

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CANADIAN BROADCASTING
CORPORATION, CTV INC., CANWEST
MEDIA INC., and CITYTV, A DIVISION
OF ROGERS BROADCASTING LIMITED

Applicants

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

ROBERT BALTOVICH

Respondent

Iain A.C. MacKinnon,
for the Applicants

Shawn Porter,
for the Respondent Crown

Joanne McLean,
for the Respondent Robert Baltovich

McCOMBS J.:

[1] The applicants, who collectively represent four media outlets, apply for the following Orders:

1. An Order unsealing Exhibit E, a D.V.D video recording of a June 7, 2007 police interview of Paul Bernardo held at Kingston Penitentiary (the "DVD exhibit, or the "Bernardo video").
2. An Order allowing the applicants access to the DVD exhibit with the right to copy, duplicate and reproduce it.

[2] The Bernardo video was played in court and filed as an exhibit as part of a pre-trial motion in the retrial of Robert Baltovich, who was acquitted of murder on April 22, 2008, when the Crown announced that it was offering no evidence. The DVD exhibit had been ordered sealed by Watt J., who was the trial judge until his appointment to the Court of Appeal for Ontario. A transcript of the interview has already been made

available, and has been widely reported in the media. Only the issue of access to the video is at stake in this application.

[3] Bernardo's counsel, Mr. Anthony Bryant, who was present with his client during the making of the Bernardo video, was served with notice of this application. He attended court as a courtesy when this application was first spoken to. He did not appear again, and advised the parties that his client did not wish to make representations or to participate in this application.

[4] Ms. McLean, on behalf of Mr. Baltovich, consents to the order being sought. She went further in oral argument, and submitted that if I decide to limit access or use in any way, that limitation should not apply to counsel for Mr. Baltovich.

[5] The Crown does not oppose the application to unseal the exhibit and allow the applicants access to it. However, the Crown submits that there should be limitations placed upon its access and use in order to avoid or at least minimize its misuse by those who might be inclined to exploit or sensationalize it.

[6] There is no serious dispute among the parties about the guiding principles in applications of this nature. Open justice and public scrutiny are core values in our justice system. The Supreme Court of Canada has repeatedly and consistently emphasized the importance of public access to courtrooms and court records, holding that open justice is "one of the hallmarks of a democratic society"¹. Obviously, unless the press has access to court information and exhibits, they are unable to provide the information to the public². Courts are required to release exhibits unless persuaded that there are sound policy reasons for refusing to do so. Sound policy reasons for refusal include a real and substantial risk to the fairness of the trial, or circumstances where the salutary effects of a publication ban outweigh its deleterious effects³.

[7] There is obviously no basis to keep the exhibit sealed to protect the fairness of the trial. The trial is over. Mr. Baltovich has been acquitted. There will be no appeal. The inquiry must therefore focus on whether the salutary effects of a ban on access by the applicants and the respondents to the Bernardo video outweigh the deleterious effects of such a ban.

[8] One salutary effect of a ban on access to the Bernardo video is avoidance of the potential distress that its widespread dissemination could cause to so many people who have been affected, directly or indirectly, by his hideous crimes. Another salutary effect of a ban on access to the Bernardo video is that it would remove the risk that unfettered access to it will attract misuse by a malevolent few, for example by editing it in a manner that distorts its content.

¹ *C.B.C. v. New Brunswick (A.G.)*, [1996] S.C.R. 480, at para. 22

² *C.B.C. v. New Brunswick (A.G.)*, *supra*, at para 24

³ *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at para 73

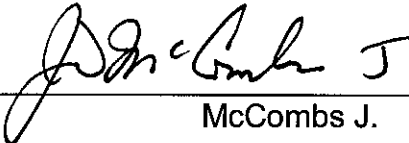
[9] In my view, however, the deleterious effect upon the core principles underlying the requirement of open justice outweigh the salutary effects of a ban on access and appropriate use by accredited media sources such as the applicants. As well, I can see no principled basis to deny access of the DVD exhibit to counsel for Mr. Baltovich, or for that matter, counsel for the Crown, should they wish to make use of it for legitimate professional purposes.

[10] The Crown has sought an order precluding the applicants from posting the Bernardo video on their websites, and an order requiring that the video copies in their possession be destroyed after a reasonable period of time. In my view, it is not appropriate to restrict the media's use of the Bernardo video in the manner sought by the Crown. The internet is now an established extension of responsible media outlets' reporting. The time pressures of modern television news reporting dictate that usually only a snippet of video will find its way into regular news programming. The media websites, on the other hand, are a means whereby interested members of the public may gain more information about a given news story. The applicants use "streaming servers" which, while not precluding determined and technically sophisticated users from downloading their videos, certainly reduces the number of users doing so.

[11] The Bernardo video does not contain graphic images or descriptions of Bernardo's crimes. If it did, my conclusion would have been different. But in the circumstances here, where there is no opposition to the release of the video, I see no basis to deny the application.

[12] The application is granted. An Order will go unsealing Exhibit E, the Bernardo video, permitting copies to be made, and a single copy provided to each of the applicants, and to either or both of the respondents, should they request a copy.

[13] The Order shall provide that the copies of the DVD exhibit may be used by the applicants or either of the respondents "in furtherance of their legitimate business or professional interests, provided, however, that they shall not further distribute or disseminate any copies of the DVD exhibit". The Order shall also provide that "no further copies shall be provided to anyone else without the express authority of a judge of this court".



McCombs J.

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RULING

McCOMBS J.

Released: June 10, 2008