C.A. No. 131906

NOVA SCOTIA COURT OF APPEAL

Freeman, Roscoe and Bateman, JJ.A.

Cite as: Canadian Broadcasting Corporation v. Nova Scotia (Provincial Court) 1997 NSCA 37

BETWEEN:

CANADIAN BROADCASTING CORPORATION, CLAUDE VICKERY, HANNAH GARTNER, HARVEY CASHORE and DAN O'CONNELL	)	David G. Coles for the Appellant
Appellants	)	
- and -	)	
	)	Alison Wheeler for the Respondent
THE HONOURABLE JUDGE JEAN-LOUIS BATIOT and GERALD AUGUSTINE REGAN	)	
Respondents	)	
	)	Appeal Heard: January 31, 1997
	)	Judgment Delivered: February 13, 1997

THE COURT: The appeal is dismissed with the exception of the issuance of the *subpoenas duces tecum*, in which regard the appeal is allowed, per reasons of Bateman, J.A.; Freeman and Roscoe, JJ.A. concurring.

BATEMAN, J.A.:

Judge Jean-Louis Batiot of the Provincial Court ordered the issuance of certain subpoenas at the request of the defence. The subpoenas were directed to four

journalists (the journalists) employed by the Canadian Broadcasting Corporation (CBC) and required them to attend to give evidence at a preliminary inquiry pursuant to s. 698 of the **Criminal Code**. He denied the defence request to order that certain notes, record of communication, video and audio material accompany the journalists (section 700 **Criminal Code**).

This is an appeal by the CBC from a decision of Glube, C.J. who: (i) on a review by *certiorari*, initiated by the appellant, refused to quash the order of the Provincial Court judge that the subpoenas be issued; and (ii) on an application for *mandamus*, initiated by the respondent, directed that the same journalists, when attending the preliminary inquiry, bring with them any "notes, record of communication, video or audiotapes" related to communications between them and two complainants (subpoena *duces tecum*).

The preliminary inquiry is in respect of indecent assault charges laid against Gerald A. Regan and relating to the allegations of thirteen complainants. Prior to the preliminary inquiry, two of the complainants, who ultimately gave evidence at the preliminary inquiry, had been interviewed about the alleged incidents by the journalists, which interviews formed a part of a CBC program "The 5th Estate" broadcast on March 29, 1994. (The contact with appellant Dan O'Connell is not said to be an interview but rather a communication during which Mr. O'Connell spoke with one of the complainants and recited certain information about the alleged events.)

The subpoenas were sought by counsel for Mr. Regan so that he could question the journalists present at interviews with the complainants and who may have made notes of the conversations and to obtain those portions of the interview that were not broadcast in order to ascertain more fully the evidence against the accused. Batiot J. further described the objective of counsel for Mr. Regan, that he wished to view those taped portions as being the best evidence available of out of court statements made by

the complainants which may be at variance with other statements they have made. Judge Batiot stated: "In essence the defence is seeking the discovery of possible inconsistent statements made out of court to better and more fully make answer and defence at trial should the accused be committed to trial." The evidence shows that there were variances between what the complainants stated in a broadcast television interview carried on the CBC and their testimony at the preliminary inquiry.

Issues:

The issues raised on this appeal are set out in the appellant's factum as follows:

> 10. Did the Learned Justice err in law in dismissing the application for **certiorari** to quash subpoenas issued July 18, 1996, pursuant to the decision of Judge Batiot dated July 8, 1996, insofar as Her Ladyship determined Judge Batiot did not commit a jurisdictional error/error of law on the face of the record. The Appellants state:
>
> (a) The record does not disclose that the Appellants are each "...likely to give material evidence ..." pursuant to section 698(1) of the **Criminal Code**;
>
> (b) The subpoenas violate each of the Appellants' rights pursuant to section 2(b) and/or 7 and/or 8 of the **Canadian Charter of Rights and Freedoms** and the decision to issue such subpoenas without "balancing" the Appellants' **Charter** rights constitutes a jurisdictional error/error of law on the face of the record;
>
> (c) The record discloses that it is not "necessary" that the Appellant give evidence at the Preliminary Inquiry such that issuance of the subpoenas is contrary to the common law;
>
> (d) The record reveals that Judge Batiot fettered his discretion and/or failed to exercise his discretion such that he committed a jurisdictional error/error of law on the fact of the record.
>
> 11. Did the Learned Justice err in law insofar as she determined subpoena(s) **duces tecum** shall issue pursuant to the **mandamus** application in that:

(a) Her Ladyship assumed the jurisdiction of an issuing authority/usurped the jurisdiction of Judge Batiot when no application for issuance of such subpoenas was before her;

(b) Her Ladyship erred in law in determining that records in the hands of third parties, not broadcast or made public are compellable by way of subpoena at a Preliminary Inquiry;

(c) Her Ladyship erred in law in determining that subpoena(s) **duces tecum** shall issue contrary to the doctrine of **stare decisis**;

(d) Her Ladyship erred in law in determining that subpoena(s) **duces tecum** shall issue when the record does not disclose that the requirements for issuance of any subpoenas pursuant to section 698(1) have been satisfied;

(e) The Appellants have been denied their rights pursuant to section 2(b) and/or 7 and/or 8 of **Canadian Charter of Rights and Freedoms** insofar as the court has determined to issue subpoena(s) **duces tecum** without first considering and "balancing" the Appellant **Charter** rights.

The Review:

Chief Justice Glube was to determine, on the *certiorari*, whether, in granting the order that the subpoenas issue, Judge Batiot made an error of law or jurisdiction. She found no such error. On the *mandamus*, however, the Chief Justice held that Judge Batiot did err insofar as he concluded that he was without jurisdiction to order that the materials sought, be brought by the journalists. In this regard, rather than remitting the matter to the Provincial Court judge, the Chief Justice directed that the *subpoenas duces tecum* issue.

Analysis:

(i) The criteria for issuance of the subpoenas:

Sections 698 and 700 of the **Criminal Code** provide:

> 698 (1) Where a person **is likely to give material evidence** in a proceeding to which this **Act** applies, a subpoena may be issued in accordance with this Part requiring that person to attend to give evidence. (emphasis added)
>
> 700 (1) A subpoena shall require the person to whom it is directed to attend, at a time and place to be stated in the subpoena, to give evidence and, if required, to bring with him anything that he has in his possession or under his control relating to the subject-matter of the proceedings.
>
> (2) A person who is served with a subpoena issued under this Part shall attend and shall remain in attendance throughout the proceedings unless he is excused by the presiding judge, justice or magistrate.

Because the journalists resided outside the province, Judge Batiot's jurisdiction to issue the subpoenas derived from s. 699(2)(b) of the **Criminal Code**:

> 699(2) Where a person is required to attend to give evidence before a summary conviction court under Part XXVII or in proceedings over which a justice has jurisdiction, a subpoena directed to that person shall be issued
>
> (a) by a justice, where the person whose attendance is required is within the province in which the proceedings were instituted; or
>
> (b) **by a provincial court judge** or out of a superior court of criminal jurisdiction of the province in which the proceedings were instituted, **where the person whose attendance is required is not within the province.**
> (emphasis added)

In issuing the subpoenas he was acting in his capacity as a Provincial Court judge as distinct from his role as the judge presiding at the preliminary inquiry. In directing that the subpoenas would issue, Judge Batiot, said "I conclude that the expression 'material', used in s. 698 of the **Code**, in effect, means 'relevant' to the purposes of the preliminary inquiry."

The following section of the **Code** is pertinent:

> 541(5) The justice **shall** hear each witness called by the accused who testifies to any matter **relevant** to the inquiry, and for the purposes of this subsection, section 540 applies

> with such modifications as the circumstances require. (emphasis added)

The appellants submit to this court, as they did before the Chief Justice on the *certiorari*, that Judge Batiot in ordering that the subpoenas issue, confused the concept of "materiality" with that of "relevance", and, accordingly, erred at law insofar as he applied the wrong test. Following a careful review of the decision of the Provincial Court judge, the Chief Justice rejected that submission. In so doing she made no error. "Materiality" as used in s. 698 must be interpreted in light of s. 541(5), above, which requires that the judge presiding at the preliminary inquiry "shall" hear the witnesses called by the defence and testifying to any matter "relevant" to the inquiry.

Materiality and relevance are related concepts, as found by Judge Batiot. I reject the appellants' interpretation of "materiality", which, if accepted, would mean that, while the justice presiding at the preliminary inquiry must hear all "relevant" witnesses called by the defence, the defence has no right to subpoena such witnesses. The "likely materiality" referred to in s. 698 must be read in the context of s. 541. Judge Batiot was using the term "relevant" in its broad sense - a witness's evidence is likely material if "it is relevant to the purposes of the preliminary inquiry". I reject the submission by the appellants that considerations of admissibility, weight or probative value have any role in this determination, save to the possible extent that they may bear upon the issue of whether the judge exercises his or her discretion to issue the subpoena, having determined that the witness is likely to give material evidence.

Counsel for the appellant further submitted that the evidence of the complainants, upon which the defence relied to support the issuance of the subpoenas, disclosed nothing from which Judge Batiot could conclude that the journalists were "likely to give material evidence". Clearly, Judge Batiot did not share that view, nor did the Chief Justice on the *certiorari*. In this regard, there was some evidence before the

judge from which he could have concluded that each of the journalist's evidence would likely be material. He did not proceed on an absence of evidence. The test on this appeal is not whether this Court, nor the Chief Justice would have reached the same conclusion. Having applied the proper test, that Judge Batiot chose to exercise his discretion in favour of granting the subpoenas, is neither an error of law nor jurisdiction.

(ii) The *Charter* issues:

The appellants' appearance before Judge Batiot on the application for the subpoenas was with the consent of the respondents. Additionally, the respondents did not oppose the appellants' position that Judge Batiot, before issuing the subpoenas, was required to entertain the *Charter* arguments put forward by the appellants. In this latter regard the appellants relied upon the comments of McLachlin, J. in **Dagenais v. Canadian Broadcasting Corporation**, [1994] 3 S.C.R. 835, to the effect that judicial acts must conform to the *Charter*. It must be noted, however, that Justice McLachlin, while finding that an order for a publication ban made pursuant to the common law called for a consideration of *Charter* principles, expressly anticipated that not all court orders are subject to *Charter* scrutiny. She wrote at p. 944:

> The question of what court orders attract the *Charter* is a large question, the answer to which is best determined on a case-to case basis. . . . Court orders in the criminal sphere which affect *Charter* rights of the ability to enforce them are themselves subject to the *Charter*. This much as a minimum is required if *Charter* rights are to be meaningful.

For the purposes of this appeal, I will accept, without deciding, that a *Charter* challenge is available on an application to issue a subpoena, in the absence of a constitutional challenge to s. 698 of the **Code**. Indeed, a number of times throughout this decision I have "accepted without deciding" various propositions. On each occasion, I do so because the assumption or proposition put forward by the appellants was not opposed by the respondents, and, accordingly, the panel did not have the

benefit of argument, nor was it necessary to decide the issue in order to dispose of the appeal.

The onus is upon the appellants to establish the *Charter* infringement, on a balance of probabilities, with the appellants bearing the initial evidentiary burden as well. (**R. v. Collins**, (1987) 33 C.C.C. (3d) 1 (S.C.C.)). The appellants tendered no evidence before Judge Batiot attesting to how, in these circumstances, the subpoenas infringed their *Charter* rights. Counsel for the appellants contends that such evidence is unnecessary because the issuance of a subpoena, *prima facie*, constitutes an infringement of various *Charter* rights. As authority for this assertion he relies upon the decision of the Quebec Court of Appeal in **U.S.A. v. Ross** (1995), 100 C.C.C. (3d) 320. I will discuss this decision below.

While I have attempted to deal individually with the *Charter* issues advanced by the appellants, they do, to an extent overlap.

Judge Batiot concluded that, sitting as a preliminary inquiry judge, he could not determine whether *Charter* rights had been infringed, but that it was within his jurisdiction to decide whether or not a right exists. In this regard, the Chief Justice, on the review, said:

> On an application for subpoenas, the presiding judge is called upon to make a final decision and if necessary to issue a remedy. Thus, sitting as a Provincial Court Judge, the Learned Judge had the jurisdiction to determine whether or not there had been a *Charter* violation and if one was found, to devise a remedy. Whether or not Judge Batiot mixed up his roles (as a Preliminary Court Judge and a Provincial Court Judge) or misinterpreted the law, he went on to determine whether a *Charter* right exists for the four persons. He reviewed the law under the right to privacy; freedom of expression (s. 2(b) of the *Charter*); and right to edit. He did not specifically refer to ss. 7 or 8 of the *Charter* although he did refer to s. 2(b). He concluded there was no *Charter* breach.

After reviewing the various sources of the alleged infringement, she agreed with the ultimate conclusion of Judge Batiot that there was no *Charter* breach. In this regard she wrote:

> Counsel for the CBC submits there must be a balancing or a consideration of "proportionality" between rights of the journalists and rights of the accused. I find there is no reason to consider *R. v. Oakes* (1986), 65 N.R. 87 (S.C.C.) or *Dagenais v. CBC*, [1994] 3 S.C.R. 835, as there is no "journalist right" found in the present case; there is no breach of any right under s. 7, 8 or 2(b) of the *Charter*.

(a) Freedom of the Press

The appellants submit that the issuance of the subpoenas infringes the journalists' right to freedom of the press under s. 2(b) of the *Charter,* which provides, in part:

> 2. Everyone has the following fundamental freedoms:
>
> . . .
>
> **(b)** freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

The issue before us is not whether the issuance of a subpoena to a journalist could ever violate freedom of the press, but whether the Chief Justice was correct in concluding that it did not do so in this case.

I am unaware of a comprehensive definition of "freedom of the press", as protected by s. 2(b) of the *Charter.* Some guidance is provided, however, by the Supreme Court of Canada in **C.B.C. v. New Brunswick** (1991), 85 D.L.R. (4th) 57. Cory, J. wrote at p. 69:

> The media have a vitally important role to play in a democratic society. It is the media that, by gathering and disseminating news, enable members of our society to make an informed assessment of the issues which may significantly affect their lives and well being.

Thus gathering and disseminating the news is a significant function of a free press. In reviewing the reasonableness of the issuance of a warrant to search certain

media offices in that case, Justice Cory considers what type of intrusion would impair the freedom of the press. He wrote at p. 68:

> In *Pacific Press*, the search **disrupted the operation of a corporation** which was not implicated in the crime being investigated and **delayed the publication of its newspaper**. These factors weighed heavily in the determination that the search warrant was not valid. (emphasis added)

And at p. 71:

> The media argue that the **issuance of a search warrant would have the effect of "drying up" their sources of information**. In my view, that argument is seriously weakened once the media have placed the information in the public domain. They can then no longer say, in effect, "I know that a crime was committed; I have relevant information that could assist in its investigation and prosecution, but I'm not going to assist you towards that end". Once the information has been made public, it becomes difficult to contend there would be a "chilling effect" on the media sources if that information were also disclosed to the police. (emphasis added)

As set out above, the appellants placed no evidentiary foundation before the judge as to the manner in which the subpoenas allegedly interfered with the s. 2(b) right. The importance of an evidentiary foundation is underscored by the comments of the Supreme Court of Canada in **Moysa v. Alberta (Labour Relations Board)** (1989), 60 D.L.R. (4th) 1. In that case, a week after the appellant, a journalist, wrote an article about Union organizing activities at several department stores, the Hudson Bay Company terminated the employment of six employees. The Union, alleging that the employees were fired because of their union organizing activities, brought an unfair labour practices claim against the Bay. The appellant was summoned to attend the Labour Relations Board hearing. The appellant objected to being compelled to testify, alleging that she had the right to protect her sources of information at common law or under s. 2(b) of the *Charter*. The Labour Relations Board ordered her to testify, which order was upheld on appeal to the Alberta Court of Appeal. Certain constitutional questions were submitted to the Supreme Court of Canada.

Sopinka, J. wrote at p. 7:

> Even if I assume for the moment that the right to gather the news is constitutionally enshrined in s. 2(b) the appellant has not demonstrated that compelling journalists to testify before bodies such as the Labour Relations Board would detrimentally affect journalists' ability to gather information. No evidence was placed before the Court suggesting that such a direct link exists. While judicial notice may be taken of self-evident facts, I am not convinced that it is indisputable that there is a direct relationship between testimonial compulsion and a "drying-up" of news sources as alleged by the appellant. The burden of proof that there has been a violation of s. 2(b) rests on the appellant. **Absent any evidence that there is a tie between the impairment of the alleged right to gather information and the requirement that journalists testify before the Labour Relations Board, I cannot find that there has been a breach of s. 2(b) in this case.**
>
> In addition, the Labour Relations Board held that the relationship between the appellant and the persons she spoke with at the Hudson Bay Company was not one based on confidence. The protection of confidence was neither sought nor given.
>
> . . .
>
> **There are no facts to support the contention that the gathering of information by the media would be threatened in the absence of *Charter* protection.** (emphasis added)

There is no factual basis before us to establish that the issuance of the *subpoenas (duces tecum*), an order far less intrusive than the search warrant under consideration in **CBC v. New Brunswick, supra**, would impair the function of the press in gathering and disseminating information. The Chief Justice made no error when she held that the appellants had not established that the issuance of the subpoenas infringed their s. 2(b) right.

(b) Freedom of Expression

The appellants, in conjunction with the assertion of the s. 2(b) right contend that the subpoenas impair their freedom of expression. There is simply no merit is this assertion, absent underlying facts as to how the response to a subpoena impairs the journalists freedom of expression.

(c) Right to Privacy

Section 7 of the Charter states:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof **except in accordance with the principles of fundamental justice**. (emphasis added)

As is clear from the wording of section 7, this is not an unqualified right. Under this heading the appellants assert an infringement of both their right to privacy and to liberty.

The appellants submit that they have a right to privacy in the information sought by the defence. In this regard, counsel for the appellants cites **R. v. O'Connor**, [1995] 4 S.C.R. 411. He says that because the material sought by the defence constitutes "third party records", the principles established in **O'Connor** apply so as to preclude production.

It is important to note that the complainants do not claim a privacy right in the communications. The journalists are asserting a separate privacy right in the information flowing between the journalists and the complainants who were interviewed for the television show.

Implicit in the submission of the appellants is the assumption that all "third party records" are "private". It is a condition precedent, however, to the application of the **O'Connor** principles that it be first established that there was a "reasonable expectation" of privacy in these communications and records.

Prima facie, the information sought from the journalists does not fall within the general class of material held by Justice L'Heureux-Dubé to be subject to a claim of privacy. She wrote at p. 477:

> It is apparent, however, that privacy can never be absolute. It must be balanced against legitimate societal needs. **This Court has recognized that the essence of such a balancing process lies in assessing reasonable expectation of**

> **privacy**, and balancing that expectation against the necessity of interference from the state: *Hunter, supra*, at pp. 159-60. Evidently, the greater the reasonable expectation of privacy and the more significant the deleterious effects flowing from its breach, the more compelling must be the state objective, and the salutary effects of that objective, in order to justify interference with this right. See *Dagenais, supra*.
>
> In **R. v. Plant**, [1993] 3 S.C.R. 281, albeit in the context of a discussion of s. 8 of the *Charter*, a majority of this Court identified one context in which the right to privacy would generally arise in respect of documents and records (at p. 293):
>
> > In fostering the underlying values of dignity, integrity and autonomy, **it is fitting that s. 8 of the Charter should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state**. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual. [Emphasis in original.]
>
> Although I prefer not to decide today whether this definition is exhaustive of the right to privacy in respect of all manners of documents and records, I am satisfied that the nature of the private records which are the subject matter of this appeal properly brings them within that rubric. Such items may consequently be viewed as disclosing a reasonable expectation of privacy which is worthy of protection under s. 7 of the *Charter*. (emphasis added)

The journalists have not asserted that there was any agreement of confidentiality or privacy with the complainants in the interviews. They have not said that they, themselves, had a reasonable expectation of privacy in the material and communications. The defence is not seeking information other than in relation to the communications that passed between the journalists and the complainants - the defence seeks the particulars of the oral communications between these parties and the contents of any notes or records kept of such communications. There is simply no evidence that there was an expectation of privacy in relation to these communications and records, nor that any such expectation, if asserted, would be reasonable in these

circumstances. The very purpose of the interviews was to prepare a publicly broadcast news report about the subject. The appellants have not demonstrated that these are "private records" which would engage an application of the **O'Connor** process. As was held in the courts below, since the appellants did not meet the burden of establishing that a right to privacy existed in relation to these records it is unnecessary to consider whether a violation occurred.

(d) Right to Silence/Right to Liberty

The appellants claim, as well, that the subpoenas constitute a *prima facie* interference with the journalists' right to silence and right to liberty. The appellants take the view that the very issuance of the subpoena amounts to a compulsion to testify, which position was not seriously contested by the respondents. The concerns under this head would, if valid, apply equally not only to journalists but to all witnesses who are subject to a subpoena.

The "right to silence" is generally raised in relation to a suspect in a criminal matter. The journalists, here, are not suspects. Lamer, J., as he then was, wrote in **R. v. Rothman** (1981), 59 C.C.C. (2d) 30 at p. 64:

> In Canada the right of a suspect not to say anything to the police is not the result of a right of no self-crimination but is merely the exercise by him of the general right enjoyed in this country by anyone to do whatever one pleases, saying what one pleases or choosing not to say certain things, unless obliged to do otherwise by law. It is because no law says that a suspect, save in certain circumstances, must say anything to the police that we say that he has the right to remain silent; which is a positive way of explaining that there is on his part no legal obligation to do otherwise. His right to silence here rests on the same principle as his right to free speech, but not on a right to no self-crimination.

In **U.S.A. v. Ross** (1995), 100 C.C.C. (3d) 320, the Quebec Court of Appeal emphasized that the right to silence is not absolute. The court wrote at p. 326:

> . . . The right to silence is not now absolute, and never has been, in Canada, in the United States, or in England.

> Thus, according to Prof. Mewett ["*The Right to Silence*" (1989-90), 32 Crim.L.Q. 273, at p. 273]:
>
> > Witnesses are compelled to testify all the time. Our whole system of justice depends upon securing the testimony of persons who are reluctant to speak and must be compelled to do so. It cannot possibly be that there is anything inherently unfair or unjust in requiring a person to speak. **It is only when what he says is subsequently used against him that any violation of fundamental justice may be seen to arise.**
>
> Again, in Wigmore's words: [J.H. Wigmore, *Evidence in Trials at Common Law*, vol. 8 (McNaughton rev. 1961), par. 2192, at p. 70]:
>
> > For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.
>
> And finally, as Zuckerman has put it: [A.A.S. Zuckerman, *The Principles of Criminal Evidence* (1989), p. 305]:
>
> > There is indeed a right of silence in that, broadly speaking, the citizen is free to withhold information from the police and everybody else. However, although the general right of silence is very important, it is, as a rule, overridden in the interests of the administration of justice.(emphasis added)

Accepting, for the purposes of analysis only, that there has been a denial of the right to silence or liberty, by virtue of the issuance of the subpoenas, there is no evidence that such denial has been in violation of the principles of fundamental justice. The information, if any, revealed by the journalists is not to be used against them. They have been represented by counsel and had a full opportunity to be heard on the question of the issuance of the subpoenas. It is unnecessary to consider, then whether there has in fact been a denial of the right to liberty or silence.

For the purposes of disposing of this issue, I have again accepted, without deciding, the submission of the appellants, largely unopposed by the respondents, that the application for the issuance of *a subpoena (duces tecum)* engages *Charter* considerations. I note the remarks of Justice L'Heureux-Dubé in **O'Connor** at p. 478:

> Although a subpoena *duces tecum* requires that a witness who is the object of the subpoena bring the requested documents into court, the subpoena does not automatically call for an order requiring the documents to be produced to the court for inspection, let alone to the defence. Production will only be ordered if the documents are likely to be relevant and if production is appropriate, having regard to all of the relevant considerations. In exercising its discretion to order production, the court must, of course, have regard to the Charter rights of the accused and the other interests at stake, including any claims of privilege or a right to privacy which the subject or guardian of the records might successfully assert in respect of those documents.

(e) Unreasonable search and seizure

The appellant asserts that the issuance of the *subpoenas duces tecum* amounts to an unreasonable search and seizure. Again, accepting without deciding that a subpoena *duces tecum* effects a seizure, guidance can be had through the analysis of the Supreme Court of Canada in **CBC v. New Brunswick**, **supra.** There, Cory, J. wrote at p. 69:

> **The constitutional protection of freedom of expression afforded by s. 2(b) of the Charter does not, however, import any new or additional requirements for the issuance of search warrants.** What it does is provide a backdrop against which the reasonableness of the search may be evaluated. It requires that careful consideration be given not only to whether a warrant should issue but also to the conditions which might properly be imposed upon any search of media premises. (emphasis added)

The respondents submit that even applying the requirements of reasonableness and necessity to the issuance of the *subpoenas duces tecum*, by analogy to the issuance of the warrants in **CBC v. New Brunswick**, **supra**, the appellants must fail.

I agree. Having found no infringement of the s. 2(b) right, the appellant is not aided by that consideration. A subpoena is a far less intrusive instrument than is a search warrant, which immediately puts the material in the hands of the authorities. Even should it be required that a subpoena *duces tecum* to a journalist could only issue in a situation of necessity - the test is met. The information sought here is not available from other sources. There were only two parties to the communications between the complainants and the journalists. If the subpoenas effect a search or seizure, the appellants have not demonstrated that it is unreasonable.

(iii) Issuance of the *subpoenas duces tecum* by the Chief Justice

The Chief Justice was correct in concluding that Judge Batiot, in his capacity as a Provincial Court judge before whom the issuance of subpoenas was sought, did have jurisdiction to issue the *subpoenas duces tecum*, and, accordingly that he erred in concluding that he did not have such jurisdiction (see ss. 698 and 700 of the **Criminal Code**). In the interests of time and expense, the Chief Justice sought to correct that error by directing that the subpoenas issue. In so doing she committed a technical error. There was no application before her to issue the subpoenas. She ought to have remitted the matter to Judge Batiot.

The appellants submit, in ground 11(b), set out above, that records in the hands of third parties are not compellable at the preliminary inquiry, thus the subpoenas should not have issued. In this regard counsel relies upon the decision in **O'Connor, supra**. As I have set out above, these are not "private third party records". **O'Connor** has no application.

In ground 11(c) the appellant says that he Chief Justice erred in "determining that the *subpoenas duces tecum* shall issue contrary to *stare decisis*". Counsel puts the argument as follows:

> The Chief Justice appears to conclude that the specific question of whether the records sought are admitted at the preliminary inquiry was a matter for the preliminary inquiry Judge alone, and that, Judge Batiot, hearing the matter as a Provincial Court Judge did not need to inquire into the admissibility of the evidence. With respect, this seems inconsistent with the provisions of the ***Code*** which require that, before any such subpoena issues, it must be with respect to material evidence. Thus, whether the issuing authority be a Provincial Court Judge or a Preliminary Court (sic) Judge, the issue of admissibility is central. Further, in this particular case, it is submitted this material is clearly not admissible.
>
> The decision of the Supreme Court of Canada in ***Patterson*** is clear authority for that proposition as are the comments of Justice L'Heureux-Dubé in ***O'Connor*** where, as is noted above, Her Ladyship agreed with the decision in ***Patterson*** such materials are only admissible at trial. While Chief Justice Glube is correct that Judge Batiot was acting as a Provincial Court Judge, it is clear that he is not the trial Judge, and was, as he concluded, without authority. The Chief Justice's decision is inconsistent with the Supreme Court of Canada's decision in ***Patterson*** and ***O'Connor***, and constitutes an error in law.

The decision in **Patterson v. The Queen** (1970), 2 C.C.C. (2d) 227 (S.C.C.) stands, primarily, for the proposition that the only ground for action by a reviewing court on a matter of *certiorari* is lack of jurisdiction and that the refusal of a magistrate to order production of a statement of the complainant did not go to the question of jurisdiction. In the course of rendering the majority judgment of the Court, Judson J. did discuss s. 10(1) of the **Canada Evidence Act**, R.S.C. 1952, c. 307. He commented that the power contained in s. 10(1) with respect to the production of a writing by a witness was a power given to a judge "at any time during trial". Judson J. did not consider any of the provisions of the **Criminal Code** as to the power of a judge presiding at a preliminary inquiry to order the production of documents. He concluded as follows at p. 230:

> Even if the Magistrate, on a preliminary inquiry, had the power to order production and failed to exercise it on request in a case where an appellate tribunal thinks that he ought to have exercised it, I would still hold that there was no jurisdictional defect. It would be no more than error in the exercise of jurisdiction.

I do not take the **Patterson** decision as a definitive statement that a judge presiding at a preliminary inquiry does not have the power to order the production of a document. The appellants submit that Justice L'Heureux-Dubé in **O'Connor, supra** opined that "a preliminary Inquiry judge is without jurisdiction to order the production of private records held by third parties." As I have found above, these are not private records held by third parties. Justice L'Heureux-Dubé in that same case, recognizes the power of the preliminary inquiry judge to compel witnesses to produce documents (at p. 510). Whatever can be gleaned from the remarks of Justice L'Heureux-Dubé in this regard, they are the expression of obiter by one judge, on any matter not essential to the issue before the court which, in Justice L'Heureux-Dubé's words, was (at p. 510):

> The more limited question for the purposes of this appeal, however, is whether the judge at a preliminary inquiry may consider applications for production of private records held by third parties.

The Chief Justice was correct when she concluded that the matter of admissibility of the records brought in compliance with the subpoena *duces tecum* is a matter for the determination of the preliminary inquiry judge, and not one to be considered on the issuance of the subpoenas.

Grounds 11(d) and (e) are addressed in the course of my remarks above.

Disposition:

The appeal is dismissed with the exception of the issuance of the *subpoenas duces tecum*. In that regard the order of the Supreme Court is vacated and the matter is remitted to the Provincial Court judge to determine whether the journalists shall be required to bring with them the records sought by the defence. Such consideration shall be on the record already established.

There shall be no order for costs.

Bateman, J.A.

Consented to:

Freeman, J.A.

Roscoe, J.A.

C.A. No. 131906

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

CANADIAN BROADCASTING CORPORATION, CLAUDE VICKERY, HANNAH GARTNER, HARVEY CASHORE and DAN O'CONNELL Appellants - and - THE HONOURABLE JUDGE JEAN-LOUIS BATIOT and GERALD AUGUSTINE REGAN Respondents	)	REASONS FOR JUDGMENT BY: Bateman, J.A.