
CANADA / JUDGMENT

R. v. Sipes

2011 BCSC 918

COURT

Supreme Court of British Columbia

DECIDED

7 July 2011

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2011 BCSC 918 R. v. Sipes

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sipes,

2011 BCSC 918

Date: 20110707

Docket: 66431-2

Registry: Kelowna

Regina

v.

Dale Gordon Sipes, Leslie Podolski, Sheldon Richard O'Donnell

Peter Manolakos and Douglas Corey Brownell

Before: The Honourable Mr. Justice Smart

MEDIA ACCESS TO EXHIBITS

Corrected Judgment: paragraphs 17 and 20 were corrected

on July 12, 2011

Reasons for Judgment

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J.Yamashita

Place and Date of Judgment:

Vancouver, B.C.

July 7, 2011

I. BACKGROUND

- [1] These reasons address the issue of access by the media to exhibits entered in this trial.
- [2] This trial has recently begun and is being heard by judge and jury. The case involves five accused and three unrelated allegations of murder, and is anticipated to last 10-12 months, possibly longer. The Crown anticipates calling over 200 witnesses and entering approximately 200 to 250 exhibits as part of its case.

- [3] Counsel for the Vancouver Sun appeared before me in the Crown's application for a publication ban concerning the name and identity of certain Crown witnesses. During that application the issue of media access to exhibits was raised. I asked the parties to make submissions concerning the process that should be followed in this case.
- [4] I have since heard those submissions. What follows is a brief review of the applicable legal principles, the positions of the parties and my decision regarding the procedure to be followed.

II. APPLICABLE LEGAL PRINCIPLES

- [5] The applicable legal principles were recently summarized in two decisions of this Court: *R. v. Basi*, 2011 BCSC 711 and *R. v. Wellwood*, 2011 BCSC 689.
- [6] *Basi* involved an application, following resolution of the case, by the Opposition Critic for access to various materials filed in pre-trial motions. Associate Chief Justice Mackenzie set out the applicable analytical framework as follows:
- [7] The analytical framework for considering applications for access to the court record was first described in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (*Dagenais*). Chief Justice Lamer articulated the following test at p. 878:

A publication ban should only be ordered when:

- (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonable available alternative measures will not prevent the risk; and
 - (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.
- [8] In *R v. Mentuck*, [2001] 3 S.C.R. 442 (*Mentuck*), the Supreme Court was asked to revisit the analytical framework established in *Dagenais* because the publication ban sought did not affect the fairness of the trial process. The Supreme Court determined that it was necessary to broaden the *Dagenais* framework to make it more applicable to a broader set of factual circumstances. Iacobucci J. wrote, 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.

- [9] Earlier this year, the Supreme Court confirmed that the scope of the Dagenais/Mentuck analysis went beyond applications for publication bans. In *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, Deschamps J. for a unanimous Court wrote at para.13 that absent a governing statutory provision, access to court exhibits rests on a discretionary decision affecting the openness of proceedings, and the analytical approach developed in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 SCC 76, therefore applies. [Emphasis in original]
- [7] The principles governing access by the media to exhibits were also recently considered by Johnston J. in *Wellwood*. That case involved an application by the media for access to, and the right to make copies of, evidence marked as exhibits at the sentencing hearing. Justice Johnston summarized the relevant legal principles as follows:
- [29] In *R. v. Fry*, 2010 BCCA 169, Newbury J.A. confirmed that the Dagenais/Mentuck principles, as they are known, apply equally to applications for disclosure of court exhibits as to applications for publication bans.
- [30] The court in *Fry* at para. 21 adopted as correct the statement of the principles set out by Pitfield J. at para. 11 of the decision that was under appeal, indexed as 2010 BCCA 169:
1. There is a rebuttable presumption that judicial proceedings are open and public: *Toronto Star* [*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 (S.C.C.)], para. 14.
 2. Section 2(b) of the Charter guarantees freedom of communication and freedom of expression, fundamental freedoms which depend for their vitality on public access to information of public interest including access to that which goes on in the courts: *Toronto Star*, para. 2.
 3. If public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice then a temporary or permanent denial of access may be warranted: *Toronto Star*, para. 3.
 4. The circumstances in which access may be denied are limited:

Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would subvert the ends of the justice or unduly impair its proper administration: *Toronto Star*, para. 4.
 5. The Dagenais/Mentuck test is applicable at every stage of the judicial process but must be applied in a flexible and contextual manner: *Toronto Star*, para. 8.

6. A limitation on access should only be ordered when the salutary effects of the order outweigh its negative impact on the freedom of expression of those affected by the ban. As stated in Dagenais and modified in Mentuck, restrictions on access 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: *Toronto Star*, para. 26.
7. Finally, the Dagenais/Mentuck test should not be applied mechanistically:

Regard must always be had to the circumstances in which a sealing order is sought by the Crown, or by others with a real and demonstrated interest in delaying public disclosure. The test, though applicable at all stages, is a flexible and contextual one. Courts have thus tailored it to fit a variety of discretionary actions, such as confidentiality orders, judicial investigative hearings, and Crown initiated applications for publication bans: *Toronto Star*, para. 3.

See also *Basi* at para. 10.

III. POSITIONS OF THE PARTIES

- [8] Mr. Anderson, on behalf of the *Vancouver Sun*, submits that in structuring the process for media access to exhibits, the court should consider that there is a presumption that exhibits are to be made available to the public. He also submits that the right of access to exhibits necessarily includes the right to timely access.
- [9] He submits that given the presumption of access any process adopted by this Court should place the onus on the party opposing access. Mr. Anderson says that to require the media to apply for and justify access to exhibits would effectively "turn the presumption on its head". He also argues that to require the media to make an application each time they wish access to an exhibit places an unfair financial burden on the media which would practically limit access.
- [10] Mr. Anderson recognizes that in certain circumstances an order restricting access may be necessary to prevent serious harm to the administration of justice; however, he submits that it should be up to the party opposing access to justify such restrictions applying the Dagenais/Mentuck test.
- [11] He also recognizes the need to ensure that trials, and in particular jury trials, are not frequently interrupted by applications for access to exhibits.
- [12] Mr. Anderson sets out the following suggested process at para. 14 of his written argument:

- (a) All counsel who tender an exhibit, where the exhibit is reasonably capable of being copied, are to provide an extra copy of the exhibit to the Court clerk for the purpose of media access to the exhibit;
 - (b) For every document tendered, counsel for the Crown and for each Defendant will, either when the exhibit is tendered or at the end of the day, indicate whether:
 - (i) they do not object to a copy of the exhibit being provided to an Accredited Journalist;
 - (ii) they do not object to the exhibit being viewed by an Accredited Journalist but they do object to a copy being provided to any Accredited Journalist;
 - (iii) they object to the exhibit being viewed by any Accredited Journalist;
 - (c) For all exhibits where no counsel objects to a copy being made available to an Accredited Journalist, a copy will be placed in a location marked "Exhibits that can be viewed and copied by Accredited Journalists". All Accredited Journalists are to have access to these copies of the exhibits and the Registry will provide a copy of any such document upon request.
 - (d) For all exhibits where no counsel object to the exhibit being viewable by Accredited Journalists but any counsel objects to a copy being provided to any Accredited Journalist, a copy will be placed in a location marked "Exhibits that can be viewed but cannot be copied by Accredited Journalists". All Accredited Journalists will have access to such exhibits but no copy of any such exhibits will be provided without an order of the Court;
 - (e) For all exhibits where any counsel objects to the exhibit being viewable by any Accredited Journalist, the exhibit will not be accessible by any member of the media without an order of the Court;
 - (f) If a member of the media requests either access to an exhibit where there has been an objection to access and/or a copy of exhibit where there has been either an objection to access or an objection to a copy of the exhibit being provided, then arrangements will be made to schedule a hearing for the argument of the issue as reasonably promptly as can be arranged, acknowledging that it is important that jury trials not be frequently interrupted.
- [13] The Crown submits that the process for access to exhibits should be a "request-based" approach. That is, a member of the media seeking access to a particular exhibit would indicate that interest in writing. Only then would counsel be required to indicate their position concerning media access.
- [14] The Crown submits that a procedure that makes exhibits presumptively accessible would place an enormous burden on counsel, who are already occupied with the conduct of this trial. It submits that a request-based approach would require counsel to turn their minds to the implications of access and the need for redactions to protect fair trial interests and the interests of third parties, as well as to make copies of only those exhibits the media is interested in, as opposed to what will likely be hundreds of exhibits that no one wants access

to.

- [15] The defence support the position of the Crown. They say that to require counsel to consider their position concerning access to every exhibit entered at trial will take away from their focus on the case itself. In particular, they suggest that to have to consider, for each exhibit, the effect release may have on the evidence of later witnesses is a considerable burden. They agree with the Crown that a request-based approach effectively balances the interests of the media, as well as the parties.

IV. ANALYSIS

- [16] The recent decision of the Supreme Court of Canada in *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, as well as the recent decisions of this Court in *Basi* and *Wellwood*, makes clear that the *Dagenais/Mentuck* test applies to access to exhibits by the media. As such, the process to be followed for media access must start from the presumption that exhibits are to be made available to the media. I agree with Mr. Anderson that this presumption also includes timely access.
- [17] To adopt a request-based process to access as the Crown and defence urge would be to adopt an approach that is inconsistent and incompatible with the presumption of timely access, and likely expensive for the media. Accordingly, I respectfully decline to adopt such a process in this case.
- [18] Instead, I am directing a procedure as suggested by Mr. Anderson. In short, unless there is an objection to media access to an exhibit it will be made accessible to the media.
- [19] I recognize that this procedure imposes the burden on trial counsel to consider and advise the court of their position concerning media access either prior to or on the day exhibits are admitted into evidence. However, the law concerning media access to trial exhibits has evolved and, as such, so must trial counsel's approach to this question. Trial counsel now has the responsibility to address the question of media access to exhibits in a timely way.
- [20] Thus, at the end of each court day, counsel will have the opportunity to state their objection, if any, to the exhibits tendered that day. If there are no objections the exhibits will be made available to the media. If there is an objection, the nature of the objection - for example, the exhibit is designated as conditional access or no access - as well as the reason for the objection need to be briefly stated. A form (Schedule "A" to these Reasons) will be provided to counsel for this purpose. This will allow the media and the court registry to have written notice of any objection and the basis for it.
- [21] Should a member of the media wish to apply to challenge the designation assigned to any exhibit, an application will need to be brought and heard at a time determined by the court. I will endeavour to schedule the application for the next available opportunity that will not unduly disrupt the progress of the trial.

- [22] The onus will be on the party opposing access to establish that an order restricting access is necessary to prevent serious harm to the administration of justice and that the benefits of restricting access outweigh the deleterious effects on the rights and interests of the parties and the public, including the right to free expression, the rights of the accused to a fair and public trial, and the efficacy of the administration of justice: Basi at para. 20.
- [23] As with most aspects of court proceedings, in order to function appropriately, this process requires counsel to act responsibly and make well-grounded objections. I am confident counsel will not object to avoid or delay proper consideration of the issue. In addition, I will screen objections to ensure they have a reasonable possibility of success. If counsel need additional time to determine their position, they can make that request. However, generally, counsel should be able to determine their position in advance of the tendering of exhibits as they are usually aware of the exhibits that are going to be tendered through each witness and need, as part of their trial preparation, to also consider the issue of media access to them.
- [24] Where possible, counsel tendering an exhibit should make an extra copy of the exhibit available for media access. Depending on the circumstances, this copy may contain redactions or edits in order to protect third-party interests, as well as the proper administration of justice. Access to a redacted exhibit will fall under the designation of conditional access.
- [25] A system for storage of and access to exhibits by the media will need to be arranged through the court registry so as to not overburden court staff.
- [26] To summarize, at the end of each court day, counsel will have the opportunity to state their objection, if any, to the exhibits tendered that day. This will be done in the absence of the jury. If I am satisfied that there is sufficient merit to the objection counsel will complete and file the attached form. The form will be available for viewing at the court registry. This will allow members of the media to determine the nature of and the reason for any objections to media access to certain exhibits. If any members of the media wish to apply to change the designation of any exhibit, an application will need to be brought and will be heard at a time determined by the court.
- [27] The following designations will apply to objections to media access to exhibits. If there are no objections to access then the media may view, copy and publish the exhibit. If there are objections, counsel will designate them as follows:
- (a) conditional access - media may view the exhibit but copying and/or publication of the exhibit may be subject to specified conditions;
 - (b) view only access - media may view the exhibit but not copy or publish the exhibit; and
 - (c) no access - media may not view, copy or publish the exhibit.

- [28] It is important that counsel also state, where applicable, the conditions applicable to conditional access exhibits, as well as the reason for the objection so that members of the media may consider whether to bring an application to change the designation.
- [29] I expect that this process will prove workable. In the event problems arise or improvements can be made, I will consider modifying the process accordingly.
- [30] In conclusion, I want to stress two additional points.
- [31] First, I am not suggesting that the process I am directing for this trial should be followed in every trial, regardless of media interest. To do so as a matter of routine would place an unnecessary burden on court clerks, court registries and counsel conducting those trials. I would expect that such a process would only occur in trials that have or are likely to generate significant media coverage and after application by trial counsel, the media, or the court on its own motion. This is what occurred here.
- [32] Second, the process I am directing in this trial is consistent with the resources available for, and the requirements of, this trial. It may not be for other trials.

"SMART J."

Appendix A

OBJECTION TO MEDIA ACCESS TO EXHIBITS

R. v. Sipes - File 66431 (Kelowna)

Date: _____

Exhibit number(s): _____

Brief Description of Exhibit(s): _____

Crown (Name): _____ or Defence (Name): _____

Counsel's designation of Exhibit Access:

_ a. conditional - media may view the exhibit but copying and/or

publication of the exhibit is be subject to the following condition(s):

_ b. view only - media may view the exhibit but not copy or publish the exhibit

_ c. no access - media may not view, copy or publish the exhibit

Reason for Designation: _____

_____ Signature: _____

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