SCC File No. 37769

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

BETWEEN:

BRADLEY DAVID BARTON

APPELLANT
(Appellant)

-AND-

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

-AND-

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS, ABORIGINAL LEGAL SERVICES, ASSEMBLY OF FIRST NATIONS, WOMEN OF THE MÉTIS NATION/LES FEMMES MICHIF OTIPEMISIWAK, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, CRIMINAL TRIAL LAWYERS' ASSOCIATION (ALBERTA), CRIMINAL LAWYERS' ASSOCIATION, INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY, AD IDEM/CANADIAN MEDIA LAWYERS' ASSOCIATION, INSTITUTE FOR THE ADVANCEMENT OF ABORIGINAL WOMEN AND WOMEN'S LEGAL EDUCATION AND ACTION FUND INC. (JOINTLY), THE NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS, AND THE VANCOUVER RAPE RELIEF SOCIETY, LA CONCERTATION DES LUTTES CONTRE L'EXPLOITATION SEXUELLE, ASIAN WOMEN FOR EQUALITY SOCIETY, ABORIGINAL WOMEN'S ACTION NETWORK, FORMERLY EXPLOITED VOICES NOW EDUCATING AND THE CENTRE TO END ALL SEXUAL EXPLOITATION (JOINTLY)

INTERVENERS

FACTUM OF THE INTERVENER,
AD IDEM/ CANADIAN MEDIA LAWYERS ASSOCIATION
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

CHRISTIAN LEBLANC
Fasken Martineau DuMoulin LLP
3700, 800 Victoria Square
Montreal, QC H4Z 1E9
T: 514-397-7545
F: 514-397-7600
E: cleblanc@fasken.com

SOPHIE ARSENEAULT
Fasken Martineau DuMoulin LLP
1300, 55 Metcalfe St
Ottawa, ON K1P 6L5
T: 613-236-3882
F: 613-230-6423
E: sarseneault@fasken.com

TESS LAYTON
Reynolds Mirth Richards & Farmer LLP
3200 Manulife Place
10180 – 101 Street
Edmonton, AB T5J 3W8
T: 780.425.9510
F: 780.429.3044
E: tlayton@rmrf.com

Counsel for the Intervener,
Ad IDEM/Canadian Media Lawyers Association

Agent for the Intervener,
Ad IDEM/Canadian Media Lawyers Association

ORIGINAL TO:

SUPREME COURT OF CANADA
The Registrar
301 Wellington St
Ottawa, ON K1A 0J1

COPIES TO:

DINO BOTTOS/ PETER SANKOFF
Bottos Law Group
4th Floor, 10226 104 St NW
Edmonton, AB T5J 1B8

T : 780- 421-7001
F: 780 421-7031
E: dbottos@depoebottos.ca
psankoff@ualberta.ca

Counsel for the Appellant

EUGENE MEEHAN, Q.C./MARIE-FRANCE MAJOR
Supreme Advocacy LLP
100, 340 Gilmour St
Ottawa, ON K2P 0R3

T: 613-695-8855
F: 613-695-8580
E: emeeehan@supremeadvocacy.ca
mfmajor@supremeadvocacy.ca

Ottawa Agents for Counsel for the Appellant

JOANNE B. DARTANA
Alberta Justice

D. LYNNE WATT
Gowling WLG (Canada) LLP

Appeals Branch
3rd Floor, 9833 109 St NW
Edmonton, AB T5K 2E3

T: 780-422-5402
F: 780-422-1106
E: joanne.dartana@gov.ab.ca

Counsel for the Respondent

2600, 160 Elgin St
Ottawa, ON K1P 1C3

T: 613-786-8695
F: 613-563-9869
E: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Respondent

CHRISTINE BARTLETT-HUGHES
BENITA WASSENAAR
JESSICA WOLFE
Attorney General of Ontario Crown Law Office - Criminal 10th Floor – 20 Bay Street
Toronto, Ontario M7A 2S9

T: (416) 326-2351
F: (416) 326-4656
E: christine.bartletthughes@ontario.ca

Counsel for the Intervener, Attorney General of Ontario

NADIA EFFENDI
Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, Ontario K1P 1J9

T: (613) 237-5160
F: (613) 230-8842
E: neffendi@blg.com

Agent for the Intervener, Attorney General of Ontario

RENÉE LAGIMODIÈRE
JENNIFER MANN
Attorney General of Manitoba 3
510 - 405 Broadway
Winnipeg, Manitoba R3C 3L6

T: (204) 945-5778
F: (204) 945-1260
E: renee.lagimodiere2@gov.mb.ca

Counsel for the Intervener, Attorney General of Manitoba

D. LYNNE WATT
Gowling WLG (Canada) LLP
160 Elgin Street Suite 2600
Ottawa, Ontario K1P 1C3

T: (613) 786-8695
F: (613) 788-3509
E: lynne.watt@gowlingwlg.com

Agent for the Intervener, Attorney General of Manitoba

ANDREJ SKOKO
Directeur des poursuites criminelles et

SANDRA BONANNO
Directeur des poursuites criminelles et

pénales du Québec Complexe Jules-Dallaire
2828, boulevard Laurier, Tour 1, bureau 500 Québec, Quebec G1V 0B9

T: (418) 643-9059 Ext: 21404
F: (418) 644-3428
E: andrej.skoko@dpcp.gouv.qc.ca

Counsel for the Intervener, Director of criminal and penal prosecutions

pénales du Québec
17, rue Laurier
bureau 1.230
Gatineau, Quebec J8X 4C1

T: (819) 776-8111 Ext: 60446
F: (819) 772-3986
E: sandra.bonanno@dpcp.gouv.qc.ca

Agent for the Intervener, Director of criminal and penal prosecutions

GWENDOLINE ALLISON JANINE BENEDET
Foy Allison Law Group
207 - 2438 Marine Drive
West Vancouver, British Columbia V7V 1L2

T: 604) 922-9282
F (604) 922-9283
E: wendoline.allison@foyallison.com

Counsel for the Intervener, Vancouver Rape Relief Society

ALBERTOS POLIZOGOPOULOS
Vincent Dagenais Gibson LLP
260 Dalhousie Street Suite 400
Ottawa, Ontario K1N 7E4

T: (613) 241-2701
F: (613) 241-2599
E: albertos@vdg.ca

Agent for the Intervener, Vancouver Rape ReliefSociety

GWENDOLINE ALLISON JANINE BENEDET
Foy Allison Law Group
207 - 2438 Marine Drive
West Vancouver, British Columbia V7V 1L2

T: 604) 922-9282
F (604) 922-9283
E: wendoline.allison@foyallison.com

Counsel for the Intervener, La Concertation des luttes contre l’exploitation sexuelle (La CLES), AWCEP Asian Women for Equality Society, Aboriginal Women's Action Network (AWAN), Formerly Exploited Voices Now Educating (EVE) and

ALBERTOS POLIZOGOPOULOS
Vincent Dagenais Gibson LLP
260 Dalhousie Street Suite 400
Ottawa, Ontario K1N 7E4

T: (613) 241-2701
F: (613) 241-2599
E: albertos@vdg.ca

Agent for the Intervener, La Concertation des luttes contre l’exploitation sexuelle (La CLES), AWCEP Asian Women for Equality Society, Aboriginal Women's Action Network (AWAN), Formerly Exploited Voices Now Educating (EVE) and CEASE: Centre to End All Sexual Exploitation (CEASE)

CEASE: Centre to End All Sexual Exploitation (CEASE)

STUART WUTTKE
JULIE MCGREGOR
Assembly of First Nations
55 Metcalfe Street, Suite 1600
Ottawa, Ontario K1P 6L5
T: (613) 241-6789 Ext: 228
F: (613) 241-5808
E: swuttke@afn.ca

Counsel for the Intervener, Assembly of First Nations

JEAN TEILLET
Jean Teillet Personal Law Corporation
861 East 11th Avenue
Vancouver, British Columbia V5T 3E7

T: (604) 787-3978
F: (416) 916-3726
E: jteillet@pstlaw.ca

Counsel for the Intervener, The Women of the Métis Nation / Les Femmes Michif Otipemisiwak

CHRISTA BIGCANOE
National Inquiry Missing and Murdered Indigenous Women and Girls
500 - 1138 Melville Street
Vancouver, British Columbia V6E 4S3
T: (416) 268-4133
F: (604) 775-5009
E: c.bigcanoe@mmiwg-ffada.ca

Counsel for the Intervener, National Inquiry into Missing and Murdered Indigenous Missing and Murdered Indigenous Women and Women and Girls
DANIEL J SONG
MATTHEW A. NATHANSON

MOIRA DILLON
Supreme Law Group
900 - 275 Slater Street
Ottawa, Ontario K1P 5H9
T: (613) 691-1224
F: (613) 691-1338
E: mdillon@supremelawgroup.ca

Agent for the Intervener, Assembly of First Nations

MICHAEL J. SOBKIN
331 Somerset Street West
Ottawa, Ontario K2P 0J8

T: (613) 282-1712
F: (613) 288-2896
E: msobkin@sympatico.ca

Agent for the Intervener, The Women of the Métis Nation / Les Femmes Michif Otipemisiwak

MEREDITH PORTER
National Inquiry Missing and Murdered Indigenous Women and Girls
300 - 222 Queen Street
Ottawa, Ontario K1P 5V9
T: (613) 222-5951
F (613) 943-5760
E: m.porter@mmiwg-ffada.ca

Agent for the Intervener, National Inquiry into Missing and Murdered Indigenous Women and Girls

MOIRA DILLON
Supreme Law Group
900 - 275 Slater Street

Sprake Song & Konye
1720 - 355 Burrard Street
Vancouver, British Columbia V6C 2G8

T: (604) 669-7447
F: (604) 687-7089
E: djsong@sprakesongkonye.com

Counsel for the Intervener, Independent Criminal Defence Advocacy Society

MEGAN SAVARD
SAMARA SECTER
Addario Law Group
171 John Street, Suite 101
Toronto, Ontario M5T 1X3

T: (416) 979-6446
F: (866) 714-1196
E: msavard@addario.ca

Counsel for the Intervener, Criminal Lawyers' Association of Ontario

LISA WEBER
SHAUN O'BRIEN
Weber Law
10209-97 Street Suite 300
Edmonton, Alberta T5J 0L6

T: (780) 758-6365
F: (780) 429-2615
E: lisa@weberlaw.ca

Counsel for the Intervener, Institute for the Advancement of Aboriginal Women

LISA WEBER
SHAUN O'BRIEN
Ottawa, Ontario K1P 5H9

T: (613) 691-1224
F: (613) 691-1338
E: mdillon@supremelawgroup.ca

Agent for the Intervener, Independent Criminal Defence Advocacy Society

COLLEEN BAUMAN
Goldblatt Partners LLP
500-30 Metcalfe St.
Ottawa, Ontario K1P 5L4

T: (613) 482-2463
F: (613) 235-3041
E: cbauman@goldblattpartners.com

Agent for the Intervener, Criminal Lawyers' Association of Ontario

NADIA EFFENDI
Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, Ontario K1P 1J9

T: (613) 237-5160
F: (613) 230-8842
E: neffendi@blg.com

Agent for the Intervener, Institute for the Advancement of Aboriginal Women

NADIA EFFENDI
Borden Ladner Gervais LLP

Weber Law
10209-97 Street Suite 300
Edmonton, Alberta T5J 0L6

T: (780) 758-6365
F: (780) 429-2615
E: lisa@weberlaw.ca

Counsel for the Intervener, Institute for the Advancement of Aboriginal Women

World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, Ontario K1P 1J9

T: (613) 237-5160
F: (613) 230-8842
E: neffendi@blg.com

Agent for the Intervener, Women's Legal Education and Action Fund Inc.

CHERYL MILNE
University of Toronto
39 Queen's Park Cres. East
Toronto, Ontario M5S 2C3
T: (416) 978-0092
F: (416) 978-8894
E: cheryl.milne@utoronto.ca

Counsel for the Intervener, David Asper Centre for Constitutional Rights

MATTHEW J. HALPIN
Norton Rose Fulbright Canada LLP
45 O'Connor Street, Suite 1500
Ottawa, Ontario K1P 1A4
T: (613) 780-8654
F: (613) 230-5459
E: matthew.halpin@nortonrose fulbright.com

Agent for the Intervener, David Asper Centre for Constitutional Rights

EMILY HILL
JONATHAN RUDIN
Aboriginal Legal Services
211 Yonge Street, Suite 500
Toronto, OntarioM5B 1M4

T: (416) 408-4041 Ext: 224
F: (416) 408-1568
E: e hill@lao.on.ca

Counsel for the Intervener, Aboriginal Legal Services

NADIA EFFENDI
Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, Ontario K1P 1J9

T: (613) 237-5160
F: (613) 230-8842
E: neffendi@blg.com

Counsel for the Intervener, Aboriginal Legal Services

NATHAN J. WHITLING
ALONEISSI O'NEILL

MARIE-FRANCE MAJOR
Supreme Advocacy LLP

Hurley O'Keeffe Millsap
300 MacLean Block
10110 - 107 Street
Edmonton, Alberta T5J 1J4

T: (780) 421-4766
F: (780) 429-0346
E: whitling@libertylaw.ca

Counsel for the Intervener, Criminal Trial Lawyers' Association (Alberta)

100- 340 Gilmour Street
Ottawa, Ontario K2P 0R3

T: (613) 695-8855 Ext: 102
F: (613) 695-8580
E: mfmajor@supremeadvocacy.ca

Agent for the Intervener, Criminal Trial Lawyers' Association (Alberta)

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
2199 - 284 Wellington Street Ottawa, Ontario K1A 0H8
Per: Jeffrey G. Johnston

T: (613) 957-6281
F: (613) 957-8412
E: jeffrey.johnston@justice.gc.ca

Counsel for the Intervener, Attorney General of Canada

DEPUTY ATTORNEY GENERAL OF CANADA
50 O'Connor Street, 5th Floor, Room 556
Ottawa, Ontario K1P 6L2
Per: Robert Frater, Q.C.

T: (613) 670-6289
F: (613) 954-1920
E: robert.frater@justice.gc.ca

Agent for the Intervener, Attorney General of Canada

TABLE OF CONTENTS

I. OVERVIEW AND STATEMENT OF FACTS

1. This case illustrates how, in prohibiting access to appeal transcripts, the Alberta Court of Appeal ("ABCA") has effectively prevented meaningful discussion about important and controversial issues taking place in our justice system including the role of judges in deciding cases fairly and openly.

2. Canadian Media Lawyers Association/Ad IDEM ("CMLA") argues that the ABCA policy of prohibiting access to digital recording or transcripts of appeal proceedings established in *McDonald v Brookfield Asset Management Inc.*[1] and followed in this case, requires this Court's intervention. The presumption against access is inconsistent with freedom of expression protected by s 2(b) of the *Canadian Charter of Rights and Freedoms* and constitutionally-entrenched values of openness in judicial proceedings consistently endorsed by this Court.

3. Court policies must allow for the broadest possible access to court records at every level of court to give practical effect to the open court principle. Transparency, accessibility, and openness in Canada's court system are vital given the modern realities of limited public attendance in court. The media, as the eyes and ears of the public, have a duty to ensure that the public is informed about what goes on in the courts on a daily basis. Complete, accurate and accessible recordings of court proceedings can only serve to advance these important objectives.

4. Measures that restrict public and media access to any court record significantly limit constitutionally protected rights and are detrimental to Canada's democratic process. Therefore, any proposed limitation on complete openness of the court system must satisfy the requirements of the *Dagenais/Mentuck* test.[2]

A. Key Facts

5. CMLA relies on the facts as stated by the Appellant, however, certain facts bear emphasis.

6. A jury acquitted the Appellant of first-degree murder and the lesser included offence of manslaughter. The Crown appealed on the basis that the jury charge contained several significant

---

[1] *McDonald v Brookfield Asset Management Inc.*, 2016 ABCA 419.
[2] *R v Mentuck*, [2001] 3 SCR 442 at para 32, citing *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835 at 878.

errors requiring appellate intervention. The Crown's appeal was based, in part, on the transcript of the proceedings at trial. The ABCA allowed the Crown appeal and ordered a new trial.

7. Following the release of the ABCA's Reasons,[3] the Appellant's counsel, Mr. Bottos, applied for a transcript of the appeal proceedings.[4] He noted four areas of concern with the Reasons, generally relating to Mr. Bottos' recollection of the oral argument of the parties and the questions and comments from the appeal panel. Mr. Bottos argued that his submissions to the Court and the Court's response to those issues at the hearing were significantly different from how those submissions were depicted in the Reasons.

8. Mr. Bottos alleged, first, that the ABCA's reliance on erroneous concessions or omissions of counsel led to reviewable errors of law. Second, that the Court's inaccurate re-characterization of some of his oral submissions in the Reasons impugned his professional integrity as a Barrister and Solicitor. He advised the Court that he required a complete copy of the appeal hearing to illustrate those errors in his application for leave to appeal to this Court.

9. The Case Management Officer ("CMO") provided 14 pages of the transcript.[5] No reasons were provided regarding why the ABCA declined to provide the complete transcript.

10. After the Appellant was granted leave to appeal, Mr. Bottos renewed his application to the Chief Justice for a complete transcript on the basis that the transcript was integral to his argument on appeal.[6] Only then did the CMO respond with a complete transcript of the two-day appeal hearing, totaling 197 pages, without reasons for reversing its earlier decision.[7]

II. ISSUES

11. CMLA intervenes to make submissions to this Court concerning the importance of access to transcripts of appellate court proceedings. CMLA submits:

---

[3] *R v Barton*, 2017 ABCA 2016 [Reasons].
[4] Letter from Dino Bottos to Chief Justice Fraser (July 6, 2017) [Letter #1] [**AR, Vol III, Tab 18].**
[5] Letter from Bobbi Jo McDevitt, Case Management Officer (August 17, 2017) [Letter #2] **[AR, Vol III, Tab 19].**
[6] Letter from Dino Bottos to Chief Justice Fraser (April 19, 2018) [Letter #3] [**AR, Vol III, Tab 20**].
[7] Letter from Bobbi Jo McDevitt, Case Management Officer (April 24, 2018) [Letter #4] **[AR, Vol III, Tab 21].**

a) The open court principle applies to transcripts of appeal court proceedings, therefore, there is a presumptive right of access; and

b) The policy of the ABCA is inconsistent with the policies of other appeal courts.

III. ARGUMENT

A. The Open Court Principle Requires Access to Appeal Transcripts

12. The concept of open courts is deeply rooted in the Canadian justice system and there are many reasons for this.[8] Free expression of public affairs "notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions."[9] It is only through openness that citizens can engage in open discussion of matters of public interest and develop and put forward opinions about the courts.[10]

13. Equally, public scrutiny of the judicial branch of government is fundamental to the operation of a free and democratic society.[11] Public confidence in the judiciary is a cornerstone of the rule of law.[12] The open court principle ensures that all members of the public, as participants in the justice system, have the benefit of discussing, commenting on, criticizing, or supporting what goes on in court and what is ultimately decided by a judge.

i. Access to appeal transcripts maintains public confidence in the judiciary

14. Our open court process compels members of the judiciary to conduct proceedings fairly, to act responsibly and to decide issues in a manner that is consistent with the values of our community.[13] It is only through openness that the public can have confidence that justice is

---

[8] *Canadian Broadcasting Corp v New Brunswick (Attorney General),* [1996] 3 SCR 480 (SCC) [*New Brunswick*] at para 21-22; *Vancouver Sun (Re),* 2004 SCC 43 at paras 23-26.
[9] *Edmonton Journal v Alberta (Attorney General),* [1989] 2 SCR 1326 at 1373, citing *Reference Re Alberta Statutes,* [1938] SCR 100 at 133.
[10] *New Brunswick* at para 26.
[11] *Edmonton Journal* at 1337, 1373, *Attorney General for Nova Scotia v MacIntyre,* [1982] 1 SCR 175 at 185.
[12] *The Honourable Chief Justice Beverley McLachlin*, "The Relationship Between the Courts and the Media" (Speech delivered at Carleton University, 31 January 2012).
[13] *Edmonton Journal* at 1360; see also Shauna Hall-Coates, "Following the Media into the Courtroom: Publicity and the Open Court Principle in the Information Age", (2015) 24 Dal J Leg Stud 101 at 105-107, The Honourable Chief Justice Marilyn Warren AC, "Open Justice in the Technological Age", 40 Monash U.L. Rev 45 (2014) at 46-47.

administered in a non-arbitrary manner and in accordance with the rule of law.[14] As Iacobucci and Arbour JJ. stated in *Vancouver Sun (Re):*

> Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.[15]

15. In *Edmonton Journal*, Wilson J. summarized that the open court principle addresses important objectives including:

> 1) to maintain an effective evidentiary process; 2) to ensure a judiciary and juries that behave fairly and that are sensitive to the values espoused by society; 3) to promote a shared sense that our courts operate with integrity and dispense justice; and 4) to provide an ongoing opportunity for the community to learn how the justice system works and how the law being applied daily in the court affects them. [16]

16. However, "discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court."[17] Modern realities create practical barriers to public participation in the justice system. It is difficult for the vast majority of the public to attend court and have the benefit of witnessing first-hand court proceedings; therefore the public depends on media coverage of those proceedings.[18] This Court has recognized the vital role of the media, as "surrogates for the public"[19] in ensuring that the public receives accurate and complete information about what went on in court:

> 20 …That the right of the public to information relating to court proceedings, and the corollary right to put forward opinions pertaining to the courts, depend on the freedom of the press to transmit this information is fundamental to an understanding of the importance of that freedom. The full and fair discussion of public institutions, which is vital to any democracy, is the *raison d'être* of the s. 2(b) guarantees. Debate in the public domain is predicated on an informed public, which is in turn reliant upon a free and vigorous press. The public's entitlement to be informed imposes on the media the responsibility to inform fairly and accurately. This responsibility is especially grave given that the freedom of the press is, and must be, largely unfettered. The significance of the freedom and its attendant responsibility lead me to the second issue relating to s. 2(b).
>
> 24 Essential to the freedom of the press to provide information to the public is the ability of the press to have access to this information.
>
> …

---

[14] *Edmonton Journal* at para 22.
[15] *Vancouver Sun (Re),* 2004 SCC 43 at para 25.
[16] *Edmonton Journal* at 1361.
[17] *Edmonton Journal* at 1340.
[18] *Edmonton Journal* at 1340, *New Brunswick* at para 22.
[19] *Edmonton Journal* at 1359 citing *Richmond Newspapers, Inc. v Virginia,* 448 US 555 (1980).

> 25 It is by ensuring the press access to the courts that it is enabled to comment on court proceedings and thus inform the public of what is transpiring in the courts.[20]

17. To give practical effect to court openness, it is imperative that all courts allow the broadest possible access to the court and to court records, subject only to specific exceptions justified through the *Dagenais/Mentuck* or *Oakes* analysis. The changing media landscape in Canada has led to a stark decrease in the number of journalists who are dedicated to watching court proceedings, which further limits public access to the justice system.[21] The media must have access to a complete record of court proceedings to ensure important information about cases unfolding in court reaches the public.[22] Reading a transcript or listening to an audio recording of an appeal hearing is the only way to know exactly what happened. The media, in accessing this information, can ensure that it discharges its duty to report on court proceedings to the public accurately and fairly.

18. Access to transcripts of appeal hearings only serves to strengthen important values that underpin the open court principle including accessibility, judicial accountability, and freedom of expression. Facilitating access to an accurate record of court proceedings undoubtedly increases the likelihood that the important objectives outlined by Wilson J. in *Edmonton Journal* are advanced.[23] There is no logical or consistent reason to deny access to a complete record of an appeal hearing held in open court in a justice system that is fundamentally premised on openness, especially since openness applies to proceedings in courts below and above it.

ii. The ABCA precedent undermines public confidence in the justice system

19. Instead, the ABCA refuses to allow access to transcripts of its proceedings.[24] Its policy is that "digital recordings of oral argument are for internal use only, and transcripts will not be provided except in exceptional circumstances upon authorization of the panel or justice presiding

---

[20] *New Brunswick* at paras 23-25.
[21] *The Honourable Chief Justice Richard Wagner*, "Official Welcome Ceremony for the New Chief Justice" (Speech delivered at Ottawa, Ontario, 5 February 2018), see also Open Justice in the Technological Age, *supra* note 14 at 48.
[22] *New Brunswick* at paras 24-26, *Mentuck* at para 52.
[23] See para 15 of this factum citing *Edmonton Journal* at 1361.
[24] *McDonald* and Letter #2 **[AR, Vol III, Tab 19]**.

at the hearing."[25] The ABCA provided no guidance about what "exceptional circumstances" are required for a successful application to obtain a transcript.

20. This Court has warned against secrecy in the judicial process. As Fish J. stated in *Toronto Star*, "In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy."[26]

21. The policy of the ABCA invites public cynicism. The closed process of the ABCA lacks transparency and undermines public confidence in the judiciary because it appears as though important aspects of proceedings in Alberta's highest court are immunized from public criticism. The need for greater public access to the courts is even more compelling where statements made by the judiciary is at the heart of public controversy. Wilson J. cited with approval the comments of Jeremy Bentham in his Treatise on Judicial Evidence (1825):

> The effects of publicity are at their maximum of importance, when considered in relation to the judges; whether as insuring their integrity, or as producing public confidence in their judgments.[27]

22. It is difficult to conceive why the ABCA was unwilling to disclose the only record capable of revealing the panel's comments during the hearing made in open court.

23. The idea that 'what a judge says in open court is made available to the public on a one time only' basis is inconsistent with the constitutionally entrenched rational for the open court principle. It ignores the realities of limited public attendance at court hearings, which have been repeatedly addressed by this Court.[28] It ignores an accused person's right to a fair and public hearing pursuant to 11(d) of the *Charter*. It ignores that the public has an ongoing right of access to the court record. And it ignores that the public has a right to critically evaluate the comments of the judiciary made in open court, particularly where an accused person challenges the accuracy of the court's statements. Disregarding these rights causes the public to question the integrity of the judicial process by throwing an unjustified shroud on a presumptively open process.

24. This Court struck down Alberta legislation that prevented the public from knowing the dialogue between the parties and the court almost 30 years ago in *Edmonton Journal*:

---

[25] *McDonald* at para 1.
[26] *Toronto Star* at para 1.
[27] *Edmonton Journal* at 1360.
[28] *New Brunswick* at paras 24-26, *Mentuck* at para 52.

> As well, the comments of counsel and the presiding judge are excluded from publication. How then is the community to know if judges conduct themselves properly. How will it know whether remarks might have been made, for example, that a wife should submit to acts of violence from her husband or that a wife should endure the verbal abuse or blows of her husband. The community has a right to know if such remarks are made yet if there is no right to publish, the judge's comments may be hidden from public view.[29]

25. The ABCA's explanation that transcripts are for "internal use only"[30] is vague and arbitrary, and does not explain what risk to the administration of justice the prohibition seeks to prevent. In this case, the ABCA released the complete transcript once the Appellant was granted leave to appeal, which sets a troubling precedent. The pattern of the ABCA suggests that it will only provide a complete transcript of proceedings to a party, and if, and only if, that party first successfully obtains leave to this Court, even where that very material may be necessary for the preparation of a successful application for leave to appeal. This distinction gives rise to an onerous and costly burden with a slim chance of success, a prerequisite which is out of step with this Court's expression of the open court principle. Unless and until a party obtains leave of this court, the public may never know important details about the dialogue between the court and the parties during a proceeding.

iii. Any restriction on access must pass the Dagenais/Mentuck test

26. This Court has been clear: court proceedings are presumptively open.[31] Openness applies to every stage of the judicial process, and to any discretionary decision of the court that affects the openness of the proceedings.[32] A presumption in favor of openness means that public access to information at every level of court is barred only when "… that disclosure would subvert the ends of justice or unduly impair its proper administration."[33] The Court of Appeal must allow the broadest possible access to court files. Any proposed limitation on complete openness of the court record, which ought to include appeal transcripts, must be considered in the context of the *Dagenais/Mentuck* test.[34]

---

[29] *Edmonton Journal* at 1341.
[30] *McDonald* at para 1.
[31] See this Court's pre-*Charter* decision in *MacIntyre* at 184; see also *Toronto Star* at paras 4, 18-19.
[32] *Toronto Star* at paras 7, 28, *Vancouver Sun*, at paras 23-28.
[33] *Toronto Star* at para 4.
[34] *Mentuck*, at para 32 citing *Dagenais*, at 878.

27. In *McDonald,* the ABCA directed that it will not allow access to digital recordings "except in exceptional circumstances".[35] Requiring an applicant to prove "exceptional circumstances" shifts the burden to the party, public, or media. *Dagenais* establishes that judicial discretion to order restrictions on freedom of expression must be subject to no lower standard of compliance with the *Charter* than legislative enactment.[36]

B. The ABCA policy is inconsistent with other courts in Canada

28. The Chief Justice of Canada has recently stated that judges "have a responsibility to be transparent."[37] The ABCA, as the administrator of the court record, has a public duty to promote openness in the justice system through bringing its own policies into compliance with the open court principle.

29. The open court principle invites public participation in the justice system. Court policies regarding access to court records have a direct correlation to the degree of public participation because the media and the public are dependent on the court to facilitate that access.

30. The policy of the ABCA is inconsistent with the Canadian Judicial Council's Model Policy and with other appeal courts in Canada, which generally all have policies that encompass a presumptive right of access to recordings or transcripts of appeal hearings.[38] Indeed this Court webcasts its hearings for any member of the public or media to view at any time during or after the appeal proceeding.

i. Canadian Judicial Council Model Policy

31. The CJC Model Policy applies to court records at both the trial and appeal levels and provides that members of the public have presumptive right of access to all court records.[39] A

---

[35] *McDonald* at para 1.
[36] *Mentuck* at para 27.
[37] *The Honourable Chief Justice Richard Wagner.*
[38] It is unclear whether the Courts of Appeal for New Brunswick and the Northwest Territories have access policies.
[39] Judges Technology Advisory Committee, "*Model Policy for Access to Court Records in Canada*" (September, 2005) [CJC Model Policy] at ss 1.2.2, 4.1.

court record" includes "records of the proceedings in any form".[40] This provision undoubtedly captures both audio recordings of appeal proceedings and transcripts of appeal proceedings.

ii. Ontario, Saskatchewan, PEI and Nova Scotia

32. The Ontario Court of Appeal Practice Directions provide that copies of digital audio recordings of appeal proceedings are available upon request, provided that a publication ban or sealing order is not in place in respect of those proceedings.[41]

33. Public access to court records in Saskatchewan is detailed in the "Guidelines for Media and the Public" applicable to all levels of court in the province.[42] Openness applies to all court records, which specifically includes "transcripts of proceedings and copies of tapes or CDs of court proceedings".[43] Access to transcripts, tapes or CDs of a proceeding is granted to any member of the public upon payment of the required fee, provided that a publication ban is not in place. If information contained in the proceeding is subject to a publication ban, judicial authorization is required unless the request for access is made by a party or a court-recognized member of the media.[44]

34. Public and media access of the Prince Edward Island Court of Appeal is governed by the Practice Directions.[45] The Practice Directions provide that the recordings of appeal proceedings are available to parties and to the media upon payment of a fee.[46]

35. The Court of Appeal in Nova Scotia ("NSCA") has a similar practice. The policy describes that the NSCA does not produce or provide text transcripts of proceedings; however, the Court makes and maintains audio recordings of its proceedings.[47] An applicant may obtain a

---

[40] *Ibid* at s 1.3.3.
[41] *Practice Directions Concerning Criminal Appeals at the Court of Appeal for Ontario*, March 1, 2017 at s 14. A person may apply to a single judge to have a transcription made.
[42] Saskatchewan Law Courts "*Public Access to Court Records in Saskatchewan – Guidelines for Media and the Public*", October, 2011. The SKCA does not discuss access to recordings of proceedings in its Practice Directions.
[43] *Ibid* at p 7.
[44] *Ibid* at p 38.
[45] *Prince Edward Island Court of Appeal Practice Direction*s, September 1, 2017.
[46] *Ibid* at s 10.
[47] *Guidelines re: Media and Public Access to the Courts of Nova Scotia*, June 1, 2017 at p 25.

copy of the audio of court proceedings upon providing an undertaking that the audio will not be broadcast or widely copied and distributed.

36. It also bears mentioning that the NSCA policy incorporates a procedure to request approval to use a camera during a NSCA proceeding to record or webcast the proceeding.[48] While approval is subject to the discretion of the Chambers judge hearing the application, the fact that the policy exists indicates that the NSCA recognizes the need to modernize openness of its court to ensure continued public accessibility.

iii. British Columbia, Manitoba, Nunavut

37. These policies closely mirror the CJC Model Policy, and state that the public has a presumptive right of access to all court records.[49] "Court Record" is defined to include "transcripts and audio recordings of court proceedings in the British Columbia and Nunavut policies.[50] The Manitoba policy does not explicitly include transcripts or digital audio recordings in the definition of "court record".

IV. COSTS AND V - ORDERS SOUGHT

38. CMLA does not seek costs and asks that no costs be awarded against it. On August 2, 2018, Rowe J. granted CMLA leave to make oral argument not exceeding five (5) minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED AT OTTAWA, ONTARIO, THIS 11TH DAY OF SEPTEMBER, 2018.

CHRISTIAN LEBLANC
TESS LAYTON
Counsel for the Intervener
Canadian Media Lawyers
Association/Ad IDEM

---

[48] *Ibid* at Appendix B.
[49] Court of Appeal for British Columbia, "*Record and Courtroom Access Policy*", January 31, 2017 at Article 1.1, Manitoba Courts "*Policy: Access to Court Records in Manitoba*" at ss 2.2.1, 2.2.2, and Nunavut Court of Justice, "*Access to Court Records Policy*" at s 1.4. Note that the Manitoba Policy states at s 2.2.2 that permission to obtain a copy of some parts of the court record may be required.
[50] "*Record and Courtroom Access Policy*", at s 1.2, "*Access to Court Records Policy*" at ss 1.4, 2.1.

VI. TABLE OF AUTHORITIES

AUTHORITY

JURISPRUDENCE	REFERENCE
Attorney General for Nova Scotia v MacIntyre, [1982] 1 SCR 175	13, 25
Canadian Broadcasting Corp v New Brunswick (Attorney General), [1996] 3 SCR 480 (SCC)	12, 16, 17, 23
Dagenais v Canadian Broadcasting Corp., [1994] 3 SCR 835 at 878	4, 26
Edmonton Journal v Alberta (Attorney General), [1989] 2 SCR 1326	12, 13, 14, 15, 16, 18, 21, 24
McDonald v Brookfield Asset Management Inc., 2016 ABCA 419	2, 19, 25, 27
R v Barton, 2017 ABCA 216	7,
R v Mentuck, [2001] 3 SCR 442	4, 17, 23, 26, 27
Reference Re Alberta Statutes, [1938] SCR 100	13
Toronto Star Newspapers Ltd. v Ontario, 2005 SCC 41	20, 25, 26
Vancouver Sun (Re), 2004 SCC 43	12, 14, 26

SECONDARY SOURCES

Shauna Hall-Coates, "Following the Media into the Courtroom: Publicity and the Open Court Principle in the Information Age", (2015) 24 Dal J Leg Stud 101	14
The Honourable Chief Justice Marilyn Warren AC, "Open Justice in the Technological Age", 40 Monash U.L. Rev 45 (2014)	14, 17
The Honourable Chief Justice Beverley McLachlin, "The Relationship Between the Courts and the Media" (Speech delivered at Carleton University, 31 January 2012)	13
The Honourable Chief Justice Richard Wagner, "Official Welcome Ceremony for the New Chief Justice" (Speech delivered at Ottawa, Ontario, 5 February 2018)	17, 28

STATUTORY PROVISIONS

Court of Appeal for British Columbia, "Record and Courtroom Access Policy", January 31, 2017	37
Guidelines re: Media and Public Access to the Courts of Nova Scotia, June 1, 2017	36, 37
Judges Technology Advisory Committee, "Model Policy for Access to Court Records in Canada" (September, 2005)	30
Manitoba Courts "Policy: Access to Court Records in Manitoba"	37
Nunavut Court of Justice, "Access to Court Records Policy"	37
Practice Directions Concerning Criminal Appeals at the Court of Appeal for Ontario, March 1,	33
Prince Edward Island Court of Appeal Practice Directions, September 1, 2017	35
Saskatchewan Law Courts "Public Access to Court Records in Saskatchewan – Guidelines for Media and the Public", October, 2011	34