

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Her Majesty the Queen, Respondent

AND:

Anthony George, Defendant/Respondent

AND:

Canadian Broadcasting Corporation and Postmedia Network Inc., Applicants

BEFORE: Garson J.

COUNSEL: Justin Safayeni, for the Applicants

Joseph Perfetto, for the Respondent

Terry L. Brandon, for the Defendant/Respondent

HEARD: August 31, 2017

**RULING ON APPLICATION FOR RELEASE OF TRIAL EXHIBITS TO THE PRESS
FOR PUBLICATION**

- [1] The Canadian Broadcasting Corporation and Postmedia Network Inc. (“the applicants”) bring an application for an order establishing a protocol for assessing, copying, and publishing exhibits entered at the upcoming second degree murder trial of Anthony George.
- [2] Neither the Crown nor the defendant oppose the draft protocol filed by the applicants. However, both the Crown and the defendant raise objections in relation to two anticipated exhibits, namely a photograph of the deceased *in situ* and a video depicting the killing of the deceased. They ask that these two exhibits be subject to a temporary ban until the conclusion of the trial.

Legal principles

- [3] Both the media and the general public, in accordance with the open courts principle and the constitutionally protected right of freedom of expression, enjoy a strong presumption in favour of the access to trial exhibits.¹

¹ See *R. v. Canadian Broadcasting Corp.*, 2010 ONCA 726.

- [4] The Crown and the defendant seek a temporary publication ban, a discretionary remedy that can limit the freedom of expression enjoyed by the press in relation to court proceedings. As such, their request is subject to the *Dagenais/Mentuck*² test which requires that a trial judge in exercising his or her discretion only order a ban when:
- (i) it is necessary to prevent a real and substantial risk to trial fairness because reasonably alternative measures will not prevent the risk; and
 - (ii) the salutary effects of the proposed ban outweigh the deleterious effects to the rights and interests of the parties and the free expression of those affected by the ban.
- [5] In other words, I must balance the impact of any ban on the right of the media to free expression with the right of the defendant to a fair and public trial and the efficacy of the administration of justice.
- [6] The onus lies with the party seeking the ban to justify the limitation on the freedom of expression. This is a heavy onus and there must exist a convincing evidentiary basis to grant the ban. A convincing evidentiary basis does not require a lengthy or elaborate review of the evidence but does require consideration of relevant factors.³

Discussion

(i) A real and substantial risk to trial fairness

- [7] I have had the benefit of seeing the photograph and watching the video.
- [8] I would describe the photograph as deeply troubling and shocking. It is extremely graphic and disturbing. The video is much less graphic but nonetheless bone-chilling and heartbreaking. The video is difficult to watch. I am advised that the family of the deceased is not opposed to these images being available in the public domain, and I need not address issues relating to the protection of such social values or make any finding of harm or injury to persons capable of overriding a constitutionally protected right.
- [9] In 2017, the existence in the public domain of a video or photograph makes it easily available and accessible on numerous social media platforms. Additionally, many of these platforms invite commentary that can often be described as inflammatory and objectionable.
- [10] I echo the words of LeSage J. in *R. v. Bernardo* when he says, “[e]xperience tells us that pictorial images often have a greater impact and effect on the viewer than words do on the listener.”⁴

² See *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76.

³ See *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3.

⁴ [1995] O.J. No. 1472 at para. 126. See also *R. v. Sylvester [Re: Canadian Broadcasting Corp.]*, [2007] O.J. No. 2261 at para. 77.

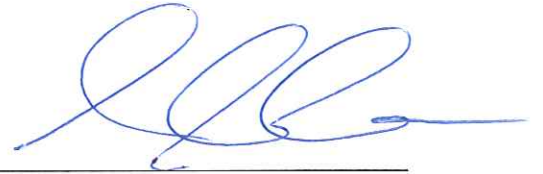
- [11] More specifically, I am mindful of the following:
- (i) the defendant faces a very serious charge and the exhibits in question are likely of significance with respect to the evidence anticipated at this trial;
 - (ii) the media will be present in court when the two exhibits at issue are referred to and filed. They will have access to these exhibits and will be permitted to describe them as they see fit in their reports; and
 - (iii) although the jurors will be instructed by me about the need to avoid media coverage of this case, and I have a measure of confidence in their ability to abide by such instructions, I am concerned about family, friends, coworkers, and acquaintances of the jurors coupled with the fact that publication of these two exhibits is likely to inflame the community and those who observe these troubling images.
- [12] In my view, the evidence before me establishes both a real and a substantial risk that could impact on the fair trial rights of the defendant. Put another way, I am satisfied on a balance of probabilities that the publication of the photograph of the deceased and the video depicting his death will inflame members of the public against the defendant, that the social circles of the jurors will likely share and express such viewpoints or observations or commentaries, and that the jurors may be either unwilling or unable to uphold their oaths or fully follow my instructions in the face of such views and comments.
- [13] Although this case may not be on the same level of notoriety as other recent murder cases in Southwestern Ontario (*i.e.* the recent high profile murders of Tori Stafford, the Bandidos, and Noelle Paquette), the subject matter and disturbingly graphic nature of the images depicted will be sufficient to likely cause a widespread inflammatory reaction amongst those members of the public in the social circles of the jurors.
- [14] Notwithstanding a robust ability of the modern public to view graphic images, I accept that the images at issue before me are sufficiently disturbing and are part of that rare set of circumstances that cross the line such that they may irremediably taint the fair trial rights of the defendant.
- [15] Although the procedural safeguards in place are many, they are nonetheless not infallible. I accept that the applicants would exercise suitable editorial discretion. However, they represent a few of the many others who would have access to such images and would likely not engage in similar editorial discretion.
- (ii) **A balancing of competing rights**
- [16] Having satisfied myself that a ban is necessary to prevent a real and substantial risk to the defendant's fair trial rights, I now turn to the second prong of the test to determine if the Crown and the defendant have shown that the salutary effects of such a temporary ban outweigh any deleterious effects.

- [17] In this regard, I take into account the following:
- (i) neither the media nor the public will be deprived of the opportunity to access, review, and describe the contents of these two exhibits;
 - (ii) the length of the proposed ban is likely less than three weeks;
 - (iii) the short-term deprivation of the opportunity for members of the public to view these exhibits constitutes a minor and transient intrusion on their right to timely, complete, and accurate reporting and information.
- [18] In my view, permitting access to these two exhibits but delaying publication of the actual images until the completion of trial strikes the appropriate balance by minimally intruding on the rights of freedom of the press, freedom of expression, and open-courts.
- [19] Accordingly, I conclude that the salutary effect of a temporary short-term ban on the publication of the images depicted in the two exhibits convincingly outweighs any deleterious effect. I must avoid creating a likely detraction from the fairness of the trial by placing images in the news and/or social media that would likely inflame the viewers. Access to these two exhibits in the brief intervening period will properly address the requirements of open courts and the rights of the media.
- [20] This time-limited and least restrictive measure is necessary to ensure the fair trial rights of the defendant.

Conclusion

- [21] I have reviewed and signed the proposed order sought by the applicants. The order is supported by both the Crown and the defendant.
- [22] In my view, the terms of the proposed protocol are reasonable in the circumstances and will assist in streamlining media access to issues in this trial.⁵
- [23] The proposed order is attached as Appendix “A” to this ruling.
- [24] The order is subject to the temporary publication ban with respect to the photograph of the deceased and the video of the killing of the deceased.
- [25] I thank counsel for the applicants for a thorough, comprehensive, and well-written set of materials that have assisted me in this application.

⁵ See *R. v. Huth*, 2013 BCSC 2123.



Justice M.A. Garson

Released: September 8, 2017

ONTARIO
SUPERIOR COURT OF JUSTICE
(Southwest Region)

THE HONOURABLE) THURSDAY, THE 31ST
JUSTICE MARC A. GARSON) DAY OF AUGUST, 2017

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

- and -

ANTHONY GEORGE

Accused

- and -

**CANADIAN BROADCASTING CORPORATION AND POSTMEDIA NETWORK
INC.**

Applicants

ORDER

UPON reviewing the Notice of Application, Factum and Book of Authorities filed by the Applicants, the Crown's Response Book and Book of Authorities, and the Accused's Application Record;

AND UPON hearing the submissions of counsel for the parties;

IT IS ORDERED THAT:

1. The Applicants shall be granted access to and copies of the exhibits filed in the course of the trial proper of Anthony George, scheduled to commence on September 25, 2017, subject to any objections made and maintained pursuant to paragraph 4 of this order.

2. Prior to being provided with access or copies, individuals from the Applicants will be required to show media identification.
3. Individuals from other media organizations (apart from the Applicants) or members of the public may apply to the court for access to exhibits by providing a written request in the form of the "Standing Request for Exhibits" form attached as Schedule "A" to this order.
4. Where an objection to access or publication of an exhibit is made:
 - (A) counsel will so advise the Court at the time the exhibit is tendered in evidence or as soon thereafter as is practicable, in the form attached as Schedule "B" to this order;
 - (B) the Court will make an initial assessment as to whether the objection is to be maintained and assign a provisional designation to the exhibit at the end of the court day on which the exhibit is entered;
 - (C) where the objection is maintained, media counsel will have an opportunity to make submissions on the proposed objection at a time to be fixed by the Court during the same week when the objection is made, or as soon as practicable thereafter;
 - (D) the Crown is responsible for compiling and submitting to the Court clerk, on a daily basis, a list of all exhibits entered, their descriptions and the provisional designations made by the Court, in the form attached as Schedule "C" to this order. (In the event the accused calls a case, this responsibility will fall to the accused.)
5. Where practicable, the Court shall have a copy of each exhibit for each of the Applicants available when the exhibit is entered, or as soon as reasonably possible thereafter.
6. For electronic exhibits, if any, the Court shall provide an electronic copy on CD/DVD or on a USB drive provided to the Court by Applicant, and this shall be provided as soon as practicable after the exhibit is entered.

7. For physical exhibits that cannot be copied, the Applicants shall be provided an opportunity to take photographs or otherwise record such exhibits.

8. Individuals from the Applicants may record the proceedings for the limited purpose of supplementing or replacing handwritten notes.

SIGNED, this 31st day of August, 2017.



GARION

Schedule "A" – Standing Request for Exhibits

In the matter of *R. v. Anthony George*

I, _____ on behalf of

Please print - Applicant's Name

Media Organization

having reviewed and agreed to the conditions noted in the Order of Mr. Justice Garson dated August 31, 2017, make a standing request for copies of exhibits filed with the court in the matter noted above. I will further advise the court registrar which specific exhibits I would like copies of, as they are filed with the court.

SCHEDULE "B"

R. v. Anthony George

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: _____

SCHEDULE "C"

R. v. Anthony George

MEMBERS OF THE MEDIA ARE RESPONSIBLE FOR ENSURING COMPLIANCE WITH ALL APPLICABLE PUBLICATION BANS

EXHIBIT LIST

MEDIA ACCESS DESIGNATION

FA = Full Access - exhibit may be viewed, copied or published

Copy only = exhibit may not be published

View only = exhibit may not be copied or published

No access = exhibit may not be viewed, copied or published

Other = see Registry for special conditions

EXHIBIT NO.	DESCRIPTION	DESIGNATION

* (F) denotes Final Designation (made by the Court following an application to set aside the provisional designation)

+ denotes physical object (arrangements will have to made to view the exhibit)