CITATION: R. v. Schertzer, 2012 ONSC 227
COURT FILE NO.: CR487/06
CR837/10
DATE: 20120109

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	*Milan Rupic*, *Susan Reid*, *John Pearson* and *J. Barrett*, for the Crown
Applicant	)	
– and –	)	*John Rosen*, *Paul Alexander* and *Emily Beaton*, for the Respondent, John Schertzer
	)	
JOHN SCHERTZER, STEVEN CORREIA, JOSEPH MICHED, NEBOJSA MAODUS and RAYMOND POLLARD	)	*Harry G. Black Q.C.* and *Joanne Mulcahy*, for the Respondent, Steven Correia
	)	
	)	*Peter M. Brauti*, for the Respondent, Joseph Miched
Respondents	)	
	)	
	)	*Patrick Ducharme*, for the Respondent, Nebojsa Maodus
	)	
	)	*Earl J. Levy Q.C.*, for the Respondent, Raymond Pollard
	)	
	)	*Iris Fischer*, for the Toronto Star
	)	
	)	*Daniel Henry* for the CBC
	)	
	)	**HEARD:** May 2, 2011

REASONS FOR DECISION

PARDU J.

[1] The Toronto Star newspaper and the CBC apply for various relief related to their intended coverage of this trial.

[2] They propose that journalists be permitted to transmit information from Blackberries, laptop computers and similar devices from inside the courtroom, and to use those devices to record any portions of the proceedings in which they are interested. Defence counsel object.

[3] Section 136 of the *Courts of Justice Act* prohibits the making of audio recordings at a court hearing but provides that this prohibition does not extend to 2(b):

> b) "a lawyer, a party acting in person or a journalist from unobtrusively making an audio recording at a court hearing, in the manner that has been approved by the judge, for the sole purpose of supplementing or replacing handwritten notes."

[4] Section 136(1)(b) prohibits the broadcast or reproduction of such recordings made to supplement or replace handwritten notes.

[5] A practice direction still in force provides,

> Recording of Court Proceedings by a Solicitor a Party Acting in Person or a Journalist
>
> Subject to any order made by the presiding judge as to non-publication of court proceedings, and to the right of the presiding judge to give such directions from time to time as he or she may see fit as to the manner in which an audio recording may be made at a court hearing pursuant to s. 146 [now s. 136] of the *Courts of Justice Act*, the unobtrusive use of a recording device from the body of the courtroom by a solicitor, a party acting in person, or a journalist for the sole purpose of supplementing or replacing handwritten notes may be considered as being approved without an oral or written application to the presiding judge.
>
> The foregoing Practice Direction was approved by the Ontario Courts Advisory Council on April 10, 1989.

[6] Counsel for the media advise that only an audio recording is contemplated. They would not video record the proceedings without the consent of all counsel, which is not forthcoming. They have no intention of re-broadcasting the audio recordings, but intend to use them to assure the accuracy of their reports. This course is contemplated by s. 136(2)(b), and according to the Practice Direction, may be considered as approved without the necessity of a formal application, and I authorize such audio recordings "for the sole purpose of supplementing or replacing handwritten notes."

[7] As to transmission of information from inside the courtroom, defence counsel object on the ground that it would make an order for exclusion of witnesses futile. Journalists could transmit "blogs" relating accounts of testimony which any potential witness could read if it were published. The reality is that the trial is an event open to the public. There is nothing to prevent any person from telling others what he or she heard witnesses say in the courtroom, and there is an expectation that any matters which take place in front of the jury may be reported in as much detail and at such time as the journalist thinks appropriate. Whether the journalist steps into the

hall for a moment to transmit the information, or does so unobtrusively in the courtroom will make no difference to the degree of publicity the trial receives. Provided that the proceedings are not disrupted, I authorize transmission of data from within the courtroom. There is a qualitative difference in the nature of the reporting, in this era of newspapers accessible on the internet, but I see no reason why this should be treated differently as a matter of principle.

[8] This is a document intensive case. All agree that journalists have the right to access to exhibits. There is some private and personal information contained in the documents, such as social insurance numbers, credit card numbers, telephone numbers and exact home addresses that all agree should not be published. On consent, there will be an order that the information listed in Appendix A to this endorsement shall not be published.

[9] Because of the large number of documents in this case, counsel have agreed to pre-numbering of exhibits and the filing of the documents on a provisional basis. This is essential for the efficient handling of documents before a jury in a case such as this. It may be however, that in the end, the Crown will be unable to prove all of the documents, and it may be that the jury will never see some of them. It was proposed that media wishing copies of the provisional exhibits in advance in the electronic form in which they are available, sign an undertaking in the following form,

> There is an unusual feature in this case that will require a variation to the manner and timing in which the media has access to the exhibits.
>
> The unusual feature in this case is that the prosecution intends to seek to have authenticated all of the documents that it intends to rely upon, at an early point in the trial, possibly days, weeks or even months before the evidence to which the proposed exhibits relate is adduced.
>
> The fair trial rights of the accused could be put at risk by premature publication of the content of exhibits.
>
> In order to remove the possibility that the trial of the accused persons will be put at risk of prejudice by the premature publication of the contained in the exhibits before the evidence to which they relate is adduced, the crown and the defence agree the court should order that the documents, even though authenticated and made exhibits, will not be made available to the media for publication until the proceedings have reached the stage where the evidence to which the exhibit relates is being adduced.
>
> When appropriate, having regard to the foregoing, the registrar may make copies of the exhibits available to the media, at the end of each day of the trial.
>
> In return for an electronic copy of pre-numbered exhibits which will be filed at the outset of proceedings by the Crown, the undersigned media organization undertakes that until the jury retires to consider its verdict, not to publish or report on anything in this matter unless the document has been referred to in the proceedings before the jury.

[10] Once the jury retires, there is no dispute that the media could report on rulings declaring some evidence inadmissible.

[11] Defence objects to this, indicating that media should not be given access to documents in advance that may never be admitted at trial, and suggests that the registrar could manually make photocopies of documents admitted into evidence at the end of every court day. Given the volume of documents, this is an impracticable suggestion.

[12] On the other hand, leaving it to media to publish a document "when it has been referred to" in front of the jury may leave room for misinterpretation as to the degree of reference required to constitute some evidence sufficient to place the matter before the jury.

[13] The practical solution to this dilemma is to permit the media to have a copy of the omnibus collection of pre-numbered exhibits, upon their undertaking not to publish the content of those documents before the jury retires unless there is sufficient evidence determined by me to admit the document into evidence before the jury. There will be little controversy as to most documents, for example police notebooks in the hand-writing of an accused. The registrar will maintain an index of all of the documents. At the end of each day, counsel will advise as to which documents have been referred to sufficiently in evidence to allow them to be placed before the jury. Crown will prepare the list for the day, and submit it to defence counsel. If there is a disagreement, I will rule on the matter after the jury is discharged for the day. The registrar may then email members of the media who have signed the undertaking the document numbers for those documents which may then be published, on the basis that the documents are admissible as there is some basis upon which the jury could conclude that they are what they purport to be. The registrar will tick off on a running list of the omnibus collection of documents, those which have been sufficiently referred to in evidence to allow them to be placed before the jury. The undertaking proposed will have to be modified to add, "and there has been a judicial determination that sufficient evidence of the document has been introduced to allow it to be placed before the jury."

Pardu J.

Released:

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HER MAJESTY THE QUEEN

Applicant

– and –

JOHN SCHERTZER, STEVEN CORREIA, JOSEPH MICHED, NEBOJSA MAODUS and RAYMOND POLLARD

Respondents

REASONS FOR DECISION

Pardu J.

Released: January 9, 2012

APPENDIX "A"

i. The press shall not report or publish collateral, personal information which is contained in documentary material unless such information is referred to in testimony or by counsel in the course of submissions in proceedings before the jury, and which falls into one of the following specific categories:

- FPS numbers
- SIN numbers
- OHIP/hospital/medical identification numbers
- Credit card numbers
- Bank account numbers
- Drivers licence numbers
- Telephone numbers
- Next of kin
- Passport/citizenship numbers
- Exact dates of birth
- Exact home addresses

ii. With respect to the original police memorandum books which are adduced into evidence (Ex. 6 to 10), the press may inspect but not copy or report such material. However, copies of the material portions of the original memo books are included in the aforementioned exhibit briefs, and those copies may be reported.