CITATION: R. v. Vandergunst, 2016 ONSC 940
COURT FILE NO.: SCA 01/15
DATE: 20160205

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
Mitchell Vandergunst	)	Mark Halfyard, for the Applicant
	)	
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	)	
Applicant	)	
	)	
- and -	)	
	)	
	)	
Her Majesty the Queen	)	Richard Weatherston, for the Respondent
	)	
	)	
	)	
Respondent	)	
	)	
	)	
	)	**HEARD:** September 30 2015

RULING

Templeton J

[1] This is an Application by Mr. Vandergunst for the following relief:

(a) directions compelling the court reporters to produce to the Applicant, copies of the transcripts of the Applicant's trial in the Ontario Court of Justice at the copy rate of $.55 cents per page; *or, in the alternative,*

(b) an order dispensing with the need to order and file the transcripts in accordance with Rule 40.08; *and*

(c) an order for costs against the court reporters in their personal capacity; *and*

(d) an order prohibiting the said reporters from cancelling the Applicant's transcript order; *and*

(e) an order abridging the time for filing of the within Application.

The Intervenors

[2] The following persons were granted intervenor status on this Application:

(a) The Criminal Lawyers' Association, represented by L. Beechner; *and*

(b) Legal Aid Ontario (limited intervenor status); *and*

(c) Lisa Gionet, Authorized Court Transcriptionist; *and*

(d) Kathy Glenn, Authorized Court Transcriptionist.

CONTEXT

[3] "A court of record does not create a record of (…) proceedings simply for the sake of making a record. As Culliton C.J.S. stated in *Regina* v. *Boylan*, supra at 46: "a proper record of the proceedings is primarily for the protection of the accused". Refreshing a witness' memory or impeaching a witness with earlier testimony, read-backs of evidence, and access to evidence during a period of deliberation, are commonplace examples of trial court reliance on recall of an accurate record. Opinion letters for Legal Aid and bail applications based on transcripts are important steps in the criminal process. Appellate review is frustrated, if not defeated, in those circumstances where a verbatim record of proceedings is not produced. Individual, or systemic, action contributing to haphazard or inaccurate maintenance of the record of court proceedings cannot be tolerated. At a point, not only are the fair trial rights of the accused compromised, but the independence of the

judiciary is impaired. It states the obvious to observe that the Attorney General cannot appear as a party in criminal proceedings and, in those very proceedings, contribute to elimination of an accurate record, without hopelessly threatening the appearance of justice." [1]

[4] These are words that were written by Justice Casey Hill in *R.* v. *Hanneman* fifteen years ago. Granted that case concerned the *accuracy* of the record but the case at bar concerns an issue even more fundamental from my perspective, namely, the *production* of *any* record. How much more significant is Justice Hill's observation therefore that the Attorney General cannot appear as a party in criminal proceedings and, in those very proceedings contribute to the non-existence of any record, without hopelessly threatening the appearance of justice?

[5] In the opening paragraphs of his paper entitled **When Open Courts meet Closed Governments**[2], Mr. David Paciocco (as he then was) wrote,

> I have long been aware at an intellectual level of the importance of the "open court" principle. I did not fully appreciate that importance, though, until I witnessed the President of the Appeals Chamber of the International to cross- examine an expert witness who had testified for the Prosecution at the trial about a missive he had sent to the Prosecutor after the trial was over claiming that our client was not at the location of a massacre for which he was convicted. When the President made his order the microphones in the sound-proof, glass-walled visitor's gallery were turned off. Then automatic blinds were inched closed to the sound of a grating motor, blocking the view into the courtroom from the gallery, presumably so that no one could read the expert's lips while looking at the back of his head (which is all their vantage point allowed). What then transpired was to be "closed" from the world forever.
>
> What amazed me about this development was that the Prosecutor had not even asked for the hearing to move into closed session. The witness requested it. All he had to say in order for the President to shut the public out and forever seal what was about to transpire was that he was concerned for the safety of some of the witnesses he had spoken to, should their names become public. No evidential foundation for his fear was presented or asked for, and no canvass was undertaken for less intrusive ways to protect those making the order. We simply continued in a closed proceeding in which issues central to the liberty of my client would be determined away from the eyes of the world.
>
> The irony that a Tribunal, created to enable the eyes of the world to witness justice, would so

[1] *R.* v. *Hanneman* [2001] O.J. No. 839

[2] (2005), 29 S.C.L.R. (2d)

> reflexively go into "closed session" was not lost on me. Nor did I fail to see the long-term risks of such practices to the integrity of the justice the Tribunal was dispensing. As a Canadian lawyer I dismissed this attitude about the open court principle as yet one more product of the cultural gap between Canadian conceptions cavalier about the open court principle, I thought. I am beginning to fear that maybe I was wrong…
>
> Still, there are various grades of democracy and various degrees of freedom, and unless those responsible for the administration of the open court principle — the executive, government officials, line peace officers and, of course, courts — turn their minds to the issue and reaffirm their commitment to leave our courts as open as they can be in this age of insecurity, our freedom and democracy will be diminished more than it need be. Society will suffer for it, and so too will some individuals…
>
> The Open Court Principle is about Access to Information, not Access to Wood-panelled Rooms
>
> The term "open court principle" is potentially misleading. It sounds like it is concerned with open doors, including the common law implication that open doors are an invitation to enter. These rudimentary notions, open doors and the right of public entry, are indeed encompassed by the open court principle but they are not its heart and soul. They are a means to an end. The "open court principle" is in fact about access to, and the dissemination of, information about what courts do. …

[6] A core assumption, of course, with respect to the information referred to by Mr. Paciocco in his thesis, and in my view, a principle tenet of the "open court principle" is that the information to be accessed is both **accurate** and **available on an equitable financial basis** to all those who are entitled to it.

[7] The fundamental role of the court reporter in the administration of justice cannot be underestimated. I have long held the view that indeed it is the court reporter who guards against secret hearings and any attempt to manipulate the law or the administration of justice. It is the court reporter's skill and knowledge in creating accurate and timely written or recorded accounts of court proceedings that holds all participants in the administration of justice, judges, lawyers, accused persons and litigants alike, accountable for fair hearings and adherence to the law. The esteem and significance of the role of the court reporter in the administration of justice was reflected in the fact that the court reporter was once deemed to be an "officer of the court"[3]. But, as observed by Mr. Justice Hill, "The profession of court reporting with its long and valued history in this province

[3] *Judicature Act*, R.S.O. 1980, c. 223, s. 103(1)

has been systematically eroded[4]" and that erosion has now lead to dramatic consequences as will be determined below.

[8] Accurate reporting and equitable access to the record created by the court reporter by those entitled to the record is essential to public confidence in the integrity of the court system.

[9] The creation of an accurate record is the foundation for almost all appellate proceedings. Equitable access to that record is necessary for the implementation of appellate proceedings to which all affected persons in the justice system have a right.

BACKGROUND

[10] In order to understand the issues in the Application before me and the significance of the evidence and the arguments, a brief history of the recent evolution of court reporting in Ontario is valuable.

[11] By statute, the Attorney General is required to superintend all matters connected with the administration of the courts, other than matters that are assigned by law to the judiciary.[5]

[12] Similarly, under the *Ministry of the Attorney General Act*, the Attorney General is required to superintend all matters connected with the administration of justice in Ontario.[6]

[13] To accomplish these tasks, the *Ministry of the Attorney General Act* provides that "[s]uch employees may be appointed under the *Public Service Act* as are required from time to time for the proper conduct of the business of the Ministry."[7] A similar provision exists under the *Courts of Justice Act*.[8]

(a) Pre- June 9, 2014

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[4] *R.* v. *Hanneman*, supra
[5] *Courts of Justice Act*, R.S.O.1990, c. C.43, Section 72
[6] R.S.O. 1990, c. M.17, Section 5(c).
[7] R.S.O. 1990, c. M. 17, Section 4
[8] R.S.O. 1990, c. C.43, Section 73(1)

[14] Court reporters were part of the Ontario Public Service Employees Union (OPSEU).

[15] As noted by the arbitrator in his decision concerning a dispute between OPSEU and the "Crown in Right of Ontario" in 2006, commonly referred to as the *Re Hunt* decision [9],

> "two of the functions necessary to the administration of the courts and the administration of justice in Ontario are the "taking of the record" and the preparation of transcripts, when requested by the judiciary, the Crown or the defense bar. A transcript is the official written record of a court proceeding. It provides a written record of the proceedings at trial and forms the basis of most appeals. Transcripts are typed from recordings created during the proceedings. The process of recording the proceedings is often referred to as "taking the record." The process of typing the recorded court proceedings is referred to as 'the preparation of the transcript'.
>
> To perform these functions, the Ministry hires Court Reporters… There are several types of Court Reporters employed, and the mix has changed over time. At present, the vast majority (approximately 80%) are Court Monitors. A Court Monitor uses an open microphone audio recording device to record the proceedings in court, supplemented by a comprehensive logbook…
>
> There are both classified and unclassified Court Reporters in the Ministry. All are employees included in the bargaining unit represented by OPSEU. The classified employees work daily from 8:30 a.m. to 4:30 p.m. The unclassified employees work on an "on-call, as required" basis. There are also agency court reporters used by the Ministry.
>
> Transcripts are produced when there is a request for a transcript – from the judiciary, the Crown Attorney, defence counsel or a member of the public. Some proceedings, however, automatically require a transcript, such as mental disorder disposition hearings, incarceration in a federal penitentiary hearing; dangerous offender hearings, reviews of parole eligibility, and several others. Further, transcripts are required for appeals…
>
> The evidence is clear that the production of transcripts, upon request, is a required part of a court reporter's duties. It is not optional. The Court Reporter cannot, without the Ministry's permission, refuse to prepare a transcript. As the Court Monitor Training Manual, produced by the Ministry to train new Court Monitors, states: "The production of the transcript is probably the most important duty you will have as a court reporter." It then adds, in bold letters, that "there is an obligation on the part of the Ministry to ensure that the court monitor produces the transcripts accurately, in the proscribed format, in a timely manner, and that the fees are collected in accordance with the Regulations." The same statement is made in the Role of the Court Monitor manual.
>
> A Court Reporter also cannot, without the Ministry's permission, delegate the preparation of a transcript to another Court Reporter. Court Reporters may hire a typist to type the transcript, but certification of the transcript remains the responsibility of the Court Reporter who took the record in court. The Court Reporter must certify that the transcript is a true and accurate transcription from the recordings the Court Reporter made in court, to the best of his or her skill and ability. Each copy of the transcript must be so certified and signed by the Court Reporter.
>
> There is one exception to this. The *Evidence Act* was recently amended to provide for two separate certifications where the proceedings have been taped by a Court Monitor. The Court Monitor certifies that the taping he or she took of the court proceedings is an accurate recording. Then there is a separate certification that the transcript is an accurate transcription of the certified recording. Normally, the same

[9] 2006 CANLII 26378 (Ont. G.S.B.)

> person both takes the record and types the transcript, but with the separate certifications the typing may be done by another court reporter. This two- step certification procedure does not exist for other types of court reporters. For short-hand, stenographer and stenomask reporters, the same person must take the record and certify that the transcript accurately reflects the verbatim proceedings in court.
>
> Mr. Uhlmann testified that the Ministry, in connection with this dual certification amendment, now "certifies" Court Monitors. The Ministry created two panels. The "A" panel included any Court Reporter who had prepared a transcript within the prior 12 months. They were "grandfathered" onto the "A" panel. The "B" panel is for new Court Reporters who have been trained and deemed qualified to produce a transcript. There is no "certification" by the Ministry of other types of Court Reporters.
>
> As noted, the job specification, since 1994, states that the preparation of transcripts is on the incumbent's "own time." The Court Monitor Training Manual, likewise, states that the "transcript is produced on the court monitor's own time" as a "separate business of the monitor." The evidence shows, however, that the practice of the Ministry in relation to Court Reporters preparing transcripts during "work time" – as opposed to on their own, unpaid time – varies throughout the province. There was substantial evidence that many Court Reporters do type transcripts and perform related functions during paid work time…
>
> Every aspect of transcript production is dictated by the Transcription and Procedures Manual. It covers transcription orders (either on Ministry forms or in writing); removing recordings and logbooks for transcription purposes; timeframes for transcript production; deposits; logging of transcript orders; transcript formatting rules including the type and size of paper, font, lines per page, headings, the cover and back page content and colour; binding; certifications; and distribution. It covers preparing the invoice for the judiciary and the Crown (on a form provided by the Ministry) as well as what must be included for private parties, including the fees that may be charge A Court Reporter cannot refuse the request to produce a transcript, but must seek permission from the Ministry in order to have the transcript reassigned.

[16] In that case, the arbitrator decided that the preparation and certification of transcripts was bargaining unit work of the Court Reporters.

[17] In his article, *Technology and Court Reporting*[10], Mr. Justice T. Granger (as he then was) described the evolution of the court reporting process from a judicial perspective:

> In 1988, most court reporters created a court record of the *viva voce* evidence by way of shorthand. If the presiding judge required a portion of the evidence transcribed, the court reporter would create a transcript after court hours from his/her shorthand notes. This system started to disappear in the late 1980's as a result of the expense involved in having a court reporter assigned to a circuiting judge. At the same time shorthand court reporters started to disappear as a result of the cost and length of time it took to train a certified shorthand reporter. There was always a concern that the accuracy of the transcript depended on the accuracy of the shorthand notes and there was no way to check the accuracy of such notes.
>
> The shorthand reporter was replaced by the steno mask court reporter who would verbally repeat the *viva voce* evidence into the steno mask and his/her voice recording was recorded on an analog cassette. The steno mask reporting system suffered from the same failings as the shorthand reporting system as the accuracy of the transcript

[10] SLAW, April 27 2010

depended on the accuracy of the words spoken by the steno mask reporter. The additional disadvantage to the steno mask system was that the *viva voce* evidence was being stored on an analog cassette which was subject to being erased, damaged or lost. There have been numerous incidents in Ontario where analog tapes have been erased, damaged or lost, thereby creating an inability to prepare a transcript or review the accuracy of the transcript which was prepared. In addition, analog cassettes have a limited "shelf life" and after a number of years the tapes stretch or break making it very difficult to recover the audio recording.

In the 1980's and 1990's, as a result of financial constraints and the disappearance of certified shorthand reporters and/or certified steno machine reporters, courts administration began to install in most courtrooms analog recording machines operated by dedicated monitors who were responsible for:

1 testing the recording machine;
2 monitoring the recording during the trial;
3 changing the cassettes when they were full; and
4 numbering and delivering the analog cassettes to the storage area;

During the time that analog recording machines were used to record the *vive voce* evidence I am unaware of any system employed by courts administration to make a backup copy of the analog cassette and store it off site. In many instances, the court reporter/monitor would take the only copy of the cassettes home to prepare a transcript. The danger of this practice was that cassettes could be lost, damaged or the audio recording erased from the tape. In many courthouses the audio cassettes were not stored in a secure location and were subject to damage from fire and/or water.

At the time courts administration was introducing monitored analog recording systems, trials were becoming longer and more complex. As a result more judges were reserving their decision in order to review his/her notes and the law before issuing their written reasons for judgment. Also as a result of the complexity of the *vive voce* evidence many judges were requiring a complete or partial transcript of the evidence which had the effect of delaying the release of the reasons for judgment. On occasion it took weeks if not months to obtain the requested transcript.

In many cases, if the trial judge orders a partial or complete transcript of the evidence, the court reporter/monitor outsourced the preparation of the transcript to a typist who was not in the courtroom when the *vive voce* evidence was given.

As trials became longer and as a result more expensive, access to justice was being impeded as most people could not afford to descend into the arena of trial litigation. If a litigant was not satisfied with the trial decision the cost of and the time to appeal was enormous as the appellant had to pay for a transcript of the *vive voce* evidence.

In my view, given the cost of and time to prepare a transcript of the *vive voce* evidence for an appeal, it is imperative that the trial judge not only understand the evidence but have an accurate recollection of the evidence when preparing his/her reasons for judgement. If the Court of Appeal requires a transcript of the evidence before reviewing the decision then the trial judge should also have a transcript of the evidence in order to ensure that his/her recollection of the evidence is accurate and not based on memory and/or his/her note taking ability.

Today, an analog court reporting system operated by a monitor simply does not:

- provide a secure system of maintaining a record of the *vive voce* evidence;
- provide the trial judges with the tools they need to ensure that they have an accurate record of the *vive voce* evidence;
- assure litigants that the judge has an accurate recollection of the *vive voce* evidence adduced at trial; and
- provide a transcript for purposes of appeal in a timely and affordable manner.

Today there is new technology available which can meet the needs of the

> judiciary and the public as set out above within the courtroom. These needs can be achieved by using electronic technology to create and maintain a digital audio recording of the *vive voce* evidence and to create a text transcript of the *vive voce* evidence at trial as it is given.
>
> Digital audio recording saves the *vive voce* testimony into a digital file which can be saved on a computer within the courtroom and/or courthouse server. The digital file is typically created in an industry standard format similar to an MP3 file. More sophisticated systems use a database to track each recording and distribute recorded files to multiple locations simultaneously to help ensure the records are safe.
>
> The advantages of a digital audio recording system are:
>
> 1 the sound quality of the recording is far superior to an analog recording
>
> 2 the digital file containing the audio recording of the testimony can be automatically backed up on a server a regular intervals, thereby eliminating the danger of deletion, destruction or being lost;
>
> 3 during the recording of the *vive voce* evidence in court, the digital audio file can be annotated by the judge and/or the dedicated court reporter, i.e. time, subject, issue, or key word; and
>
> 4 the annotations can be searched by time, subject, and/or key word …..
>
> Unfortunately, court reporting in Ontario has not kept pace with the emerging technology which is available in the market place today and which could greatly assist judges in having a command of the *vive voce* testimony during the trial and when preparing their reasons for judgment.
>
> Although the judiciary is responsible for ensuring a record is made of the *vive voce* evidence it appears that the judiciary has allowed Courts Administration to determine the type of court reporting that will be used in the trial courtrooms in Ontario. In my view it is time the judiciary insisted that Courts Administration provide a court reporting system which will provide the judiciary with the tools it requires to judge in a complex trial environment and at the same time provide litigants with an affordable and timely transcripts.

[18] As noted by the Honourable Justice Granger, in the 80's and 90's with the introduction of recording technology such as tape recorders, MAG created a position called the Court Recording Monitor. Under this system, the monitor could both monitor the recording technology and further, produce transcripts. The duties and responsibilities of a Court Reporter included the preparation of transcripts of court proceedings and the preparation of a transcript production record.

[19] At the time Court reporters and Court Recording Monitors were subject, *inter alia*, to the following:

> **Administration of Justice Act**
> **ONTARIO REGULATION 587/91**
> **COURT REPORTERS AND COURT MONITORS**
>
> Last amendment: O. Reg. 94/14.
>
> ***This is the English version of a bilingual regulation.***
>
> **1.** In this Regulation,
>
> "court monitor" means court electronic equipment operator. O. Reg. 587/91, s. 1.

2. (1) Court reporters and court monitors shall be paid the following fees for attendances and services requested by an official of the Ministry of the Attorney General and performed on or after the 1st day of January, 1990:….

3. Court reporters and court monitors shall be paid the following fees in respect of duties performed on and after the day that this Regulation comes into force:

1.	For a single copy of a transcript of evidence for the purpose of reproduction in an appeal to the Court of Appeal, per page	$3.75
2.	For copies of transcripts, including transcript of charge to jury and transcript of oral judgment, but not including a transcript under paragraph 1 or a transcript for use in an appeal book,	
	• i. for the first copy, per page	3.20
	5 ii. for each additional copy, per page	.55

4. A copy of a transcript of evidence ordered by a judge for the judge's own use shall be paid for by the Province of Ontario. O. Reg. 587/91, s. 4.

6. This Regulation, except section 3, does not apply to a court reporter or a court monitor who is a civil servant or a public servant within the meaning of the *Public Service Act*. O. Reg. 587/91, s. 6.

[20] On March 1 2013, following the *Re Hunt* decision, the Grievance Settlement Board released a decision in which it ordered the Crown in Right of Ontario to forthwith cease its "violation of the collective agreement by failing to apply the collective agreement to Court Reporters and ordered the Employer to forthwith apply the collective agreement to Court Reporters performing bargaining unit work of production of transcripts, and not treat them as independent contractors" [11].

[21] In this decision, the arbiter observed that the employer (MAG) had "made it known to the union as well as the Board that its intention is to exercise its management rights to contract out the work of producing transcripts. It takes the position that when this is done, the collective agreement would no longer apply to that work…the employer has explicitly stated that it has no intention of applying the collective agreement to that work in the interim period leading up to the implementation of its planned contract out".

[11] *Ontario Public Service Employees Union (Union)* v. *The Crown in Right of Ontario (Ministry of Attorney General)* GSB #2011-1335 Union #2011-0999-0033

[22] On May 15, 2013 the Ministry of the Attorney General presented its new court reporting staffing model to all court reporters in meetings held across the province.[12]

[23] On or about March 3 2014, OPSEU signed a Memorandum of Understanding with the Crown in Right of Ontario in which it appears that the outstanding grievances and litigation regarding these issues affecting court reporters were settled. Under the settlement, court reporters would have until July 2 2014 to choose one of two options: a pension contribution option or a lump sum payment option.

[24] In a Request for Proposal (RFP), MAG apparently sought a third party vendor to assume responsibility for the administration of transcript production[13] and issued a public announcement that a new model for producing court transcripts in Ontario would take effect on June 9 2014. The announcement indicated that if a person orders a court transcript, that person must select and contact an independent, authorized Transcriptionist from the List of Authorized Court Transcriptionists for Ontario and that this list would be administered and maintained by an independent service provider and will be available online at www.courttranscriptontario.ca. [14]

[25] In an announcement on its website, the *Court Reporters Association of Ontario*[15] indicated the following:

> On March 10, 2014 the Ministry of the Attorney General presented three options to all court reporters employed in the Provincial criminal courts and announced that on June 9, 2014 certified transcripts produced across the Provincial criminal, civil, and family court justice system will become a competitive service industry provided by independent Transcriptionists and contractors… Commencing June 9, 2014 the ordering party will be able to choose a Transcriptionist of their choice from a website list maintained by an independent service provider (ISP), *Arkley Professional Service*. Arkley Professional Services was the successful proponent chosen through the RFP process under contract for three years with the Ministry of the Attorney General. In its role, Arkley (sic) Professional Services will perform the following functions: Verifying qualification of candidates for ISP registered list; Collecting and managing annual registration fees; Entering into agreements with authorized Transcriptionists; Developing and maintaining a publicly accessible website; Providing technical support of the

[12] accuratelynoted.com, *Information Release. New MAG Staffing Model*
[13] www.opseu.org *Justice for All Newsletter, September 30 2014*
[14] www.attorneygeneral.jus.gov.on.ca
[15] http://www.crao.ca

> website; Maintaining current standards, regulations and practices to its registered members; Implementing quality control and complaint resolution mechanisms.

[26] Under this new model, MAG Court reporters could apparently choose to

> (a) take the in-court record and also produce certified transcripts. Court reporters choosing this option would appear on the independent service provider (ISP) website list as of June 9, 2014; or
>
> (b) become authorized, and be put on the ISP list in the future. In choosing this option, court reporters reserve their decision to appear on the ISP website list until a later time; or
>
> (c) take in the in-court record only and not produce certified transcripts. Their names would not appear on the ISP list. [16]

[27] On April 8 2014, the Attorney General signed a document called "Approval and Authorization" under s. 5 of the *Evidence Act* and *Ontario Regulation 158/03* in which she confirmed that for the purpose of s. 4 (2) of *Ontario Regulation 158/03*, she authorized any individual on the *List of Authorized Court Transcriptionists* maintained by Arkley Professional Services. This document was attached as an Appendix to the *Court Transcript Standards and Procedures Manual*[17] that had been produced by MAG. It will be discussed in greater detail below.

[28] In a memo dated May 20 2014 to all staff and managers in the Court Services Division, the assistant Deputy Attorney General indicated that Arkley is the independent provider responsible for administering and maintaining the List of Authorized Transcriptionists. All aspects of the transcript order was to be agreed upon directly between the ordering party and the Transcriptionist including availability to prepare the transcript within the timeframe requested and payment and delivery of the transcript.

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[16] ibid, *Information Release, February – March 2014*, Court Reporters Association of Ontario

[17] This document was updated in November 2015.

[29] It is also clear from this memo that certain individuals could be employees of the Ministry *and* independent contractors as Authorized Court Transcriptionist on the list maintained by Arkley. According to the submission of the Crown, while the reporter is in the courtroom, he/she is an employee of the Ministry but when producing transcripts, he/she is an independent contractor.

(b) Post June 9, 2014

(i)Fees for Court transcripts

[30] Prior to the implementation of the changes to the court reporting model, Ontario Regulation 587/91 of the *Administration of Justice Act* was revoked on May 1 2014, and was replaced by the following in Ontario Regulation 94/14:

> **FEES FOR COURT TRANSCRIPTS**
>
> **Consolidation Period:** From May 1, 2014
>
> (i) No amendments.
>
> (ii) This is the English version of a bilingual regulation.
>
> (iii) Definitions:
>
> "authorized court Transcriptionist" means a member of a class of persons authorized by the Attorney General to transcribe recordings; ("transcripteur judiciaire autorisé")
>
> "recording" means a recording made under subsection 5 (1) of the *Evidence Act* of a court proceeding or of evidence in a court proceeding. ("enregistrement")
>
> (iv) Fees for court transcripts

	Service	Fee
1.	To transcribe all or part of a recording and produce a first certified copy of a transcript	$4.30 per page or $20.00, whichever is greater
2.	To transcribe all or part of a recording and produce a first certified copy of a transcript, to be provided within five business days	$6.00 per page or $20.00, whichever is greater
3.	To transcribe all or part of a recording and produce a first certified copy of a transcript, to be provided within 24 hours	$8.00 per page or $20.00, whichever is greater
4.	For any additional certified copy of the transcript, in printed format	$.55 per page or $20.00, whichever is greater
5.	For an electronic copy of the transcript, requested at the same time as a request for item 1, 2, 3 or 4	No charge
6.	For an electronic copy of the transcript, requested at any other time	$20.00

[31] On its website[18], Legal Aid Ontario posted a helpful 'before and after' analysis regarding the increase in fees for transcripts:

How the government's court transcript fee increase will affect you

Service	Previous rate (under O. Reg. 587/91 of the *Administration of Justice Act*)	Rate effective May 1, 2014 (under O. Reg. 94/14, Fees for Court Transcripts)
Transcription of first copy	• $3.20 per page for non-Court of Appeal transcript • $3.75 per page for Court of Appeal transcript (Ministry will reproduce copies required)	• $4.30 per page for a certified original*. • Harmonized Court of Appeal rate with other levels of court • Ministry will reproduce copies required for Court of Appeal
Expedite (within five business days)	Not applicable (N/A)	$6.00 per page for a certified original*.
Daily (within 24 hours)	N/A	$8.00 per page for a certified original*.
Electronic reproduction (orders placed subsequent to the original)	N/A	$20.00 per transcript
Paper reproduction (orders placed subsequent to the original)	$0.55 per page	$0.55 per page for a certified hard copy*.
Minimum fee	N/A	$20.00 per transcript
Transcript not required	N/A	• $22 (per day, per case) for a copy of the digital court recording or • $10.50 (per day, per case) for a subsequent day's recording, for requests made at the same time

Friday, May 16, 2014

Further to MAG's recent announcement, lawyers will soon be required to bill more for transcripts from the court of appeal as well as Ontario and supreme courts of justice. The new fees, effective May 1, 2014, comply with a new government-mandated model for court reporting and transcript production — the first in 22 years.
Legal Aid Ontario (LAO) will pay requests submitted to transcribers on or after May 1, 2014 under the new rates. LAO is also developing new policies that reflect the new model, and will advise panel lawyers of the details in late May.

Previous rates vs. rates as of May 1, 2014

*Electronic copy provided for no extra charge for requests made at same time as the request for a hard copy original

[32] Fees for court transcripts are regulated by Ontario Regulation 94/14 - Fees for Court Transcripts cited above. According to the Arkley Professional Services ('Arkley')

[18] legalaid.on.ca

website[19], deposits and/or payments of the regulated fees are arranged between the ordering party and the chosen Authorized Court Transcriptionist.

(ii)Transcript Production

[33] Prior to June 2014, ordering parties did not have a choice with respect to who produced and certified the transcript. They placed their order with the court office and, typically, the transcript was produced and certified by the court reporter. The ordering parties did not have a choice with respect to who produced and certified the transcript.

[34] Under the current model, however, ordering parties place their transcript order with an independent, authorized Transcriptionist of their choosing. All aspects of the ordering including availability to produce the transcript within the required timeline, deposits, payment and delivery options are arranged and agreed to directly between the ordering party and the authorized court Transcriptionist.

(iii)Complaint Procedure

[35] Under the new model, complaints about court transcripts, including timelines, payment and accuracy, should be dealt with directly with the Authorized Court Transcriptionist. Where parties cannot reach an agreement regarding the accuracy of a transcript, either party may provide the complaint in writing to Arkley Professional Services, documenting the nature of the issue and identifying the exact portion(s) of the transcript requiring review.

THE INDEPENDENT CONTRACTOR

[36] In view of the seismic shift in the nature of the court reporter's relationship with the Attorney General who, as I have indicated, is required to superintend all matters connected with the administration of justice in Ontario, it is helpful to briefly review the legal nature of the term "independent contractor".

[19] www.courttranscriptontario.ca

[37] In order to determine whether the persons responsible for producing the record of court proceedings are truly "independent contractors", the crucial question to decide in this regard, is "whose business is it?". The question is whether the party carrying on the business is carrying it on for himself, on his own behalf, or carrying it on, on behalf of a superior. [20] The term "independent contractor" imports the discretion and the authority to independently negotiate the terms of a contract and to accept or decline the contract if the parties fail to reach an agreement.

[38] Both Lindsay Gionet and Kathy Glenn have deposed that they were "grandfathered" into ACTO (Authorized Transcriptionists of Ontario) as experienced Transcriptionists and are now independent contractors with all the right that this position entails.

[39] On the website called "Authorized Transcriptionists of Ontario", instructions are provided to the public with respect to "transcript ordering, payment and delivery." The inference is also clear from the wording on this website, that in ordering a transcript and entering into arrangements for payment and delivery, a member of the public is dealing with an independent contractor who is subject to the fees that are regulated by Ontario Regulation 94/14.

[40] Deposits and/or payments of the regulated fees, however, are to be arranged between the ordering party and the chosen Authorized Court Transcriptionist.

[41] All functions related to court transcription services including soliciting business must be done on the Authorized Court Transcriptionist's own time, outside of court facilities and government premises and without the use of ay government equipment or supplies including paper, printers, computers and copiers.

THE EVIDENCE ON THE APPLICATION

[20] *Montreal* v. *Montreal Locomotive Works Limited et. al.* [1947] 1 D.L.R. 161 (P.C.)

[42] The Court received Affidavit evidence and heard oral submissions from both the Applicant and the Respondent and the Intervenors who were granted standing (save and except the LAO which filed Affidavit evidence only).

[43] Mr. Vandergunst was convicted of sexual assault on October 3, 2014 following a nine-day trial. He was sentenced on February 5 2015 to one year in custody. He has appealed both the conviction and sentence to the Superior Court of Justice.

[44] During the course of the trial, transcripts of the proceedings were ordered by trial counsel, Mr. David Reid. The transcripts were for the trial proceedings that took place on March 24, June 20, June 27, July 11 and August 22 2014. Both Lindsay Gionet and Kathy Glenn were the Authorized Court Transcriptionists with respect to these transcripts.

[45] The following invoices were delivered to Mr. Reid from Ms Glenn with respect to those orders:

(a) April 28 2014: re: March 24 2014 1 original (68 pages @ $3.20 per page) $217.60

(b) June 24 2014: re: June 20 2014 1 original (expedited – 167 pages @ $6.00 per page) $1002.00

(c) July 29 2014: re: June 27 2014 1 copy (141 pages @ $.55 per page) $77.55

TOTAL: **$1297.15**

and from Ms Gionet:

(d) August 13 2014: re: July 11 2014 1 copy (175 pages @ $.55 per page) $96.25

(e) Sept 23 2014: re: August 22 2014 1 copy (137 pages @ $.55 per page) $75.35

TOTAL: **$171.60**

[46] Several days of the proceedings had not been transcribed, however, namely, the proceedings that occurred on March 31, April 24, September 5 and February 4 2015.

[47] On April 8 2015 (1:53 pm), Lindsay Gionet sent an email to Erica, a staff member at Mr. Reid's firm asking if Mr. Reid was going to be ordering additional copies of the transcript for the purpose of the appeal that had been filed. She indicated that she and "Kathy" had provided one copy each day but reminded Erica that three copies would be required for the appeal.

[48] On April 14, 2015 (11:07 am), Melissa Lall a staff member at Mr. Halfyard's office, sent a request to Ms Glenn for two copies of the transcripts. Mr. Halfyard is Mr. Vandergunst's appellate counsel. At the same time, she sent the same email but under separate cover to Ms Gionet.

[49] In the order to Ms Glenn, two *electronic* copies of the transcripts of the complete proceedings on March 24, June 20 and June 27 2014 were requested for the purpose of a Summary Conviction Appeal to the Superior Court.

[50] In the order to Ms Gionet, two *electronic* copies of the transcripts of the complete proceedings on July 11 and August 22 were requested for the purpose of a Summary Conviction Appeal to the Superior Court.

[51] By way of email (5:06 pm) on the same day, Ms Glenn acknowledged the order and indicated that three copies of the transcript would be required for the appeal. Ms Lall, in reply, confirmed that only two copies would be required in her reply email of the same date.

[52] On April 15, 2015 (7:21 am), Ms Gionet sent an email acknowledging the order and wrote as follows "Thank you for the transcript order, however, I notice that it is only ordering 2 copies. Unfortunately it is our (sic) mandate for appeal transcripts to produce three copies for Superior Court and five copies for the Court of Appeal. All three, in this case, have to be bound in red and with appeal numbers on them."

[53] On April 16, 2015 (9:35 am), Ms Lall responded on behalf of Mr. Halfyard and indicated, "This was for a SCA, please just provide us with two copies. Thank you."

[54] At 9:39 am, Ms Gionet replied, "Automatically this becomes an appeal transcript at one full rate and two copies. It doesn't matter what type of appeal it is. An appeal is an appeal and unfortunately those are our rules that we are governed by." At 9:50 am, Ms Lall reminded Ms Gionet that she had typed (and produced) the requested transcripts already.

[55] At 9:44 am. Mr. Halfyard wrote an email to Ms Gionet and confirmed the order of two copies at "copy rate". He further wrote, "The transcription is already done (which is nearly all the work) and paid for by the client at trial…We already have our copy of the transcripts that we have indicated, we only want two additional copies." At 9:57 am Ms Gionet responded, "Hi Mark, Unfortunately I understand what you are saying but it is our right to charge the appeal rate for any appeal. And it is our mandate to provide three copies. I'm not sure what you would like me to do at this point."

[56] The emails flowed back and forth between Ms Gionet and Mr. Halfyard throughout the day. Mr. Halfyard indicated that he had never encountered a situation where the transcripts were produced at trial and he had been restricted to relying on the copies already produced or had to pay for the transcript twice.

[57] At 10:25 pm, Ms Gionet referred Mr. Halfyard to s. 6.2.3 of the *Court Transcript Standards and Procedures Manual* which is entitled "Invoicing and Distribution of Summary Conviction Appeals". Under this heading, MAG indicates that whether the appellant is the Crown or the defence, the Authorized Court Transcriptionist is to prepare three copies of the transcript and provide them to the ordering party along with an invoice.

[58] Also, in her view, the appeal was an entirely new proceeding and since the transcript is for appeal purposes, "it is reverted to full price for the first copy and copy rate for the additional copies".

[59] Mr. Halfyard indicated that he was going to raise this issue before the Court.

[60] On April 29 2015, Ms Gionet sent an email to him indicating that it had been two weeks since they had last corresponded and that at that point in time he was either going to have to cancel the transcript order or move forward with "having them sent out". Mr. Halfyard asked her to produce them.

[61] On April 30 2015, Ms Glenn sent an Invoice dated April 29 2015 to Mr. Halfyard for the following:

(a)	re: March 24 2014	1 original (68 pages @ $4.30 per page)	$292.40
		2 copies (68 pages @ $.55 per page)	$74.80
(b)	re: June 20 2014	1 original (167 pages @ $4.30 per page)	$718.10
		2 copies (167 pages @ $.55 per page)	$183.70
(c)	re: June 27 2014	1 original (141 pages @ $4.30 per page)	$606.30
		2 copies (141 pages @ $.55 per page)	$155.10
	TOTAL:		**$2030.40**

[62] And on the same day, Ms Gionet sent an Invoice dated April 30 2015 to Mr. Halfyard:

(a)	re: July 11 2014	1 original (175 pages @ $4.30 per page)	$756.80
		2 copies (352 pages @ $.55 per page)	$193.60
(b)	re: August 22 2014	1 original (138 pages @ $4.30 per page)	$593.40
		2 copies (276 pages @ $.55 per page)	$151.80
	TOTAL:		**$2212.40**

[63] Ms Gionet has deposed that both she and Ms Glenn were fully prepared to accept the transcript orders pursuant to their invoices. If Mr. Halfyard did not agree to pay the amounts charged, he was at liberty to select another Transcriptionist from the approved Transcriptionist list and she suggested to him that he do so.

[64] It is Ms Gionet's evidence that when Mr. Halfyard told her to "Just produce them", she was of the view that he had accepted the invoice she had submitted. Mr. Halfyard has indicated that this email was sent on the basis of erroneous information that Ms Glenn had agreed to producing the transcripts on the basis of the copy rate.

[65] On May 11 2014, she sent an email to Ms Lall asking about the status of the invoices. In response, Mr. Halfyard indicated that he had obtained the money from his client and it was in trust but was still considering court action concerning this issue.

[66] Courtesy between Ms Gionet and Mr. Halfyard dissipated. In her response to Mr. Halyard's reply, she wrote,

> I would also appreciate you speaking to the previous counsel, Dave Reid. I have voiced my opinion of you on this issue, so he may be of some assistance in this regard….It's kind of cut and dry but please bring your application sooner rather than later as me and my coworker will be in attendance. I sent you an email on April 28th regarding the transcripts and you sent just produce them. So I'm glad in fact that I invoiced you first because I had a sneaky suspicion you were going to do this…if your intention is not to pay the fee, then please cancel the order.

[67] In a later email to Mr. Halfyard and the Crown and Mr. Reid (at Mr. Halfyard's request, she wrote:

> As a Transcriptionist, it has been my practice for well over ten years now that once as appeal is ordered the transcripts become full rate once again and two copy rate charges...Unfortunately that is my fee for the transcript so I intend to be at any hearing where Mr. Halfyard tries to get a judge to rule what my fees should be. Mr. Halfyard has asked that I get MAG involved, however I have informed him that we are our own bosses now as per the new transcript procedures…I'm sorry I feel that Mr. Halfyard is wasting everyone's time on this issue and it seems to me that he has a tad too much time on his hands…Mr. Halfyard, if you are not going to pay the transcript fee, please cancel your order. I am not being responsible for you playing games and holding up appeals…Once the transcripts are ordered for appeal they become new transcript orders unfortunately. That is how I practice. How you practice, I don't agree with either but I am not raising issues with that."

[68] On May 11 2015, Ms Gionet confirmed that she would not be producing any transcripts until the issue had settled, and further indicated, "However, **I do not have to provide the transcripts to you and you may have to get them retyped because I don't have to do business with anyone I no longer want to**." (*my emphasis*)

[69] Mr. Halfyard offered to pay her the amount she was seeking if she would hold the money in trust until a ruling from this court. She declined, indicating that she would not be forwarding any transcripts and "holding any money".

[70] On May 12 2015, Ms Gionet sent an email to Mr. Halfyard stating that if she did not hear from him the following day regarding the transcripts, she would be officially declining his order for transcripts. She wrote, "**We are not obliged any longer to work for or with anyone that we choose not to** (*my emphasis*). So again at this time, I feel that I cannot complete your order and therefore will be declining it."

[71] On September 28 2015, Ms Gionet sent out a further email to the parties in which she disclosed that she had consulted with Arkley with respect to whether there is an

obligation to accept an order even if it has been previously typed. Melanie Fox of Arkley wrote, "Your statement: "I am not obliged to accept this new order, even though I prepared the transcript previously" is correct. As with any independent contractor you have the right to refuse work for any reason".

[72] On questioning by the Court during the hearing in an effort to understand the process and the impact of the new model on the administration of justice, Ms Gionet indicated the following. Ms Gionet impressed me as sincere, straightforward and confident with respect to what she was describing, her belief and her position. I am satisfied that, in effect, Ms Gionet has accurately described the ramifications of the 'independent service provider' model for the administration of justice currently in Ontario:

- An appeal is a new proceeding regardless of the fact that a certified transcript of the entirety of the trial in the court below is already in print and available. Because an appeal is a new proceeding, an "original" or "first copy" of a transcript of the evidence at trial is required for the appeal. This practice and approach vary however depending on the Authorized Court Transcriptionist;

- Fees are charged for appeal transcripts as a result of having to change and modify the existing transcripts to comply with the criminal appeal rules;

- Every Authorized Court Transcriptionist on the List of Authorized Transcriptionists has the option to decline or refuse an order from a person who orders a transcript; [21]

- Every Authorized Court Transcriptionist on the List of Authorized Transcriptionists has the option to decline or refuse an order for a transcript for professional and/or personal reasons;

- In effect, taken to its extreme, every Authorized Court Transcriptionist on the List has the option for personal or professional reasons to refuse an order to

[21] It is unclear if judges are included in this category.

produce a written record of court proceedings and, in that case, no transcript would be produced;

- If an Authorized Court Transcriptionist accepts an order, the Transcriptionist is at liberty to negotiate with the ordering party, the cost per page of producing a transcript up to the amount referred to in the Regulation. This aspect of their independence has induced competition amongst the Authorized Court Transcriptionists;

- If a Court Reporter in the Courtroom is also an Authorized Court Transcriptionist on the List, the Court Reporter is prohibited from discussing an order for a transcript in the Courtroom;

- Authorized Court Transcriptionist are at liberty to prepare transcripts for free if the person ordering the transcript is perceived as not being able to afford to pay for the order.

- The actual cost per page for the production of a transcript is in the discretion of the Authorized Court Transcriptionist subject to the maximum amount prescribed in the Regulations, which is $4.30 per page. An Authorized Court Transcriptionist is at liberty to charge any fee per page up to that amount;

- An Authorized Court Transcriptionist is at liberty to accept an amount higher than $4.30 per page if the ordering party offers to pay more for an expedited copy, for example;

- An electronic transcript of the proceeding may not be used by a litigant in appeal proceedings because it is within the discretion of the Authorized Court Transcriptionist to refuse to certify the printed copy. In any event, an electronic copy of a transcript is not to be printed without payment of 55 cents per page to the Authorized Court Transcriptionist who provided the electronic version,

- Every Authorized Court Transcriptionist determines on an individual basis whether an appeal is a 'new proceeding' for the purpose of ordering a transcript and determining the price per page.

[73] In this case, Ms Glenn and Ms Gionet are seeking to be paid $4.30 per page for one copy of every page of transcript that is to be prepared for a Superior Court Judge even though the same page of transcript has been prepared for a Ontario Court Judge. This was the practice that was in place prior to the change in model; it was the practice of MAG; and, it is a practice that continues to date.

THE POSITIONS and SUBMISSIONS OF THE PARTIES AND INTERVENORS

(a) The Applicant

[74] It is the submission of the Applicant that the cost difference between two additional copies at the copy rate as opposed to the rates claimed by Ms Glenn and Ms Gionet amounts to approximately $2967.00.

[75] The cost to his client for payment of a product that has already been created is unfair and impedes his financial ability to pursue his appeal. The cost of the creation of an "original" transcript in addition to copies at each level of appeal could put access to justice out of reach for many Ontarians particularly in view of the fact that there are five levels of court.

[76] One copy of this transcript which is 690 pages in length at the rate of $.55 per page would cost $379.50 but at the full original transcript rate of $4.30 per page, the cost to Mr. Vandergunst is $2967. By virtue of the position taken by the Ms Gionet and Ms Glenn, Mr. Vandergunst is required to pay an additional $2587.50 for a record of the court proceedings that has already been created. This cost should not be borne by the litigant.

(b) The Crown

[77] It is the position of the government that Authorized Court Transcriptionists are independent contractors.

[78] The Crown questions the court's jurisdiction to order the Authorized Court Transcriptionists to produce a transcript at a certain rate. By virtue of the change in model, the Authorized Court Transcriptionists are completely independent of MAG and are responsible for operating and maintaining their own business and arranging all aspects of the transcript orders.

[79] If someone ordering a transcript doesn't like the rate that is to be charged, the requested Authorized Court Transcriptionist cannot be forced to produce the transcript. Under the old regime, reporters could be ordered to produce a transcript but it is not possible for the court to order an independent contractor to produce a transcript if the independent contractor does not want to.

[80] MAG is not the employer of either Ms Glenn or Ms Gionet and they are not parties to this proceeding.

[81] The Crown does not take a position concerning the complaints of the Applicant regarding the price charged for the transcripts.

[82] However, in order to properly proceed with this Summary Conviction appeal, court transcripts of the evidence must be filed with the court.

(c) <u>Ms Glenn and Ms Gionet, Authorized Court Transcriptionists</u>

[83] In her submissions, Ms Gionet explained that they are governed by Arkley who is their regulator. But they are independent contractors and "basically just pay fees" to Arkley. She indicated that Arkley has refused to become involved in this case. In Arkley's view, the Authorized Court Transcriptionists are independent contractors.

[84] It is the position of Ms Glenn and Ms Gionet that in this case, a transcript order was not accepted by either of them because the initial step with respect to an agreement regarding fees was not reached. The section indicating "acceptance" was not completed on the Order form.

[85] The changes made by MAG that privatized transcript production in Ontario on June 9 2014 completely revised the previous regulatory scheme.

[86] As independent contractors, there is no express or implied obligation to produce a transcript. Further, an order is not accepted until the ordering party is in receipt of the Court Reporter's Certificate of Evidence. At no time did they issue a Court Reporter's Certificate of Evidence because they did not accept the order.

[87] Finally, it their position that as independent contractors, this Court has no jurisdiction to compel them to accept the transcript order.

(d) The Criminal Lawyers Association

[88] Counsel for the Criminal Lawyers Association submits that the financial resources of persons who stand accused of a crime impact access to justice. Accessible justice includes the meaningful exercise of appellate rights. The costs to exercise those rights should be kept to a reasonable level including the fees of counsel which must be fair and reasonable and the fees charged by others who are also involved in the administration of justice.

[89] It is neither fair nor reasonable for an appellant to pay full freight twice for the preparation of a transcript.

[90] Members of the Association represent clients who privately retain their counsel and are funded through the provincial Legal Aid Plan.

[91] The changes to the regulation of Court Reporters/Transcriptionists that occurred on June 9 2014 have caused administrative difficulties at all levels of appeal. This Application is a matter of first impression on the question of the applicable rate to be charged under Ontario Regulation 94/14 for appeal transcripts in circumstances in which those transcripts were previously produced and paid for at trial. Under the old court reporter system, the Ontario Court of Appeal fixed the copy rate to apply. The question is whether that jurisprudence is equally applicable under the new reporting system and how the court should interpret the roles and responsibilities under the newly implemented system.

[92] A second and fundamental issue in this Application is whether Authorized Court Transcriptionist may unilaterally refuse to accept a transcript order when they produced the original transcript.

[93] The objectives of accessible justice and general fairness should be considered in determining whether it is in the interests of justice to allow an appellant to rely on the transcripts previously prepared without paying full cost to the Transcriptionist.

[94] The Court has the jurisdiction under Rule 2.01 of the *Criminal Proceedings Rules for the Superior Court of Justice* to so order where it is in the interests of justice to do so.

[95] Permitting an Authorized Court Transcriptionist to refuse a transcript order unilaterally can lead to arbitrary results depending on the Transcriptionist, which has the potential to cause appellate delay and/or force some appellants but not others to pay for the same transcript twice at the same rate.

(e) Legal Aid Ontario

[96] Legal Aid Ontario (LAO) was granted limited intervenor status to submit a sworn affidavit from the General Counsel Office of LAO.

[97] Transcript costs are a significant disbursement item. In 2013, LAO paid $739,600 for transcripts in relation to criminal trial certificates and $788,700 in 2014. Pursuant to s. 12 of the *Legal Aid Services Act* [22], LAO shall administer a cost-effective and efficient system for providing high quality legal aid services within the financial resources available to it.

[98] The implication of an increase in costs in one area is that LAO will be forced to reduce the provision of legal aid services to low income Ontarians in other areas.

[22] 1998, S.O. 1998, c. 26

[99] The position taken by the Authorized Court Transcriptionists in this matter has greatly increased the cost of the appeal transcripts in this singular appeal. If transcript costs were to dramatically increase across the board, this would have a direct impact on LAO and the provision of legal aid services across all of Ontario.

ANALYSIS

(a) Jurisdiction

[100] Ms Glenn and Ms Gionet submit that this Court does not have jurisdiction to deal with the issues raised by the Applicant because they are independent contractors. I do not agree. The administration of justice fall squarely within the domain of the court where the administration affects the rights of the accused and the interests of the state.

[101] Where an appeal is taken to the summary conviction appeal court, s. 821(3) of the *Criminal Code of Canada* (the '*Criminal Code*') provides:

> Appellant to furnish transcript of evidence - Where the evidence on a trial before a summary conviction court has been taken by a stenographer duly sworn or by a sound recording apparatus, the appellant shall, unless the appeal court otherwise orders or the rules referred to in section 815 otherwise provide, cause a transcript thereof, certified by the stenographer or in accordance with subsection 540(6), as the case may be, to be furnished to the appeal court and the respondent for use on the appeal.

[102] Certification of a transcript by a stenographer[23] is addressed in s. 540(5) of the *Criminal Code*:

> Authentication of transcript - Where the evidence is taken down by a stenographer appointed by the justice or pursuant to law, it need not be read to or signed by the witnesses, but, on request of the justice or of one of the parties, shall be transcribed, in whole or in part, by the stenographer and the transcript shall be accompanied by
>
> (a) an affidavit of the stenographer that it is a true report of the evidence; or
>
> (b) a certificate that it is a true report of the evidence if the stenographer is a duly sworn court stenographer.

[23] I am of the view that the term 'stenographer' includes but is not limited to 'court reporter' and 'court monitor'.

[103] And, transcription of a record taken by a sound recording device is the subject of s. 540(6):

> Transcription of record taken by sound recording apparatus - Where, in accordance with this Act, a record is taken in any proceedings under this Act by a sound recording apparatus, the record so taken shall, on request of the justice or of one of the parties, be dealt with and transcribed, in whole or in part, and the transcription certified and used in accordance with the provincial legislation, with such modifications as the circumstances require mentioned in subsection (1)

[104] In *R.* v. *Hanneman*[24], Mr. Justice Hill reviewed in detail the legislation empowering the court with respect to the creation of a record of court proceedings, namely, a transcript. The sections and rules he referred to and relied on in that decision remain in force today subject to minor amendments.

[105] Section 482 of the *Criminal Code* empowers a superior court of criminal jurisdiction to make rules of court, consistent with the *Criminal Code* and other Acts of Parliament, touching various subjects including appeals in criminal matters within the jurisdiction of the court.

[106] Section 482(3)(d) provides:

> Purpose of rules -- (3) Rules under subsection (1) or (2) may be made
>
> (d) to carry out the provisions of this Act relating to appeals from conviction, acquittal or sentence and, without restricting the generality of this paragraph,
>
> (i) for furnishing necessary forms and instructions in relation to notices of appeal or applications for leave to appeal to officials or other persons requiring or demanding them,
> (ii) for ensuring the accuracy of notes taken at a trial and the verification of any copy or transcript,
> (iii) for keeping writings, exhibits or other things connected with the proceedings on the trial,
> (iv) for securing the safe custody of property during the period in which the operation of an order with respect to that property is suspended under subsection 689(1), an
> (v) for providing that the Attorney General and counsel who acted for the Attorney General at the trial be supplied with certified copies of writings, exhibits and things connected with the

[107] As Justice Hill observed in *R. v. Hanneman*, the rules of court are published in the Canada Gazette and have the force of law.

[108] Subsections (1), (2) and (18) to (22) of Rule 40.08 state:

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[24] [2001] O.J. No. 839

Certificate Respecting Evidence

(1) Except in the case of appeals to which subrules (3) and (4) apply… the appellant shall, at the time notice of appeal is filed, furnish a certificate in Form 2C from each court reporter who took the evidence, stating that copies of the transcript as required by these rules have been ordered.

(2) Where the appellant is unable to obtain a certificate in Form 2C from each court reporter by the time of filing the notice of appeal, the appellant may file the notice of appeal, the certificates in Form 2C that have been obtained and written confirmation that all other transcripts have been ordered. Where all certificates in Form 2C are not filed at the time the notice of appeal is filed, the appellant shall file the outstanding certificates in Form 2C within 30 days of filing the notice of appeal.

Completion of Transcripts

(18) Upon signing a certificate, each court reporter shall proceed with reasonable diligence to prepare and certify the transcript. All transcripts shall be prepared no longer than 90 days after the date the transcript was ordered.

(19) If the transcript has not been completed within 90 days from the date the transcript was ordered, the court reporter shall notify the parties to the appeal and the clerk of the appeal court, in writing, of the reason for the delay, and the date upon which the transcript will be prepared forthwith.

(20) Upon completion of the transcript, the court reporter shall forthwith notify the parties to the appeal and the clerk of the appeal court, in writing, that the transcript has been completed, by filing a Certificate in Form 2D, which shall include the date(s) to which the transcript relates.

(21) The Appellant shall serve on the respondent and all other parties to the appeal, and file together with proof thereof, a copy of the transcript within 30 days of receipt of a Certificate in Form 2D from each court reporter responsible for preparing a portion of the transcript.

(22) Unless an appeal has been wholly abandoned, after a transcript has been ordered, the completion of the transcript shall not be suspended nor the order countermanded except pursuant to an order of a judge made in accordance with rule 2.01.

[109] Should there be any question that the issue of cost for production of a transcript be beyond the jurisdiction of this Court, those concerns are allayed by the fact that the Ontario Court of Appeal has considered the issue of costs of production of a transcript in

R. v. *Papadopoulos* [25] and in *R.* v. *J.W.*[26] and the Superior Court of Justice has considered the issue of costs of production of a transcript in *R.* v. *Williams.* [27]

[110] In my view, the argument that these decisions were released prior to the change in model has no merit. Although the Court's jurisdiction may not be over the Transcriptionists themselves in this case because they are not parties to this proceeding, the Court's jurisdiction over the issue has not been ousted by the Attorney General's decision to outsource the the creation of the record.

[111] For all of these reasons, I am satisfied that this Court has the jurisdiction to deal with the issues raised in the Application.

(b) The "Order for Court Transcript of an Ontario Court Proceeding"

[112] To order a transcript from an Authorized Court Transcriptionist, the ordering party must complete a form entitled, *Order for Court Transcript of an Ontario Court Proceeding*.

[113] If I understand the position of Ms Gionet and Ms Glenn correctly, there is no "order" in this case because they did not complete section 6 on this Form which, from their perspective, is the section in which an Authorized Court Transcriptionist indicates acceptance of the Order. Once signed, the Authorized Court Transcriptionist then returns the completed Form back to the ordering party.

[114] I have reviewed the form entitled *Order for Court Transcript of an Ontario Court Proceeding*. Section 6 of the form reads as follows:

6. For Authorized Court Transcriptionist (ACT) Use Only

Please Note that this Transcript Order cannot be processed without the Transcriptionist's Name and ACT ID

Name of Transcriptionist _____

ACT ID _____

[25] [2004] O.J. No. 4546
[26] [2013] O.J. No. 5451
[27] [2006] O.J. No. 4033

Authorized Court Transcriptionist Undertaking:

- I acknowledge and understand that I have signed an undertaking to the court for authorized access to digital court recordings and that it applies to this request.

Date Section 6 completed: _____

[115] Given the nature and apparent intention of this section in view of the wording, I find it difficult to understand the position put forward by Ms Gionet and Ms Glenn that in this case there was *no order* from the Applicant because they did not sign the undertaking.

[116] It seems to me that a request had been made by a party to the proceedings, the Applicant, and in compliance with s. 540 (6) of the *Criminal Code*, a transcript is required to be produced.

[117] Even if I am to understand that Ms Glenn and Ms Gionet are of the view that there was *no contract* with the Applicant because this section was not signed, I continue to have difficulty appreciating the impact of the lack of their signature with respect to their Undertaking. Nowhere in this Order Form is there a reference to the financial terms that are to be agreed to by the parties. This Form is not intended to be a contract.

[118] I find, therefore, that reliance on the Order Form as evidence that a transcript is not producible is misplaced and that their argument in this regard is without merit or is confusing at best.

(c) Interpretation and Application of the Statutes, Regulations and MAG Standards

(i) Production of a Transcript

(a) The Criminal Code of Canada

[119] As I have indicated above, s. 821(3) of the *Criminal Code* requires an appellant to cause a transcript of the evidence of a trial before a summary conviction court to be created, certified and furnished to the appeal court and the Respondent for use on appeal. The section is not permissive.

[120] If the submissions of the Authorized Court Transcriptionists in this case and, apparently, the position of Arkley are correct, the decision by MAG to allow an Authorized Court Transcriptionist who is chosen by an accused person or his/her counsel in accordance with the new model, the option of whether or not to produce the transcript required by the accused to pursue an appeal, threatens to sabotage the efforts of an accused to comply with this section. In my view, to say, "Well he can choose another Authorized Court Transcriptionist from the List" is not enough and is not the answer. Apparently all of the Authorized Court Transcriptionist on the List have the same power/option in the exercise of their rights as "independent contractors". The potential for no transcript ever being produced under this new model is not, therefore, illusory, if indeed, the Authorized Court Transcriptionist has the discretion described by Ms Gionet and Ms Glenn.

[121] But S. 540 (6) of the *Criminal Code* governs the production of a transcript of a record taken by sound recording apparatus as is the case here. This section requires that the record taken by sound recording in any proceedings under this Act, **shall be** *dealt with* **and** *transcribed*, in whole or in part, **and** the transcription *certified* and used in accordance with the provincial legislation, with such modifications as the circumstances require ***on request of the justice or one of the parties***.

[122] Contrary to the position taken by the Authorized Court Transcriptionists in this case and Arkley, this section *requires* the evidence taken by sound recording apparatus to be

transcribed in whole or in part by the stenographer to took down the evidence ***on request of*** the justice or ***one of the parties*** and the transcript *is to be* accompanied by a certificate.

[123] The mandatory nature of the wording in this section is such that, on the *request* of a party the evidence must be transcribed. It does not say, "once he/she reaches an agreement with the Authorized Court Transcriptionist", the evidence must be transcribed. This section is not permissive and is binding.

(b) <u>The Criminal Appeal Rules</u>

[124] Appellate review of verdicts in criminal cases is grounded in statute and not the common law. A right of appeal is governed by the *Criminal Code* and by the rules of the court of the relevant jurisdiction.[28] The *Criminal Appeal Rules* ('CAR') govern procedural matters in the Court of Appeal.

[125] Issues concerning transcripts for the Court of Appeal are dealt with in Rule 8. I refer to the CAR only to note the following provision in Rule 8 (15):

> After a transcript has been ordered, the completion of the transcript shall not be suspended or the order countermanded without an order of a judge or the Registrar, unless the appeal has been wholly abandoned and the court reporter notified in accordance with subrule 30 (3).

[126] A Court Reporter's Certificate or other proof that a transcript has been ordered must be filed on the filing of the notice of appeal and a Court Reporter's Certificate of Completion is to be filed when the transcript has been completed.

[127] In the context of an extraordinary remedy application (*certiorari*, for example), appellants are apparently not required to pay for an 'appeal copy' of the transcript of the preliminary inquiry in addition to the copy obtained for the purpose of the Superior Court. [29] Rule 8(7) allows an appellant to file a copy of the transcript that was obtained in the Superior Court.

[28] *R.* v. *Hamilton*; *R.* v. *Rhingo*, [1997] O.J. No. 1110
[29] Gold, A. and Lacy, M., *The Practitioner's Ontario Criminal Practice 2015*, LexisNexis 2015

Counsel may simply photocopy the transcripts that have already been obtained and paid for.[30]

[128] Where complete transcripts had already been produced for the trial, the court reporter is only entitled to charge the copy rate of $.55 per page to prepare transcripts for the Court of Appeal hearing. In 2013, Tulloch J.A. quoted the policy/guidelines of the Court Services Division of MAG that was in place at that time (prior to the implementation of the new model) with respect to transcript fees ,

> Where a transcript has already been produced in a lower court, CSD offers the following guidelines for transcripts prepared for the Court of Appeal or the Divisional Court:
>
> *If the transcript has already been transcribed for any reason, the reporter is entitled to charge $.55 per page copy (for appeal) for portions previously transcribed and $3.75 per page for any portions not previously transcribed (copies provided in this instance at no additional cost). If the transcript has already been typed but requires substantial changes, the reporter may charge the one-time fee of $3,75 per page for pages where substantial changes are made (copies provided in this instance at no additional costs). Where no changes are required, the reporter charges $.55 per page per copy).*
>
> One of the objectives of the justice system is to be accessible to litigants who are before the courts. The most effective way of achieving this goal is for the justice system to allow parties to litigate issues at a reasonable cost.[31]

[129] In *R.* v. *Papadopoulos*[32], counsel for two of the court reporters pointed out that many court reporters are not employees of MAG and are not therefore bound by the Ministry's Court Reporter's Manual. Simmons J.A. ruled as follows,

> In my view, the obvious purpose of rule 8(7) is to dispense with unnecessary duplication of expense in circumstances where the court reporters have already been paid for their work in preparing a certified transcript and where the court reporters will not be required to perform additional work necessary to prepare the transcript in the format required by the Court of Appeal…(W)hile the Court Reporters Manual prepared by MAG may not be binding on all court reporters, it does provide a useful guideline concerning reasonable expectations for payment…As already noted, in these circumstances, the court reporters have already been paid for their work in preparing a certified transcript in accordance with the requirements of the Criminal Appeal Rules and s. 3 of O.Reg.587/91.

(c) <u>Criminal Proceedings Rules for the Superior Court of Justice (Ontario)</u>

[30] *R.* v. *Papadopulos*, supra
[31] *R.* v. *J. W.*, supra

[130] I have already referred to Rule 40.08 (1) of these *Rules* which apply to prosecutions, proceedings, applications and appeals within the jurisdiction of the Superior Court of Justice. Rule 40.08(1) provides that except in the case of appeals to which subrules (3) and (4) apply, the appellant shall, at the time notice of appeal is filed, furnish a certificate in Form 2C from each court reporter who took the evidence, stating that copies of the transcript as required by these rules have been ordered.

[131] I repeat my finding above; if the Authorized Court Transcriptionists are correct, the decision by MAG to allow an Authorized Court Transcriptionist chosen by an accused person or his/her counsel in accordance with the new model, a choice of whether or not to produce the transcript required by the accused to pursue an appeal, threatens to sabotage the efforts of an accused to comply with this section and, in my view, the administration of justice.

[132] However, I question the accuracy of the submissions of the Authorized Court Transcriptionists in this regard by virtue of the following.

[133] The *Court Transcript Standards and Procedures Manual* (the '*Manual*') prepared by MAG appears to replace the *Court Reporters Manual* referred to by Simmons J.A. in the decision above. In the preamble, MAG indicates as follows,

> This manual is the authoritative reference for transcript standards and procedures for Ontario courts.
>
> Authorized Court Transcriptionists (ACTs) must comply with the standards and procedures as set out in this manual

[134] Section 3.8.3.3 of the *Manual* concerns Summary Conviction Appeals to the Superior Court of Justice and defines the impact of Rule 40.08 on Authorized Court Transcriptionists,

> Pursuant to Rule 40.08 of the Criminal Proceedings Rules for the Superior Court of Justice (Ontario), upon receipt of a **request** *(my emphasis)* for a transcript of proceedings for the purpose of appeal, **each** ACT **must** *(my emphasis)* issue a Form CSR-2C-40.08 (Certificate Respecting Evidence).
>
> **Note:** Pursuant to the Rules, appellants must serve and file the Notice of Appeal (including Form 2C) within 30 days of the sentencing, or adjudication under appeal. ACTs should ensure

> Form 2C is completed in a timely manner in order for the appellant to meet this timeline. The certificate may be sent electronically to the RMC generic mailbox.
>
> Certificate CSR-2C-40.08 requires that ACTs identify specific additional portions of the proceedings to be included in the transcript if they pertain to a ground of appeal. The ACT should consult with the appellant to clarify any questions concerning portions of the proceedings that are required to be transcribed for the appeal….
>
> Upon completion of the transcript, the court reporter [authorized court transcriptionist] shall forthwith notify the parties to the appeal and the clerk of the appeal court, in writing, that the transcript has been completed

[135] It is clear therefore, that according to the *Manual* prepared by MAG, only a *request* from the ordering party is required to trigger the implementation of the production of a transcript by an Authorized Court Transcriptionist.

[136] Contrary to the position of the Ms Gionet and Ms Glenn, (a) an agreement or contract with the Authorized Court Transcriptionist is *not* required; and, (b) upon receipt of the request, an Authorized Court Transcriptionist then *must* issue a Certificate Respecting Evidence. The Authorized Court Transcriptionist has no discretion to refuse to do so.

[137] The mandatory nature of this direction is consistent with the s. 821(3) and s. 540 (6) of the *Criminal Code* and ensures, in my view, the protection of the rights of both an accused person and the Crown with respect to the production of a record of court proceedings within the context of an appeal or otherwise.

(ii) Cost of the Transcript

[138] As I have indicated above, the costs for the production of a transcript are regulated by Ontario Regulation 94/14 under the *Administration of Justice Act*. The current fees became effective on May 1, 2014.

(a) Is the transcript ordered by the Applicant a copy or an original/first certified copy?

[139] I formed the impression during the hearing that the definition of whether a transcript order is for a first certified copy (original) or a additional copy depends on the Authorized Court Transcriptionist.

[140] The fee structure imposed in Regulation 94/14 which is applicable to all Authorized Court Transcriptionists in Ontario, however, defines the service to be rendered as well as the fee for that service.

[141] The cost of the service to transcribe all or part of a recording and produce a *first* (my emphasis) certified copy of a transcript is $4.30 per page or $20.00 whichever is greater. The Regulation speaks for itself. Logically, only one certified copy of a transcript can be the *first*. All other copies produced thereafter are second, third, fourth copies etc. or, as identified in the fee structure, "additional copies". The rate of $4.30 per page is therefore restricted to one copy of the transcript only, namely, **the** first.

[142] The fact that this case is an appeal and/or in a higher Court than the trial proceedings is irrelevant to the fact that the "first certified copy" was generated during the course of the trial itself. In the past, MAG policy may well have permitted Court Reporters to charge a higher rate as if the first copy of the transcript created for each successive level of appellate court was an original and thereby charge a much higher fee but, in my view, the wording in the Regulation currently in effect is clear and straightforward. There is no reference in the Regulation or the Fess structure to the level of court or the purpose for which the transcript is generated.

[143] Argument may be had that "a" first certified copy as described in the fee structure is different from the concept of "the" first certified copy. I do not agree. In a numerical context, there can only be one "first".

[144] In any event, even if I were wrong, I adopt and apply the decisions of Tulloch J.A. and Simmons J.A. of the Court of Appeal where the issue of which fee is to be applied when a transcript has been generated at a lower level of court was considered and resolved.

[145] In my view, the lack of discretion for an Authorized Court Transcriptionist to define the nature of the transcript he/she has been asked to produce as "original" or "copy" is intentional.

[146] The integrity of the judicial system requires impartial and consistent application of the law and its administration for all its participants.

(b) Does the Authorized Court Transcriptionist have a discretion with respect to how much to charge?

(i) The cost per page (the fee)

[147] The Regulation declares that the court transcript fee schedule applies to transcript orders placed on or after May 1, 2014. The transcript fee schedule does not allow for flexibility or discretion. The provisions in the Regulation to which Authorized Court Transcriptionists are bound do not include a discretionary component. The *Manual* does not include a discretionary component. Contrary to the submissions of the Authorized Court Transcriptionist, nowhere are the words "up to" included in the fee structure.

[148] Access to justice must be available on a blind and equal footing to all those who seek it. Favouritism or benefits bestowed at will in the exercise of individual discretion particularly with respect to the creation of a record that protects the open court principle attacks the "heart and soul" of that principle. One and the same fee applicable to all parties who request a transcript ensures fairness and impartiality for all participants, a fundamental hallmark of the justice system.

[149] My view that the fee structure required by the Regulation is not subject to variation or discretion is further supported by a declaration in the MAG document entitled *A Guide to Fee Waiver Requests* dated October 2014. Under the heading *Which fees can be waived?*, the Attorney General states that the fee waiver applies to most fees in civil and small claims court proceedings, and family law cases but that "Some fees CANNOT be waived, including: transcript fees and other fees to authorized court transcriptionists."

[150] Just as the Attorney General has required the public to pay transcript fees and other fees to an Authorized Court Transcriptionist so too has the Attorney General fixed those fees.

The Authorized Court Transcriptionist does not have the discretion to waive the fees and, in my opinion, the Authorized Court Transcriptionist does not have the discretion to alter the fee structure for any ordering party.

[151] To allow otherwise would both undermine the administration of justice and bring the administration of justice into disrepute.

[152] Ms Gionet and Ms Glenn have also submitted that according to the *Manual*, they are required to produce three copies for this appeal. In s. 6.2.3 of the *Manual* which is entitled *Invoicing and Distribution of Summary Conviction Appeals***,** MAG directs that whether the appellant is the Crown or the defence, the Authorized Court Transcriptionist should prepare three copies of the transcript and provide them to the ordering party along with the invoice. Both the Federal and Provincial Crown have agreed to notify the defence of the completion of the transcript.

[153] This is not a direction that three further copies should be prepared in addition to a copy that has already been created. The Authorized Court Transcriptionist is to prepare three copies for the appeal. In this case, two further copies are all that is required.

(ii) <u>Payment of the fee</u>

[154] On the website, Authorized Court Transcriptionists for Ontario referred to above, in response to 1.5 Q *What are the fees for court transcripts?*, the public is informed that Fees for court transcripts are regulated by *Ontario Regulation 94/14 – Fees for Court Transcripts* but "(d)eposits and/or payments of the regulated fees are arranged between you as the ordering party, and the transcriptionist you choose."

[155] A discretion afforded to the Authorized Court Transcriptionist as to the method of payment and terms of payment of the prescribed fee is entirely reasonable. Some Authorized Court Transcriptionists may require a deposit while others may not; some Authorized Court Transcriptionists may require payment in full at the outset while others may be prepared to wait until the transcript is delivered until rendering an invoice. But this discretion does not extend to the amount to be charged per page of transcript.

(c) What is a substantial change?

[156] In his decision, Tulloch J.A. decided that if the transcript has already been typed but requires substantial changes, the reporter may charge the one-time fee of $3.75 (now $4.30) per page for pages requiring substantial changes.

[157] Ms Gionet submitted that it is due to the work involved with respect to reviewing, correcting and amending the first transcript and 'substantial changes' thereto that a higher fee is charged and a transcript for the appellate court is considered to be a 'first copy'.

[158] The difficulty I have with this argument, however, is that if the ordering party is now required to deal with a Court Reporter as an independent contractor then surely there would be very few, if any, changes necessary to a transcript with respect to typographical errors and spelling. The accuracy of the transcript would no longer be an issue for the original work product would be both accurate and of high quality. In a contractual relationship, there must be accountability for the quality of service rendered. A transcript that is inaccurate ought not to have been certified. Although perfection is not required, proofreading a transcript already created and released to the extent described by Ms Gionet ought not to be necessary.

[159] Granted, the inclusions and exclusions with respect to transcripts prepared for the purpose of the Superior Court of Justice and those prepared for the Court of Appeal as well as perhaps the format of the document may differ but in the context of a contractual relationship, the changes necessary to the transcript to comply with the *Rules* must be accounted for to the ordering party.

[160] In any event, I note that Tulloch J.A. ordered that if the transcript has already been typed but requires substantial changes, the reporter may charge the one-time fee of $3.75 per page, "for pages requiring substantial changes". In other words, the increased fee relates to the page that required substantial changes. The increased fee cannot be applied to those pages within the same transcript that did not require substantial changes.

SUMMARY AND CONCLUSIONS

[161] The issues in this case have highlighted the need for regulation and oversight by the Attorney General with respect to ensuring the integrity of the administration of justice in the context of the new model of court reporting that it has decided to adopt.

[162] The significance of the creation of a transcript cannot be overstated. The transcript holds us all accountable for our words, actions and decisions. It is the document that assists an accused and the Crown alike in ensuring that their rights and responsibilities have been properly upheld and satisfied.

[163] It allows the public to ensure that the law is applied fairly and correctly. It is the public's window into the justice system and promotes and ensures the "open court" policy. The transcript is the wall between secrecy and closed courts and a "dissemination of what courts do".

[164] A transcript is not, therefore, and cannot be relegated to the status of "work product" to be generated at the conclusion of negotiations in a "for profit" transcription market.

[165] Before concluding, however, I must indicate that I have a great deal of empathy for both Ms Glenn and Ms Gionet. They impressed me as dedicated participants in the administration of justice and, in my view, are not to be faulted for the positions they have adopted due to the advice received from Arkley and a perceived lack of oversight with respect to these issues by the Attorney General.

[166] For all of these reasons, the following order is appropriate in the current circumstances:

(a) Within seven days, the Authorized Court Transcriptionists shall produce and deliver to the Applicant along with an invoice, two certified copies of the transcripts as requested at a rate of $.55 per page. The invoice shall be paid in full by the Applicant within 48 hours of receipt of the invoice(s).

(b) Should the Authorized Court Transcriptionists fail or refuse to produce and deliver the copies as ordered herein, the Crown Attorney shall first bear the cost of ordering or

producing an electronic copy of the transcripts required and shall print and deliver to the Applicant, the copies required by the Applicant for the purpose of this appeal.

(c) In the alternative, should the Authorized Court Transcriptionists fail or refuse to produce and deliver the copies as ordered herein and time be of the essence, the Applicant is at liberty to photocopy the transcript he has in his possession and submit the cost of photocopying to the Attorney General for payment.

(d) For the purpose of this appeal, a photocopy of the transcript, if necessary will be acceptable to the Superior Court.

"Justice L. C. Templeton"
Justice L. C. Templeton

Released: February 5, 2016

CITATION: R. v. Vandergunst, 2016 ONSC 940
COURT FILE NO.: SCA 01/15
DATE: 20160205

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Mitchell Vandergunst

Applicant

- and –

Her Majesty the Queen

Respondent

RULING

TEMPLETON J.

Released: February 5, 2016

ADDENDUM

Two further issues regarding the new transcription model but unrelated to the issues in the Application are as follows:

1. In a proceeding involving a child protection matter and in which the Children's Aid Society of London and Middlesex was a party, I requested a transcript of one of the two hearings. A copy of the transcript was sent to me for review by the ACT. In the transcript, the CAS was identified as "Family and Children's Services (Operated by the Children's Aid Society of the Regional Municipality of London and Middlesex)". This party does not exist. The order ultimately involved two different ACTs and the transcript was returned three times for correction. The ACTs were unfamiliar with the identity of parties and the names of the lawyers in this jurisdiction.

2. In delivering electronic transcripts of the highly sensitive evidence in the case above which was a child protection proceeding, the ACTs either did not have access to or chose not to use secure email servers and, instead, sent the transcript using 'hotmail' accounts under their personal names.

Clearly the method of delivery for otherwise confidential evidence contained in a transcript must be addressed.