Fullowka et al v. Royal Oak Mines Inc. et al (Re Canadian Broadcasting Corp.), 2001 NWTSC 4
Date: 2001 01 19
Docket: CV05408

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

SHEILA FULLOWKA, DOREEN SHAUNA HOURIE, TRACEY NEILL, JUDIT PANDEV, ELLA MAY CAROL RIGGS, DOREEN VODNOSKI, CARLENE DAWN ROWSELL, KAREN RUSSELL and BONNIE LOU SAWLER

Plaintiffs
(Applicants)

- and -

ROYAL OAK MINES INC., MARGARET K. WITTE, also known as PEGGY WITTE, PROCON MINERS INC., PINKERTON'S OF CANADA LIMITED, WILLIAM J.V. SHERIDAN, ANTHONY W.J. WHITFORD, DAVE TURNER, THE GOVERNMENT OF THE NORTHWEST TERRITORIES AS REPRESENTED BY THE COMMISSIONER OF THE NORTHWEST TERRITORIES, NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA, Successor by Amalgamation to CANADIAN ASSOCIATION OF SMELTER AND ALLIED WORKERS and the Said CANADIAN ASSOCIATION OF SMELTER AND ALLIED WORKERS, HARRY SEETON, ALLAN RAYMOND SHEARING, TIMOTHY ALEXANDER BETTGER, TERRY LEGGE, JOHN DOE NUMBER THREE, ROGER WALLACE WARREN, JAMES EVOY, DALE JOHNSON, ROBERT KOSTA, HAROLD DAVID, J. MARC DANIS, BLAINE ROGER LISOWAY, WILLIAM (BILL) SCHRAM, JAMES MAGER, CONRAD LISOWAY, WAYNE CAMPBELL, SYLVAIN AMYOTTE and RICHARD ROE NUMBER THREE

Defendants

- and -

ROYAL OAK MINES INC., HER MAJESTY THE QUEEN IN RIGHT OF CANADA, THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, CANADA, AND THE MINISTER OF LABOUR, CANADA and THE ROYAL CANADIAN MOUNTED POLICE AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA and THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

Third Parties

-and-

THE CANADIAN BROADCASTING CORPORATION

(Respondent)

Application for pre-trial production from a non-party. Denied.

REASONS FOR JUDGMENT OF THE HONOURABLE J. Z. VERTES

Heard at Yellowknife, Northwest Territories
on December 12 & 13, 2000.
Reasons Filed: January 19, 2001
Counsel for the Applicants (Plaintiffs): J.B. Champion
Counsel for the Respondent (C.B.C.): D.C.I. Lucky

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(Respondent)

REASONS FOR JUDGMENT

[1] This is an application by the plaintiffs, pursuant to Rule 231 of the Rules of Court, seeking pre-trial production of documents, videotapes to be exact, in the possession of a non-party to this action, the respondent Canadian Broadcasting Corporation. I am told that, with one exception, this is the first time that this type of motion in a civil suit has been considered where the non-party is a news service. I am

also told that this is the first time where production has been resisted on the basis of the constitutional principle of freedom of the press.

Facts:

[2] The background facts to this litigation are notorious. The plaintiffs are the dependants of nine miners killed in an explosion at the Giant Mine in Yellowknife in 1992 during a volatile and lengthy strike at the mine. The defendant Warren was eventually convicted of murder in these deaths. He is being sued in this lawsuit along with a host of other entities and individuals. The allegations of course differ with respect to the different defendants. The relevant portions of the pleading for this application are those against Warren, who was a striking miner, and some other individual defendants.

[3] The plaintiffs allege that Warren entered the mine and placed an explosive device in close proximity to the track along which miners working underground were regularly transported in "man cars". They further allege that certain individuals actually assisted Warren to gain entry to the mine. More significantly, they allege that several individual defendants, all of whom were also striking miners or their supporters and in a position to exercise influence over Warren, created an atmosphere of violence during the strike that in turn created a foreseeable risk of harm to others on the mine site. This plea, while perhaps novel, has withstood a "no cause of action" attack and is at least triable: see [1997] N.W.T.R. 1 (C.A.).

[4] Warren is defending this law suit and representing himself. Earlier this year, Warren was examined for discovery. During the course of that examination he was asked about certain statements made by him and captured on film. They relate to two separate incidents.

[5] The first incident is a scene at the picket line during the strike filmed by the CBC on June 7, 1992. The CBC aired two different segments of this scene. The first one was aired shortly after Warren's arrest in 1993. The second one, a slightly expanded version of the first segment, was aired after Warren's conviction in 1996. In both segments Warren can be seen and heard making threats of harm to the replacement workers at the mine. There are other defendants depicted as well on the tape and some of them are heard to utter what may be regarded as threatening comments. During his discovery, Warren stated that the scene depicted on this videotape was preceded by

speeches by various striking union members which, according to Warren, may have instigated him to say what he did.

[6] The second incident is an interview given by Warren to a CBC journalist in 1998 after his application for leave to appeal his criminal conviction to the Supreme Court of Canada was rejected. This too was aired on a television news programme. Warren talked about the events of 1992 and denied his involvement in the fatal blast. Warren also denied any involvement in the blast at his criminal trial even though the prosecution presented several confessions by him. At his discovery in this case Warren said that the interview must have been edited because he recalled saying additional things.

[7] The plaintiffs have all of the tapes that were aired relating to these two specific incidents. They were played for me at the hearing of this application. What the plaintiffs seek, however, are the edited and unbroadcast portions of the tapes relating to these two incidents. Warren, at his discovery, undertook to request the CBC to provide him with the entire unedited tape of his interview and the unedited tape of the whole sequence of events filmed on June 7, 1992. Whether Warren should have given those undertakings, or if he had counsel whether there would have been objections to such undertaking requests, are now quite beside the point. He wrote to the CBC and the CBC refused to provide the tapes. As part of my ongoing role as case management judge for this action I directed that this issue be brought forward as a Rule 231 application.

[8] The CBC, as revealed in an affidavit filed by its regional director, has a uniform policy of resisting requests to provide film footage taken by CBC camera crews in investigating news stories. This position is taken regardless of the merits of the request and is the same whether the request comes from law enforcement officials, an accused person or a private litigant. No catalogue is kept of unbroadcast or edited material and it would be very onerous to locate any specific items. In this case all that can be said by the respondent is that there is unbroadcast material from Warren's interview but, as far as the June 7 picket line incident is concerned, probably there is unbroadcast material but such has not been located or identified. But it is acknowledged that there was some editing done since two versions of the June 7 incident were aired.

The Issues:

[9] The position of the applicants is that the sole issue for them to address is the relevance or probable relevance of the material sought. It is then, in their view, up to the respondent to provide cogent reasons why production should not be ordered. On the question of relevance, applicants' counsel submitted that the tapes are directly relevant to (i) Warren's, and other defendants', animus toward the deceased miners; (ii) the influence which certain defendants had on others, including Warren; (iii) threats by Warren and others toward replacement workers; (iv) Warren's recollection of events and circumstances preceding the explosion; and (v) Warren's credibility.

[10] The position of the CBC is that this application represents a serious intrusion into the ability of the press to carry out its functions, functions that have been constitutionally recognized as part of the protection accorded to freedom of the press by s.2(b) of the Canadian Charter of Rights and Freedoms. Therefore, I should favour the public interest in the media's constitutionally protected function of news gathering over a private litigant's interest in obtaining pre-trial production of what the CBC counsel referred to as journalist's "work product". It was submitted that there is already so much evidence available to the applicants in this case, in addition to the tapes that were broadcast, that any decision as to whether the unbroadcast material is necessary for resolution of issues in this case is one that should be deferred to the trial judge.

[11] The arguments advanced on this application require a consideration of the following issues:

(a) the scope of Rule 231;
(b) the effect of the Charter guarantee of freedom of the press on this application; and,
(c) the factors that must be taken into account when a production request is directed toward the media.

These are necessary to consider so as to determine if the principles underlying Rule 231 are satisfied in this case and, if they are, how the discretion granted by Rule 231 should be exercised.

The Scope of Rule 231:

[12] The relevant portion of Rule 231 is subrule (1):

> 231.(1) Where a document is in the possession of a third person who is not a party to the action and there is reason to believe that the document is relevant to a material issue in the action and it is not privileged, the Court may, on the application of any party, order the production of the document at such time and place as the Court directs.

The rule also provides (in subrule 3) for inspection of the document by the court where privilege is claimed or if there is uncertainty as to the relevance of or necessity for discovery of the document. Privilege is not an issue on this application.

[13] The first point to note is that the order is discretionary: "... the Court *may* ... order the production ..." There is no right to an order under this rule. By being discretionary it requires the court to look at the justice of the individual circumstances.

[14] A second point is that the test is not actual relevance but probable relevance to a material issue in the action: "... there is *reason to believe* that the document is relevant..." The Alberta Court of Appeal, when considering a similar rule in that jurisdiction, stated the applicable test as one of "relevance or probable relevance" to a matter in issue: *Metropolitan Trust Co. v. Peters* (1996), 38 Alta. L.R. (3d) 150.

[15] A third point is that Rule 231 is found in Part XV of the Rules of Court dealing with pre-trial discovery of documents. The test for relevance at this stage of proceedings is quite broad (although not as broad as the rules dealing with discovery from a party) . The point though is that production from a non-party is not confined to the trial stage. It is not necessary for an applicant on this type of motion to establish that the documents sought would be admissible in evidence at trial.

[16] Rule 231 is similar to ones found in other Canadian jurisdictions. It is intended to facilitate the procuring of evidence. It is not intended to be a "fishing expedition" nor should it be used as a means of obtaining discovery from a stranger to the action: *Rhoades v. Occidental Life Ins. Co.*, [1973] 3 W.W.R. 625 (B.C.C.A.). I do not consider this application as fitting into either of these categories.

[17] There are also policy considerations raised by an application for production from non-parties. In *Cook v. Ip* (1985), 52 O.R. (2d) 289 (Ont. C.A.), leave to appeal to S.C.C. refused (1986), 55 O.R. (2d) 288, the court observed that it is in the public

interest to ensure that all relevant evidence is available to the court for a just determination of the dispute. The court must consider whether the interests of the administration of justice outweigh any interest to be protected from non-disclosure: *Bergwitz v. Fast* (1980), 18 B.C.L.R. 368 (C.A.). These factors very much depend on the degree of relevance and importance of the information sought relative to the issues in the case.

[18] There is a further concern, however, at this stage of the proceedings. That is to keep pre-trial discoveries within some reasonable limits. This point was emphasized by the Ontario Court of Appeal in *Ontario (Attorney General) v. Ballard Estate* (1995), 26 O.R. (3d) 39. That action was a claim alleging breach of fiduciary duties by executors of an estate. The plaintiffs sought production of financial documents in the possession of non-parties. The motions judge refused the request for production; the appeal court set aside that decision and remitted the issue to the motions judge (who was also the case management judge for the action) to reconsider.

[19] The Ontario rule (Rule 30.10(1) of the Rules of Civil Procedure) provides that production may be ordered from a non-party where (a) the document is relevant to a material issue in the action; and (b) it would be unfair to require the applicant to proceed to trial without having discovery of the document. The appeal court held that the motions judge erred by setting too high a standard for the "fairness" assessment. The motions judge held that the applicant must show that the documents requested are "crucial" to their case. The appeal court held that the importance of the documents requested is only one factor to consider in making the "fairness" assessment. It wrote (at paras. 11-13):

> ...An order requiring production should be made only after a full consideration of all of the relevant factors. The motion judge, who is case managing this complex litigation, is in a much better position than this court to determine whether fairness requires production of all, some or none of the demanded documents at this stage of the litigation. In our view, the policy underlying the case management system is best served by remitting the matter to the motion judge for a determination of the merits.
>
> In making the fairness assessment required by rule 30.10(1) (b), the motion judge must be guided by the policy underlying the discovery régime presently operating in Ontario. That régime provides for full discovery of, and production from parties to the litigation. It also imposes ongoing disclosure obligations on those parties. Save in the circumstances specifically addressed by the Rules, non-parties are immune from the potentially intrusive, costly and time-consuming process of discovery and production. By its terms, rule 30.10 assumes that requiring a party to go to trial

> without the forced production of relevant documents in the hands of non-parties is not per se unfair.
>
> The discovery process must also be kept within reasonable bounds. Lengthy, some might say interminable, discoveries are far from rare in the present litigation environment. We are told that discovery of these defendants has already occupied some 18 days and is not yet complete. Unless production from and discovery of non-parties is subject to firm controls and recognized as the exception rather than the rule, the discovery process, like Topsy, will just grow and grow. The effective and efficient resolution of civil lawsuits is not served if the discovery process takes on dimensions more akin to a public inquiry than a specific lawsuit.

[20] The comments made above respecting the case management system and the policy underlying the discovery regime established by the rules are equally applicable to this jurisdiction. The concerns about an ever-expanding discovery process are also pertinent in the context of this litigation in particular. But, in my opinion, the significance of this judgment is that it recognizes that there must be a consideration of all relevant factors. This is so even where, as in Rule 231, there is no equivalent to the "fairness" subrule as found in the Ontario rule.

[21] The appeal court, in *Ballard Estate*, went on to identify some of the factors that should be considered on this type of application (at para. 15):

> -the importance of the documents in the litigation;
>
> -whether production at the discovery stage of the process as opposed to production at trial is necessary to avoid unfairness to the appellant;
>
> -whether the discovery of the defendants with respect to the issues to which the documents are relevant is adequate and if not, whether responsibility for that inadequacy rests with the defendants;
>
> -the position of the non-parties with respect to production;
>
> -the availability of the documents or their informational equivalent from some other source which is accessible to the moving parties;
>
> -the relationship of the non-parties from whom production is sought, to the litigation and the parties to the litigation. Non-parties who have an interest in the subject-matter of the litigation and whose interests are allied with the party opposing production

> should be more susceptible to a production order than a true "stranger" to the litigation.

[22] The reasoning in *Ballard Estate* was followed in *Morse Shoe (Canada) Ltd. v. Zellers Inc.* (1997), 10 C.P.C. (4th) 390 (Ont. C.A.), where Austin J.A., on behalf of the court, wrote that an order for production from a non-party "should not be made as a matter of course; such an order should be made only in exceptional cases" (at para. 19).

[23] In my opinion, it is not enough for an applicant on a Rule 231 motion to simply establish that the document sought is or may be relevant. I therefore disagree with the proposition advanced by the applicants' counsel that, once probable relevance is shown, it is up to the respondent to provide cogent reasons as to why production should not be ordered. That would, in my view, turn production from non-parties into the rule, as opposed to the exception. I am of the opinion that it is also up to an applicant to show, based on a consideration of all relevant factors, that the interests of justice in the particular case require that discretion be exercised in favour of production.

[24] I noted at the beginning of these reasons that only one previous case has been identified where a request for non-party production was directed to a media outlet. That was the decision of an Ontario Supreme Court motions judge in *Hockenhull v. Laskin* (1987), 59 O.R. (2d) 157. In that case the plaintiff sought production of a recording of a television broadcast. It was in the context of a defamation action where the tape showed the uttering of the allegedly defamatory comments. The motions judge noted that (a) there was nothing in the rule (Rule 30.10(1) as noted above) that permitted the respondent to withhold production as a matter of public policy; (b) if there is no privilege to the document sought, the respondent must assess whether it is relevant to a material issue and whether it would be unfair to require the applicant to proceed to trial without it; and (c) if these two criteria are met, the document should be produced. The motions judge held that lack of relevance and lack of unfairness are the only grounds upon which an application for production may be resisted. He went on to say (at 160): "Novel though it may be to resist the application on the grounds of freedom of the press and public policy related thereto I am convinced that a careful consideration of the rule and its purpose would have suggested that such a defence to the process was doomed to fail."

[25] With respect, I doubt very much if the *Hockenhull* case would be decided the same way if the application was heard today. It is a decision that came early in the history of Ontario Rule 30.10 (which was enacted in 1984) and before the guidance of the Ontario Court of Appeal was available. More significantly, it predates the several judgments from the Supreme Court of Canada (which will be addressed later in these reasons) that address the nature and applicability of freedom of the press principles to court processes. It is also distinguishable because the tape in that case depicted the actual cause of action. For these reasons I find it to be of no assistance to the issues I must address.

Effect of the Charter:

[26] One of the pivotal arguments advanced on this application has been the effect of the Charter of Rights and Freedoms guarantee of freedom of the press on the consideration of this case. Both sides agree that it cannot be ignored; they disagree on what emphasis should be put on it. This issue really has two components: first, does the Charter apply at all to this application made in the course of what is after all private litigation; and, second, if it does, what weight should be placed on the values encompassed by the Charter guarantee of freedom of the press?

[27] There can be no dispute that freedom of the press, both before and since the enactment of the Charter, has been recognized as "a paramount value" in Canadian society: per Lamer C.J.C. in *Re Dagenais et al and Canadian Broadcasting Corp. et al*, [1994] 3 S.C.R. 835 (at 876). But the protection now enshrined in s.2(b) of the Charter is meant to protect that freedom from government action. This is private litigation and there is no state action alleged in this application. Thus, the Charter should have no application to the dispute on this motion: per McIntyre J. in *R.W.D.S.U. Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573. But the answer is not that simple.

[28] Numerous cases from the Supreme Court since *Dolphin Delivery* have held that bodies exercising statutory authority are bound by the Charter even though they may be independent of government authority: see, for example, *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624 (at para. 21). In several cases, the Supreme Court has also confirmed that the exercise of a discretion by a court, whether at common law or a legislative conferral of discretion, is subject to the Charter in the sense that it must be exercised within the boundaries set by the principles of the Charter: *Slaight Communications Inc. v. Davidson,* [1989] 1 S.C.R. 1038 (at 1078); *Re Dagenais* (at

875); *Canadian Broadcasting Corp. v. New Brunswick (Re Carson)*, [1996] 3 S.C.R. 480 (at paras. 50-53). Many of these cases are ones decided in a criminal law context. It seems to me, however, that there are some significant parallels between the application of Charter principles to the exercise of a discretionary power in a civil context and a criminal one.

[29] The Rules of Court are authorized by s.60 of the *Judicature Act*, R.S.N.W.T. 1988, c.J-1 (as amended). They are statutory instruments. As such they are not beyond the purview of the Charter. In *Crothers v. Simpsons Sears Ltd.*, [1988] 4 W.W.R. 673 (Alta. C.A.), a plaintiff in a civil case brought a constitutional challenge to the security for costs rule in the Alberta Rules of Court (similar to our Rule 633) on the basis that it violated the plaintiff's mobility (s.6 of the Charter) and equality (s.15 of the Charter) rights. The court upheld the validity of the rule and found no violation. A similar result was reached in *Lapierre v. Barrette* (1988), 59 D.L.R. (4th) 200 (Que. C.A.). In both cases, the courts accepted without the need for discussion that the Charter applied to rules of court even though those rules were invoked in the context of private litigation.

[30] On this motion I am not asked to decide the constitutional validity of Rule 231. I am asked, however, to exercise a legislated discretionary power (albeit one found in a subsidiary enactment) to order a non-party to make production. Without the rule, and the power to enforce it through contempt proceedings, there is no compulsion on the non-party to produce. That non-party is a media source which enjoys a constitutional guarantee of freedom from government interference in its news gathering and dissemination activities. Legislation that intrudes on those activities is "state" action (even if this court is not an arm of government). The Charter does not apply to a relationship between private litigants (such as the parties to this application) but it does apply to how I will exercise a discretion conferred on me by a statutory enactment.

[31] So perhaps the answer is this. The Charter does not apply to the resolution of private disputes, but, the courts cannot ignore the values underlying the Charter in any decision they are called upon to make. This is a very short paraphrase of something said by L'Heureux-Dubé J. in *D.P. v. C.S.*, [1993] 4 S.C.R. 141. This was explained further in *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, where Cory J., on behalf of the majority, emphasized the distinction between Charter rights and Charter values (at para. 95). Private litigants owe each other no constitutional duties. Therefore, a cause of action cannot be founded on a Charter right because Charter

rights do not exist in the absence of state action. The most a private litigant can do is argue that the law to be applied to the case is inconsistent with Charter values. It thus involves a conflict between principles that must somehow be balanced. This balancing exercise must be more flexible than the traditional s.1 Charter analysis and one must be careful in applying principles emanating from citizen vs. government actions to purely private litigation. But, the exercise must still involve the application of Charter values. This does not transform this civil motion into a constitutional case. It simply adds a constitutional dimension to this particular application.

[32] The *Hill* case involved a Charter challenge to the common law of defamation. But the approach it outlines is equally applicable to a situation such as this where a legislated power, it is said, should be exercised in conformity with Charter values.

Factors to be Taken Into Account:

[33] The balancing exercise I referred to is at the core of Charter jurisprudence. It is fundamental to the s.1 justification test. It is also the basis on which conflicting Charter rights are sought to be reconciled and mutually respected: see *Dagenais (supra)*, at 877. It is also the basis on which the competing interests at stake on this application are to be assessed. Those competing interests may be characterized in different ways: the applicants' desire to access all potentially relevant evidence and the respondent's wish to safeguard its independence; or, the public interest in the correct disposal of litigation and the public interest in preserving a free and unhindered press.

[34] The balancing exercise must also be done in the context of the particular case. Case law has shown that even a fundamental freedom such as freedom of the press cannot be viewed as an absolute or abstract principle. It must be viewed within a contextual analysis: *Edmonton Journal v. Alberta*, [1989] 2 S.C.R. 1326.

[35] Most of the cases presented to me on this application fall into three categories: those where the police seek to execute a search warrant on media premises so as to aid their investigation of a crime; those where a journalist is compelled to testify pursuant to a subpoena; and those where the media outlet itself is a party, usually the defendant in a defamation case (which is not the situation here). As such they are of limited

practical assistance (although very important for the principles some of them articulate).

[36] Two of the more pertinent cases are the companion decisions of the Supreme Court of Canada in *Attorney-General of Quebec v. Canadian Broadcasting Corp. (C.B.C. v. Lessard)* (1991), 67 C.C.C. (3d) 517, and *Canadian Broadcasting Corp. v. New Brunswick* (1991), 85 D.L.R. (4th) 57. Both cases dealt with the position of the media vis-à-vis criminal search warrants. In both cases the police attempted to seize film that had been taken by the CBC at public demonstrations at which crimes had been committed. In both cases the warrants were upheld.

[37] In the *Lessard* case, L'Heureux-Dubé J., speaking for herself but concurring in the result, stated (at 527):

> Important as the constitutional protection of the freedom of the press is, it does not go as far as guaranteeing the press special privileges which ordinary citizens, also innocent third parties, would not enjoy in a search for evidence of a crime. The law does not make such a distinction and the Charter does not warrant it. In fact, the press itself does not generally request special privileges.

[38] Cory J., on behalf of the majority, however, recognized that a search warrant sought for media premises must be given special consideration (at 533). Care must be taken to ensure that any disruption to the gathering and dissemination of news be limited as much as possible. He said: "The media are entitled to this special consideration because of the importance of its role in a democratic society." In the end, a critical factor in the majority's decision to uphold the warrant was the fact that portions of the film had already been broadcast. The media, it was said, had already completed their basic function of news gathering and dissemination so there was no interference with the operation of the media (at 535).

[39] In the *New Brunswick* case, Cory J., again writing on behalf of the majority, stated that the constitutional protection afforded by s.2(b) of the Charter provides a "backdrop" against which the reasonableness of a warrant will be evaluated. Again he placed considerable emphasis on whether the media have completed their news gathering function and actually published or broadcast the results (at 70):

> The factors to be weighed with regard to issuing a warrant to search any premises will vary with the circumstances presented. This is as true of searches of media offices as of other premises. It seems to me, however, that where the media have fulfilled their role by gathering the news and publishing it, there would seem to be less to be said for refusing to make that material available to the police. At that point, the media have given to the public, by way of picture or print, evidence of the commission of a crime.

> The media, like any good citizen, should not be unduly opposed to disclosing to the police the evidence they have gathered with regard to that crime.

Cory J. went on to summarise the factors to be considered on an application for a warrant or for a court reviewing a warrant issued in respect of media premises (at 73-74). The relevant ones are:

> (1) It is essential that all the requirements set out in s.487(1)(b) of the Criminal Code for the issuance of a search warrant be met.
>
> (2) Once the statutory conditions have been met, the justice of the peace should consider all of the circumstances in determining whether to exercise his or her discretion to issue a warrant.
>
> (3) The justice of the peace should ensure that a balance is struck between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news gathering and news dissemination. It must be borne in mind that the media play a vital role in the functioning of a democratic society. Generally speaking, the news media will not be implicated in the crime under investigation. They are truly an innocent third party. This is a particularly important factor to be considered in attempting to strike an appropriate balance, including the consideration of imposing conditions on that warrant.
>
> (4) The affidavit in support of the application must contain sufficient detail to enable the justice of the peace to properly exercise his or her discretion as to the issuance of a search warrant.
>
> (5) Although it is not a constitutional requirement, the affidavit material should ordinarily disclose whether there are alternative sources from which the information may reasonably be obtained and, if there is an alternative source, that it has been investigated and all reasonable efforts to obtain the information have been exhausted.
>
> (6) If the information sought has been disseminated by the media in whole or in part, this will be a factor which will favour the issuing of the search warrant.
>
> (7) If a justice of the peace determines that a warrant should be issued for the search of media premises, consideration should then be given to the imposition of some conditions on its implementations so that the media organization will not be unduly impeded in the publishing or dissemination of the news...

[40] Several of these factors are particularly apt to this application even though it is not in the context of a criminal search warrant. For example, just as in factor (1) above, the requirements of Rule 231 must be met. All of the circumstances, in particular the vital role played by the press in a democratic society, must be taken into account. There must be an adequate evidentiary base presented to establish why production from a non-party should be ordered, including the availability of the same or similar evidence from alternative sources. Has the material sought already been published or broadcast in whole or in part? These are all pertinent considerations on this motion.

[41] Another helpful case, although again from a criminal law context, is *R. v. Hughes (Ruling No. 3)*, [1998] B.C.J. No. 1694 (S.C.). There the accused, charged with several sexual assaults, issued a subpoena to a reporter to testify at his criminal trial and sought an order compelling the reporter to turn over his notes of interviews conducted with some of the complainants. Several complainants had gone directly to the reporter after being encouraged to come forward by the reporter's newspaper. They had been interviewed by the reporter before they reported their allegations to the police. The defence argued that in order to make full answer and defence he required the reporter's notes and the reporter should be called to testify. Credibility was the main issue and it was alleged that the complainants had made inconsistent statements.

[42] Romilly J. upheld the subpoena and also ordered the notes produced. In doing so he outlined what he called a non-exhaustive list of factors to consider (at para. 66). Many of those factors are apposite to this motion. Romilly J. listed the relevance, materiality, necessity and probative value of the evidence. These are all components of the "importance" of the evidence. He also noted such factors as whether the evidence is available through other means and whether the media's ability to gather and report the news will be impaired by the reporter being called to give evidence. Finally, he posed the question, the same as posed on this application, of whether the importance of the evidence outweighs the impairment, if any, of the role of the media.

[43] These cases, of course, do not address the balancing of factors in a civil context. There is, however, some helpful jurisprudence from England. There, even though there is no explicit constitutional guarantee of freedom of the press, there is a recognition of the special position of the press. In *Senior v. Holdsworth*, [1975] 2 W.L.R. 987, the Court of Appeal dealt with the issuance of a summons directing a television network to produce film it had taken of the police break-up of a disorderly

music festival. The plaintiff had sued the police alleging that he had been assaulted. He wanted the film in anticipation that it may show the assault. The Court of appeal set aside the summons on the basis that it was speculative and oppressive. In so holding, Lord Denning M.R. said that the courts have the power to order the production of the film "when the course of justice so requires" and "only when it is likely that the film will have a direct and important place in the determination of the issues before the court" (at 994). He noted the balance that must be struck when the press is the subject of a production request (at 993):

> Next there is the special position of the journalist or reporter who gather news of public concern. The courts respect his work and will not hamper it more than is necessary. They will seek to achieve a balance between these two matters. On the one hand there is the public interest which demands that the course of justice should not be impeded by the withholding of evidence: see *Reg. v. Lewes Justices, Ex parte Secretary of State for Home Department* [1973] A.C. 388, 401 by Lord Reid. On the other hand, there is the public interest in seeing that confidences are respected and that newsmen are not hampered by fear of being compelled to disclose all the information which comes their way: see *Democratic National Committee v. McCord* (1973) 356 Fed. Supp. 1394, in the United States. As we said in this court as to oral testimony of a newsman:
>
> > "The judge ... will not direct [him] to answer unless not only it is relevant but also it is a proper and, indeed, necessary question in the course of justice to be put and answered": see *Attorney-General v. Mulholland* [1963] 2 Q.B. 477, 489.
>
> So also with production of a film.

[44] Many of these cases emphasize the news gathering and dissemination functions of the press without actually analyzing the different aspects to those functions. The majorities in both the *Lessard* and *New Brunswick* cases placed great weight on the fact that some of the film sought had been broadcast. They did not differentiate between broadcast and unbroadcast material. Here, of course, the applicants already have the broadcast material (they taped it off the broadcasts); what they seek are any edited portions (the unbroadcast material) of the two incidents in question.

[45] In her dissenting judgment in the *Lessard* case, McLachlin J. (as she then was) commented on the purpose of s.2(b) of the Charter and stated: "... it may be ventured that an effective and free press is dependent on its ability to gather, analyze and disseminate information, independent from any state-imposed restrictions on content,

form or perspective except those justified under s.1 of the Charter" (at 539). The references to "content, form or perspective" can be taken as including the editing process employed by television and other news agencies. The CBC's regional director acknowledged in this case that editing is meant to give context and decisions are made in the editing process so as to objectively reflect the situation being reported. Applicants' counsel argued that it was important to obtain all unedited portions so as to have the whole context of the tapes available for examination.

[46] The question of the media's right to control content was the subject of a pre-Charter case, *Gay Alliance Toward Equality v. Vancouver Sun*, [1979] 2 S.C.R. 435. In that case the issue was whether a newspaper's refusal to accept an advertisement was subject to review under provincial human rights legislation. Martland J., for the majority, held that it was not and relied on the principle of freedom of the press. He wrote (at 455):

> The law has recognized the freedom of the press to propagate its view and ideas on any issue and to select the material which it publishes. As a corollary to that a newspaper also has the right to refuse to publish material which runs contrary to the views which it expresses.

Martland J. also quoted with approval from the reasons of Chief Justice Burger, of the United States Supreme Court, in *Miami Herald v. Tornillo*, 418 U.S. 241 (1974):

> A newspaper is more than a passive receptacle or conduit of news, comment and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials O whether fair or unfair O constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulations of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved at this time.

The *Gay Alliance* case may be somewhat dated in its treatment of the scope of human rights legislation. But its ruling as to the importance of the media's freedom to control content has not been diminished.

[47] What I draw from this therefore is that the editorial choices made by the CBC in this case must be accorded some recognition in the balancing exercise. The mere fact that some material has been broadcast does not necessarily mean that all the material thereby becomes producible.

[48] This review of the case law reveals three broad propositions: first, the media occupies a special position before the courts; second, the exercise of a discretion, whether it is based on a common law or statutory power, must be exercised in accordance with Charter values; and, third, there must be a balancing of interests done within a contextual framework.

[49] Counsel for the applicants argued that this court should not create a special subcategory for Rule 231 depending on the status of the non-party who is asked to make production. But that is exactly what the Supreme Court did in the *Lessard* and *New Brunswick* cases by imposing a gloss on the statutory search warrant provisions when a media outlet is the target of the warrant. It is exactly what is done by the courts on a regular basis, for example, when considering whether evidence from some source (such as a doctor or a priest) should be subject to Wigmore's case-by-case privilege protection. The fact that the respondent here is a media outlet must be given special consideration.

[50] If I examine the factors noted in the *Ballard Estate* case, dealing generally with applications for non-party production, and the factors outlined in the criminal cases of *Lessard*, *New Brunswick* and *Hughes*, there are many common features which are applicable on this type of motion:

1. Have the criteria in Rule 231(1) been met? In other words, is there reason to believe that the documents are *relevant* to a *material* issue? "Relevant" as used here means "probably relevant" while "material" simply requires that the issue be a significant one in the case.

2. Have the materials sought been adequately identified?

3. What is the probative value of the information sought? In other words, what is the degree of relevance and importance of the information to the case?

4. Is production necessary at the pre-trial stage? Or, would it be less speculative and intrusive to defer the issue to the trial judge who can assess the necessity of the evidence in the context of all the evidence?

5. Is information of the same or similar evidentiary value available from other sources? Have reasonable efforts been made to obtain it?

6. Will discovery of the defendants with respect to the issues to which the documents may be relevant be adequate?

7. Have the applicants put forth a sufficient evidentiary basis so as to draw conclusions with respect to items 1 through 6? If not, the application can be dismissed simply on that basis.

8. Has the information sought been disseminated in whole or in part?

9. Have the media completed their news-gathering function? In other words, is this "old news" or an ongoing matter? If ongoing, will the media's ability to gather and report news be impaired?

10. What is the relationship of the non-party to the litigation or the parties? Is the respondent here a true "stranger" to the litigation?

11. As a corollary to number 10, what role did the respondent play in the creation of the information sought? Was it merely reporting news or was it developing news?

[51] All of these factors must be considered against the backdrop (as it was put in the *New Brunswick* case) of the constitutional protection afforded to the press in its news gathering and dissemination functions. This is not a case where two apparently conflicting Charter rights (such as freedom of the press and an accused criminal's right to a fair trial) must be reconciled; but there are significant interests nevertheless to be balanced. A private litigant's interest in accessing all available evidence for a civil suit is not on the same constitutional level as the state's interests in law enforcement or an accused's fair trial interests, but that does not mean there is no constitutional significance to the private litigant's interest in correctly resolving the litigation. The values of a free and democratic society, values which are given expression in part in the Charter, also include within the rule of law an orderly and fair system of justice for the resolution of private disputes among its citizens. So it is not simply a matter of a constitutionally recognized right, freedom of the press, trumping the private litigant's desire to access potential evidence. There is still a balancing process to be carried out.

<u>Application of the Factors to this Case:</u>

[52] In this case, in my opinion, the criteria stipulated in Rule 231(1) have been met. There is reason to believe, based on my viewing of the edited material that was broadcast, that the unbroadcast material is probably relevant to material issues in this case. Those issues are the attitude of Warren and other defendants toward replacement workers at the mine, the uttering of actual threats towards replacement workers generally by Warren and others, and Warren's credibility. This is not a broadsweeping demand but one focussed on specific items.

[53] The probative value of this evidence is speculative. There is enough material on the tapes that were broadcast to qualify as probative of the issues I identified above. Whether the unbroadcast material would add anything of value is speculative. The importance of the information sought may or may not be just as important as that already in the possession of the applicants but, to the extent that it is, it may merely replicate the information already known.

[54] There is no evidence before me as to why production is necessary at this stage. The applicants have already conducted, or soon will conduct, examinations for discovery of all the defendants, including those shown on the tapes of the June 7 picket line incident. They can be questioned about the entire incident on that date (whether it is shown on the tape or not).

[55] With respect to Warren specifically, there is undoubtedly a significant amount of evidence going to his credibility or lack thereof. There are, among other things, his confessions, which were admitted at his criminal trial, and his recantations on the stand in that trial. Further evidence of his denials or *ex post facto* explanations may be superfluous. In any event, while it can be said that credibility is always an issue in a trial, it will hardly be the central issue as far as the civil case against Warren and the other defendants is concerned.

[56] In this case the material has been partially disseminated. While that may be, as noted in the various search warrant cases, a significant factor justifying the order sought, it should be remembered that the warrants in those cases were directed at seizing both the broadcast and unbroadcast portions. It is evident that the police, in those cases, did not have the film that had been broadcast, or if they did they wanted all the film so as to identify as many of the perpetrators shown on the film as possible. Here the applicants have the broadcast film. I have not been provided with an adequate explanation as to what more the unbroadcast film could provide other than "context" or "more of the same".

[57] I am also not satisfied as to the need for this evidence in relation to the other evidence in this case. Among the material filed on this application is a list of 103 other videotapes already produced in this case. Most of them are identified as originating either from the R.C.M.P. (a Third Party in this action) or Royal Oak Mines (a defendant). It was not made known whether those entities are sources in the sense of "creators" of the tapes or whether they are simply the parties who produced them on discovery. In any event, there is no information provided as to what is contained on those tapes (and I note that at least three of them are dated June 7, 1992). There is also a list of 23 other items identifying material broadcast by the respondent at various times. Again, it seems to me, without further information, that the requested material may be surplus to what is already possessed by the applicants.

[58] In terms of the respondent's relationship to this litigation, clearly it is a "stranger" to the proceedings. I was, nevertheless, somewhat concerned about its role vis-à-vis the interview of Warren. There can be no doubt that in respect of the June 7 picket line incident the respondent was engaged in its role of gathering the news. With respect to the interview, however, it seems to me that it was engaged in a bigger role. It was not only gathering news but also developing it. The respondent sought out Warren for an interview; it's personnel travelled to the penitentiary where Warren is serving his sentence to conduct the interview. I had considered, having regard to this broader role as well as Warren's evident acquiescance to the applicants' request for access to the whole interview, that this aspect of the request should be granted. On reflection, however, I am unable to draw a distinction between the news gathering and editorial function performed in one context and that in another. That is not to say that such a distinction could never be drawn where it can be said that the media was instrumental in "creating" the news that it gathers and disseminates. In any event, Warren is a party and anything he may have said in response to questions from a reporter he can say in response to questions on discovery.

[59] I am also not convinced that the news-gathering function in relation to these events has been concluded. The strike, the explosion and Warren's criminal conviction may be "old news", but the circumstances surrounding these fatalities and the progress of this litigation are very much current and ongoing matters of interest. By subjecting the press to production now they may very well be reticent to actively pursue these news stories. I do not mean to say that I am particularly concerned about what has been termed the "chilling effect" of disclosure orders on the press. I am merely saying that the press may be disinclined to actively follow and report on private

litigation that may be of broader interest if they were readily subject to non-party production orders.

[60] What it comes down to in the end is whether this is one of those exceptional cases where a non-party should be ordered to make production. When I consider the special position of the press, I am of the opinion that the importance of the information sought must be much more evident than it is in this case. It is precisely because I have been case managing this action for the past five years that I cannot see any significant reason why the interests of the applicants, at this stage of the proceedings, should intrude on the interests of the respondent as a non-party and as a part of the press. And I am of the opinion that there should be a significant reason because a non-party production order, in these circumstances, would necessarily intrude on the freedom of the press. Further, I believe it is necessary to place some limits on the extensive discovery process in this case. For that reason as well there should be a significant reason demonstrated as to why the information sought is necessary. No such significant reason, with respect to either point, has been provided. There have been many good reasons put forward on behalf of the applicants but not so as to warrant my exercise of discretion in their favour.

[61] For these reasons, the motion is denied. The motion may, of course, be renewed before the trial judge should it appear that it may be important in the trial context. But that is for the trial judge to consider. Counsel may make arrangements to speak to the matter of costs if they cannot agree.

J.Z. Vertes
J.S.C.

Dated at Yellowknife, NT
this 19th day of January, 2001.

Counsel for the Applicants (Plaintiffs): J.B. Champion
Counsel for the Respondent (C.B.C.): D.C.I. Lucky