

CANADA / JUDGMENT

Phillips v. Vancouver Sun

2002 BCSC 1169

COURT

Supreme Court of British Columbia

DECIDED

7 August 2002

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

Source record

2002BCSC1169

Citation: Phillips v. The Vancouver Sun et al

Date: 20020807
2002 BCSC 1169Docket: 20033
Registry: Vancouver
IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF AN APPLICATION FOR RELIEF IN THE NATURE OF
CERTIORARI AND UNDER S. 24(1) OF THE CANADIAN CHARTER OF RIGHTS AND
FREEDOMSBETWEEN: MURRAY PHILLIPS
APPLICANTAND: THE VANCOUVER SUN, THE ATTORNEY GENERAL FOR BRITISH COLUMBIA,
VANCOUVER CITY POLICE DEPARTMENT, HIS HONOUR JUDGE DAVID SMYTH
RESPONDENTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE PARRETT

[IN CHAMBERS]

Counsel for the applicant:

J.W. Williams

Counsel for the Attorney General:

G. Webber

Counsel for the Vancouver Sun:

R.S. Anderson

Counsel for the Vancouver Police Department:

K.W. Ball

Dates and Place of Hearing:

January 23 and 25, 2002

Vancouver, BC

INTRODUCTION

- [1] The applicant, Murray Phillips, seeks, by way of certiorari, to remove into this court and quash a decision of a judge of the Provincial Court of British Columbia rendered on January 11, 2000.
- [2] In that decision the learned Provincial Court Judge ordered the edited search warrant and supporting materials, which had led to a search of office premises utilized by Murray Phillips on May 28, 1999, disclosed to the Vancouver Sun.

BACKGROUND

- [3] The applicant, Murray Phillips, is a Detective Constable with the Vancouver City Police and, at the material time, held a position in that police department's robbery squad.
- [4] In May of 1999, as part of an investigation of an offence of breach of trust by a public official (s. 122 of the Criminal Code), the investigators sought and obtained a search warrant to search the office premises utilized by Murray Phillips at the Vancouver Police Department.
- [5] In support of the application for a search warrant, Patrick Fogarty swore a lengthy information to obtain a search warrant on May 27, 1999. The search warrant was issued and on the same day an order was made sealing the information until September 1, 1999.
- [6] On September 29, 2000, a second order was made sealing the information and restricting access to it indefinitely.
- [7] The warrant was executed on May 28, 1999 and a number of items were seized. The evidence developed was submitted to and evaluated by Crown counsel and a decision made that no prosecution would be initiated and no charges laid.
- [8] The Vancouver Sun applied to the Provincial Court for an order terminating the sealing order which prohibited access to and disclosure of information relating to the search warrant. The hearing of the application began on November 21, 2001, and proceeded on November 26, December 5 and December 18. The learned Provincial Court Judge's reasons were released on January 11, 2002.

- [9] Murray Phillips was represented by counsel at the hearing, as was the Attorney General of British Columbia and the Vancouver Police Department. After the initial appearance, counsel for the Crown and the Vancouver Police Department edited the sealed material for the purpose of dealing with informant and investigational issues.
- [10] At the conclusion of the editing process, these parties advised the Provincial Court Judge that the police investigation was complete and there was no concern that vacating the sealing order would undermine the investigation.
- [11] As a result of that as well as the editing of information related to informant privilege and the deletion of wire tap evidence contained within the information to obtain, the Crown and the Police Department advised the court that they were not opposed to its release in edited form.
- [12] Cst. Phillips has maintained throughout his opposition to the materials release.
- [13] During the course of the hearing in Provincial Court, edited copies of the Information to Obtain were released to counsel and they were permitted to review them with a member of the applicant's editorial board on an undertaking of confidentiality.
- [14] On January 11, 2002, reasons were released in the court below. After delivery of the reasons, Cst. Phillips asked the Provincial Court Judge to issue a stay of his order to permit him to prepare and file an application for certiorari relief in this court. A stay of one week was ordered and on January 14, 2002 the present petition was filed seeking certiorari and relief under s. 24(1) of the Canadian Charter of Rights and Freedoms.
- [15] On January 18, 2001, Dohm, A.C.J.S.C., in this proceeding ordered a stay of the order of the Provincial Court pending a determination of the present application.

ISSUES

- [16] The applicant, Cst. Phillips, on the present application raises two issues -
- 1) Firstly, he submits that given the language of s. 487.3(4) of the Criminal Code and the circumstances of this case, the Provincial Court was without jurisdiction to hear the application and to make the order it did.
 - 2) Secondly, in the event the Provincial Court had jurisdiction to entertain the application, the court below exercised its discretion in a manner which unfairly impinged on rights of the applicant guaranteed by the Canadian Charter of Rights and Freedoms.
- [17] The second of these two issues raises directly the issue of the scope of freedom of the press mentioned by s. 2(b) of the Charter and what the applicant asserts as the individual's right to privacy which he submits are inherently guaranteed by sections 7 and 8 of the Charter.

THE REASONS IN THE COURT BELOW

[18] The learned Provincial Court Judge characterized the issue on the application before him in this way:

As the application has evolved, then, the controversy is now between the Vancouver Sun and Cst. Phillips, and the problem is whether the principle of openness by which judicial proceedings are generally governed should yield to the privacy interests Cst. Phillips claims.

[19] The learned Provincial Court Judge began his consideration of the issue by stating what he considered to be the general rule. In para. 6 of his reasons he observes:

6 That openness is the general rule was made clear by the Supreme Court of Canada in Attorney-General of Nova Scotia et al. v. MacIntyre (1982), 132 D.L.R. (3d) 385, a case that was concerned with the right of the public to inspect a search warrant and the information upon which it was based. Dickson, J. (as he then was) delivered the majority judgment, in which he said this(at pp. 402 and 403):

Parliament has seen fit, and properly so, considering the importance of the derogation [sic] from fundamental common law rights, to involve the judiciary in the issuance of search warrants and the disposition of the property seized, if any. I find it difficult to accept the view that a judicial act performed during a trial is open to public scrutiny but a judicial act performed at the pre-trial stage remains shrouded in secrecy.

...

At every stage the rule should be one of public accessibility and concomitant judicial accountability; all with a view to ensuring there is no abuse in the issue of search warrants, that once issued they are executed according to law, and finally that any evidence seized is dealt with according to law. A decision by the Crown not to prosecute, notwithstanding the finding of evidence appearing to establish the commission of a crime may, in some circumstances, raise issues of public importance.

In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent.

...

In my view that consideration overrides the public access interest in those cases where a search is made and nothing is found. The public right to know must yield to the protection of the innocent. If the warrant is executed and something is seized, other considerations come to bear.

[20] The decision moved immediately into a consideration of where the onus lay, concluding that the burden of proof lay with the party seeking to maintain the sealing order observing that:

This is consistent with the principle of openness.

He then goes on to conclude, in the alternative, that if he is incorrect on the first proposition then, in the circumstances of this case, the burden has shifted to Cst. Phillips because the original basis for the sealing order no longer exists.

[21] The learned Provincial Court Judge then returns to his consideration of MacIntyre at para. 12:

MacIntyre spoke of the protection of the innocent as a consideration to which, in the search-warrant context, the principle of openness in judicial proceedings might sometimes be subordinated. Dickson, J. differentiated between cases in which things were seized on the execution of a warrant and those in which they were not, with the public entitled to inspect the warrant and its supporting materials in the former case, but not in the latter. Counsel for The Vancouver Sun argued that for the purposes of Dickson, J.'s reasons for judgment, "innocent" means a person whose premises were searched, but where no evidence was seized". I do not agree. In my view when Dickson, J. spoke of the "innocent" he assigned no special meaning to the word and simply meant those who are entitled to the presumption of innocence. Thus, protection of the innocent is a factor in any case of weighing disclosure against suppression, not only one in which a warrant has been executed and nothing seized. Where a seizure has been made, all other things being equal, protection of the innocent will argue less persuasively for suppression than will openness for disclosure. Cst. Phillips is entitled to the presumption of innocence and I must take account of his interests as an innocent person.

Of course, Attorney-General of Nova Scotia et al. v. MacIntyre is a decision that predates The Canadian Charter of Rights and Freedoms, but post-Charter decisions do not derogate from the principle of openness. Dagenais v. CBC, [1994] S.C.R. 835, CBC v. New Brunswick (A.G.), [1996] 3 S.C.R. 480, HMQ v. Mentuck, [2001] S.C.J. No. 73, and HMQ v. O.N.E., [2001] S.C.J. No. 74 are all decisions in which the Supreme Court of Canada has made this clear. It is true that these cases involve publication bans on trial and post-trial proceedings, and not the pre-trial suppression of information concerning search warrants, but it is clear that the view of the Court is still as expressed by Dickson, J. in the passage from MacIntyre quoted earlier in these reasons.

[22] The reasons then, commencing at para. 17, move on into a consideration of the privacy interests asserted by Cst. Phillips:

In Cst. Phillips' formulation, this application requires me to determine whether his general privacy interests subsumed under s. 7 of the Charter should be subordinated in this instance to the applicant's s. 2(b) rights.

I am satisfied, as I said earlier, that Cst. Phillips is an "innocent" person for the purpose of applying the principles in MacIntyre, notwithstanding the seizure of things pursuant to the warrant. In determining whether it is appropriate that I order edited disclosure I must take that status into account. I must also take into account that evidence was seized, and that Cst. Phillips has not been charged.

While I would not be comfortable saying that Cst. Phillips has no privacy interests relevant to this discussion, as the applicant submitted in argument, I think, that his privacy interest in the results of the search and the basis upon which it was made must carry little weight. The search concerned an allegation that he had committed a breach of trust as an officer of the Vancouver Police Department. It was conducted at his place of work. I have been given a copy of the report made to a justice following the search and the things seized consisted almost entirely of files, notes and other information and things gathered or used in the course of his employment. This was not a search delving into Cst. Phillips' private affairs, but rather the performance of his public duty, and the things seized in the search appear to relate directly to his performance of that duty.

(emphasis added)

[23] The analysis then concludes in the following passage:

I agree with The Vancouver Sun that the investigation of Cst. Phillips and the judicial proceedings taken in respect of that investigation are matters of public interest. So far as possible they should be open to public examination. That is what the principle of openness calls for. It can scarcely be over-stressed that no charges have been laid against Cst. Phillips, but in my view the privacy interest he has shown in this application should not be preferred to the s. 2(b) rights asserted by the applicant, and are really of the kind Dickson, J. had in mind when he wrote (at p. 402 of MacIntyre) that:

"As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings."

I order the disclosure of the edited warrant and its supporting materials.

DISCUSSION

The Jurisdictional Question

[24] The jurisdictional issue in the present case emerges from the specific language of s. 487.3(4) of the Criminal Code and the somewhat unusual features of this case. The relevant section of the Criminal Code reads:

- (4) An application to terminate the order or vary any of its terms and conditions may be made to the justice or judge who made the order or a judge of the court before which any proceedings arising out of the investigation in relation to which the warrant was obtained may be held. 1997, c. 23, s. 14; 1997, c. 39, s. 1.

[25] When the original search warrant was issued on May 27, 1999, an order was made at the same time sealing the Information to Obtain until September 1, 1999. The authority for such an order is found in s. 487.3(1):

487.3(1) A judge or justice may, on application made at the time of issuing a warrant under this or any other Act of Parliament or of granting an authorization to enter a dwelling-house under section 529 or an authorization under section 529.4 or at any time thereafter, make an order prohibiting access to and the disclosure of any information relating to the warrant or authorization on the ground that

- (a) the ends of justice would be subverted by the disclosure for one of the reasons referred to in subsection (2) or the information might be used for an improper purpose; and
- (b) the ground referred to in paragraph (a) outweighs in importance the access to the information.

[26] The grounds for exercising this power are found, in turn, in s. 487.3(2):

(2) For the purposes of paragraph (1)(a), an order may be made under subsection (1) on the ground that the ends of justice would be subverted by the disclosure

(a) if disclosure of the information would

(i) compromise the identity of a confidential informant,

(ii) compromise the nature and extent of an ongoing investigation

(iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used, or

(iv) prejudice the interests of an innocent person; and

(b) for any other sufficient reason

[27] Although nothing turns on it in the present application the initial sealing order granted by the Justice of the Peace expired on September 1, 1999. It was not renewed for a period of time until a Justice of the Peace issued a further sealing order on September 29, 2000. This second order was stipulated to extend "until further order of the court".

[28] Details of this specific sequence and of the subsequent order were not placed before this court and, as a result, the interesting questions which may have emerged from this sequence of events are not before me.

[29] By the time the Vancouver Sun filed its application in Provincial Court on November 19, 2001, the decision not to proceed with charges against the applicant had been made. At this point there could be little doubt that there would be no "proceedings arising out of the investigation" in so far as the applicant was concerned.

- [30] In essence, the applicant submits that, in these circumstances, an application under s. 487.3(4) had to be brought either before the Justice of the Peace who had issued the order or before this court on an application falling within the inherent jurisdiction of the court. The submission is formulated around the language of s. 487.3(4) and the certainty that there are no proceedings that "may" be held in the Provincial Court.
- [31] The learned Provincial Court Judge ruled that the institution of further proceedings was not a necessary pre-condition to him assuming jurisdiction and that as a judge of the court before whom proceedings "may" be initiated he had jurisdiction to hear the application.
- [32] Counsel for the Vancouver Sun supports this conclusion submitting that the language of s. 487.3(4) does not require the commencement of proceedings but only that the application be brought to a judge of the court where proceedings may be held.
- [33] The language of s. 487.3(4) appears calculated, in my view, to allow applications to be made during the time between the issuance of a search warrant and the initiation of proceedings rather than in those relatively rare applications brought where a decision has been made not to proceed with charges.
- [34] While it may seem to be an anomaly in the legislation, absent a specific legislative authorization the jurisdiction does not exist in a court which has only statutory jurisdiction.
- [35] In the present case there was no uncertainty, the decision had been made and no proceedings would be initiated, nor have they been. In these circumstances the options available under s. 487.3(4) were reduced to bringing the application before the "justice or judge" who made the order or to a court of inherent jurisdiction. I am satisfied that there was no jurisdiction in the court below to entertain the application in the circumstances of this case.

THE SCOPE OF REVIEW ON CERTIORARI

- [36] Historically, in English practice, a writ of certiorari was issued to command a lower court to certify and return their record of proceedings to enable a judicial review of their actions and decision.
- [37] The scope of review by way of certiorari is a limited one.
- [38] In *Dagenais v. C.B.C.*, [1994] 3 S.C.R. 835, the Supreme Court of Canada reviewed in some detail the use of certiorari as an avenue of appeal of orders involving the imposition of publication bans. Lamer, C.J.C., writes at p. 864:

Provincial superior courts have jurisdiction to hear applications for the extraordinary remedy of certiorari against provincial court judges for excesses of jurisdiction and for errors of law on the face of the record. As I will explain in Part C of these reasons, the common law rule governing the issuance of orders banning publication must be consistent with the principles of the Charter. Since the common law rule does not authorize publication bans that limit Charter rights in an

unjustifiable manner, an order implementing such a publication ban is an error of law on the face of the record. Therefore, if a publication ban order is made by a provincial court judge, the media can apply to the superior court for certiorari and argue that the ban is not authorized by the common law rule. If this is the case, the ban will then constitute an error of law on the face of the record. By virtue of s. 784(1) of the Criminal Code, an appeal lies to the Court of Appeal from a decision granting or refusing the relief sought in proceedings by way of certiorari.

This avenue uses established procedures and is not inconsistent with previous Supreme Court of Canada case law. In addition, the certiorari avenue provides for appeals (through s. 784(1) of the Criminal Code). It therefore avoids the undesirable situations of: (a) important rights being left without the protection of review and appeal; and (b) an increased number of leave applications being made to this Court and cases needing to be heard by this Court.

[39] In *Dagenais* (supra) at p. 857, Lamer, C.J.C., dealt with the question of possible avenues for appeal or review available to third parties where publication bans are issued in criminal proceedings. Counsel for the Vancouver Sun places substantial importance both in his written and oral submissions on the use of the expression "criminal proceedings" rather than "criminal trials".

[40] The passage from the judgment is important. It reads:

In cases involving publication bans issued in the context of criminal proceedings, the Crown and the accused have established avenues to follow when seeking or challenging a ban. These avenues are consistent with an informed by the common law principle against interlocutory appeals in criminal matters (see McIntyre J.'s reasons in *Mills v. The Queen*, [1986] 1 S.C.R. 863, at p. 959, and *R. v. Meltzer*, [1989] 1 S.C.R. 1764, at p. 1774). To seek a ban under a judge's common law or legislated discretionary authority, the Crown and/or the accused should ask for a ban pursuant to that authority. This request should be made to the trial judge (if one has been appointed) or to a judge in the court at the level the case will be heard (if the level of court can be established definitively by reference to statutory provisions such as ss. 468, 469, 553, 555, 798 of the Criminal Code, R.S.C. 1985, c. C-46, and s. 5 of the Young Offenders Act, R.S.C., 1985, c. Y-1). If the level of court has not been established and cannot be established definitively by reference to statutory provisions, then the request should be made to a superior court judge (i.e., it should be made to the highest court that could hear the case, in order to avoid later having a superior court judge bound by an order made by a provincial court judge). To seek or challenge a ban on appeal, the Crown and the accused should follow the regular avenues of appeal available to them through the Criminal Code (Parts XXI and XXVI).

(emphasis added)

[41] Chief Justice Lamer does use the general expression "criminal proceedings", he does so in the context of a passage in which he refers to the Crown and the accused three times. An accused is a person who stands charged with a criminal offence. Mr. Anderson, with respect, draws more importance from the use of the expression than is justifiable given the context.

[42] The applicant's submission in the present case is that certiorari is available to him because even if the court below acted within its jurisdiction the exercise of that legislated discretion must be done in accordance with Charter principles and must not impinge on Charter rights in an unjustifiable manner. The applicant submits that the process is analogous to that described in *Dagenais*, and where Charter principles are infringed it constitutes an error of law on the face of the record.

[43] In *Dagenais*, the court went on to fashion a remedy by expanding the application of s. 24(1) of the Charter. At p. 866:

However, it is open to this Court to enlarge the remedial powers of certiorari and I do so now for limited circumstances. Given that the common law rule authorizing publication bans must be consistent with Charter principles, I am of the view that the remedies available where a judge errs in applying this rule should be consistent with the remedial powers under the Charter. Therefore, the remedial powers of certiorari should be expanded to include the remedies that are available through s. 24(1) of the Charter. It should be emphatically noted that it is not necessary in this case for this Court to decide whether or not the Charter applies directly to court orders. I am simply saying that when a judge exceeds his authority under the common law rule governing publication bans, then the remedies available through a certiorari challenge to the judge's action should be the same as the remedies that would be available under the Charter.

(emphasis in original)

[44] Chief Justice Lamer then goes on to explain the rationale behind this expansion by quoting from the reasons in *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at p. 196:

When a person can demonstrate that one of his Charter rights has been infringed, access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the Charter which surely is to allow courts to fashion remedies when constitutional infringements occur.

[45] In the present case I have already found that the court below exceeded its jurisdiction in the circumstances. A further difficulty emerges from the reasons of the learned Provincial Court Judge. In the first sentence of his reasons in the Court below, the nature of the application is framed in these words:

1 This is an application by The Vancouver Sun for the termination of an order prohibiting access to and the disclosure of any information relating to a search warrant.

The reasons conclude eight pages later with the following order:

21 I order the disclosure of the edited warrant and its supporting materials.

[46] While it seems clear in the reasons that the learned Provincial Court Judge is considering the termination of the sealing order, the final decision and order expressed in para. 21 is, at least, ambiguous. The decision proceeds on the basis that the issue had been narrowed as a result of the editing of the sealed material. The following extracts of the reasons are material to this issue:

4 Following the parties' initial appearance on the application, counsel for the Crown and the Vancouver Police Department edited the sealed material. They do not oppose disclosure of the material as edited, but Cst. Phillips is against disclosure of any of it, edited or not.

5 It had been the position of The Vancouver Sun during argument that the edited warrant and supporting information should be disclosed forthwith, and that a hearing should then be held to determine whether the deleted parts should also be disclosed, but counsel for The Vancouver Sun has since informed opposing counsel and me that his client now seeks only disclosure of the edited material. As the application has evolved, then, the controversy is now between The Vancouver Sun and Cst. Phillips, and the problem is whether the principle of openness by which judicial proceedings are generally governed should yield to the privacy interests Cst. Phillips claims.

...

7 Is it for The Vancouver Sun, the applicant for termination of the sealing order, to show that there is no longer any need for it, or is the onus upon Cst. Phillips to show that the order should be continued?

8 In my view, the onus should be upon the party seeking the continuance of the sealing order, just as it is upon the party seeking a sealing order in the first place. This is consistent with the principle of openness. It does not require that the Court scrutinize the propriety of the original order, which is presumed to have been rightly made, because the question is not whether a proper basis for making a sealing order ever existed, but whether such a basis still exists. To put the onus on the party seeking access to the documents effectively requires that party to prove a negative, that justification for a sealing order does not exist, and virtually turns the presumption of openness into a presumption of secrecy.

...

10 If I am wrong in my view as to where the onus of proof lies as a general rule, I hold that it has shifted to Cst. Phillips in the circumstances of this case. The application for the sealing order was supported by the affidavit of one Patrick Fogarty, who is described as a "peace officer." In it he asserted that the ends of justice would be subverted by disclosure of information relating to the warrant because disclosure of it would "compromise the nature and extent of an ongoing investigation," and "prejudice the interests of an innocent person." He went on to depose:

The grounds in support of this application are as follows:

That this investigation continues and [sic] which requires further follow up. The release of this information would jeopardize and contaminate future witnesses and evidence and therefore compromise the ongoing investigation.

11 Neither the sealing orders nor the affidavits upon which they were based advert either directly or by implication to interests of Cst. Phillips. They appear to have been based upon these other concerns. This and the fact that the Crown does not oppose disclosure of an edited version of the material seem to me to show that the justifications for the order have substantially abated and that there is no reason to continue it insofar as it concerns the edited material. If there is some other justification for a sealing order, then in my opinion Cst. Phillips must show it.

...

15 Counsel for Cst. Phillips has urged upon me as binding and essentially determinative the decision of Humphries, J. in *R. v. Schmidt* [1996] B.C.J. No. 2341. Schmidt was a case involving applications for disclosure of the information to obtain a search warrant by persons who were charged following the execution of the warrant, but whose charges were later stayed. Humphries, J. declined to order disclosure and said (at p. 8):

Given the sealing order, access by a non-accused person to the Information to Obtain must also be discretionary. With respect to the exercise of that discretion, I am unable to distinguish the search warrant context from the wiretap context. Exactly the same concerns apply. It therefore follows that unless the non-accused person adduces some evidence to suggest that the authorization for the search was obtained unlawfully, the Information to Obtain must remain sealed.

There is no evidence before me on which I could conclude that the relevant search warrants here were obtained other than lawfully.

16 The sealing order in Schmidt, like the sealing order in this case, was made for reasons of informant safety and in order to ensure the efficacy of the investigation. While the investigation may have ended when the matter came before Humphries, J., there was nothing to suggest that informant safety no longer justified the sealing order, and disclosure was opposed by the Crown. In the matter before me, the Crown has met its concerns, and those upon which the sealing order was apparently based, through editing. Circumstances have materially changed since the sealing order was made, and the Crown does not oppose edited disclosure. This, I think, is a substantial basis for distinguishing Schmidt from this case. I would also say, however, that Humphries, J. seems to have applied a different test for disclosure than did Dohm, A.C.J. in *Clark*. If the decision of Humphrey, J. [sic] and that of Dohm, A.C.J. are not legally reconcilable, I would prefer the Associate Chief Justice's more recent decision.

...

20 I agree with The Vancouver Sun that the investigation of Cst. Phillips and the judicial proceedings taken in respect of that investigation are matters of public interest. So far as possible they should be open to public examination. That is what the principle of openness calls for. It can

scarcely be over-stressed that no charges have been laid against Cst. Phillips, but in my view the privacy interest he has shown in this application should not be preferred to the s. 2(b) rights asserted by the applicant, and are really of the kind Dickson, J. had in mind when he wrote (at p. 402 of MacIntyre) that: "As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings."

21 I order the disclosure of the edited warrant and its supporting materials.

- [47] In paras. 7 and 8 of his reasons, the learned Provincial Court Judge is clearly focused on the issue of terminating the sealing order and whether a basis for continuing it still exists. In paras. 10 and 11 he goes on to conclude that the "justifications for the [sealing] order have substantially abated and that there is no reason to continue it insofar as it concerns the edited material". He then goes on to find that the onus is on Cst. Phillips to show some other justification.
- [48] In para. 16 he finds that "Circumstances have materially changed . . . and the Crown does not oppose edited disclosure".
- [49] What appears to have fallen out of consideration is the fact that if the decision in MacIntyre stands for the proposition that after execution, where items are seized, the principle of openness of court proceedings will generally prevail and the search warrant and its supporting material will be disclosed, then there is no basis for editing the material, of if there is, the editing must take the form of a variation of the sealing order or the original material must inevitably be disclosed.
- [50] I am completely satisfied that the Crown and the Vancouver Police Department remained opposed to the disclosure of the unedited material. It is not correct to conclude that ". . . the justification for the [sealing] order have substantially abated . . ." when the matters giving rise to those justifications have been removed by editing.
- [51] Finally, as I stated earlier, the language of the order in para. 21 is ambiguous. On its face it directs disclosure of the "edited warrant and its supporting materials". It does not direct disclosure of only the edited version of the Information to Obtain and it does not clearly deal with whether or not the sealing order is terminated or whether it is varied in order to disclose the edited versions.
- [52] Clarity and precision is needed in dealing with such matters and, regrettably, its absence in the present case leads to uncertainty as to the order given in the court below.
- [53] These difficulties, I find, constitute errors on the face of the record of the court below within the meaning of the relevant authorities.

The Substantive Arguments

[54] It is useful to begin this portion of the analysis with a consideration of s. 2(b) of the Canadian Charter of Rights and Freedoms. In addressing s. 2(b) it is unwise, in my view, to resort to the shorthand version of the right often characterized as "freedom of the press" for that, in my respectful view, is neither what was intended in s. 2(b) nor the natural result of the language used:

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (C) freedom of peaceful assembly; and
- (d) freedom of association.

[55] The meaning of rights and freedoms guaranteed by the Charter is to be found by examining the right or freedom " . . . in the light of the interests it was meant to protect" *R. v. Big M Drug Mart Ltd* (1985), 58 N.R. 81 at 112. Dickson, C.J.C., went on in this decision to explain that:

. . . the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated.

[56] With this purposive approach in mind it must be recognized that the expression "freedom of the press and other media of communication" is found not as a separate freedom or right guaranteed by the Charter but within the broader category which begins s. 2(b) namely "freedom of thought, belief, opinion, and expression . . .". Of even more importance are the words that introduce s. 2 itself and the other items listed in s. 2.

[57] The introductory words are "Everyone has the following fundamental freedoms". The list which follows these words enumerates fundamental freedoms enjoyed by every citizen of this country. It follows from this that freedom of the press is not a separate and distinct right granted to the media but a means by which each citizen can achieve the constitutionally enshrined "freedom of thought, belief, opinion and expression . . .". In other words, "freedom of the press" as it is set out in s. 2(b) is the means by which the average citizen exercises his right to be informed, and may thus achieve the first four freedoms listed in s. 2(b).

[58] Freedom of the press, in this light, does not extend to the press a greater right than that extended to any citizen, for it is the right of the citizen on which it is founded. Ironically, this was recognized by Mr. MacIntyre in 1982, and acknowledged indirectly in the majority decision at p. 397:

Although Mr. MacIntyre happens to be a journalist employed by the C.B.C. he has throughout taken the position that his standing is no higher than that of any member of the general public. He claims no special status as a journalist.

[59] The importance of the press and other media has long been recognized, but freedom of the press, like all such freedoms, does not exist without limits. In *Manitoba (Attorney-General) v. Groupe Quebecor Inc.* (1987), 45 D.L.R. (4th) 80 at p. 94, Twaddle, J.A. expressed it in these words:

The second ground of appeal concerns the freedom of the press. The appellants argued that it was unnecessary to limit the freedom in order to ensure a fair trial for the accused. That argument assumes that the freedom of the press is absolute save for such reasonable limits as can be justified. I do not accept that assumption.

The press and other media of communication are vital to a free and democratic society. An informed public is a highly desirable element of a democracy. For the public to be informed there must be a means by which information can be communicated freely. The press and other media are the only means now available by which such communication can be made effectively.

Freedom is not, however, absolute. It is circumscribed, in its enjoyment, by the rights of others. This restriction is not a limit prescribed by law, but a limit inherent to the concept of democratic freedom.

This concept of freedom does not originate with me. It is a concept generally understood by students of the law and recognized over many years in judgments of the courts.

[60] The decision then proceeds to examine a series of authorities dating back to 1936. The analysis is one which is vital to remember, for the freedom we enjoy as members of a democratic society exists because of the respect each member of that society holds for the rights of others. In times when the focus seems to be on individual rights it is necessary to acknowledge that the coin which pays for these rights is the recognition that the rights of others limits the way in which we may exercise our own:

A convenient point at which to begin my review of authority is the enigmatic statement of Lord Wright M.R. made in the course of delivering an opinion of the Judicial Committee of the Privy Council in *James v. Commonwealth of Australia*, [1936] A.C. 578. He stated, at p. 627, "Free speech does not mean free speech;". He clarified his meaning, thus: "[I]t means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth; it means freedom governed by law . . .".

The inherent limitation on the freedom of speech, referred to by Lord Wright as "freedom governed by law", was recognized by the Supreme Court of Canada in *Reference re Alberta Legislation*, [1938] 2 D.L.R. 81 at p. 107, [1938] S.C.R. 100 at p. 133, in which Duff C.J.C. said:

The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in *James v. Commonwealth of Australia*, [1936] A.C. 578 at p. 627, "freedom governed by law".

The concept was further recognized by Rinfret C.J.C. in *Boucher v. The King* (1950), 99 C.C.C. 1, [1951] 2 D.L.R. 369, [1951] S.C.R. 265. The case involved the question of what intent was necessary as an essential ingredient of sedition. The members of the court were in agreement that there had been misdirection in the charge to the jury, but were of different views as to whether the consequence should be an acquittal or a new trial. Rinfret C.J.C. shared the minority view that there should be a new trial. The statement to which I refer was not made, however, with reference to his dissenting view, but obiter on the larger question of the inherent limits to free speech. He said (at pp. 11-2 C.C.C., pp. 378-9 D.L.R., p. 277 S.C.R.):

I would not like to leave this appeal, however, without stating that to interpret freedom as licence is a dangerous fallacy. . . . It should not be understood from this Court . . . that persons subject to Canadian jurisdiction "can insist on their alleged unrestricted right to say what they please and when they please, utterly irrespective of the evil results which are often inevitable". It might well be said in such a case, in the words of Milton, "Licence they mean when they cry liberty", or, as expressed by Mr. Edouard Herriot, "La liberté doit trouver sa limite dans l'autorité légale".

The concept that no right is absolute was recognized by this court in *R. v. Myran* (1973), 11 C.C.C. (2d) 271, 35 D.L.R. (3d) 473, [1973] 4 W.W.R. 512. The question before the court was whether rights conferred on treaty Indians with respect to hunting were unrestricted by the Wildlife Act, R.S.M. 1970, c. W140. Hall J.A., delivering the judgment of the court, said (at p. 274 C.C.C., p. 476 D.L.R., p. 515-6 W.W.R.):

In the present case the governing statute is the Wildlife Act, and in particular s. 46(1) thereof. Section 10(1), under which the accused were charged does not restrict the type of game, nor the time or method of hunting, but simply imposes a duty on every person of hunting with due regard for the safety of others. Does that duty reduce, detract or deprive Indians of the right to hunt for food on land to which they have a right of access? If one regards that right in absolute terms the answer is clearly in the affirmative; but is that the case? Surely, the right to hunt for food as conferred or bestowed by the agreement and affirmed by the statute cannot be so regarded. Inherent in the right is the quality of restraint, that is to say, that the right will be exercised reasonably. Section 10(1) is only a statutory expression of that concept, namely, that the right will be exercised with due regard for the safety of others, including Indians.

Later he stated (at p. 274-7 C.C.C., 476-7 D.L.R., p. 516 W.W.R.):

The Canadian Bill of Rights, 1960 (Can.), c. 44 [now R.S.C. 1970, App. III], confers many fundamental freedoms without specifically defining them; that does not mean that such freedoms can be asserted with impunity, but it does mean that such freedoms are subject to corresponding duties or restraints.

The first of those passages was quoted with approval by Dickson J. (now C.J.C.) in a judgment delivered by him for the Supreme Court of Canada confirming the decision of this court: sub. nom. *Myran v. The Queen* (1975), 23 C.C.C. (2d) 73, 58 D.L.R. (3d) 1, [1976] 2 S.C.R. 137, at pp. 76-7 C.C.C., pp. 4-5 D.L.R., p. 142 S.C.R.

Most recently, in *Re Fraser and Public Service Staff Relations Board* (1985), 23 D.L.R. (4th) 122, [1985] 2 S.C.R. 455, 19 C.R.R. 152, the Supreme Court of Canada dealt with the "freedom of speech" inherited from the United Kingdom by virtue of the preamble to the Constitution Act, 1867. As Dickson C.J.C., delivering the judgment of the court, pointed out, the case did not involve the freedom of expression enshrined by the Charter. The facts giving rise to the dispute in that case had happened before the Charter had been proclaimed. None the less, important statements concerning the inherent limits on "freedom of speech" are to be found in the judgment. Dickson C.J.C. said (at p. 128 D.L.R., p. 463 S.C.R.):

But it [freedom of speech] is not an absolute value. Probably no values are absolute. All important values must be qualified, and balanced against, other important, and often competing, values. This process of definition, qualification and balancing is as much required with respect to the value of "freedom of speech" as it is for other values.

Later, at pp. 131-2 D.L.R., p. 467 S.C.R., he said:

[I]t is equally obvious that free speech or expression is not an absolute, unqualified value. Other values must be weighed with it. Sometimes these other values supplement, and build on, the value of speech. But in other situations there is a collision. When that happens the value of speech may be cut back if the competing value is a powerful one. Thus, for example, we have laws dealing with libel and slander, sedition and blasphemy. We also have laws imposing restrictions on the press in the interests of, for example, ensuring a fair trial or protecting the privacy of minors or victims of sexual assault.

There is nothing in the Charter, or in the circumstances in which it was enacted, which, in my view, expands the freedom of speech (now called the "freedom of expression") from a freedom that is subject to the rights of others to a freedom that ignores them. Such a construction of the Charter would lead to the result that, instead of guaranteeing rights, the Charter would abrogate them.

[61] I don't for a moment minimize the importance of freedom of the press within the confines I have addressed, but I prefer to view the "right" as freedom of expression, which, in my view, more accurately reflects the protected value. The importance of this right did not originate with the Charter for it has been a foundation of democratic institutions since they began.

[62] In *Edmonton Journal v. Alberta (Attorney General)*, [1987] 2 S.C.R. 1326 at p. 1336 Cory, J. described the importance and evolution in these words:

It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. No doubt that was the reason why the framers of the Charter set forth s. 2(b) in absolute terms which distinguishes it, for example, from s. 8 of the Charter which guarantees the qualified right to be secure from unreasonable search. It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances.

The vital and fundamental importance of freedom of expression has been recognized in decisions of this Court. In *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, McIntyre J., speaking for the majority, put the position in this way at p. 583:

Freedom of expression is not, however, a creature of the Charter. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.

[63] The substance of the present application reduces itself to this: Does the public interest in the execution of a search warrant which results in no charges being laid override the privacy interests of an individual who faces no criminal charges? Put another way, in each case where a search warrant is granted, does the fact that items are seized pursuant to the warrant result in the underlying information becoming public even where charges do not proceed?

[64] In expressing the issues in these words it is important to remember that the privacy right of the individual is not what is weighed against the public interest in disclosure for under the Charter the privacy rights of the individual are a matter of public interest. What these issues represent is the collision of two public interests not the collision of a public interest and a purely individual interest.

[65] Central to the submissions of both sides is the decision of the Supreme Court of Canada in *Attorney-General of Nova Scotia et al v. MacIntyre* (1982), 132 D.L.R. (3d) 385. This was a 5 to 4 decision of the court, delivered on January 26, 1982, some three months before the Charter was proclaimed in force on April 17, 1982.

[66] The factual background to this decision was that Mr. MacIntyre, a television journalist, asked to see certain search warrants and the supporting material on which they had been issued. When he was refused he commenced action seeking an order that such materials were a matter of public record. The trial division of the Supreme Court of Nova Scotia ruled that search warrants which have been executed and the information supporting them are court records available for inspection by members of the public.

[67] On appeal to the Appeal Division of the Supreme Court of Nova Scotia the decision was upheld on broader grounds with the court finding not only that there was a right of inspection but that a member of the public had the right to be present in "open court" when the search warrants were issued.

[68] The Supreme Court of Canada granted leave to appeal. The two issues stated on the appeal were put in these words:

(i) Are search warrants issued pursuant to Section 443 of the Criminal Code issued in open court and are they and the informations pertaining thereto consequently documents open for public inspection,

(ii) Whether there is otherwise a general right to inspect search warrants and the informations pertaining thereto.

[69] On the first of these issues all nine judges were in agreement. Martland, J., writing for the dissenting minority, expressed that agreement in these words:

With respect to the first issue, I am in agreement with my brother Dickson, for the reasons which he has given, that the broad declaration made by the Appeal Division cannot be sustained. That being so, the respondent cannot assert a right to examine the search warrants and the related informations on the basis that the issuance of the search warrants was a judicial act in open Court with a right for the public to be present.

[70] In the majority decision, Dickson, J. (as he then was) noted both the absence of legislative direction and of authority at p. 398 he writes:

The Criminal Code gives little guidance on the question of accessibility to the general public of search warrants and the underlying informations. And there is little authority on the point. The appellant Attorney-General of Nova Scotia relied upon Taylor's Treatise on the Law of Evidence, 11th ed., published in 1920, upon a footnote to O. 63, r. 4 of the English Rules of Court, and upon *Inland Revenue Com'rs v. Rossminster Ltd.*, [1980] 2 W.L.R. 1. These authorities indicate that under English practice there is no general right to inspect and copy judicial records and documents. The right is only exerciseable when some direct and tangible interest or proprietary right in the documents can be demonstrated.

It does seem clear that an individual who is "directly interested" in the warrant can inspect the information and the warrant after the warrant has been executed. The reasoning here is that an interested party has a right to apply to set aside or quash a search warrant based on a defective information (*R. v. Solloway Mills & Co.* (1930), 53 C.C.C. 261, [1930] 32 D.L.R. 293, [1930] 1 W.W.R. 779 (Alta. S.C.)). This right can only be exercised if the applicant is entitled to inspect the warrant and the information immediately after it has been executed.

[71] In beginning his analysis, Dickson, J. characterizes the search warrant process in these words at p. 397:

A search warrant may be broadly defined as an order issued by a Justice under statutory powers, authorizing a named person to enter a specified place to search for and seize specified property which will afford evidence of the actual or intended commission of a crime. A warrant may issue upon a sworn information and proof of reasonable grounds for its issuance. The property seized must be carried before the Justice who issued the warrant to be dealt with by him according to law.

Search warrants are part of the investigative pre-trial process of the criminal law, often employed early in the investigation and before the identity of all of the suspects is known. Parliament, in furtherance of the public interest in effective investigation and prosecution of crime, and through the enactment of s. 443 of the Code, has legalized what would otherwise be an illegal entry of premises and illegal seizure of property. The issuance of a search warrant is a judicial act, on the part of the Justice, usually performed *ex parte* and *in camera*, by the very nature of the proceedings.

He then goes on to observe that:

The search warrant in recent years has become an increasingly important investigatory aid, as crime and criminals become increasingly sophisticated and the incidence of corporate white collar crime multiplies. The effectiveness of any search made pursuant to the issuance of a search warrant will depend much upon timing, upon the degree of confidentiality which attends the issuance of the warrant and upon the element of surprise which attends the search.

[72] At p. 398 he analyzes the competing interests and the impact of the legislation on those interests:

As is often the case in a free society there are at work two conflicting public interests. The one has to do with civil liberties and the protection of the individual from interference with the enjoyment of his property. There is a clear and important social value in avoidance of arbitrary searches and unlawful seizures. The other, competing, interest lies in the effective detection and proof of crime and the prompt apprehension and conviction of offenders. Public protection, afforded by efficient and effective law enforcement, is enhanced through the proper use of search warrants.

In this balancing of interests, Parliament has made a clear policy choice. The public interest in the detection, investigation and prosecution of crimes has been permitted to dominate the individual interest. To the extent of its reach, s. 443 has been introduced as an aid in the administration of justice and enforcement of the provisions of the Criminal Code.

- [73] In this last paragraph the majority judgment recognizes the balancing of the public interest in the investigation of crime against the competing public interest in preserving the individual right of privacy and the concomitant right to be free from search and seizure.
- [74] In balancing these interests parliament has chosen to insert as a safeguard or a check a form of judicial authorization at the investigative stage. In doing so it is mindful of the rights and freedoms which such searches invade and the importance of those rights and freedoms in a free society.
- [75] It should be emphasized that this process is not meant to replace the existing means by which police abuses of search and seizure may be challenged before the courts either by interested parties or by someone subsequently charged with a criminal offence. Instead this process creates an additional safeguard at the investigation stage.
- [76] It is useful to examine, in contrast, the approach taken by the dissenting members of the court. Martland, J., at p. 392 writes:

It is quite clear that the respondent has no direct and tangible interest in the documents which he sought to examine. He wished to examine them to further an ulterior object, i.e., for the purpose of preparing a news story. Applying the rule applicable under English law, the appellant, Grainger, was entitled to refuse his request.

It is suggested that a broader right might be recognized consonant with the openness of judicial proceedings. This suggestion requires a consideration of the nature of the proceedings provided for in s. 443. That section provides a means whereby persons engaged in the enforcement of criminal law may obtain leave, inter alia, to search buildings, receptacles or places and seize documents or other things which may afford evidence with respect to the commission of a criminal offence. A Justice is empowered by the section to authorize this to be done. Before giving such authority, he must be satisfied by information on oath that there is reasonable ground for believing that there is in the building, receptacle or place anything in respect of which an offence has been committed or is suspected to have been committed; anything that there is reasonable ground to believe will afford evidence of the commission of a criminal offence; or anything that there is reasonable ground to believe is intended to be used for the commission of an offence against the person for which a person may be arrested without warrant.

The function of the Justice may be considered to be a judicial function, but might more properly be described as a function performed by a judicial officer, since no notice is required to anyone, there is no opposite party before him and, in fact, in the case of a search before proceedings are instituted, no opposite party exists. There is no requirement that the Justice should perform his function in Court. The Justice does not adjudicate, nor does he make any order. His power is to

give authority to do certain things which are a part of pre-trial preparation by the Crown. No provision is made in either s. 443 or s. 446 for an examination by anyone of the documents on the basis of which the Justice issued a search warrant.

As the function of the Justice is not adjudicative and is not performed in open Court, cases dealing with the requirement of Court proceedings being carried on in public, such as *Scott v. Scott*, [1913] A.C. 417, and *McPherson v. McPherson*, [1936] 1 D.L.R. 321, [1936] 1 W.W.R. 33, [1936] A.C. 177, are not, in my opinion, relevant to the issue before the Court. The documents which the respondent seeks to examine are not documents filed in Court proceedings. They are the necessary requirements which enable the Justice to grant permission for the Crown to pursue its investigation of possible crimes and to prepare for criminal proceedings.

If the documents in question in this appeal are not subject to public examination prior to the execution of the search warrants, I see no logical reason why they should become subject to such examination thereafter, at least until the case in respect of which the search has been made has come to trial. It is true that a search of those documents before the search warrant has been executed might frustrate the very purpose for which the warrant was issued by forewarning the person whose premises were to be searched. The element of surprise is essential to the proper enforcement of the criminal law. There are, however, additional and important reasons why such documents should not be made public which continue even after the warrant has been executed.

The information upon oath on the basis of which a search warrant may be issued is in Form 1 contained in Part XXV of the Criminal Code. It requires a description of the offence in respect of which the search is to be made. The informant must state that he has reasonable grounds for believing that the things for which the search is to be made are in a particular place and must state the grounds for such belief. This document, which may be submitted to the Justice before any charges have been laid, discloses the informant's statement that an offence has been committed or is intended to be committed.

The disclosure of such information before trial could be prejudicial to the fair trial of the person suspected of having committed such crime. Publication of such information prior to trial is even more serious.

[77] In the two decades which has passed since the decision in *MacIntyre*, crime and criminals have become increasingly more sophisticated and the evolution of the Charter has made search warrants increasingly important. As the Charter has evolved there has been an increasing role for the judiciary and judicial officers in the investigation of criminal offences. I deliberately use that phrase rather than the phrase "... investigative pre-trial process ..." for reasons which will become apparent. I will return to this issue later in these reasons.

[78] At p. 399, *Dickson, J.*, writing for the majority posed the issue before the court in this way:

The appellant, the Attorney-General of Nova Scotia, does not contest the right of an "interested party" to inspect search warrants and informations after execution. His contention is that Mr. MacIntyre, a member of the general public, not directly affected by issuance of the warrant, has no right of inspection. The question, therefore is whether, in law, any distinction can be drawn, in respect of accessibility, between those persons who might be termed "interested parties" and those members of the public who are unable to show any special interest in the proceedings.

[79] After recognizing the relative dearth of authority on the issue, he goes on to set out an approach with respect to search warrants which recognizes the need to balance a variety of interests. At pp. 400-1, he said:

By reason of the relatively few judicial decisions it is difficult, and probably unwise, to attempt any comprehensive definition of the right of access to judicial records or delineation of the factors to be taken into account in determining whether access is to be permitted. The question before us is limited to search warrants and informations. The response to that question, it seems to me, should be guided by several broad policy considerations, namely, respect for the privacy of the individual, protection of the administration of justice, implementation of the will of Parliament that a search warrant be an effective aid in the investigation of crime, and finally, a strong public policy in favour of "openness" in respect of judicial acts. The rationale of this last-mentioned consideration has been eloquently expressed by Bentham in these terms:

In the darkness of secrecy, sinister interest, and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and surest of all guards against improbity. It keeps the judge himself while trying under trial.

The concern for accountability is not diminished by the fact that the search warrants might be issued by a Justice in camera. On the contrary, this fact increases the policy argument in favour of accessibility. Initial secrecy surrounding the issuance of warrants may lead to abuse, and publicity is a strong deterrent to potential malversation.

In short, what should be sought is maximum accountability and accessibility but not to the extent of harming the innocent or of impairing the efficiency of the search warrant as a weapon in society's never-ending fight against crime.

[80] The two main arguments are set out at p. 401 of the majority decision:

There are two principal arguments advanced in support of the position of the appellant. The first might be termed the "privacy" argument. It is submitted that the privacy rights of the individuals who have been the object of searches would be violated if persons like Mr. MacIntyre were permitted to inspect the warrants. It is argued that the warrants are issued merely on proof of "reasonable grounds" to believe that there is evidence with respect of the commission of a criminal offence in a "building, receptacle or place". At this stage of the proceedings no criminal charge has been laid and there is no assurance that a charge ever will be laid. Moreover, search

warrants are often issued to search the premises of a third party who is in no way privy to any wrongdoing, but is in possession of material necessary to the inquiry. Why, it is asked, submit these individuals to embarrassment and public suspicion through release of search warrants?

The second, independent, submission of the appellant might be termed the "administration of justice" argument. It is suggested that the effectiveness of the search warrant procedure depends to a large extent on the element of surprise. If the occupier of the premises were informed in advance of the warrant, he would dispose of the goods. Therefore, the public must be denied access to the warrants, otherwise the legislative purpose and intention of Parliament, embodied in s. 443 of the Criminal Code, would be frustrated.

[81] In addressing the first of these arguments, Dickson, J. draws the analogy of excluding the public from "court proceedings". At p. 401 he continues:

Let me deal first with the "privacy" argument. This is not the first occasion on which such an argument has been tested in the courts. Many times it has been urged that the "privacy" of litigants requires that the public be excluded from Court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the Court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings. The following comments of Laurence J. in *R. v. Wright*, 8 T.L.R. 293, are apposite and were cited with approval by Duff J. in *the Gazette Printing Co. v. Shallow* (1909), 41 S.C.R. 339 at p. 359:

Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.

The leading case is the decision of the House of Lords in *Scott v. Scott*, [1913] A.C. 417, In the later case of *McPherson v. McPherson*, [1936] A.C. 177 at p. 200, Lord Blanesburgh, delivering the judgment of the Privy Council, referred to "publicity" as the "authentic hall-mark of judicial as distinct from administrative procedure".

It is, of course, true that *Scott v. Scott* and *McPherson v. McPherson* were cases in which proceedings had reached the stage of trial whereas the issuance of a search warrant takes place at the pre-trial investigative stage. The cases mentioned, however, and many others which could be cited, establish the broad principle of "openness" in judicial proceedings, whatever their nature, and in the exercise of judicial powers. The same policy considerations upon which is predicated our reluctance to inhibit accessibility at the trial stage are still present and should be addressed at the pre-trial stage. Parliament has seen fit, and properly so, considering the importance of the derogation from fundamental common law rights, to involve the judiciary in the issuance of search warrants and the disposition of the property seized, if any. I find it difficult to accept the view that a judicial act performed during a trial is open to public scrutiny but a judicial act

performed at the pre-trial stage remains shrouded in secrecy.

The reported cases have not generally distinguished between judicial proceedings which are part of a trial and those which are not. Ex parte applications for injunctions, interlocutory proceedings, or preliminary inquiries are not trial proceedings, and yet the "open court" rule applies in these cases. The authorities have held that subject to a few well-recognized exceptions, as in the case of infants, mentally disordered persons or secret processes, all judicial proceedings must be held in public. The editor of Halsbury's Laws of England, 4th ed. Vol. 10, para. 705, p. 316, states the rule in these terms:

In general, all cases, both civil and criminal, must be heard in open court, but in certain exceptional cases, where the administration of justice would be rendered impracticable by the presence of the public, the court may sit in camera.

At every stage the rule should be one of public accessibility and concomitant judicial accountability; all with a view to ensuring there is no abuse in the issue of search warrants, that once issued they are executed according to law, and finally that any evidence seized is dealt with according to law. A decision by the Crown not to prosecute, notwithstanding the finding of evidence appearing to establish the commission of a crime may, in some circumstances, raise issues of public importance.

In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent.

[82] The last sentence in this passage raises an issue of significance, in my view, for it recognizes and then begins to formulate an exception and an interest of "superordinate importance".

[83] The reasons go on to expand upon that concept:

Many search warrants are issued and executed, and nothing is found. In these circumstances, does the interest served by giving access to the public outweigh that served in protecting those persons whose premises have been searched and nothing has been found? Must they endure the stigmatization to name and reputation which would follow publication of the search? Protection of the innocent from unnecessary harm is a valid and important policy consideration. In my view that consideration overrides the public access interest in those cases where a search is made and nothing is found. The public right to know must yield to the protection of the innocent. If the warrant is executed and something is seized, other considerations come to bear.

(emphasis added)

[84] With the greatest of deference and some considerable trepidation, I have difficulty with this passage. This may arise with the present day perspective twenty years later, but the specific facts of the present case serve to highlight in graphic terms what I perceive to be the difficulty.

- [85] The first item listed in the search warrant issued in the present case is "i. Computer hard drive - D2294". In today's world, the execution of a search warrant very often will result in the seizure of items and material, such as computer hard drives or disks, which can only be analyzed and examined after they have been seized. This subsequent examination and/or analysis may confirm the presence of evidence relevant to the criminal offence being investigated or it may establish that nothing relevant is present.
- [86] It simply cannot be the case that it is the seizure of items or the absence of seizures which triggers an overriding public interest in disclosure. What must, in my view, trigger that public interest is, rather, at the least, the seizure of evidence which discloses the commission of a criminal offence, and the initiation of criminal proceedings. Absent such a result the search is of primary interest only to the persons whose rights of privacy have been invaded by the search.

[87] In dealing with the second argument, the majority judgment concludes at p. 403:

That brings me to the second argument raised by the appellant. The point taken here is that the effective administration of justice would be frustrated if individuals were permitted to be present when the warrants were issued. Therefore, the proceeding must be conducted in camera, as an exception to the open Court principle. I agree. The effective administration of justice does justify the exclusion of the public from the proceedings attending the actual issuance of the warrant. The Attorneys-General have established, at least to my satisfaction, that if the application for the warrant were made in open Court the search for the instrumentalities of crime would, at best, be severely hampered and, at worst, rendered entirely fruitless. In a process in which surprise and secrecy may play a decisive role the occupier of the premises to be searched would be alerted, before the execution of the warrant, with the probable consequence of destruction or removal of evidence. I agree with counsel for the Attorney-General of Ontario that the presence in an open court-room of members of the public, media personnel, and, potentially, contacts of suspected accused in respect of whom the search is to be made would render the mechanism of a search warrant utterly useless.

None of the counsel before us sought to sustain the position of the Appeal Division of the Supreme Court of Nova Scotia that the issue of the search warrant is a judicial act which should be performed in open Court by a Justice of the Peace with the public present. The respondent Mr. MacIntyre stated at para. 5 of his factum:

One must note that the Respondent never sought documentation relating to unexecuted search warrants nor did he ever request to be present during the decision-making process . . .

. . .

Although the rule is that of "open Court" the rule admits of the exception referred to in Halsbury, namely, that in exceptional cases, where the administration of justice would be rendered impracticable by the presence of the public, the Court may sit, in camera. The issuance of a search warrant is such a case.

In my opinion, however, the force of the "administration of justice" argument abates once the warrant has been executed, i.e., after entry and search. There is thereafter a "diminished interest in confidentiality" as the purposes of the policy of secrecy are largely, if not entirely, accomplished. The need for continued concealment virtually disappears. The appellant concedes that at this point individuals who are directly "interested" in the warrant have a right to inspect it. To that extent at least it enters the public domain. The appellant must, however, in some manner, justify granting access to the individuals directly concerned, while denying access to the public in general. I can find no compelling reason for distinguishing between the occupier of the premises searched and the public. The curtailment of the traditionally uninhibited accessibility of the public to the working of the Courts should be undertaken with the greatest reluctance.

The "administration of justice" argument is based on the fear that certain persons will destroy evidence and thus deprive the police of the fruits of their search. Yet the appellant agrees these very individuals (i.e., those "directly interested") have a right to see the warrant, and the material upon which it is based, once it has been executed. The appellants do not argue for blanket confidentiality with respect to warrants. Logically, if those directly interested can see the warrant, a third party who has no interest in the case at all is not a threat to the administration of justice. By definition, he has no evidence that he can destroy. Concern for preserving evidence and for the effective administration of justice cannot justify excluding him.

Undoubtedly every Court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.

[88] Once again I contrast this conclusion with that reached by the minority. At p. 395, Martland, J. writes:

In summary, my conclusion is that proceedings before a Justice under s. 443 being part and parcel of criminal investigative procedure are not analogous to trial proceedings, which are generally required to be conducted in open Court. The opening to public inspection of the documents before the Justice is not equivalent to the right of the public to attend and witness proceedings in Court. Access to these documents should be restricted, in accordance with the practice established in England, to persons who can show an interest in the documents which is direct and tangible. Clearly, the respondent had no such interest.

[89] In examining the minority reasons in MacIntyre I do not for a moment suggest that they should be preferred to the majority decision but rather that the juxtaposition of the reasons serves to place in perspective and to explain the reasoning in the majority judgment.

[90] The difference between the majority and minority decisions in MacIntyre appears, in the end, to come down to the characterization of the role of the judicial officer in issuing a search warrant as a court proceeding to which the principle of open public access applies.

[91] The majority decision considers the process to be a court proceeding because in the circumstances the reasoning is predicated on charges proceeding to trial. This underlying assumption is apparent from the reference to the "pre-trial investigative stage" at p. 402. In the remaining portion of this one paragraph there are two more references that refer to the trial in conjunction with the "pre-trial stage". The final sentence makes the context clear:

I find it difficult to accept the view that a judicial act performed during a trial is open to public scrutiny but a judicial act performed at the pre-trial stage remains shrouded in secrecy.

THE PRIVACY RIGHT ASSERTED

The house of everyone is to him as his castle and fortress.

[92] This principle found its first expression in *Semayne's Case*, (1604) 5 Co. Rep. 91a, 77 E.R. 194. The better known expression, however, was that of William Pitt, First Earl of Chatham, who expressed it in these words.

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail - its roof may shake - the winds may blow through it - the storm may enter - but the King of England cannot enter - all his force dares not cross the threshold of the ruined tenement.

[93] In the decision in *Semayne's Case*, nearly four centuries ago, the law gave expression to the importance of placing restrictions on the power of the Crown to intrude on the privacy and property of its citizens. The decision went on to hold that the King's sheriff "... ought to signify the cause of his coming, and to make request to open doors ..."

[94] In many respects this was the genesis of the present day search warrant.

[95] In 1982, the same year in which the decision in *MacIntyre* was released, the Canadian Charter of Rights and Freedoms entrenched in the Canadian Constitution the right to be secure from unreasonable search and seizure (s. 8).

[96] Since that time many decisions have dealt with s. 8 and the principles underlying it. Two decisions of the Supreme Court of Canada are of particular importance.

[97] In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, Dickson, J. (as he then was) set out three criteria necessary for a valid search under s. 8. The three criteria are summarized in J.A. Fontana, *The Law of Search and Seizure in Canada*, 5th Ed., (Markham, Butterworth, 2002) at 2.

1. Prior authorization, where feasible, is a precondition for a valid search and seizure. It follows that warrantless searches are *prima facie* unreasonable under s. 8.

2. For the authorization procedure to be meaningful, it is necessary for the person authorizing the search to be able to assess the conflicting interests of the state and the individual in an entirely neutral and impartial manner. This means that while the person considering the prior authorization need not be a judge, he must nevertheless, at a minimum, be capable of acting judicially. For example, he must not be someone charged with investigative or prosecutorial functions under the relevant statutory scheme.
3. Reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard consistent with s. 8 of the Charter for authorizing searches and seizures.

[98] The decision in *Hunter* was a unanimous decision given over two years after the decision in *MacIntyre* and after the coming into force of the Charter. The specific language of the court's decision gives an important perspective on the impact of the Charter and the principles underlying it. At p. 160:

If the issue to be resolved in assessing the constitutionality of searches under s. 10 were in fact the governmental interest in carrying out a given search outweighed that of the individual in resisting the governmental intrusion upon his privacy, then it would be appropriate to determine the balance of the competing interests after the search had been conducted. Such a post facto analysis would, however, be seriously at odds with the purpose of s. 8. That purpose is, as I have said, to protect individuals from unjustified state intrusions upon their privacy. That purpose requires a means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to be occurred in the first place. This, in my view, can only be accomplished by a system of prior authorization, not one of subsequent validation.

A requirement of prior authorization, usually in the form of a valid warrant, has been a consistent prerequisite for a valid search and seizure both at common law and under most statutes. Such a requirement puts the onus on the state to demonstrate the superiority of its interest to that of the individual. As such it accords with the apparent intention of the Charter to prefer, where feasible, the right of the individual to be free from state interference to the interests of the state in advancing its purposes through such interference.

I recognize that it may not be reasonable in every instance to insist on prior authorization in order to validate governmental intrusions upon individuals' expectations of privacy. Nevertheless, where it is feasible to obtain prior authorization, I would hold that such authorization is a precondition for a valid search and seizure.

(emphasis in original)

[99] This passage, in my view, succinctly summarizes the elevation of the individual right of privacy to an important public interest of being free from unreasonable search as the purpose behind s. 8.

[100] Dickson, J. goes on at p. 161 to deal with the authorization process:

The purpose of a requirement of prior authorization is to provide an opportunity, before the event, for the conflicting interests of the state and the individual to be assessed, so that the individual's right to privacy will be breached only where the appropriate standard has been met, and the interests of the state are thus demonstrably superior. For such an authorization procedure to be meaningful it is necessary for the person authorizing the search to be able to assess the evidence as to whether that standard has been met, in an entirely neutral and impartial manner. At common law the power to issue a search warrant was reserved for a justice. In the recent English case of *Inland Revenue Commissioners v. Rossminster Ltd.*, [1980] 1 All E.R. 80, Viscount Dilhorne suggested at p. 87 that the power to authorize administrative searches and seizures be given to "a more senior judge". While it may be wise, in view of the sensitivity of the task, to assign the decision whether an authorization should be issued to a judicial officer, I agree with Prowse J.A. that this is not a necessary precondition for safeguarding the right enshrined in s. 8. The person performing this function need not be a judge, but he must at a minimum be capable of acting judicially.

(emphasis added)

[101] This passage recognizes in clear and unambiguous terms the importance of a prior authorization at the investigative stage. It goes on, however, to emphasize the fact that the person performing this authorization function need not be a judge so long as he or she is capable of acting judicially.

[102] This, in my view, is a clear recognition that the involvement at the investigative stage is not part of the court process itself but rather a specific part of the investigative phase which may become a part of the court proceedings when they are initiated.

[103] In the second of the two decisions, *R. v. Collins*, [1987] 1 S.C.R. 265, the Supreme Court of Canada held that for a search to be reasonable:

- (1) a search must be authorized by law;
- (2) the law itself must be reasonable; and
- (3) the search must be carried out in a reasonable manner.

[104] What emerges, in my view, from the decision in *Hunter* is the clear recognition of the importance of the individual's privacy rights and the imposition of a general requirement for prior authorization when the state seeks to intrude upon it. The balance of the passage quoted above recognizes, in my view, that the authorization process itself, while it may require judicial acts is not a part of the court process in the traditional sense.

[105] In my view, from today's perspective, it is apparent that one of the major impacts of the Charter has been to redefine the role of the courts.

- [106] Amongst those changes, one of the most significant has been to increase the importance of having judicial officers in certain aspects of the investigation phase in a supervisory role. This is true in the case of search warrants (s. 487) and authorizations to intercept private communications (s. 184.2) to name but two examples.
- [107] Parliament, in establishing this role for judicial officers, was, in my view, seeking to establish a process by which the public interest was represented in the investigative phase. It was not a part of that process to import into it a public hearing or a structured appeal process.
- [108] In fact, such a structure is unnecessary for the requisite interests are already represented within the existing structure.
- [109] When a search warrant is issued there is a class of individuals who are immediately affected by the execution of the search warrant. That class of persons are people interested and directly affected by the warrant. They have the immediate right to apply for a review of the warrant in an application to quash. Such an application triggers a court proceeding and an open hearing in which the court exercises an adjudicative function.
- [110] At the forefront of this class stands the "target" who, once charges have been laid, has, of course, the means within the trial process to embark upon a public review of the search warrant and to challenge both its validity and the admissibility of any evidence seized by means of it.
- [111] It seems clear that the majority decision in MacIntyre is predicated on the assumption that the matter is one which resulted in charges that are proceeding to trial.
- [112] The court's unanimous decision on the first issue is, in my respectful view, a clear and unanimous finding that the issuance of a search warrant, while it may be a judicial act under the present legislation, is not one ordinarily carried out in open court with a concomitant right of the public to be present. Given this finding it seems clear that the characterization of the process as a court proceeding in the majority judgment occurs either at the time an interested person seeks review or when charges are laid.
- [113] Until that step is taken a file is maintained by the authorizing judicial officer, not as a public file available for inspection but as a record of a specific judicial act so that it is, if necessary, available when court proceedings are initiated in one of the two ways already identified.
- [114] It is difficult to see what public interest is not protected in this process. If charges are laid, a public process is initiated. If the police abuse their powers in obtaining a search warrant and executing it, it becomes increasingly likely that the interested parties will challenge the warrant, either by application or through the civil process.
- [115] The present application and the submissions made on behalf of the Vancouver Sun seek to turn the interests involved here on their head.

- [116] One starts from the proposition that the state must generally not intrude on the privacy rights of the individual unless it obtains prior judicial authorization. Thereafter it must be demonstrated, as required by the third criteria in *Hunter*, that the state in obtaining that authorization has established reasonable and probable grounds to believe an offence has been committed and that evidence will be found of that if a search is permitted. Finally, if the search is carried out and the fruits of that search are evaluated and analyzed by the proper independent agency of the Crown and a decision is made that the circumstances and evidence developed does not justify the initiation of a prosecution, the intrusion of the state into the privacy of the individual has been found, in the end, to be unwarranted.
- [117] It is neither consistent with Charter principles, nor logical, to find that in those circumstances the state's intrusion into areas they are not generally entitled to intrude may now become fully public because of the participation of a judicial officer in the process.
- [118] Where, as in the present case, what evidence is developed is, in the end, found to be insufficient to justify the preferring of criminal charges, it is surely the privacy rights of the individual which must again prevail. It is not proper to force the individual to attempt to restore the privacy right which existed but for the judicial authorization.
- [119] It is precisely this principle which is recognized in the majority decision in *MacIntyre* at p. 403:

In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent.

Many search warrants are issued and executed, and nothing is found. In these circumstances, does the interest served by giving access to the public outweigh that served in protecting those persons whose premises have been searched and nothing has been found? Must they endure the stigmatization to name and reputation which would follow publication of the search? Protection of the innocent from unnecessary harm is a valid and important policy consideration. In my view that consideration overrides the public access interest in those cases where a search is made and nothing is found. The public right to know must yield to the protection of the innocent. If the warrant is executed and something is seized, other considerations come to bear.

(emphasis added)

- [120] I have already dealt with the difficulty which emerges from basing the result on the simple proposition that something was seized. Of more importance is the recognition that if nothing is found the protection of the individual whose premises have been searched from "the stigmatization to name and reputation" is a valid social value of superordinate importance.

- [121] In the present case the issue reduces itself to the following proposition. Is a distinction to be drawn between the situation where nothing is seized and no charges result and the situation where although some items are seized, after analysis and review, no charges result?
- [122] I have carefully reviewed the authorities, nothing in those authorities leads me to conclude that where no charges are laid that the allegations filed in support of a search warrant should be made public to achieve the very stigmatization envisioned by Dickson, J. in MacIntyre.
- [123] This is a situation where the public interest in reviewing the material must yield to the greater public interest of protecting both an individuals right of privacy and the protection of the innocent.
- [124] In the present case it is asserted that it is the decision not to prosecute and the fact that Cst. Phillips is a police officer which gives rise to the public interest component. With the greatest of respect to this submission, the publication or release of the Information to Obtain cannot cast light on the decision of the Crown not to proceed with charges. It is also, by no means, the only way in which the media can investigate that decision.

DECISION

- [125] The learned Provincial Court judge, as I have found, exceeded his jurisdiction. In addition, for the reasons given above, there are errors on the face of the record.
- [126] Certiorari will issue; the decision below is quashed and the sealing order, until further order of the court, is restored.
- [127] Costs may be spoken to if they cannot be agreed to.

"W.G. Parrett, J."

The Honourable Mr. Justice W.G. Parrett

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/02/11/2002bcsc1169.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/phillips-v-vancouver-sun-2002>

Prepared on 29 October 2026 · Esheria