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Supreme Court of Canada Upholds Constitutionality of Publication Bans in Bail Hearings, Media Outlets Unhappy

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Cases Considered:
Toronto Star Newspapers Ltd. v. Canada, 2010 SCC 21,
an appeal from the Courts of Appeal of Ontario (*Toronto Star Newspapers Ltd. v. Canada*, 2009 ONCA 59) and Alberta (*R. v. White*, 2008 ABCA 294).

The Supreme Court of Canada recently dealt with appeals from Ontario (*Toronto Star Newspapers Ltd. v. Canada*) and Alberta (*R. v. White*) wherein several media outlets challenged the constitutionality of s. 517 of the *Criminal Code*, R.S.C. 1985, c.C-46, which sets out when judges must impose a mandatory publication ban for evidence heard in bail proceedings. In the *White* case, the Alberta Court of Appeal had determined that while *Criminal Code* s. 517 violates freedom of expression under *Charter* s. 2(b), it can nevertheless be saved by *Charter* s. 1 as reasonable and justifiable in a free and democratic society (see my previous post on *White*).

In the Ontario courts, the result was somewhat different. In this case, twelve adults and five young persons were charged with various terrorism-related offences under the *Criminal Code*. The arrests attracted a great deal of media attention. One of the accused applied for a publication ban, while some of the others opposed it. Justice Durno of the Ontario Superior Court refused to quash the publication ban ordered by Justice of the Peace Currie, arguing that if one accused seeks a ban under s. 517, the order applies to *all* of his or her co-accused.

Criminal Code s. 517 states:

> If the prosecutor or the accused intends to show cause under section 515, he or she shall so state to the justice and the justice may, and shall on application by the accused, before or at any time during the course of the proceedings under that section, make an order that the evidence taken, the information given or the representations made and the reasons, if any, given or to be given by the justice shall not be published in any document, or broadcast or transmitted in any way before such time as . . . the trial is ended.

The Toronto Star, CBC, Associated Press and CTV Television and two of the accused challenged the constitutionality of s. 517. Justice Durno held that he was bound by the decision in *Re Global Communications Ltd. and Attorney General for Canada* (1984), 44 O.R. (2d) 609 (C.A.), which held that s. 571 does not infringe *Charter* s. 2(b).

On appeal to the Ontario Court of Appeal, Justice Feldman, writing for the majority, with Justices Laskin and Simmons concurring, found that s. 517 was overbroad. She held that the objective of the provision —to safeguard the right to a fair trial by banning publication of prejudicial information that could bias a jury—was pressing and substantial, and rationally

connected to the objective. However, she concluded that the provision did not meet the minimal impairment test under s.1 of the *Charter* because it applied to all bail hearings, regardless of the mode of trial (e.g., even when there was not going to be a jury trial). Justice Feldman read down s. 517 to exclude a ban for any cases where the charges would not be tried by a jury (*Toronto Star Newspapers Ltd. v. Canada*, ONCA para 8). Justices Rosenberg and Juriansz dissented and would have declared the mandatory ban to be invalid because it did not meet the requirement of proportionality between the deleterious and salutary effects of the measure (para. 8). Justices Rosenberg and Juriansz would have left the discretion to order a publication ban with the bail judge.

The appellant media organizations argued before the Supreme Court of Canada that the correct decision was the opinion of the dissenting judges from Ontario (that the mandatory publication ban was unconstitutional), while the respondents (the governments and most of the accused persons) argued that the provision is constitutional in all circumstances. The appellants argued that the considerations regarding the granting of a publication ban set out in *R. v. Mentuck*, 2001 SCC 76 and *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 should apply. These two decisions held that publication bans were only to be imposed when they are necessary to protect against real and substantial risks to an accused's fair trial rights or serious risks to the administration of justice (para. 71).

At the Supreme Court, Justice Marie Deschamps and seven other justices held that s. 517 was constitutional because premature publication of police and Crown allegations would endanger the rights of individuals who are presumed innocent. The majority held that the *Dagenais/Mentuck* test only applies to the situation where the justice of the peace had the discretion to decide whether or not to grant a publication ban. As with the *White* case, the majority's analysis turned on an interpretation of whether s. 517 could be justified under s.1 of the *Charter* s. 1 using the *Oakes* test (*R. v. Oakes*, [1986] 1 S.C.R. 103).

Section 1 of the *Charter* reads:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The *Oakes* test for whether an infringement of a *Charter* right or freedom may be justified under s.1 was set out by Justice Deschamps as follows:

> When a protected right is infringed, the government must justify its action by identifying a pressing and substantial objective, by demonstrating that there is a rational connection between the objective and the infringement, and by showing that the means chosen interferes as little as possible with the right and that the benefits of the measure taken outweigh its deleterious effects (*Toronto Star*, SCC para. 19).

Justice Deschamps opined as follows on the four aspects of the *Oakes* test:

Objectives of the Legislation

Noting that the mandatory ban on publication is one of many measures recommended in a 1969 report on criminal justice and corrections (Canada. Committee on Corrections, *Report of the Canadian Committee on Corrections—Toward Unity: Criminal Justice and Corrections.* Ottawa:

Queen's Printer, 1969), Justice Deschamps said that the new rules were meant to protect accused persons from the effects of pre-trial incarceration and to ensure that they were not punished at a time when they should be presumed innocent. The objectives of the mandatory ban were "to ensure expeditious bail hearings" and "to safeguard the right to a fair trial" (at para. 23). These objectives were found to be pressing and substantial, and achieved by establishing a process that "facilitate[s] early release of an accused … to mitigate the harshness of his or her interaction with the criminal justice system, limit the stigma as far as possible, and ensure that the trier of fact remains impartial" (at para. 24).

Rational Connection to the Objective

The current bail mechanisms in place were seen to be closely linked, and a rational connection was found in the "interplay between the various components" of the bail reform rules (at para. 33). The ban prevents dissemination of evidence which, for the sake of ensuring an expeditious hearing, is untested for relevance or admissibility.

Minimal Impairment

Justice Deschamps noted (at para. 35) that if a publication ban hearing were to be held instead of a mandatory publication ban, the accused would face an additional burden at a time when he or she may not have been able to consult with counsel. Accused persons should be "devoting their resources and energy to obtaining their release" and not focusing on "whether to compromise on liberty in order to avoid having evidence aired outside of the courtroom" (at para. 36). In view of the delay and the resources involved in a publication ban hearing, and of the prejudice that could result if untested evidence is made public, it was "difficult to imagine" a measure that would meet the government's objectives and more minimally impair freedom of expression (at para. 37). Further, Justice Deschamps pointed out that the mandatory publication ban under s. 517 is not an absolute ban on publication of evidence adduced, information given, etc., when this is obtained outside of the bail hearing. In addition, the publication ban is only temporary and ends when the accused is discharged after a preliminary inquiry or at the end of the trial (at paras. 38 to 40).

Salutary Effects

The ban was seen to limit the deprivation of the accused's liberty by confining the issues at the hearing to those related specifically to bail, thereby avoiding undue delay and permitting accused persons to focus their energy and resources on liberty interests rather than their privacy interests. The ban also ensures that the public will not be influenced by untested, one-sided and stigmatizing information bearing on issues that are often irrelevant to guilt. On the other hand, "the ban prevents full public access to, and full scrutiny of, the justice process" (at para. 59). The outcome of a bail hearing may not be fully understood by the public if the media is restricted in the information it may convey. Nevertheless, the deleterious effects of the publication limitation were found by the majority to be outweighed by the need to guarantee a fair trial and fair access to bail (at para. 60).

Thus, the majority concluded that s. 517 infringes freedom of expression, but that the infringement can be demonstrably justified in a free and democratic society.

Justice Rosalie Abella disagreed with the majority and wrote a compelling dissent. She held that it is imperative for the public to see the judicial process at work in order to maintain trust in the

justice system. Justice Abella stated that courts and judges have consistently attempted to "enhance both the visibility of the justice system and the confidence of the public" with the open court principle (at para. 65). She noted Justice Cory's remarks in *Edmonton Journal v. Alberta (Attorney General),* [1989] 2 S.C.R. 1326 at p. 1340 that: "Practically speaking, this information can only be obtained from the newspapers or other media."

Justice Abella agreed with Ontario Court of Appeal Justice Rosenberg, who held that the mandatory ban in *Criminal Code* s. 517 "does not survive the final stage of the *Oakes* test" (at para. 66). She also agreed that the appropriate remedy would be "to sever the mandatory aspect of s. 517 and leave in place a discretion to order a ban" (at para. 66), in accordance with the principles set out in *Dagenais* and *Mentuck.*

According to Justice Abella, the automatic ban on information for everyone except the few who happen to be present in the courtroom has the effect of "denying access to information surrounding a key aspect of the criminal justice system – … whether or not to release an accused back into the community pending his or her trial" (at para. 67). Justice Abella stated that this "denial is a profound interference with the open court principle" (at para. 67). She summarized the seriousness of the infringement by quoting from Justice Rosenberg in the Ontario Court of Appeal who stated:

> Section 517 cuts off meaningful and informed public debate about a fundamental aspect of the administration of criminal justice, the bail system, at the very time that the debate may be most important — when the decision is made to grant or deny bail. It also hinders debate in other circumstances of great public interest, as where an accused on bail commits another, perhaps serious crime. The public is left to speculate about why the accused was released and the justice system is unable to provide a timely and meaningful response because of the statutorily imposed silence. (*Toronto Star*, ONCA para. 32).

Justice Abella also held that the two major benefits attributed to mandatory publication bans — "reduction in pre-trial publicity and delay" —could each "largely be attenuated" (at para. 70). Further, by permitting an automatic ban at the request of an accused regardless of whether he or she can demonstrate a "real and substantial risk" to his or her fair trial rights "completely collapses the constitutional framework" set out in *Dagenais* and *Mentuck* (at para. 71). This would thus leave "the public's presumptive right to know what goes on in a courtroom" out of the balance (at para. 71). Justice Abella also noted that:

> s. 517 only protects an accused from disclosure of pre-trial information from a bail hearing. There is no legislative protection from potentially prejudicial pre-trial information that emanates from sources other than the bail hearing. In the absence of such a generalized ban, the benefit of a ban only on bail hearing information seems to me to be too porous to justify the seriousness of the infringement (at para. 73)

In sum, the majority ruled that s. 517 is constitutional. No exceptions were carved out for the situation where the accused does not face a jury trial. At the same time, we are aware from other cases (e.g., Karla Homolka) that the information is available to the few people who can actually attend the bail hearing or to others from sometimes unreliable sources, such as the internet. By failing to adequately acknowledge these other sources of information, the majority downplayed the fact that potential jurors might then get their information from arguably less reliable sources

and draw their own erroneous conclusions. As noted by Kirk Makin in the Globe and Mail on June 10, 2010 (Supreme Court upholds blanket publication ban for bail), this decision "was a major disappointment for media outlets, which argued that the bans are an unnecessary restriction on the free flow of information in the Internet age". When interviewed for the same article, Dean Jobb, King's College Journalism professor, stated that the public will be forced to speculate about bail decisions, which could possibly lead to outrage over perceived injustices, which could in turn undermine public confidence in the justice system. It is also interesting that several of the accused persons in the Ontario case opposed the publication ban and wanted the allegations against them to be published. It would seem that despite the application of s. 517, the public is getting information from untested sources that may indeed be more prejudicial than information they may receive from a bail hearing. Thus, the practical implications of the SCC ruling may be to actually intensify the concerns expressed in support of the constitutionality of s. 517 (ensuring the accused person has a fair trial).