

**R. v. CAIRN-DUFF:
A LOOK INTO MEDIA ACCESS TO COURT EXHIBITS**

ADRIENNE ROY*

I. INTRODUCTION

It is firmly established that judges possess a discretionary power at common law to prevent the media from accessing and broadcasting court exhibits in certain circumstances.¹ In *Sylvester*, Minden J. held that “[a]s custodian of the exhibits, the court is entitled to regulate the use to be made of the exhibits and to take steps to ensure it does not become an unwitting party to their misuse.”² However, this discretionary judicial power should be exercised in accordance with general legal principles, case law, and statutory provisions so that consistent judgments in this area of law are rendered. In departing from the jurisprudence that demonstrated a general trend to favour media access to court exhibits, *Cairn-Duff*,³ a 2008 Alberta Court of Queen’s Bench decision, is a noteworthy judgment in its interpretations of certain principles, its consideration of previously unacknowledged practicalities, and its shift in onus to the media of having to prove its access is warranted. *Cairn-Duff* essentially devised a new approach for deciding whether media access to court exhibits should be granted, which, if followed in subsequent cases, will have a rather sweeping effect of restricting media access to court exhibits for the purpose of broadcast.

The question for Alberta courts is whether the previous framework provided by the Supreme Court of Canada in *Dagenais*⁴ and *Mentuck*⁵ is sufficient for guiding a judge’s discretionary power, or whether the approach taken in *Cairn-Duff* should be adopted in order to produce more consistent decisions. I will argue that the *Dagenais/Mentuck* test⁶ provides a sufficient guideline for the courts, although a refined definition of what exactly the open court principle entails would prove constructive. In *Cairn-Duff*, Moen J. ultimately moved beyond the established jurisprudence in constricting media access to court exhibits.

II. THE DECISION: R. v. CAIRN-DUFF

A. THE FACTS

The court exhibit in question in *Cairn-Duff* was a recording of a 911 call wherein an employee of Emergency Medical Services gave instructions to Wesley Cairn-Duff and a third party on how to administer CPR to the victim.

* Currently a third-year law student at the University of Saskatchewan. The author gratefully acknowledges the guidance of Professor Glen Luther and the Honourable Chief Justice R.D. Laing, and the significant contributions of David Crerar. All views, errors, and omissions remain solely the fault of the author.

¹ *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 [*Dagenais*].

² *R. v. Sylvester* (2007), 222 C.C.C. (3d) 106 at para. 52 (Ont. Sup. Ct. J.) [*Sylvester*].

³ *R. v. Cairn-Duff*, 2008 ABQB 576, 98 Alta. L.R. (4th) 142 [*Cairn-Duff*].

⁴ *Dagenais*, *supra* note 1.

⁵ *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442 [*Mentuck*].

⁶ This test is clearly set out in *Mentuck*, *ibid.* at para. 32.

The situation arose after the victim, Cairn-Duff's roommate, initially attacked Cairn-Duff, who then stabbed the victim during the fight, purportedly in self-defence. Almost immediately after the stabbing, Cairn-Duff and the landlord called 911 in an attempt to save the victim. The 20-minute long recording included the defendant's confession that he had stabbed the victim and numerous graphic descriptions of the victim, who eventually died during the recording.⁷

Following the Court's admittance of the audio tape as an exhibit, a reporter for the Canadian Broadcasting Corporation (CBC) asked for a copy for the purpose of broadcast. The application was made in the middle of a non-sequestered jury trial for a second-degree murder charge where no publication bans were in effect. The Crown took the position that responding to such an application in the middle of a jury trial created a strain on counsel as it diverted them from the main issues at trial.⁸ Defence counsel objected on the basis of trial fairness as the release of the recording could indirectly influence the jury through the public's perception of the events. Defence counsel further noted that the audio tape contained the voice of a witness who was subject to an exclusion order and had not yet testified when the application was made.⁹ Moreover, the defence counsel raised a concern over maintaining the dignity of the deceased. The parents of the deceased had chosen not to attend the trial because it was too painful to hear and see the evidence; however, the brother of the deceased did not object to releasing the recording on the condition that it would not unfairly impact the trial of the accused.

Justice Moen denied the CBC's application to obtain a copy of the recording for the purpose of broadcast. In addition to addressing the concerns raised by counsel, the trial judge raised a number of practical considerations on behalf of the Court, counsel, and the jury that were previously unacknowledged in the jurisprudence, to the ultimate detriment of the media.

B. THE ISSUES

In considering whether the CBC should be able to broadcast the audio tape Moen J. addressed four issues that will be discussed in turn:

1. Does the principle of openness of judicial proceedings include the right of the media to copies of "real" exhibits such as audio and visual recordings?
2. What is the impact on the administration of justice when the Court is faced with such an application by the media in the midst of a jury trial?
3. Whose onus is it on such an application to put forward evidence and satisfy the Court that the recording should be copied for the press?
4. Are there any other considerations in this trial which should be taken into account?¹⁰

⁷ *Cairn-Duff*, *supra* note 3 at para. 61.

⁸ *Ibid.* at para. 9.

⁹ *Ibid.* at para. 10.

¹⁰ *Ibid.* at para. 5.

In considering the first issue of whether the open court principle automatically entitled the media to copies of court exhibits, Moen J. made it clear that her discussion addressed the specific circumstances surrounding *Cairn-Duff*: an application brought during a jury trial where the media had access to the courtroom and where there was no publication ban in place. Moreover, the members of the press could listen to and view the audio and video recordings when court was not in session and obtain copies of the transcripts.¹¹

Justice Moen proceeded to narrowly interpret the open court principle enunciated in the three leading Supreme Court judgments, *Dagenais*, *Mentuck*, and *Toronto Star*.¹² While the CBC argued that they stood for the proposition that the media is entitled to copies for the purpose of broadcast, the trial judge stated that “I find that those cases stand for the simple principle that the public and the media are entitled to an open court in which they can come and go and listen to and view all of the evidence at the time it is given absent some other principled reason for excluding the public and the press.”¹³ Moreover, she held that if a court decided to permit the dissemination of copies of the exhibits, that court has discretion in relation to the format in which it is released.

In maintaining that there is not an automatic right to the exhibit’s format as presented in court, Moen J. acknowledged that she was going further than the jurisprudence. This prompted her to state, “[i]f I am wrong and there is in fact such a right,”¹⁴ which led her into a discussion of whether Canadian courts could provide a system for copying exhibits in their original format. The Alberta Court of Queen’s Bench concluded that the open court principle had been met without giving the media access to the court exhibit for the purpose of broadcast.

The second issue Moen J. considered was the impact on the administration of justice when the media brings forward an application in the midst of a jury trial.¹⁵ The key considerations hinged on the impact on the jury, providing notice to the affected parties, granting the media standing, fair trial concerns, and the released audio tape’s possible affect on the public and jury. For Moen J., this would disturb the administration of justice in two principal ways. First, Moen J. asserted that proceeding with such an application would adversely affect the jury and counsel. More specifically, the resulting delay would frustrate the jury and compromise the accused’s right to a fair trial, and the preparation of additional arguments unrelated to the main issues at trial would unfairly burden counsel.¹⁶

The trial judge’s second key consideration of the administration of justice arose out of concern for the accused’s fair trial interests. Justice Moen acknowledged that the media would likely only play select portions of the recording, namely, where Cairn-Duff confessed he stabbed the victim, which would serve to sensationalize the evidence and distort the true picture of the events. In a non-sequestered jury situation, the trial judge noted that while the jury was instructed to avoid media reports of the trial, the possible misconceptions of the

¹¹ *Ibid.* at para. 12.

¹² *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188 [*Toronto Star*].

¹³ *Cairn-Duff*, *supra* note 3 at para 32.

¹⁴ *Ibid.* at para. 45.

¹⁵ *Ibid.* at paras. 51-69.

¹⁶ *Ibid.* at paras. 52-53.

public could influence the jury. That being said, Moen J. recognized that there may be times when the media should be able to make an application for an exhibit in its original format — but this would occur only in extraordinary circumstances “where there is a public purpose in addition to the open court principle which outweighs the right of the accused to a fair trial and the jury to an expeditious one.”¹⁷ Justice Moen concluded this issue by making several sweeping statements such as, “[a]nything that distracts from the live issues in a jury trial means that the whole process is diverted” and “[b]y its nature, an application for production of a copy of an exhibit is unfair to the accused and to the jury.”¹⁸ It thus became evident that the media was not going to be successful in its application and the remaining issues would serve to bolster this position.

The third issue Moen J. considered was which party ought to bear the onus of presenting evidence to satisfy the Court that the media should have access to court exhibits. Here, the trial judge made a clear distinction on the basis of which party initiated the action to limit the openness of the court. She reaffirmed that when the Crown or defence makes an application for a publication ban, the counsel seeking to limit public access must provide evidence.¹⁹ However, Moen J. distinguished the present situation where the media was requesting access to court exhibits by highlighting the required obligations of the parties.

If the requirement is that the Crown and Defence counsel must put evidence before the Court in the middle of a jury trial to oppose a media application, then they must stop the trial process, they must muster evidence and legal argument while the media applicant stands by and waits. As does the jury. It is my view this is completely unfair to the trial process, to the accused, and especially to the jury.²⁰

Through this reasoning, the Court held that where the media makes an application for access to a court exhibit in its original format, the onus is on the media to present evidence to the Court as to why the Court should provide such access.²¹

In assessing the fourth and final issue, Moen J. questioned the possibility of any remaining considerations in an attempt to be thorough.²² She suggested that there may be property interests in the exhibits, as well as privacy interests of the deceased’s family and the other individuals on the audio tape. However, having already decided that the CBC did not have a right to copy and broadcast the audio tape based on the lack of evidence presented, Moen J. did not find it necessary to weigh and balance the proprietary and privacy interests of the affected parties.

III. OVERVIEW OF THE LAW

The area of law informing a court’s decision in granting media access is complex as it is influenced by the *Canadian Charter of Rights and Freedoms*,²³ case law, and statutory

¹⁷ *Ibid.* at para. 69.

¹⁸ *Ibid.* at para. 68.

¹⁹ *Ibid.* at para. 79.

²⁰ *Ibid.*

²¹ *Ibid.* at para. 80.

²² *Ibid.* at paras. 82-85.

²³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter].

provisions in the *Criminal Code*,²⁴ as well as by court guidelines established for Alberta courts.²⁵ It requires balancing the rights and interests of numerous affected parties: the accused's right to privacy and to a fair trial; the victim and his/her family's privacy interest; the court's interest in the fair administration of justice; and the media and the public's right to freedom of expression and communication.

A. CHARTER RIGHTS

Section 2(b) of the *Charter* guarantees everyone the right to “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”²⁶ In *Toronto Star*, the Supreme Court considered whether the media should have access to information used to obtain a search warrant. Justice Fish, writing for the Court, emphasized the importance of this *Charter* right and ultimately dismissed the appeal in favour of the media:

In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy.

That lesson of history is enshrined in the *Canadian Charter of Rights and Freedoms*. Section 2(b) of the *Charter* guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.²⁷

In the recent Saskatchewan Court of Queen's Bench decision, *R. v. Dagenais*,²⁸ released 17 March 2009, Allbright J. also highlighted the important role that the media plays in a democratic society by citing La Forest J. in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*:

[I]t is evident that s. 2(b) protects the freedom of the press to comment on the courts as an essential aspect of our democratic society. It thereby guarantees the further freedom of members of the public to develop and to put forward informed opinions about the courts. As a vehicle through which information pertaining to these courts is transmitted, the press must be guaranteed access to the courts in order to gather information.²⁹

Thus, the public's right to information about court proceedings, and subsequently the media's freedom to transmit such information is firmly entrenched in Canadian society. However, there is also a recognition that *Charter* rights are not absolute. In certain circumstances, it is uncontroversial that public access to certain court proceedings or court records would serve to endanger the justice system rather than uphold its integrity.³⁰

²⁴ R.S.C. 1985, c. C-46.

²⁵ Court of Queen's Bench of Alberta, *Audio Recording Policy*, online: Alberta Courts <<http://www.albertacourts.ab.ca/CourtofQueensBench/MediaAudioRecording/tabid/328/Default.aspx>> [*Audio Recording Policy*].

²⁶ *Charter*, *supra* note 23, s. 2(b).

²⁷ *Toronto Star*, *supra* note 12 at paras. 1-2.

²⁸ 2009 SKQB 104, 243 C.C.C. (3d) 554 at para. 32.

²⁹ [1996] 3 S.C.R. 480 at para. 26.

³⁰ *Ibid.* at para. 29.

Section 11(d) of the *Charter* also provides that any person charged with an offence has the right to a “fair and public hearing.”³¹ Although there is often tension between these two *Charter* rights, in *Dagenais*, Lamer C.J.C. described the requisite balancing act and rejected a hierarchical approach to rights:

It would be inappropriate for the courts to continue to apply a common law rule that automatically favoured the rights protected by s. 11(d) over those protected by s. 2(b). A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law. 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.³²

It is questionable whether Moen J. applied the hierarchical approach when she stated that “[t]his question necessarily must consider whether the trial process can ever be fair where counsel and the Court are diverted from their main task especially when that task involves putting evidence before a jury and the liberty of a person is at stake.”³³ This statement suggests that where s. 11(d) rights are in tension with s. 2(b) rights, the former will always be favoured over the rights of the media and the public.

Notably, the accused’s right to a fair trial may be aligned with the right to freedom of expression, as it allows the public to scrutinize and comment on whether the accused is receiving a fair trial.

B. GENERAL PRINCIPLES — THE OPEN COURT PRINCIPLE

The open court principle is firmly rooted in s. 2(b) of the *Charter*. In *Toronto Star*, Fish J. held that there is a presumption that judicial proceedings are open and public: “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 justice* or *unduly impair its proper administration*.”³⁴

However, the law is unsettled as to what exactly the open court principle entails and what is required to meet it. Previous lower court decisions illustrate that the jurisprudence addressing the open court principle, including access to court exhibits, is subject to various interpretations and inconsistent holdings. In *Cairn-Duff*, Moen J. struggled with the jurisprudence, stating:

I have found the principle of “access” to the courts is unclear. Some of the case law assumes that access includes the right to copies of exhibits, including copies of audiotapes and videotapes; others do not. If this is so, I wonder what the limits are? What other kinds of exhibits might the media want?³⁵

³¹ *Charter*, *supra* note 23, s. 11(d).

³² *Dagenais*, *supra* note 1 at para. 72.

³³ *Cairn-Duff*, *supra* note 3 at para. 29.

³⁴ *Toronto Star*, *supra* note 12 at para. 4 [emphasis in original].

³⁵ *Cairn-Duff*, *supra* note 3 at para. 17.

Indeed, the Manitoba Court of Appeal in *Hogg*³⁶ assumed that open court includes the right to copies of the court exhibits for the purpose of broadcast, and in the same format as the exhibit was presented in court. In *Hogg*, the accused gave a videotaped statement after being charged with aggravated assault. The assault was unprovoked and violent, and captured the attention of the media and the public. CTV subsequently made an application to air the videotaped statement on its program, “W-FIVE.” The Manitoba Court of Queen’s Bench denied the application on the belief that, in the future, accused persons and police officers may be reluctant to participate in videotaped statements if they might be publicly broadcast, thus hindering the administration of justice. In overturning this decision, the Court of Appeal held that the judge’s reliance on common sense and logic was not sufficient without the support of real and substantial evidence to overcome the openness of the courts, and granted the release of the videotapes for broadcast.

In contrast, in *Sylvester*, Minden J. assumed that the open court principle entitled the media to copies of the court exhibits, but not necessarily in the same format in which they were presented in court:

I am not aware of any binding authority that holds that the concept of open courts necessarily includes the media’s right to disseminate information to the public, or the public’s right to receive it, in precisely the same form in which it was produced and presented in the courtroom.³⁷

It would appear that there is no Supreme Court judgment that has directly addressed whether the open court principle includes the media’s right to copies of the exhibit for broadcast and whether this right extends to the exhibit’s original format. This could be for two reasons: first, the Supreme Court has left a gap in this area of the law by not addressing the requirements of the open court principle, or second, the Court has always assumed that the ability to copy and broadcast is included in the open court principle. There is some indication that the Supreme Court could hold the latter position when considering the minority judgment in *Vickery*.³⁸ Justice McLachlin (as she then was), who was one of three judges who formed the dissenting decision, but who is the only judge from the decision still sitting on the Supreme Court, took the position that the mere production and playing of the tapes at trial did not satisfy the principle of open courts.³⁹ The minority opinion held that “[t]here is a common law right of access to judicial records and this right includes the opportunity to inspect and to copy such records.”⁴⁰ The question then is whether McLachlin J. intended this common law right to include the broadcasting of the copied records. Considering that the minority would have allowed the media access to the tapes in question, it is arguable that the broadcast of the copied records is a right included in the open court principle in the absence of any overriding factors.

³⁶ *R. v. Hogg*, 2006 MBCA 132, 208 Man. R. (2d) 244 [*Hogg*].

³⁷ *Sylvester*, *supra* note 2 at para. 72.

³⁸ *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671 [*Vickery*].

³⁹ See David Crerar & Majda Dabaghi, “SCC Upholds Open Court Principle for Media Reporting on Proceedings” *The Lawyers Weekly* (28 October 2005) 15.

⁴⁰ *Vickery*, *supra* note 38 at para. 105.

C. CASE LAW

The Supreme Court of Canada set out the framework for the exercise of judicial discretion to limit the freedom of expression and of the press in *Dagenais*.⁴¹ In *Dagenais*, the four accused were seeking a publication ban on a television miniseries, *The Boys of St. Vincent*, which, although fictional, depicted certain facts and events that were very similar to those in their ongoing criminal trial. The Court held that a ban should only be enforced in certain circumstances:

[A] ban should only be imposed where alternative measures cannot prevent the serious risk to the interests at stake and, even then, only to the extent found by the Court to be necessary to prevent a real and substantial risk to the fairness of the trial. In addition, a ban should only be ordered where its salutary effects outweigh its negative impact on the freedom of expression of those affected by the ban.⁴²

In *Mentuck*, the Supreme Court reaffirmed the *Dagenais* test but reformulated and broadened it. The Crown applied for a publication ban on the names and identities of undercover police officers and their investigative techniques. Writing for the majority, Iacobucci J. held that the purpose of the reformulation was “not to disturb the essence of [*Dagenais*]” but rather to recognize that publication bans can invoke more interests and rights than the rights to trial fairness and freedom of expression, such as the proper administration of justice.⁴³ The *Dagenais/Mentuck* test was described in *Mentuck* as follows:

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*.⁴⁴

Justice Iacobucci also emphasized that the “serious risk” in part (a) of the test must be “*real, substantial, and well grounded in the evidence*: ‘it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained.’”⁴⁵

In *Toronto Star*, the Supreme Court elaborated on the application of the *Dagenais/Mentuck* framework. While the Crown argued that the *Dagenais/Mentuck* test did not apply to assessing public access to search warrant materials, Fish J. held that the test applied to “*all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings*.”⁴⁶ He further noted that the *Dagenais/Mentuck* test

⁴¹ *Supra* note 1.

⁴² *Toronto Star*, *supra* note 12 at para. 25, paraphrasing Lamer C.J.C. in *Dagenais*, *ibid*.

⁴³ *Mentuck*, *supra* note 5 at para. 33.

⁴⁴ *Ibid.* at para. 32 [emphasis added].

⁴⁵ *Toronto Star*, *supra* note 12 at para. 27, quoting *Mentuck*, *ibid.* at para. 34 [emphasis in original].

⁴⁶ *Toronto Star*, *ibid.* at para. 7 [emphasis in original].

should be applied flexibly and contextually rather than mechanistically. The test should be tailored for the particular interests and rights of the parties, in the specific circumstances of each case, thus enabling its application to a variety of discretionary actions.⁴⁷ Finally, the Court in *Toronto Star* affirmed that the onus of convincing the judge whether access to court exhibits should be granted is on the party seeking to limit public access.⁴⁸

In October 2008, the Quebec Court of Appeal released a further case addressing media access to the courts that mandates consideration. In *S.R.C.*,⁴⁹ the Court of Appeal upheld the constitutionality of certain rules of the Quebec Superior Court that limited interviews and the taking of pictures and videos to certain designated areas of the courthouse, and prohibited the broadcast of the official sound recordings of the court proceedings. The majority of the five-member panel held that restricting interviews and picture-taking to designated areas did not infringe on a journalist's ability to report on what occurred in the courtroom as the main purposes of freedom of expression were not intruded upon, namely, democratic discourse, truth finding, or self-fulfillment. In regards to the use of the tape recordings of the court proceedings, Robert C.J. held that freedom of expression and freedom of the press includes the right to obtain and broadcast the information, but not necessarily the right to the best means or form of broadcasting the information.

Moreover, since the journalists were still able to report on the testimony of the witnesses, as well as obtain a copy of the official recording to ensure the accuracy of their reports, the freedom of expression was minimally impaired.⁵⁰ In denying the broadcasting of the tape recordings, the Court of Appeal held that it was necessary in order to maintain the security, dignity, and privacy of the affected parties, and to provide a serene, orderly atmosphere for the participants. It thus appears that the Court held that the value of these benefits to the justice system outweighed the burdens imposed by these rules on the media, which included the media's less sensationalized portrayal of the events and less interesting visuals.⁵¹

The Quebec Court of Appeal ruling might suggest that Moen J. was correct in her ruling as the majority's reasoning supported her narrow interpretation of the open court principle and employed a similar line of analysis — essentially that concerns over the proper administration of justice will always outweigh the less sensationalized reporting and the increased difficulties the media might face. However, it is possible to distinguish *Cairn-Duff* from *S.R.C.* on several facts.

With regards to the tape recordings, in *Cairn-Duff* the CBC was applying for access to a certain court exhibit and not to all of the court proceedings. Asking a judge to balance the interests of the affected parties in relation to a specific court exhibit is more reasonable than asking to broadcast any or all segments of the court proceeding. A court would invariably want more control over the release of its entire proceedings. Second, *S.R.C.* took place within the context of upholding the rules of the Quebec Superior Court, whereas in *Cairn-Duff* Moen J. was issuing a discretionary court order that limited court access. In turn, Quebec

⁴⁷ *Ibid.* at para. 31.

⁴⁸ *Ibid.* at para. 9.

⁴⁹ *Société Radio-Canada c. Québec (Procureur général)*, 2008 QCCA 1910, [2008] R.J.Q. 2303 [*S.R.C.*].

⁵⁰ *Ibid.* at para. 113.

⁵¹ *Ibid.* at para. 122.

Superior Court rules fall outside the framework of the *Dagenais/Mentuck* test, whereas it is arguable that this test applies in the circumstances of *Cairn-Duff*. This discussion will follow in the subsequent section. In light of this new case, it may be said that the trend in the courts to favour media access is diminishing; however, because of the specific circumstance in which *S.R.C.* takes place, it is difficult to make any definite conclusion.

D. THE CRIMINAL CODE

Section 486.5 of the *Criminal Code* creates a procedure for the prosecutor, victim, witness, or justice system participant to apply for a non-publication order. Notably, it does not directly cover the situation wherein the media makes an application for access to court exhibits, but rather is intended for certain offences where the identification of a victim or witness is an issue. Nevertheless, s. 486.5(7) sets out seven useful factors that the judge “shall” consider when determining whether to make such an order.⁵² It would appear that Parliament endorsed the *Dagenais/Mentuck* framework as the list of factors under this section is very comparable to the jurisprudential test.

E. ALBERTA COURT GUIDELINES FOR MEDIA ACCESS

Provincial court policies regarding public access to court records are the final source that informs whether copies of court exhibits should be made for the media. The Alberta judiciary is currently drafting guidelines for access to its proceedings entitled “Public and Media Access Policy.” While this policy was not yet released at the time of writing, the Alberta courts have established an audio recording policy effective 2 September 2008. This policy allows accredited members of the press to bring audio recording devices into courtrooms once they have either notified the court clerk of their intention to record the proceedings, or have prominently displayed their media identification while recording. The policy makes clear, however, that the recordings are for the sole purpose of verification as copying or broadcasting the recordings are strictly prohibited.⁵³ If the media wants to broadcast any of the proceedings an application to a court official has to be made, which will then be forwarded on to the presiding judge in all criminal cases. The judge will then apply case law in considering whether to allow such copies to be made available.

IV. THE ANALYSIS

In considering the overview of the law, it is evident that the Court in *Cairn-Duff* took a novel approach in considering whether to exercise its discretion to prohibit the media from copying court exhibits for the purpose of broadcast. In not applying the *Dagenais/Mentuck* test, the Alberta Court of Queen’s Bench recognized practical considerations that are largely unacknowledged in the jurisprudence, re-prioritized others, and shifted the onus on the media to provide evidence warranting the access. The question thus arises, was the Court justified in doing so?

⁵² *Criminal Code*, supra note 24, s. 486.5(7).

⁵³ *Audio Recording Policy*, supra note 25 at paras. 1-2.

A. NOT APPLYING THE *DAGENAIS/MENTUCK* TEST

In *Cairn-Duff*, Moen J. did not apply the framework as suggested by the Supreme Court of Canada for discretionary orders that limit the openness of the courts. Rather, she distinguished the present case from the jurisprudence on the basis of whether the application had the effect of *limiting* information, as opposed to *not granting* media access to court exhibits to copy and broadcast. Justice Moen stated, “[i]n those three cases [*Dagenais*, *Toronto Star*, and *Mentuck*], the trial court had considered an application by the Crown or the Defence to *limit* information that would be available to the press. In the case before me, there was no such limitation.”⁵⁴ The trial judge concluded that refusing the CBC’s request for a copy of the recording should not be considered a ban as the media had the right to attend the court proceedings, to report on what was seen and heard, and had access to a copy of the written transcript. It is arguable, however, that the practical effect of not granting the media access to court exhibits for broadcasting purposes limits freedom of expression and of the press.

The Supreme Court has emphasized that “[w]hile the 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.”⁵⁵ It also noted a number of discretionary actions where courts have found it workable, including confidentiality orders, judicial investigative hearings, and Crown initiated applications for publication bans. It appears, similar to *Toronto Star*, that the suggested framework would be applicable in this circumstance.

Further, it seems artificial that the *Dagenais/Mentuck* test would be applied where the defence or Crown counsel makes an application to exclude media access to the exhibits, but not where the media makes an application for access to copies of court exhibits. Notably, if the Court in *Cairn-Duff* would have interpreted the open court principle as including the inherent right to copies, as courts have done in numerous decisions, the media would not be burdened with such an application as their access to the copies would be presumed, subject to evidence proving otherwise. Moreover, it is important to acknowledge that although the Court of Queen’s Bench of Alberta in its media access policy makes a distinction between access to court records and publication of those records, the *Dagenais/Mentuck* test is still the governing test.

The *Dagenais/Mentuck* test seems workable within the circumstances of *Cairn-Duff*. Since it is a flexible and contextual framework, the Court could have applied it here. It is certainly speculative as to whether the application of this test would have yielded the same holding. In considering that the *Dagenais/Mentuck* test requires the party opposing access to establish that a ban is “necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternate alternative measures will not prevent the risk,”⁵⁶ it is arguable that the reasons set out in *Cairn-Duff*, namely, that the application would delay the proceedings, possibly annoy the jury, and require counsel to provide additional argument,

⁵⁴ *Cairn-Duff*, *supra* note 3 at para. 36 [emphasis in original].

⁵⁵ *Re Vancouver Sun*, 2004 SCC 43, [2004] 2 S.C.R. 332 at para. 31.

⁵⁶ *Mentuck*, *supra* note 5 at para. 32.

would have met this stringent test. However, it is also possible to reconcile reaching the same result within the *Dagenais/Mentuck* framework. Justice Moen's reasoning and considerations were indeed interesting and pragmatic, but they displaced considerations produced by the *Dagenais/Mentuck* test and re-prioritized others.

B. THE NOVEL CONSIDERATIONS

Justice Moen's consideration of the impacts of an application for media access on the administration of justice in the midst of jury trial are not without controversy. She significantly hindered the media's right to freedom of expression and communication when she took judicial notice that the time delay would annoy the jury, and the preparation of additional argument would unduly distract counsel, concluding that an unfair trial would always result. While the *Dagenais/Mentuck* test requires the rights of these parties to be carefully balanced within the specific circumstances, this approach leads to the media's rights being outweighed every time. This is difficult to accept as it is not impossible to think of situations where such an application could be made and decided upon in a relatively short period of time with readily recognizable legal arguments.

The Court weakened the media's position further when it emphasized that media standing could be postponed. For support, it cited Slatter J. in *R. v. White*,⁵⁷ who held that the media was not a party to a trial and that it could not impose itself on the proceedings at its convenience.⁵⁸ In *Cairn-Duff*, Moen J. postponed the consideration of the media's application until after the jury was sequestered. She considered this delay under two circumstances:

If the CBC was correct and they were entitled as a matter of right [to receive the information in same format], then I was wrong to wait until the end of trial, after the news had gone cold.⁵⁹

If the principle is that the media is *not* entitled as a matter of right to receive the evidence in the format it was presented to the Court, then a trial judge may safely tell the media when such a request is made that the request cannot be heard until the trial is over and the judge can therefore maintain the fairness of the trial to the accused, to the Crown, and to the jury.⁶⁰

However, if the Court does not give the media's application timely consideration, the likely effect is to essentially deny their access to the court exhibits altogether. In *R. v. Domm*, the Ontario Court of Appeal noted the importance of timely publication when it stated, "[s]ometimes an order delaying publication will be tantamount to an outright ban on publication. The values promoted by s. 2(b) are not served by publication when the speaker has lost his audience and the message to be conveyed has lost its purpose."⁶¹

The media is ultimately put in a vulnerable situation with few effective rights. If the open court principle is narrowly interpreted so that the media's right to copy court exhibits is not included and so an application to the court becomes necessary, it does not seem fair to then

⁵⁷ 2008 ABCA 294, 93 Alta. L.R. (4th) 239.

⁵⁸ *Cairn-Duff*, *supra* note 3 at para. 56.

⁵⁹ *Ibid.* at para. 57.

⁶⁰ *Ibid.* at para. 58 [emphasis in original].

⁶¹ (1996), 31 O.R. (3d) 540 at 555.

say that their application does not have to be heard until after the trial when its potential use has almost certainly passed. In *Toronto Star*, the Supreme Court upheld Doherty J.A., writing for the Ontario Court of Appeal, when he held the trial judge had exceeded her jurisdiction by not allowing counsel for the media to make an application for a sealing order. Justice Doherty found that the media “can legitimately be expected to play an important role on applications to prohibit their access, and that of the public they serve, to court records and court proceedings.”⁶²

Justice Moen’s second consideration of how the accused’s fair trial interests may be prejudiced concerned how the media’s likely sensationalized and decontextualized account of the events could give rise to public misconceptions and, in turn, influence the jury. On the facts of *Cairn-Duff*, the Court was concerned that the public would only hear the confession — that the victim initially attacked Cairn-Duff, who stabbed back in self-defence and then immediately called 911 in an attempt to save the victim. The Court thus echoed Minden J. in *Sylvester* who was concerned that if the video’s graphic segments were broadcast, it “would have an impact on the public that would be fundamentally different than the printed word and would have a real potential to create a widespread and negative impact on the public’s measured response to the accused.”⁶³ Despite the jury instruction and the jury’s best efforts to comply with the instruction, Minden J. was concerned that “there might come a point at which it would be impossible for the jury to insulate itself from the atmosphere likely to be produced by broadcast of the clips.”⁶⁴

Implicit in this reasoning is a general cynicism towards the media. In *Black*,⁶⁵ Humphries J. granted a media application to broadcast recordings of a RCMP undercover situation, despite acknowledging that fair and accurate reporting can be prejudiced by the media’s portrayal:

What underlies the resistance to the production of the exhibits in this case is basically a distrust of the media’s motives in reporting. Is it to fairly inform the public or is it, as counsel for the RCMP and the Crown contend, to sensationalize the trial, take the most startling sound bite, distort the evidence, attract viewers and sell advertising time? If the latter, it is contended that the media’s interest is purely commercial, not constitutional, and will detract from the proper administration of justice by misleading the public into hasty and unfair judgments.⁶⁶

However, Humphries J. concluded that we must necessarily operate on the assumption that the media will fairly inform the public of what goes on in the courts as it is a cornerstone of a democratic society. In *Black*, the trial judge thus struck an appropriate balance when she allowed for the reproduction of the tapes, but attached certain conditions to the release, such as editing parts of the video to protect third party interests and to prevent the identification of the RCMP officers.

⁶² *Toronto Star*, *supra* note 12 at para. 13.

⁶³ *Cairn-Duff*, *supra* note 3 at para. 42.

⁶⁴ *Ibid.* citing *Sylvester*, *supra* note 2.

⁶⁵ *R. v. Black*, 2006 BCSC 2040, 74 W.C.B. (2d) 441 [*Black*].

⁶⁶ *Ibid.* at para. 28.

In addition, in *Cairn-Duff*, the probability that the public would receive a sensationalized and inaccurate portrayal of the events, and that this would subsequently tarnish the jury, seemed low because of the relatively unremarkable facts. This can be contrasted with the circumstances surrounding *Sylvester*, which involved the disappearance and eventual murder of a young woman, Alicia Ross, from her front yard in Ontario. Her disappearance and the ensuing search sparked an outpouring of public interest and attracted widespread media coverage. When the accused, the next door neighbour, confessed to her murder and revealed the gruesome details of her death, the public interest and the media coverage magnified. Moreover, the videotapes in *Sylvester* that would have been released to the public were significantly different in substance: the accused had re-enacted the brutal murder while giving a very disturbing account of the details.⁶⁷ The facts of *Cairn-Duff* can thus be distinguished as the high-profile media coverage and disturbing substance of the videotape were not present to the same degree. It is unlikely that the facts of *Cairn-Duff* would have produced an atmosphere where the public's perception of events would have influenced the jury — there was little public interest in the case, the self-defence motion was not contentious, and the not-guilty verdict was uncontroversial.

Moreover, it could also be argued that the media's portrayal may not always influence the jurors. In *Dagenais*, Lamer C.J.C. held that the risks may be more speculative rather than real:

I doubt that jurors are always adversely influenced by publications. There is no data available on this issue. However, common sense dictates that in some cases jurors may be adversely affected. Assuming this, I nevertheless believe that jurors are capable of following instructions from trial judges and ignoring information not presented to them in the course of the criminal proceedings.⁶⁸

Assuming that a jury may be influenced by the media's sensationalized portrayal may perhaps be too speculative in all circumstances.

Another unique and practical issue that Moen J. considered in *Cairn-Duff* was the current lack of an administration system to provide copies to the media in the same format in which they were received. She questioned, "how is this to be done? And who is responsible for having it done? ... if the media is entitled to copies of exhibits there must be a system in place to provide for copies when the media requests them."⁶⁹ After exploring four possibilities, the Court concluded that this obligation could lead courts to lose continuity of their exhibits and compromise their integrity, while other possibilities could require taxpayers or litigants to bear the extra burden of paying for such a system. The Court stated, "if openness extends to the format for exhibits, then courts across this country will be obligated to establish [the] means."⁷⁰

The continuity of an exhibit is an important concern. The possibility of the court giving the exhibit to the media for copying or the media bringing in their own equipment to facilitate the copying do not seem like viable options in light of the continuity issue. There

⁶⁷ *Sylvester*, *supra* note 2 at para. 77.

⁶⁸ *Dagenais*, *supra* note 1 at para. 87.

⁶⁹ *Cairn-Duff*, *supra* note 3 at para. 47.

⁷⁰ *Ibid.* at para. 49.

is simply too much at risk. However, the two alternatives provide viable solutions: the party whose exhibit it is could provide a copy, or the courts could provide a system that makes copies available to the media. Since recordings are now digital, providing copies is a relatively easy process. Once the equipment is purchased, there is little time involved, extra copies are extremely inexpensive, and the chance of corruption is very minute. Therefore, the burden to provide copies of an exhibit is not terribly onerous when considering the digital technology now being used in the courts. It does not seem unreasonable to require a court, or the party whose exhibit it is, to make several copies of the exhibit in case they are requested. Of course, this assumes the defence will have access to such equipment at the courthouse so there are few costs put on the litigant. If this can not be provided, the onus to provide copies should either be on the Crown or the court.

In *R. v. Casement*,⁷¹ a Saskatchewan Queen's Bench decision released in March 2009, the Court applied the *Dagenais/Mentuck* test to six exhibits that contained audio and video recordings of conversations during an undercover operation. The Court denied the application but permitted the applicants, the CBC, CanWest Media Inc., and CTV to have further access to the original exhibits. To ensure continuity, the trial judge held that only an authorized member of the RCMP could operate the necessary equipment; the applicants, however, would be responsible for all expenses incurred for arranging and replaying the exhibits. This is another interesting possibility in terms of which party should bear the burden. The question here would then be whether the media applicants would reduce their profit margins or merely pass these costs onto their consumers, who would ultimately bear the burden.

Justice Moen raised an interesting point when she questioned whether the public would be willing to pay for a media right to copy and broadcast court exhibits (assuming that the courts would incur some expenses in relation to the process — equipment, personnel, etc.). This point, however, should perhaps be left unanswered until the government engages in discussion with the public regarding it. In the present case, the Court could have at least facilitated a means for the CBC to obtain a copy of the audio tape of the 911 telephone call without great expense.

Justice Moen's consideration of the mainly practical matters of the application, such as the system that would provide the copies and the inconvenience to the jury and counsel, raised novel considerations that do not necessarily arise in the application of the *Dagenais/Mentuck* framework. While this was a distinct feature of the judgment, so then was the absence of considerations that would have been produced by the *Dagenais/Mentuck* test.

C. INTERESTS AND RIGHTS NOT CONSIDERED

A distinguishing feature of the Court's approach in *Cairn-Duff* was the absence of several rights and considerations that are the heart of other judgments, namely the privacy rights of the accused, the victim and/or their family, and any third parties recorded on the exhibit. Justice Moen only considered them in her fourth issue raised under the heading, "Are there

⁷¹ 2009 SKQB 105, 330 Sask. R. 274.

any other considerations which should be taken into account?"⁷² It seems unusual that such an important right, which is a determinative factor in many cases, was not considered at the forefront of the decision. Justice Moen deemed it unnecessary to consider these primary interests based on the following:

Given that I have found that the CBC did not have a right to a copy of the audiotapes and that the CBC did not meet the onus on them to show extraordinary circumstances during the course of this jury trial warranting copying of the audiotapes, nor did the CBC provide proper notice to interested parties, I do not have to weigh and balance the privacy interests, nor the proprietary interests surrounding the audiotape.⁷³

This line of reasoning is precarious. If the CBC did have a right to a copy, which this Court acknowledged it may, the Court would have concluded that access to the court exhibits should not be granted based on not providing notice and the CBC not meeting its onus. These two arguments will be addressed in turn.

While Moen J. in *Cairn-Duff* took great care in describing the practical realities of the courtroom — the day-to-day responsibilities of the jury, judge, and counsel during a jury trial, and the time constraints they face — she did not afford the media the same practical considerations in providing notice. She stipulated that in order to consider this application properly, the applicants would have had to have given notice to the affected parties.⁷⁴

Providing notice can be a difficult and complex task for the media applicants as time constraints and the different physical locations of people often serve as significant barriers. To illustrate, if the exhibit is entered in the morning and the media would like to air it that afternoon or shortly afterwards, family members of the victims and witnesses could be widely dispersed and difficult to contact. Moreover, if one of the interested parties were in prison, the media would have to communicate through Corrections Canada or the Crown. If the judge were to allow a week for those parties to consider their positions and retain counsel, the broadcast of the exhibit would have become old news and no longer be of interest.

Although it has been suggested that the Crown would be in a better position to facilitate contact with affected parties, this is not to say that the media should not bear any obligation to provide notice to the affected parties. However, it seems that in many of the cases, the judge would often be able to predict the position of the affected parties from an objective viewpoint, and thus properly consider the application. To illustrate, in *R. v. Quintal*,⁷⁵ in a pre-sentencing report and forensic assessment, the accused had revealed to a court-appointed psychiatrist the names of individuals he alleged sexually abused and who themselves had committed other crimes. When the media requested access to the assessment, the Court held that where there were third party privacy interests the information could not be released. This line of reasoning is a substantive way of denying access to court exhibits as opposed to on the basis of not giving notice.

⁷² See *Cairn-Duff*, *supra* note 3 at paras. 82-85.

⁷³ *Ibid.* at para. 85.

⁷⁴ *Ibid.* at para. 55.

⁷⁵ 2003 ABPC 79, 335 A.R. 14.

Finally, while Moen J. emphasized that the media had the right to attend the court proceedings, she did not acknowledge the practical impediments that the media face, namely, that they often lack the staffing and resources required to be present for each trial they would like to attend, and for the entirety of the proceedings. By not addressing this and concluding that the openness of the court had been satisfied, Moen J. indirectly further limited the media's access to the courtroom.

D. SWITCHING THE ONUS OF PROVIDING ARGUMENT TO THE MEDIA

In the present case, the Court reversed the onus from the party seeking to limit court access to the media. This appears to be inconsistent with *Toronto Star*, in which Fish J. held that openness of the court was to be presumed until the party seeking to deny public access could prove the disclosure would subvert the ends of justice.⁷⁶

The Court in *Cairn-Duff* manoeuvred around the original onus through its narrow interpretation of the open court principle. It held, “[h]owever, here the media are not seeking to ensure that the court is open. They are seeking a copy of the exhibit.”⁷⁷

Justice Moen appeared to support the line of reasoning used by the Attorney General of Canada in *Black* who argued that the principles surrounding publication bans do not apply to the reproduction of exhibits because, while they are a part of the court record, they are not produced by the court and have various property rights associated with them. The onus would then be on the party seeking them to prove their access is warranted.⁷⁸ However, Moen J. did not specifically approve this statement of the law and ultimately decided the issue of onus on the basis of fairness. Notably, in *Black*, Humphries J. instead applied the onus as set out in *Toronto Star* and granted access to the videotapes.

Justice Moen stressed that when a media applicant brings forward an application during the middle of a jury trial, it is unfair to Crown and defence counsel to have to prepare arguments and provide evidence and make the jury wait, while the applicant is able to stand by and wait. This led Moen J. to conclude that it is only fair for the media applicant to have to provide evidence before the court. While her position is practical and based on common sense, it appears out of line with the long history of cases standing for the authority that there is a strong presumption favouring openness of the courts.

What is more, Moen J. stated that the media applicant must satisfy the following requirements in order to make an application for a copy of a court exhibit in the same format it was presented in court:

- (1) the media has the onus “to give notice to all persons that may be directly affected by the broadcast of the recording,”

⁷⁶ *Toronto Star*, *supra* note 12 at para. 21.

⁷⁷ *Cairn-Duff*, *supra* note 3 at para. 75.

⁷⁸ *Ibid.* at para. 78.

- (2) the media must “*put evidence before the Court* as to why the Court should provide or arrange for such copies,”
- (3) the media then has the onus “*to convince the Court that extraordinary circumstances* militating production of a copy of an exhibit are present in the middle of a jury trial, and that the Court should hear the matter in the midst of the jury trial,” and
- (4) the media must then “*provide legal argument* to which interested parties can respond.”⁷⁹

This new approach compels the media to meet a number of stringent requirements to gain access to broadcast exhibits where it was not obligated to so in the other cases. If this approach is followed in subsequent decisions, the media’s access will likely be significantly restricted.

V. CONCLUSION

Justice Moen in *Cairn-Duff* went too far in preventing media access to court exhibits. The novel approach she took addressed pragmatic considerations and raised thought-provoking issues; however, her reasoning did not seem sufficient to replace the *Dagenais/Mentuck* considerations suggested by the Supreme Court of Canada. Rather, the Alberta courts should continue to apply the *Dagenais/Mentuck* test when the media makes an application for access to court exhibits for broadcasting purposes rather than adopt the approach set out in *Cairn-Duff*. The *Dagenais/Mentuck* test is workable in this context as it is by its nature a flexible and contextual test. It requires the judge to carefully balance the rights and interests of the parties and the public, including “the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice”⁸⁰ and ensures that an application will only be denied if there is a serious risk to the proper administration of justice.

The *Dagenais/Mentuck* test often produces conflicting interests and rights as it is an inherently complex equation: there are often numerous affected parties who each have their own interest and rights. But this also is why the equation works effectively; it allows the judge to consider all of the relevant viewpoints and tailor a decision based on the specific circumstances that will best serve the interests of the accused and the public.

One interest that is notably not directly addressed by either Moen J.’s approach or the *Dagenais/Mentuck* test is the privacy interest. It is indeed easy to imagine a case where one’s privacy interest in the court exhibit could be a central issue arising on the facts — to illustrate, psychiatric assessments that become court exhibits could easily present such a circumstance. The question that then arises is whether the *Dagenais/Mentuck* test will be sufficient in balancing the competing rights in light of the privacy interest, or whether the test will need to be further modified.

⁷⁹ *Ibid.* at para. 80 [emphasis added].
⁸⁰ *Mentuck*, *supra* note 5 at para. 32.

A clearer understanding of what exactly the open court principle entails would also prove constructive. This would enable the courts to have similar starting points in their analyses and lead to more consistent decisions. Numerous lower court judgments that have recently been released on this topic throughout Canada appear difficult to reconcile; thus, a forthcoming judgment from the Supreme Court that settles the boundaries of this principle is warranted.

It is not without notice that these media applications can be disruptive during a trial, however, they are disruptive because the court officials do not know whether to release copies of media exhibits or not. The courts understandably want control of what gets released to the public and what does not as part of upholding the integrity of the criminal justice system, but the media cannot be faulted for this. If a court insists on maintaining effective control over its exhibits, it should feel obligated to give the media timely standing in court in order to enable the media to carry out its essential functions in a democratic society. The legitimacy and functioning of the criminal justice system in Canada is predicated on the public's acceptance of it. In order to have confidence in the justice system, society needs to know what happens in it, including the decisions the courts make and how they make them. Freedom of expression and communication is a constitutionally guaranteed right that should not easily be infringed upon. Therefore, when a court does infringe upon that right, it should do so based on substantive considerations that lie at the core of such decisions rather than ancillary or speculative matters.