June 20, 2022

Decision: Enfield Big Stop Videos

1. Coltsfoot Publishing Ltd. seeks to be released from its undertaking so that it might publish certain videos that have been exhibited in our proceedings.

BACKGROUND

2. After approximately 11:24 am on April 19, 2020, two RCMP members shot and killed the perpetrator at the Irving Big Stop at Enfield, thus ending his 13-hour killing rampage. Five videos from various Big Stop security cameras depict this encounter. Some depict the perpetrator being fatally shot and removed from the stolen car in which he arrived. Two videos also depict the car windows shattering with the impact of the bullets fired by the two RCMP members. These videos were shared with Participants at the earliest opportunity as part of the Commission's regular disclosure process.

3. All five videos were marked as exhibits in conjunction with the April 13, 2022 presentation to the public of the Commission's Foundational Document entitled *Enfield Big Stop.* Consistent with our practice for all exhibits, the Commission sent embargoed copies of three of the videos in advance to accredited media to assist them with their reporting (two were inadvertently not included). Accredited media receive advance copies of exhibits pursuant to an undertaking not to distribute them until so authorized. Sharing exhibits in this way permits media to serve their critical function of observing the Commission's process on behalf of a broader public.

4. Still photographs from these videos formed part of Commission counsel's April 13, 2022 public presentation of the Foundational Document.

5. At the time these videos were tendered into evidence, we did not post them to the Commission website. We opted to post still photographs of relevant moments in the videos in order to ensure the public had access to the necessary information to understand the encounter between RCMP members and the perpetrator. With the exception of a brief video clip to establish the location and direction of travel of the police vehicle, the videos were not livestreamed in public proceedings, nor posted to the website. This was intended to prevent harms arising from posting the videos to the internet, including making them available

for uses unconnected with the Commission's mandate and fact-finding responsibilities. In addition, by using the still photographs of the relevant moments rather than the video in the webcast, we intended to ensure that people who watched the proceedings (then or in the future) in order to learn and understand what happened would be able to navigate the information in an accessible and transparent way without being unnecessarily confronted with these videos. Posting the videos separately from the proceedings would support people in navigating this information, should they decide to do so, at a time of their own choosing.

6. Our Orders in Council direct us, in carrying out our work, "to be guided by restorative principles in order to do no further harm" and to "be attentive to the needs of and impacts on those most directly affected and harmed".

7. Therefore, considering the test set out by the Supreme Court of Canada in *Sherman Estate v. Donovan,* 2021 SCC 25 ("*Sherman*"), at the time these videos were tendered as exhibits, we concluded that:

    a. this aspect of the mandate to do no further harm represented an important public interest that would be placed seriously at risk, should these videos be allowed to live on the internet in perpetuity,

    b. this limitation to exhibit access was necessary to prevent this serious risk and there appeared to be no reasonable alternative to prevent the risk, and

    c. the benefits of this limitation outweighed its negative effects.

8. We therefore directed that the various still photographs used in the April 13, 2022 Foundational Document presentation would be posted to the website. The videos themselves would not be posted, but they would remain available for viewing at the Commission offices upon request by any member of the public.

9. Consistent with this determination, we informed accredited media that, pursuant to their undertakings, they were not authorized to publish these videos.

10. Coltsfoot Publishing Limited was one such accredited media outlet to receive advanced embargoed copies of these videos. Dissatisfied with our decision, it applied to the Commission, seeking to be released from this aspect of its undertaking so that it might publish the videos.

11. The Commission provided notice of Coltsfoot's application to all Participants and accredited media. We received various written submissions supporting

Coltsfoot's position. Commission counsel also made submissions in support of permitting publication. No one made submissions opposing Coltsfoot's application.

ANALYSIS

12. We acknowledge that our initial direction should not have applied to all five videos. Although they depict the same timeframe, some are not graphic and represent little risk of causing harmful effects if posted to the internet.

13. Turning to the application proper, we agree with Commission counsel that the principles set out in *Sherman*, *supra* apply to our analysis. At paras 37-38, the Court noted:

> 37. Court proceedings are presumptively open to the public ([*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 SCR 175] at p.189; *A.B. v. Bragg Communications Inc*., 2012 SCC 46, [2012] 2 S.C.R. 567, at para.11).
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> 38. The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order ([*Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41], at para.53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
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> > (1) court openness poses a serious risk to an important public interest;
> >
> > (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
> >
> > (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> Only where all three of these prerequisites have been met can a discretionary limit on openness—for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a

redaction order—properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario,* 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[Emphasis added.]

14. Given the submissions received, we must now look at the *Sherman* principles in a new light. Specifically, despite our concern to protect the mandated important public interest in doing “no further harm” and to be “attentive to the needs of and impacts on those most directly affected and harmed”, it now appears that anyone who may be directly affected by the internet publication of these videos has chosen not to oppose removing this limitation.

15. We maintain that a serious public interest would be put at risk by publishing these videos. For example, as noted in Commission counsel’s submissions, the British Columbia Supreme Court in *Capital City News Group Ltd. v. Her Majesty the Queen in Right of the Province of British Columbia* 2021 BCSC 479 acknowledged the spectre of internet abuse:

> 58 Evidence of direct harmful consequences to an individual for example can support a court-imposed restriction if there is "objectively discernable harm": *A.B. v. Bragg Communications Inc*, 2012 SCC 46 at para. 15. Absent scientific or empirical evidence of the necessity of restricting access, the court can find harm by applying reason and logic (at para. 16).
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> ….
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> 62 Finally, the ubiquitous nature of the internet can be considered. Once information is released it will remain accessible indefinitely anywhere, and can be manipulated and referenced out of context: *Hyde(Re)*,2009 NSPC 32 at paras.19,21,59,72–73; *Hyde (Re)*, 2009 NSPC 34 at paras. 22–26; *R. v. Panghali*, 2011 BCSC 422, at paras. 51–54.

To this we add that the factors enunciated in *Vickery v. Nova Scotia Supreme Court (Prothonotary),)* [1991] 1 S.C.R.SCR 671 (“*Vickery*”) continue to inform our analysis regarding access to and publication of exhibits. For example, in *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, the Court noted:

> 13. The analytical approach developed in [*Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835 and *R. v.*

Mentuck, 2001 SCC 76 ("*Dagenais/Mentuck*"] applies to all discretionary decisions that affect the openness of proceedings. In *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, Iacobucci and Arbour JJ. wrote the following:

> While the [*Dagenais/Mentuck*] 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. Discretion must be exercised in accordance with the *Charter*, whether it arises under the common law, as is the case with a publication ban (*Dagenais*, *supra; Mentuck, supra*); is authorized by statute, for example under s. 486(1) of the *Criminal Code* which allows the exclusion of the public from judicial proceedings in certain circumstances (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General),*[[1996] 3 S.C.R. 480] *supra*, at para. 69); or under rules of court, for example, a confidentiality order (*Sierra Club of Canada v. Canada (Minister of Finance*), [2002] 2 S.C.R. 522, 2002 SCC 41). The burden of displacing the general rule of openness lies on the party making the application: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 71. [para. 31]

(See also *Toronto Star Newspapers Ltd. v. Ontario,* 2005 SCC 41, [2005] 2 S.C.R. 188, at para. 7; *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253, at para. 35; *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721, at paras. 15-16; *R. v. Canadian Broadcasting Corporation*, [2010 ONCA 726] at para. 21).

14. Thus, there is no need to determine whether the facts in the case at bar are analogous to those in *Dagenais* or *Mentuck*. The findings that the activity in issue is protected by s. 2(b) of the *Charter* and that the order was within the discretion of Lévesque J. will suffice. The issue must accordingly be resolved by applying the test from *Dagenais* and *Mentuck*. Requiring the judge to apply this test does not mean that it is necessary to conduct a lengthy or elaborate review of the evidence, although all the relevant facts must be considered. Nor is there anything new about trial judges being responsible for establishing conditions for access to exhibits. Judges have always been required, in exercising their discretion, to balance factors that might seem to point in opposite directions. With this in mind, the factors listed in *Vickery* remain relevant, but they must be considered in light of the framework developed in *Dagenais* and *Mentuck*.

16. However, the fact that everyone with a direct interest to protect has been notified and no one has submitted evidence to oppose the application now suggests that the second *Sherman* criterion cannot be sustained.

17. We therefore accept Commission counsel's submission that this limitation on dissemination of the videos should now be lifted.

18. We further agree that the most efficient way to grant the relief sought is to have the Commission post these videos on its website. This would avoid having to release all accredited media from their undertakings and this process would also level the media playing field by making it available to media outlets who have not sought accreditation.

19. We therefore direct that the videos be made available on the Mass Casualty Commission website, via the hyperlinks in the *Enfield Big Stop* Foundational Document to the relevant "COMM numbers". We further direct that the videos be posted with a warning as to the nature of their content.

20. We agree with Commission counsel that a less formal process should be in place, should limitations be required on any future exhibits. We endorse the following process proposed by Commission counsel and direct that:

    1. The Commissioners provide brief reasons on the cover of each summary going forward, as to why a summary and not the exhibit is being made available to the public, and stating that the exhibit itself is available for public viewing by emailing the Registrar at Darlene.Sutherland@masscasualtycommission.ca;
    2. Commission staff conduct an audit to ensure that any public exhibits that have been summarized and were not already made available to the media via *Titan File* are made available, albeit subject to the Confidentiality Undertaking; and
    3. Any challenges to discretionary decisions to summarize exhibits be dealt with in the same manner as was this one: by first writing to Commission counsel and if no resolution is possible, then by bringing an Application before the Commissioners.

21. We urge the public to bear in mind that every time the photographs and videos associated with the mass casualty are discussed or reported upon in a public forum, the people depicted, and their families, are affected, and for some it is retraumatizing.