S.C.C. File No. 38992

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA)

BETWEEN:

CANADIAN BROADCASTING CORPORATION / SOCIÉTÉ RADIO-CANADA

Appellant (Moving Party)

-and-

HER MAJESTY THE QUEEN

Respondent (Respondent)

-and-

STANLEY FRANK OSTROWSKI

Respondent (Appellant)

-and-

B.B., SPOUSE OF THE LATE M.D., AND J.D., IN HIS CAPACITY AS EXECUTOR OF THE ESTATE OF THE LATE M.D.

Respondents (Interested Parties)

-and-

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PART I - OVERVIEW

1. The Coalition offers two submissions:

(a) The open court principle encompasses all aspects of a judicial proceeding, not just admitted evidence; and

(b) A court that issues a publication ban has a continuing jurisdiction to vary or set it aside, even after the underlying proceedings have terminated.

PART II - POSITION ON THE QUESTIONS IN ISSUE

2. The Coalition takes no position on the disposition of the appeal.

PART III - STATEMENT OF ARGUMENT

A. The open court principle applies to all stages of a judicial proceeding, not only to evidence that is ultimately admitted

3. Contrary to the submission of the respondent, Her Majesty the Queen, the open court principle and the *Dagenais*/*Mentuck*[1] test fully apply to evidence that is tendered but not ultimately admitted. This is so for two reasons: (1) the open court principle covers the process of tendering and admitting or excluding evidence and (2) the *Dagenais*/*Mentuck* test applies to publication bans even if the open court principle is not engaged.

(i) The open court principle applies to the process of admitting or excluding evidence

4. The process of tendering and admitting or excluding evidence is covered by the open court principle. Speech about that process, including about evidence not ultimately admitted, furthers the *purpose* of the open court principle. This Court's jurisprudence has repeatedly framed that purpose very broadly, to cover all the workings of the justice system. For example:

> *Edmonton Journal*: "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."[2]
>
> *CBC v New Brunswick*: "Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings."[3]

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[1] *Dagenais v Canadian Broadcasting Corp*, [1994] 2 SCR 835 ("*Dagebais*"); *R v Mentuck*, 2001 SCC 76
[2] *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 ("*Edmonton* Journal") at p1340.

> *Mentuck*: "The right to a public trial is meant to allow public scrutiny of the trial process."[4]
>
> *Vancouver Sun*: "[Openness] is integral to public confidence in the justice system and the public's understanding of the administration of justice. … The press plays a vital role in being the conduit through which the public receives that information regarding the operation of public institutions."[5]
>
> *Toronto Star*: "What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians."[6]

5. On the other hand, nowhere has this Court suggested that the public's right to scrutinize the courts is limited to knowing evidence that is ultimately admitted.

6. There is good reason for this: an important part of the justice system is the process of receiving tendered evidence, and deciding whether to admit or exclude it. It is a judicial function (as Her Majesty concedes[7]). That means the open court principle applies.[8]

7. Furthermore, the very concepts of relevance and admissibility are not mathematical absolutes, immune from disagreement. Indeed, they and their application are often highly controversial, as they are in some sexual assault cases, or where evidence is excluded under s. 24(2) of the *Charter of Rights and Freedoms*. To hold that the public has no legitimate interest in learning about and debating those parts of our court system would be paternalistic and would corrode Canadians' trust in that system.

8. Thus, as one might expect, this Court's jurisprudence also holds that the open court principle extends to *all stages* of a judicial proceeding, not just to the evidence that is ultimately admitted on the merits:

> (a) In *Edmonton Journal*, the Court recognized that the open court principle applied not only to "the nature of the evidence that was called", but also to "the arguments presented", and "the comments made by the trial judge."[9] The latter two are not

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[3] *Canadian Broadcasting Corp v New Brunswick (Attorney General)*, [1996] 3 SCR 480 ("*New Brunswick*") at para 26.
[4] *Mentuck*, *supra,* at para 52 (SCC).
[5] *Vancouver Sun, Re*, 2004 SCC 43 ("*Vancouver Sun*") at paras 25-26.
[6] *Toronto Star Newspapers Ltd v Ontario*, 2005 SCC 41 ("*Toronto Star*") at para 2.
[7] Factum of the Respondent, Her Majesty the Queen, at para 12.
[8] *Vancouver Sun*, *supra,* at paras 37-40 (SCC).
[9] *Edmonton Journal*, *supra,* at p 1339 (SCC).

admissible, but both are important to the public's understanding and scrutiny of the court system.

(b) In *MacIntyre*[10], *Vancouver Sun*, and *Toronto Star*, the Court held that the open court principle extended to pre-trial investigative proceedings, since "the policy considerations upon which openness is predicated are the same as in the trial stage."[11] The key question was whether the hearing in question was judicial in nature. If it was, then the open court principle, and the *Dagenais*/*Mentuck* test, applied.[12]

9. *APTN v Alberta*, on which Her Majesty relies, is consistent with the submissions above. There, the portions of the evidence to which the publication ban applied had *not* formed part of the judicial proceeding. They had not been tendered for admission, nor had they been played in court, or referred to in cross-examination. They were "never considered by either the judge or jury when deciding any issue, factual or legal, substantive or procedural."[13] The Court of Appeal ruled that "[i]f a videotaped statement is reviewed or considered by the trier of fact or law – even to determine the video's admissibility, or even during the judge's deliberations – then the video is part of the court record, and the open court principle is engaged."[14]

10. *APTN* is consistent with this Court's jurisprudence: judicial consideration (even in a *voir dire*) triggers the open court principle. Thus, if evidence is tendered for admission, and considered by the court, it is still a part of the proceeding and is subject to that principle – even if it is not ultimately admitted.

(ii) The Dagenais/Mentuck test extends beyond the open court principle

11. The open court principle, for all its breadth, does not exhaust the *Dagenais*/*Mentuck* test. That test flows from the s. 2(b) right as a whole, not just the component of that right that pertains to speech about court proceedings. That is why the *Dagenais*/*Mentuck* test applies even where the open court principle does not.

12. The best example of this is *Dagenais* itself. It involved a fictionalized mini-series about sexual abuse in a Catholic institution. While the events had also given rise to criminal

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[10] *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 SCR 175 ("*MacIntyre*").
[11] *Vancouver Sun, supra,* at para 27 (SCC).
[12] *Ibid.* at paras 37-40.
[13] *Aboriginal Peoples Television Network v Alberta (Attorney General)*, 2018 ABCA 133 ("*APTN*") at para 46.
[14] *Ibid.* at para 47.

proceedings, the mini-series did not report on what was happening in court. This Court's concern in *Dagenais* was not with the "open court principle" at all. Rather, it was with the media's right to speak *per se*. Nonetheless, a strict necessity/proportionality test was required, because that right is still constitutionally protected.

13. Another example is *Globe and Mail*. There, the publication ban applied to reporting on confidential settlement negotiations. This Court held that the *Dagenais*/*Mentuck* test applied even though the negotiations had not occurred in court: "While its target or substance … is indeed not a judicial proceeding, that is no matter. The order itself was made in the context of a judicial proceeding, and had the effect of infringing … s. 2(b) rights."[15]

14. Since the *Dagenais* test applied in *Dagenais* and in *Globe and Mail*, neither of which involved reporting about court proceedings, then it certainly must apply to evidence that is tendered and considered for admission in a court proceeding, even if it is ultimately not admitted.

15. Perhaps the open court principle is best understood as a factor in the second (proportionality) stage of the *Dagenais*/*Mentuck* test. Infringing the media's right to speak *about a court proceeding* is a particularly grave deleterious effect. However, where the open court principle is not engaged, the overall test still applies, and the first (necessity) stage operates identically. Even under the second stage, there are deleterious effects that have nothing to do with the open court principle,[16] and, as in *Dagenais* and *Globe and Mail*, the test will still be demanding.

B. Courts have continuing jurisdiction to vary or rescind a publication ban

16. A court that makes a discretionary order restricting publication has a continuing jurisdiction to vary or rescind it, even after the underlying proceedings have terminated. A court may be *functus officio* in respect of the underlying proceedings without losing jurisdiction in respect of the publication ban. The ban may be varied or rescinded if there is a material change in circumstances, such as where the ban was issued without notice to the media, and the media applies to challenge the ban.

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[15] *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41 ("*Globe and Mail*") at para 87.

[16] E.g. freedom of speech to discuss sexual abuse in religious institutions [*Dagenais*, *supra* (SCC)] or police investigative tactics [*Mentuck*, *supra,* see paras 50-51 (SCC)].

(i) Publication bans may be varied or rescinded after the issuing court is functus *in respect of the underlying proceedings*

17. The respondent Her Majesty the Queen accepts that a court that issues a publication ban has a continuing ability to clarify it or provide reasons.[17] However, she suggests that a court that is *functus officio* in respect of the underlying proceeding has no power to vary or rescind a publication ban, even if there is a material change in circumstances.[18]

18. This submission fundamentally misconceives the relationship between a court's power to issue publication bans and its jurisdiction over the underlying proceeding. For the doctrine of *functus officio*, it is critical to distinguish between decisions that pertain to the *substance* of the dispute, and those that are *ancillary* to it. While the former cannot be reconsidered after the final disposition of the underlying dispute, ancillary orders, such as publication bans, can still be varied or rescinded by the court that made them.

19. In *Adams*, a trial judge rescinded a publication ban after acquitting the accused – that is, while *functus*. This Court stated that the approach to *functus* is "less formalistic and more flexible" where the decision in question related "to the conduct of the trial", holding: "As a general rule, any order relating to the conduct of a trial can be varied or revoked if the circumstances that were present at the time the order was made have materially changed."[19]

20. As *Adams* indicates, and as the respondent Her Majesty concedes,[20] a publication ban is an ancillary order, "relating to the conduct of the trial", rather than part of the resolution of the underlying dispute.

21. In *Adams* itself, this Court held that a publication ban was ancillary, in deciding whether s. 40(3) of the *Supreme Court Act* prevented the Court from hearing the appeal. This turned on whether the publication ban was "integrally related to" a judgment of acquittal or conviction. *Adams* held that the appeal of the publication ban was not ruled out by s. 40(3), because the publication ban was *ancillary* to the final disposition of the case. "[A]n order made under the ancillary jurisdiction of a court of appeal … is not integrally related to one of the kinds of

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[17] E.g. Factum of the Respondent, Her Majesty the Queen, at paras 90-91; see also *New Brunswick*, *supra*, at para 3 (SCC).
[18] E.g. Factum of the Respondent, Her Majesty the Queen, at paras 80-83.
[19] *R v Adams*, [1995] 4 SCR 707 ("*Adams*") at paras 29-30.
[20] See Factum of the Respondent, Her Majesty the Queen, at paras 106-107, 112-114, and 137. See also *New Brunswick*, *supra*, at paras 37-38 (SCC).

judgments listed in s. 40(3)."[21] The Court stated: "The order [revoking the publication ban] is not integrally related to the acquittal. Indeed, it had no bearing whatsoever on the acquittal."[22]

22. Since a publication ban is an ancillary order, the full strength of the doctrine of *functus officio* does not apply. Instead, the court that made the order can vary or set it aside if there has been a material change in circumstances.

23. Indeed, Attorneys General have asked courts to grant publication bans,[23] or set aside sealing orders,[24] *after* the underlying proceedings are terminated. In those cases, the Attorneys General have conceded that the trial judge or court is *functus* in respect of the underlying case, but have nevertheless urged courts to exercise inherent jurisdiction to set aside, or even make, a publication ban or sealing order. As the Alberta Court of Queen's Bench wrote in such a case:

> [A] superior court always has jurisdiction to vary or vacate a sealing order of its proceedings made under its inherent jurisdiction to control its own processes…That inherent jurisdiction continues so long as the record exists. … If the reason for a sealing order no longer exists, then it may be vacated by the court in the exercise of its inherent jurisdiction to control its own records. … A sealing order by its very nature is not a final order. In fact the reverse is the case: a court does not have jurisdiction in granting a sealing order to provide that the order is final and can never be varied or terminated … This is so because circumstances may change which require that the sealing order be vacated or varied to maintain the integrity of the administration of justice, and in particular the criminal justice system.[25]

24. The reference in this passage to "superior courts" should not be read as limiting. While appellate courts do not have inherent jurisdiction on matters of *substance*, they do have inherent jurisdiction to control their own *processes*,[26] which is exactly the jurisdiction on which they draw to grant, and vary or set aside, publication bans.[27]

25. In *GEA Refrigeration Inc v Chang*, the British Columbia Court of Appeal held that a trial court could set aside a sealing order, even after entering a final judgment on the merits, and after an appeal. The trial court was not *functus* in respect of the publication ban: "it remains able to

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[21] *Adams*, *supra*, at para 17 (SCC).
[22] *Ibid.* at para 18.
[23] E.g. *R v Wagner*, 2017 ONSC 6603.
[24] E.g. *Canada v Chan*, 2007 ABQB 554 ("*Chan*").
[25] *Ibid.* at paras 12-17.
[26] See *United States of America v Shulman*, 2001 SCC 21at para 33, and *Pelisek v Pelisek*, 2003 MBCA 145 at paras 29-36.
[27] See *New Brunswick*, *supra*, at paras 37-38 (SCC).

deal with procedural and ancillary matters that have not been dealt with in its final judgment. Such matters include the court's inherent jurisdiction to control access to its own files."[28]

26. Finally, this Court itself has recognized that a motion to set aside a publication ban can be made once the underlying proceedings are over. In *CBC v The Queen*, a criminal trial court prohibited journalists from broadcasting a videotaped statement of the accused, which the Crown had tendered in his trial. Before CBC's appeal reached this Court, the accused was acquitted and so the trial court became *functus* in respect of the underlying proceedings. However, this Court stated:

> However, not only is the trial over — Mr. Dufour was acquitted — but the Court of Appeal has dismissed the Crown's appeal from that verdict since this Court took the instant case under advisement. The circumstances have therefore been altered fundamentally and the appeal as framed has become moot. Nevertheless, since this is a question of interest, I should mention a few considerations that might prove to be relevant should a motion to broadcast the statement be made even though the judicial proceedings are over.[29]

27. To sum up, a publication ban is an ancillary order that is not part of the resolution of the underlying dispute. As such, even after the termination of the underlying proceedings, they can be varied or set aside where there has been a material change in circumstance.

(ii) A publication ban made without notice to the media can be varied or set aside on application of the media

28. One way in which circumstances can materially change is where a publication ban is initially made without notifying the media, and a media organization then applies to set it aside or vary it. In that scenario, the order should be regarded as having been made *ex parte*, because it was made without the participation of a party whose rights (indeed, constitutional rights) it affected.

29. In that scenario, "there is the general principle that any person affected by an order of the court, granted on an *ex parte* basis, has the right to seek to have the order set aside once the order

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[28] *GEA Refrigeration Canada Inc. v Chang*, 2020 BCCA 361 at para 186.
[29] *Canadian Broadcasting Corp v The Queen*, 2011 SCC 3at para 15.

comes to their attention."[30] As this Court put it, an order made *ex parte* is "properly reviewable pursuant to the inherent jurisdiction of trial judges to review such an *ex parte* order."[31]

30. In other words, the participation of an affected party, such as a media organization in the case of a publication ban, who did not receive proper notice of the initial hearing, can be understood as a material change in circumstance. The Court must assume that the applicant, who did not participate in the original hearing, could present information that is material to the Court's decision and so, potentially, change the outcome. Specifically, a media organization that is not notified of an intention to seek a publication ban may have new and material information to provide on the application of the *Dagenais*/*Mentuck* test. That constitutes a material change in circumstance which, in light of the case law discussed above, entitles the court to reconsider the publication ban.

31. This approach has been applied to publication bans where a judge is otherwise *functus*. In *Toronto Sun v Alberta*, the trial judge ordered that a ban on the publication of the evidence on a *voir dire* would continue after sentencing, and then, when a media organization applied after sentencing to lift the ban, held that he was *functus officio*. The Alberta Court of Appeal disagreed: "the judge was not *functus* because if he had jurisdiction to make the order in the first place he similarly had jurisdiction to vary or rescind it on the motion of a party necessarily affected by it."[32]

(iii) Other material changes in circumstances can occur after the termination of the proceedings

32. Of course, an application to set aside an *ex parte* order is not the only kind of material change in circumstance that can occur after the underlying proceeding has been finally resolved. The end of the proceeding itself may constitute a change in circumstance: as the trial ends, so ends the risk that publication may prejudice the accused's right to a fair trial. Depending on the case, the mere passage of time may constitute a material change in circumstance: "[d]uration and timing are logically factors to be considered in the assessment of necessity" under the

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[30] *R v TELUS Communications Company*, 2015 ONSC 3964 at paras 5-11; quotation from para 7.
[31] *Knox Contracting Ltd v Canada*, [1990] 2 SCR 338 at para 5.
[32] *Toronto Sun Publishing Corp v Alberta (Attorney General)*, 1985 ABCA 145 at para 6.

Dagenais/*Mentuck* test.[33] Or, after the trial ends, a complainant, whose interests the ban was meant to protect, may consent to the publication of his or her identity.

33. The latter kind of change in circumstance occurred in *R v Ireland*, where, after conviction and sentence, the CBC applied to lift a publication ban on the complainant's identity. The accused asserted that only the trial judge could vary the order and the trial judge was *functus*, such that the only way to challenge the ban was to apply for leave to appeal to this Court. The application judge disagreed, and held that the consent of the complainant was a material change in circumstance, such that the court had inherent jurisdiction to set aside the ban even after the passing of sentence.[34]

34. Similarly, in *R v TSH*, after the accused had been sentenced, one complainant consented to the lifting of a publication ban, and the Crown applied on her behalf to lift it. Citing *Ireland*, the court stated:

> There has been a material change in circumstances since the publication ban in this matter was made. The Crown and C.G. have both consented to the lifting of that portion of the publication ban relating to protecting C.G.'s identity. … Although the trial judge is *functus* after a finding of guilt has been made and sentence imposed, any judge of the Superior Court of Justice can hear an application to lift a publication ban imposed at trial.[35]

(iv) The practical consequences of the contrary position

35. As a practical matter, it would be unfortunate if the submission of the respondent Her Majesty were correct. As the cases above suggest, circumstances will often change after the underlying dispute is finally resolved, and the *Dagenais*/*Mentuck* calculus will change with them. If issuing courts cannot vary or set aside publication bans after that point, then an affected party's only remedy would be *certiorari* or leave to appeal to this Court (depending on the level of court that issued the ban). Then, realistically, the affected party, and the public, would often be left without a remedy for the infringement of their constitutional rights, and many unjustified publication bans would remain in place forever. But, as this Court held in *Mentuck*, "it is not

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[33] *Chan*, *supra*, at para 14 (Alta. Q.B.).
[34] *R v Ireland* (2005), 203 CCC (3d) 443(Ont. Sup. Ct. J.).
[35] *R v H.(T.S.)*, 2019 ONSC 3244at paras 6-7.

desirable for this, or any, Court to enter the business of permanently concealing information in the absence of a compelling reason to do so."[36]

36. This Court may be powerless to *create* satisfactory appeal rights in respect of publication bans, but it is *not* powerless to take into account the lack of a satisfactory avenue of appeal – which Lamer CJC described a quarter century ago as "deplorable"[37] – when it interprets the common law of *functus officio*.

37. Without commenting on the merits of the appeal, the underlying facts here illustrate how important it is that an issuing court has continuing jurisdiction over publication bans. Here, a ban was ordered without notice to, or participation by, media organizations. It was not memorialized in a formal order, and no meaningful reasons were given. Further, the scope of the ban was somewhat vague – it applied to the "details" of a sealed affidavit. In these circumstances, media organizations might reasonably decide not to publish anything on the issue, for fear of facing a contempt proceeding. The potential infringement of free expression, and deleterious effect on public speech about court proceedings, is obvious. It is exactly in such a case that there ought to be a meaningful avenue to challenge the ban.

PART IV - COSTS

38. The Coalition does not seek costs and asks that no order as to costs be made against it.

PART V - ORDER REQUESTED

39. The Coalition takes no position on the outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 17TH DAY OF FEBRUARY, 2021

Fredrick Schumann / Zachary Al-Khatib
Stockwoods LLP

[36] *Mentuck*, *supra*, at para 58 (SCC).
[37] *Dagenais*, *supra*, at p 874 (SCC).

PART VI – TABLE OF AUTHORITIES

	Para(s) in Factum
CASE LAW	
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PART VII – STATUTORY PROVISIONS

***Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c 11**

FUNDAMENTAL FREEDOMS	LIBERTÉS FONDAMENTALES
Fundamental freedoms	**Libertés fondamentales**
2. Everyone has the following fundamental freedoms:	**2.** Chacun a les libertés fondamentales suivantes :
(*a*) freedom of conscience and religion; (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (*c*) freedom of peaceful assembly; and (*d*) freedom of association.	*a*) liberté de conscience et de religion; *b*) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication; *c*) liberté de réunion pacifique; *d*) liberté d'association.

***Supreme Court Act*, R.S.C. 1985, c. S-26**

APPELLATE JURISDICTION	JURIDICTION D'APPEL
Appeals with leave of Supreme Court **40 (1)** Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.	**Appel avec l'autorisation de la Cour** **40 (1)** Sous réserve du paragraphe (3), il peut être interjeté appel devant la Cour de tout jugement, définitif ou autre, rendu par la Cour d'appel fédérale ou par le plus haut tribunal de dernier ressort habilité, dans une province, à juger l'affaire en question, ou par l'un des juges de ces juridictions inférieures, que l'autorisation d'en appeler à la Cour ait ou non été refusée par une autre juridiction, lorsque la Cour estime, compte tenu de l'importance de l'affaire pour le public, ou de l'importance des questions de droit ou des questions mixtes de droit et de fait qu'elle comporte, ou de sa nature ou importance à tout égard, qu'elle devrait en être saisie et lorsqu'elle accorde en conséquence l'autorisation d'en appeler.
Application for leave **(2)** An application for leave to appeal under this section shall be brought in accordance with paragraph 58(1)(a).	**Demandes d'autorisation d'appel** **(2)** Les demandes d'autorisation d'appel présentées au titre du présent article sont régies par l'alinéa 58(1)a).
Appeals in respect of offences **(3)** No appeal to the Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.	**Appels à l'égard d'infractions** **(3)** Le présent article ne permet pas d'en appeler devant la Cour d'un jugement prononçant un acquittement ou une déclaration de culpabilité ou annulant ou confirmant l'une ou l'autre de ces décisions dans le cas d'un acte criminel ou, sauf s'il s'agit d'une question de droit ou de compétence, d'une infraction autre qu'un acte criminel.
Extending time for allowing appeal **(4)** Whenever the Court has granted leave to appeal, the Court or a judge may, notwithstanding anything in this Act, extend the time within which the appeal may be allowed.	**Prorogation du délai d'appel** **(4)** Dans tous les cas où elle accorde une autorisation d'appel, la Cour ou l'un de ses juges peut, malgré les autres dispositions de la présente loi, proroger le délai d'appel.