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Open Court Principle: ABCA Agrees with Less than Full Disclosure in Some Circumstances

By: Jay Moch

Case Commented On: *Aboriginal Peoples Television Network v Alberta (Attorney General)*, [2018 ABCA 133 \(CanLII\) \(APTN\)](#)

In 2011, Casey Armstrong was stabbed to death, leading to the arrest of Wendy Scott and Connie Oakes, a Cree woman. Scott pled guilty to the second-degree murder charge, while Oakes decided to undergo a jury trial, which led to her eventual conviction (*APTN*, at para 4). During Oakes' trial, Scott acted as a key witness for the Crown. On cross-examination, Scott was questioned about three videotaped statements she had made to the police following her arrest. To highlight the inconsistencies between Scott's in-court testimony and the police statements, specific small portions of the videotapes were played to the jury and judge. Although only parts of the tapes were shown, the trial judge marked the videos collectively as "Exhibit F for identification" (*APTN*, at para 5).

Following Oakes' murder trial, the Aboriginal Peoples Television Network (*APTN*) applied for access to Exhibit F under the open court principle (*APTN*, at para 7). The open court principle is fundamental for the administration of justice as it allows the public the ability to gain insight into the judicial system; it increases transparency and the integrity of the courts by allowing the public and media open access (*APTN*, at para 13). In the end, Madam Justice E. A. Hughes granted partial disclosure of the tapes for the portions that were shown in court but decided that the open court principle did not apply to the entirety of Exhibit F. She noted that the jury had only seen brief excerpts from the videos. She also pointed out that cross-examination of a witness using a prior inconsistent statement did not make the statement admissible in evidence and held that the full statements (contained on two DVDs) were not admissible (*APTN*, para 8). (Justice Hughes' Order on the matter of disclosure was unreported.) *APTN* is an appeal to the Alberta Court of Appeal (ABCA) of the 2015 Order in which *APTN* sought full disclosure.

APTN argued four grounds of appeal in its application:

- 1 the chambers judge failed to recognize and apply the open court principle to the request for Exhibit F;
- 2 the chambers judge failed to apply the test governing publication restrictions properly;
- 3 the chambers judge subjected the request to irrelevant considerations and restrictions, namely, the admissibility of Exhibit F; and

- 4 the chambers judge erred in failing to order the release of Exhibit F in its entirety (*APTN*, at para 9).

Ultimately, the main issue before the ABCA was whether the open court principle applies to all of Exhibit F or if it only applies to the portions that were used during cross-examination. To address these grounds, Justices McDonald, Veldhuis and Greckol answered a series of questions using the correctness standard of review (*APTN*, at para 12).

In her decision, Justice Hughes had noted that the video statements themselves were not admissible since they were only utilized for cross-examination of a witness's prior inconsistent statement (*APTN*, at para 8). Due to this, the reports were never admitted as evidence; they were merely used as a tool to impeach the credibility of Scott. Typically, the inadmissibility of statements results in them not being marked as exhibits, but in this case, they had been. This prompted *APTN* to claim that the videos became subject to the open court principle since exhibits are corollary (i.e., they are supportive of the public's right to disclosure). However, Justice Hughes made it clear that, even if marked as exhibits, any out-of-court statements that are not adopted are not considered for the truth of their contents, and instead, are used only to evaluate the witness's reliability and credibility. So, although the videos were admitted as exhibits for identification they had not been accepted as evidence (*APTN*, at paras 20, 21). Further, the court mentioned that the main reasons the videos were admitted in their entirety were for practical purposes—not because they were admissible as evidence (*APTN*, at para 29).

The ABCA noted that this does little to answer the question as to whether the open court principle applies, since the admissibility or inadmissibility of evidence is not the sole indicator as to whether it can be shared with the public. There is a list of additional factors that need to be considered, such as:

- the nature of the exhibit,
- whether anyone has a proprietary interest in the exhibit,
- how the exhibit will be used by the party seeking access, and
- whether the underlying proceedings are concluded (*APTN*, at para 27).

In addition, when exercising a discretionary power to consider whether an exhibit should be released to the public in accordance with the open court principle, courts generally apply the “*Dagenais/Mentuck*” test. This was described as (*APTN*, at para 15):

A trial judge considers whether:

- (a) a limitation on the public's ability to access the exhibit 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 limitation on the public's ability to access the exhibit outweigh the deleterious effects on the rights and interests of the parties and the public,

including the effects on freedom of expression, the accused's right to a fair and public trial, and the efficacy of the administration of justice [citations omitted]

Justice Hughes held that because of the limited use of the videos, the open court principle did not apply. Due to this, she ruled that the *Dagenais/Mentuck* test need not be utilized (*APTN*, at para 8). The ABCA seemed to agree with Justice Hughes' analysis, holding that allowing the public to view the entirety of the videos did not advance the goals of the open court principle. Ensuring the public is well informed about court proceedings is undeniably important, but there is a limit. The videos were never considered by the trier of fact or law, and the unused portions did not influence the judge or jury's decision. Showing them would not accurately explain to the public the court's behaviour (*APTN*, at para 36 and 38). The ABCA's decision turns on how the videos were, or in this case, were not, used. If the videos were reviewed or considered by the trier of fact or law, then they would be part of the court record and subject to the open court principle (*APTN*, at para 47). The ABCA held that since they were only utilized to assess witness credibility, Justice Hughes had not erred when determining that the *Dagenais/Mentuck* balancing test was not necessary (*APTN*, at para 46).

The ABCA held that in the limited circumstances where an entire exhibit is marked but not used, although the open court principle does not apply, a judge can use discretion to allow the public access. A judge would consider similar factors as in *Dagenais/Mentuck* (above). In light of the evidence presented, the ABCA decided that Justice Hughes' decision to continue to prohibit disclosure was reasonable and correct (*APTN*, at para 50). Thus, *APTN*'s appeal was dismissed.

The open court principle is vital to the administration of justice, as it ensures transparency, accountability, and integrity of the courts. However, even with the principle's importance, open access to the courts is not a free-standing right (*APTN*, at para 43). In certain circumstances, judges have discretion and can elect not to apply the *Dagenais/Mentuck* test. In *APTN* the central issue before the court was whether the open court principle applied to all of Exhibit F, or if it only applied to the portions that were used during cross-examination. This central issue of law questions which aspects of a legal case the public is truly permitted to access as well as how much discretion a judge can use when applying the open court principle. Although many factors were considered—such as the admissibility of evidence used for questioning a prior inconsistent statement and why Exhibit F was marked in its entirety instead of just the portions used—the driving force behind the court's decision came from examining how the evidence was utilized. Since the exhibit was not considered by the trier of fact or law, and only small portions were used, subjecting the entire exhibit to the *Dagenais/Mentuck* test was unnecessary. Overall, the court decided that, although *APTN* had a legitimate interest in reporting the trial, prohibiting access to Exhibit F did not unjustly diminish their reporting ability, nor did it hinder the goals of the open court principle.

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