

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Huth*,  
2013 BCSC 2123

Date: 20131122  
Docket: 155800  
Registry: Victoria

**Regina**

v.

**Brandon Carl Huth**

Before: The Honourable Mr. Justice Macaulay

## **Reasons Re Media Access to Videotapes**

|                                      |                                     |
|--------------------------------------|-------------------------------------|
| Counsel for the Crown:               | T. P. Stokes                        |
| Counsel for the Defence:             | J.M.P. Firestone                    |
| Agent for CTV Vancouver Island News: | S. Weston                           |
| Place and Date of Application:       | Victoria, B.C.<br>November 18, 2013 |
| Place and Date of Reasons:           | Victoria, B.C.<br>November 22, 2013 |

[1] Immediately after the conviction of Brandon Huth for manslaughter, CTV Vancouver Island News (“CTV”) applied for the release of copies of certain videotapes entered as exhibits at trial for the purpose of immediate broadcast. The exhibits are forensic copies of footage originally obtained from private surveillance cameras located inside and outside a McDonald’s restaurant in Victoria. CTV offered to electronically blur the facial features of all persons visible in the frames, excepting the accused and the deceased, before broadcasting any of the images.

[2] Notwithstanding the objections of the defence and the concerns of the deceased’s family that the Crown related to me, I ordered the release of the copies. These are my reasons for doing so.

[3] The outcome of the CTV application for access to the video exhibits is subject to the principles that the Supreme Court of Canada enunciated in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, *R. v. Mentuck*, [2001] 3 S.C.R. 442 and *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188. These principles were recently applied in *Global BC, A Division of Canwest Media Inc. v. British Columbia*, 2010 BCCA 169 at para. 65 (*R. v. Fry*, [2010] B.C.J. No. 590), in an application very similar to the present one.

[4] In summary, CTV is presumptively entitled to access as sought unless an order limiting access (the “ban”) is necessary to prevent a serious risk to the administration of justice, “reasonably alternative measures will not prevent the risk”, and the salutary, or beneficial, effects of the ban outweigh the deleterious effects on the “rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice” (*Mentuck* at para. 32).

[5] The video footage in the exhibits extends over a total period of almost eight minutes. Apart from Huth and the deceased, other persons, including witnesses, are identifiable as well. Some of the latter include strangers who were customers in the restaurant or were walking by at the material time.

[6] The deceased's family objected to the release of some of the footage outside the restaurant that precedes the eventual confrontation between Huth and the deceased. Some of that footage may be seen as reflecting poorly on the behaviour of the deceased. It also permits identification of a number of friends who were with the deceased that night.

[7] Granting access to CTV so that it can use the images in its broadcast does not, in my view, present a serious risk to the administration of justice. The trial is over and reference to the images may make the media commentary on either the trial or my judgment more understandable for the public. In that way, the broadcast of images may enhance perceptions that the trial was fair. CTV's offer to blur the facial features of all persons apart from Huth and the deceased fairly takes into account their privacy interests.

[8] Counsel for Huth also opposed the application but primarily raised procedural issues. These included:

- (a) The disruption to the trial process associated with the initial delivery of the CTV application for access during the trial and the scheduling of the hearing of the application after final submissions, which was eventually adjourned generally, then reset by CTV with minimal notice at final judgment;
- (b) The lack of notice to stakeholders that may have a legitimate privacy interest to take into account, such as McDonald's restaurant; and finally
- (c) The lack of any *Criminal Rules* to address these procedural issues.

Section 482 of the *Criminal Code* permits this court to pass rules governing media applications of this type, although that has not happened.

[9] As I discuss below, judges have developed and ordered protocols governing media access in cases that are expected to generate significant ongoing media

interest. These protocols can be adapted for use in any case and reflect the current state of the law. Hopefully, these reasons will provide the media and counsel with some guidance for future cases.

[10] The issues that counsel identified potentially arise in all criminal trials but, undoubtedly, arise most frequently in long complex trials. Nonetheless, an understandable tension may arise in any trial as a result of counsel's wish to remain focused on substantive trial issues and not be distracted by media access issues. The media, on the other hand, receives no formal notice of the exhibits to be presented and, in order to meet its obligations to the public and news deadlines, may not have the time or opportunity to give advance notice seeking access.

[11] The tension would not be relieved, in my view, by requiring the media to file written applications for access, with adequate notice to third parties whose privacy interests may be affected. The cases referenced above do not require notice to third parties and it would add unnecessarily to the complexity and time required to address the issues that may arise.

[12] For the most part, the privacy interests of third parties are adequately protected if counsel, before tendering an exhibit, determines whether there is any objection to the media having access and, if so, the basis for that objection. In an unusual case, the trial judge may make such other directions as may be necessary to ensure that the interests of any third parties are taken into account. Here, CTV has already agreed to take the privacy interests of persons other than Huth and the deceased into account.

[13] McDonald's privacy interest appears slight. The cameras are apparently in plain view and the content of the footage focuses on areas to which the public has access. The Crown attempted to obtain a response to the application from McDonald's but was unsuccessful. I would not require service of a formal application on McDonald's in the circumstances.

[14] The protocol, to which I have already referred and an example of which is attached as Schedule "A", is not necessary in all cases. In any case where counsel anticipates media interest in the trial, however, he or she should invite the trial judge, at a pre-trial stage if possible, to give directions for a protocol governing media access. In this way, the protocol maintains the burden on counsel to anticipate the likely flow of the trial and helps to minimize unanticipated interruptions.

[15] I deliberately refer to the attached protocol as an example. It includes the following: Exhibit Access Protocol, Objection to Media Access to Exhibits and Exhibit List -- Media Access Designation. All may require some variation to suit the circumstances of the particular case.

[16] In essence, if the judge approves a protocol in the form attached, it will allow unrestricted access -- that is the right to view, copy and publish -- to the media unless any party seeks a restriction. For that reason, any party presenting an exhibit is, for the most part, required to submit an additional copy for potential media access. Rather than placing an onus on the media to formally apply for access, the media will have unrestricted access to the copy that counsel provides unless there is an objection, in which case the trial judge will make a provisional designation setting out the proposed terms of any permissible access. Unless it is further challenged, the provisional designation will be dispositive.

[17] To object under the protocol, any counsel may, when the item is first tendered as an exhibit, file a summary form of objection to access. In this way, for example, the privacy interests of third parties can be brought to the trial judge's attention.

[18] The objection covers a range of alternative outcomes from no access to conditional access. The latter, for example, may include "view only" or "copy only but not to be published" access. Of course, the media's use of exhibits is always subject to any existing publication ban. Upon reviewing any objections, the trial judge will then provisionally designate an outcome.

[19] The provisional designation occurs in court and, as a result, is immediately known to counsel and the media. The media or counsel may apply for a full hearing to set aside the provisional designation. In that event, the trial judge will hear submissions and decide whether to confirm or vary the designation, subject to any directions that he or she may make respecting the conduct of the hearing.

[20] The protocol, or one similar to it, should remove the necessity for unnecessary media applications while also providing a reasonably efficient means of resolving most issues respecting media access to, and the permitted use of, copies of exhibits.

“M. D. Macaulay, J.”  
The Honourable Mr. Justice Macaulay

## Schedule "A"

### EXHIBIT ACCESS PROTOCOL

It is my present intention to follow the media exhibit access protocol that was recently used in both the *Sipes* and *The Queen of the North* trials. That protocol appears to have worked well in facilitating media access to exhibits, providing an opportunity for the parties to object to media access to individual exhibits in an efficient and timely way, and minimizing the burden on the court clerk and Registry staff.

#### ***The Process***

The party tendering an exhibit will bring an extra copy for the media. Once the exhibit is entered, the party will place a media copy of the exhibit in the Media Room.

The Media Room is a secure set of offices available to the media located at the end of the 4<sup>th</sup> floor past Courtroom 46. To gain access to the Media Room, counsel will need a code for the door which can be obtained from the court clerk. An office within the Media Room will be set aside for exhibits in the *Haevischer et al.* trial.

The Crown will maintain a media exhibit access designation list with the corresponding media access designation. (In the event the accused call a case, this responsibility will fall to the accused.) I have attached a template for the list based on the one used in *The Queen of the North* trial. It will be the responsibility of the Crown to provide a current copy of the media exhibit access designation list to the court clerk at the end of each sitting day.

Where it is not possible to make a copy of an exhibit -- for instance, physical objects or large maps or charts -- members of the media will have to make specific arrangements with the registry and the Court to view the exhibits.

Unless objection is made, the media will have full access to exhibits. Where a party does object to the media having full access to an exhibit, it must make that objection known by filing an objection form (attached) with the court clerk at the time the exhibit is entered. The Court will make an initial assessment as to whether the objection should be maintained and assign a provisional designation to the exhibit. The possible designations are:

- **Copy only** - the exhibit may not be published;
- **View only** - the exhibit may not be copied or published;
- **No access** - the exhibit may not be viewed, copied or published; or
- **Other** - see the Registry for special conditions.

If further submissions regarding access are necessary, they will be scheduled for a convenient time.

**Schedule "A"**

Exhibits with conditional access designations will not be placed in the Media Room. They will be provided to the Court and will be available for viewing through the exhibit desk in the Registry during designated hours each day.

Copies of the completed objection forms will be filed as exhibits for identification in the trial and will be available for viewing from the exhibits desk in the Registry.



Schedule "A"

R. v.

OBJECTION TO MEDIA ACCESS TO EXHIBITS

Date: \_\_\_\_\_

Exhibit Number: \_\_\_\_\_

Brief Description of Exhibit: \_\_\_\_\_

\_\_\_\_\_

Counsel Name (Crown  or Defence 

Counsel's designation of Exhibit Access:

- COPY ONLY** - exhibit may not be published
- VIEW ONLY** - exhibit may not be copied and may not be published
- NO ACCESS** - media may not view, copy or publish the exhibit
- OTHER** - the following conditions apply to access to this exhibit: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

Reason for Designation: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Signature: \_\_\_\_\_



Provisional Designation by Court: \_\_\_\_\_

Date: \_\_\_\_\_ Signature: \_\_\_\_\_

