SC CV 93022

CV 03749

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

THE WORKERS COMPENSATION BOARD
OF THE NORTHWEST TERRITORIES

Plaintiff

- and -

LORIE SCHOTT

Defendant

Injunction postponing publicity in the present civil proceedings granted subject to any application to vary it or set it aside which may be made at the instance of the media or any person affected.

Heard at Yellowknife on March 29th 1993

Judgment filed: April 19th 1993

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. de WEERDT

Counsel for the Plaintiff: Adrian C. Wright, Esq.

Counsel for the Defendant: Ms. Susan T. Cooper

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REASONS FOR JUDGMENT

The defendant asks for an injunction order prohibiting any publication and broadcasting of the proceedings in this action, including any material filed, until further order. Her application for this order is not opposed by the plaintiff. Be that as it may, notice of the defendant's application has not been given to the public or to any of the media of public information. In reference to them, the application is made *ex parte*. If the requested order is made, it may yet therefore be set aside or varied on application by any person who is affected by it.

Essentially, the defendant's application rests on her claim that any publication or broadcasting of the proceedings in this action, including any material filed, is likely to prejudice her right to a fair trial on pending criminal charges arising out of the same circumstances as those giving rise to this action. It may be added that the injunction sought would operate only until all of the criminal charges now in the course of a police

investigation have been finally disposed of. The injunction would not extend to those charges, when laid, or to the criminal court proceedings flowing from them.

In other words, what is sought is only a postponement of any publicity as to this civil action until the expected criminal proceedings are concluded. Moreover, except for the temporary sealing of the file in this matter while I reserved my decision on the present application, the file in this action is to remain open to public inspection subject to any further order of the Court. And the proceedings in this action shall not be otherwise restricted with regard to access by the public to them, unless the Court so orders.

In May and June 1992, allegations of major misappropriations by the defendant in the course of her employment by the plaintiff were given highly visible publicity in two local newspapers: **news/north** and **Yellowknifer**. Local radio stations are said to have made broadcasts which included reportage along similar lines. That publicity is now sufficiently far in the past to have died down in public consciousness. What is now sought is to prevent a repetition of the publicity while the criminal charges remain to be dealt with by the courts. Given the nature of the allegations earlier reported, it is apparent that the offences likely to be charged will be indictable and involve significant sums of public money.

As I have outlined above, the scope of the injunction sought in this instance is limited to the publication and broadcasting of the present civil proceedings; and only for so long as may be necessary to avoid prejudice to a fair trial of the defendant in the

anticipated criminal proceedings. The present civil proceedings are otherwise to be conducted openly in the presence of the public, in the usual manner. The record of these proceedings is to remain open to public scrutiny. Nor is the injunction to operate in respect of the publication or broadcasting of any information regarding the criminal proceedings.

The 1992 news reportage made clear and prominent references to the defendant by using her name, which is quite distinctive. Granting an injunction today against disclosure of her name in reference to the present proceedings will therefore not suffice to prevent the obvious linkage to her of any current news reportage of these proceedings. If any injunction is to be granted, it will therefore have to be in the terms sought by the defendant if it is to be effective in preventing widespread publicity which may prejudice the fair trial of the imminent criminal charges which she has good reason to anticipate. There is no apparent alternative which would be less restrictive of the media and yet effective for the purpose intended. The Court is thus left with the simple choice of either granting the injunction sought or refusing to grant any injunction at all.

This choice requires the Court to balance the well-recognized need for a fair trial with the equally well-recognized requirement for open justice. The question is one of deciding where the point of balance, in the circumstances of this case, is to be located.

The right of everyone in Canada to a fair trial on any criminal charge against one is not only enshrined in specific provisions of the **Canadian Charter of Rights and Freedoms**, such as sections 7 and 11; it is inherent in the opening words of the Charter

recognizing that the rule of law is a founding principle of our country's constitution. Trials in (or by) the media are not to displace fair trials in court according to law and the fundamental principles of justice embodied in the law.

At the same time, as held in **Edmonton Journal v. Alta. (A.G.)**, [1989] 1 S.C.R. 1326, [1990] 1 W.W.R. 577, 64 D.L.R. (4th) 577, 45 C.R.R. 1, 41 C.P.C. (2d) 109, 102 N.R. 321, at pages 125-127 (C.P.C.) per Cory J., for the court:

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be overemphasized. No doubt that was the reason why the framers of the *Charter* set forth s.2(b) in absolute terms which distinguishes it, for example, from s.8 of the *Charter* which guarantees the qualified right to be secure from unreasonable search. It seems that the rights enshrined in s.2(b) should therefore only be restricted in the clearest of circumstances.
>
> The vital and fundamental importance of freedom of expression has been recognized in decisions of this Court. In *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573, [1987] 1 W.W.R. 577, 9 B.C.L.R. (2d) 273, 38 C.C.L.T. 184, 33 D.L.R. (4th) 174, 87 C.L.L.C. 14,002, 71 N.R. 83, McIntyre J., speaking for the majority, put the position in this way at p. 583:
>
> > "Freedom of expression is not, however, a creature of the *Charter*. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.
> >
> > The importance of freedom of expression has been recognized since early times: see John Milton, *Areopagitica; A Speech for the Liberty of Unlicenc'd Printing, to the Parliament of England* (1644), and as well John Stuart Mill, 'On Liberty' in *On Liberty and Considerations on Representative Government* (Oxford, 1946), at p.14;

> 'If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.'
>
> And after stating that 'All silencing of discussion is an assumption of infallibility', he said, at p. 16:
>
> 'Yet it is as evident in itself, as any amount of argument can make it, that ages are no more infallible than individuals; every age having held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions now general will be rejected by future ages, as it is that many, once general, are rejected by the present.'
>
> Nothing in the vast literature on this subject reduces the importance of Mill's words. The principle of freedom of speech and expression has been firmly accepted as a necessary feature of modern democracy."
>
> There can be no doubt that the courts play an important role in any democratic society. They are the forum not only for the resolution of disputes between citizens, but for the resolution of disputes between the citizens and the state in all its manifestations. The more complex society becomes, the more important becomes the function of the courts. As a result of their significance, the courts must be open to public scrutiny and to public criticism of their operation by the public.

What is proposed here will not prevent all public scrutiny of the present proceedings, of course. It will merely postpone any publicity regarding those proceedings while criminal charges remain outstanding. The proceedings will be open to the public and, in due course, to the full blaze of public discussion and criticism.

The test propounded by the Alberta Court of Appeal on applications such as this was stated as follows in **Canadian Broadcasting Corp. v. Keegstra** (1986), 48 Alta. L.R. (2d) 114, [1987] 1 W.W.R. 719, 35 D.L.R. (4th) 76, 77 A.R. 249, 16 C.P.C. (2d) 116, (C.A.) at page 119, (C.P.C.) per Kerans J.A. for the court:

> The test ... is this: is there a real and substantial risk that a fair trial will be impossible in the circumstances of the case if publication is allowed?

In the recent English case of **Ex Parte The Telegraph et al.** (1993) T.L.R. 33 (March 16th 1993), Lord Taylor C.J. on behalf of the Court of Appeal applied a similar test based on an English statute of 1981. The test used in that case had two distinct parts: (i) Will publication create "a substantial risk of prejudice to the administration of justice"? and (ii) Does postponement of publication "appear to be necessary for avoiding" that risk? Lord Taylor went on to say, according to the report in The Times:

> In forming a view whether it was necessary to make an order for avoiding such a risk the court would inevitably have regard to the competing considerations of ensuring a fair trial and of open justice. The risk of prejudice to the administration of justice had to be "substantial". The second requirement of the necessity for an order was statutory recognition of the principle of open justice.

In that case, all parties to the proceedings in the Court of Appeal agreed that there would be a substantial risk of prejudice to the administration of justice in the subsequent trials of certain specified individuals on criminal charges, if there were to be any news reporting of proceedings held in the absence of the jury at an earlier trial of other individuals, separately charged but said to be involved in the same criminal activities along with the specified individuals. Having identified the risk, the court held that the next step was to consider, in the light of the competing public interests in fair trials and open justice, whether it was necessary to grant injunctive relief so as to postpone publication of any proceedings in the first trial (or whether some less restrictive order would suffice). In determining whether publication would cause a substantial risk of prejudice to a future trial, it was held that the jury for such a trial was to be credited with the will and ability to follow the trial judge's instructions to decide the matter before them

on the evidence without regard to any publicity. And it was mentioned that the staying power and detail of such publicity, even in cases of notoriety, are limited; the nature of a trial is to focus the jury's minds on the evidence put before them rather than on matters outside the courtroom. In the result, since there was a judicial ban on publication of information likely to reveal the identities of the specified individuals, it was held to be unnecessary to prohibit contemporaneous publication of the proceedings of the first trial.

In the matter before me, the present civil proceedings have been brought for the recovery of a judgment in the amount of money alleged by the plaintiff to have been misappropriated by the defendant. In the circumstances, the nature of the proceedings is such that an adverse outcome, from the defendant's standpoint, is likely to be taken as virtually conclusive proof of her guilt on the criminal charges which are expected to be laid very shortly. Publicity regarding any such outcome, not to mention the evidence leading to it, is in my view likely to prejudice the defendant's fair trial on the criminal charges, in consequence.

This is not a case such as **Canadian Broadcasting Corporation v. Keegstra**, in which the publicity sought to be restrained was a fictional televised drama which a viewer would readily appreciate for what it was. In the present case, the publicity to be restrained is news reportage of an actual court proceeding, which the public is bound to identify with the subject matter of the anticipated criminal proceedings.

Nor is this a case such as **R. v. Legge** (1991) N.W.T.R. 222 (S.C.), in which a second criminal jury trial had been ordered by the Court of Appeal when it reversed the

defendant's earlier conviction after an earlier criminal jury trial. In that case, it should be remembered, the trial court's judgment against the defendant had been set aside on appeal. In the present case, however, there could well be a civil judgment against the defendant which will not have been set aside, with criminal charges pending against the defendant with reference to the very same allegations of misappropriation as those giving rise to the judgment, if such should be the outcome in the present civil proceedings.

This case is therefore distinguishable on its facts from **R. v. Legge**. I have, nevertheless, taken that case into consideration, since it discusses a number of authorities which are applicable in situations of the kind now before me. See also **R. v. Haslam** (1991) N.W.T.R. 296 (S.C.). In addition, I have been greatly assisted by the very useful discussions in **Pacific Press Ltd., The Province and McLintock v. Vickers and Palmer and the Attorney General of British Columbia**, [1985] 3 W.W.R. 75, 60 B.C.L.R. 91 (S.C.); **Foshay v. Key Porter Books Ltd.** (1986), 21 C.P.C. (2d) 196 (Ont. H.C.J.); and **A.G.B.C. v. Pacific Press Ltd.**, [1988] 6 W.W.R. 536 (B.C.S.C.).

The risk of prejudice to the administration of criminal justice in reference to the anticipated charges against the defendants is, in my view, a substantial one in the circumstances of this case. Will a fair trial be impossible in those circumstances, if the injunction now sought is not granted? I am unable to answer that question with any degree of certainty. It is too soon to say, one way or the other. That the injunction appears to be necessary for avoiding that risk is, I believe, nevertheless clear. And, as I have mentioned, the scope of the injunction is to be limited in such a way as not to

deprive the public of access to the record or to the proceedings in the present civil action. Nor will it in any way restrict publicity with respect to the criminal charges when laid.

In conclusion, an injunction order shall issue prohibiting publication and broadcasting of the proceedings in this action, including any material filed in the records of this Court, until the conclusion of any criminal proceedings against the defendant arising out of the circumstances described in the statement of claim in this action or until the further order of the Court.

Copies of the formal order shall be served forthwith upon the publishers of **news/north, The Press Independent, The Globe and Mail, The Edmonton Journal,** and **Yellowknifer;** and, as well, upon the managers of the Canadian Broadcasting Corporation and Station CJCD at Yellowknife; together with a copy of these reasons for judgment. The formal order shall so state.

M.M. de Weerdt
J.S.C.

Yellowknife, Northwest Territories
April 19th, 1993

Counsel for the Plaintiff: Adrian C. Wright, Esq.

Counsel for the Defendant: Ms. Susan T. Cooper

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