SCC upholds open court principle for media reporting on proceedings

David Crerar advises courts to "be wary of proposed restrictions in public dissemination" of court exhibits.

By David Crerar and Majda Dabaghi

This summer Justice Morris Fish, writing for the Supreme Court of Canada in *Toronto Star Newspapers v. Ontario*, [2005] S.C.J. No. 41, confirmed that "in any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy". The open court principle is the cornerstone of the common law. In order to ensure that justice is administered in accordance with the rule of law, public access to the judicial process is vital.

Toronto Star quashed the lower court's sealing order over information contained in search warrants. The decision confirmed the consistent line of Supreme Court of Canada jurisprudence, from *R. v. Dagenais* [1994] 3 S.C.R. 835 , and *R. v. Mentuck* [2001] S.C.J. No. 73 to *Re Vancouver Sun* [2004] S.C.J. No. 41, holding that media are presumptively entitled to report on court proceedings. Access is to be curtailed only if necessary to prevent a serious risk to the proper administration of justice, and only if the salutary effects of the restriction outweigh harm caused to the rights and interests of the parties and the public; these interests include the right to free expression, the right to a fair public trial and the efficacy of the administration of justice. Further, limitations on access must be carefully tailored to restrict no more than is necessary to protect the interests in question. The party seeking to limit access bears the onus proving that harm may arise absent restrictive court orders. Cogent proof is required; a general assertion by the Crown or accused of potential harm is insufficient.

In light of this jurisprudence, it may be questioned whether an older Supreme Court of Canada decision, *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] S.C.J. No. 23, remains good law. *Vickery* concerns the mirror issue to a publication ban: do the media have a right to inspect, copy and broadcast exhibits filed in court proceedings, including those read out or displayed in open court? In *Vickery* the media applicant sought access to a taped confession filed and shown in the proceedings. The accused had been acquitted after that evidence was found to have been obtained in breach of the accused's *Charter* rights and thereby ruled inadmissible.

The majority decision, written by Justice William Stevenson on behalf of six justices, held that the media were not entitled to view and copy the tapes. The majority started with the principle that the court is the custodian of its exhibits. It held that the privacy interests of the accused, by that point deemed an innocent party, outweighed the public's interest in the exhibit. Allowing members of the public to attend trials is sufficient to fulfill the open court principle. Further, once the exhibit had served its role at trial, the need for contemporaneous scrutiny of the judicial process lost its preeminence.

The minority decision was written by Justice Peter Cory on behalf of three justices, including the only justice still sitting on the court, Chief Justice Beverley McLachlin. Justice Cory noted that the media had a right and responsibility to keep the public informed of the administration of justice. Merely allowing the public to view exhibits in open courtrooms is not a sufficient means of ensuring public scrutiny, given limited seats and the inability of most working Canadians to attend. Media access to exhibits allows public scrutiny of the judicial process, and builds public confidence in the workings of justice. Nor should the fact that the tapes had been ruled inadmissible remove them from public viewing via the media: the public ought to know what was excluded and why.

Toronto Star recently confirmed that the *Dagenais-Mentuck* principles and presumptions in favour of access apply to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings; they do not only apply to sealing orders and publication bans. These principles should also extend to the media's right of access to court records, specifically to criminal exhibits, and call into question the more restrictive reasoning and conclusion of the pre-*Dagenais Vickery*.

Further, the evidence and argument before the *Vickery* court was notably limited. The applicant had not presented affidavit evidence that he sought access in order to further judicial accountability. Fundamentally, the court also did not permit any arguments based on s.2(b) of the *Charter*, as that authority was not argued in the courts below. As section 2(b) is at the core of the subsequent *Dagenais-Mentuck-Vancouver Sun* jurisprudence, *Vickery* may be considered sufficiently *per incuriam* to make formal overruling unnecessary.

In the 15 years since *Vickery*, trial courts have regularly granted media access to court exhibits, in decisions such as *R. v. Stark*, [1995] B.C.J. No. 3064 (SC); *R v. Driver* [1997] B.C.J. No. 3158 (S.C.); *R. v. Arenburg*, [1997] O.J. No. 2386 (Gen. Div.); *R. v. Shearing* [1998] B.C.J. No. 1254 (S.C.); and *R. v. Ertmoed* [2002] B.C.J. No. 3153 (B.C.S.C.). A very recent decision, *R. v. CTV* [2005] M.J. No. 245, could serve as a model decision: citing *Mentuck*, it confirms that the media have the constitutional right to attend and report on the proceedings before the court. As the accused failed to raise evidence of privacy rights or any risk to the administration of justice if the media were granted access to the tapes of the accused's statements to undercover officers, the exhibits were released for broadcast.

Ultimately, such rulings lie within the discretion of the court. But this discretion must be exercised judicially and consistently with the jurisprudence. Further, courts hearing such applications must be wary of proposed restrictions in public dissemination, including disproportionate delays, lest the exhibits become stale news, with the practical effect of never being provided to the public. Appellate court confirmation that media, and thereby public, access to court exhibits, has progressed in the 15 years since *Vickery*, would help ensure that the law is applied consistently and expansively. It could thereby ensure that the media better fulfill their role as the eyes and ears of the public to court proceedings.

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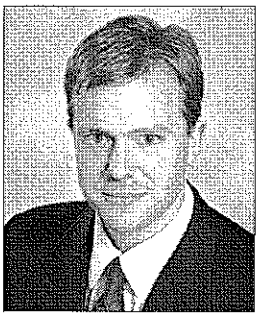

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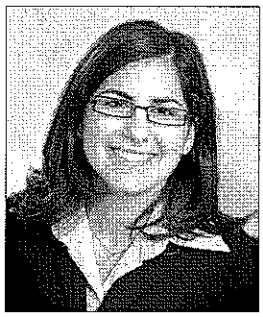

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Swagger to file notice of appeal

SWAGGER
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in the first place). Could not the water leaks themselves constitute "physical injury to tangible property", or at least the damage to "interior building components", or "loss of use" "resulting" from such leaks or damage? It is certainly arguable that the *Swagger* decision has confused tort concepts – such as "economic loss" and the now discredited "complex structure" theory – with insurance coverage issues.

Second, Justice Smith also held that there was no "accident", and therefore no "occurrence", either. This was for much the same reasons as just discussed. Namely, it was all Swagger's work that was damaged or defective to begin with. But exactly why resulting damage – due to unintentional defects in such construction work – cannot constitute an "occurrence" is not at all clear from the reasons. Could continuous water ingress not constitute "continuous exposure to the same general conditions"?

Swagger has instructed his counsel to file a notice of appeal. Given the now conflicting case law in B.C., the time would seem ripe for the appeal court to consider such questions.

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