

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF Her Majesty the Queen v. Robert Baltovich and an application in the nature of *certiorari* by the Applicant for an Order quashing a subpoena issued to Derek Finkle by the Clerk of the Ontario Superior Court of Justice on October 17, 2006 at Toronto, Ontario.

B E T W E E N:

DEREK FINKLE

Applicant

- and -

HER MAJESTY THE QUEEN IN THE RIGHT OF ONTARIO

Respondent

-and -

THE CANADIAN ASSOCIATION OF JOURNALISTS, CANADIAN
JOURNALISTS FOR FREE EXPRESSION, THE WRITERS' UNION OF
CANADA, PEN CANADA, and THE PROFESSIONAL WRITERS
ASSOCIATION OF CANADA

Interveners

--- Before THE HONOURABLE MR. JUSTICE WATT, without a jury, at the Metropolitan Toronto Court House; commencing on **Thursday, June 28, 2007.**

RULING on MOTION to QUASH SUBPOENA

A P P E A R A N C E S:

IAIN MacKINNON, Esq.

for the Applicant

P. KOTANEN Esq. &
A. PILLA, Esq.

for the Respondent

J. LOCKYER, Esq. &
J. McLEAN, Ms.

for Robert Baltovich

J. NORRIS, Esq.

for the Interveners

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THURSDAY, JUNE 28, 2007

R v DEREK FINKLE and HER MAJESTY THE QUEEN IN RIGHT OF
ONTARIO

ORAL RULING

[1] Derek Finkle is a journalist who nurtured an interest in the investigation and prosecution of Robert Baltovich for the murder of Elizabeth Bain. In 1998, about six years after Robert Baltovich's conviction of second degree murder in connection with the death of Elizabeth Bain, Derek Finkle published *No Claim To Mercy*, a non-fiction account of the investigation, prosecution and conviction of Robert Baltovich.

[2] In *No Claim To Mercy*, Mr. Finkle took a critical look at the case against Robert Baltovich. Amongst other things, he raised questions about the thoroughness and objectivity of the police investigation, the fairness of Robert Baltovich's first trial, and the validity of his conviction.

[3] In December 2004, over a dozen years after Robert Baltovich's conviction of the second degree murder

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of Elizabeth Bain, the Ontario Court of Appeal quashed the conviction and ordered a new trial. The prosecutor has decided to proceed with a second trial more than 17 years after the death of the deceased.

[4] The prosecutor has in mind a new role for Derek Finkle at Robert Baltovich's new trial: witness for the prosecution. Or at least so it would seem, because the prosecutor has obtained a subpoena to compel Mr. Finkle's attendance. And what is more, the subpoena requires Derek Finkle to bring along with him

"all documents or notes in relation to any publications or other material printed in relation to Robert Baltovich."

[5] Derek Finkle says he has no material evidence to give at Robert Baltovich's second trial. For myriad reasons, the subpoena should never have been issued. The prosecutor begs to differ. And so it is that I am asked to decide whether the subpoena issued for Mr. Finkle's attendance as a prosecution witness should be quashed.

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A. The Essential Background

1. Introduction

[6] To set this application in its proper procedural and evidentiary context requires recital of some prior events, though not a forced march along the long and winding road that has gone before. A laboratory examination of the prosecutor's case can await another day.

2. The Disappearance of Elizabeth Bain

[7] On June 19, 1990 Elizabeth Bain attended classes at the Scarborough Campus of the University of Toronto where she was an undergraduate student. She parked her car in a campus lot. Three days later, her car was found a short distance from the parking lot. Investigators found blood in the back seat. The blood was the blood of Elizabeth Bain.

[8] In the seventeen years since that late spring day, neither Elizabeth Bain nor any further signs of her have been found.

3. The Conviction of Robert Baltovich

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[9] In due course, Robert Baltovich, the deceased's sometime boyfriend, was arrested on a charge of second degree murder. The prosecution's case against him was entirely circumstantial. It included evidence of

* opportunity;

* motive; and

* after-the fact conduct said to be indicative of consciousness of guilt.

[10] On March 31, 1992, a jury unanimously concluded that Robert Baltovich had unlawfully caused the death of Elizabeth Bain and that the unlawful killing was second degree murder, the offence with which he was charged.

4. The Publication of *No Claim To Mercy*

[11] In 1998, Derek Finkle published the original edition of *No Claim To Mercy*. An updated version was published several years later. The original version won the Crime Writers' Arthur Ellis Award for the best non-fiction book published in 1998.

[12] The author describes the book's subject-matter as the controversial case for murder against Robert

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Baltovich. He presents a critical analysis of the police investigation, prosecution and trial and calls into question the correctness of the jury's verdict.

[13] The sources upon which Derek Finkle relied in writing *No Claim To Mercy* included lengthy interviews with Robert Baltovich and other trial participants, and a painstaking review of transcripts of the preliminary inquiry and trial proceedings and other matters routinely disclosed in the conduct of a criminal prosecution.

5. The Appellate Proceedings

[14] On December 2, 2004 a panel of judges in the Ontario Court of Appeal allowed Mr. Baltovich's appeal, quashed his conviction of second degree murder and ordered a new trial on the indictment. This is the first in a series of applications to be heard and determined prior to the jury selection in early October of this year.

6. The Preliminary Discussions about the Evidence of Derek Finkle

[15] During the summer months in 2006, investigators and prosecutors continued their preparations for the second trial of Mr. Baltovich. They considered

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the prospect of obtaining the notes of Derek Finkle along with other relevant source materials. Of special interest to investigators and prosecutors, doubtless as a prospective source of admissions, were Mr. Finkle's interviews of Robert Baltovich.

[16] Detective Robert Wilkinson, who had become the new lead investigator prior to the end of the protracted appellate proceedings, began his efforts to speak with Mr. Finkle about the author's knowledge of Robert Baltovich's case in August 2006.

[17] At first, a veneer of co-operation appeared. But the press of other obligations made an interview of the writer something that would have to await a more propitious time. A brief conversation on the telephone as summer turned to fall. Mr. Finkle retained counsel. He wanted the detective's questions to be put in writing, ostensibly to assure accuracy of response. No written questions. And needless to say, no answers.

7. The First Subpoena: October 17, 2006

[18] Rebuffed in their efforts to speak with Derek Finkle in a manner acceptable to them, Detective

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Wilkinson and other investigators discussed with the prosecutors other available options. They regarded a search warrant to be executed at a media outlet and Derek Finkle's house as overly intrusive. The alternative investigators and prosecutors settled upon was a subpoena *duces tecum* made returnable well in advance of the scheduled trial date to permit resolution of any issues arising out of its service.

[19] On October 17, 2006 Detective Wilkinson supplied a clerk in the Crown Attorney's office with the information to be incorporated on the face of a standard criminal *subpoena duces tecum* in Form 16. The information provided included:

i. the name of the proposed witness, Derek Finkle;

ii. the return date of the subpoena, a court appearance to be made by Robert Baltovich; and

iii. a description of the things to be brought by the prospective witness, "all documents or notes in relation to any publications or other material printed in relation to Robert Baltovich".

[20] Detective Wilkinson did not attend before the clerk of the Superior Court who would ultimately be asked to issue the subpoena. Neither he nor the clerk in

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the Crown Attorney's office to whom he spoke provided any information to the subpoena issuer upon which the issuer could conclude that Derek Finkle was likely to give material evidence at Robert Baltovich's trial.

[21] On October 17, 2006 a clerk of the Superior Court of Justice issued the subpoena Detective Wilkinson had requested the same day. Mr. Finkle's then counsel accepted service on his behalf. The process was returnable on October 20, 2006.

8. The Inter-Subpoenae Period

[22] In the months that followed on the heels of the first subpoena, Mr. Finkle's [then] counsel turned over to the police a list of the materials the writer claims to have maintained after publication of *No Claim To Mercy*. Investigators noted that the inventory failed to include any tape recordings of interviews Mr. Finkle conducted. The author's response was to point to the language of the subpoena, which refers exclusively to printed material.

[23] The entrenched positions of the parties continued throughout the remainder of 2006. No questions

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in writing. No interviews. No materials provided. No answers given. No amicable resolution. Nobody blinks. Nobody bends. Both invoke principle.

[24] On January 18, 2007 the prosecutor made it clear to Derek Finkle's lawyer that the prosecution also wanted all audio, visual, digital or other recordings in Mr. Finkle's files about Robert Baltovich.

[25] Derek Finkle's response to this expanded prosecutorial request was a notice of application to quash the subpoena issued on October 17, 2006. The principal grounds advanced in the application of January 18, 2007 are these.

1. The subpoena compelling Derek Finkle to testify and to produce "all documents or notes in relation to any publications or other material printed in relation to Robert Baltovich" ("Printed Research Materials") was issued by the Clerk of the Court without proper, necessary, or any evidence as to whether Derek Finkle is likely to give material evidence at the trial of Robert Baltovich;

2. The subpoena compelling Derek Finkle to testify and produce all of his Printed Research Materials infringes the common law principle that journalists are not required to testify

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unless it is necessary and there is no other way to prove the same evidence;

3. The subpoena compelling Derek Finkle to testify and produce all of his Printed Research Materials infringes his rights to freedom of expression and freedom of the press, pursuant to section 2(b) of the *Canadian Charter of Rights and Freedoms*;

4. Derek Finkle is not a person who is likely to give material evidence in the proceeding to which the subpoena relates, or alternatively, any evidence that Mr. Finkle can provide can be adduced through other witnesses.

[26] The application to quash the subpoena of October 17, 2006 was not heard immediately. Mr. Finkle's counsel sought clarification from the prosecutor about the precise materials sought under the subpoena. The prosecutorial response offered two alternatives. One list included materials sought on a contested application, another sought a somewhat briefer list, recited in the materials requested in the event that the application to quash did not proceed.

[27] Neither party will cede ground to the other. One seeks everything. The other provides nothing.

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9. The Second Subpoena: April 30, 2007

[28] On April 30, 2007 more than three months after the application to quash the subpoena of October 17, 2006 had been filed, Detective Wilkinson sought a second *subpoena duces tecum* for Derek Finkle. It is a reasonable inference that he did so at the request, or at least with the benefit of the advice of the prosecutors in an attempt to circumvent some of the deficiencies identified in the notice of application of January 18, 2007.

[29] Detective Wilkinson followed a different procedure to obtain the second subpoena for Derek Finkle. After having the same clerk in the Crown Attorney's office complete the face of the subpoena in identical terms to the subpoena of October 17, 2006, Detective Wilkinson went to the Clerk's office in room 241 of the Court House. There the officer told the clerk of the Superior Court of Justice that he, Wilkinson, believed that the statements in Derek Finkle's book, which Mr. Finkle attributed to Robert Baltovich and others, were "pertinent". The officer told the clerk "that Mr. Finkle's knowledge of

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these statements appears to be relevant and required for his [Robert Baltovich's] retrial."

[30] The clerk of the Superior Court of Justice issued the subpoena in the terms requested.

10. The Parties to this Application

[31] In an earlier appearance before another judge of this Court, several organizations sought and obtained intervener status. They include:

- * the Canadian Association of Journalists
- * Canadian Journalists for Free Expression
- * the Writers' Union of Canada
- * Pen Canada
- * the Professional Writers Association of

Canada.

[32] The principals in this application, Derek Finkle and Her Majesty the Queen in right of Ontario represented by the prosecutor, were joined by counsel for Robert Baltovich. Each made submissions, although the interveners declined to take a position on the merits of the application.

B. The Positions of the Parties

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1. Introduction

[33] A brief recasting of the positions advanced by the parties will serve as a helpful preliminary to the discussion of the principles that inform the decision in this case.

2. The Position of the Applicant

[34] For Derek Finkle, Mr. MacKinnon submits that both subpoenas were issued without jurisdiction. Quite simply stated, nothing was presented to the issuing authority on either occasion upon which the clerk could exercise her statutory discretion to issue a subpoena. To the extent that any information was provided, it fell far short of demonstrating that Derek Finkle is *likely* to give material evidence.

[35] Mr. MacKinnon says that the procedural requirements of s.698(1) of the *Criminal Code* have *not* been met. While acknowledging the absence of any under oath requirement, Mr. MacKinnon contends that, at the least, an applicant must articulate a set of case specific facts to satisfy the issuing authority that the proposed witness has material evidence to give in the proceedings

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in which his or her attendance is sought. No such display, he submits, occurred here.

[36] According to Mr. MacKinnon, it is patent that Derek Finkle has no material evidence to give in the prosecution of Robert Baltovich. To be material, the evidence of a proposed witness must be relevant and not contravene any admissibility rule. At best, anything relevant Derek Finkle would have to say would be inadmissible hearsay, a repetition of what others told him offered to prove the truth of what they said.

[37] Mr. MacKinnon also inveighs against the colourable use of a subpoena, the primary purpose of which is to compel a person's attendance to *give evidence as a witness*, when the underlying purpose here is to obtain documents in the proposed witness's possession. The method chosen is a thinly veneered circumnavigation of the much more onerous requirements for either a production order or a search warrant and should not be countenanced.

[38] In a related submission, Mr. MacKinnon says that the breathtaking sweep of the prosecutorial request, reflected in the language of the subpoena, affords cogent

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evidence that the prosecution is going on a fishing trip. Denied direct access to Robert Baltovich, they seek everything he said to Derek Finkle in the hope they might catch something to advance their case. Prior precedent puts paid to the use of the process of the court for any such purpose.

[39] It is the position of Mr. MacKinnon that, even if I were to conclude that the subpoena-issuing process were not fatally flawed, and decide that Derek Finkle had material evidence to give, the subpoenas should still be quashed. Journalistic activities are accorded protection under section 2(b) of the *Charter*. This protection extends to collection and reporting of news and is reflected in the special rules applicable when authority is sought to conduct a warranted search of a media outlet. This protection must be balanced against society's interest in requiring those with information about crimes to provide it to the appropriate authorities.

[40] Mr. MacKinnon urges that the balance here falls decidedly in favour of quashing the subpoena. Derek Finkle's evidence would be largely inadmissible hearsay, a

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repetition of things said by others offered for its truth. For the most part at least, the substance of this evidence is available from other sources, the people to whom Derek Finkle spoke. To convert Mr. Finkle into a witness for the prosecution would be inimical to the public interest.

3. The Position of the Interveners

[41] In submissions commendable for their brevity and clarity, Mr. Norris for the several interveners characterized what occurred here as a production order in disguise. The true purpose of the *subpoena duces tecum* is to obtain Derek Finkle's notes and other materials, not to compel his testimony at trial. At the same time, the prosecutor has sidestepped the more rigorous requirements for a production order, an information on oath compliant with s.487.012(3), the prospect of terms and conditions imposed under s.487.012(4), and the availability of an exception mechanism under s.487.015.

[42] Mr. Norris adopts the alternative position advanced by Mr. MacKinnon about the constitutionally

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ensured position of journalists, but takes, as I have said, no position on the merits of the application.

4. The Position of the Prosecutor

[43] The prosecutorial response to the application of Derek Finkle is straightforward: however, exceptional it may be to subpoena a journalist, to do so here is fully justified in the absence of other information of equivalent quality from any other source and the procedure followed is unexceptionable.

[44] Mr. Kotanen emphasizes the unusual circumstances of this case. Elizabeth Bain was killed seventeen years ago. In other words, we are *not* dealing with current events. Contemporaneous news gathering and reporting is not at risk here. What Derek Finkle collected at times less remote from the events of 1990 may be of value in assisting the refreshment of stale memory, even in determining whether a reasonable prospect of conviction, identified earlier as a reason for going forward, remains after review of the further material.

[45] The prosecutor says that the clerk properly concluded on the basis of information provided by

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Detective Wilkinson, that Derek Finkle has material evidence to give at Robert Baltovich's trial. Admissibility falls to be decided later, *not* when a subpoena is sought or issued.

[46] Mr. Kotanen acknowledges that a production order is another statutory procedure that could have been invoked here. But service of a *subpoena duces tecum* was an equally available and reasonable choice. Derek Finkle has exercised his right to challenge the issuance of the subpoena, just like he could have sought exception from a production order or have challenged the issuance of a search warrant after the fact. He has suffered no disadvantage by the procedure chosen, rather has raised the same challenges as would have been made had a production order been granted.

[47] The prosecutor points out that there is no issue here, as there often is in media cases, about the confidentiality of the journalist's sources. Those who spoke to Mr. Finkle did so for attribution, and are revealed in *No Claim To Mercy* or other publications. There is *no* realistic prospect that Derek Finkle will be

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seen as part of the investigative arm of the state if compelled by subpoena as a prosecution witness.

[48] Mr. Kotanen rejects any suggestion that issuance of the second subpoena amounts to an abuse of process. The second subpoena simply responded to the applicant's complaints about the procedure followed to obtain the first subpoena. The information provided, which demonstrates that Mr. Finkle has material evidence to give, is rooted in Derek Finkle's own comments and his own descriptions.

[49] The prosecutor reminds that materiality is a determination to be made by a court, not by a prospective witness. Evidence is material even if only confirmatory of the testimony of other witnesses. It is not for Derek Finkle to say, much less determine that he has no material evidence to give.

[50] Mr. Kotanen emphasizes that statements attributed to Robert Baltovich may be tendered as admissions, but only at the instance of the prosecution, the party that seeks access to them here. These statements may also be of evidentiary value to contradict

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or qualify other statements attributed to Mr. Baltovich. The prosecutor then offered several examples to illustrate each use.

5. The Position of Robert Baltovich

[51] After a brief overview of the prosecution's case at the first trial, Mr. Lockyer, for Robert Baltovich, contended that the subpoena served on Derek Finkle was not issued to compel his attendance as a prosecution witness as would be the usual case with a subpoena. Rather the underlying purpose and animating spirit for the subpoena is to obtain production of Mr. Finkle's notes and other materials of which he remains in possession.

[52] Mr. Lockyer urges that the relevance of what is sought is, at best, flimsy. Derek Finkle, quite simply put, has no material evidence to give at Robert Baltovich's trial. The great bulk of his research consisted of parsing the preliminary and trial transcripts, together with interviews of persons identified in *No Claim To Mercy* and other publications who are equally available to the prosecutor and investigators.

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[53] Mr. Lockyer then turned his attention to each of the examples summoned by the prosecutor to demonstrate that Derek Finkle had material evidence to give. For each instance, according to Mr. Lockyer, the subject-matter comes up short on materiality.

C. The Governing Principles

1. Introduction

[54] Several principles inform my determination of this application. A brief recapture of them will be sufficient for current purposes.

2. The Statutory Authority to Issue a Subpoena

[55] Part XXII of the *Criminal Code* provides several mechanisms for procuring the attendance of witnesses in proceedings to which the *Criminal Code* applies, or at least obtaining their evidence in some manner or other.

[56] The primary means of compelling the attendance of a person to give evidence as a witness in criminal proceedings is the issuance of a subpoena. Section 698(1) describes the basis upon which a subpoena

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may be issued to any prospective witness. The precise terms of the subsection are these:

698(1) Where a person is *likely to give material evidence* in a proceeding to which this Act applies, a subpoena *may* be issued in accordance with this Part requiring that person to attend to give evidence. (Emphasis added).

[57] Subpoenas issued under Part XXII of the *Criminal Code* may be in Form 16, modified to suit the circumstances of the case. See, *Criminal Code*, sections 699(6) and 849(1). Although the *Criminal Code* contains no such distinction, there are, in fact, two types of subpoena:

- i. *subpoena ad testificandum*; and
- ii. *subpoena duces tecum*.

The former compels attendance for the purpose of giving evidence in a proceeding. The latter commands attendance for the purpose of giving evidence, and directs the subpoenaed witness to bring with him or her certain things described on the face of the subpoena, or on occasion in an attachment to it.

[58] Section 698(1) sets the threshold for issuance of the subpoena of either type. The issuer must

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be satisfied that the proposed witness is *likely to give material evidence*. But the subsection offers no assistance about the *manner* in which the party requesting the subpoena is to satisfy that threshold for its issuance.

[59] A final preliminary observation about the issuing authority of section 698(1) is apt. The subsection is cast in permissive terms: The permissive "may" is used, not the imperative "shall". In the result, satisfaction of the statutory threshold does *not* guarantee issuance of the subpoena.

3. The Necessity of Inquiry

[60] Imposition of a threshold for issuance of a subpoena ensures that subpoenas are not issued for the asking. The erection of the threshold bespeaks a requirement of its satisfaction before the issuer may invoke the statutory discretion the subsection provides. It logically follows that, in some manner or other, the issuer must be satisfied that the proposed witness *is likely to give material evidence* in the proceedings in which his or her attendance is sought. It falls to the

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party who seeks the subpoena to establish the conditions precedent to its issuance.

[61] In *Foley et al v Gares* (1989), 53 C.C.C. (3d) 82 (Sask. C.A.) Bayda C.J.S. described the obligation of the subpoena issuer, and, by inference, of the party seeking the subpoena, in these terms at pages 87-88:

Although it does not expressly so provide, s.626 of the Code implicitly provides that before issuing the subpoena a justice (as well as a provincial court judge, a superior court judge or a clerk of the court, as the case may be) should satisfy himself or herself that the person required by the intended subpoena to attend the proceeding is "a person [who] is likely to give material evidence in [that] proceeding". The underlined portion of Form 11 quoted above confirms that the law contemplates that "it has been made to appear" to someone that the person is "likely to give material evidence". The most logical "someone" to whom it should be made to so appear is the issuer of the subpoena. The need for a statutory duty such as I find s.626 implicitly casts on a subpoena issuer is reinforced by the importance which the law places upon the duty to testify and the commensurate seriousness with which the law treats subpoenas. The importance and seriousness are exemplified in the following excerpt from a judgment by Cory J. (in which he dissents in part but on matters not material to the present case) in

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Hickman v. Marshall (S.C.C.)
 (unreported October 5, 1989):

Dean Wigmore in his treatise on Evidence in Trials at Common Law (McNaughton rev. 1961) 2192 pointed out that all privileges of exemption from the duty to testify are exceptional and ought to be discountenanced unless there is good reason plainly shown for their existence. He put it in this way at p.73:

The pettiness and personality of the individual trial disappears when we reflect that our duty to bear testimony runs not to the parties in that present cause, but to the community at large and forever.

It follows...that all privileges of exemption from this duty, are exception, and are therefore to be discountenanced. There must be good reason, plainly shown, for their existence. [Emphasis in original.]

Although the statement was made in a context not particularly relevant to the present case, the words nevertheless are appropriate.

See also *R v. Gingras* (1992), 71 C.C.C. (3d) 53, 57 (Alta. C.A.); *R v Dickie* (1996), 110 C.C.C. (3d) 573, 576 (Ont. Ct. Gen. Div.) per Hill J; and *R v Wood*, [2006] OJ No.841 (Sup. Ct.) at [12], [13] and [19] per Bryant J.

4. The Form of Inquiry and Nature of Proof

[62] Section 698(1) is curiously but firmly silent about the form of the inquiry into likely materiality, and the manner in which it may be established.

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[63] At the risk of offering a penetrating glimpse into the self-evident, neither section 698(1) nor any other provision in Part XXII requires that the likelihood of the perspective witness giving material evidence be established by an information on oath in writing, an affidavit, statutory declaration or similar document. It is reasonable to conclude that Parliament did not consider it necessary to require such a formalized procedure for the issuance of a subpoena.

[64] In *Foley et al v Gares*, above, Bayda C.J.S. described the nature of the inquiry in these terms at page 88 C.C.C.:

What type of inquiry is a justice acting under ss.626 and 627(2)(a) required to make,? It is safe to say that the standard of inquiry is not so high, for example, as that expected of a judge acting under s.726(3), but the justice nonetheless should make some examination of the circumstances. He is given discretion in the matter of issuing the subpoena and he should exercise it judiciously if not judicially. The justice may choose not to insist upon evidence on oath but he may want to conduct an oral examination, if only a cursory one, of some person who has knowledge of the circumstances. The extent of such an examination will depend on the

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circumstances of each situation. One thing however is certain. If he takes no steps whatsoever to satisfy himself that the person is likely to give material evidence, the justice is abusing his power and his discretion if he issues the subpoena. His decision to issue the subpoena may be set aside by a superior court on the ground that without making any examination the justice had no jurisdiction to exercise his discretion to issue the subpoena. In short his decision is amenable to certiorari.

[65] In *R v Gingras*, above, the Alberta Court of Appeal considered that hearsay could be relied upon to support the issuance of a subpoena, then continued at page 57 C.C.C.:

The governing section of the Criminal Code is s.698, which calls for evidence that the evidence sought would likely be material. It became obvious during argument at trial that counsel for the defence really did not know any more, and was just hoping that there would be relevant files which would contain something helpful. We do not even know whether he hoped that something in the files would be itself evidence, or would be put in cross-examination to the inmate when he testified or would lead to the names of other witnesses who might be subpoenaed themselves to give testimony.

It appears to us that this is a pure fishing expedition and goes far beyond

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what would be permitted in a civil case, let alone a criminal case, and does not begin to fall within what is called for in s.698 of the Criminal Code. Therefore, the subpoena should never have been issued, and was properly quashed either on that ground or as an abuse of process.

[66] In *R v Dickie*, above, Hill J. described what is essential in a brief passage at page 576:

The exercise of judicial determination of the likelihood of materiality contemplates some articulation of facts by the applicant supportive of the pleaded belief that a court order ought to issue. The likely materiality of evidence must be contextualized to the specific case. The standard then is a relative term with materiality measured in light of the precise issues formulated in the litigation. A failure to provide a legally adequate factual substratum for the application can, in some circumstances, lead readily to the perception that what is sought is an "off the shelf" subpoena.

[67] In *R v Wood*, above, Bryant J. acknowledged that, in some cases at least, a letter setting out the reasons for the subpoena request or a record containing a recital of why the request was granted may afford a sufficient factual basis for the proper exercise of the issuer's discretion.

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[68] To hem applicants for subpoenas into a particular form of information to satisfy the requirements of section 698(1) seems at once inconsistent with the terms of the provision and inimical to the best interests of the administration of justice. Excessive formality would ensure form triumphs over substance and serve no useful purpose. That said, simply to attend with a list of names and addresses and expect subpoenas on demand reduces the requirement of section 698(1) "is likely to give material evidence" to a mere shibboleth.

[69] At bottom, what is required is information on the basis of which the issuer can conclude that the proposed witness is likely to give material evidence in the proceedings in which the witness's attendance is to be compelled.

5. The Standard to be Established

[70] The statutory terms "is likely to give material evidence" refers to a probability, *not* a mere possibility or something that exists only in the fevered imaginings of the party seeking the subpoena. Something is likely if it is *probable*, not merely possible.

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[71] Materiality is a legal concept. It defines the status of the propositions that a party seeks to establish by evidence to the case at large. What is in issue in a case, hence what is material, is a function of

- i. the applicable substantive law;
- ii. the allegations contained in the indictment; and
- iii. the applicable procedural law.

Evidence is material if it is offered and tends to prove or disprove a fact in issue. Material evidence is evidence that is pertinent to the issue in dispute.

[72] When the issuance of a subpoena is challenged, it is inadequate for the party proposing to call the witness, in this case the prosecutor, to respond with a mere allegation that the proposed witness can give material evidence. More is required. And that more is to establish that the proposed witness is *likely*, or said another way, would *probably* have evidence material to the issues raised to give. See, *R v Harris* (1994), 93 C.C.C.(3d) 478, 479-80 (Ont. C.A.). See also *Re Stupp and*

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The Queen (1982), 36 O.R. (2d) 206, 70 C.C.C. (2d) 107, 121 (H.C.J.) per Craig J.

[73] It may also be appropriate on review to consider whether the proposed evidence is reasonably capable of admission in the proceedings in which it is to be tendered. While admissibility is for the trial judge to decide, there may be some cases in which it may be obvious that what is proposed to be given falls foul of the incontrovertible rules of admissibility, or cannot enter the proceedings for some other reason.

6. The Relevance of Finkle's Standing as a Journalist.

[74] As we saw earlier, the language in section 698(1) is permissive, not imperative. Where the conditions precedent have been met, the threshold surmounted, a subpoena *may* be issued. A residuum of discretion is reposed in the issuing authority, unshaped by any enumerative or exhaustive list of factors.

[75] It is familiar ground that persons involved in the collection and report of news, more particularly the activities of such persons in collecting and reporting

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news, are afforded constitutional protection under section 2(b) of the *Charter*. As a result, for example, when a search warrant is sought and issued for a media outlet, the freedom afforded by section 2(b) provides a backdrop against which the reasonableness of any search conducted may be evaluated. It requires careful consideration of whether a warrant should issue, as well, if a warrant does issue, or has issued, whether conditions may be imposed on its execution to take cognizance of the constitutional freedoms involved. See, *Canadian Broadcasting Corporation v New Brunswick* (Attorney General), [1991] 3 S.C.R. 459, 67 C.C.C. (3d) 544, 556 per Cory J. See also, *Edmonton Journal v Alberta* (Attorney General), [1989] 2 S.C.R. 1326, 1339-40 per Cory J.

[76] The constitutional protection afforded freedom of expression by section 2(b) of the *Charter* does not import any new or additional requirements for the issuance of search warrants for execution at media premises. On the other hand, the Supreme Court of Canada has developed an enumerative but not exclusive list of factors relevant for consideration on an application to

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obtain a warrant to search the premises of a news organization, along with other factors that may be pertinent on judicial review of the issuance of a search warrant. In *Canadian Broadcasting Corporation v Lessard*, [1981] 3 S.C.R. 421, 444-5, Cory J. explained:

[46] The weighing and balancing which must be undertaken will vary with the facts presented on each application. Certainly in every case the requirements of s.487 of the Code must be met. However, this is not the end of the matter. Even after the statutory conditions have been met it may still be a difficult and complex process to determine whether a search warrant should be issued. For example, a greater degree of privacy may be expected in a home than in commercial premises which may be subject to statutory regulation and inspection. At the same time, among commercial premises, the media are entitled to particularly careful consideration, both as to the issuance of a search warrant and as to the conditions that may be attached to a warrant to ensure that any disruption of the gathering and dissemination of news is limited as much as possible. The media are entitled to this special consideration because of the importance of their role in a democratic society.

[47] In the companion appeal *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, I attempted to summarize the factors that must be

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taken into account in the balancing process in determining whether a search warrant should be issued. They are as follows (at p.481):

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,

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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 implementation, so that the media organization will not be unduly impeded in the publishing or dissemination of the news.

8) If, subsequent to the issuing of a search warrant, it comes to light the authorities failed to disclose pertinent information that could well have affected the decision to issue the warrant, this may result in a finding that the warrant was invalid.

9) Similarly, if the search itself is unreasonably conducted, this may render the search invalid.

See also, *Canadian Broadcasting Corp. v New Brunswick* (Attorney General), above, at 560-1 C.C.C. per Cory J.

[77] In *R v Dunphy*, [2006] OJ No. 850, the prosecutor applied for an order requiring a newspaper reporter to produce his notes of interviews with one Gravelle, a person suspected of superintendence of a criminal organization with some connection to the murders of a criminal lawyer and her husband. Gravelle's brother was charged with the murders and it was reasonable to conclude that the person interviewed had some relevant information about those responsible for the killings.

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[78] In dismissing the prosecutor's application, Glithero J. summoned in aid the principles developed in *Canadian Broadcasting Corp. v New Brunswick* (Attorney General) and *Canadian Broadcasting Corp. v Lessard*, both above.

[79] The investigative procedures authorized by a search warrant or production order are invoked by police agencies, with or without prosecutorial advice and assistance, to obtain *real evidence*, things including documents, not testimony. Where the statutory conditions to the issuance of the warrant or order have been met, the justice or judge must consider *all the circumstances* in determining whether to exercise his or her discretion to issue the warrant or grant the production order. Among the circumstances that fall to be considered where the premises to be searched or the person or organization ordered to produce documents is a media outlet or journalist are the availability of alternate sources from which the information may reasonably be obtained, and whether what is sought has already been disseminated by the media or journalist affected.

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[80] As it seems to me, a reasonable case may be made for the application of similar considerations where the process invoked is a *subpoena duces tecum*, at the very least where its principal purpose seems to be to obtain things *not* testimony. After all, like sections 487(1) and 487.012(1), section 698(1) is dressed in discretionary language.

D. Discussion

1. Introduction

[81] What remains is an application of these governing principles to the *subpoena duces tecum* issued to compel the attendance of Derek Finkle and his much sought materials.

2. The First Subpoena: October 17, 2006

[82] At the risk of understatement, the procedure followed to obtain the *subpoena duces tecum* on October 17, 2006 was perfunctory. Detective Wilkinson provided a clerk in the Crown Attorney's office with the name of the proposed witness and a description of the materials the prosecution wanted Derek Finkle to bring

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with him when he responded to the subpoena as required by its terms.

[83] The clerk in the Crown Attorney's office conveyed this information incorporated on a subpoena in Form 16 to a clerk of the Superior Court of Justice who, without information or inquiry, signed and issued the subpoena. No questions asked. No information provided.

[84] The presumption of regularity that carried the day in *R v Young* (1999), 138 C.C.C. (3d) 184 (Ont. C.A.) provides no shelter here. That presumption is rebuttable. Here, the affidavit of Detective Wilkinson, as well his cross-examination on the return of the application, plainly establishes that there was nothing provided to the issuing authority upon which the clerk could conclude that the witness to be subpoenaed, Derek Finkle, was likely to give material evidence at Robert Baltovich's second degree murder trial. In the result, the subpoena of October 17, 2006 was issued without jurisdiction. As a consequence, that subpoena is quashed.

3. The Second Subpoena: April 30, 2007

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[85] The procedure followed to obtain the second *subpoena duces tecum* issued on April 30, 2007 included an appearance by Detective Wilkinson before the clerk of the Superior Court of Justice who issued the subpoena. The officer told the clerk that the proposed witness, Derek Finkle, had written a book about the case in which his attendance as a witness was being sought. Detective Wilkinson said that he believed that:

There are pertinent statements in the book attributable to Mr. Baltovich and others and that Mr. Finkle's knowledge of these statements appears to be relevant and required for his retrial.

According to the officer, the clerk seemed to recognize that the proposed witness was a journalist.

[86] Detective Wilkinson did *not* tell the clerk whether he or other officers had interviewed any of the persons described in *No Claim To Mercy* about what they told Derek Finkle. Nor did he indicate to the clerk that as a journalist, Mr. Finkle was entitled to have the clerk consider whether the subpoena should be issued because of the influence of the constitutional protection afforded freedom of the press in section 2(b) of the *Charter*.

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[87] In practical terms, the subpoena was issued on the basis that

i. Derek Finkle wrote a book about the case in which the prosecution seeks to subpoena him as a witness;

ii. the book refers to *statements* made or *information* given by various people, including Robert Baltovich; and

iii. since Derek Finkle knows about these statements and information, he is likely to give material evidence for the prosecution at Robert Baltovich's trial.

[88] Under Part XXII of the *Criminal Code*, a subpoena is issued to compel the attendance of a witness whom a party to the proceedings wishes to call to testify on behalf of that party. A subpoena, literally translated "under penalty", is a command to the person named to appear at a time and place specified to give *testimony* about a matter in issue between the parties to a proceeding. A *subpoena duces tecum* requires the witness to bring with him or her things like books, papers and other things connected with his or her *testimony*. In the

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usual course, a *subpoena duces tecum* is not used to obtain these other things, which are often used as *aides memoires* for production at trial.

[89] The *Criminal Code*, more generally the adjectival law, authorizes various procedures and investigative techniques to enable investigators to obtain evidence relevant to issues raised in a criminal prosecution. A search warrant under section 487(1). A telewarrant under section 487.1 A production order under section 487.012. Each requires an information on oath and in writing (at least where the means of telecommunication is used to produce as a writing).

[90] In each of conventional search warrants, telewarrants and production orders, where a media outlet or journalist is to be the subject of the warrant or order, the supportive materials 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.

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[91] It is uncontroversial that, where alternative methods of obtaining evidence are available, the party who seeks the evidence may generally choose the means to achieve that end. At the same time, however, courts should be chary of manifest circumventions of traditional methods of acquiring evidence, especially those that avoid adherence to established constitutional principle. A *subpoena duces tecum* ought not to be used to avoid the scrutiny associated with other methods of acquisition. See, by comparison, *R v French* (1977), 37 C.C.C. (2d) 201, 213-4 (Ont. C.A.) per MacKinnon J.A., affirmed on other grounds (1979), 47 C.C.C. (2d) 411 (S.C.C.).

[92] The issuing authority was told nothing about the relevance of alternative sources of the information sought by subpoena, much less about any efforts made to obtain the information from alternative sources. While not dispositive of issuance, such disclosure would inform the exercise of the statutory discretion of the issuer. The issuer was aware that the information sought was already in the public domain.

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[93] The standard that the issuing authority was to apply was *not* whether Derek Finkle *could* give material evidence. And it was *not* whether Derek Finkle had documents that *could* be of assistance to the prosecution at Robert Baltovich's trial. The test that the issuing authority was bound to apply on the basis of Detective Wilkinson's say so, was whether Derek Finkle was *likely* to give material evidence at Robert Baltovich's trial. The material presented must establish this probability, not a mere possibility.

[94] A further concern is the near breathtaking sweep of the materials to be brought along. No effort seems to have been made to limit the carry-on. A similar description proved fatal in *Ehman v Saskatchewan* (Attorney General), [1994] SJ No. 202.

[95] The subpoena issued on April 30, 2007 amounts to a fishing expedition under a colourable licence issued without authority. Fishing season is closed. The subpoena is quashed.

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CERTIFIED CORRECT:

LUANNE DUBE, C.S.R.
OFFICIAL COURT REPORTER
SUPERIOR COURT OF JUSTICE