TAB 8

Orfus Realty v. D.G. Jewellery of Canada Ltd.

24 O.R. (3d) 379

[1995] O.J. No. 1905

No. C8292

Court of Appeal for Ontario,

Morden A.C.J.O., Osborne and Laskin JJ.A.

June 27, 1995

Civil procedure -- Discovery -- Documents -- Implied undertaking rule -- Party who obtains document from another party under discovery process being subject to implied undertaking not to use document for collateral or ulterior purpose except with consent of other party or leave of court -- "Collateral or ulterior purpose" not having pejorative meaning but simply referring to use of document in other proceedings -- Party breaching implied undertaking rule where documents produced on discovery given to other persons and subsequently forming basis for action against producer of documents -- Party in contempt of court.

In the course of discovery, the defendant produced two documents to the plaintiff's solicitors which the plaintiff, through its principal officer, gave to other persons and which subsequently appeared in the affidavit of documents of those persons in an action commenced by them against the defendant. The defendant moved for an order that the plaintiff and its principal officer, O, be found in contempt of court by reason of their breach of an implied undertaking not to disclose documents which were produced to them on discovery. The motions court judge found that the plaintiff, through O, gave the documents to the other persons. He nevertheless held that he was not satisfied beyond a reasonable doubt that O had a collateral or ulterior purpose in handing over the documents. The motion was dismissed. The defendant appealed.

Held, the appeal should be allowed.

The implied undertaking rule forms part of the law of Ontario. The motions court judge erred in his conclusion that it had not been proven that the documents were given to the other persons for a collateral and ulterior purpose. He apparently attributed to the expression "collateral or ulterior" some sort of pejorative meaning rather than the correct meaning of for a purpose other than that of the litigation in which the document was produced. The documents clearly were furnished to the other persons in breach of the implied undertaking rule. The plaintiff and O were in contempt of court. The appropriate penalty was an order that they pay the costs of the motion and the appeal on a solicitor and client basis.

Cases referred to

Alterskye v. Scott, [1948] 1 All E.R. 469, 92 Sol. Jo. 220 (Ch.); Goodman v. Rossi (1995), 24 O.R. (3d) 359 (C.A.); R. v. Johnson (1993), 12 O.R. (3d) 340, 79 C.C.C. (3d) 42, 21 C.R. (4th) 336 (C.A.); Reichmann v. Toronto Life

Publishing Co. (1988), 28 C.P.C. (2d) 11 (Ont. H.C.J.)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 60.11(3)

Authorities referred to

Williston and Rolls, The Law of Civil Procedure (1970), p. 941

APPEAL from the dismissal of a motion for an order that the respondents be found in contempt of court.

J. David Sloan, for appellant.

Jarvis K. Postnikoff and Lawrence S. Crackower, Q.C., for respondents.

The judgment of the court was delivered by

MORDEN A.C.J.O.: -- The defendant appeals from the dismissal of its motion for an order that the plaintiff and its principal officer, Howard Orfus, be found in contempt of court by reason of their breach of an implied undertaking not to disclose documents which were produced to them as part of the discovery in this action. This appeal was heard together with that in Goodman v. Rossi, the reasons for judgment in which are being released with these reasons [now reported ante, p. 359].

In Goodman v. Rossi we have held that the implied undertaking rule, as described in those reasons, is part of the law of Ontario.

From the content and form of the reasons of the learned motions court judge in this proceeding it appears that it was not in dispute that the implied undertaking rule was part of the law. The judge referred to Reichmann v. Toronto Life Publishing Co. (1988), 28 C.P.C. (2d) 11 (Ont. H.C.J.) at p. 23, its reference to Williston and Rolls, The Law of Civil Procedure (1970), at p. 941 and Alterskye v. Scott, [1948] 1 All E.R. 469 at p. 470, 92 Sol. Jo. 220 (Ch.). He dismissed the motion for this reason:

> I am not satisfied beyond a reasonable doubt that Mr. Orfus had a collateral or ulterior purpose in handing over to the Ben-David family the financial statements and sales summaries relating to a period when the Ben-David family was a shareholder of the defendant and when there was no litigation existing or in prospect between the defendant and the Ben-David family.

Accepting that the implied undertaking rule is in effect, the main issue presented to the court on this appeal is whether, on the material filed, the defendant has properly proven its case. Having regard to the points raised, I can be relatively brief in my statement of the facts.

The issue arose in the context of a counterclaim in this action in which the defendant, the tenant under a lease, claims a large sum of money for breach of the plaintiff s covenant as landlord to heat and air-condition the demised premises properly. In the course of the discovery in this proceeding the defendant s solicitors, on October 9, 1988, mailed and faxed two documents to the plaintiff s solicitors -- the defendant's financial statements for 1987 and a sales summary for 1986 and 1987.

These two documents subsequently appeared in the affidavit of documents of a plaintiff in an action commenced against the defendant. The plaintiff in this other action is referred to compendiously in the material before us as "the Ben-David family". The material also states that members of the Ben-David family are former shareholders of the defendant with whom a settlement was reached around July 1988, under which the Ben-David family released their shares and loans to the defendant. The Ben-David family were dissatisfied with the settlement and recently instituted further proceedings against the defendant.

At this point I shall return to the motion court judge's reasons. As I have indicated, the judge dismissed the motion because he was not satisfied that there was a collateral purpose involved in the "handing over" of the documents to the Ben-David family. There can be no doubt that he found that the plaintiff, through Mr. Orfus, gave the documents to the Ben-David family. He said this in the passage I have quoted and in an earlier part of his brief reasons:

> A copy of the 1987 financial statement and 1986-1987 sales summary of the defendant was provided by Mr. Orfus to the Ben-David family sometime after October 9, 1988.

Assuming that this finding is correct, I think that the judge erred in his conclusion, on applying the proper burden of proof, that it had not been proven that the documents were given to the Ben-David family for a collateral or ulterior purpose. It appears from his reasons that he attributed to the expression "collateral or ulterior" some sort of a pejorative meaning rather than the correct meaning of for a purpose other than that of the litigation in which the document was produced.

With respect, I do not think there can be doubt that, having regard to this meaning, the documents were furnished in breach of the implied undertaking rule. If one were to reflect more fully on the evidence on this particular issue one could infer that the purpose was to assist the Ben-David family at the expense of the defendant. I think that it is fair to say that the respondents did not attempt to support the holding of the judge on this issue.

The respondents' basic argument in this court is that the evidence is not capable of supporting the conclusion that the plaintiff, through Mr. Orfus, gave the documents to the Ben-David family.

I begin with the observation that the motions court judge made this finding and, apparently, without difficulty. There was clear evidence to support it in the form of notations on the copies of the documents produced in the Ben-David proceeding which showed that they were copies of the very documents which had been faxed by the defendant s solicitors to the plaintiff's solicitors on October 9, 1988. The affidavit filed in support of the motion was that the defendant's solicitors shared space with the solicitors whose name appeared on the documents beside the date October 9, 1988.

There is an irresistible inference that the respondents furnished these documents to the Ben-David family. The failure of the respondents to file any evidence to counter or explain this evidence merely strengthens the defendant s case: see R. v. Johnson (1993), 12 O.R. (3d) 340, 79 C.C.C. (3d) 42 (C.A.).

The respondents have also submitted that the finding could not be made because the defendant was relying on hearsay evidence. The only hearsay evidence, in the form of evidence on information and belief, which is relevant to the motion, is that contained in the supporting affidavit to the effect that the defendant s solicitors on October 9, 1988 shared space with the solicitors whose names appeared on the two documents. This evidence was on a fact that was not contentious and was in a form that fully complied with rule 60.11(3) of the Rules of Civil Procedure. I would not give effect to this submission.

As far as the penalty is concerned, the defendant has submitted that it should take the form of a fine equal to the fees which the defendant paid its solicitors in the Ben-David action. Mr. Sloan very fairly indicated that it was not clearly proven that there was any connection between the respondents breach and the instigation of this action. Accordingly, I do not think that we should give effect to this submission. We were informed that the Ben-David action has been settled.

Neither do I think that there is any logical connection between the breach and plaintiff s action against the defendant so as to make the staying of this action a proper penalty. This was another one of the submissions of the defendant.

In the circumstances, I think the proper result is to find the respondents in contempt for breach of the implied undertaking and to order that they pay the costs of the motion and of this appeal on a solicitor and client basis.

In the result, I would allow the appeal, set aside the order of the motions court judge, and make the order which I have just described.

Appeal allowed.

TAB 9

CITATION: Kitchenham v. Axa Insurance Canada, 2008 ONCA 877
DATE: 20081224
DOCKET: C48369

COURT OF APPEAL FOR ONTARIO

Doherty, Cronk and Juriansz JJ.A.

BETWEEN

Janet Winifred Kitchenham

Plaintiff (Respondent)

and

AXA Insurance Canada

Defendant (Appellant)

Geoffrey D.E. Adair, Q.C. and Robert M. Ben, for the appellant

Karl Arvai, for the respondent

Heard: November 6, 2008

On appeal from the order of the Divisional Court dated September 10, 2007 with reasons reported at (2007), 284 D.L.R. (4th) 722.

Doherty J.A.:

I. FACTUAL BACKGROUND

[1] Civil litigants are compelled in the discovery process to disclose information to their opponents. Forced disclosure can compromise a litigant's legitimate interest in maintaining the confidentiality of documents and information. However, interference with that privacy interest is justified as essential to a fair and accurate resolution of the litigation. Various judicial and legislative means have been developed to limit the interference with privacy interests to the confines of the litigation in which the disclosure is compelled. In Ontario, the deemed undertaking, created by Rule 30.1 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, protects privacy interests by controlling the use of information outside of the litigation in which it was obtained by way of compelled disclosure. This appeal examines the application of the deemed undertaking rule where a plaintiff, who obtained information from a defendant in one action, seeks to withhold that information from another defendant in the discovery process in a second action also commenced by the plaintiff.

[2] Janet Kitchenham, the respondent ("plaintiff"), was in a car accident in January 1993. She sued the other driver in January 1995 (the "tort action"). The tort defendant obtained an order under s. 105 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, requiring the plaintiff to submit to an independent medical examination. That medical examination was performed by Dr. Clifford, a psychiatrist. A copy of his report (the "IME"), dated January 1999, was provided to the plaintiff by the tort defendant as required under rule 33.06.

[3] The tort defendant conducted surveillance of the plaintiff. During the discovery process, the tort defendant provided a copy of the surveillance videotape to the plaintiff, pursuant to Rule 30.[1]

[4] The tort action settled some time in the year 2000. About four years earlier, the plaintiff had commenced a second action (the "benefits action"). In the benefits action, the plaintiff sued her own insurer, AXA Insurance Canada ("AXA"), claiming that she was disabled and unable to work, and that AXA had improperly withheld weekly income replacement benefits and payments for certain rehabilitation-related expenses. AXA filed a statement of defence in 1997.

[5] Discoveries in the benefits action were completed in 2003. During those discoveries, the plaintiff refused to produce the following:

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[1] In its factum, the appellant suggests that the record does not indicate how the plaintiff came into possession of the videotape. Both the motion judge (para. 49) and the Divisional Court (para. 6) proceeded on the basis that the copy of the videotape of the surveillance was given to the plaintiff pursuant to the tort defendant's obligations under Rule 30. I propose to do the same.

- a copy of the surveillance videotape provided to the plaintiff by the tort defendant;
- a copy of the IME provided to the plaintiff by the tort defendant; and
- copies of documents relating to the settlement of the tort action.

[6] The plaintiff refused to produce the videotape and the IME claiming that she was bound by the deemed undertaking in Rule 30.1. She refused to produce the documents relating to the settlement claiming that they were irrelevant to any issue in the benefits action. AXA brought a motion challenging the refusals.

[7] The motion judge held that the video surveillance and the IME engaged the deemed undertaking rule, whether or not the plaintiff was the recipient of the discovery documents. However, he concluded that the Rule precluded use and not disclosure. He ordered production of the videotape and the IME, limiting their use to potential impeachment purposes. He agreed with the plaintiff's contention that the settlement documents were irrelevant: see *Kitchenham v. Axa Insurance* (2005), 17 C.P.C. (6th) 375 (Ont. S.C.).

[8] Both parties obtained leave to appeal the order of the motion judge to the Divisional Court. That court agreed with the motion judge that the videotape and the IME were caught by the deemed undertaking in Rule 30.1, but disagreed with the production order. The Divisional Court held that the videotape and the IME could not be produced by the plaintiff in the discovery process in the benefits action, subject to a judge's order under rule 30.1.01(8). The Divisional Court agreed with the motion judge that the settlement documents were irrelevant and need not be produced to AXA: see *Kitchenham v. AXA Insurance* (2007), 284 D.L.R. (4th) 722.

[9] AXA obtained leave to appeal to this court.[2] Although I have a different interpretation of Rule 30.1 than both the Divisional Court and the motion judge, I arrive at the same result as the Divisional Court.

[10] In my view, the Rule exists to protect the privacy interest of the party compelled by the rules of disclosure to provide that information to another party to the litigation. The Rule provides that protection by prohibiting the party who obtained the information through compelled disclosure from using that information outside of the litigation, except where certain exceptions apply or the court makes an order permitting its use.

[2] At the same time that AXA pursued its leave to appeal application in this court, it brought a motion for production of the material pursuant to rule 30.1.01(8) in the Superior Court. On February 11, 2008, Kennedy J. ordered production of the videotape but not the IME. This court was told that both parties have now appealed that decision to the Divisional Court. I will have more to say about this development when addressing the appropriate order in Part IV of these reasons.

[11] The plaintiff obtained copies of the videotape and the IME from the tort defendant in the course of the discovery process in the tort action. Consequently, that material falls within the scope of the deemed undertaking found in Rule 30.1. AXA can obtain a copy of the videotape and the IME by obtaining either the consent of the tort defendant, or an order of the court pursuant to rule 30.1.01(8).

[12] I agree with the Divisional Court and the motion judge that AXA has not demonstrated that the settlement documents have any relevance to the benefits action brought by the plaintiff against AXA. I would not order those documents produced and will briefly address that issue before turning to an analysis of the deemed undertaking rule.

II. THE SETTLEMENT DOCUMENTS

[13] AXA argues that it is entitled to production of the settlement documents in the tort action because the amount and terms of the settlement could provide a disincentive to the plaintiff to work, thereby colouring her claim in the benefits action that she is actually disabled and unable to work. No other relevance is suggested. The amount of the settlement in the tort action can have no impact on what AXA must pay under its policy if the plaintiff's claim succeeds.

[14] I agree with the motion judge (paras. 51-53) and the Divisional Court (para. 22) that this ground of appeal cannot succeed. The issue in the benefits action is whether the plaintiff is disabled and unable to work. The impact, if any, of the settlement in the tort action on the plaintiff's motivation to work and, more particularly, the connection between that motivation and the extent to which the plaintiff is actually disabled are both so speculative as to be beyond even the generous notion of relevance applied at this stage of a proceeding: *Kay v. Posluns* (1989), 71 O.R. (2d) 238 (H.C.), at p. 246.

III. THE DEEMED UNDERTAKING RULE

[15] The copy of the videotape and the IME are relevant in the benefits action. Both potentially speak to the level of the plaintiff's disability. They are in the possession of the plaintiff. Apart from Rule 30.1, no basis has been advanced by the plaintiff for withholding this material from AXA during the discovery process. The plaintiff did not advance a privilege claim, although some of the plaintiff's submissions suggested that the personal nature of the information conveyed to Dr. Clifford, which he referenced in the IME, was relevant to whether the IME should be produced. For the purpose of this appeal, AXA's entitlement to a copy of the videotape and the IME turns exclusively on the operation of Rule 30.1.

[16] The terms of the deemed undertaking are found in subrule (3) of the Rule. It must, however, be read as a whole to understand its meaning and scope:

30.1 – DEEMED UNDERTAKING

Application

30.1.01 (1) This Rule applies to,

(a) evidence obtained under,

(i) Rule 30 (documentary discovery),

(ii) Rule 31 (examination for discovery),

(iii) Rule 32 (inspection of property),

(iv) Rule 33 (medical examination),

(v) Rule 35 (examination for discovery by written questions); and

(b) information obtained from evidence referred to in clause (a).

(2) This Rule does not apply to evidence or information obtained otherwise than under the rules referred to in subrule (1).

Deemed Undertaking

(3) All parties and their counsel are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

Exceptions

(4) Subrule (3) does not prohibit a use to which the person who disclosed the evidence consents.

(5) Subrule (3) does not prohibit the use, for any purpose, of,

(a) evidence that is filed with the court;

(b) evidence that is given or referred to during a hearing;

(c) information obtained from evidence referred to in clause (a) or (b).

(6) Subrule (3) does not prohibit the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding.

(7) Subrule (3) does not prohibit the use of evidence or information in accordance with subrule 31.11(8) (subsequent action).

Order that undertaking does not apply

(8) If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that subrule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.

(1) Reasons of the Motion Judge and the Divisional Court

[17] The motion judge acknowledged that Rule 30.1 had its origin in the implied undertaking rule developed in the common law and recognized by this court in *Goodman v. Rossi* (1995), 24 O.R. (3d) 359. However, he went on to identify two differences between the implied undertaking at common law and the deemed undertaking found in Rule 30.1.

[18] First, he noted that, as interpreted in *Tanner v. Clark* (2003), 63 O.R. (3d) 508 (C.A.), leave to appeal to S.C.C. refused, [2003] 3 S.C.R. viii, the common law implied undertaking constrained only the conduct of the recipient of the information and not the party who had disclosed the information in the discovery process. The motion judge read Rule 30.1 as applying to all parties. At paras. 25 and 27, he stated:

> [S]ubrule 30.1.01(3) imposes the undertaking on "[a]ll parties and their counsel". This includes both the party disclosing the evidence and the party receiving it, as well as their respective counsel. By contrast, the focus in *Tanner v. Clark* was on the *recipient* of the information only. As Carthy J.A. noted, the accident benefits insurer was bound by the undertaking, but the plaintiff (referred to as the "source" of the information) was not. ...

> Rather than focussing on the recipient of information, and imposing an implied obligation on that recipient, the rule focuses on the nature of the evidence in question. If the evidence was obtained under one of the five enumerated procedures in sub-rule 1(a), then the use of that evidence is constrained by the rule. These constraints are imposed on all parties and their counsel. Clearly, the drafters of the rule intended that it should apply not only to the parties and counsel in the original proceeding, but also to the parties and counsel where the specified evidence is sought to be introduced. [Italics in original; underlining added.]

[19] The second difference identified by the motion judge concerns the scope of the undertaking. In his view (at para. 29), the common law rule constrained only uses that were detrimental to the party that produced the information. In contrast, the deemed undertaking set out in the Rule foreclosed use "for *any* purpose other than those of the proceeding in which the evidence was obtained." On the motion judge's reading of the Rule, it was irrelevant whether the subsequent use was to the detriment of the party who produced the information.

[20] The motion judge ultimately decided the motion on a point not raised or argued by counsel. He drew the following distinction at para. 32: "The point that was entirely missed in argument is that this rule constrains the *use* of evidence, it does not constrain the *disclosure* of evidence" (emphasis in original).

[21] The motion judge concluded that although the Rule foreclosed use of the material, the plaintiff was compelled to produce a copy of the IME and the videotape to AXA. AXA, however, could only use the material for impeachment purposes. This limited use was found in the exception to the deemed undertaking created by rule 30.1.01(6). If AXA wished to make broader use of the material, it would have to bring a motion under subrule (8).

[22] The Divisional Court agreed with the motion judge that the deemed undertaking rule, unlike the common law implied undertaking, applied not just to the recipient of the documents, but also to the discovered party, stating at para. 14:

> Because of the clear wording of Rule 30.1.01(3) and in particular to the phrase "(3) All parties and their counsel are deemed to undertake…", we are unable to accept the submission of the respondent that it is only the recipient of discovery documents or evidence that is constrained from

> disclosing or using them outside the proceeding and that the discovered party is not constrained by the deemed undertaking rule in any way. In addition to what we regard as the clear wording of the rule, it is obvious that in many instances the discovered party may have a privacy interest worthy of protection under the rule.

[23] The Divisional Court, however, disagreed with the motion judge's distinction between disclosing information otherwise captured by the deemed undertaking and using that information. The Divisional Court concluded that disclosure was a form of use and was captured by the deemed undertaking in subrule (3), indicating at para. 16:

> We would begin by recognizing that the routine disclosure of discovery evidence from a prior proceeding in a subsequent action would totally fail to give effect to the important privacy interests which form the basis of Rule 30.1.01, the deemed undertaking rule, and indeed its common law counterpart. There does not appear to be any authority for the distinction between disclosure and use which the motion judge suggests. The prohibited "use" in the Rule is a term sufficiently broad to include disclosure. Indeed the case law, both at common law and under the deemed undertaking rule seems to protect the privacy of litigants by protecting the confidentiality of documents and information produced on discovery against any further disclosure without leave of the Court.

[24] The Divisional Court concluded that the videotape and the IME were protected from disclosure by the deemed undertaking rule, irrespective of which party was the discloser or recipient of the information, and directed that an application for relief from that rule should be made by way of motion to a judge of the Superior Court under subrule (8).

(2) Analysis

(i) Who is Subject to the Deemed Undertaking?

[25] Rule 30.1 is referred to as the deemed undertaking rule. With respect to the contrary view, an interpretation of that Rule that extends the deemed undertaking to the party who provided the information and to strangers to the litigation in which the information was provided is inconsistent with the meaning of an undertaking in the

litigation context. "Undertaking" is defined in *Black's Law Dictionary*, 4th ed., revised, in part as:

> [A] promise given in the course of legal proceedings by a party or his counsel, generally as a condition to obtaining some concession from the court or the opposite party.

[26] An undertaking is a promise given by one party to another party to the lawsuit in exchange for obtaining something from that party. Thus, in the discovery process, one party receives information from another party, and in exchange promises the other party that the information will not be used for any purpose other than the litigation at hand. The disclosed information flows in one direction, from the discovered party to the discovering party. The undertaking flows in the opposite direction, from the party obtaining the disclosure to the party giving the disclosure. That undertaking does not limit what the discovered party can do in the future with its own information. There is no reason for imposing an undertaking limiting future use of the information on the party who has suffered the burden of producing the information through compelled disclosure. It is equally at odds with the accepted meaning of an undertaking to hold that parties who had no connection with the process in which the undertaking arose should, at some later time in some other litigation, find themselves bound by that promise or undertaking.

[27] I appreciate that it is ultimately the meaning of Rule 30.1 and not the customary meaning of an undertaking that controls the outcome of this appeal. However, the rationale underlying the Rule, the language used in the Rule, and the jurisprudence of this court interpreting the Rule, all support an interpretation that is consistent with the way in which undertakings customarily work.

(a) Rationale underlying the Rule

[28] Rule 30.1 came into force on April 1, 1996: O. Reg. 61/96, s. 2. It is a direct descendant of the common law implied undertaking doctrine recognized by this court in *Goodman v. Rossi*. The implied undertaking was recently described in these terms:

> One such safeguard is the implied undertaking of confidentiality, which *circumscribes the use that a party receiving discovery may make of the information it obtains. Where the implied undertaking exists, the party in receipt of information is deemed to give an undertaking to the court that it will not use that information for any collateral or ulterior purpose unrelated to the litigation at hand.* [Emphasis added.]

Cristiano Papile, "The Implied Undertaking Revisited" (2006) 32 Advocates' Q. 190, at p. 190.

[29] The common law implied undertaking, as developed in Canada and England, limits the use that the recipient of the compelled disclosure could make of information obtained by that disclosure. The implied undertaking did not bind either the party who provided the disclosure or strangers to the litigation in which the disclosure was made: see *Juman v. Doucette*, [2008] 1 S.C.R. 157, at paras. 4 and 55; *Tanner v. Clark* at paras. 5-7, aff'g (2002), 60 O.R. (3d) 304 (Div. Ct.), at paras. 39 and 48-55; *Home Office v. Harman*, [1983] 1 A.C. 280 (H.L.), per Lord Keith at p. 308; John B. Laskin, "The Implied Undertaking" (a paper presented to the CBA-Ontario, CLE Conference on *Privilege and Confidential Information in Litigation – Current Developments and Future Trends*, October 19, 1991), at p. 2.

[30] The implied undertaking promotes the due administration of justice in the conduct of civil litigation in two ways. First, it encourages full and frank disclosure on discovery by the parties. It does so by interdicting, except with the court's permission, the subsequent use of the disclosed material by the party obtaining that disclosure for any purpose outside of the litigation in which the disclosure was made. Second, the implied undertaking accepts that the privacy interests of litigants must, subject to legitimate privilege claims, yield to the disclosure obligation within the litigation, but that those interests should be protected in respect of matters other than the litigation: *Juman v. Doucette*, at paras. 23-27; Richard B. Swan, "The Deemed Undertaking: A Fixture of Civil Litigation in Ontario" (Winter 2008) 27 Advocates' Soc. J., No. 3, p. 16.

[31] In *Goodman v. Rossi* at p. 369, Morden J.A. quotes from Matthews and Malek's *Discovery* (1992), at p. 253, where the rationale for the rule is described as follows:

> The primary rationale for the imposition of the implied undertaking is the protection of privacy. Discovery is an invasion of the right of the individual to keep his own documents to himself. It is a matter of public interest to safeguard that right. The purpose of the undertaking is to protect, so far as is consistent with the proper conduct of the action, the confidentiality of the party's documents. It is in general wrong that one who is compelled by law to produce documents for the purpose of particular proceedings should be in peril of having those documents used by the other party for some purpose other than the purpose of the particular legal proceedings...

[32] The promotion of full and frank disclosure, and the protection of the privacy interests of those who are compelled to make disclosure during discovery are both served by restricting the use that the party obtaining the information can make of that information. Neither rationale for the implied undertaking justifies any restriction on the subsequent use of the information by the party who produced that information. To the contrary, wrapping all information produced in the discovery process in one action in a cloak of non-disclosure for any subsequent purpose, and requiring a court order to remove that cloak of secrecy would inevitably interfere with the effective operation of the discovery process.

(b) The language of the Rule

[33] The language of Rule 30.1 confirms that it, like the common law implied undertaking, targets subsequent use by the recipient of information disclosed through the discovery process. Subrule (1) identifies the material captured by the deemed undertaking. Subrule (1)(a) refers to "evidence obtained under" the various discovery mechanisms described in subrule (1)(a). Subrule (1)(b) extends the Rule to cover information obtained from evidence described in clause (a).

[34] The verb "obtained" signals that the Rule applies to evidence (and derivative information) received through the discovery process and not to information provided in that process. A party who receives evidence through compelled disclosure *obtains* that evidence. The party who provides evidence through compelled disclosure does not *obtain* that evidence under any accepted meaning of the word. Subrule (2) expressly excludes from the operation of the Rule any evidence (or derivative information) other than evidence obtained through the discovery process. Consequently, if a party called upon to disclose evidence (or derivative information) in a subsequent proceeding did not obtain that evidence through the discovery process, the Rule has no application.[3]

[35] The actual deemed undertaking is set out in subrule (3):

> ***Deemed undertaking***
>
> **(3)** All parties and their counsel are deemed to undertake *not to use evidence or information to which this Rule applies* for any purposes other than those of the proceeding in which the evidence was obtained. [Emphasis added.]

[36] The undertaking applies to "evidence or information to which this Rule applies". That phraseology drives the reader back to subrules (1) and (2). As indicated above, the

[3] There may be cases where an entity in possession of evidence (or derivative information) was not a party to the litigation in which the deemed undertaking arose but has sufficient connection to the recipient of the information that the deemed undertaking will extend to that entity. That issue does not arise in this case.

Rule only applies to evidence (and derivative information) obtained through the discovery procedures identified in subrule (1)(a). Consequently, "[a]ll parties and their counsel" who obtained evidence through those procedures are deemed to undertake not to use that evidence for any purpose other than purposes arising in the proceedings in which they obtained that evidence. If the party called upon to disclose the evidence in a subsequent proceeding did not obtain that evidence (or derivative information) through discovery in the prior proceeding, the Rule does not apply and there is no deemed undertaking. A party who provides evidence on discovery does not obtain that evidence through discovery. That party's subsequent use of that evidence is unaffected by the deemed undertaking rule.

[37] Two other features of the Rule demonstrate that it applies exclusively to the party or parties who obtain the evidence on discovery. Subrule (4) excludes from the deemed undertaking provision in subrule (3) a use "to which the person who disclosed the evidence consents". An outright exclusion from the deemed undertaking rule based on the unilateral consent of the disclosing party makes sense only if the Rule exists exclusively to protect the residual privacy interest of that party in the information it revealed on discovery. An exclusion from the deemed undertaking based on the disclosing party's consent is inconsistent with an interpretation of the Rule that makes the disclosing party subject to the undertaking. On that reading, one subrule would make the disclosing party subject to the deemed undertaking, while another subrule would allow the disclosing party to escape the deemed undertaking, simply by consenting to the subsequent use. One can hardly be said to be bound by an undertaking if one's own consent can negate that undertaking.

[38] Subrule (8) also assists in identifying the nature of the deemed undertaking rule. It provides that the court may order that the deemed undertaking in subrule (3) does not apply to evidence, or information obtained from it, "if satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence". Subrule (8) makes it clear that the party who disclosed the evidence through the compelled discovery process is the exclusive beneficiary of the protection afforded by the deemed undertaking. It is that party's privacy interests that can justify restriction on the use of information obtained through discovery outside of the litigation in which that information was obtained: see *B.E. Chandler Co. v. Mor-Flo Industries Inc.* (1996), 30 O.R. (3d) 139 (Gen. Div.), at p. 142.

[39] In arriving at the conclusion that the deemed undertaking Rule foreclosed use by both the recipient of the disclosure and the party giving disclosure, the Divisional Court referred to the opening language of subrule (3) and added, at para. 14, that "it is obvious that in many instances the discovered party may have a privacy interest worthy of protection under the rule."

[40] I agree with this observation. Indeed, I think that the discovered party has the only privacy interest protected under the Rule. However, the protection of the privacy of the discovered party is neither served, nor justified, by an extension to the discovered party of the obligation not to use the information in a subsequent proceeding. The protection of the discovered party's privacy interest flows from the imposition of the undertaking limiting subsequent use on the discovering party.

(c) The case law

[41] The case law from this court supports a reading of the Rule that imposes the undertaking on the recipient of the compelled disclosure for the benefit of the party who was compelled to make the disclosure. In *Tanner v. Clark*, this court, after concluding that in the circumstances, the common law implied undertaking and not the deemed undertaking rule applied, held that the implied undertaking constrained only subsequent use outside of the litigation by the recipient of the disclosed documents. The motion judge and the Divisional Court distinguished *Tanner v. Clark* on the ground that it spoke to the common law implied undertaking and not the terms of the deemed undertaking found in Rule 30.1.

[42] Carthy J.A. addressed both the common law implied undertaking and the deemed undertaking in *Tanner v. Clark*. After agreeing with the observation of Epstein J. in the Divisional Court that the implied undertaking protected against use by the recipient of the information rather than against all uses of the information, Carthy J.A. went on to draw the parallel between the common law and Rule 30.1 at para. 6:

> It is "used by the other party" and "use them to the detriment of the party who has produced them" that are the keynote phrases. *Rule 30.1.01(1) speaks in the same voice – it is "evidence obtained" on discovery that shall not be "used". These verbs describe the acts of receiving and disseminating information; they do not label the evidence as sealed or privileged.* The applicants in the AB proceedings submitted to medical examinations knowing that the information they impart will not be used by the two insurance companies except in those proceedings, and will not be communicated to others for their use in other proceedings. That has not happened here. The insurers in the tort proceedings are different companies and the information is sought, not from the insurers in the AB proceedings, but from the source of that information, the respective plaintiffs in the tort actions. Those plaintiffs are not constrained in any way from the use of their medical information for any purpose. What they argue for is not enforcement of an undertaking, but a

> protective shield against production of very relevant evidence. [Emphasis added.]

[43] The analysis of Carthy J.A. applies with full force to the deemed undertaking as described in Rule 30.1. This is demonstrated by the reasons in *Rogacki v. Belz* (2003), 67 O.R. (3d) 330 (C.A.), at para. 28. Borins J.A., relying on *Tanner v. Clark*, described the Rule in these terms:

> The documents and testimony obtained from the discovered party are protected by the deemed undertaking from improper use by the discovering party. *Under Rule 30.1 the discovered party is not constrained from any use of his testimony or the documents elicited by the discovering party. It is the discovering party's use of information obtained from the discovered party for a purpose other than that of the litigation in which it was obtained that is precluded by Rule 30.1.* [Emphasis added.]

[44] *London Life Insurance Co. v. Konney* (1998), 41 O.R. (3d) 706 (Div. Ct.) does offer some support for the position taken by the plaintiff. It would appear that in *Konney* the insured, relying on rule 30.1.01(3), claimed that medical reports he had prepared for use in a tort action could not be produced by him in a subsequent action brought by his insurer against him. The court accepted this contention stating, at p. 709, that "[t]hese documents originated in the tort actions and their use by any party is *prima facie* confined to those actions."

[45] In holding that the deemed undertaking bound all parties to the earlier proceeding, the court purported to rely on *Goodman v. Rossi*. For reasons set out above, I read that authority and the many it referred to as placing a restriction on the use of documents obtained in discovery only on the recipient of those documents. In *Konney*, the insured was the source of the medical reports and not the recipient of those reports from the opposing party. The deemed undertaking rule protected the insured against the use of those reports outside of the tort action by the defendant to whom those reports were produced. The Rule did not permit the insured to withhold its own relevant information from a different insurer in a second action. Not only does *Konney* misread *Goodman v. Rossi*, but it has been overtaken by the decisions of this court in *Tanner v. Clark* and *Rogacki v. Belz*.

[46] In summary, the rationale for the Rule, the language of the Rule, and this court's jurisprudence, all support the following observation in Garry D. Watson, ed., *Holmested*

and Watson: Ontario Civil Procedure, looseleaf, vol. 3 (Scarborough, Ont.: Carswell, 1984), at p. 30.1-5:

> The undertaking *prevents the recipient of the information from revealing it to third parties* (perhaps most particularly, but not limited to, the media) or making use of the information in a proceeding other than the one in which it was obtained. [Emphasis added.]

(ii) Did the Plaintiff Obtain a Copy of the Videotape and the IME Through the Discovery Process?

[47] The tort defendant conducted surveillance of the plaintiff and recorded that surveillance by way of videotape. A copy of that videotape was produced to the plaintiff on discovery. The plaintiff clearly obtained a copy of the videotape during discovery. The fact that she is the subject of that videotape is irrelevant. The plaintiff is bound by the deemed undertaking not to use the videotape except as permitted by the Rule. The tort defendant, and not the plaintiff, is the beneficiary of that deemed undertaking. The deemed undertaking protects any privacy interest the tort defendant may have in the use of a copy of the videotape outside of the tort action.

[48] Similarly, the plaintiff obtained the IME during discovery in that it was produced to her by the tort defendant pursuant to Rule 33. As with the copy of the videotape, the plaintiff is bound by the deemed undertaking not to use the IME in another proceeding and the tort defendant is the beneficiary of that undertaking.

[49] During oral argument, counsel for the plaintiff referred to the IME, medical records provided by the plaintiff to Dr. Clifford for use in the preparation of the IME as required by rule 33.04, and medical information given to Dr. Clifford by the plaintiff in the course of the doctor's examination of the plaintiff as if all were subject to the deemed undertaking in Rule 30.1. If I understood counsel's submission correctly, he asserts that all this material is protected from disclosure in the benefits action by the deemed undertaking rule.

[50] Only the IME was obtained by the plaintiff in the course of discovery in the tort action and, therefore, only the IME is subject to the deemed undertaking rule. The other medical information given to Dr. Clifford by the plaintiff as required by the Rules flowed from the plaintiff to Dr. Clifford and was not "obtained" by the plaintiff in the course of the discovery. The same observation applies to any information conveyed by the plaintiff to Dr. Clifford during his examination. The plaintiff's obligation to produce her own medical information in the benefits action is unaffected by the fact that she had already

produced that information in the tort action for the purpose of the preparation of the IME. If the information is relevant and not protected by privilege, it must be produced.

[51] Counsel's attempt to bring all the plaintiff's medical information provided to the tort defendant within the deemed undertaking rule suggests a misconception of the scope and purpose of the Rule. The Rule has nothing to do with the nature of the information in issue, but turns exclusively on how the party called upon to disclose the information came into possession of that information: *Juman v. Doucette*, at para. 25. If the party obtained the information in the course of the discovery process, it is subject to the deemed undertaking rule regardless of whether the information is confidential. If, however, the information was not obtained in the discovery process, the deemed undertaking rule has no application no matter how confidential the information might be. A litigant who wishes to resist production on the basis of the nature of the information sought must find shelter in some privilege or challenge the relevancy of the information.

(iii) Does the Deemed Undertaking Prohibit Production of Evidence on Discovery in a Subsequent Proceeding?

[52] Subrule (3) proscribes use of evidence or information covered by the Rule "for any purposes other than those of the proceeding in which the evidence was obtained." The prohibition is drawn in very wide terms. Those terms are consistent with the scope of the common law implied undertaking that prohibited use for any purpose other than the conduct of the litigation in which the compelled disclosure occurred: *Goodman v. Rossi*, at pp. 374-75. The privacy rationale underlying the Rule also warrants extending the protection of the Rule to requests for disclosure of the information covered by the Rule in the course of discoveries in subsequent proceedings. Disclosure on discovery compromises the residual privacy interest of the party from whom the material was obtained by compelled disclosure in the earlier proceeding.

[53] The motion judge was moved to exclude the disclosure of material in the course of discoveries from the scope of subrule (3) because subrule (6) accepted use for impeachment purposes of information otherwise caught by the deemed undertaking in subrule (3). The motion judge reasoned at para. 35:

> As already noted, sub-rule 30.1.01(6) permits the use of such evidence to impeach the testimony of a witness in the present proceeding. Obviously, it would be impossible to make use of the evidence in that manner without having it disclosed in the first place.

[54] I do not agree that Rule 30.1.01(6) requires the disclosure of protected evidence for impeachment purposes. Litigants will sometimes, quite properly, be in possession of

material that is subject to the deemed undertaking rule. They will not be permitted to use that material. If, however, the occasion arises, they can use that material for impeachment purposes. For example, if party "A" sues party "B" and obtains certain documents on discovery, the deemed undertaking rule will prohibit "A" from using those documents for any purpose outside of that litigation. However, should party "A" become involved in a second lawsuit, subrule (6) would permit party "A" to utilize the evidence lawfully obtained in the prior action to impeach the testimony of a witness in the second proceeding. There is no need to exempt production on discovery from scope of the deemed undertaking to give meaning to the impeachment exception to the Rule.

[55] Neither party on this appeal supported the distinction drawn by the motion judge between using a document and producing that document. Like the Divisional Court, I do not think that distinction is warranted either on the language of the Rule or having regard to its rationale. Where the undertaking applies, it reaches production of evidence (and derivative information) captured by the Rule.

(iv) The Operation of Subrule (8).

[56] Having concluded that the copy of the videotape and the IME were obtained by the plaintiff in the course of discovery in the tort action, and that their disclosure on discovery by the plaintiff in the subsequent benefits action would constitute a use of that evidence, it follows that the material is subject to the deemed undertaking created by the Rule. None of the exceptions enumerated in subrules (4) to (7) apply. AXA can obtain the material either by getting the consent of the tort defendant to the plaintiff giving the material to AXA, or by obtaining an order under subrule (8) lifting the deemed undertaking as it applies to the copy of the videotape and the IME.

[57] Subrule (8) identifies the two competing interests which must be considered on a motion under that subrule. On the one side stands the "interest of justice". On the other side stands "prejudice" to the "party who disclosed evidence". The former interest must "outweigh" the latter before the deemed undertaking will be held not to apply to the information in issue. In the context of subrule (8), the "interest of justice" refers to factors that favour permitting the subsequent use of the information. Where the motion arises in the context of a party who seeks to use the information in subsequent litigation, the more valuable the information to the just and accurate resolution of the subsequent litigation, the more the interest of justice will be served by permitting the use of that information.

[58] The interests of the party who was compelled to disclose the information are the only interests that can justify maintaining the undertaking. My reading of subrule (8) is consistent with an interpretation of the Rule that recognizes the party who gave up the information as the sole beneficiary of the protection afforded by the Rule. It is also

consistent with subrule (4), which provides that the deemed undertaking has no application if the party who disclosed the evidence consents to its use.

[59] On the view I take of subrule (8), the interests advanced by the plaintiff to justify her refusal to produce the copy of the videotape and the IME have no place in the exercise of the discretion contemplated in subrule (8). The plaintiff contends that she has a privacy interest in the material. She also argues that AXA could obtain the same kind of medical information through other means. Unlike the motion judge (paras. 38 and 43-45) and the Divisional Court (para. 20), I do not think these interests carry any weight on a motion under subrule (8). The motion judge, at para. 38, mistakenly refers to the subrule as contemplating the balancing of the interest of justice against "any prejudice that would result to a party". As set out above, subrule (8) looks only at prejudice to the party who disclosed the evidence, in this case, the tort defendant. Claims based on the recipient of the information's privacy interests in the material (in this case, the plaintiff) have nothing to do with whether a judge should permit use of evidence otherwise subject to the deemed undertaking.[4]

[60] The discretion in subrule (8) must be exercised on a case-by-case basis. However, where the beneficiary of the undertaking resists relief from that undertaking, the undertaking should only be set aside in "exceptional circumstances". Those circumstances must be particularly compelling if a stranger to the undertaking seeks to use material protected by the undertaking: see *Juman v. Doucette*, paras. 38 and 53.

[61] *Juman v. Doucette* is a recent case in which a stranger to the undertaking rule sought judicial permission to use evidence given on discovery by a party who strongly opposed that use. The Vancouver police were conducting a criminal investigation targeting the appellant. The British Columbia prosecutorial authorities sought access to evidence given by the appellant in an earlier discovery in a civil proceeding from the discovering parties. The appellant moved to prohibit the discovering parties from providing the discovery transcripts to the police.

[62] Although *Juman v. Doucette* involved the application of the common law implied undertaking rule, Binnie J. did refer to subrule (8) of the Ontario Rule. At para. 32, he stated:

> An application to modify or relieve against an implied undertaking requires an applicant to demonstrate to the court on a balance of probabilities the existence of a public interest of greater weight than the values the implied undertaking is designed to protect, namely privacy and the efficient conduct

[4] The arbitration cases relied on by the plaintiff have no application. Those cases accept that the arbitrator has a discretion that goes far beyond the balancing of competing interests contemplated by subrule (8): see *e.g. Snook v. ING Insurance Company of Canada*, September 15, 2003, FSCO A02-000728 (Arbitrator J. Sandomirsky).

> of civil litigation. In a case like the present, of course, there weighs heavily in the balance the right of a suspect to remain silent in the face of a police investigation, and the right not to be compelled to incriminate herself. The chambers judge took the view (I think correctly) that in this case that factor was decisive. In other cases the mix of competing values may be different. *What is important in each case is to recognize that unless an examinee is satisfied that the undertaking will only be modified or varied by the court in exceptional circumstances, the undertaking will not achieve its intended purpose.* [Emphasis added.]

[63] The "examinee" referred to by Binnie J. is the party who was compelled to submit to the examination for discovery and to disclose information in that testimony. On the facts of this case, it is the tort defendant, and not the plaintiff, who stands in the same shoes as the "examinee" in *Juman v. Doucette*.

[64] The result of the balancing process required by subrule (8), and described by Binnie J. above, must be very different where the beneficiary of the protection afforded by the deemed undertaking has no interest in availing itself of that protection. In this case, the tort defendant has not expressed any concern about the production of the videotape or the IME in the benefits action. Indeed, it is unclear whether the tort defendant is aware of the dispute over the production of this material. The plaintiff resists disclosure, not for any reasons connected to the privacy interest of the tort defendant, the beneficiary of the undertaking, but for reasons of her own which, whatever merit they may have, have nothing to do with the rationale for the deemed undertaking. On the present record, this case would appear to fit within that category of cases described in *Goodman v. Rossi*, at p. 378:

> Of course, there will be cases where the interests of the discovered party sought to be protected by the rule will not be seriously affected, or affected at all, by a collateral use of discovered documents...

[65] Where the interests of the party protected by the deemed undertaking would not be adversely affected by the use of the material, and assuming the material has relevance in the subsequent proceeding, the interest of justice would inevitably outweigh any resulting prejudice to the party who had disclosed the evidence.

IV. THE APPROPRIATE ORDER

[66] In the normal course, I would simply dismiss the appeal and uphold the order of the Divisional Court that Rule 30.1 applies to both the videotape and the IME, and that subject to a judge's order under rule 30.1.01(8), they cannot be disclosed by the plaintiff in the benefits action. However, while this appeal was pending, the parties proceeded with their motion under subrule (8). The motion judge ordered the plaintiff to produce the videotape, but refused to order production of the IME. Both sides have obtained leave to appeal from that order to the Divisional Court. The parties included a copy of the motion judge's endorsement in the appeal book. Those reasons must now be assessed in the light of these reasons.

[67] If both parties are content, the appeals from the motion judge's order under subrule (8) should proceed in the Divisional Court in the normal course. One or both parties may, however, wish to make a motion under s. 6(2) of the *Courts of Justice Act*. That section would allow this court to hear the appeal from the motion judge as long as this appeal was still outstanding in this court. There was some discussion at the time of oral argument concerning the possible application of s. 6(2). I think the parties should have an opportunity to revisit their positions with respect to that section after reviewing these reasons.

[68] Rather than dismissing the appeal immediately, I would release these reasons and allow the parties an opportunity to decide whether either or both wish to bring a motion under s. 6(2) of the *Courts of Justice Act*. The parties should inform this court within seven days of the release of these reasons whether any such motion will be brought. If the motion is to be brought, counsel may arrange a conference call with me to work out the details. If neither party decides to bring a motion under s. 6(2), an order can issue dismissing the appeal.

V. COSTS

[69] The parties agreed that the successful party on the appeal was entitled to costs in the amount of $14,000, inclusive of disbursements and GST payable upon the completion of the action. If no motion is brought under s. 6(2) and the appeal is dismissed, the plaintiff is entitled to costs in that amount. If a motion is to be brought under s. 6(2), I would not make any order as to costs until the matter is fully dealt with in this court.

RELEASED: "DD" "DEC 24 2008"

"Doherty J.A."
"I agree E.A. Cronk J.A."
"I agree R.G. Juriansz J.A."

TAB 10

DATE: 20040322
DOCKET: M31085, M31088

COURT OF APPEAL FOR ONTARIO

SHARPE J.A. (In Chambers)

BETWEEN:

N.G. Plaintiff (Responding Party)

- and -

UPPER CANADA COLLEGE Defendant (Responding Party)

Luba Kowal and Crystal O'Donnell for the appellant (Non-Party), the Attorney General for Ontario
David Outerbridge for the respondent, Upper Canada College; Elizabeth Grace for the respondent, N.G.

HEARD: March 19, 2004

SHARPE J.A.:

[1] The Attorney General for Ontario moves for a stay of an order requiring the production in a civil action of a videotape statement given by the plaintiff to the police for use in criminal proceedings.

[2] The stay motion arises in the following context. The plaintiff and others have made allegations of sexual assault against Douglas Brown, a teacher formerly employed by the defendant school. Those allegations have led to criminal charges against Brown and this civil action in which the plaintiff claims damages against the defendant Upper Canada College, alleging negligence, breach of fiduciary duty, vicarious liability and occupier's liability.

[3] Shortly after Brown's arrest in August 2001, the plaintiff gave the police a videotaped statement that is the subject of this motion. The videotape formed part of the Crown brief prepared with respect to the criminal charges against Brown. The videotape has been produced to Brown in the criminal proceedings as part of the Crown disclosure. The Crown initially agreed to produce the videotape, but changed its position when a new Crown counsel took over the file. The plaintiff consents to the production of the videotape in this action.

[4] The defendant moved for production of the videotape as a document in the possession of a non-party to a civil action pursuant to rule 30.10. Master Albert found that it would

be unfair to require the defendant to proceed to trial without the videotape and that the public interest in preserving the integrity of the criminal proceedings could be met by imposing confidentiality safeguards as conditions of the production order. On appeal to a single judge of the Divisional Court, Lang J. agreed with both findings, but added to the confidentiality safeguards. The result is that the videotape must be produced, but on the following conditions:

1. Only counsel for the parties to the civil action may receive copies of the videotape and transcript;

2. Counsel may show the videotape to their clients (including insurers) and may discuss the contents with them, but counsel shall ensure that no copies are made for anyone;

3. Counsel and the parties are to take all reasonable steps to ensure that potential witnesses in the criminal trial are not exposed to the contents of the videotape, subject to any ruling the trial judge may make with respect to admissibility and the imposition of any safeguards appropriate to that context.

[5] The Attorney General has applied for leave to appeal to this court from the judgment of the Divisional Court.

[6] The criminal trial, originally scheduled to begin in February 2004 is now scheduled to proceed in September 2004. The civil action is scheduled to begin on April 13, 2004, although the defendant has indicated that it will argue that the confidentiality conditions are unduly restrictive and that the trial should be adjourned to ensure that it can make full use of the videotape. The plaintiff is most anxious to have the civil trial proceed at the earliest possible date.

[7] The Attorney General raises three grounds in its application for leave to appeal:

1. That the master has no jurisdiction to order production of documents generated in criminal proceedings for use in collateral civil proceedings as such jurisdiction is reserved exclusively to judges of the Superior Court.

2. That production of documents generated in criminal proceedings for use in collateral civil proceedings may only be ordered pursuant to the screening mechanism established in P.(D.) v. Wagg (2002), 61 O.R. (3d) 746 (Div. Ct.) and that the Divisional Court erred in holding that the master was entitled to order production pursuant to rule 30.10.

3. That the videotape is subject to litigation privilege.

[8] The Attorney General argues that these grounds of appeal constitute a serious question to be tried, that production of the videotape would give rise to irreparable harm, and that the balance of convenience favours granting the stay.

Analysis

1. Serious Question To Be Tried.

i. Jurisdiction of the Master

[9] The Attorney General relies on the following passage from paras 48-50 of Wagg for the proposition that only a Superior Court judge can order production from a Crown brief in an on-going criminal proceeding for the purposes of a collateral civil action:

The notion of the court reserving control over documentation contained in the Crown Brief is consistent with, and supports, the court's general jurisdiction to control its own process in order to protect the public interest and ensure the proper administration of justice....

A superior court has original and plenary jurisdiction in all civil and criminal matters including inherent jurisdiction to control and regulate its process and to prevent this from being abused or obstructed....

I am therefore satisfied that the court has the authority to make the ruling and give the directions respecting the process that I propose.

[10] This statement must be read in context. Wagg dealt with a request for production of a Crown brief that was in the possession of one of the parties as a result of Crown disclosure. Under the Rules of Civil Procedure, there was no procedural mechanism to put the Crown on notice and to afford the Crown an opportunity to be heard on the issue. I agree with the respondent U.C.C.'s submission that the quoted statements do not deal with exclusivity of jurisdiction, but rather with the question of jurisdiction to create the screening mechanism. As the present case involves production from the Crown as a non-party, rule 30.10 applies and provides the required mechanism. Masters have jurisdiction to deal with rule 30.10 motions and statutory courts have by necessary implication the power to control their own process and the procedural tools to ensure the effective and efficient disposition of matters falling within their competence: R. v. Felderhof, [2003] O.J. No. 4819 (C.A.) at para 41; R. v. 974649 Ontario Ltd., [2001] 3 S.C.R. 575 at para 38. Under rule 30.10, masters routinely weigh and balance the public interest concerns of non-parties, including government agencies. Masters also routinely make procedural orders arising under the rules that arguably have a more significant impact upon criminal proceedings than the order sought here: for example, ordering accused persons to be examined for discovery as non-parties and staying civil proceedings pending the completion of related criminal proceedings. In my view, the master and the Divisional Court correctly dismissed the Attorney General's submission that the master lacked jurisdiction and I see no merit in this ground of appeal.

[11] Even if the Attorney General is correct and the master did not have jurisdiction to entertain the motion, the matter has now been carefully reviewed by a Superior Court judge who, indeed, did modify the confidentiality conditions on the production order. No arguable point has been advanced to suggest that the Divisional Court erred in its

assessment of the public interest. In these circumstances, it seems to me highly unlikely that leave to appeal would be granted.

ii. Application of Rule 30.10

[12] It would appear that to a significant extent, this point overlaps with the argument relating to the jurisdiction of the master. Putting the jurisdiction argument to one side, I see nothing in rule 30.10 that is inconsistent or incompatible with the screening mechanism contemplated by Wagg. In my view, Lang J. correctly concluded that in the context of a request for production of material from a Crown brief, the fairness test under rule 30.10 "encompasses balancing consideration of the needs of the moving party for access to the particular material against the interests of a third party, the interests of the public in protecting the material from disclosure, and any other relevant interests." The reasons of both the master and the Divisional Court, as well as the conditions they imposed upon production, demonstrate that they both fully considered the public interest arguments identified in Wagg under the regime of rule 30.10. Accordingly, I conclude that this ground of appeal does not meet the "serious issue to be tried" test.

iii. Litigation Privilege

[13] In my view, the Divisional Court correctly concluded that litigation privilege does not apply in the circumstances of this case. The Attorney General does not suggest that the videotape is protected by solicitor-client privilege. Litigation privilege may attach to some materials prepared by the police for the purpose of a criminal trial, but I fail to see any basis for its application in the circumstances of this case. The purpose of litigation privilege, as distinct from solicitor-client privilege, is to protect work product in the adversarial litigation process: see Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer) (2002), 62 O.R. (3d) 167 (C.A.). It follows that production to the opposite party in the litigation effectively ends the privilege. The videotape has already been produced to the accused in the criminal proceedings and hence in that litigation, privilege no longer attaches to the videotape. Litigation privilege, unlike solicitor-client privilege, does not survive the litigation in which it arose, although legislation may extend broader protection to material prepared for the purposes of litigation: Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer).

[14] At this stage, any interest the Attorney General may assert to refuse production does not arise from litigation privilege but rather under the heading of the public interest identified in Wagg. As I have already stated, those concerns were fully and fairly considered by the master and the Divisional Court.

Serious Question to be Tried - Conclusion

[15] While I am mindful that the threshold is low, I consider it so unlikely that leave to appeal will be granted in this case that I am prepared to conclude that the Attorney General has failed to satisfy this first branch of the test for a stay. I see no merit in the

only substantive ground of appeal (privilege) and the remaining two grounds of appeal are entirely procedural in nature. The Attorney General's submissions with respect to the jurisdiction of the master and the application of rule 30.10 are not strong. Moreover, the Attorney General has had the benefit of a comprehensive review by a Superior Court judge and no arguable point has been advanced to suggest that the Divisional Court erred in its assessment of that issue. In these circumstances, the leave to appeal application appears to me to be doomed to almost certain failure.

2. Irreparable Harm

[16] The Attorney General contends that it will suffer irreparable harm if the civil trial proceeds with the videotape in the hands of the defendant, as there is a risk that witnesses in criminal proceedings could become "tainted" if they were to learn what the plaintiff told the police in the videotape. I find this submission to be without merit. First, the risk of "tainting" witnesses is met by the strict confidentiality conditions imposed by the master and the Divisional Court. Second, this motion deals only with production of the videotape, not its use at trial, and so the fears raised by the Attorney General are entirely speculative. If and when the defendant seeks to make use of the videotape during the trial, it would be open to the trial judge to impose conditions to shield the videotape from eyes that should not see it, if indeed that is required. Third, even if we were to focus on the use of the videotape at trial, any risk of tainting from the videotape seems to me to be remote, if not non-existent. If there is a risk of tainting, it surely stems from the fact that the plaintiff will testify, not from production of the videotape. The videotape may enter the trial if the plaintiff is cross-examined on any inconsistent statements, but any added tainting that would flow from revealing such contradictions seems to me to be very remote.

[17] If there was any merit to the Attorney General's argument that the videotape is protected by privilege, it would be arguable that requiring production before the determination of the criminal proceeding could give rise to irreparable harm. However, as I view the privilege claim to be without merit, I find no irreparable harm on that count.

3. Balance of Convenience

[18] In my view, the balance of convenience strongly favours denying the stay. There have been concurrent findings by the master and by the Divisional Court that it would be unfair to require the defendant to proceed to trial without production of the videotape. The likely effect of a stay will be to force the trial court to decide whether to proceed without production of the videotape, or adjourn the trial until after the Attorney General's proposed appeal has run its course or until after the completion of the criminal trial. If the civil trial proceeds before the criminal trial, the defendant will suffer prejudice. If the defendant is granted an adjournment of the civil trial because the videotape has not been produced, the plaintiff will suffer the prejudice of delay. In my view, the harm that would be suffered by the parties in the civil action clearly outweighs any harm that might be suffered by the Attorney General and its interest in a fair criminal trial by reason of the

production of the videotape. The rights of the parties to fair and expeditious justice should prevail.

[19] The Attorney General submits that denial of the stay may render its appeal moot. Given my assessment of the merits of the proposed appeal, I do not regard that possibility as having any weight on the balance of convenience.

[20] I hardly need to add that if I am wrong in my assessment of the merits of the proposed appeal, and three of my colleagues conclude that the Attorney General does raise points deserving the consideration of this court, they clearly have the discretion to grant leave to appeal even where the appeal has become moot.

Conclusion

[21] Accordingly, the motion for a stay is dismissed. The respondents are entitled to their costs of the motion fixed at $2,500 to each party, inclusive of GST and disbursements.

[22] As an addendum, I note that Exhibit 3 to the supplementary affidavit of Thomas Ward contains a copy of the information in the criminal proceedings revealing the names of the complainants, that affidavit shall be sealed and the plaintiff is directed to file for the public record another copy of the affidavit with those names deleted.

"Robert J. Sharpe J.A."

Released: March 22, 2004

TAB 11

Vickery *v.* Nova Scotia Supreme Court (Prothonotary), [1991] 1 S.C.R. 671

Claude Vickery

Appellant

v.

Prothonotary of the Supreme Court of Nova Scotia at Halifax and Brent Stephen Nugent *Respondents*

and

Canadian Association of Journalists *Intervener*

Indexed as: Vickery *v.* Nova Scotia Supreme Court (Prothonotary)

File No.: 21598.

1990: October 31, November 1; 1991: March 28.

Present: Lamer C.J. and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ.

on appeal from the supreme court of nova scotia, appeal division

Evidence -- Exhibits -- Access -- Audio and video tapes admitted in evidence in criminal trial resulting in conviction -- Appeal court finding evidence inadmissible and overturning conviction -- Whether member of public entitled to access to tapes.

Courts -- Administration -- Exhibits -- Access -- Audio and video tapes admitted in evidence in criminal trial resulting in conviction -- Appeal court finding evidence inadmissible and overturning conviction -- Whether member of public entitled to access to tapes.

Respondent N was convicted of second degree murder on the basis of audio cassettes containing an alleged confession and a video cassette of an alleged re-enactment of the killing. The trial, the admission of the tapes into evidence and information about their contents were reported in the media. On appeal the majority found that the audio and video evidence had not been freely and voluntarily obtained from N, that it had been obtained in violation of his right to counsel, and that its admission into evidence brought the administration of justice into disrepute. As a result of the exclusion of the evidence, N's conviction was overturned. Appellant, a journalist, requested a copy of the tapes, but the respondent prothonotary refused to release them. The Nova Scotia Supreme Court, Trial Division, granted appellant's application, as a member of the public, to obtain the tapes. The Appeal Division reversed the judgment.

Held (L'Heureux-Dubé, Cory and McLachlin JJ. dissenting): The appeal should be dismissed.

Per Lamer C.J. and Wilson, La Forest, Sopinka, Gonthier and Stevenson JJ.: N's privacy interests as a person acquitted of a crime outweigh the public right of access to exhibits judicially determined to be inadmissible against him. The court, as custodian of the exhibits, is bound to inquire into the use to be made of them and

is fully entitled to regulate that use. Such exhibits are frequently the property of non-parties and there is ordinarily a proprietary interest in them. In this case N was a participant in the creation of the tapes, a creation found to have been in violation of his constitutional rights, and the court ought to take steps to protect his legitimate interests. In the face of obvious prejudice and with no proposed use being specified, the order for unrestricted access should not have been made. The exhibits were produced at trial and were open to public scrutiny and discussion, so that the open justice requirement had been met. Further, while those subjected to judicial proceedings must undergo public scrutiny of what is said at trial or on appeal, and contemporaneous reporting is protected, different considerations may govern when the process is at an end and the discussion removed from the hearing context. While fair, accurate, contemporaneous reports are likely to be balanced, to display the full context, and to expose the arguments on both sides, the subsequent release and publication of selected exhibits is fraught with the risk of unfairness. The courts must be careful not to become unwitting parties to N's harassment by facilitating the broadcasting of material which was found to have been obtained in violation of his fundamental rights.

In short, curtailment of public accessibility is justified where there is a need to protect the innocent, and N must be considered an innocent person for this purpose. Someone who has been accused and convicted of a serious crime on the basis of self-incriminating evidence obtained in violation of his *Charter* rights should not be made to bear the stigma resulting from unrestricted repetition of the very same illegally obtained evidence.

The Court should not entertain appellant's argument that the prohibition of access was an infringement of his rights under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, since that point was not developed in the courts below. Had the point been raised, the parties would have had the right to lead evidence, the Court would have had the benefit of the reasoning of the courts below, and interested parties might have sought to intervene.

Per L'Heureux-Dubé, Cory and McLachlin JJ. (dissenting): Two principles of fundamental importance to our democratic society must be weighed in the balance in this case: the right to privacy and the principle of open courts. Here the openness of the courts must prevail. This result is necessary to maintain public confidence in the administration of justice. Further, appellate deference should be accorded to the trial judge's discretionary order concerning access, which was reasonable and should be upheld.

There is a strong presumption in favour of access to ensure judicial accountability. Criminal appeals, like criminal trials, should be as open as possible. The media, as the public's representative, should have access to all the exhibits which are part of the appeal proceedings and which may form the basis for the appellate court's decision. In particular, access should not be denied on the grounds that the tapes were found to be inadmissible. The public has a right to know what was excluded by the appellate court and the reason for its exclusion. To prohibit access to all evidence which has been ruled inadmissible would permit the courts to operate in secret. The trial judge in this case admitted all the tapes and the dissenting member of the court of appeal would have admitted the videotape and most of the

audio tapes. This diversity of views on the issue of admissibility further supports the case for access, since the public is entitled to know the actual evidence that was the subject of differing judicial opinion.

Finally, the production of the tapes at trial did not satisfy the common law right of access and the underlying open court principle. The fact that the tapes have been played before should not weaken any claim for access, and makes the privacy interest less compelling. The right of access to court documents, which includes the opportunity to inspect and copy such records, facilitates the openness of court processes. While it is not necessary in this case to consider whether it is guaranteed by s. 2(*b*) of the *Charter*, this right also promotes and advances the constitutional values of freedom of expression.

Cases Cited

By Stevenson J.

Applied: *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; **distinguished:** *Re Regina and Lortie*, [1985] C.A. 451, 21 C.C.C. (3d) 436; **referred to:** *Solomon v. McLaughlin*, [1982] 4 W.W.R. 415; *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).

By Cory J. (dissenting)

Ex parte Drawbaugh, 2 App. D.C. 404; *Craig v. Harney*, 331 U.S. 367 (1947); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978); *United States v. Mitchell*, 551 F.2d 1252 (1976); *United States v. Myers*, 635 F.2d 945 (1980); *United States v. Criden*, 648 F.2d 814 (1981); *In re National Broadcasting Co.*, 653 F.2d 609 (1981); *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (1981); *United States v. Edwards*, 672 F.2d 1289 (1982); *United States v. Beckham*, 789 F.2d 401 (1986); *United States v. Webbe*, 791 F.2d 103 (1986); *Valley Broadcasting Co. v. United States District Court for the District of Nevada*, 798 F.2d 1289 (1986); *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110; *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042.

Statutes and Regulations Cited

American Constitution, First Amendment.

Canadian Charter of Rights and Freedoms, ss. 2(*b*), 24(2).

Defamation Act, R.S.N.S. 1967, c. 72, s. 13(1)(b).

Nova Scotia Civil Procedure Rule 30.11(6).

Authors Cited

Whelan, William J. "Copying and Broadcasting Video and Audio Tape Evidence: A Threat to the Fair Trial Right" (1982), 50 *Fordham L. Rev.* 551.

APPEAL from a judgment of the Nova Scotia Supreme Court, Appeal Division (1989), 91 N.S.R. (2d) 126, 233 A.P.R. 126, 41 C.C.C. (3d) 6, 71 C.R. (3d) 33, reversing a judgment of Glube C.J.T.D. (1988), 87 N.S.R. (2d) 29, 222 A.P.R. 29, granting appellant access to electronic tapes filed as exhibits in a criminal trial. Appeal dismissed, L'Heureux-Dubé, Cory and McLachlin JJ. dissenting.

David G. Coles, *James L. Connors* and *Danny J. Henry*, for the appellant.

R. M. Endres and *M. Smith, Q.C.*, for the respondent the Prothonotary of the Supreme Court of Nova Scotia at Halifax.

Marguerite J. MacNeil, *Kevin G. Coady* and *R. James Filliter*, for the respondent Nugent.

Richard G. Dearden, for the intervener.

//Stevenson J.//

The judgment of Lamer C.J. and Wilson, La Forest, Sopinka, Gonthier and Stevenson JJ. was delivered by

STEVENSON J. -- The appellant appeals a judgment of the Supreme Court of Nova Scotia Appeal Division refusing him access to electronic tapes filed as exhibits in the criminal trial of the respondent Nugent. The issue is whether the appellant, a journalist, is entitled to have access and copy those tapes which, while admitted at

a trial, were held to be inadmissible by that Appeal Division, which acquitted Nugent.

In May 1987, Nugent was convicted, at trial, of second degree murder. At that trial, two forms of electronic tapes, prepared by the R.C.M.P., were admitted into evidence. One form of tape was audio cassettes, containing an alleged confession by Nugent to the killing of the victim. The other form was a video cassette of an alleged re-enactment of the killing by Nugent. These tapes became the basis of the Crown's case against Nugent and, ultimately, the basis of his conviction. The trial, the admission of the tapes into evidence, and information of their content, were reported in the media.

On May 10, 1988, in a four-to-one decision, the Appeal Division allowed Nugent's appeal of his conviction, set the conviction aside, and entered an acquittal. The majority of the Appeal Division ruled that the audio and video evidence was not obtained freely and voluntarily from Nugent, that it was obtained in violation of his right to counsel, and that its admission into evidence brought the administration of justice into disrepute.

On May 16, 1988, the appellant wrote to the Attorney General's Department requesting a copy of the audio and video tapes which were admitted at Nugent's trial. The appellant was advised to contact the Registrar of the Appeal Division, as custodian of such exhibits. The Registrar, by letter of May 19, 1988, indicated that he would not release the exhibits, either before or after the appeal period, which was still running. This refusal on the part of the Registrar eventually led to the

appellant's bringing an application, as a member of the public, to obtain the tapes from the Registrar, as Prothonotary of the Supreme Court at Halifax.

In his application the appellant swore that he was a television producer "currently doing research on the topic of video tapes and their use by the police in recording confessions, re-enactments of crime and recording of surveillance activities". He swore that he had been denied access by the prothonotary, who proposed releasing the exhibits to the Crown, but invited the appellant to apply to a Supreme Court judge in chambers.

The prothonotary, in making his ruling, referred to Nova Scotia Civil Procedure Rule 30.11(6):

> On the expiration of the time for appeal or on the disposition of the appeal, the prothonotary or registrar on his or her own initiative shall return the exhibits to the respective solicitors or parties who put the exhibits in evidence at the trial. . . .

Glube C.J.T.D. heard the application, hearing counsel for Nugent on the application as well as counsel for the appellant and the prothonotary: (1988), 87 N.S.R. (2d) 29. She concluded that the appellant was entitled to access, including the right to make copies. In the course of her ruling she said, at p. 34:

> I was not asked to rule on, nor does this application relate to, whether or not these videotapes and copies of audiotapes could be played on television. If that issue was before me, I would be prepared to put restrictions on the viewing, such as nondisclosure of the individual and location of the event, as well as blocking off the face of Mr. Nugent. However, on the actual application, I was unable to accept the argument of Mr. Coady on behalf of Mr. Nugent that the ends of justice require that I refuse the application in spite

> of the decision of the Court of Appeal and the remarks in **MacIntyre** [*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175] about protection of the innocent. Any violation of that protection has already occurred and controls over future publication could be imposed if the appropriate application is made.
>
> Based on the case law cited, namely, **MacIntyre** and **Lortie** [*Re Regina and Lortie* (1985), 21 C.C.C. (3d) 436 (Que. C.A.)], I concluded that this was an appropriate case in which to grant the application for access to and permitting copying of the audio and videotapes as requested. I find their release does not bring the administration of justice into disrepute. The public interest outweighs any private interest. Had an application been made during the trial, it might well have been granted.

The appeal was argued before us on the basis that the issue was one of access; no question was raised regarding the right to copy if access were properly permitted. Moreover, counsel for the appellant suggested other uses that might be made of the copied tapes, for example, to criticize the decision of the Attorney General not to appeal the decision acquitting Nugent. The order of the chambers judge makes no restriction on the use to be made, and the appellant seeks an order from this Court, free of any restrictions upon the use of the copies. That order does not reserve any questions of use nor reserve any right of further application. Counsel for Vickery declined, during argument, to delineate the use to which the copies would be put.

Nugent was given party status in order to appeal the judgment of Glube C.J.T.D. Macdonald J.A. speaking for the Appeal Division reversed the judgment: (1989), 91 N.S.R. (2d) 126. After referring to *MacIntyre*, *supra*, and *Solomon v. McLaughlin*, [1982] 4 W.W.R. 415 (Alta. Q.B.), he recognized the principle that the court is the keeper of its records and may exercise its discretion in excluding them from public access where the circumstances require. He added the following (at pp. 132-33):

> The acquittal of Mr. Nugent . . . is equivalent to a finding of innocence with respect to any subsequent criminal proceedings. As a matter of public policy, it is my opinion that the acquittal should also be treated as the equivalent of a finding of innocence with respect to the right of the public to inspect, copy and publish the prejudicial material contained in the [respondent's] confessions. I recognize that the rule is that the public have a general right to inspect judicial records and documents. This right is not absolute but rather is one where, as Chief Justice Dickson said in **MacIntyre** (p. 149), "Every court has a supervisory and protecting power over its own records."
>
> In my opinion, Mr. Nugent comes within the exception to the general access rule with respect to innocent persons referred to in the **MacIntyre** case. There the fundamental principle that the innocent must be protected from unnecessary harm was held to override the public access interest in those cases where nothing is found upon the execution of a valid search warrant. That being so, in my view the protection of the innocent from unnecessary harm should prevail here and override the public access interest in Mr. Nugent's confessions.

In the hearing before us the appellant sought to argue that the prohibition of access was an infringement of his rights under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*.

That point was not pursued in the courts below. While this Court undoubtedly has a discretion to entertain arguments not developed in the courts below, I would not extend that privilege to the appellant in this case. Had the point been raised in chambers, the parties would have had the right to lead evidence. We would have had the benefit of the reasoning of the courts below. If the issue had been clearly raised, interested parties might have sought to intervene even though no constitutional question in the technical sense of that term was raised. I note in passing, however, that if the appellant were to succeed on the *Charter* ground, the effect would be to impose a gloss upon rule 30.11(6).

In my view this Court should not entertain the *Charter* argument at this stage.

I turn then to the matters to be considered in judging whether to grant access to filed exhibits. In my view, the Appeal Division was correct in concluding that Nugent's privacy interests as a person acquitted of a crime outweigh the public right of access to exhibits judicially determined to be inadmissible against him.

The case of *Re Regina and Lortie*, [1985] C.A. 451, 21 C.C.C. (3d) 436, to which the chambers judge referred, is distinguishable. In that case, the question was whether, pending the disposition of an appeal, there should be a temporary prohibition against the showing of tapes which were exhibits and had been copied. The majority of the Quebec Court of Appeal granted the prohibition. L'Heureux-Dubé J.A. (as she then was) dissented. Her comments were stressed before us. Her strong defence of the openness concept accords with the views of this Court in *MacIntyre*. In *Lortie*, the accused, whose privacy interests would be of paramount concern, supported the showing of the tapes. L'Heureux-Dubé J.A. was very careful to note (at p. 443 C.C.C.) that the question of copying and broadcasting of the tapes after the court of appeal had given its decision was not before the court. That question was before the Nova Scotia Appeal Division and is before us.

In *MacIntyre*, the other case to which the chambers judge referred, the press sought access to search warrants and supporting material. Dickson J. (as he then was), speaking for the majority, noted that it was unwise to attempt any comprehensive definition of the right of access (p. 183), and pointed out the competing policy considerations of respect for individual privacy and the need for

"openness" in respect of judicial acts. This Court concluded that protection of the innocent would override public access, but that where the warrant was executed and something found the parties affected and the public should have access to the material upon which the warrant had been issued. Because a search warrant is issued *in camera*, allowing access to the materials in those circumstances serves public accessibility and concomitant judicial accountability (p. 186).

In this appeal, the exhibits were presented at an open trial to which there was public access and, indeed, information relating to them was publicly discussed.

I have already noted that the heart of *MacIntyre* is public accessibility as an important ingredient of judicial accountability. The applicant, in his sworn affidavit in support of this application, makes no claim to serve that interest. He does not indicate that these tapes are to be used to engage in some scrutiny of the judicial process. Public access to the trial and appellate process in which these exhibits were discussed was in no way impeded and there is no basis on the material before us for concluding that unrestricted dissemination of them would make any meaningful contribution to scrutiny.

I believe that the Appeal Division was correct in applying the principles in *MacIntyre* and concluding that the interests of Nugent outweighed those put forward by the appellant.

In my view, the chambers judgment fails to recognize four significant factors that come into play in deciding whether the appellant should be given access to (and

thus the ability to copy and disseminate) these exhibits. (I note that these points may not have been put to the chambers judge in argument). The factors are:

1) The nature of exhibits as part of the court "record".

2) The right of the court to inquire into the use to be made of access, and to regulate it.

3) The fact that the exhibits were produced at trial and open to public scrutiny and discussion so that the open justice requirement had been met.

4) That those subjected to judicial proceedings must undergo public scrutiny of what is said at trial or on appeal and contemporaneous discussion is protected, but different considerations may govern when the process is at an end and the discussion removed from the hearing context.

1) The Nature of Exhibits as Part of the Court "Record"

An exhibit is not a court record of the same order as records produced by the court, or pleadings and affidavits prepared and filed to comply with court requirements. Exhibits are frequently the property of non-parties and there is, ordinarily, a proprietary interest in them. When they have served the purpose for their filing they are ordinarily at the disposition of the person who produced them. While they remain in its custody, the court has a duty to pass upon any request for access. That function is ordinarily exercised by its officers, such as the prothonotary here, but the court having custody of the exhibits has supervision over their use. The chambers judge here noted the Nova Scotia rule which directs that exhibits be turned over to the party producing them (Rule 30.11(6), *supra*). She observed that the reason for the rule was to relieve the court of the task of storing unwanted exhibits. The rule, however, reflects the fact that exhibits are not the property of the court.

While proprietary interests are not stressed by any of the parties before us, they are relevant to characterizing the nature of exhibits in balancing the interests of competing parties. Ordinarily the person entitled to possession would be a party to any application for access to them. Here, Nugent was a party to their creation.

I note that counsel here suggested that someone might want access to the tapes for the purpose of preparing educational programmes for the police. If that were the object of the request, the police, who probably own them, might well have some view to express.

Once exhibits have served their purpose in the court process, the argument based on unfettered access as part of the open process lying at the heart of the administration of justice loses some of its pre-eminence.

2) The Right of the Court to Inquire Into the Use to be Made of Access, and to Regulate It

It follows that the court, as the custodian of the exhibits, is bound to inquire into the use that is to be made of them and, in my view, is fully entitled to regulate that use by securing appropriate undertakings and assurances if those be advisable to protect competing interests. Nugent has put forward a genuine interest in the disposition of the tapes. He was a participant in their creation, a creation found to have been a violation of his constitutional rights, and the court ought to take steps to protect his legitimate interests.

In exercising its supervisory powers over material surrendered into its care, the court may regulate the use made of it. In circumstances such as these I do not think it right to say, as the chambers judge suggested, that Nugent must initiate other proceedings to protect or promote his privacy interests. While subsequent proceedings might lie, the court is, on the application, able to obviate that step. There is no need for a multiplicity of proceedings, nor should someone in the position of Nugent run the risk of bolting the laboratory door after the virus has not only been removed, but reproduced. In an application of this nature the court must protect the respondent and accommodate the public interest in access. This can only be done in terms of the actual purpose and, in the face of obvious prejudice and the absence of a specific purpose, the order for unrestricted access and reproduction should not have been made.

3) The Fulfillment of the Open Justice Requirement

The exhibits were produced at trial and open to public scrutiny and discussion so that the open justice requirement had been met.

I do not, for one moment, gainsay the importance of the principle that justice must be administered openly, but I am inclined to agree with the observation of Powell J. of the United States Supreme Court, quoted by Macdonald J.A. in the judgment appealed from, at p. 131, that "[t]he requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed." (*Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), at p. 610.)

In the course of that judgment, Powell J. noted that the court having custody of records and other material has a responsibility to exercise an informed discretion "with a sensitive appreciation of the circumstances that led to their production" (p. 603). As none of the United States authorities to which I have been referred deal with the copying of inadmissible exhibits, I am unable to say what conclusion a court in the United States would reach, but I am persuaded that conclusion is, in the United States, as here, reached upon a balancing of the interests at the time access is sought.

I am not persuaded that the court appealed from erred in its conclusion that the chambers judge had given insufficient weight to Nugent's privacy rights, rights he holds after a judicial acquittal. He surrendered that privacy during the trial process, but he did not surrender it for all time.

4) Non-Contemporaneous Public Scrutiny

Those subjected to judicial proceedings must undergo public scrutiny of what is said at trial or on appeal and contemporaneous discussion is protected, but different considerations may govern when the process is at an end and the discussion removed from the hearing context.

Nugent's privacy was surrendered to the judicial process. Public access to and reporting of those proceedings is a price that he and any other accused must pay in the interests of ensuring the accountability of those engaged in the administration of justice. This principle is reflected in the special privilege that our law has traditionally accorded those who report judicial proceedings. Yet, modern

defamation statutes restrict that privilege to contemporaneous reporting (see for example s. 13(1)(b) of the *Defamation Act*, R.S.N.S. 1967, c. 72, which is also c. D-3 of the C.S.N.S.). The reason, I suggest, is obvious. Fair, accurate, contemporaneous reports are likely to be balanced, to display the full context, and to expose the arguments on both sides. The subsequent release and publication of selected exhibits is fraught with risk of partiality, with a lack of fairness. Those policy considerations which form our attitude towards the openness of the administration of justice are relevant to an application such as this. Nugent cannot escape from proceedings in which he was involved, nor from the fair and accurate reporting of them, but the courts must be careful not to become unwitting parties to his harassment by facilitating the broadcasting of material which was found to have been obtained in violation of his fundamental rights.

As Dickson J. observed in *MacIntyre*, at p. 184:

> In short, what should be sought is maximum accountability and accessibility but not to the extent of harming the innocent . . . .

Before us counsel suggested that there might be scope for challenging the decision of the Attorney General not to appeal Nugent's acquittal by the Appeal Division and the tapes could be used to that end. I am by no means persuaded that it is necessary to go beyond the proceedings in the trial and appeal to make that challenge.

Conclusion

While *MacIntyre* did not address access to or copying of exhibits, the principles discussed there must, *a fortiori*, apply to them.

In *MacIntyre*, Dickson J. said this (at pp. 186-87):

> In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent.

The appellant would have us interpret the expression "innocent person" extremely narrowly. Dickson J. did not claim to define exhaustively the limitations of rights of access. He said this (at p. 183):

> By reason of the relatively few judicial decisions it is difficult, and probably unwise, to attempt any comprehensive definition of the right of access to judicial records or delineation of the factors to be taken into account in determining whether access is to be permitted.

He also spoke of innocent persons who were the subject of search warrants as entitled to protection from "the stigmatization to name and reputation which would follow publication of the search" (p. 187).

I find it difficult to fathom how Nugent could be considered anything other than an innocent person within *MacIntyre*. Someone who has been accused and convicted of a serious crime on the basis of self-incriminating evidence obtained in violation of his *Charter* rights should not be made to bear the stigma resulting from unrestricted repetition of the very same illegally obtained evidence.

The Appeal Division was correct in concluding that Nugent's privacy interests outweighed the appellant's interests in viewing and disseminating the exhibits.

It may be said that the order of the chambers judge was discretionary in nature. I am not satisfied that it should be so characterized and, as the point was not made by the appellant, authorities supporting that characterization were not advanced. However, assuming the order was "discretionary", the chambers judge did not have all the relevant considerations before her, gave insufficient weight to Nugent's innocence and should have insisted upon the proposed use being specified so that any order could be crafted accordingly. In my view it was wrong to give an order, let alone an unrestricted order.

I would dismiss the appeal, with costs to the respondent Nugent, with no costs for or against the prothonotary or the Attorney General.

//Cory J.//

The reasons of L'Heureux-Dubé, Cory and McLachlin JJ. were delivered by

CORY J. (dissenting) -- I have read with great interest the reasons of my colleague Justice Stevenson but, with respect, I cannot agree with them.

The Principles that Must be Weighed in the Balance

There are two principles of fundamental importance to our democratic society which must be weighed in the balance in this case. The first is the right to privacy which inheres in the basic dignity of the individual. This right is of intrinsic importance to the fulfilment of each person, both individually and as a member of society. Without privacy it is difficult for an individual to possess and retain a sense of self-worth or to maintain an independence of spirit and thought.

The second principle is that courts must, in every phase and facet of their processes, be open to all to ensure that so far as is humanly possible, justice is done and seen by all to be done. If court proceedings, and particularly the criminal process, are to be accepted, they must be completely open so as to enable members of the public to assess both the procedure followed and the final result obtained. Without public acceptance, the criminal law is itself at risk.

In this appeal an appropriate balance must be struck between the right to privacy and the principle of open courts.

The American Experience

At the outset, it may be of assistance to consider the American experience in the field. This review should be conducted carefully and cautiously, bearing in mind the differences between the American Constitution and the *Canadian Charter of Rights and Freedoms*, as well as the differences in the history and background of the two countries. The examination is undertaken not with the aim of slavishly

following the American decisions, but rather to benefit from the discussions and learning which have emanated from the American jurisprudence and scholarship.

A. *Contrasting the English and American Approaches*

Courts in both England and the United States have traditionally recognized the existence of a common law right to inspect and copy judicial records. This right has often been referred to as a "right of access". It has a long and honoured history, gaining recognition as early as the fourteenth century. In 1644, Lord Coke advocated an unrestricted right of access to judicial records. In England, however, while all persons enjoyed a general right of access, only those with an evidentiary or proprietary interest in the records were able to enforce their right if it were denied them.

The American approach, on the other hand, was based on a clear general right of access to court records, the enforcement of which was not restricted to those asserting a special interest in the documents. Generally, the American approach has favoured access for all citizens. As early as 1894, American courts recognized the right of access to judicial records including transcripts, evidence and other material. They did so on the basis that the denial of access would be an attempt to maintain secrecy in judicial records and would conflict with "the common understanding of what belongs to a public court of record, to which all persons have the right of access, and to its records, according to long established usage and practice". See *Ex parte Drawbaugh*, 2 App. D.C. 404, at pp. 407-8.

B. *The United States Supreme Court and the Open Court Principle*

The open court principle has two facets. The first is the right of the public and of the media, as members or agents of the public, to attend trials and court proceedings and to report on all that transpires. The second facet is the right of the public to scrutinize and criticize the judicial process. In order to exercise this right effectively, it is necessary to have full access to the information upon which such scrutiny and criticism may be based.

The United States Supreme Court has on several occasions emphasized the importance of public scrutiny of the judicial process. In *Craig v. Harney,* 331 U.S. 367 (1947), the court stressed the public nature of court proceedings and vindicated the right of members of the press to report on them. In his reasons, Douglas J. stated, at p. 374: "A trial is a public event. What transpires in the court room is public property. . . . Those who see and hear what transpired can report it with impunity."

The importance of the press in securing the principle of open courts and court processes was emphasized again by the U.S. Supreme Court in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), where it stated (at p. 350):

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Supreme Court stressed the importance of the public's right to know the contents of public records. Although recognizing the legitimacy of privacy concerns, the court relied on the First Amendment to conclude (at p. 491) that the State could not

> impose sanctions on the accurate publication of the name of a rape victim obtained from public records -- more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection.

The court emphasized the need in modern society for full and open access to public records. It stated (at p. 495):

> Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.

The *Cox* decision also contains important observations about the role of the media in facilitating public debate and in furthering the open court principle. The court stated (at pp. 491-92):

> . . . in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately upon the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and

> many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.

See also *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976), where the Supreme Court again reaffirmed the essential role of the press in safeguarding effective judicial administration by exposing the judicial process to public scrutiny.

Finally, the U.S. Supreme Court in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), held that the right to attend criminal trials is implicit in the guarantees of the First Amendment. On behalf of the majority, Burger C.J. recognized public access to the criminal courtroom as a right guaranteed by the American Constitution and, in doing so, emphasized the importance of public acceptance of the criminal justice process. At page 571, he noted that:

> . . . especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results.

He went on to state (at pp. 571-73):

> When a shocking crime occurs, a community reaction of outrage and public protest often follows. . . . Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help," . . .
>
> The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in

> a corner [or] in any covert manner." . . . It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process "satisfy the appearance of justice," . . . .
>
> Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This "contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system . . . ." [citing the concurring judgment of Brennan J. in *Nebraska Press Assn.*, *supra*.] [Emphasis added.]

These decisions stress the vital importance of the open court principle and the public scrutiny of the judicial process which it facilitates. In so doing, they provide a context in which to consider the American approach to the more immediate question of access to taped evidence.

C. *The American Approach to Access to Audio and Video Tape Evidence*

The U.S. Supreme Court considered the issue of public and media access to taped evidence in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). The media sought access to audio tapes which had been introduced in evidence at the trial of aides to President Nixon on charges arising out of the Watergate break-ins. During the trial, 22 hours of audio tapes were played for the jury. All those in court, including members of the media, were provided with earphones and transcripts of the tapes. Six weeks after the trial had begun, several broadcasters filed a motion seeking permission to obtain and copy the tapes played at trial. They based their

claim on the common law right of access to judicial records. District Court Judge Sirica denied access on the grounds that broadcast of the tapes would endanger the rights of the defendants on appeal. The broadcasters appealed Judge Sirica's order to the Court of Appeals for the District of Columbia.

In *United States v. Mitchell*, 551 F.2d 1252 (1976), the D.C. Circuit Court of Appeals considered the common law right to inspect and copy judicial records and determined that the right is essential to the functioning of a democratic state, although it is not absolute. Since no clear guidelines could be articulated as to when judicial records should be closed to the public, the decision necessarily rested within the discretion of the trial court, subject to appellate review for abuse of discretion. However, the court stated that any incursions on the right of access should be made only where "justice so requires". It observed as well that "once an exhibit is publicly displayed [in open court], the interests in subsequently denying access to it necessarily will be diminished" (p. 1261). The Court of Appeals thus found a strong presumption in favour of access and determined that only compelling circumstances could militate against release. Since such circumstances were absent in that case, the D.C. Court of Appeals overturned the decision of Judge Sirica and granted access to the tapes.

In *Nixon v. Warner Communications*, *supra*, the U.S. Supreme Court reviewed the *Mitchell* decision. In a 5/4 split, the court reversed the Court of Appeals and denied the broadcasters' request for access. The broadcasters had claimed a constitutional right of access under both the free press clause of the First Amendment and the Sixth Amendment guarantee of a public trial. The court rejected these

claims. It held that, while physical access to judicial records is a right at common law, the right is not absolute and is not constitutional in nature. In rejecting the Sixth Amendment claim, Powell J. stated at p. 610:

> The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed.

It is important to note, however, that this statement was made in refuting the broadcasters' claim to a constitutional right of access. It was not directed to the balancing process required when considering the common law right of access.

With respect to the latter issue, the court held that the general common law right of access is subject to the "sound discretion" of the trial court. It observed that the question of access would typically be resolved by weighing "the interests advanced by the parties in light of the public interest and the duty of the courts", and that this balancing exercise would take place in the larger context of "the presumption -- however gauged -- in favor of public access to judicial records" (p. 602).

At the same time, the court refused to define the scope of the common law right or to identify the specific factors to be weighed in determining whether to grant access. Rather, the majority decided the issue on the basis of "an additional, unique element" not argued by either of the parties -- namely, the *Presidential Recordings Act*. In the court's view, the Act provided an alternative administrative procedure by

which the public could gain access to all presidential materials of historical interest, including the recordings at issue. Accordingly, the court held (at p. 606) that it:

> . . . need not weigh the parties' competing arguments as though the District Court were the only potential source of information regarding these historical materials. The presence of an alternative means of public access tips the scales in favor of denying release.

Since then, American federal appeal courts have differed as to the interpretation which should be given to the *Nixon* decision and have articulated varying approaches to the issue of access to taped evidence.

In the first line of cases, which arose out of various FBI "sting" operations, the *Nixon* decision was construed narrowly as turning on the applicability of the *Presidential Recordings Act*. Having distinguished *Nixon* in this way, several appeal courts followed, either expressly or implicitly, the approach taken by the D.C. Circuit Court in the *Mitchell* case, *supra*. They held that the common law right created an extremely strong presumption in favour of access which, though not of constitutional stature, could be overcome only rarely and in the clearest of cases. The holding of the Second Circuit Court of Appeals in *United States v. Myers*, 635 F.2d 945 (1980), is typical. The court stated (at p. 952):

> . . . it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence, when it is in a form that readily permits sight and sound reproduction. . . . When physical evidence is in a form that permits inspection and copying without any significant risk of impairing the integrity of the evidence or interfering with the orderly conduct of the trial, only the most compelling circumstances should prevent contemporaneous public access to it.

The same approach was adopted by the Third Circuit Court of Appeals in *United States v. Criden*, 648 F.2d 814 (1981), and by the District of Columbia Circuit in *In re National Broadcasting Co.*, 653 F.2d 609 (1981).

It is important to consider the grounds advanced in opposition to the release of the tapes in these cases. The defendants argued that access would jeopardize their right to a fair trial as guaranteed by the Sixth Amendment and would also render unfair the pending criminal trials of other defendants through the prejudicial effect publicity would have upon present and prospective jurors. All the appeal courts rejected this argument. They held that standard jury instructions and the examination of prospective jurors in the selection process together provided sufficient mechanisms to safeguard the fair trial rights of criminal defendants from any potential prejudice which might arise from broadcasting the tapes.

A contrary position was taken by the Fifth Circuit in *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (1981). The court accepted that a common law right of access exists, but determined that the standard of appellate review was whether or not the trial court had abused its discretion in its decision regarding access. In direct refutation of the earlier line of authority, the court held that the observations of the trial judge were essential in considering whether a fair trial could be ensured for present and prospective defendants and that the balancing of competing values was heavily reliant on the observations and insights of the presiding judge. The court considered its appellate role to be a narrow one.

In subsequent cases, American appellate courts have attempted to reconcile the more extreme positions and to articulate a "middle ground". The first such attempt

was made by the Seventh Circuit in *United States v. Edwards*, 672 F.2d 1289 (1982). The court recognized the presumption in favour of access and citing the *Mitchell* case, *supra*, observed that the "common law right supports and furthers many of the same interests which underlie those freedoms protected by the Constitution" (p. 1294). At the same time, referring to *Belo Broadcasting*, *supra*, the court acknowledged that the right was non-constitutional in origin and conceded that a number of factors might militate against public access. It set out its position in these words (at p. 1294):

> . . . we hold that there is a strong presumption in support of the common law right to inspect and copy judicial records. Where there is a clash between the common law right of access and a defendant's constitutional right to a fair trial, a court may deny access, but only on the basis of articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture. . . . We stress that it is vital for a court clearly to state the basis of its ruling, so as to permit appellate review of whether relevant factors were considered and given appropriate weight. [Emphasis added.]

This position was echoed by the Sixth Circuit in *United States v. Beckham*, 789 F.2d 401 (1986), and by the Eighth Circuit in *United States v. Webbe*, 791 F.2d 103 (1986).

Finally, in *Valley Broadcasting Co. v. United States District Court for the District of Nevada*, 798 F.2d 1289 (1986), the Ninth Circuit reaffirmed the middle ground position. In so doing, the court expanded upon the holding in *Edwards*, *supra*, by specifically requiring the trial judge not only to articulate the reasons for denying access, but also to substantiate possible prejudice with a clear factual basis for the danger. The court put its position this way (at p. 1295):

> The only potential prejudice appropriate for consideration by the district court was, therefore, the added prejudice that might result from broadcasting excerpts of the tapes as opposed to simply describing their contents. While we recognize that the added danger of jury taint arising from the transmission of the tapes themselves may vary from case to case, we reemphasize that the district court must articulate the factual basis for the danger without relying on hypothesis or conjecture.

D. *General Principles Emerging from the American Cases*

The American courts have for many years recognized a common law right of access to judicial records. All courts have held this right to include a common law, but not a constitutional, right of access to taped evidence introduced at trial. There is also a consensus that the decision as to whether to grant access is within the discretion of the trial court, which must balance the relevant interests at stake. In *Nixon*, the U.S. Supreme Court committed this determination to "the sound discretion" of the trial judge.

American courts have agreed that the standard of appellate review to be applied to the trial judge's determination regarding access is whether there has been an "abuse of discretion". Although there is agreement as to the standard to be applied, there is variation amongst the appellate courts as to whether the application of that standard should be deferential or strict.

All courts considered the media to be the representatives of the public with regard to judicial proceedings. The cases recognize the right and responsibility of the media to keep the public informed of the workings of the courts, particularly in the criminal context. The courts have acknowledged that the media play an essential

role in furnishing the information upon which public scrutiny and criticism of court proceedings can properly be based, and that in fulfilling this role the media make a substantial contribution to the democratic process of government. It is the media which make the courts truly accessible and "public".

The American cases indicate that there are several factors weighing in favour of public access to evidentiary tapes. First, it is said that audio and video tapes provide additional meaning to the written word or eyewitness account. Gestures, facial expressions, voice patterns and voice intensity are all modes of communication common to humanity that are lost in transcripts. Second, all persons present in the courtroom at trial witness the tapes as they are introduced into evidence for the benefit of the triers of fact. Broadcasting the tapes publicly would give effect and meaning to the open court principle by allowing members of the public who are unable to be physically present in the courtroom to witness all that privileged members of the public have been able to see for themselves. Third, public broadcasting of the taped evidence allows those who cannot be present at the trial to weigh the evidence and form their own opinion. This, it is said, satisfies both the appearance and the reality of justice within the community. Finally, public access to judicial records permits the public to keep an eye on all branches of government, including the judiciary.

On the other side of the balance, certain interests are put forward as militating against media access to audio and video tapes. In the American cases, the primary countervailing concern is the possible prejudice to the right of an accused to a fair

trial. Other interests weighing against access are concerns relating to admissibility and privacy.

It must be remembered that the balancing in the American cases is far different from that required in the case at bar. In the American decisions the common law right of access had to be balanced against the constitutional right of present or prospective defendants to a fair trial as guaranteed by the Sixth Amendment to the American Constitution. In those cases where access was denied, the defendant's constitutional right to a fair trial was considered to outweigh the common law right of access. Furthermore, it is not without significance that, despite their concern for the Sixth Amendment rights of present and prospective defendants, the majority of American appellate courts were still willing to grant access.

In the case at bar, the fair trial interest simply does not arise. Nugent stands in no criminal jeopardy. He has been acquitted of the murder charge and the time for any further appeal has long since elapsed. He cannot claim any prejudice to a present or future right to a fair trial. Thus, the primary concern weighing in the balance against access in the American jurisprudence is not present in this case.

It is worth bearing in mind that some of the American cases suggest that the right to a fair trial is the only countervailing interest which could overcome the strong presumption in favour of access. It is significant as well that in the American setting, the principal contention of those writers who argue most vehemently against access is the need to preserve the right of the accused to a fair trial. Furthermore, none of them would recommend that the denial of access be indefinite. See, for

example, William J. Whelan, "Copying and Broadcasting Video and Audio Tape Evidence: A Threat to the Fair Trial Right" (1982), 50 *Fordham L. Rev.* 551, at pp. 580-81:

> . . . it is clear that the proper time to stem any possible prejudice is before it is allowed to occur. In the cases that involve requests to copy tapes in evidence, the trial judge should deny their release until all risk of prejudice to the current defendants and to those implicated by the tapes has passed. Only when all rights to appeal are exhausted should the tapes be made available for copying.
>
> . . .
>
> When the records are video and audio tapes introduced into evidence at trial, the presumption in favor of release should not apply. Because there is a reasonable possibility that the broadcast of those tapes will irreparably harm the accused's right to a fair trial, the courts as a matter of law should deny the release of the tapes for copying until the accused is no longer in jeopardy. [Emphasis added.]

In light of the above analysis, it would appear that in the United States the media would be granted access to the tapes filed as exhibits in the trial of Mr. Nugent.

The Factors to be Considered in the Present Case

At the outset, I should say that for the reasons given by my colleague, I agree that the appellant's argument that his s. 2(*b*) *Charter* right to freedom of expression had been breached should not be considered. This argument was not raised before the judge of first instance and, although argued before the Court of Appeal, was not considered by that court in its reasons.

A. *The Nature and Extent of the Common Law Right of Access to Court Documents in Canada*

There can be no doubt that there exists in Canada a common law right of access to court documents. The nature and extent of that right will determine the outcome of this appeal. The common law right of access is of fundamental importance to the functioning of courts and to the preservation of public confidence in court processes. The right of access was considered in the pre-*Charter* case of *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175. In that case Dickson J., as he then was, clearly acknowledged that there is a strong general presumption in favour of access to judicial records. At page 184 he stated:

> In short, what should be sought is maximum accountability and accessibility but not to the extent of harming the innocent or of impairing the efficiency of the search warrant as a weapon in society's never-ending fight against crime.

He went on to observe that there is a need for contextual balancing in deciding whether to grant access in individual cases. After noting the general right to inspect and copy public records that exists in the United States, he said at p. 183:

> By reason of the relatively few judicial decisions it is difficult, and probably unwise, to attempt any comprehensive definition of the right of access to judicial records or delineation of the factors to be taken into account in determining whether access is to be permitted. The question before us is limited to search warrants and informations. The response to that question, it seems to me, should be guided by several broad policy considerations, namely, respect for the privacy of the individual, protection of the administration of justice, implementation of the will of Parliament that a search warrant be an effective aid in the investigation of crime, and finally, a strong public policy in favour of "openness" in respect of judicial acts.

In emphasizing the need for openness with respect to judicial acts, Dickson J. stated at p. 185:

> It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings.

B. *Some General Policy Considerations*

It is important that the public have confidence in the workings and proceedings of the courts. There can be a cathartic effect to a criminal trial. When a serious crime has been committed, the community quite naturally is outraged. In earlier times that sense of outrage sometimes led to vengeful acts which triggered a chain of violent action and reaction and occasionally led to mob violence. The criminal trial has pre-empted violence by providing an outlet and a means of sublimating the community's sense of outrage at the commission of a serious crime. It provides both a stage and a forum whereby the alleged crime can be explored and, if the accused is found to be guilty, the appropriate penalty imposed. An open trial process demonstrates to all, whether the family of the victim, the family of the accused, or the members of the community in general, that the entire criminal process has been conducted fairly and that those accused of crimes have been dealt with justly.

To operate effectively, the criminal law must have the support of the community. The public has traditionally, and very properly, had a compelling interest in the criminal trial process. In simpler days gone by, a significant segment

of the community could attend criminal proceedings. Those who were present could and did advise their families and friends as to the nature of those proceedings. The process was, in the truest sense of the term, open to the public.

Obviously times have changed. Courtroom space is limited. Even if it were not, it is impossible for most members of the community to attend in court no matter how much they might wish to do so. Obligations to work and family make attendance impossible. The public is now represented by members of the media who are, in a very practical sense, the proxies of the community at the trial process. This has been recognized by reserving a special place for members of the press in most courtrooms.

The public has accepted the media as their representatives at the unfolding of the criminal process. However, it necessarily follows that the modern community must rely upon the media for a fair and accurate depiction of the proceedings in order to facilitate the public right to comment on and criticize that process. This simply cannot be done without the degree of openness which would provide the media with full access to court documents, records and exhibits. The more barriers that are placed in the way of access, the more suspect the proceedings become and the greater will be the irrational criticism of the process. It is through the press that the vitally important concept of the open court is preserved.

The open court principle has been clearly recognized by this Court in previous decisions. As noted above, the *MacIntyre* case, *supra*, emphasized the importance

of public scrutiny of the courts. More recently, in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, I discussed the open court principle in the context of the s. 2(*b*) *Charter* right to freedom of expression. I stated at p. 1339:

> It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

With regard to the role which the media play in advancing this principle, the following appears at p. 1340:

> It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. 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. Practically speaking, this information can only be obtained from the newspapers or other media.

Although these remarks were made in the *Charter* context, the underlying principles are of general application and import in a democratic society. The rationale of the open court principle is important to the balancing exercise whether under the *Charter* or, as in the present case, at common law.

Appeals are the natural and frequent continuation of the criminal trial process. What is the community to make of a situation where an accused has been found guilty and the decision reversed by a court of appeal? No matter how right and

proper that appellate decision may be, it will always be difficult for a community to accept. These difficulties will be magnified if the appellate court decision is based upon material which is not made accessible to the public's representative, the media.

Therefore, like the criminal trial, the criminal appeal should be as open as possible. The media, as the public's representative, should have access to all the exhibits which are part of the appeal proceedings and which may form the basis for the appellate court's decision. There can be no confidence in the criminal law process unless the public is satisfied with all court proceedings from the beginning of the process to the end of the final appeal. Of the three levels of government, it is the courts above all which must operate openly. While what is done in secret is forever suspect, what is done openly, whether susceptible to praise or condemnation, is more likely to meet with acceptance. There cannot be reasonable comment or criticism unless all aspects of the proceedings are known to the public.

In the absence of some overriding principle, there should, in my view, be access to the tapes filed as exhibits at trial and on appeal. Particularly is this true in a situation such as the present where the issue of the admissibility of the tapes formed the very basis of the appeal court decision. Access is essential if the community is to continue to support and have confidence in the work of the courts, particularly in the criminal context. Let us see if there is any such overriding principle applicable in this case.

C. *Should Access be Denied on the Grounds that the Tapes were Found to be Inadmissible?*

In arguing that access to the tapes should be denied, Nugent emphasized that the tapes had been ruled inadmissible by the Court of Appeal as having been obtained in violation of his *Charter* and common law rights. Nugent argued that the tapes should not remain part of the public record after the Court of Appeal made "the very pointed rulings that resulted in their inadmissibility".

In the American case of *Criden*, *supra*, there was a question as to the admissibility of the tapes filed in evidence. Nevertheless, the Third Circuit Court of Appeals ruled that the public interest in access prevailed over the issue of admissibility. Noting that the right of access is based on the public's interest in seeing and knowing the events which actually transpired, the Court pointed out that it would be unduly restrictive of the right of access were it to be confined to evidence found to have been properly admitted. Only through access can the public reasonably consider and criticize the rulings of the court, including rulings as to admissibility. Therefore, it would appear that in the United States access to the tapes would not be denied simply because they were ruled inadmissible. The approach of the Third Circuit Court of Appeals seems eminently sound.

It is not without significance that in the case at bar the majority of the Court of Appeal indicated that there was nothing manifest on the videotape itself which would make it inadmissible; rather, it is what had transpired earlier which rendered it so. This contrasts with the situation with respect to some of the audio tapes which should clearly not have been admitted in view of the police conduct recorded on the tapes themselves. Apart from any question of prior police misconduct, a viewing of the videotape demonstrates that there is nothing in it that would cater to a morbid or

prurient appetite. It is a measured, unemotional recounting of a killing. If anything to do with a murder case can be said to be unexceptional, this tape fits that description.

Should the issue of admissibility in itself prohibit access to the tapes? I think not. The media as the agent of the public ought to have access to the tapes and be able to make copies of them. The public has a right to know what was excluded by the appellate court and the reason for its exclusion. To prohibit access to all evidence which has been ruled inadmissible would permit the courts to operate in secret.

Although it is necessary and appropriate that rulings be made at the trial level as to what may be properly admitted for consideration by the triers of fact, the trial is now over. The principal issue in the Court of Appeal was the admissibility of the taped evidence. There should not be a priestly cult of the law whereby lawyers and judges exclusively determine those items of the appeal record which can be seen and heard by members of the public. What evidence is admitted or excluded usually determines the outcome of a trial. Appeal court decisions on this issue are important to the public. Anything that prevents light being shed upon the subject can only lead to dark suspicion of the process.

The ruling of the Court of Appeal was based to a large extent on the denial to Nugent of his *Charter* right to counsel. Section 24(2) of the *Charter* provides:

24. . . .

> (2) Where . . . a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The importance of the *Charter* as the supreme law of the land cannot be denied. It follows as the night the day that the public has a right to know what courts consider to be evidence which is so unacceptable that its admission would bring the administration of justice into disrepute. The public should be able to comment on and, if appropriate, to criticize the court's position on that issue. It is a matter of public importance, interest and concern.

In this case, judicial opinion differed on the issue of admissibility. The trial judge admitted all the tapes. Four members of the Court of Appeal held all of the tapes to be inadmissible. The dissenting member of the court would have admitted the video tape and most of the audio tapes. This diversity of views on the issue of admissibility further supports the case for access, since the public is entitled to know the actual evidence that was the subject of differing judicial opinion. I therefore conclude that the fact that the tapes were ruled inadmissible should not constitute a bar to their accessibility by the media. The public has a right to know what was ruled admissible and the reason for that ruling.

D. *Did the Production and Playing of the Tapes in Open Court Satisfy the Common Law Right to Access*?

It was argued that the production and playing of the tapes during the trial satisfied the common law right of access and the underlying open court principle.

It may be that in some cases the production of audio or video tapes in open court would satisfy the public's right of access to those tapes. However, it cannot be forgotten that the ruling as to their inadmissibility determined the outcome of the appeal. So far as the community in which Nugent lived was concerned, he had been found guilty by a jury of his peers. The community and the public in general had a right to know the basis for the reversal of that decision by the Court of Appeal.

Surely the media cannot be faulted for not knowing at the time of trial what grounds of appeal might be raised or the issues upon which an appeal would be decided. Even experienced appellate counsel often raise additional legal issues that were not considered at trial. The media, on behalf of the public, are entitled to gain access to and copy the tapes which became the focal point of the appeal. It is neither fair nor reasonable to say that the media at trial should have recognized the legal issue or anticipated the centrality of the question of admissibility of the tapes on appeal and reported and commented on the tapes accordingly.

In my view, it cannot be said that the production of the tapes at trial satisfies the principle of open courts. The appellate proceeding must be as open as the trial. Court records and documents, including exhibits filed at trial which form part of the appeal record, should, as a general rule, be open to all. The fact that the tape has been played before should not weaken any claim for access. Indeed, the fact that the tape has been publicly viewed renders the privacy interest less compelling. The view expressed by the Third Circuit Court of Appeals in the *Criden* case, *supra*, is apposite (at p. 828):

> Whatever the validity of the original ruling, the tapes were in fact admitted into evidence, their contents publicized, and the transcripts of the tapes released to the press. Thus, whatever privacy right defendants may have claimed in such tapes is irretrievably lost, and if any remedy remains, it must perforce be confined to appellate action with regard to the underlying conviction.

Developments in Canada since 1982 have raised the common law right of access and the open court principle on which it is based to even greater prominence. With the advent of the *Charter of Rights and Freedoms*, courts are playing a far wider role in the affairs of all Canadians than ever before. The concepts of freedom of religion, freedom of expression and equality rights have been and will continue to be before the courts. With this widening judicial role, there is an increased public interest in judicial decisions and their effects. As a result, the principle of open courts has attained ever-greater significance. When the balancing of competing rights and interests is undertaken, due weight must be given to the added importance of open courts. What is done by the courts away from the clear light of public scrutiny fosters public suspicion, no matter how ill-founded that suspicion might be. Suspicion nurtures the cancerous growth of mistrust which must, if possible, be avoided.

In this case, on balancing the privacy considerations of Nugent against the principle of open courts, the openness of the courts must prevail. This result is necessary to avoid ill-founded suspicion of the courts and to maintain public confidence in the adminstration of justice. It is openness which maintains both the integrity of the court system and public confidence in it. The preservation of that essential policy of openness must outweigh Mr. Nugent's privacy interest in the tapes which were already displayed to the public at the time of trial.

E. *Proprietary Interests*

Finally, my colleague has raised the issue of proprietary interests in exhibits. With respect, I am of the view that it does not arise in the present case. Regardless of the question of ownership of the audio and video tapes, the fact remains that the tapes were in the custody of the Supreme Court of Nova Scotia at the time the application for access was brought. Thus, it was entirely appropriate that a party seeking access apply to the court; indeed, this was the only manner a party seeking access could proceed. Once the application was made, the court was correct in retaining custody of the exhibits until the question of access was determined. Its right to do so flows from a court's supervisory and protecting power over its own records, as recognized by this Court in *MacIntyre*, *supra*. As a result, I am of the view that the question of proprietary interest in the tapes is irrelevant to the determination of the present appeal.

Conclusion

There can be no question that there must be a strong presumption in favour of openness to ensure judicial accountability. Certainly, it is clear that the right of access not only facilitates the openness of court processes, but also promotes and advances the constitutional values of freedom of expression. As a result, it is deserving of recognition and protection in appropriate instances, of which the present case is a prime example. Accordingly, I am of the view that access was properly granted in the present case.

The Discretionary Nature of the Order of the Trial Judge and Appellate Review of that Order

There is a further and independent basis for upholding the decision of the judge of first instance. Glube C.J.T.D. considered the matter fully before granting access to the tapes. She was well aware of the effect that the reproduction or broadcast of the tapes might have upon Nugent and specifically reserved the question of what use might be made of the tapes. Referring to the videotape, she stated that steps might be taken to protect the identity of Nugent. It was clearly implicit in her order that before any use could be made of the tapes, the matter was to come before her again once the media had gained access. Thus, the trial judge carefully considered the matter before exercising her discretion. I would note in passing that the question as to what steps might properly be taken to control the use of the tapes is not before this Court. The sole issue is the media's right of access to the tapes.

It is clear that an appellate court should not interfere with a discretionary order unless a significant error is revealed. In *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, Beetz J., speaking for the Court, quoted with approval from the decision of the House of Lords in *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042. The latter case emphasized the limits imposed upon a court of appeal in substituting its own discretion for that of a motion judge granting an interlocutory injunction, even in situations where the appellate court has had the benefit of additional evidence. In that case Lord Diplock stated:

> . . . it is I think appropriate to remind your Lordships of the limited function of an appellate court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in

> the High Court judge by whom the application for it is heard. On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own.

I can find no error that would justify setting aside the order of Glube C.J.T.D. Indeed, in my view, the decision in *MacIntyre*, *supra*, would lead to the conclusion that Glube C.J.T.D. was correct in the order which she granted.

Summary

There is a common law right of access to judicial records and this right includes the opportunity to inspect and to copy such records.

It is not necessary in this case to consider whether that right is guaranteed by s. 2(*b*) of the *Charter*. Nevertheless, the right of access plays an important role in

promoting openness of the courts and accountability of the judiciary, and clearly advances the values enshrined in s. 2(*b*) of the *Charter*.

There is a very strong presumption in favour of access. That presumption must be balanced against other important rights and interests.

The balancing exercise must be conducted on a case-by-case basis. Any order made with regard to access is discretionary. If access is to be denied, the trial court should outline the opposing interests which have been deemed sufficient to overcome the strong presumption in favour of the common law right of access.

In considering and balancing the right of Nugent to privacy, it must be remembered that Nugent has undergone a trial and the tapes were played in public. In those circumstances the right to privacy, although it always must be taken into account, is of less weight than it would be had the tapes never been played. Further, the importance of the openness of the courts and judicial accountability weighs heavily in favour of access in the present case.

Appellate deference should be accorded to the discretionary order of the trial judge concerning access. See *Attorney General of Manitoba v. Metropolitan Stores*, *supra*.

Disposition

The trial judge's decision to grant access in this case is reasonable and should be upheld. In the result, I would allow the appeal and restore the order of the judge of first instance.

Appeal dismissed, L'HEUREUX-DUBÉ, CORY *and* MCLACHLIN JJ. *dissenting.*

Solicitors for the appellant: Boyne, Clarke, Dartmouth.

Solicitor for the respondent the Prothonotary of the Supreme Court of Nova Scotia at Halifax: The Department of the Attorney General, Halifax.

Solicitors for the respondent Nugent: Coady, Filliter, Halifax.

Solicitors for the intervener: Gordon, Strathy & Henderson, Ottawa.

TAB 12

Case Name:

CTV Television Inc. v. Ontario Superior Court of Justice

Between
CTV Television Inc., applicant (appellant), and Ontario Superior Court of Justice (Toronto Region) (Registrar), Ontario Superior Court of Justice (Provincial Divisions) (Scarborough Region), Toronto Police Service and the Ministry of the Attorney General, respondents (respondents)

[2002] O.J. No. 1141

59 O.R. (3d) 18

157 O.A.C. 238

163 C.C.C. (3d) 321

17 C.P.C. (5th) 252

5 C.R. (6th) 189

2002 CanLII 41398

112 A.C.W.S. (3d) 864

53 W.C.B. (2d) 394

Docket No. C35819

Ontario Court of Appeal
Toronto, Ontario

Carthy, Goudge and Cronk JJ.A.

Heard: November 16, 2001.
Judgment: April 2, 2002.

(33 paras.)

On appeal from the judgment of Justice Romain W.M. Pitt dated January 18, 2001.

Counsel:

Richard Storrey and N. Butterfield, for the appellant.
Leslie Mendelson, for the respondent.
Luba Kowal, for the intervener, The Ministry of the Attorney General.

The judgment of the Court was delivered by

1 **GOUDGE J.A.**:-- On January 18, 2001, Pitt J. dismissed the application of CTV Television for an order compelling the Toronto Police Service to provide it with access to and the right to photocopy and reproduce the exhibits filed at the preliminary hearing and sentencing hearing in the matter of R. v. Lorenz. He based his decision on jurisdictional concerns and expressly declined to make a finding on the merits as to CTV's entitlement to the order sought.

2 For the reasons that follow, I have concluded that he had jurisdiction to consider CTV's request and that he erred in declining to do so. I would therefore allow the appeal.

THE FACTS

3 On August 9, 1999, Anton Lorenz appeared at a preliminary hearing in the Ontario Court of Justice to face charges as a result of the death of his common law spouse, Sandra Quigley. He was charged with attempting to murder her on May 22, 1998, with a subsequent breach of a recognizance requiring that he not associate with her, and with her first degree murder on February 27, 1999.

4 The exhibits filed at the preliminary hearing included photographs, letters, journals, the audio tape of the 911 call placed on May 22 1998, the audio tape of a police interview with Sandra Quigley and a videotape confession of Lorenz.

5 Some of these exhibits were ordered sealed. All formed part of the public court record. The Crown successfully sought a publication ban at the commencement of the preliminary hearing. The ban prevented publication of the evidence including the exhibits until the conclusion of the trial.

6 After Lorenz was committed for trial on all charges, the court record, including the exhibits, was sent from the Ontario Court of Justice to the Superior Court of Justice at 361 University Avenue in Toronto.

7 On February 16, 2000, Lorenz pleaded guilty before a judge of the Superior Court of Justice to attempted murder, second degree murder and breach of recognizance. He was sentenced on the murder charge to imprisonment for life and parole ineligibility for ten years. He was sentenced on the other two charges to lesser concurrent sentences.

8 It appears from a note on file in the file room at 361 University Avenue that all of the evidence in this case, including the exhibits, was released to the Toronto Police Service on June 15, 2000. However, we were advised by counsel for the respondent, the Toronto Police Service, that while that respondent had indeed received the exhibits, it had been determined in preparing for this appeal that the whereabouts of the original exhibits is now unknown, but that the respondent is in possession of copies of the exhibits requested in this proceeding.

9 In September 2000, the appellant approached the Toronto Police Service and sought to access and copy all of the Lorenz exhibits. It intended to examine the exhibits as part of a W-Five Program on domestic abuse and how that abuse is dealt with by the police and the judicial system. The appellant had the support of the deceased's sister to have the program include the circumstances of the Lorenz case and her consent to obtain access to the exhibits. However, there was nothing in the record before Pitt J. to indicate whether either of Ms. Quigley's children or those responsible for them, or other family members, felt the same way.

10 The respondent declined the appellant's request for access and this proceeding resulted.

THE DECISION APPEALED FROM

11 The application judge based his decision on his view of his jurisdiction. He found that the court could grant access to exhibits only where the requirements of open justice had not been met. In this case both the preliminary hearing and the sentencing hearing were open to the public. He therefore determined that the open justice requirement had been met. He went on to conclude that, while the court might retain some power over these exhibits for the purpose of the administration of justice (presumably such as an allegation of a miscarriage of justice), the court had no power to act simply for the purpose of public access. Having found this want of jurisdiction, he declined to make a finding one way or the other as to CTV's entitlement on the merits but invited the appellant to pursue its objective through the applicable freedom of information legislation.

12 He put his fundamental conclusions in the following language:

> [30] ... The evidence before me suggests, if not demonstrates, that the subject exhibits may also probably be owned by the police. I leave this issue unresolved on the basis of the limited record before me and in view of the jurisdictional concerns I express below.
>
> [31] Be that as it may, the extent to which the court should be involved in co-ordination with the police and CTV in selecting and vetting exhibits so that CTV can successfully achieve its commercial broadcasting objectives raises troubling administrative problems. Such involvement could, in my view, be justified, only if it were designed to meet the common-law and Charter requirements of open justice, which have already been met.
>
> ...
>
> [38] In a word, the open justice requirement having been met by the courts, there is no issue of limitation by the courts of the applicant's right to access the exhibits. Whatever residual inherent common law and statutory supervisory powers and duties the courts retain to protect records out of their possession are, in my view, required to be exercised and performed only for the purposes of the administration of justice.

ANALYSIS

13 The central issue in this appeal is the extent of the court's power or jurisdiction over its own records. To determine whether it extends to the circumstances of this case, it is important to remember that the court's jurisdiction over its own records is anchored in the vital public policy favouring public access to the workings of the courts.

14 This was made clear in the seminal case of Attorney General of Nova Scotia et al. v. MacIntyre, [1982] 1 S.C.R. 175. Speaking for the majority of the court, Dickson J. upheld public access to a search warrant and the information upon which it had been issued once the warrant had been successfully executed. In doing so he eloquently described the

importance of public accessibility at every stage of the process. The rule should be one of public accessibility, to be departed from only if necessary to protect what he called "social values of superordinate importance", such as the protection of the innocent. As he indicated, this approach fosters both public confidence in the integrity of the court system and public understanding of the administration of justice. At p. 189 of his reasons he concluded with the following:

> Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.

15 Of the two important objectives served by public access referred to in MacIntyre, the court in that case emphasized judicial accountability and the consequent public confidence that results from public access to the workings of the courts.

16 In subsequent cases the court has made equally clear how important public access is to the second objective, namely a greater public understanding of the administration of justice. Moreover, the court has underlined how important the media are in providing the medium of communication to achieve this end. For example, in Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480 the court discussed the value of public access as a means of enhancing public understanding. La Forest J. said this at pp. 496-497:

> Openness permits 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.
>
> ...
>
> 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.

17 In MacIntyre the court made clear that the strong presumption in favour of public access to court records should be displaced only with the greatest reluctance and only because of considerations of very significant importance such as the protection of the innocent. In Vickery v. Nova Scotia Supreme Court (Prothonotary), [1991] 1 S.C.R. 671 the court further elaborated on the factors to be considered in deciding whether public access should be given.

18 The issue in Vickery was whether a journalist should have access to audio and video tapes filed as exhibits at a criminal trial given that the appeal court had held that they were inadmissible, had reversed the conviction and acquitted the accused.

19 Speaking for the majority, Stevenson J. concluded that access to the tapes was properly denied because the privacy interest of the accused as a person acquitted of a crime outweighed the public right of access to exhibits which had been held to be inadmissible against him. In reaching this conclusion, Stevenson J. reiterated the fundamental proposition in MacIntyre that there should be maximum accessibility but not to the extent of harming the innocent.

20 He went on to outline several other significant factors to be considered in deciding whether to accord access. He referred to the nature of exhibits as a part of the court "record" including, particularly, the proprietary interest that non-parties may have in them, and suggested that this may cut against unfettered access once the exhibits have served their purpose in the court process. He made clear that the court had the right to inquire into the use to be made of access and to regulate that use by securing appropriate undertakings to protect competing interests. He described as another important consideration whether the exhibits had been open to public scrutiny at trial. And he indicated that once the

judicial proceedings had been concluded different considerations might govern, for example where the subsequent release of selected exhibits would create risks of partiality and unfairness.

21 In the end, he decided that the privacy interest of the innocent person who had been acquitted outweighed the access interest of the journalist who sought to view and disseminate the tapes.

22 I think it is clear from this jurisprudence that the court's jurisdiction to determine access to court records (including exhibits) rests on the premise that public accessibility should be curtailed only with the greatest reluctance, taking into account the need to protect the innocent and the other considerations described in Vickery. It is also clear that this jurisdiction does not vanish simply because it is shown that these exhibits were filed in open court. As Vickery indicates, this is not conclusive, but merely one factor for the court to consider in determining whether to depart from the presumption of public accessibility. Indeed, in the present case, where there was a publication ban during the trial, it is perhaps a factor of diminished importance.

23 Thus, I conclude that the application judge erred in determining that he had no power to grant the appellant's request for access simply because these exhibits had been filed at the preliminary hearing and then forwarded to the sentencing court both of which were open to the public.

24 The Toronto Police Service also seeks to defend the decision appealed from on the basis that the exhibits sought by the appellant are no longer in the possession of the court.

25 While both in MacIntyre and Vickery the relevant court records remained in the court's possession, in my view there can be no principled basis for terminating the court's jurisdiction to provide access to exhibits just because they have left the possession of the court. They do not lose their character as exhibits simply because they have been physically transferred to the Toronto Police Service. They remain an integral part of the court record in the Lorenz case.

26 Moreover, the objectives that are served by the presumption of public accessibility - namely, judicial accountability and public understanding of the administration of justice - continue to be important even when possession passes from the court. Fostering judicial accountability in a particular case and enhancing public understanding of that case do not cease when the exhibits are transferred to the police. The policy objectives served by the court's jurisdiction to provide public access to its records thus strongly suggest that, whatever its ultimate reach, this jurisdiction does not end when the records pass out of the court's possession.

27 As with the proprietary interest in exhibits referred to in Vickery, it may be that where they have passed into the control of another, there is a possessory interest to be considered in deciding on public access. In a case like this, however, where the exhibits have simply been returned to the police a few months after the court proceeding and the application for access has been promptly made, that interest would not seem to be significant.

28 Finally, the Toronto Police Service argues that the existence of the Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56 precludes the court from exercising its common law jurisdiction to order access to court records. The respondent says that this legislation permits the appellant to apply for access to the exhibits it seeks and sets up criteria for evaluating such a request.

29 In my view, the simple answer to this argument is that the regime set up under this legislation has an entirely different purpose. It is designed to regulate access to private information which, but for the regime, would not otherwise be available to the public. By contrast, the jurisdiction which the appellant seeks to engage is over court records which the common law treats as presumptively accessible to the public. There is nothing in the legislation that suggests either explicitly or by necessary implication that the court's jurisdiction at common law is being curtailed or removed. This is hardly surprising since the legislation is designed for such a different purpose. The regime it establishes is simply one which co-exists with the court's jurisdiction. It does not replace it.

30 In summary, therefore, I conclude that the court has jurisdiction to order public access to the court exhibits sought

by the appellant.

31 In my view, we should not go beyond this to decide the application on its merits. The application judge did not do so. He did not address how the relevant considerations should be balanced, nor did he decide that if public access should be granted, on what, if any, terms that should be done. In addition, there was no substantial argument on these issues in this court where the focus was simply on the question of jurisdiction. Finally, it appears that the children of the victim in the Lorenz case have a legitimate interest which ought to be canvassed before a final determination of the appellant's application is made.

32 Therefore I would allow the appeal, set aside the order below and remit the application to be heard on the merits before a judge of the Ontario Superior Court of Justice. The parties should be free to file further material on that application if so advised.

33 The appellant is entitled to its costs of the appeal from the respondent the Toronto Police Service, on a partial indemnity basis. In order to comply with the rule that this court fix costs of the appeal, the appellant is requested to file within 10 days its proposed bill of costs with brief written submissions. The respondent may make brief written submissions thereon within 10 days thereafter. Costs of the original application should be in the discretion of the judge to whom the application is remitted.

GOUDGE J.A.
CARTHY J.A. -- I agree.
CRONK J.A. -- I agree.

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