a publication ban.

Once the Court releases reasons for judgment, they are often re-published and distributed widely, including by the media, on websites and in electronic and paper case reporters. Reasons for judgment come to form part of the common law and may be relied upon by other decision makers in other cases and in other courts.

The Court therefore does not usually redact reasons for judgment after their release. For example, when a person has received a pardon for a criminal offence, the Court will generally not remove or otherwise redact its reasons for judgment once published. Instead, the Court relies on counsel and litigants to identify sensitive information that may require a publication ban prior to or during the hearing of an appeal.

If you wish to make an inquiry concerning the use of personal information in reasons for judgment, you may contact the Registrar or Legal Counsel by telephone or by letter.

1.6 Obtaining Access to a Civil Court Record (Other than a Family Court Record)

Access to any civil court records held by the Court of Appeal is presumed if there is no restriction on rights of access (see Section 1.4).

Some civil court records (e.g. Notice of Appeal, Notice of Application for Leave to Appeal, correspondence, judgments, orders and minute sheets) may be accessed by making an inquiry in person at the registry counter. Often these records are also available through Court Services Online, the British Columbia electronic court registry. It is a good idea to check if the record is available electronically to save the time and expense of attending in person.

Other civil court records (e.g. factums, appeal records, appeal books and transcripts) may be accessed by submitting an access request form. Search, photocopying or transmission costs will apply (exception for counsel of record and parties to the proceeding). Payment is required by cash or cheque before court records are released. The Court will send electronic copies (where available) as soon as possible after payment has been received. For photocopying requests please allow a minimum of 48 hours for completion, although in some cases the waiting period could be longer.

For information regarding access to family court records, please see Section 1.8.

1.7 Obtaining Access to a Criminal Court Record

Access to criminal court records held by the Court of Appeal is subject to any restriction on rights of publication (see Section 1.3) and any restriction on rights of access (see Section 1.4).

You may request access to a notice of appeal or notice of application for leave to appeal, reasons for judgment and any order other than a bail order in a criminal appeal file at the registry counter without making a written application for access.

To request a criminal factum or sentence statement filed on or after October 1, 2012 that is not subject to publication or access restrictions at the time of the request, please submit an access request form. Search, photocopying or transmission costs will apply (except for counsel of record and parties to the proceeding). Payment is required by cash or cheque before court records are released. The Court will send electronic copies (where available) as soon as possible

after payment has been received. For photocopying requests please allow a minimum of 48 hours for completion, although in some cases the waiting period could be longer.

If you seek access to any other criminal court record held by the Court of Appeal (e.g. a factum or sentence statement filed before October 1, 2012; a factum or sentence statement filed on or after October 1, 2012 that is subject to publication or access restrictions; an appeal record; an appeal book; or a transcript) you must submit a written request using the form in Appendix "C" to the Court of Appeal Registrar at:

Court of Appeal Registrar
RE: Access Request, *[Court file No.]*
Court of Appeal for British Columbia
400 – 800 Hornby Street
Vancouver, B.C. V6Z 2C5

Though a written request must be made, the governing legal principle remains that access is presumed. The request process is in place because the court recognizes that criminal court records may contain information the disclosure of which is harmful to innocent parties. Once the request is received, the Registrar may refer the request to the Chief Justice for consideration, who may seek the input of the parties to the appeal to provide their positions on the request.

1.8 Obtaining Access to a Family Court Record

Due to the sensitive nature of information in family law proceedings, you must apply before a Justice in chambers for an order permitting access. For instructions on how to bring an application and model forms, please see Appendix "A".

1.9 Obtaining Bulk Access

Bulk access means an arrangement that allows access, other than on a file-by-file basis, to all or a subset of the electronic court record relating to proceedings before the court.

All applications for bulk access must be made to the Judicial Access Policy Working Committee by contacting the Court of Appeal Registrar at the address set out in Section 1.7 above. Each application requires the execution of an agreement restricting the use of the information to protect the privacy interests of those whose personal information may appear within the court record.

1.10 Retention, Disposition and Storage of Records

The Court of Appeal ensures that physical records relevant to each proceeding are retained permanently, except for books of authorities. According to Government Retention and Disposition schedules court records are kept with the court for 6 - 20 years and then stored

indefinitely in off-site storage facilities managed by the Government Records Service. Prior to 2004 archival court records would have been transferred to the Provincial Archives. Registry and Judicial staff continue to provide access to physical records stored off-site.

1.11 Listening to Audio, Obtaining Transcripts or Reasons for Judgment

1.11.1 Audio and Minute Sheets (Clerks' Notes)

The Court of Appeal creates and keeps an audio record of all proceedings using a digital audio recording system (DARS), which was implemented in 2006. Prior to the implementation of DARS, the use of cassette tapes and written notes by court stenographers or court reporters was common.

Unless there is a restriction on access (see Section 1.4), if you were entitled to be present in the courtroom for a proceeding in the Court of Appeal, you may:

- except in the case of oral reasons for judgment, which are subject to editing by the justices, listen to the audio recording of that proceeding;
- review the record of the proceeding kept by the court clerk in the form of minute sheets ("clerks' notes"), which includes information about the parties and counsel appearing, the start and stop times, and the disposition of a hearing.

1.11.2 Requesting Minute Sheets or Listening to Audio Recordings

To request minute sheets or listen to audio recordings of Court of Appeal proceedings, please use the minute sheets and audio recordings request form. The Court will not release a physical copy of a DARS audio recording under any circumstances.

1.11.3 Transcripts of Court of Appeal Proceedings

Transcripts of proceedings transcribe what happened in Court, such as the arguments made or questions asked by the judge or judges. They are different from copies of reasons for judgment, which are the judge's reasons for making an order. If you are requesting a copy of the judge's reasons, please see sections 1.11.4 and 1.11.5 below.

If you can access the audio recording of a proceeding, you may also order and receive a transcript of that proceeding. To request transcripts of Court of Appeal proceedings, please contact transcription companies. This checklist for transcription companies can be used as a guide when you order transcripts.

To order a criminal transcript, contact JC Word Assist at 604-669-6550.

To order a civil transcript, contact any of these Transcription Companies.

1.11.4 Reserved Reasons for Judgment

By the Court (three judges) or by a Judge in Chambers (one judge): When Justices take time to write their decision after the hearing, these decisions are called reserved or written reasons for judgment. It can take weeks to months to a write a judgment. They are then released in open Court and are published on the Court's website at approximately 10:00 am on the day they are released.

1.11.5 Oral Reasons for Judgment

Oral reasons for judgment are decisions pronounced in court on the day of the hearing. Oral reasons for judgment are transcribed by judicial staff rather than by a transcription company. There is no public access to the audio recording of oral reasons for judgment because once transcribed they are subject to editing by the Justice or Justices who decided the appeal or application.

By the Court (three Justices): Oral reasons for judgment by a division of the Court are given by three Justices. The oral reasons for judgment are given a neutral citation, are published and can be accessed on the Court's website, once approved and signed by the Justices.

By a Justice in Chambers (single Justice): Oral reasons for judgment in chambers are given by a single Justice. Oral reasons for judgment by a single Justice are not published, except where it is determined that a decision may be of precedential value. However, you may request a transcription of a judge's oral reasons for judgment.

1.11.6 Requesting Oral Reasons for Judgment

To request a transcription of oral reasons for judgment, please call or e-mail the Registrar's Assistant by:

Phone: 604-660-2729
E-mail: CA-orals@courts.gov.bc.ca

Please include in the e-mail subject line:

- the Court of Appeal file number (CA0XXXXX);
- a short style of cause (*Smith v. Jones);* and
- the date the judgment was given (July 15, 2010).

Example:
Subject: CA012345 *Smith v. Jones* July 15, 2010

A fee will apply if you are not counsel of record or one of the parties. Transcriptions are usually completed within 10 business days. The Court of Appeal does not offer an expedited transcription service.

1.12 Hearing Lists and Available Court Dates

Weekly hearing lists and daily chambers lists are posted on the Court of Appeal's website the Friday of each week. The public may obtain information about how a chambers application or appeal was decided from registry staff unless there is a restriction on rights of access (see Section 1.4).

1.13 Judicial Settlement Conferences

In accordance with *Judicial Settlement Conferences* (Civil Practice Directive, 19 September 2011), certain civil and family cases before the Court of Appeal are mediated by a Justice of the court prior to the hearing of an appeal. Any information that relates to a Judicial Settlement Conference shall not be released to the public under any circumstances without the express written permission of all litigants who participated in the Judicial Settlement Conference and the Justice who presided over that settlement conference.

1.14 Proceedings Under the Youth Criminal Justice Act, S.C. 2002, c. 1 ("YCJA")

In certain circumstances, access to, and publication of names or other information relating to young persons dealt with under the YCJA is prohibited by Part 6 of the YCJA. For this reason, to access records relating to any appeal involving a "child" or "young person" that was or is being dealt with under the YCJA, you must make an application. For instructions on how to make an application and model forms, please see Appendix "A" below.

1.15 An Individual's Criminal Record and Wiretaps

There are certain records that may appear within an appeal book or affidavit that are subject to statutory restrictions:

Criminal Records in the Case of Absolute or Conditional Discharges: If more than a year has elapsed since a person was discharged absolutely or three years has elapsed since a person was discharged on conditions, registry staff must not allow access to the record of the discharge or disclose the existence of the record or the fact of the discharge to any person other than the person who is the subject of the discharge or counsel acting on his or her behalf.

Criminal Records, Pardons and Certification of Conviction: The *Criminal Records Act* R.S.C. 1985, c. C-47 imposes restrictions on public access to criminal records. Registry staff must not allow access to any record that would disclose a conviction in respect of which a pardon has been granted or disclose the existence of the record or the fact of the conviction to any person, other than the person who is the subject of the pardon or counsel acting on his or her behalf. A pardon does not, however, entitle the pardon holder to a redaction or change in reasons for judgment issued by the Court.

Supreme or Provincial Court Wiretap Authorizations: Because of Part VI of the *Criminal Code*, the public may not access wiretap authorizations or any material submitted to the court in support of an application for a wiretap authorization or any material related to a wiretap authorization unless the court makes an order otherwise.

1.16 Obligations in the Event of a Breach or Suspected Breach

Any person who becomes aware of a breach or suspected breach regarding the use or disclosure of court records or regarding any section of this Policy, should immediately contact the Court's legal counsel at 604-660-0352.

2.0 ACCESS TO THE COURTROOM AND LIVE PROCEEDINGS

2.1 Presumption of Access

The British Columbia Court of Appeal welcomes and encourages members of the media and public to view the proceedings of the court. As discussed above in Part 1, the court recognizes the importance of the open court principle in maintaining public confidence in the administration of justice and preserving the integrity of the court system. The Court of Appeal recognizes the importance of providing access to courtrooms whenever possible to allow public scrutiny and full and accurate reporting of proceedings.

However, as discussed in *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, "it is sometimes necessary to harmonize the exercise of freedom of the press with the open court principle to ensure that the administration of justice is fair." In very exceptional cases in the Court of Appeal, the courtroom may be closed to the public to protect the privacy interests of those participating in an appeal or to protect the administration of justice.

Despite the contents of this part of the access policy, the presiding Justice always has the discretion to regulate activity within the courtroom.

2.2 Courtroom Decorum

Those who choose to view courtroom proceedings are asked to conduct themselves in a way that is respectful of the dignity and safety of participants that are engaged in the process of presenting their appeal. Activities that might disrupt or interfere with proceedings are prohibited.

2.3 Use of Electronic Devices

Many of the risks associated with the use of electronic devices are reduced in the Court of Appeal because of the absence of live witnesses and juries. Accordingly, the policy of the Court of Appeal may differ from trial courts, such as the Provincial Court of British Columbia and the Supreme Court of British Columbia.

The use of electronic devices within courtrooms in the Court of Appeal is governed by the Joint Courts' Policy on the Use of Electronic Devices.

Warning: Members of the media or public who choose to use electronic devices to report on proceedings are reminded to check with counsel, the court clerk or registry staff concerning the existence of publication bans. The Court of Appeal will monitor media broadcasts and treat any breach of a publication ban very seriously. Breach of a publication ban may result in consequences, including criminal contempt proceedings. Common publication bans are listed in Appendix "B" to Part 1 of this access policy.

2.4 Video Recording or Televising Proceedings

In the case of video recordings, requests to record and/or televise court proceedings should be made to the Chief Justice through the Court of Appeal Legal Counsel at least sixty (60) business days prior to the hearing of an appeal and at least five (5) business days prior to the hearing of an application in chambers.

In addition to identifying the proceedings to be recorded, the request should describe the precise method by which the broadcast may take place and any logistical issues. For example, you should consider whether the proceedings can be filmed from the gallery or if access to the well of the courtroom will be required. Any potential impact on the privacy interests of those who might be affected by the broadcast of the proceedings should also be identified in the application letter.

In reviewing an application to photograph or televise court proceedings, the Chief Justice or presiding Justice may elect to contact parties to the appeal and consider whether:

1. privacy interests or the interests of justice outweigh the public interest in having the proceedings televised; or,

2. any potential disruptive effect that televising will have on the proceedings; or,

3. any potential additional expense to the court.

2.5 Audio Recording

The use of audio recording devices, including electronic devices for the purposes of recording audio, is prohibited in the courtroom, except by accredited journalists. The process for accreditation and the permitted use of audio recording devices is explained in the Media Accreditation Process and the Joint Courts' Policy on Use of Electronic Devices in Courtrooms.

Journalists seeking accreditation must apply to a member of the Accreditation Committee and sign an undertaking to abide by the Courts' Policy on Use of Electronic Devices in Courtrooms. Accredited journalists seeking to audio record appeal proceedings must display their identification and lanyard.

2.6 Media Interviews

The Justices of the Court of Appeal speak through their orders and reasons for judgment. The Chief Justice and Justices of the court do not comment on specific cases that are or have been before the court or may come before it in the future.

You may obtain general information about court proceedings by contacting the court Registry, Registrar or Legal Counsel through the court's general telephone inquiries line at **604-660-2468**.