CR 02518

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF
certain exhibits entered
in the record of the
Court in the trial
between:

HER MAJESTY THE QUEEN

- and -

ROGER WALLACE WARREN

BETWEEN:

CANADIAN BROADCASTING CORPORATION

Applicant

- and -

HER MAJESTY THE
QUEEN and ROGER
WALLACE WARREN

Respondents

AND BETWEEN:

THE EDMONTON JOURNAL

Applicant

- and -

HER MAJESTY THE
QUEEN and ROGER
WALLACE WARREN

Respondents

REASONS FOR JUDGMENT

1 At issue in these proceedings is the extent to which certain media may obtain

and dispose of (or otherwise deal with) copies of court exhibits entered in evidence during the trial in this case.

2 It is not a simple matter, as quite frequently occurs, of returning exhibits to the litigant who produced them or had them entered in evidence through a third party. Nor is it an equally simple matter of returning them to that third party or to any one else having or claiming to have a proprietary interest in them. Such cases are routinely dealt with and generally present no problem.

3 In the present instance, the applicant media have no proprietary interest in the exhibits in question, and assert none. They claim instead, and there is no dispute on this score, that there presently exists a lively public interest in the trial, which has given rise to a wide public curiosity regarding many of these exhibits. It is evidently the object of the applicant media to satisfy this curiosity by copying the exhibits and to then publicly broadcast or publish those copies (or excerpts from them) and to otherwise deal with the copied material so as to give it a very wide public dissemination, whether in print, on radio, or by television and other electronic means.

I. The Proceedings

4 The trial was held at Yellowknife, before a jury, on an indictment charging the accused with nine counts of first degree murder. It was the longest trial ever held in the Northwest Territories. And given that the offences charged arose out of the violent deaths of nine miners working underground at Giant Mine during the hotly contested

labour dispute which occurred there in 1992 and 1993, the deaths resulting from an explosion which could not be explained away as an ordinary industrial accident, it is not surprising that the trial attracted national news coverage.

5 The present proceedings come before the Court in the form of two applications:

1. The Canadian Broadcasting Corporation ("C.B.C.")

(a) C.B.C. requests an order of the Court granting it access to, and authorizing it to electronically duplicate, the audio and video tapes entered as exhibits in evidence at the trial.

(b) C.B.C. requests that the order also authorize it to broadcast through its radio and television networks such (duplicate) portions of those tapes as may, in its opinion, fairly represent the evidence presented to the jury during the trial.

2. The Edmonton Journal ("The Journal")

(a) The Journal requests an order of the Court granting it access to, and authorizing it to electronically duplicate, the audio and video tapes mentioned.

(b) The Journal also requests that the order authorize it to have access to and duplicate any and all photographs entered in evidence at the trial.

(c) In addition, The Journal seeks authority in the order to enable it to publish any such (duplicate) photographs and any such (duplicate) portions of the tapes as may, in its opinion, fairly represent the evidence presented to the jury during the trial.

6 Each of these applications is opposed, in its entirety, both by the Crown and by the accused.

7 The applications were heard together. Both C.B.C. and The Journal were represented by the same counsel. And while the applications differ in certain details, they raise essentially the same issue. There is no issue as to the legal standing of C.B.C. and The Journal to bring these applications.

8 Initially, the applications were brought in the absence of the jury while the trial was in progress. At the request of both counsel for the Crown and counsel for the accused, the hearing of the applications was then adjourned until the jury had retired to consider their verdicts. At that point, I heard the applications and reserved my decision after hearing argument both for and against the applications.

II. The Exhibits

9 Four kinds of exhibits are sought to be copied or duplicated:

(a) video tape recordings of certain interviews and demonstrations or re-enactments portraying the accused, among others;

(b) audio tape recordings of certain interviews and demonstrations or re-enactments in which the accused took part;

(c) photographs;

(d) transcripts of the recordings described in

paragraphs (a) and (b) immediately above.

10 A number of the recordings, and the transcripts of those recordings, were not sought by counsel for the accused to be excluded from the evidence before the jury at the trial. Of these, all of which were ruled admissible at a pre-trial hearing held in the absence of the jury, only some were (in whole or part) introduced in evidence before the jury at trial. However, others of the recordings and their related transcripts were objected to by counsel for the accused as being inadmissible in evidence before the jury at the trial. Of the latter items, a number can be briefly labelled as "confession exhibits", since their contents have that character. All these items were admitted in evidence before the jury at trial.

11 Certain of the photographs portraying the accused were evidently taken at times when recordings comprised in the "confession exhibits" were being made. Those photographs, although "stills", are apparently regarded by the accused in the same light as the "confession exhibits" themselves.

III. Integrity Of The Exhibits

12 The jury having returned verdicts of second degree murder on each of the nine counts in the indictment, an appeal by the accused is to be expected. There is also the possibility that the Crown may appeal against the accused's acquittal on the charges of first degree murder. In the event that any such appeal is taken, the exhibits will be required by the Court of Appeal, or, if appealed further, by the Supreme Court of Canada.

Should a further trial or appeal follow, the exhibits will then have to be held for the purposes of any such further proceedings.

13 It is therefore apparent that the integrity of the exhibits, and their safekeeping, must be assured, no matter what the outcome of the present applications may be. No evidence has as yet been adduced in the present proceedings to provide any such assurance. However, I note that copies of some of the tapes were made for purposes of the trial, so that this appears quite possible. I assume, then, for present purposes, that this aspect of the matter does not present a problem.

14 Neither the Royal Canadian Mounted Police, from whose custody the exhibits in question were produced in evidence, nor the Attorney General of the Northwest Territories (as distinct from the Attorney General of Canada, on whose behalf Crown counsel conducted the prosecution pursuant to the *Criminal Code*) made any appearance on the present applications, although duly notified. The proprietary interest of the R.C.M.P. in those items is therefore not in issue. Nor has any issue been raised as to the impact which the relief sought by C.B.C. and The Journal might have on future police investigations or, for that matter, on the day-to-day administration of the Court, if the case should come to be regarded as of precedential value.

IV. Regulatory Regime

15 There is nothing of which I have been made aware in the *Criminal Code*, the federal or territorial statutes on evidence, the *Judicature Act*, R.S.N.W.T. 1988, c. J-1, or

the *Rules of Court* promulgated under that Act, which specifically governs such matters. Nor has any Practice Direction been given by the judges of this Court which might provide guidance to me in dealing with these applications. The Court is, as yet, unprovided with staff familiar with the functioning of the media (other than as consumers of media products) who might assist the judiciary in developing appropriate regulatory policies and procedures in situations such as this. In consequence, there are at present no declared policies or procedures in such matters to be followed by our court personnel. Each situation of this kind must therefore be approached afresh and at the judicial level.

V. Historical Precedents

16 The chief instance in this Court of which I am aware, in which a court exhibit has been photographed for public display, is the (now) taxidermically mounted mallard duck whose shooting gave rise to the well-known case of *R. v. Sikyea* (1962), 40 W.W.R. 494 (N.W.T. Terr.Ct.), reversed (1964) 2 C.C.C. 325, 43 C.R. 83, 43 D.L.R. (2d) 150, 46 W.W.R. 65 (N.W.T.C.A.), reversal affirmed (1964) S.C.R. 642, (1965) 2 C.C.C. 29, 50 D.L.R. (2d) 80, 49 W.W.R. 306.

17 Exactly how the exhibit became transformed from the limp carcass produced by the Crown at trial (when it was entered as Crown evidence) into a finely mounted work of art which is now held in trust as part of the Sissons-Morrow Collection usually on display in the foyer of the Yellowknife Court House, is unknown to me, although I was Crown counsel at trial and before the Court of Appeal in that case. It was however

evidently photographed, prior to acquiring its fully finished mounted condition, beside a stack of legal reference books on the counsel table in the Supreme Court of Canada (presumably while the court was not in session) at the time of the appeal in *R. v. Sikyea* before that court. A copy of that photograph is on display in my private chambers in the Court House at Yellowknife.

18 In his memoirs, *Judge of the Far North* (McLelland & Stewart, 1968), the late Mr. Justice Sissons of this Court (then known as "The Territorial Court of the Northwest Territories") referred to the exhibit at page 150, in part, as follows:

> In the summer of 1962 I added a stuffed duck to the ornaments in my office at Yellowknife.

19 While the year appears to be in error, bearing in mind that the transformation of the exhibit had not occurred prior to the final appeal in 1963, it is apparent that the exhibit was later taxidermically treated as a measure for its preservation and that this, and any photographs of it subsequently, had been authorized by Mr. Justice Sissons in either of his capacities as a judge of this Court or of the Court of Appeal. A photograph of Mr. Justice Sissons in his office, standing beside the mounted duck exhibit, is on display in the Judges' Library in the Yellowknife Court House.

20 There is also the instance of the muskox skull and horns, together with hide, which were entered as an exhibit in another case which came before Mr. Justice Sissons for adjudication in the 1960s, which now also form part of the Sissons-Morrow collection on public display (except temporarily at present) in the Court House at Yellowknife. These

items have also been photographed from time to time, with judicial authority and without any question. In fact, the skull and hide can be seen on the wall and floor of Mr. Justice Sissons's office in the photograph last mentioned.

21 These now rather out-dated precedents are of limited application in the matter now before me. First of all, no jury was (or was ever likely to be) involved in either case. Secondly, we do not have any details of how the exhibits there in question came to be dealt with as they were. Mr. Justice Sissons appears to have regarded himself as their custodian, exercising his powers as an *ex officio* clerk of the Court. Any proprietary interest in the exhibits which may have been claimed either by the Crown or by any third party does not appear to have prevented him from dealing with them as he did. In the absence of pertinent information on these points, it will be apparent that these historical precedents are without legal value other than to show that the public display and photography of court exhibits is not altogether without any precedent in this Court.

VI. The Trial

22 The Crown's case at trial relied very substantially on the "confession exhibits". On these rested the alleged confession of the accused to being solely responsible for what amounted to at least the culpable homicide of the nine victims of the fatal explosion. If, on appeal, the admission of these exhibits in evidence before the jury at trial should be held to have been legal error on my part as the presiding judge, it is not too much to say that the Crown would have no case worth pursuing in a subsequent trial. To that extent,

there would be no legal prejudice to the accused in the public display of those exhibits now, in the sense that this could not, in that event, influence a future jury in a subsequent trial. However, if the appeal were to result in a further trial at which the confessions were held to be admissible in evidence before the jury, I understand the joint position of both the Crown and the accused is that there could then be a substantial risk of prejudice to that trial by reason of prior wide public dissemination of excerpts from the confession exhibits. And yet, if those exhibits are admissible in evidence before the jury at such a further trial, it would appear to follow that the prior disclosure of certain excerpts is likely to be inevitably eclipsed by the jury's having the entire exhibit before them at the trial, making the prior viewing of any mere excerpt relatively insignificant.

23 By my count, there is a total of some 30 hours of tape recordings, the transcripts of which comprise almost 600 pages. In addition, there are at least 166 photographs, together with diagrams and charts. Two exhibits alone, being transcripts of the entire testimony of the accused on the *voir dire* (held in the absence of the jury) and at the trial itself, consist of about another 600 pages. The volume of material which may be affected by the outcome of the present applications is therefore considerable. There will be a major additional administrative burden on the court registry staff, if the applications succeed.

24 It is not an exaggeration that the proceedings in open court in this case far surpass in length any other held in this Court since its reconstitution in 1955. Following five weeks of pre-trial hearings, the trial alone occupied some ten weeks. And the jury

deliberated for the best part of five full days. Forty-nine witnesses had testified before the trial concluded and others might have been required if there had been no agreement as to certain facts. Six hundred persons were summoned for jury duty before the trial; and about 250 actually attended for jury selection. As a result, additional court facilities had to be obtained, not to mention additional sheriff's officers, all with attendant additional public inconvenience and expense. Besides all the primary reasons for avoiding the risk of a new trial, there is therefore the additional reason that such an undertaking would no doubt be a major one. All the more reason, furthermore, for avoiding any possibility of prejudice to any party to a new trial, should a new trial prove to be required.

VII. Discussion

1. The Charter

25 The freedom of the press (and other media of communication) is guaranteed to all of us in Canada by virtue of section 1 and paragraph 2(b) of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982* and hence, by definition in s.52 of that Act, the Constitution and supreme law of Canada.

26 For convenience of reference, these provisions of the Charter read as follows:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 2. Everyone has the following fundamental freedoms: ...

> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; ...

27 In addition, the Charter declares our right to a fair trial before a jury in accordance with the principles of fundamental justice, as we understand those principles in Canada, in a case such as the present. Once again, the pertinent provisions of the Charter may be conveniently quoted, as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 11. Any person charged with an offence has the right ...
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; ...
>
> (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment; ...

2. The *Dagenais* Decision

28 This is not a case in which it is sought to set aside or modify an existing order of a court or judge prohibiting or restricting the publication or broadcasting of something which might reflect upon certain court proceedings as occurred in *Canadian Broadcasting Corporation et al. v. Lucien Dagenais et al.*, December 8th 1994 (S.C.C.). In that case, C.B.C. was enjoined, at first instance, against broadcasting a television mini-series entitled

"The Boys of St. Vincent", a fictional account of sexual and physical abuse of children in Newfoundland. C.B.C. was, in addition, enjoined against broadcasting or publishing any information relating to that mini-series. The injunctions had been issued at a time when Lucien Dagenais and certain others were scheduled to be tried before a jury in Ontario on charges of that kind.

29 The present case differs factually from the *Dagenais* case on the further ground that the subject matter of the injunctions in that case was an artifact created and intended only for purposes of public entertainment and information, whereas our concern here is with exhibits created and intended only for the purposes of evidence in court proceedings.

30 With those important distinctions in mind, and finding nothing in any ordinary statute or the *Rules of Court* to govern, I take the view that the relief sought in the matter before me lies within my judicial discretion in the exercise of the inherent powers of the Court, so that there is no need in this instance to invoke s.24(1) of the Charter. That provision, were it necessary to rely on it, would presumably confer a similar discretion upon me, to the extent that the circumstances would make the provision applicable, as a reading of it shows:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

31 It goes without more than passing mention that the exercise of a judicial

discretion in such matters is of course always subject to the supreme law of the Constitution, and not least to the above quoted provisions of the Charter. See *Dagenais*, where Lamer C.J. stated on behalf of the majority (5:4) at page 30, quoting from *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416, 93 N.R. 183, 26 C.C.E.L. 85, 89 C.L.L.C. 12247, 40 C.R.R. 100:

> As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force and effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the Charter, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation of no force or effect, unless it could be justified under s.1.

32 As already mentioned, there appears to be no legislation governing the discretion which I am asked to exercise, other than the general provisions of the *Judicature Act* having reference to the jurisdiction of this Court; and those provisions have not been made subject to challenge or dispute in the matter now before me. The legal source of the discretion is rooted in the common law as recognized implicitly in the Act.

33 The *Dagenais* case thus marks a clear departure from the pre-Charter common law rule in Canada, which gave primacy to fair trial rights over those of free expression wherever they came into conflict. This hierarchical approach is now to be avoided. Instead, the proper interpretation and application of the Charter requires a judicious balance to be achieved which fully respects the various constitutional rights of all

concerned; and, in each case, the balance is to be struck with due regard for its particular factual circumstances.

34 Speaking for the unanimous court in *Re Fraser and Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, 23 D.L.R. (4th) 122, 63 N.R. 161, 18 Admin. L.R. 72, 9 C.C.E.L. 233, 86 C.L.L.C 12012, 19 C.R.R.152, Dickson C.J.C. fore-shadowed this new approach in saying:

> All important values must be qualified, and balanced against, other important, and often competing values. This process of definition, qualification and balancing is as much required with respect to the value of "freedom of speech" as it is for other values.

35 As *Dagenais* now makes perfectly clear, the same is to be said of fundamental "fair trial" values.

36 Although this is not a case in which a judicial ban on publication or broadcasting exists, in specific terms, with respect to duplication (or dissemination of duplicates) of the exhibits, the fact that these exhibits remain in the Court's control at present puts the applicants in somewhat the same position as if such a ban had been declared by a lower court. And so, even if the applicants and other media have had access to the exhibits, as directed by me during the trial (through the good offices of the clerk in charge of the exhibits) and as I understand in fact occurred, the applicants are now nevertheless obliged to seek judicial permission to make and deal with the duplicates mentioned.

37 While therefore not on all fours with the facts in the *Dagenais* case (where a judicial ban had been declared), the present application is in this respect no different from the application to set aside the injunctions there, leaving aside for the moment the fact that what was sought to be broadcast and publicized in that case was a fictional dramatic presentation, whereas here we are concerned with court exhibits purporting to show events as they actually occurred, those events comprising an alleged confession to the commission of a culpable homicide.

38 The effect of the *Dagenais* decision therefore is to require me to proceed with an analysis of the facts in the matter at hand so as to ensure that my judicial discretion to grant or withhold the relief sought by the present applicants is exercised in conformity with constitutional principle as laid down in that case.

3. Earlier Cases

39 Even before the Charter came into force on April 17th 1982, the Supreme Court of Canada had begun to assert "free expression" values in the face of competing considerations: *A.-G. N.S. v. MacIntyre*, [1982] 1 S.C.R. 175, 65 C.C.C. (2d) 129, 26 C.R. (3d) 193, 132 D.L.R. (3d) 385, 49 N.S.R. (2d) 609, 40 N.R. 181. In that case, a journalist (claiming no greater right than a member of the general public) sought access to a document filed in support of an application for a search warrant, on grounds that it was a matter of public record in the administration of justice and that it should therefore be open to public inspection, the warrant having been executed. In the final result, the

journalist was permitted to have access to the document for purposes of its inspection (and, I presume, such copying as was wished) subject to maintenance of the integrity of the document as a record of the court in question.

40 On behalf of the majority (5:4) in the *MacIntyre* case, Dickson J. (as he then was) held that public access to court documents filed in the course of an *in camera* pre-trial judicial proceeding leading to issuance of a search warrant under the *Criminal Code* is properly prohibited prior to execution of the warrant but not thereafter. The argument that access should then be permitted only to those who could show a personal or specific interest in the document was rejected.

41 In reaching that conclusion, Dickson J. referred to "several broad policy considerations, namely the 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." He went on to quote from Jeremy Bentham, as follows:

> In the darkness of secrecy, sinister interest, and evil in every shape have full swing. Only in proportion as publicity has place can any checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and surest of all guards against improbity. It keeps the judge himself while trying under trial.

42 A word of caution then followed which deserves mention. The interest of an

innocent individual in maintaining his or her privacy is not to be lost from view. In the present case, although the accused has now been publicly convicted of nine counts of second degree murder, those convictions may yet be set aside on appeal. If that should occur, the accused would once again be presumed innocent of those offences, subject to the outcome of any further trial. But it cannot be said that his privacy, in the sense discussed in the *MacIntyre* case, will remain unimpaired by denying the relief here claimed. The privacy interest became significantly less compelling when the exhibits in question were publicly shown and heard during the trial. In giving expression to a contrary view, it is to be noticed that Stevenson, J. for the majority (6:3) in *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671, 64 C.C.C. (3d) 65, 104 N.S.R. (2d) 181, 283 A.P.R. 181, 124 N.R. 95, assumed that duplication of the exhibits would lead inevitably to *unrestricted* repetition of their contents. He said:

> 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.

43 The cautionary note in *MacIntyre* as to protection of an innocent individual's privacy rights was also given decisive effect in *Toronto Sun Publishing Corp. v. Alberta* (1985), 62 A.R. 315 (C.A.) so as to uphold a publicity ban issued at trial to the extent that the identity of blackmail victims might otherwise be disclosed. A similar interest is recognized and is nowadays given at least qualified protection by s.276.3 of the *Criminal*

Code.

44 Protection of an innocent individual's privacy rights was given primacy over the claim of a journalist to relief similar to that now sought by C.B.C. and The Journal, in the *Vickery* case. However, it is noteworthy that the majority in that case ruled out all consideration of s.2(b) of the Charter since no issue had been raised, on grounds of press freedom (or freedom of expression generally), in the courts below. That case is thus clearly distinguishable from the matter now before me, in which the journalistic purposes for which the relief is here claimed are clearly stated in the notices of motion, and s.2(b) is thus directly engaged. Moreover, the terms of the relief sought in the present case are significantly more restrictive than those of the relief granted at first instance in that case and which were there held on appeal to be overbroad.

45 Another case in which a journalist sought to be allowed to broadcast duplicate video recordings of an accused person's words and actions, the original recordings having been entered in evidence at the accused's murder trial before a jury, is *Re R. and Lortie* (1985), 21 C.C.C. (3d) 436, 46 C.R. (3d) 322 (Que. C.A.). That was the case in which the accused killed three people as the cameras rolled in the Legislative Assembly of Quebec. The recordings thus showed the very acts constituting the crimes in question.

46 Unlike Vickery, Lortie was convicted; and so the presumption of innocence in Lortie's case was never restored following his conviction. Furthermore, Lortie wished the media to broadcast the duplicate material, whereas Vickery did not. Given these

points of distinction, it is nevertheless worthy of notice that L'Heureux-Dubé J., who dissented in the Court of Appeal in the *Lortie* case, also dissented in *Vickery*, in each instance favouring a result which gave primacy to freedom of expression over competing values. And while she dissented once again in *Dagenais*, she nonetheless supported the majority decision to set aside the publication ban in that case also. This decision was likewise supported by McLachlin J., who had joined Cory and L'Heureux-Dubé JJ. in dissent in the *Vickery* case. And Cory J. was among those who concurred as members of the majority in *Dagenais*.

47 Whereas the judicial ban on broadcasting the material in *Lortie* was sustained by the Quebec Court of Appeal pending the outcome of the appeal, it appears that the ban was no more than a temporary one, which has long since expired, the material having been widely broadcast in recent weeks when Lortie was due to become eligible for parole pursuant to s.742 of the *Criminal Code*.

48 Given the grounds for distinguishing the decision in *Vickery* in a case where s.2(b) of the Charter is at issue, as in the present applications, the dissenting reasons of Cory J. in that case are deserving of consideration since they directly address that issue in terms which I find pertinent in the present context. In particular, the following passages from those reasons bear repetition here:

> **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.

49 A third principle, that of the right of every accused to a fair trial, was not discussed in *Vickery*, since that case had been concluded and hence no further trial was to be anticipated. That third principle, however, deserves also to be weighed in the balance in the present case. It is on the basis of this last principle that the present applications are opposed by both the Crown and the accused.

50 This third principle was what the majority in *Dagenais* held to be overborne, in the circumstances of that case, by the second of these three principles. As Lamer C.J.C. put it:

> The pre-Charter common law governing publication bans emphasized the right to a fair trial over the expression interests of those affected by the ban. In my view, the balance this strikes is inconsistent with the principles of the Charter, and in particular, the equal status given by the Charter to ss.2(b) and 11(d). It would be inappropriate for the courts to continue to apply a common law rule that automatically favoured the rights protected by s.11(d) over those protected by s.2(b). A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when

> developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.

51 Cory J., in *Vickery*, discussed the importance of maintaining public confidence in the courts by giving the public access to them, in the following passages from his reasons for judgment in that case:

> 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 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 the proceedings. The process was, in the truest sense of the term, open to the public.
>
> Obviously times have changed. Court-room space is limited. Even if it were not, it is impossible for most members of the public 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 court-rooms.

52 It is readily apparent from the foregoing that the principle of openness in court proceedings is essentially but an aspect of freedom of expression, since expression in such matters is of the essence of the process and public understanding (with consequent public acceptance or non-acceptance) of it. Cory J. went on to illustrate this as follows:

> 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.

53 The fact that an appeal may be pursued in the present case, whether by the Crown or the accused (or both) is immaterial, in my respectful view, except to the extent that consideration should be given to the possible outcomes of any such appeals. As Cory J. also observed in *Vickery*:

> Appeals are the natural and frequent continuation of the 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 the 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.

54 Although the specifics of "access" are not discussed in *Vickery*, the duplication of electronically generated records such as audio and video tapes is clearly contemplated as falling within that term. And so (as I read the judgments) is any subsequent use to which the duplicates may be put, including broadcasting or publication. If access, in this broad sense, is permissible in the exercise of my judicial discretion; and if I conclude that it should be granted, the question will then be only as to the terms upon which access is to take place.

55 While the outcome in the *Vickery* case appears to have been conclusively determined by the inadmissibility of the exhibits in question, as found by the Court of Appeal, it should not be forgotten that the final result reached in that case (with respect to public access to the exhibits) was determined without more than passing reference to the paramount fundamental rights of fair trial and free expression, submissions on those not having been advanced in the courts below. Faced with submissions on both these additional considerations, as I am in the present instance, the dissenting reasons of the minority in that case become for me extremely persuasive in the light of the *Dagenais* decision.

56 It will of course not be forgotten that the fundamental importance of freedom of expression, while declared (and so recognized) by the Charter, pre-dates that instrument by many years. As MacIntyre J., for the majority (5:2) said in *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174, 25 C.R.R. 321, (1987) 1 W.W.R. 577, 9 B.C.L.R. (2d) 273, 38 C.C.L.T. 184, 87 C.L.L.C. 14,002, 71 N.R. 83:

> 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 ...

57 Quoting these passages and more, in *Edmonton Journal v. Alberta (Attorney-*

General), [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, 41 C.P.C. (2d) 109, 45 C.R.R. 1, (1990) 1 W.W.R. 577, 103 A.R. 321, 71 Alta. L.R. (2d) 273, 102 N.R. 1, Cory J. (speaking for himself, Dickson C.J.C. and Lamer, J.) went on to say:

> 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 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.
>
> The importance of the concept that justice be done openly has been known to our law for centuries.

58 In the words of the author Arnold Bennett, "The price of justice is eternal publicity."

59 That the free expression interest in court proceedings extends beyond the traditional openness of the courtroom, while matters are being heard, was placed beyond question in *Ford v. Quebec (A.G.)*, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577, 36 C.R.R. 1, 19 Q.A.C. 59, 90 N.R. 94 (*sub nom Chaussure Brown's v. Quebec (P.G.)*), in which it was observed that freedom of expression protects listeners as well as speakers. As Cory J. explained in the *Edmonton Journal* case:

> That is to say, as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role. It is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples nor mothers or fathers house-bound with young children would find

> it possible to attend court. Those who cannot attend rely in large measure upon the press to inform them about court proceedings - the nature of the evidence that was called, the arguments presented, the comments made by the trial judge - in order to know not only what rights they may have, but how their problems might be dealt with in court. 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 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.

60 I do not read these words as being in any sense intended to exclude television watchers from the category of "listeners" or "readers" to whom Cory J. referred. Nor do I understand him to have intended a narrow and exclusive meaning of the term "documents" in what followed. The expression "documentary", when applied to moving pictures, is apt to convey the larger meaning which I take to be intended. The passage which then followed reads:

> It is equally important for the press to be able to report upon and for the citizen to receive information pertaining to court documents. It was put in this way by Anne Elizabeth Cohen in her article "Access to Pretrial Documents Under the First Amendment" (1984), 84 Colum. L. Rev. 1813, at p.1827:
>
> "Access to pretrial documents furthers the same societal needs served by open trials and pretrial civil and criminal proceedings. Court officials can be better evaluated when their actions are seen by informed, rather than merely curious spectators."

61 The references in these passages to "the press" are not, as I understand them, to be read in a sense confined to the print media to the exclusion of other media of public

information such as radio and television. That expression is instead to be given its widest contemporary connotation.

4. Exercising The Discretion

62 Having recognized the fundamental importance of the applicants' free expression interests, it remains to weigh these together with the fair trial interests of the respondent Crown and accused, not forgetting the privacy interests of the accused in the event that he should be found to have been wrongly convicted.

63 Notwithstanding my earlier noted reservations questioning the validity of the argument that those fair trial interests must be prejudiced, in the circumstances of this case, should the relief now sought be granted prior to the exhaustion of every possibility of another trial of the accused on the charges upon which he has been convicted, I recognize that there remains at least a theoretical possibility of such prejudice if the relief granted is not appropriately conditioned to eliminate it. The well-known *dictum* that "justice should not only be done, but should manifestly and undoubtedly be seen to be done" (per Lord Hewart C.J. in *R. v. Sussex JJ.; Ex parte McCarthy*, (1924) 1 K.B. 256 at 259 (Div.Ct.)) is therefore to be understood subject to consideration of the time factor which should apply in this instance.

64 Applying the criteria laid down by the majority in *Dagenais*, the first point to be considered is that of the legal standing of the applicants. As earlier mentioned, this is not in dispute. That being so, I have amended the style of cause to show them as

having the status of applicants rather than intervenors only, so that the status of all parties for appeal purposes should be fully apparent. It may be noticed, at the same time, that the applicants mention the possibility of sharing any duplicated material with others. However, those others remain unidentified at this stage. I do not, in consequence, see the applicants as acting, or claiming to act, in a representative capacity in the matter.

65 I have had the advantage of seeing and hearing all the exhibit material which the applicants seek to duplicate and disseminate in duplicated form. The material is extensive in its total volume, as I have already noted. There are references in certain of the exhibits to persons other than the accused, those others being presently charged with other criminal offences allegedly committed during the labour dispute at Giant mine in 1992 and 1993. I made an order at the conclusion of the trial of the accused in the matter before me, prohibiting publication of any of the evidence or proceedings in this case to the extent that it pertained to those other persons, namely Timothy Bettger, Allan Shearing and Arthur St. Amand, pending the conclusion of the proceedings against them. Any relief to be now granted to the applicants CBC and The Journal must be understood as being subject to that order.

66 The applicants have offered assurances that they will deal with any duplicated material responsibly and in accordance with standards of balanced reportage currently recognized by the major information media in Canada. These assurances, if their terms can be appropriately embodied in the relief granted, should adequately protect the accused's legitimate privacy interests, such as they may prove to be. The relief should

furthermore be couched in such terms as to meet the concern expressed by Stevenson J. in *Vickery* that an innocent person might be "made to bear the stigma resulting from *unrestricted* repetition of the very same illegally obtained evidence" (emphasis added here).

67 Taking the approach approved in *Dagenais*, I am not satisfied that the respondents have shown that an outright refusal of the relief sought is necessary to ensure protection either of their fair trial interests or, in the case of the accused, of his legitimate privacy interests. However, I am satisfied that a temporary delay before that relief becomes effective is necessary to adequately protect those other interests, provided that the limitation in time is kept to the necessary minimum for that purpose. And I am also satisfied that the conditions described below, which are to apply, reflect an appropriate balance between the free expression interests of the applicants and those other interests of the respondents.

IX. Disposition

68 Orders shall therefore issue in the terms following:

1. The C.B.C's. application

The relief sought is granted subject to these restrictions and qualifications:

(a) the order shall have effect upon entry in the usual way; this should enable any right of appeal to be exercised without uncertainty or undue delay;

(b) every duplicate made as hereby authorized (and any copy thereof or excerpt therefrom) shall be retained by C.B.C. for its own use as hereby authorized;

(c) prior to any duplicate being made, C.B.C. shall provide evidence to the satisfaction of a judge of this Court that it can and will be made without in any way adversely affecting the integrity of the exhibit to be duplicated;

(d) no duplication shall be made save under the direct supervision of the Clerk of the Court or her designate, who shall at all times retain complete control over the exhibit in question;

(e) nothing in this order revokes or varies any other order made by this Court (or a judge thereof) with respect to non-publication and non-broadcasting of evidence relating to Timothy Bettger, Allan Shearing or Arthur St. Amand pending the conclusion of any criminal proceedings against them or any of them;

(f) no duplication as hereby authorized shall take place until any appeal from this order is finally disposed of or until the period within which to bring such appeal expires, whichever occurs later; and

(g) no broadcast or publication of any duplicate hereby authorized, either in whole or in part (or any copy of or excerpt therefrom) shall be made or permitted by C.B.C. until all proceedings against the accused and any appeal in respect thereof, with reference to the offences of which he stands convicted, or any of them, are finally concluded.

2. The Journal's application

The relief sought is granted subject to these restrictions and qualifications:

(a) the order shall have effect upon entry in the usual way; this should enable any right of appeal to be exercised without uncertainty or undue delay;

(b) every duplicate made as hereby authorized (and any copy thereof or excerpt therefrom) shall be retained by The Journal for its own use as hereby authorized;

(c) prior to any duplicate being made, The Journal shall provide evidence to the satisfaction of a judge of this Court that it can and will be made without in any way adversely affecting the integrity of the exhibit to be duplicated;

(d) no duplication shall be made save under the direct supervision of the Clerk of the Court or her designate, who shall at all times retain complete control over the exhibit in question;

(e) nothing in this order revokes or varies any other order made by this Court (or a judge thereof) with respect to non-publication and non-broadcasting of evidence relating to Timothy Bettger, Allan Shearing or Arthur St. Amand pending the conclusion of any criminal proceedings against them or any of them;

(f) no duplication as hereby authorized shall take place until any appeal from this order is finally disposed of or until the period within which to bring such appeal expires, whichever occurs later; and

(g) no broadcast or publication of any duplicate hereby authorized, either in whole or in part (or any copy of or excerpt therefrom) shall be made or permitted by The Journal until all proceedings against the accused and any appeal in respect thereof, with reference to the offences of which he stands convicted, or any of them, are finally concluded.

69 If anything further requires to be settled, counsel may apply on due notice to the other parties, if any, who may be affected. There shall be no costs unless these are sought in that manner.

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

Yellowknife, Northwest Territories
February 2nd 1995

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Counsel for the Respondent Crown:	David W. Guenter, Esq.
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