CITATION: CBC v. Chief of Police, 2021 ONSC 6935
DIVISIONAL COURT FILE NO.: 431/21
DATE: 2021101

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Backhouse, Tzimas and Nishikawa JJ.

BETWEEN:	
Canadian Broadcasting Corporation, CTV News, a division of Bell Media Inc., Toronto Star Newspapers Limited and Postmedia Network Inc. Applicants	*Ryder Gilliland*, Counsel for Applicants
– and –	
Chief of Police James Ramer and Toronto Police Service Respondents	*Mattison Chinneck*, Counsel for Toronto Police Services Board
-and -	
Sergeant Gauthier Respondent	*Lawrence Gridin*, Counsel for Sergeant Gauthier
-and -	
John Doe Intervenor	*Dawn Way*, Counsel for Intervenor
	HEARD by videoconference in Toronto on October 13, 2021

Overview

[1] This application for judicial review involves three main issues. First, the applicants submit that a video exhibit at the professional misconduct hearing of Sergeant Gauthier was improperly withdrawn, infringing openness principles and should be made available to the public without limitation on its use. The respondents assert that openness principles are not engaged because the video exhibit never was part of the record, not having been physically produced and not having been viewed or relied upon in the proceeding before it was withdrawn. Second, the applicants seek a declaration that the failure to provide contemporaneous access to exhibits at the hearing is an unjustified infringement of the open court principle. Third, the applicants seek a declaration that the fees charged by the Toronto Police Service for accessing exhibits is an arbitrary and unconstitutional barrier to access.

[2] The parties other than Sergeant Gauthier ask this Court to determine whether the video shall be made available to the public rather than sending the matter back to the Hearing Officer. The hearing is concluded. It is not known whether the Hearing Officer is available and what his position would be with respect to whether he retains jurisdiction. It is not in the interests of efficiency or economy to send the matter back to the Hearing Officer.

[3] For the reasons that follow, I find that the video was part of the record and was made the subject of a publication ban without a determination of whether the proper test set out in *Dagenais-Mentuck*[1] was met. The exhibit was then improperly withdrawn after the applicants were granted permission to make submissions regarding the inappropriateness of a publication ban but before they were able to do so. To grant the publication ban without applying the correct test and then to allow the exhibit to be withdrawn after the applicants sought to challenge the publication ban engaged openness principles, was an error in principle and plainly wrong.

[4] There is no basis for a publication ban under the test in *Dagenais-Mentuck.* After redacting any reference to the victim's name, the video shall be made available to the public without limitation on its use.

[5] Failure to produce the exhibits until after the hearing concluded contravened the open hearing principle in the circumstances of this case. Going forward, the Toronto Police Service shall be required to provide exhibits in quasi-judicial police discipline hearings during the hearing except in exceptional circumstances. In addition, the exhibits shall be provided in accordance with the TPS policy to provide access to exhibits at no charge if they are available electronically and at a nominal charge, if they are not available electronically.

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[1] *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442.

Background

[6] Between September 2010 and June of 2017, Bruce McArthur murdered eight male victims, all of whom were gay or bisexual. All but two were men of colour. The fact that it took so long to apprehend McArthur despite multiple interactions with police caused a public outcry. The Toronto Police Service Board commissioned an independent civilian review into missing persons investigations which reviewed what went wrong and examined how things can be done differently ("the Review").

[7] One of McArthur's interactions with police occurred in 2016 when he was arrested after a man called 911 alleging that McArthur violently choked him during a sexual encounter. McArthur was interviewed by police, but he was released on the same day because the police believed that the complainant had consented to being choked.

[8] The Review found that it was premature for the investigator to conclude, based on McArthur's purported mistaken belief in consent, that no offence had been committed and that it was well arguable that the evidence did not support this conclusion. The Review's mandate did not include making findings of professional misconduct and no such findings were made.

[9] The investigator who interviewed and promptly released McArthur in 2016, Sergeant Gauthier, was charged with two counts of professional misconduct in February 2019. The disciplinary hearing was heard virtually between May 17 and 21, 2021. It was attended by numerous members of the media including the applicants and was the subject of extensive contemporaneous reporting. Sergeant Gauthier was ultimately found not guilty of any misconduct.

Tendering the Video as Exhibit 19 and granting a publication ban

[10] At the outset of the hearing, the prosecutor and counsel for Sergeant Gauthier agreed, on consent, to introduce the video of Sergeant Gauthier's 2016 interview of McArthur. In consenting to the video being made an exhibit, counsel for Sergeant Gauthier stated that it was "part and parcel of the case." After the video was made Exhibit 19, counsel jointly sought a publication ban on the basis that the video contained intimate details of sex acts between McArthur and the victim and was necessary to protect the victim.

[11] The Hearing Officer found that a publication ban was necessary to protect the intimate details, the privacy and the identity of the victim. It should be noted that there was already a publication ban in place preventing the victim from being identified. The Hearing Officer granted the publication ban without hearing argument on the factors to be considered in the applicable test set out in *Dagenais-Mentuck.*

Media Sought to Challenge the Publication Ban

[12] Members of the media requested the opportunity to make submissions about the publication ban and the Hearing Officer acknowledged the media's request to be heard and agreed to hear the submissions after the lunch break.

Video Exhibit Withdrawn

[13] When the hearing resumed after lunch, counsel for both parties advised that they were no longer agreeing to enter the video as an exhibit and instead were tendering a summary. The relevant portions of the hearing transcript are as follows:

> MS. CIOBOTARU: Um over the lunch break, um, my friend and I discussed the exhibits that were tendered uh, on consent, uh as admissible. And one of those exhibits was Exhibit number 19, which is the um video which the media was proposing to make submissions in relation to, to which you put a-, a publication ban. Um…
>
> RET. SUPT. ANDREWS: Yeah
>
> MS. CIOBOTARU: … the parties over the lunch hour have recognized the sensitivity of the matter, and we have come to an agreement that we're actually going to be asking that, that exhibit be withdrawn. Um neither party is agreeing to enter that as an exhibit. Uh, in its place we are in agreement to tender the interview summary. Um so that's a summary, not a transcript, vebat,- verbatim, but a summary, um of that same interview. But it's our position that the actual interview is not necessary um for either the prosecution or defence of this matter. And therefore we would be content to have the summary in its place. And that summary has been redacted, uh and I can provide that uh to the Tribunal as an exhibit. And I think that should resolve the issue because it's my position that if something is no longer an exhibit or um is being pulled as an exhibit, which, is my right to do as a prosecutor, um (clears throat) then there's um no item upon which uh can be granted access. Subject to any comments my friend wants to make in relation to that.
>
> RET. SUPT. ANDREWS: Mr. Gridin?
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> MR. GRIDIN: Uh, I'm content with that approach that was just set out by my friend. So you're going to be receiving by email a replacement exhibit for Exhibit 19, uh which will be a-, uh a written summary, with a number of redactions over the identities of different people. Um just to make it easier for the reader to understand who is talking about whom, instead of the – the names being used in the summary, where those names are redacted and white text is placed over-, over those redactions, saying: "complainant" or "suspect". So there's no identities contained in it, but you can still tell who is talking about whom.
>
> …
>
> RET. SUPT. ANDREWS: Thank you, well since uh the video had not been uh tendered or um submitted or played or any evidence had been given in regards to

> that um, then it is being removed as Exhibit number 19, instead Exhibit number 19 um, will be an interview summary, of the interview between Sergeant Gauthier and the accused in this matter, and it is a redacted summary and as uh a result, the publication ban that did pertain to the video uh is no longer required, the overall publication ban regards to information that could lead to the identity um – of the victim, complainant still uh remains in order. So, with that being said um, there were members of media that wanted to address. I suspect that this now has removed that necessity, however, uh I did say that they would have an opportunity, so Ms. Gillis?
>
> MS. GILLIS: thank you so much, thank you very much to all the parties for giving us an opportunity to comment. Um you know initially we- we had no notice of this publication ban coming, and now of course we don't-, didn't have any notice about the removal of this exhibit. Uh, I will have to confer with my counsel on-, on what to do next but, I-, I'm understanding correctly that um the-, the video was going to be an exhibit, it was under a publication ban, and then when it was challenged by the media, it was pulled as a-, as an exhibit, is that correct? Am I-, am I understanding correctly?
>
> RET. SUPT. ANDREWS: So Exhibit number 19 has been replaced with an interview summary, so Exhibit 19 as it stands right now, is an interview, a redacted summary of the uh interview between uh Officer Gauthier and the accused. And as a result, there is not publication ban on that uh-, on Exhibit Number 19.

[14] One reporter asked if it would be possible to submit a written submission respecting the decision to withdraw the exhibit. This was followed by an exchange between the prosecutor and the Hearing Officer (with emphasis added):

> MS. CIOBOTARU: Yeah, I just want to confirm that um the evidence in the Hearing has not actually commenced, so um, **although this uh exhibit was tendered** uh, the Hearing itself, or the Hearing proper rather, uh the witnesses obviously - have not commenced, we're till litigating legal issues and um it's my view that uh the prosecution and the defence um you know, reserve the right to determine what we're going to tender as exhibits or if things are challenged, uh that's for you to make that determination. Um and, this decision was made in the interest of moving this uh matter along in expeditious fashion, sticking to the matters at hand before you. Um and this replacement exhibit has no publication ban on top of it, so if the media would like access to that exhibit, they can get access to it in the-, in the usual course. And the last thing I'll say in-, in respect to the written submissions, it it's my view that uh, although the media has the opportunity to speak in relation to – – although the media has the opportunity to… …make submissions, um **written submissions are-, are not to be made here, there's a proper forum, um if uh the media wants to challenge um your determination or uh your decision making, and that would be in the Superior Court**, it's been done before on exhibits that are uh being contested. So it's my view that you as the Hearing Officer can make a determination in reference to um the fact that we've

> pulled this exhibit uh and put something in its place that has no publication ban, and should this uh there be an issue on that, **this would not be the correct forum for which to have that legal argument.**
>
> RET. SUPT. ANDREWS: Okay, and-, and **that is my understanding as well**, but thank you for the clarification of that Ms. Ciobotaru. …

Availability and Cost of Hearing Exhibits

[15] The applicants assert that their experience at the hearing did not accord with the Toronto Police Service's own policy for making exhibits available during the proceeding. The Toronto Police Service Policy for Requesting and Distributing materials states:

> 8.2 Any person not a party to the appeal or anyone wanting to use an exhibit for other than purposes consistent with Part V of the Police Services Act may request an exhibit by e-mailing Corporate Communications
>
> 8.3 Exhibits are available during the proceedings, subject to vetting
>
> 8.4 Exhibits will be vetted by the Toronto Police Service for the purpose of removing personal or confidential information
>
> 8.5 Once vetted for release, exhibits can be viewed at TPS Headquarters or can be photocopied for a nominal fee, if they are not available electronically.

[16] Despite hearing exhibits having been requested on the first day of the hearing, they had not been provided by the last day of the hearing nor by the date Ms. Gillis affirmed in her affidavit on May 26, 2021 that she still had not received the exhibits nor been advised when she might expect to receive them.

[17] The applicants assert that it is unique to police disciplinary hearings that exhibits are not made available to the media during the hearing and that the charges of $1/page for documents even where available electronically and $10 for audio/video files available electronically charged by the Toronto Polices Service contravenes section 8.5 of its own policy.

Issues

[18] The central issue on this application for judicial review is whether in the circumstances of this case it was an error in principle to allow the video exhibit to be withdrawn from the record. A further issue is whether the Toronto Police Service should be required to make exhibits available during a hearing and comply with its own policy, at no charge if they are available electronically and otherwise, at a nominal charge.

Analysis

The Applicable Principles

Standard of Review

[19] The applicants submitted that the standard of review on this application for judicial review is correctness because it involves questions of law. The respondents make no submissions on the standard of review.

[20] The standard of review on an application for judicial review is presumptively reasonableness. The reasonableness standard is rebutted where the rule of law requires that the standard of correctness be applied. This exception applies to a narrow set of circumstances where certain categories of legal questions are involved, such as constitutional questions, and general questions of law of central importance to the legal system as a whole and questions related to jurisdiction.[2]

[21] The standard of review on a question involving the exercise of discretion is whether the decision maker committed an error in principle or was plainly wrong. Reversing a decision maker's discretionary decision is also appropriate where the decision maker gave no or insufficient weight to relevant considerations: *Penner v. Niagara (Regional Police Services Board*).[3]

[22] I have found that the Hearing Officer's decisions to grant the publication ban and then to allow the exhibit to be withdrawn are errors in principle, plainly wrong and cannot stand, on either a reasonableness or correctness standard of review.

Open Justice is a Core Democratic Principle

[23] It is trite to say that the "open court" principle is a central feature of democratic society. As Justice Fish stated succinctly for the Supreme Court in *Toronto Star Newspapers Ltd. v. Ontario*, "[I]n any constitutional climate, the administration of justice thrives on exposure to light – and withers under a cloud of secrecy".[4] Open justice is a "cornerstone of the common law" and a "hallmark of a democratic society".[5]

[24] An open justice system ensures that justice is done and, importantly, that it is seen to be done. As the Court stated in *Vancouver Sun*:

> Openness is necessary to maintain the independence and impartiality of the courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.[6]

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[2] *Canada (Minister of Citizenship and Immigration) v. Vavilov* 2019 SCC 54.
[3] *Penner v. Niagara (Regional Police Services Board*), 2013 SCC 19, para.27.
[4] *Toronto Star Newspapers v. Ontario* 2005 SCC 41 (CanLII), para 1.
[5] *Vancouver Sun (Re*, 2004 SCC 43 (CanLII), [2004] 2 S.C.R. 332, paras 22-31.
[6] *Vancouver Sun (Re*, 2004 SCC 43 (CanLII), [2004] 2 S.C.R, para.25.

[25] Part and parcel of the right to access exhibits is the right to access them in a timely manner.[7]

Openness for Tribunals

[26] The same rationale informing the open court principle informs openness for tribunals.[8]

[27] In *Southam v. Minister of Employment and Immigration,* the Federal Court noted that:

> "…statutory tribunals exercising judicial or quasi-judicial functions involving adversarial type processes which result in decisions affecting rights truly constitute part of the 'administration of justice'. The legitimacy of such tribunals' authority requires that confidence in their integrity and understanding of their operations be maintained, and this can be effected only if their proceedings are open to the public.[9]

[28] It follows that quasi-judicial hearings, are presumptively open and that any limit on openness must be justified through application of the *Dagenais/Mentuck* test.[10]

Openness Principles Apply to Police Discipline Hearings

[29] As openness principles apply to all quasi-judicial proceedings, they apply to police discipline hearings, which are quasi-judicial proceedings governed by the *Statutory Powers and Procedures Act*. In the pre-*Dagenais* decision, *Ottawa (City) Commissioners of Police v. Lalande,* the District Court dismissed an application to hold a police disciplinary hearing *in camera* stating:

> The public has a vital interest in the performance of police officers who are given great powers in order to protect the public. It is obvious that personal and embarrassing matters will or may be divulged during this hearing. I believe the right of the parties, there are two here, the public and the person charged, to a public and open hearing is a safeguard to the proper state of justice.[11]

[30] In both *Southam Inc. v. Canada*[12] and in *Canadian Broadcasting Corp. v. The City of Summerside*[13], courts held that holding police disciplinary hearings in private violated s. 2(b) of the *Charter*.

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[7] *Toronto Star v AG Ontario*, 2018 ONSC 2586, paras. 66 and 67.
[8] *Toronto Star v AG Ontario*, 2018 ONSC 2586, para.54 and 55.
[9] *Southam Inc v Minister of Employment and Immigration*, [1987] 3 FC 329, para. 99.
[10] See: *Lifford Wine Agencies Ltd v. Ontario (Alcohol & Gaming Commission)*, 2003 CarswellOnt 4717, paras. 3-7; *Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry*, 2007 ONCA 20, para. 36.
[11] *Ottawa (City) Commissioners of Police v. Lalande*, 1986 CarswellOnt 974 (Dist.Ct.), para.6.
[12] *Southam Inc. v. Canada (Attorney General,* [1997] O.J. No. 4533 (Ont.Gen.Div.).
[13] *Canadian Broadcasting Corp. v. The City of Summerside,* [1999] P.E.I.J. No. 3 (PEICTD).

Access to Exhibits

[31] It is well established that open proceedings require that the public be able to obtain copies of exhibits. The Supreme Court has described the ability to access exhibits as a corollary to the open court principle.[14] It has similarly held that the state "must not interfere with an individual's ability to 'inspect and copy public records and documents including judicial records and documents''. Thus, where access to exhibits is denied, as with any other restriction on openness, it must be justified through application of the *Dagenais/Mentuck* test.**[15]**

Findings

Video Forms Part of the Record

[32] At the professional misconduct hearing the prosecutor and defence counsel agreed that the video should be tendered as an exhibit. It was made Exhibit 19 by the Hearing Officer. The video was not produced simultaneously with being made an exhibit as is not uncommon in a hearing conducted by videoconference. The respondents provide no authorities in support of their statement that an item must be physically received and accepted by the adjudicator before becoming an exhibit. In the virtual age, the physical custody of an exhibit is not a substantive basis for determining whether an exhibit was tendered.

[33] There is nothing to support the respondents' characterization that the video was given a tentative exhibit number or that the video was being filed for identification, as was found to have occurred in *Aboriginal Peoples Television Network v. Alberta (Attorney General)*[16] where only the portions that were provided to the jury were found to be part of the trial record. In *R. v. Canadian Broadcasting Corporation*[17], the Ontario Court of Appeal held that when an exhibit is introduced into evidence to be used without restriction in a judicial proceeding, the entire exhibit becomes part of the record in the case, regardless of the portion of the audio or video that is played in court.

[34] Moreover, the respondents' characterization of the joint application for a publication ban as conditional on "if the video was entered as an exhibit" does not accord with the transcript of the proceedings where counsel referred to the video as "having been tendered". Once a publication ban in regard to the video was jointly requested and granted by the Hearing Officer, it cannot be said that the video was not an exhibit. Courts and tribunals are not in the business of making publication bans on hypothetical evidence. In these circumstances, there is no merit to the respondents' submission that the video was not part of the record.

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[14] *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3 (CanLII), para. 12.
[15] *Canadian Broadcasting Corp. v. R.*, 2010 ONCA 726**, para. 39.**
[16] *Aboriginal Peoples Television Network v. Alberta (Attorney General*, 2018 ABCA 133.
[17] *R. v. Canadian Broadcasting Corporation*, 2010 ONCA 726, para. 43-44.

Withdrawal of the Exhibit Infringed Openness Principles

[35] After tendering the video, the prosecutor and the defence counsel jointly sought a publication ban before the Hearing Officer on the basis that the video contained intimate details of sex acts between McArthur and the victim and was necessary to protect the victim. The Hearing Officer found that a publication ban was necessary to protect the intimate details, the privacy and the identity of the victim. As noted above, there was already a publication ban in place preventing the victim from being identified. The Hearing Officer did not view the video before making the order, nor did he hear submissions from the media.

[36] The *Dagenais/Mentuck* test was recently reformulated by the Supreme Court in *Sherman Estate v. Donovan*.[18] The Court recast the formerly two-part test as a three-part test, stating that any person asking the court to limit the open court principle must establish that: (a) court openness in the case at hand poses a serious risk to an important public interest; (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.[19]

[37] The publication ban was granted without the proper *Dagenais-Mentuck* test being considered. This was plainly wrong. In addition, the media was granted the right to make submissions about the appropriateness of the publication ban only after the publication ban had been ordered. This too was an error. The media had no opportunity to make those submissions because the exhibit was then withdrawn.

[38] The media were also denied the right to make submissions on the appropriateness of the withdrawal of the exhibit. In these circumstances, the removal of the video exhibit from the record in the face of a pending media challenge to the publication ban that had been imposed infringes openness principles. Justice is clearly not "seen to be done" when evidence is removed from a record in order to be shielded from the public. It was an error in principle for the Hearing Officer to do so.

Court should Exercise Its Remedial Powers to Order Production of the Video

[39] The parties, with the exception of Sergeant Gauthier, ask this Court to determine the issues rather than sending the matter back to the Hearing Officer. Before the Hearing Officer, when the media sought the right to make written submissions with respect to the withdrawal of the video, the prosecution counsel submitted that the hearing was not the proper forum in which to do so and that such submissions should be made at the Superior Court. The Hearing Officer accepted this submission. In these circumstances, given the position taken by the TPS, it would be unfair to the media to now require them to return to the Hearing

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[18] *Estate v. Donovan*, 2021 SCC 25, para.38.
[19] *Sherman Estate v. Donovan*, 2021 SCC 25, para.38.

Officer. In addition, as set out above, it is not in the interests of efficiency or economy to send the matter back to the Hearing Officer.

Position of the Parties on this Application on whether Dagenais/Mentuck Test Met

[40] After viewing the video, counsel for the victim had no objection to the public being granted access to the video provided: 1) the publication ban preventing the victim from being identified remained in place; and 2) the victim's name be completely redacted from the video. Counsel for Sergeant Gauthier took no formal position on whether the test for granting a publication ban was met. Counsel for the Chief of Police and Toronto Police Service took the position that the *Dagenais/Mentuck* test was met.

First factor of Dagenais/Mentuck test (as reformulated in Sherman Estate) Not Met: No Serious Risk to an Important Public Interest

[41] It has long been the law that the sensibilities of individuals are not an important risk justifying a publication ban. Earlier this year, in *Sherman Estate*[20], the Supreme Court affirmed that "[n]either the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness". The Supreme Court had made the same finding more than twenty years before in the case of *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, in which Justice LaForest wrote for the Court that "[m]ere offence or embarrassment will not likely suffice for the exclusion of the public from the courtroom".[21] These findings form part of a long line of cases refusing to impose publication bans to protect from shame and embarrassment. In *H. (M.E.) v. Williams*[22], for example, the Ontario Court of Appeal stated that, "personal emotional distress and embarrassment… cannot justify limiting publication of or access to court proceedings and records…".

[42] Similarly, the fact that information in a court record might offend public sensibilities is not a basis for imposing a publication ban. In the case of *R. v. Canadian Broadcasting Corporation*, the Ontario Court of Appeal found that the mere fact that a video showing the circumstances of an individual's death was "gruesome" and "disturbing" was not sufficient to warrant issuing a publication ban on the video.[23] As Justice Sharpe stated for the Court, "absent any finding of potential harm or injury to a legally protected interest, there is nothing in the law that permits a judge to impose his or her opinion about what does not need to be broadcast to the general public".[24]

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[20] *Sherman Estate v. Donovan*, 2021 SCC 25, para.63.
[21] *Canadian Broadcasting Corp. v. New Brunswick (Attorney General), para.41*.
[22] *H. (M.E.) v. Williams*, 2012 ONCA *35, para.30.*
[23] *R v. Canadian Broadcasting Corporation v. R.*, 2010 ONCA 726, paras 46-50.
[24] *R v. Canadian Broadcasting Corporation v. R.*, 2010 ONCA 726, para.50.

Second factor of Dagenais/Mentuck test (as reformulated in Sherman Estate): Pre-existing publication ban on victim's identity protects privacy interests

[43] In determining whether an infringement on the open court principle is necessary, the Court must consider "whether there are alternatives to the order sought and to restrict the order as much as reasonably possible to prevent the serious risk".[25] A publication ban is not necessary to protect individuals from embarrassment or to protect the public's sensibilities. In this case, the pre-existing publication ban on the victim's identity does, in any event, protect the victim's privacy interests and any risk to the victim of shame or embarrassment.

[44] Having viewed the video, there is nothing about it that would, in any event, offend public sensibilities, by today's standards.

Third factor of Dagenais/Mentuck test (as reformulated in Sherman Estate): The Benefits of the Order Do Not Outweigh the Negative Effects

[45] As there is no identified interest that justifies infringing the open court principle, the balancing part of the *Sherman Estate* three-part test is not engaged.

No Basis for Publication Ban on Video

[46] As noted in *Ottawa (City) Commissioners of Police v. Lalande*[26], the public has a vital interest in the performance of the police officers that yield significant power in our society. This interest requires that the public have a full understanding of all relevant information when this performance is being evaluated by a tribunal. When consenting to its introduction by the prosecution, defence counsel stated that it was "part and parcel of this case." The public ought to be able to consider for itself whether the video was important or not.

[47] The respondents argue that issuing a publication ban would reduce the likelihood that other victims of sexual assault would be deterred from coming forward. Provisions of the *Criminal Code* that protect witnesses and victims of sexual assault do so through bans on publishing information that could identify the victim as was accorded the victim who came forward in this case. This argument is untenable.

[48] The fact that the video was introduced as an exhibit over which a publication ban was summarily imposed – and then withdrawn from the record when the publication ban was challenged – only reinforces the need for public scrutiny.

[49] There is no merit to the respondents' submission that the video meets any of the parts of the *Dagenais-Mentuck* test (as reformulated in *Sherman Estate).*

S.9(1) of the Statutory Powers Procedure Act does not override Dagenais-Mentuck test

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[25] *Sherman Estate v. Donovan*, 2021 SCC 25 at para 105.
[26] *Ottawa (City) Commissioners of Police v. Lalande*, 1986 CarswellOnt 974, 57 O.R. (2d) 509 (Dist. Ct.), para 6.

[50] The respondents rely on s.9(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, which states:

> **9** (1) An oral hearing shall be open to the public except where the tribunal is of the opinion that,
>
> (a) matters involving public security may be disclosed; or
>
> (b) financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public, in which case the tribunal may hold the hearing in the absence of the public.

[51] The respondents submit that the effect of s.9 (1) of the *Statutory Powers Procedure Act* is that the *Dagenais-Mentuck* test and the openness principle do not apply to police board hearings. There is no merit to this submission where, as was the case here, the hearing was a quasi-judicial professional misconduct hearing.[27]

Access to Exhibits during a Hearing

[52] The Toronto Police Service submits that the request by the applicants to be provided with contemporaneous access to tribunal exhibits is absurd and is neither practical nor realistic.

[53] Part and parcel of the right to access exhibits is the right to access them in a timely manner. Providing hearing exhibits days or weeks after the hearing has concluded ensures that those exhibits will not form part of the media's reporting and for all practical purposes public access is denied. To submit that there are insufficient resources or that there are other priorities is not a justification for an infringement of the open hearing principle. There was no evidence in this case that the exhibits could not have been made available while the hearing was still pending. Producing the exhibits after the hearing concluded contravened the open hearing principle. Going forward, the Toronto Police Service shall be required to provide exhibits in police misconduct hearings during the hearing except in exceptional circumstances. In addition, the exhibits shall be provided in accordance with the TPS policy to provide access to exhibits at no charge if they are available electronically and at a nominal charge, if they are not available electronically.

Conclusion

[54] For these reasons, the application is granted and the order of the Hearing Officer withdrawing the video is set aside. The publication ban over the video is also set aside. The publication ban protecting the identity of the victim from being disclosed remains in effect. The victim's name shall be completely redacted from the video. The video shall then be made available to the public without limitation on its use.

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[27] *Canadian Broadcasting v. Ferrier*, 2019 ONCA 1025.

[55] The failure in this case to produce the exhibits requested by the applicants until after the hearing concluded contravened the open hearing principle. In the future, the Toronto Police Service Board shall be required to produce exhibits during the quasi-judicial police discipline hearings except in exceptional circumstances. In addition, the exhibits shall be provided in accordance with the TPS policy to provide access to exhibits at no charge if they are available electronically and at a nominal charge, if they are not available electronically.

Costs

[56] All parties are in agreement that there shall be no costs awarded.

Backhouse J.

I agree

Tzimas J.

I agree

Nishikawa J.

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BETWEEN:

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Applicants

– and –

Chief of Police James Ramer and Toronto Police Service

Respondents

-and -

Sergeant Gauthier

Respondent

-and -

John Doe

Intervenor

REASONS FOR JUDGMENT

Backhouse, J.

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