Case Name:

Canadian Broadcasting Corp. v. Manitoba (Attorney General)

Between
Canadian Broadcasting Corporation, (Applicant) Appellant, and
Attorney General for Manitoba and Provincial Judge John Guy, (Respondents) Respondents

[2008] M.J. No. 286

2008 MBCA 94

[2008] 10 W.W.R. 19

58 C.P.C. (6th) 5

296 D.L.R. (4th) 724

228 Man.R. (2d) 312

2008 CarswellMan 426

168 A.C.W.S. (3d) 94

Docket: AI08-30-06855

Manitoba Court of Appeal

R.J. Scott C.J.M., B.M. Hamilton and R.J.F. Chartier JJ.A.

Heard: May 29, 2008.
Judgment: July 25, 2008.

(44 paras.)

Government law -- Access to information and privacy -- Access to information -- Legislation -- Provincial and territorial -- Right to information -- Inspection of public documents -- Bars and grounds for refusal -- Confidential information -- Appeal by the Canadian Broadcasting Corporation from a decision dismissing its motion for access to certain records of Child and Family Services Agency dismissed -- Records were produced during inquest into death of 14 year-old girl who had been in care of the Child and Family Services Agency -- Section 76(3) of the Child and Family Services Act provided that all records made under the Act were confidential -- Disclosure was prohibited subject to certain statutory exceptions -- Inquest judge did not

err in the exercise of his judicial discretion in concluding that access for publication purposes should be denied.

Appeal by the Canadian Broadcasting Corporation from a decision dismissing its motion for access to certain records of Child and Family Services Agency. The Chief Medical Examiner called an inquest into the of a 14 year-old child in care who committed suicide by hanging. The child had been a permanent ward of Southwest CFS for some time prior to death. Exhibits were filed at the inquest, including records of Southwest CFS, together with a report provided by the Chief Medical Examiner to the Minister, as required by s. 10 of the Fatality Inquiries Act. Section 76(3) of the Child and Family Services Act provided that all records made under the Act were confidential, and prohibited disclosure or communication of the contents of the record subject to certain statutory exceptions. The appellant's motion for access to the CFS's records, together with the s. 10 report, was dismissed.

HELD: Appeal dismissed. The inquest judge did not err in the exercise of his judicial discretion in concluding that access for publication purposes should be denied in the particular circumstances of the proceedings before him. The inquest judge carefully weighed and balanced the competing constitutional and common law imperatives. He concluded that the public would not suffer from lack of information with respect to the s. 10 report. He did not err in principle in so holding.

Statutes, Regulations and Rules Cited:

Child and Family Services Act, C.C.S.M. c. C80, s. 76(3)

Fatality Inquiries Act, C.C.S.M. c. F52, s. 9(2), s. 10

Appeal From:

Appeal from 2007 MBQB 278, 221 Man. R. (2d) 269.

Counsel:

R.L. Tapper, Q.C. *for the Appellant*.

C.A. Devine *for the Respondents*.

I.D. Frost and ***S.D. Boyd*** *for the Intervener The Government of Manitoba (Department of Family Services*.

K.M. Saxberg *for the Intervener First Nations of Southern Manitoba Child and Family Services Authority*.

J.F. Harris *and* ***L.D. LaBossiere*** *for the Intervener Southeast Child and Family Services*.

[Editor's note: An erratum was released by the Court September 18, 2008; the erratum is appended to this document.]

The judgment of the Court was delivered by

1 R.J. SCOTT C.J.M.:-- The important issue on this appeal concerns the confidentiality that attaches to statutorily protected records of Child and Family Services (CFS) Agency, as well as a report prepared by the Chief Medical Examiner for the responsible minister, when they became exhibits at an inquest into the death of a child who had been in the care of a CFS Agency.

Introduction

2 As mandated by *The Fatality Inquiries Act*, C.C.S.M., c. F52 (the *FIA*), the Chief Medical Examiner called an inquest into the death of a 14-year-old child in care who committed suicide by hanging. The child

had been a permanent ward of Southeast CFS for some time prior to her death.

3 Extensive evidence was presented and exhibits filed at the inquest, including records of Southeast CFS, together with the report provided by the Chief Medical Examiner to the minister as required by sec. 10 of the *FIA*. Section 10 obliges the Chief Medical Examiner, after reviewing the records and actions of CFS, to assess the quality or standard of care of the service provided by CFS and to make a written report to the minister (the sec. 10 report).

4 Section 76(3) of *The Child and Family Services Act*, C.C.S.M., c. C80 (the *Act*), provides that all records made under the *Act* are confidential, and prohibits disclosure or communication of the contents of the record, subject to certain statutory exceptions to be reviewed later in these reasons. The effect of sec. 10(4) of the *FIA* is to incorporate the confidentiality bestowed by sec. 76(3) of the *Act* to the sec. 10 report.

5 The appellant, Canadian Broadcasting Corporation (CBC), moved before the Provincial Court judge conducting the inquest for access to certain records of CFS, together with the sec. 10 report. CBC's application was dismissed, with extensive written reasons being provided.

6 In reviewing the relevant provisions of the *Act* and the *FIA*, the inquest judge noted (at paras. 12-13):

> All of the sections try to put forward a balanced approach to receiving information normally considered confidential in order to fulfill the purposes of an inquiry without causing undue harm or prejudice.
>
> In other words an inquest open to the public with conditions attached to the material submitted rather than an in camera inquest with a report to follow.

7 He acknowledged the role the media plays in our modern society (at para. 17):

> ... [O]ne of the main goals of the inquiry is to bring to light any valid deficiencies surrounding the death in order to correct such deficiencies to prevent reoccurrence. Obviously the media has a very important role to play in this goal and preventing access may inhibit their role in this regard. ...

8 He endeavoured in the exercise of his discretion to "reach a balance in light of the nature of proceedings and of the subject-matters" (at para. 14); that is to say, the inherently public nature of an *FIA* inquiry on the one hand, and the importance of confidentiality of CFS records and the sec. 10 report on the other. He concluded (at para. 36):

> ... The social value of affording confidentiality with respect to Child and Family Services documentation is of superordinate importance to society that justifies curtailment of public accessibility.

Therefore (at para. 45):

> ... [T]he balance must be struck in favour of denial of access with respect to [the exhibits in question] which exhibits contain the material provided with understanding of and reliance upon confidentiality.

9 While he did not specifically refer to the Supreme Court of Canada's seminal decision in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, concerning publication bans, the balancing process that he undertook essentially utilized the same test and analysis to determine the CBC's request for access. The *Dagenais/Mentuck* (*R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442) approach, as it is now called, is more fully described in para. 26.

10 The CBC then brought a motion for *certiorari* in the Court of Queen's Bench to have the inquest judge's decision overturned, following the path recommended by the Supreme Court in *Dagenais*. The CBC's application was dismissed.

11 The motions court judge rejected the CBC's argument that once the documents in question were filed as exhibits at the inquest, confidentiality was lost. He concluded that the order of the inquest judge denying access to the exhibits was not a discretionary one "such as that dealt with in **Dagenais**" because "confidentiality of those records and the prohibition against disclosure were mandated by statute" (at para. 25).

12 In the result, he held the inquest judge had no option but to deny access to the CFS Agency's records or the sec. 10 report.

13 Finally, relying upon his interpretation of the definition of "court" in the *Act*, he found that jurisdiction to make an order under sec. 76(3) of the *Act* rested exclusively with the Court of Queen's Bench, Family Division.

14 CBC now appeals to this court.

The Statutory Context of the Inquest

15 Section 9(2) of the *FIA* mandates that a medical examiner or investigator investigate, *inter alia*, when the death of a child "might be" the result of suicide. For this purpose, the medical examiner has access to all CFS records. As we have seen, in such circumstances, the Chief Medical Examiner is required to prepare a sec. 10 report for the minister.

16 Inquests are *prima facie* open to the public, but upon application, an inquest judge may order that all or part of an inquest be conducted in camera if testimony or "other evidence to be introduced" might involve "public security," unjustifiable damage to professional reputations or "the privacy of a person would be unreasonably breached" (the *FIA,* secs. 31(1) and (2)). No appeal may be taken from such an order.

17 Part VI of the *Act* expressly addresses confidentiality. Section 75 of the *Act* deals with proceedings under the *Act* and sec. 76 with access to CFS records. Child protection proceedings, while generally closed to the public, are open to the media unless the court is satisfied that their presence would be "manifestly harmful to any person involved in the proceedings" (sec. 75(1)). But in any event, sec. 75(2) provides:

> **Reporting not to identify persons involved**
>
> **75(2)** No press, radio or television report of a proceeding under Part II, III or V shall disclose the name of any person involved in the proceedings as a party or a witness or disclose any information likely to identify any such person.

18 For the purposes of sec. 76 of the *Act*, "access" gives a right to examine and obtain a copy of the record (sec. 76(1)). "Record" is defined very widely in the *Act*.

19 Section 76(3) of the *Act* makes records created by virtue of the *Act* confidential, subject to certain exceptions. The relevant provisions of sec. 76(3) are:

> **Records are confidential**
>
> **76(3)** Subject to this section, a record made under this Act is confidential and no person shall disclose or communicate information from the record in any form to any person except
>
> (a) where giving evidence in court; or
> (b) by order of a court; or

(d.1) to the children's advocate; or
(d.2) where the disclosure is by the children's advocate under section 8.10; or

...

20 "Court" is defined in the *Act* as follows:

> **"court"** means the Court of Queen's Bench of Manitoba (Family Division) or the Provincial Court (Family Division) in Part II, Part III other than in clauses 19(4)(a) and (a.1) and subsections 19(6) and (7), Part VI other than subsection 75(1.1), clauses 76(3)(a) and (b), 76(12)(a), 76(14)(a), and subsection 76(21), and in Part VII; and the Court of Queen's Bench of Manitoba (Family Division) in Part V.

21 The inquest judge relied on sec. 76(3) of the *Act* as the basis of his jurisdiction to consider and ultimately reject the CBC's request for access to the CFS documents and the sec. 10 report.

Submission of the CBC

22 The CBC submits, as do all counsel, that the motions court judge erred in his conclusion that the inquest judge was without jurisdiction and that only a judge of the Family Division of the Court of Queen's Bench possessed the authority to deal with the CBC's application for access. Relying on *The Interpretation Act*, C.C.S.M., c. I80, and the modern principled approach to statutory interpretation (see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, and *Dupuis v. Manitoba Public Insurance Corp. et al.*, 2007 MBCA 53, 214 Man.R. (2d) 126), the CBC argues that the interpretation placed upon the definition of "court" in the *Act* by the motions court judge leads to a highly impractical, if not absurd, result. It would deprive the inquest judge of the ability to determine whether access should be given to an exhibit filed at an inquest, while retaining the statutory authority to determine whether any part of the proceedings should be held in camera.

23 Section 33(3) of the *FIA* states that a Provincial Court judge may "order exhibits tendered at an inquest to be disposed of in such manner as the provincial judge considers appropriate" [emphasis added]. CBC argues that this gives the presiding inquest judge a judicial discretion to, in effect, waive confidentiality. I will deal with this issue now. Examination of the section in light of its wording, context and purpose makes it clear that it refers to a completely separate issue, namely, the disposal of documents produced at an inquest once the inquest has been completed. It is of no relevance to the issue before us.

24 The CBC submits that the motions court judge was wrong when he concluded that the issue respecting access was not discretionary in nature. The CBC argues the inquest judge made four errors in the exercise of his discretion. Firstly, he assumed that in every instance the parents of children in the care of CFS Agencies would want all details to remain private. Secondly, he erred in determining the "balance" under sec. 76(3)(b) of the *Act* and failed to give adequate weight to the heavy burden on a party who wishes to maintain confidentiality once the records have been filed in court. Thirdly, the inquest judge failed to appreciate the distinction between a trial and an inquest; and lastly, if he was so concerned about confidentiality, he ought to have conducted the proceedings with respect to those documents in camera as permitted by the *FIA*.

25 The sum total of these errors, the CBC argues, is that the inquest judge failed to perform a proper *Dagenais*/*Mentuck* analysis and to give proper weight to the fact that the documents were already in the public realm and accessible by the media by virtue of the operation of secs. 75 and 76 of the *Act*.

26 The *Dagenais/Mentuck* test is conveniently summarized in *B. (K.) (Litigation Guardian of) v. Toronto District School Board* (2006), 81 O.R. (3d) 56 (S.C.J.) (at paras. 34-35):

> The Supreme Court of Canada in two decisions, *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, [1994] S.C.J. No. 104 and *R. v. Mentuck*, [2001] 3 S.C.R. 442, [2001] S.C.J. No. 73 (at para. 32), established a two-pronged test to be satisfied by a party seeking to limit the principle of open courts:

> (a) that 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) that 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 to the administration of justice.
>
> While the test arose in the context of publication ban applications, it has been extended to apply to all discretionary orders that seek to limit freedom of the press during judicial proceedings: *Vancouver Sun (The)*, [2004] 2 S.C.R. 332, [2004] S.C.J. No. 41, at para. 31.
>
> The first prong of the *Dagenais/Mentuck* test requires that the moving party show not only that the order limiting openness is necessary to prevent a serious risk to the administration of justice, but also proof that the order sought is as narrowly circumscribed as possible and there are no other effective means available to achieve that objective. ...

27 *B. (K.) (Litigation Guardian of)* and *Pham Estate, Re*, 2004 ABPC 24, 45 C.P.C. (5th) 111, are cited by the CBC as examples where courts have concluded, applying the *Dagenais/Mentuck* test, that once information becomes part of the public record, it is subject to "the common law and the constitutional principle of open courts" (*B. (K.) (Litigation Guardian of)*, at para. 36). When the "confidential documents" were made public exhibits at the inquest, the court was therefore obliged, CBC argues, to apply the *Dagenais/Mentuck* two-pronged test to determine whether or not the information contained in the records should remain confidential and, if so, to craft as narrow a limit to disclosure as possible in the circumstances. This, the CBC says, the inquest judge did not do. Freedom of expression, we were reminded, is one of the most important rights in our democratic society, *per* Cory J. in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326. Indeed, counsel says the important role played by the media to inform the public about the operation of the courts should operate "much as a trump card."

Submission of the Attorney General

28 The Attorney General agrees with the CBC that the motions court judge erred when he held that the inquest judge had no authority to deal with a request for access.

29 The Attorney General submits that sec. 76(3) of the *Act* is not a statutory publication ban. Indeed, there is no express prohibition on media access to CFS records tendered at an inquest. The inquest was not a trial, but an open, public examination of the causes of the young girl's suicide with preventative steps being (hopefully) recommended for the future. It is for this reason that an inquest judge is specifically permitted to refer to information from CFS records in the inquest report if he or she is of the opinion it is necessary in the public interest, even if adduced in camera. As it happened, at this inquest all evidence was tendered in public.

30 The Attorney General argues that there is a discretion for the inquest judge to make an order for media access to such "confidential" records, as we are dealing with here, using the *Dagenais/Mentuck* test in the context of sec. 76(3)(b) of the *Act*. The *Dagenais/Mentuck* test must be flexible to accommodate the different interests at play at an inquest such as this. Whenever access is an issue, the public interest and confidence in the administration of the child protection regime in place in Manitoba under the *Act* must be delicately balanced with the public's right to know why a child in care committed suicide. This is an inquest into the death of a child, not a trial where rights are in issue and "fault" may need to be determined. Therefore, one must start with the "context" that the documents sought to be disclosed to the media are statutorily protected child protection records. The Attorney General refers to three cases in support. See *CTV Television Inc. v. R. et al.*, 2006 MBCA 132, 208 Man. R. (2d) 244 at paras. 23-28, for a discussion of the development of the

Dagenais/Mentuck test which attempts to "balance both the right to a fair trial and the right to freedom of expression rather than enshrining one at the expense of the other" (at para. 23). See as well, *Histed v. Law Society of Manitoba*, 2005 MBCA 106, 195 Man. R. (2d) 224. Freedom of expression does not "trump other rights." See *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 (at para. 72):

> ... Although freedom of expression is undoubtedly a fundamental value, there are other fundamental values that are also deserving of protection and consideration by the courts. When these values come into conflict, as they often do, it is necessary for the courts to make choices based not upon an abstract, platonic analysis, but upon a concrete weighing of the relative significance of each of the relevant values in our community in the specific context. ...

31 In this instance, given the high degree of privacy and confidentiality in the CFS records and the report of the medical examiner under sec. 10 of the *FIA*, there is an elevated expectation of privacy. This distinguishes the circumstances here from the authorities of *Pham Estate* and *B. (K.) (Litigation Guardian of)* relied on by the CBC. While the statutory right to confidentiality is attenuated to some extent given the public interest in the child's death and the purpose of an inquest, it is wrong to say that confidentiality was automatically lost once the documents became exhibits at the inquest. While freedom of the press should be given a very high level of protection, preservation of the efficacy of the child protection system is of at least equal importance. This likely explains why no reported decision has been found where a court has granted media access to exhibits that were protected by statutory confidentiality.

32 As noted earlier, all interveners supported the submissions of the CBC and the Attorney General that the motions court judge had erred in concluding that only the Family Division of the Court of Queen's Bench had jurisdiction to order access to documents pursuant to sec. 76 of the *Act* or at common law. The intervener Southeast CFS argued that there should be a complete prohibition against the production of CFS-generated records or the sec. 10 report, noting that the CBC would have been denied access to the documents under *The Freedom of Information and Protection of Privacy Act*, C.C.S.M., c. F175. The other interveners supported the arguments of the CBC and the Attorney General that the inquest judge did possess a judicial discretion to be exercised through a *Dagenais/Mentuck* type of analysis.

Decision

The Definition of "Court" in Section 76(3) of the *Act*

33 In my opinion, the motions court judge erred when he concluded that the definition of "court" in the above section referred exclusively to the Court of Queen's Bench, Family Division. His interpretation comports neither with the wording of the section considered in light of its purpose and context, nor when it is considered with the intra-relationship of the *Act* and the *FIA* in mind. Practical difficulties abound. It has already been noted how impractical it would be if an inquest judge could close the proceedings to the public because of concerns about privacy and confidentiality, but did not possess the authority to determine a request by the media for access (effectively permission to communicate) during the same hearing. Applying the modern principled approach to statutory interpretation (see *Rizzo & Rizzo Shoes*, at para. 21), I have no difficulty in concluding that "court" in the *Act* includes a judge of the Provincial Court, whether conducting an inquest or a trial.

The Scope and Reach of Section 76(3)(b)

34 As we have seen, sec. 75 entitles the media, as representative of the public, to be present during court proceedings involving child protection matters, subject to the limitations already reviewed concerning manifest harm to or identification of anyone participating in the proceeding, but there is a clear prohibition against disclosing or communicating "information from the record in any form to any person" in any circumstance except as permitted by sec. 76(3).

35 It can be seen that the *Act* and the *FIA* in combination ensure that a significant amount of information is available to the media, while at the same time leaving it to the court to determine access to the records

themselves. For example, should cross-examination take place with respect to the contents of a particular document, the media, subject to court order, are in a position to publish such details so long as the identity of the person is not disclosed. Similarly, if reference is made to the documents in the inquest report, these references too are in the public realm.

36 I agree with the position taken by the Attorney General and all other parties except the intervener Southeast CFS that for the regime under the *Act* to pass constitutional muster, the court must possess the discretion to perform a *Dagenais/Mentuck* balancing analysis when the request is made by the media for access to documents. It is overly simplistic, and wrong, to say that the mere fact that a CFS record is filed as an exhibit at an inquest means that it is in the public realm. I endorse the Attorney General's description of these interests as:

> ... [G]enerally the public interest in freedom of the press and open court principle (adapted for the context of an inquest), the privacy and dignity of the child and her family, and the public interest in maintaining confidence in child protection agencies by ensuring that records are kept confidential.

37 I agree, too, with the submission of counsel for the Government of Manitoba that sec. 76(3) is not, by itself, freestanding enabling legislation. It simply vests the court that the particular matter is before - in this case the inquest judge - with the ability to deal with requests for access beyond that which is already provided in secs. 75 and 76 of the *Act*. Applications for access where there are no court proceedings can be made to the Court of Queen's Bench. But whichever court is engaged in a sec. 76(3) analysis under the *Act*, the process and criteria to be applied are precisely those set forth by the Supreme Court in *Dagenais/Mentuck*. And see *Toronto Star Newspapers Ltd. v. Ontario,* 2005 SCC 41, [2005] 2 S.C.R. 188 at paras. 7-8, where Fish J., for the court, emphasized that the *Dagenais/Mentuck* test was meant to be applied in a "flexible and contextual manner."

38 As the Supreme Court noted in *Dagenais* itself, "publication bans should not always be seen as a clash between two titans - freedom of expression for the media versus the right to a fair trial for the accused" (at p. 881); rather, it is a question of determining firstly whether a ban of some sort is necessary to guard the fairness of the trial and, if so, to strike the right balance "between the salutary and deleterious effects of a publication ban" (at p. 884), keeping in mind that there should be as minimal an interference as possible with the public's right to know what is going on in their courts.

39 In other words, in this instance, the benefit of not permitting disclosure or communication of information under sec. 76(3) of the *Act* or of imposing a protective order at common law must outweigh the potential negative impact on public access to the courts.

40 This is precisely the process that was followed in *L. (F.E.) (Re)*, 2008 ABQB 10, 289 D.L.R. (4th) 555. Interestingly, Veit J., dealing with legislation similar to sec. 76(3) of the *Act*, concluded that the legislators did not intend an outright publication ban as found by the motions court judge in this instance. Rather (at para. 6):

> ... [O]n an individual basis, the Court must weigh the constitutional right to free expression, which includes a constitutional right for the public to open courts, against the disclosure of confidential information, especially in a situation where the individual whose information it is wishes to have it disclosed.

I agree with this observation.

41 In my opinion, the inquest judge did not err in the exercise of his judicial discretion in concluding that access for publication purposes should be denied in the particular circumstances of the proceedings before him. His reasoning does not suffer from any of the alleged defects asserted by the CBC.

42 While the inquest judge did not specifically refer to the *Dagenais/Mentuck* analysis, it is clear from reading his extensive reasons that this is precisely the exercise that he undertook. He carefully weighed and balanced the competing constitutional and common law imperatives. He noted that the sec. 10 report had

been given a "full and fair public hearing" and "[t]here was, in my view, a full, frank and candid review of the report. The public will not suffer from lack of information with respect to that report" (at para. 44). He concluded that in considering "the effect of that legislation if the confidential material is provided to Court as an exhibit within the legislative framework of the *Fatality Inquiries Act*" (at para. 45), the balance favoured denial of access with respect to the exhibits in question because (at paras. 46-47):

> To hold otherwise would destroy the safeguards in providing such information where such confidentiality is essential. The legislation was meant to provide this protection.
>
> Secondly, in my view, allowing access because the confidential material was contained in exhibits used in the *Fatality Inquiries Act* hearing would destroy a social value of superordinate importance - confidentiality of disclosure used to assist child and family in abusive and neglectful situations.

43 In my opinion, he did not err in principle in so holding.

44 The appeal is accordingly dismissed with costs to the Attorney General and to the interveners.

R.J. SCOTT C.J.M.
B.M. HAMILTON J.A.:-- I agree.
R.J.F. CHARTIER J.A.:-- I agree.

* * * * *

ERRATUM

Released: September 18, 2008.

With respect to the above-noted appeal, the reasons for decision released on July 25, 2008, are altered to eliminate any order of costs in favour of the interveners. In all other respects, the reasons will remain as originally delivered.

cp/e/qlttm/qlclg/qlbrl/qlbxm/qlrxg/qlbrl