

CANADA / JUDGMENT

Wong v. Antunes

2008 BCSC 1739

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 1739 Wong v. Antunes

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wong v. Antunes,

2008 BCSC 1739

Date: 20081219

Docket: M065041

Registry: Vancouver

Between:

Frank Low Fat Wong on his own behalf and as
personal representative of the Estate of Stanley Wong,
and on behalf of Sau Ying Wong and Lorna Wong

Plaintiff

And

Paul George Antunes, Transport Action Lease Systems Inc.
and Ju Ling Catherine Yen

Defendants

And

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Mr. Justice Pitfield

Reasons for Judgment

Counsel for the Plaintiff (Applicant):

W.T. Morley

Counsel for the Ministry of Attorney General (Respondent):

A.K. Fraser

N.H. Barnes

Date and Place of Hearing:

November 6, 2008

Vancouver, B.C.

Introduction

- [1] The plaintiff in this civil action applies for an order requiring the production of documentation compiled by the Vancouver Police Department ("VPD") in connection with a criminal investigation.
- [2] Stanley Wong was struck and killed by a motor vehicle on November 11, 2005. The unidentified driver of the vehicle fled from the scene. On September 6, 2006, the VPD announced that as a result of its investigation into the incident, it believed that Paul George Antunes was the operator of the motor vehicle. He was charged with criminal negligence causing death. Crown counsel has fulfilled its disclosure obligation in relation to the criminal prosecution by providing Antunes with the documentation assembled by police in the course of the investigation. The trial on the criminal charges commenced in February 2008 in the Provincial Court and continued until it was adjourned. It has reportedly been fixed for continuation on October 5, 2009.
- [3] On January 27, 2007, Mr. Frank Wong, the deceased's father and legal personal representative, commenced an action on his own behalf, and on behalf of Ms. Sau Ying Wong and Ms. Lorna Wong, the deceased's mother and common law spouse, respectively. Mr. Wong claims damages from Antunes for economic loss pursuant to the Family Compensation Act, R.S.B.C. 1996, c. 126. The statement of claim alleges that Transportation Lease Systems Inc. was the owner, and Ms. Yen, the lessee of the vehicle that struck the deceased. The Insurance Corporation of British Columbia ("ICBC") was added as a third party pursuant to s. 21(7) of the Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231, because it denied coverage under any policy of insurance. The family compensation action is set for trial commencing March 23, 2009.

- [4] In his statement of defence and on examination for discovery, Antunes has denied that he was the driver of the motor vehicle that struck the deceased. ICBC also denies that Antunes was the driver.
- [5] On October 23, 2007, the plaintiff obtained a court order requiring Antunes to comply with Rule 26 by delivering a list of documents to all parties. He did not comply. On July 25, 2008, the plaintiff's solicitor delivered a letter to Antunes demanding that he do so. On August 7, 2008, counsel who had been retained by Antunes in the criminal but not the civil proceeding provided a list of documents purportedly in compliance with the court order. The list did not identify any documents and, in particular, did not identify any of the documents provided by Crown counsel in the criminal proceeding as part of the disclosure process.
- [6] Because of the position taken by Antunes, who is presently unrepresented in the civil action, the plaintiff applied by notice of motion dated July 30, 2008 directed to the Attorney General of British Columbia, the VPD, and all defendants, for an order that:
1. The Attorney General of British Columbia through the office of Crown counsel, or, alternatively, the Vancouver Police Department, provide counsel for the plaintiff with copies of all documents concerning the motor vehicle accident that occurred on or about November 11, 2005 which is the subject matter of proceedings herein, which documents were provided to the Defendant, PAUL GEORGE ANTUNES ("the Defendant ANTUNES"), or his counsel, during the course of, or in relation to, the criminal proceedings against the Defendant ANTUNES, on condition that the documents be produced subject to the implied undertaking of confidentiality governing production of documents in civil proceedings; [and]
 2. Alternatively, the said documents be produced subject to such other conditions as the Court may deem just.
- [7] The VPD did not appear by counsel at the hearing of the application. Counsel appearing on behalf of the Attorney General purported to represent the interests of the VPD.

The Position of the Parties

- [8] The plaintiff says that documents in the VPD file will likely identify evidence that may be adduced at the trial of the civil proceeding to support his claim that Antunes was the operator of the vehicle. He claims that because of the circumstances surrounding the accident, access to the police file is essential if he is to be in a position to prove that Antunes was the driver.
- [9] The plaintiff relies on Rule 26(11) in support of their application:

- [11] Where a document is in the possession or control of a person who is not a party, the court, on notice to the person and all other parties, may order production and inspection of the document or preparation of a certified copy that may be used instead of the original. An order under Rule 41 (16) in respect of an order under this subrule may be made if that order is endorsed with an acknowledgment by the person in possession or control of the document that the person has no objection to the terms of the proposed order.
- [10] In support of their application, the plaintiff claims that documents in the possession of a non-party should be produced if they are probative and not privileged. They say a police file is generally not privileged and is subject to production, and, in any event, documents provided in the course of Crown disclosure in a criminal proceeding to an accused who is also a defendant in a civil proceeding relating to the same subject matter should be produced to a plaintiff in the civil proceeding, subject to appropriate undertakings regarding confidentiality.
- [11] The Attorney General opposes the application for the production of documents in the Crown's possession on the grounds that the material in its possession had its origin in police files, and is subject to a claim for legal professional privilege or public interest immunity. The Crown says that the litigation privilege attaching to any document was not waived by Crown disclosure in the criminal proceeding, and, in any event, much of the documentation is not relevant in the context of the civil action. The Crown says that the issue of production should be deferred until completion of the criminal proceeding in order not to jeopardize the prosecution.

Analysis

- [12] The issue on this application is whether the VPD can and should be required to produce any documentation assembled in the course of its investigation of an accident that caused a death when the investigation has allegedly identified the driver and has resulted in criminal charges against him; where the documents that provide evidence, or identify sources of evidence, relating to the driver's identity have been disclosed to the accused; the accused is the defendant in a civil action arising out of the same accident; and the accused as defendant has refused to list or produce the documents as required by the Rules of Court.
- [13] At the outset, I think it appropriate to address the question of whether, in the circumstances, Rule 26(11) can or should be invoked in present circumstances. The rule is intended to facilitate the production of documents in the possession of a non-party and not in the possession of a party: see *Lacker v. Lacker* (1982), 42 B.C.L.R. 188 (S.C.), citing *Bachman v. Sandoz (Can.) Ltd.* (1978), 6 B.C.L.R. 57 (S.C.). In this instance, Antunes possesses the documents but has refused to describe them in a list.
- [14] The plaintiff obtained an order from the court on October 23, 2007, which required Antunes to provide a list of documents within seven days. Because of his failure to do so, counsel for the plaintiff wrote in July 2008 asking him to comply. Counsel for Antunes in the criminal

proceeding but not the civil action, prepared a list of documents that he signed on behalf of Antunes. The list did not identify any documents that the defendant would produce, and did not identify documents that had been, but were not then, in Antunes's possession or control. Privilege was claimed in relation to the following:

Minutes of evidence, memoranda and all documents consisting of confidential communications, which since the commencement of this action have passed between the defendant and his solicitors for the purpose of obtaining or furnishing information and material to be used as evidence in this action.

[15] In a covering letter to plaintiff's counsel enclosing the list, counsel for the defendant said the following regarding the documents received in the course of Crown disclosure:

I should say that my preliminary view is that the documents which you seek relating to the criminal proceedings are the property of the Crown and are not properly disclosable in our possession.

[16] Notwithstanding the caveat, the list was clearly deficient. It did not disclose the existence of any of the documents provided to Antunes as a result of disclosure in the criminal proceeding. All of those documents were in the possession or control of the defendant. The Rules of Court required them to be listed. The fact that some person claimed a property interest in any document is irrelevant in so far as the requirement to list documents is concerned. If the property interest of another, or some other reason, was thought sufficient to preclude the production of a listed document, the basis for the objection should have been stated in the list.

[17] The implied undertaking not to disclose documents provided to an accused in the course of disclosure in a criminal proceeding might reasonably have been advanced as a basis to refrain from production. Had that been done, the plaintiff would have been in a position to apply for production from the defendant notwithstanding the undertaking, with appropriate notice to the VPD and the Attorney General. An application under Rule 26(11) would not have been required.

[18] In this instance the plaintiff is in a position to apply to strike out the Antunes defence because the defendant has not complied with a court order. One possible outcome of such an application would be an order granting a further period of time within which to provide a proper list, failing which the defence would be struck. Production of a list in proper form in response to that kind of order would likely lead to an application for production where production was denied. Failure to provide a proper list and the consequential striking of the defendant's defence would entitle the plaintiff to enter default judgment against Antunes with damages to be assessed. That remedy would only be of value if there was any prospect of actually recovering damages from Antunes. If he lacked the capacity to discharge the award, the plaintiff would be obliged to seek indemnity from ICBC. Because ICBC denies that Antunes was the driver, the plaintiff would be required to adduce evidence proving on a balance of probabilities that he was the driver of the vehicle that struck the deceased, and

that he was driving the vehicle in a negligent manner at the time that he did so.

- [19] I need not decide whether, had the Antunes defence been struck, it would have amounted to a determination, as against ICBC, that Antunes was the driver. To guard against the possibility that the striking of the defence would not be conclusive, the plaintiff would undoubtedly have resorted to Rule 26(11) in an attempt to obtain production of the VPD documents that were not in the possession of ICBC.
- [20] Because of the difficulties the plaintiff has encountered in attempting to obtain a list of documents from Antunes, and because the question of whether any documents in the VPD file can or should be produced to the plaintiff would undoubtedly be a matter for consideration at some point in the civil action, I conclude that it is appropriate for the plaintiff to resort to Rule 26(11). The customary requirement that the requested documents be in the possession of a non-party and not in the possession of a party, should not prevent the plaintiff from doing so.
- [21] In my opinion, this application is most appropriately regarded as one seeking production of documents in the possession of the VPD. The VPD conducted the investigation into the accident and compiled the documentation which may afford evidence regarding the identity of the driver, as part of its general policing obligations. The documentation in the file belongs to the VPD.
- [22] The base question is whether the documentation in the VPD file that pertains to the operation of the vehicle and the identity of the driver must be produced to the plaintiff. Any privilege that attaches to that documentation is that of the VPD and not the Crown. The fact that the VPD provided the Crown with copies of the documents does not alter the base question, nor cloak the documents with a protection they would not otherwise enjoy. If any of the documents must be produced, they must be produced by the VPD, and not as a consequence of any independent obligation that might be owed by the Crown to the plaintiff.
- [23] As a result of its investigation, the VPD concluded that it should prepare a report to Crown counsel recommending prosecution. Copies of the police documentation accompanied the report. It is obvious that Crown counsel approved the charge or charges that were actually laid against Antunes. As part of its ongoing disclosure obligation in the criminal proceeding, Crown counsel disclosed some or all of the information it received from the VPD to Antunes.
- [24] What is relevant in the context of the civil proceeding is the nature and extent of the protection, if any, that should be afforded documentation in the VPD file that might provide evidence of, or identify the source of evidence to support, the plaintiff's claim that, on the balance of probabilities, Antunes was the driver. The opinion of any VPD member or of Crown counsel regarding the question of whether the essential elements of the offence alleged against Antunes could be proved beyond a reasonable doubt, or regarding the question of how the criminal trial should proceed, is not relevant in the context of the civil action.

- [25] With respect to the application directed to the VPD, the starting point must be the directive from the Court of Appeal to the effect that an application for the production of a document under Rule 26(11) should not be dismissed unless "the probative value of the document, or the information in the document, would be slight, and the production and inspection of the document would cause so much embarrassment to the non-party, or have such an adverse affect on him, that it would be unjust to require him to produce it for the inspection of the parties to the action": *Dufault v. Stevens* (1978), 6 B.C.L.R. 199, 86 D.L.R. (3d) 671. Any order to produce must respect any privilege attached to the document. To conclude otherwise would cause the non-party embarrassment, adversely affect the non-party, or would otherwise be unjust.
- [26] Orders requiring the production of documents in police files have been granted in a variety of circumstances. In *Nevills v. Greer* (1985), 60 B.C.L.R. 310, 33 M.V.R. 162 (S.C.), the court determined that the notes of officers involved in the investigation of a motor vehicle accident, and witness statements, were not privileged and were therefore subject to production under Rule 26(11). The court determined that statements obtained from the driver of the vehicle were privileged because of s. 61 of the Motor Vehicle Act, R.S.B.C. 1979, c. 288. It is not clear from the reasons whether the statements and notes had been or were to be used to facilitate a prosecution.
- [27] In *Huang (litigation guardian of) v. Sadler*, 2006 BCSC 559, the court ordered production of documents in the possession of the VPD relating to an accident in respect of which a civil trial was to proceed on June 26, 2006, and a criminal prosecution was to proceed commencing September 18, 2006. The application was made by the defendant, Sadler, who was also one of the accused. The application was required because Sadler had received documents by way of Crown disclosure on the usual condition that the material would not be used for any purpose other than making full answer and defence in the criminal proceeding. Sadler sought permission to use that material in the civil action in which he was the defendant. He also sought production of material that had not been part of the Crown disclosure package.
- [28] The Attorney General represented the police in *Huang* and opposed the application on the basis described by the court at para. 5:

The [Attorney General] opposes production of documents prepared for criminal proceedings as a general rule and particularly opposes production of witness statements and expert reports in this case. The [Attorney General] says that there is an express or implied undertaking not to use the documents disclosed in the criminal proceedings for collateral or ulterior purposes. The [Attorney General] seeks dismissal of the application with liberty to apply after conclusion of the criminal proceedings. In the alternative, the [Attorney General] says that there should be a specific process outside of the Rules of Court for production of these documents.

- [29] Following a thorough discussion of the applicable principles considered in *P.J. v. Canada (Attorney General)* (2000), 198 D.L.R. (4th) 733, 2000 BCSC 1780, *N.G. v. Upper Canada College* (2004), 70 O.R. (3d) 312, 50 C.P.C. (5th) 218, (C.A.), and *D.P. v. Wagg* (2004), 71 O.R. (3d) 229, 239 D.L.R. (4th) 501 (C.A.), the court said the following at paras. 16 - 17 and 20:
- [16] ...The Crown cannot limit use of Crown disclosure documents for all purposes when a party is under a legal obligation to produce documents, when interests of fairness and justice in civil proceedings require disclosure, and when state and third party interests can be adequately protected through the implied undertaking rule in civil proceedings or through confidentiality conditions attached to a production order, if necessary.
- [17] The documents requested to be produced are relevant to the facts of the accident which are very much in issue as between the three defendants. It is acknowledged that certain of ... may not be relevant to this action. The [Attorney General] has not suggested that there is specific third party privacy or other interests that should be protected here. There is no suggestion that the investigation is ongoing or will be compromised. Any concern about witness tainting through exposure to other witness statements can be met through strict confidentiality conditions such as those approved in *N.G.* at paras. 4 and 16.
- [20] In this case, fairness of the civil trial clearly overweighs any concern for the criminal proceedings when two defendants already have most of the material, the documents are relevant, and no specific interest is in need of protection through non-disclosure. The VPD is required to produce all of the documentation sought. The parties in possession of documentation are required to list the documents on a list of documents, at which time any claim for privilege will be apparent. [The defendants] shall list all relevant ... documents of Stadler is then at liberty to apply for further disclosure of the records based on his knowledge of the documents. Counsel and the parties shall take all reasonable steps to ensure that potential witnesses in the criminal trial are not exposed to other witness statements, subject to ruling as to admissibility in the trial and the imposition of specific safeguards.
- [30] The only substantive difference between the applications now under consideration and those in *Huang* is that the defendant, Antunes, does not want to assist the plaintiff in obtaining production of the VPD documents.
- [31] *Huang* is a considered and thorough decision. But for the Crown's claim that *Huang* cannot stand because of a subsequent decision of the Supreme Court of Canada on the question of litigation privilege, I would respectfully adopt and apply the reasoning in it, and grant the order which the plaintiff seeks.
- [32] The Crown says that I should not apply *Huang* and the authorities on which it relied because the VPD documents were created for the purpose of litigation, and are therefore protected from production by litigation privilege. The Crown claims that the privilege was not lost by virtue of disclosure of some or all the documentation to the accused in fulfilment of the Crown's disclosure obligations enunciated in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 68 C.C.C.

(3d) 1. In addition, the Crown says that the VPD documents are protected from disclosure because of public interest immunity.

- [33] The Crown's submission in relation to litigation privilege is rooted in the decision of *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, 2006 SCC 39. In that case, Mr. Blank made repeated attempts to obtain documents from the Government of Canada pertaining to various penal proceedings initiated, but eventually stayed, against him. Production was denied under the rubric of "solicitor-client privilege", one of the grounds for a refusal to produce which is recognized by the Access to Information Act, R.S.C. 1985, c. A-1. The court concluded that the phrase "solicitor-client privilege" used in the Act encompassed legal advice privilege and litigation privilege.
- [34] The court described the two forms of privilege at paras. 6 through 8, and again at paras. 26 and 27:
- [6] The Minister contends that the solicitor-client privilege has two "branches", one concerned with confidential communications between lawyers and their clients, the other relating to information and materials gathered or created in the litigation context. The first of these branches, as already indicated, is generally characterized as the "legal advice privilege"; the second, as the "litigation privilege".
- [7] Bearing in mind their different scope, purpose and rationale, it would be preferable, in my view, to recognize that we are dealing here with distinct conceptual animals and not with two branches of the same tree. Accordingly, I shall refer in these reasons to the solicitor-client privilege as if it includes only the legal advice privilege, and shall indeed use the two phrases --solicitor-client privilege and legal advice privilege-- synonymously and interchangeably, except where otherwise indicated.
- [8] As a matter of substance and not mere terminology, the distinction between litigation privilege and the solicitor-client privilege is decisive in this case. The former, unlike the latter, is of temporary duration. It expires with the litigation of which it was born. Characterizing litigation privilege as a "branch" of the solicitor-client privilege, as the Minister would, does not envelop it in a shared cloak of permanency.
- ...
- [26] Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

- [27] Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.
- [35] Having emphasized that litigation privilege was designed to create "a zone of privacy in relation to pending or apprehended litigation," the court held that the privilege ends once the litigation ends, and litigation ends when the litigants or related parties cease to be engaged in the litigation, or in any litigation that is representative of the same legal combat:
- [34] The purpose of the litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose -- and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have "terminated", in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.
- [36] In this case, the Crown says that the documentation generated by the VPD was created for the purpose of pending or apprehended litigation. On that question, there is little room for doubt. It says that litigation in the form of the prosecution of Antunes has not terminated, the litigation privilege endures, and the disclosure of the documentation to Antunes did not terminate the privilege. With respect, the decision in Blank does not compel that conclusion.
- [37] Litigation privilege allows "parties to litigation, represented or not to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure": Blank, at para. 27. Once a document has been disclosed in the course of the litigation in which the privilege arises and to which the documentation or information pertains, the interests that the privilege is designed to serve are no longer of concern. In my opinion, Crown disclosure results in a limited loss of the privilege, and the introduction of another form of protection from widespread dissemination of the documents or information transmitted to the accused.
- [38] An accused who receives documents or information in the course of Crown disclosure is constrained by an explicit or implied undertaking not to use the documentation except for the purpose of making full answer and defence to the criminal charge. The accused is not permitted to disclose the information to the world at large. The undertaking to refrain from disclosure is no different from the implied undertaking that arises in the context of civil litigation: see *Juman v. Doucette*, 2008 SCC 8, 75 B.C.L.R. (4th) 1 (S.C.C.). The undertaking which binds the accused may be modified with the consent of the Crown, or by court order in appropriate circumstances, as in *Huang* and other the instances cited in that case.

- [39] The application in Blank pertained to documents that had not been produced in the course of Crown disclosure. With respect, nothing in Blank has altered the principles that apply when considering an application to require the production and to permit the use by a party to a related civil action of documents provided to an accused in the course of Crown disclosure.
- [40] The Crown cites authority for the proposition that litigation privilege will not necessarily be lost by disclosure. In *British Coal Corporation v. Dennis Rye Ltd.*, [1988] 1 W.L.R. 1113 (C.A.), the claimant in a civil action created documents for the purpose of demonstrating the fraud of the defendant. The claimant provided its work product to police, who eventually disclosed the documentation to an accused who was also the defendant. The claimant did not expressly reserve the privilege that attached to its work product created for the purpose of litigation when delivering the documents to police. Following the acquittal of the defendant on the charges laid against it, the claimant applied for the return of its work product, which the defendant had come to possess through disclosure by the police.
- [41] The U.K. Court of Appeal ordered the return of the documents saying that "the action of the plaintiff in making documents available for the purpose of the criminal trial did not constitute a waiver of the privilege to which it was entitled in the present civil proceedings." The case is distinguishable on the basis that what was being protected there was documentation that was the privileged property of the plaintiff in the civil litigation. The application was not concerned with documents prepared and disclosed by the Crown.
- [42] In *Philip Services Corp. (Receiver of) v. Ontario (Securities Commission)* (2005), 77 O.R. (3d) 209, the Ontario Superior Court of Justice, Divisional Court, held that legal opinions provided by a company to its auditors in order that the auditors could fulfil their obligations to shareholders to provide fair financial statements, did not cease to be privileged as against others, including the Ontario Securities Commission. The case is readily distinguishable. In *Philip*, the client had provided documents protected by legal advice privilege to its auditor to aid in the preparation of financial statements. The principal difference is that that decision was concerned with the protection of legal advice privilege, which is more enduring in nature than is litigation privilege. A second but material difference is that the disclosure had been made to its auditors who, unlike an accused in relation to the Crown, cannot be regarded as an adverse party.
- [43] The issue in the present application then is whether the actual or implied undertaking to refrain from using Crown disclosure documentation for any purpose other than making full answer and defence should be modified to permit disclosure to a plaintiff in a related civil action in which the accused is a defendant. A number of factors must be considered:
1. As with any request for production, the requested documentation or the information that may be derived from it, must relate to an issue in the proceeding in which use of the documentation is intended.

2. The information likely to be obtained from the documentation must not be available from other sources, thereby necessitating production.
3. The public interest in ensuring the conduct of a prosecution in a manner that is fair from the perspective of both the Crown and the defence must be balanced against the private interest of ensuring the capacity of a plaintiff to advance a bona fide and meritorious claim in a civil action. In other words, the balance of convenience must favour disclosure. As the Ontario Court of Appeal said in *D.P. v. Wagg* (2004), 239 D.L.R. (4th) 501, 71 O.R. (3d) 229, [2004] O.J. No. 2053, at para. 53:
 53. ...Society has an interest in seeing that justice is done in civil cases as well as criminal cases, and generally speaking that will occur when the parties have the opportunity to put all relevant evidence before the court. The Crown disclosure may be helpful to the parties in ensuring that they secure all relevant evidence.
- [44] The court may be required to engage in a screening process conducted with the participation of Crown, police and defence in order to identify the documentation that must be produced and to ensure that the preconditions to production have been satisfied. The screening process will only be avoided in the event that consent to production is forthcoming.
- [45] I am persuaded by the affidavit evidence that documents in the VPD file that may afford evidence of, or point to the source of evidence regarding, the operator of the vehicle involved in Mr. Wong's death and its manner of operation, are relevant and material in so far as the family compensation action is concerned. I am also satisfied that the evidence cannot be obtained by the plaintiff from other sources available to him. The plaintiff does not possess any of the investigative tools that were likely employed by the VPD in its attempts to identify the driver.
- [46] The remaining question is whether the balancing of the public and private interests should result in production of the relevant documents at this point in time. The Crown has tendered affidavit evidence suggesting that the criminal prosecution might be jeopardized by disclosure of any documents to the plaintiff because the material might find its way to potential witnesses, to the jury pool, or to persons who could seek to subvert the course of justice. While the affidavit evidence contains general statements of possible adverse effects resulting from premature disclosure, it does not identify any specific concerns in the context of the Antunes prosecution. Moreover, the possibility of any adverse effect can be materially reduced, or eliminated, by an appropriate undertaking from counsel and the plaintiff in the civil action.
- [47] In sum, I can see no reason why, in the circumstances, the accused should be in a position to know of the police evidence or sources of evidence pertaining to the identity of the driver and the allegation of negligent operation of a motor vehicle, but the plaintiff who sues on behalf of the victim of the operator's negligence should not.

Order

- [48] The VPD shall produce to the plaintiff a copy of any document in its possession that has been disclosed to Antunes in the criminal proceeding, provided that the document relates to the identity of the driver or the manner of operation of the vehicle, and provided further that the plaintiff and counsel on his behalf undertake to use the documents and information in them solely for the purpose of conducting the civil action against Antunes arising out of the death of Stanley Wong.
- [49] To assist the court in screening the documents in respect of which there remains a dispute over the obligation to produce, whether because of the alleged lack of relevance, because the document is an expression of opinion from someone other than an expert, or because of some other reason consistent with these reasons, the VPD and the Crown shall provide a list identifying the character of that document, and shall specify the reason why production of the document, or any portion of it, is not required by the terms of this ruling. The Crown or the VPD shall apply before me for a ruling with respect to the requirement to produce any document in the list.
- [50] Failing the filing and hearing of a screening application before me on or before January 31, 2009, all documents provided to Antunes in the course of the Stinchombe disclosure shall be produced to the plaintiff's counsel. Upon production, the plaintiff and his counsel shall be bound not use the documentation except for the purpose of conducting the civil action.

"Mr. Justice Pitfield"

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