CITATION: R. v. Canadian Broadcasting Corporation, 2010 ONCA 726
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COURT OF APPEAL FOR ONTARIO

Laskin, Sharpe and Epstein JJ.A.

BETWEEN

Canadian Broadcasting Corporation

Applicant (Appellant in Appeal)
(Respondent in Cross-Appeal)

and

Her Majesty the Queen

Respondent (Respondent in Appeal)

and

Valentino Burnett, Karen Eves, Blaine Phibbs and Travis MacDonald

Respondents (Respondents in Appeal)

and

Waterloo Regional Police Service and The Office of the Chief Coroner

Respondents (Respondents in Appeal)

and

Correctional Service of Canada

Respondent (Respondent in Appeal)
(Appellant in Cross-Appeal)

Patricia M. Latimer, for Canadian Broadcasting Corporation

Joel Robichaud and Nancy Noble, for Correctional Service of Canada

Lorenzo D. Policelli, for the Office of the Chief Coroner

Gary Melanson, for Waterloo Regional Police Service

Heard: September 15, 2010

On appeal from the judgment of Justice G.E. Taylor of the Superior Court of Justice dated January 5, 2010, with reasons reported at (2010), 251 C.C.C. (3d) 414.

Sharpe J.A.:

[1] This appeal involves consideration of the media's right to access and copy exhibits filed at a preliminary inquiry. In October 2007, Ashley Smith died in custody at the Grand Valley Institution for Women. Four correctional officers were charged with criminal negligence causing death. Those charges proceeded to a preliminary inquiry where certain exhibits were introduced into evidence. The exhibits included video recordings, one of which captured the actual circumstances of Ashley Smith's death. Part way through the preliminary inquiry, the Crown decided not to proceed with the charges and the four correctional officers were discharged. A coroner's warrant was subsequently issued for the seizure of all documents related to Ashley Smith's death including the preliminary inquiry exhibits.

[2] The appellant Canadian Broadcasting Corporation ("CBC") decided to produce an investigative documentary on Ashley Smith's tragic life. CBC sought access to and copies of the preliminary inquiry exhibits. The preliminary inquiry judge refused CBC's

request on the ground that he should not interfere with the process of the coroner's inquest. The application judge granted certiorari to review that order and held that CBC was entitled to access the exhibits, but he limited CBC's rights in certain respects. In particular, he held that CBC was entitled to view and copy only those portions of the video evidence that were actually played at the preliminary inquiry, and that CBC was entitled to view but not copy the portion of the video that was played showing Ashley Smith's death.

[3] CBC appeals the limitations imposed on its right to access and copy the exhibits. The Correctional Service of Canada ("CSC") cross-appeals arguing that the application judge erred by applying the *Dagenais/Mentuck* test and granting CBC any right to copy the exhibits.

FACTS

[4] Ashley Smith, a 19-year-old from Moncton, New Brunswick, was serving a six-year sentence at the Grand Valley Institution for Women in Kitchener. On October 19, 2007, while under observation in an isolation cell, she strangled herself with a strip of cloth. Four correctional officers employed by CSC were charged with criminal negligence causing death. Those charges proceeded to a preliminary inquiry in November 2008. A publication ban was imposed pursuant to s. 539 of the *Criminal Code*. The exhibits entered into evidence included photographs, documents and audio and video recordings relating to CSC's management of Ashley Smith. Although these

recordings were marked as exhibits in their entirety, only portions were actually played in open court. The portion of one of the video recordings showing the actual circumstances of Ashley Smith's death was played in open court.

[5] Several days into the preliminary inquiry, the Crown determined that there was no reasonable prospect of any of the accused being convicted and decided not to proceed with the charges. All four accused were discharged. As the preliminary inquiry had concluded, the publication ban expired pursuant to s. 539(1)(c) of the *Criminal Code*. The exhibits were returned to the investigating police force, the Waterloo Region Police Service ("WRPS"), and then given to the Office of the Chief Coroner ("OCC") pursuant to a coroner's warrant for the purpose of a coroner's inquest into Ashley Smith's death.

[6] Several CSC employees were disciplined and grievances were filed. The estate and members of Ashley Smith's family commenced a civil action against CSC.

PROCEEDINGS IN THE ONTARIO COURT OF JUSTICE AND SUPERIOR COURT OF JUSTICE

[7] In July 2009, some seven months after the conclusion of the preliminary inquiry, CBC applied to the Ontario Court of Justice for access to the preliminary inquiry exhibits. CBC wanted copies of the exhibits to use in a proposed documentary on Ashley Smith's life for the series *the fifth estate*. The preliminary inquiry judge held that he retained jurisdiction over the exhibits but he refused to deal with CBC's request on the ground that he should not interfere with the process of the coroner's inquest.

[8] CBC sought certiorari in the Superior Court of Justice to quash the decision of the preliminary inquiry judge and an order pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms* granting it access to and the right to copy the exhibits. The application judge found that the preliminary inquiry judge erred by refusing to deal with CBC's application on the merits, and then turned to CBC's application for a s. 24(1) *Charter* remedy.

[9] The application judge held that the principles enunciated in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, [2001] 3 S.C.R. 442, generally know as the "*Dagenais/Mentuck*" test, applied to CBC's request. The *Dagenais/Mentuck* test requires the party opposing media access to demonstrate that the order is necessary to prevent a serious risk to the proper administration of justice and that the salutary effects of the order sought outweigh the deleterious effects on the rights and interests of the parties and the public.

[10] The application judge concluded that the respondents could not satisfy that onus and that CBC was entitled to access the preliminary inquiry exhibits subject to a number of exceptions and limitations. CBC takes no issue with the following exceptions and limitations imposed by the application judge:

- the faces of any CSC officer or any other individual who did not consent to their faces being shown was to be digitally obscured;

- the audio recordings were to be edited to remove the names of any corrections officers or other person who did not consent to their name being broadcast;
- the copying and editing of the video and audio recordings was to be done so as to maintain the integrity of the original recordings;
- the exhibits are to be used solely for use in a documentary by *the fifth estate*;
- no copies are to be made of the exhibits other than for that use;
- copies of the exhibits are not to be posted on any internet site except as part of a documentary by *the fifth estate*.

[11] CBC appeals the following exceptions and limitations imposed by the application judge, namely, that it:

- is entitled to access and copy only the portions of the video recordings that were played in open court;
- is entitled to view but not copy the portion of the video showing Ashley Smith's death that was played in open court;
- is entitled to view but not to copy the portion of one video recording showing four correctional officers entering the segregation unit;
- where it is uncertain what portion of an exhibit was actually played in open court CBC was denied any access to that exhibit.

[12] The application judge denied the OCC's request for an order delaying release of the exhibits until completion of the coroner's inquest.

[13] On January 8, 2010, CBC aired *the fifth estate* documentary on the life of Ashley Smith which incorporated some video footage from the exhibits copied in accordance with the application judge's order.

ISSUES

[14] CBC appeals the restrictions imposed by the application judge on its right to access and copy the exhibits that I have identified in para. 11 of these reasons. The respondent CSC cross-appeals the order granting CBC the right to access and copy the exhibits. The respondent OCC takes the position that the application judge should have deferred CBC's request to the coroner presiding at the coroner's inquest into Ashley Smith's death. The respondent WRPS essentially supports the order of the application judge.

[15] As the cross-appeal raises the fundamental issue of whether CBC was entitled to any access to the exhibits, I will deal with that issue first. I will then turn to the issues raised by CBC's appeal as to the limitations imposed on its right to access and copy the exhibits.

[16] The issues may be summarized as follows:

1. Did the application judge err by applying the *Dagenais/Mentuck* test to CBC's request?
2. Did the application judge err by limiting CBC's right to access and copy the exhibits?

3. Did the application judge err by failing to give adequate consideration to the coordinate jurisdiction of the OCC?

ANALYSIS

1. Did the application judge err by applying the Dagenais/Mentuck test to CBC's request?

[17] CSC submits that the application judge erred by applying the *Dagenais/Mentuck* test to CBC's request to access and obtain copies of exhibits. CSC argues that *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671, governs such requests and required that CBC satisfy the onus of demonstrating why it was entitled to copies of the exhibits. CSC argues that the open court principle allows the public and the media to attend court and to listen to and observe the evidence as it is given, but does not stand for the proposition that the media is entitled to obtain copies of the exhibits and to publish or broadcast the copies.

[18] *Vickery* involved a media request for access to an accused's alleged confession that had been excluded at a murder trial. The accused was acquitted and a journalist sought access to the alleged confession. By a 6-3 majority, the Supreme Court denied access, essentially on the ground that the acquitted accused's privacy interest and the need to protect the innocent outweighed the public's right of access.

[19] *Vickery* preceded *Dagenais* and *Mentuck.* In *Vickery*, the Supreme Court of Canada expressly refused to consider the *Charter* as the journalist seeking access had not raised the *Charter* at first instance. As *Dagenais* and *Mentuck* make clear, the *Charter*

has fundamentally altered the legal landscape in relation to court orders limiting freedom of the press in relation to court proceedings. *Vickery* plainly did not take into account that fundamental legal change. And, as the application judge rightly observed at para.14, *Vickery* did not purport "to formulate a general rule for regulating access to audio and video recordings which were made court exhibits."

[20] For the Supreme Court's post-*Charter* test that applies to all discretionary decisions limiting freedom of the press in relation to court proceedings, it is to *Dagenais* and *Mentuck* that one must turn. The *Dagenais/Mentuck* test, as restated in *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188 at para. 26, reflects the importance of the open court principle and the rights of freedom of expression and freedom of the press in relation to judicial proceedings. Restrictions on the open court principle and freedom of the press in relation to judicial proceedings can only be ordered where the party seeking such a restriction establishes through convincing evidence that:

> (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 restriction outweigh the deleterious effects on the rights and interest 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.

[21] While the *Dagenais/Mentuck* test was developed in the context of publication bans, the Supreme Court has stated that it applies any time s. 2(b) freedom of expression

and freedom of the press rights are engaged in relation to judicial proceedings: "[T]he *Dagenais/Mentuck* test applies to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings": *Toronto Star* at para. 7 (emphasis in original). See also *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332 at paras. 30-31.

[22] The open court principle, permitting public access to information about the courts, is deeply rooted in the Canadian system of justice. The strong public policy in favour of openness and of "maximum accountability and accessibility" in respect of judicial or quasi-judicial acts pre-dates the *Charter*: *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175 at p. 184. As Dickson J. stated at pp. 186-187: "At every stage the rule should be one of public accessibility and concomitant judicial accountability" and "curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance."

[23] Now recognized as a fundamental aspect of the rights guaranteed by s. 2(b) of the *Charter*, the open court principle has taken on added force as "one of the hallmarks of a democratic society" that deserves constitutional protection: *Canadian Broadcasting Corp. v. New Brunswick (A.G.)*, [1996] 3 S.C.R. 480 at para. 22.

[24] The open court principle and the rights conferred by s. 2(b) of the *Charter* embrace not only the media's right to publish or broadcast information about court proceedings, but also the media's right to gather that information, and the rights of

listeners to receive the information. "[T]he press must be guaranteed access to the courts in order to gather information" and "measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press.": *CBC v. New Brunswick* at paras. 23-26. In *Vancouver Sun (Re)* at para. 25, the Supreme Court of Canada described the openness of the courts and judicial processes as being "necessary to maintain the independence and impartiality of courts", "integral to public confidence in the justice system" and "a principal component of the legitimacy of the judicial process".

[25] I am unable to accept CSC's submission that the *Dagenais/Mentuck* test does not apply to media requests for access to exhibits. That argument has been properly and firmly rejected by two provincial appellate courts. In *R. v. Fry* (2010), 254 C.C.C. (3d) 394 at para. 65 (B.C.C.A.), a majority of the British Columbia Court of Appeal held that "the principles enunciated by the Supreme Court of Canada" in *Dagenais* and *Mentuck* "are fully applicable" to a media request for access to and the right to copy an exhibit after the conclusion of a trial. *R. v. Hogg* (2006), 208 Man. R. (2d) 244 (C.A.) is to the same effect. The Manitoba Court of Appeal applied the *Dagenais/Mentuck* test to assess the media's right to access a video recording of a statement made by an accused person that had been entered as an exhibit at a preliminary inquiry.

[26] To paraphrase Fish J. in *Toronto Star* at para 30, CSC's argument that the *Dagenais/Mentuck* test does not apply to CBC's right to access and copy exhibits "is

doomed to failure by more than two decades of unwavering decisions" from the Supreme Court and from provincial courts of appeal.

[27] In my view, the authority of *Vickery*, post *Dagenais* and *Mentuck*, is limited. The case still stands as authority for the proposition that concern for the protection of the privacy and reputation of innocent persons are among the factors to be considered and weighed by the judge applying the *Dagenais/Mentuck* test, although under *Dagenais/ Mentuck*, privacy interests and the protection of the innocent no longer automatically trump the public's right to access: *Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry* (2007), 278 D.L.R. (4th) 550 at para. 42 (Ont. C.A.).

(i) Are the media's rights limited to attending court and observing and reporting on what transpires in the courtroom?

[28] I do not agree with CSC's submission that the open court principle and the media's s. 2(b) *Charter* rights are limited to attending court and observing and reporting on what actually transpires in the courtroom. Even before the *Charter*, access to exhibits that were used to make a judicial determination, even ones introduced in the course of pre-trial proceedings and not at trial, was a well-recognized aspect of the open court principle: *MacIntyre.* That approach was endorsed in *Vancouver Sun* at para. 27:

> [T]he principle of openness of judicial proceedings extends to the pretrial stage of judicial proceedings because the policy considerations upon which openness is predicated are the same as in the trial stage....[In *MacIntyre*,] Dickson J. found "it difficult to accept the view that a judicial act performed

> during a trial is open to public scrutiny but a judicial act performed at the pretrial stage remains shrouded in secrecy".

[29] Likewise, in *Toronto Star*, the Supreme Court applied the *Dangenais/Mentuck* test to a Crown application to seal search warrant materials, thereby underlining that *Dagenais/Mentuck* applies to ensure the "openness of the judicial process", not only what actually transpires in open court. CSC's argument was implicitly rejected by this court in *CTV Television Inc. v. Ontario Superior Court of Justice (Toronto Region)* (2002), 59 O.R. (3d) 18, where the court held that the jurisdiction to order access to exhibits does not vanish simply because the exhibits were filed in open court.

[30] In *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, [2001] 2 S.C.R. 743 at para. 72, the Supreme Court defined the media's right to access to court records and exhibits very broadly and in terms that are inconsistent with notion of a bare right to report on what actually transpires in open court:

> [O]nce the trial begins, and except for the limited number of cases held *in camera* or subject to a publication ban, *the media will have broad access to the court records, exhibits and documents filed by the parties, as well as to the court sittings*. They have a *firm guarantee of access*, to protect the public's right to information about the civil or criminal justice systems and freedom of the press and freedom of expression. [Emphasis added.]

(ii) Does the right to access exhibits include the right to make copies?

[31] In my view, absent the proof of some countervailing interest sufficient to satisfy the *Dagenais/Mentuck* test, the right to access exhibits includes the right to make copies.

[32] While the Supreme Court of Canada appears not to have directly ruled on this point, there are *dicta* in at least two Supreme Court decisions supporting the proposition that the right to access exhibits includes the right to make copies.

[33] In *Named Person v. Vancouver Sun*, [2007] 3 S.C.R 253 at para 33, the court reaffirmed the holding in *Edmonton Journal v. Alberta (Attorney General),* [1989] 2 S.C.R. 1326 at p. 1338, that the right to access exhibits includes the right to make copies as "s. 2(b) provides that the state must not interfere with an individual's ability to 'inspect and copy public records and documents, including judicial records and documents'."

[34] We were referred to a long list of first instance decisions dealing with the right to make copies. While those decisions are not entirely consistent, the clear preponderance of authority applies the *Dagenais/Mentuck* test to such requests and allows for copies to be made.

[35] Most, if not all, of the decisions cited by CSC in support of the argument that there is no right to copy exhibits are readily distinguishable. *R. v. Pilarinos* (2001), 158 C.C.C. (3d) 1 (B.C.S.C.), dealt with the British Columbia Supreme Court's policy banning cameras from the courtroom. Likewise, *Société Radio-Canada c. Québec (A.G.)*, 2008 QCCA 1910, dealt with restrictions on holding interviews and recording images within the courthouse and the prohibition of broadcasts of court hearings. The debate over cameras in the courtroom and the right to broadcast court proceedings raises very different issues that do not concern us in this appeal.

[36] Three cases cited by CSC dealt with the impact of allowing access on fair trial rights in ongoing criminal trials. In *R. v. Sylvester* (2007), 222 C.C.C. (3d) 106 (Ont. S.C.), the trial judge refused to allow a media request to copy an exhibit, but he did so because he was satisfied (at para. 86) that "to permit dissemination to occur…would pose a real and substantial risk to [the accused's] right to a fair trial." *R. v. Cairn-Duff* (2008), 237 C.C.C. (3d) 181 (Alta. Q.B.), also dealt with a mid-trial request to copy an exhibit. While there are certainly some statements in that case that could be taken to support CSC's position, the trial judge also referred to the need to protect the accused's right to a fair trial and the failure of the media to give notice to all persons who might be affected by allowing copies to be made.

[37] *R. c. Dufour*, 2008 CarwellQue 14365 (S.C.), leave to appeal granted, [2009] S.C.C.A. No. 84, also dealt with a mid-trial application for access to a video recording of a statement made by the accused. The trial judge denied that request on the ground that Rules of Practice of the Superior Court prohibit the broadcast of the proceedings of the court.

[38] In my view, the cases cited by CSC do not establish anything approaching a general rule or practice that the media are not entitled to copies of exhibits filed in judicial proceedings. In the present case, there is no fair trial interest to protect, as all four accused were discharged at the preliminary inquiry, and no suggestion that the ban on cameras in the courtroom applies.

[39] On the other side of the ledger, there is a very long line of cases that permit the media to make copies of exhibits. In *R. v. Hogg*, the media sought access to a video recording of an accused that had been introduced at a preliminary inquiry. The accused pleaded guilty at trial and received a conditional sentence. The Crown successfully appealed the sentence and a custodial term was imposed. At that point, the media sought access to the video recording of the statement and the right to make a copy for purposes of broadcast. The Manitoba Court of Appeal held at para. 47 that the media were "entitled to have access to and copy the videotape subject to any condition the court officers may impose to preserve the integrity of the exhibit." For other cases allowing the right to access and copy exhibits, see e.g.: *R. v. Fry*; *R. v. Baltovich* (2008), 232 C.C.C. (3d) 445 (Ont. S.C.); *R. v. Côté* (2007), 213 Man. R. (2d) 233 (Q.B.); *R. v. Hilderman* (2006), 395 A.R. 218 (Q.B.); *R. v. Black*, 2006 BCSC 2040; *R. v. Arenburg* (1997), 38 O.T.C. 91 (Gen. Div.); *R. v. Van Seters* (1996), 31 O.R. (3d) 19 (Gen. Div.); *R. v. Stark*, [1995] BCJ No. 3064 (S.C.).

(iii) Conclusion: application of the Dagenais/Mentuck test.

[40] I conclude that the trial judge was correct in applying the *Dagenais/Mentuck* test to CBC's request for access to and copies of the exhibits at issue in this case. If CBC is to be denied access, or to have its access limited, it is for the party seeking to assert or uphold that denial to demonstrate through convincing evidence that the two-part *Dagenais/Mentuck* test has been satisfied.

[41] Accordingly, I would dismiss the cross-appeal.

2. Did the application judge err by limiting CBCs right to access and copy the exhibits?

(a) Is access and the right to copy limited to only those portions of the videos played in open court?

[42] In my view, the application judge erred by limiting CBC's right of access to only those portions of the exhibits that were played in open court. While this result follows from much of what I have already said about the application of the *Dagenais/Mentuck* test, I add the following considerations.

[43] When an exhibit is introduced as evidence to be used without restriction in a judicial proceeding, the entire exhibit becomes a part of the record in the case. While a party may choose to read or play only portions of the exhibit in open court, the trier of fact, whether judge or jury, is not limited to considering only those portions when deciding the case. A party who introduces an exhibit without restriction cannot limit the attention of the trier of fact to only portions of the exhibit that favour that party and that the party chooses to read out or play in open court.

[44] As the entire exhibit is evidence to be used in deciding the case, I can see no principled reason to restrict access to only those portions played or read out in open court. When Dickson J. articulated and applied the open court principle to accord a journalist access to an affidavit filed in support of a search warrant application in *MacIntrye*, he was plainly confronted with material that had not been read out in open court. Yet he did not hesitate to order access. Absent some countervailing consideration sufficient to

satisfy the *Dagenais/Mentuck* test, the open court principle and the media's right of access to judicial proceedings must extend to anything that has been made part of the record, subject to any specific order to the contrary.

[45] Accordingly, it is my view that the application judge erred by limiting CBC's access to only those portions of the exhibits that were played in open court.

(b) Did the application judge err by refusing CBC the right to copy the portion of the video exhibit showing the actual circumstances of the death of Ashley Smith?

[46] The application judge did not give extensive reasons for refusing CBC the right to copy the portion of the video showing the circumstances of the death of Ashley Smith. He stated at para. 49:

> I have decided that the CBC should be entitled to access to the video recording of Ashley Smith's death but not to have a copy of the recording. The gruesome image of a person dying is not something that I feel needs to be broadcast to the general public. By allowing the CBC access to the recording, will permit a verbal description to be broadcast, which in my view is sufficient.

[47] We have viewed the contested portion of the video and it is certainly disturbing. However, I am not persuaded that there is anything in the record before us that can be invoked to justify the limitation imposed by the application judge, whether under the *Dagenais/Mentuck* test or under any other legal rule or principle.

[48] The circumstances of this case are distinguishable from *R. v. Bernardo*, [1995] O.J. No. 1472 (Gen. Div.), leave to appeal refused, [1995] S.C.C.A. No. 250, further appeal dismissed for lack of jurisdiction, 122 C.C.C. (3d) 475 (Ont. C.A.), where the trial

judge made an order relating to the treatment at trial of video tape evidence depicting in explicit detail the sexual assaults and rapes of four young girls, three of who were murder victims. LeSage A.C.J.O.C. applied the *Dagenais* test and, after a careful review of the evidence and the competing *Charter* arguments, concluded that the case for restricting access had been made out. He ruled that when the evidence was played, it should be visible only to the judge, the jury, counsel, the accused and to the extent necessary, court staff. No limit was imposed on the access to the audio portion of the exhibit. LeSage A.C.J.O.C. stated at para. 121 that the evidence established that "the harm that flows from the public display of this videotape evidence far exceeds any benefit that will flow from the public exposure of sexual assault and child pornography." LeSage A.C.J.O.C. found, again at para. 121, that the families of the victims would

> …suffer tremendous psychological, emotional and mental injury if the evidence, as the Crown has described it in the opening statement, that is rape; anal and vaginal, the forced fellatio, cunnilingus, anilingus, forcing of the neck of a wine bottle in both the vagina and anus of one of these young women, is publicly displayed.

[49] There are no comparable findings in this case. The application judge's perception that "[t]he gruesome image of a person dying is not something that I feel needs to be broadcast to the general public" is not based upon a finding of potential harm or injury to a recognized legal interest. Ashley Smith's mother, willing to have the circumstances of her daughter's death publicly considered, asserts no claim to privacy and agrees that CBC should have access and no other member of Ashley Smith's family has objected.

[50] With respect, 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. That would be inconsistent with the constitutional protection our legal order accords freedom of expression and freedom of the press. In this case, there is no finding of harm or injury capable of overriding a constitutional guarantee, and I would set aside that part of the application judge's order.

(c) Other limitations

[51] CBC also raises the issue of the propriety of the restriction the application judge imposed on copying a portion of exhibit 41 because it "is something about which the Correction Service of Canada has security concerns". The evidence in support of that contention is limited to a bald assertion and, having viewed the exhibit, it is very difficult to discern what the security concern would be. In my view, the evidence led to support this restriction on access falls well short of the "convincing evidence" required to satisfy the *Dagenais/Mentuck* test. Accordingly, I would set aside that part of the application judge's order.

3. Did the application judge err by failing to give adequate consideration to the coordinate jurisdiction of the OCC?

[52] The OCC takes the position that the presiding coroner is in the best position to decide the impact of publication or broadcast of exhibits on a pending inquest and that the application judge failed to take that into account. The OCC submits that the issue of

the right to access and copy the exhibits should be left to the coroner presiding at the inquest into the death of Ashley Smith.

[53] I am unable to accept that submission. As specified by s. 31 of the *Coroners Act*, R.S.O. 1990, c. C. 37, the coroner's jury will be prohibited from making any findings of legal responsibility in relation to Ashley Smith's death, but will be asked to make recommendations "directed to the avoidance of death in similar circumstances or respecting any other matter arising out of the inquest." There is nothing in this record to show that the order sought by CBC would interfere with the successful accomplishment of that mandate. In my view, the application judge quite properly concluded that there was no risk to the administration of justice arising from the pending coroner's inquest that would justify restricting CBC's access to the exhibits.

[54] Nor, in the context of this case, does any possessory interest of the CSC, OCC or WRPS constitute a factor capable of precluding the court from exercising its jurisdiction over the exhibits and making an order in favour of CBC: see *CTV Television Inc.* at paras. 24-27.

DISPOSITION

[55] For these reasons, I would allow CBC's appeal and dismiss CSC's cross-appeal. The order of the application judge should be amended in accordance with these reasons.

"Robert J. Sharpe J.A."
"I agree John Laskin J.A."
I agree Gloria Epstein J.A."

RELEASED: November 01, 2010