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Alberta Court of Appeal Upholds Constitutionality of Deferring Publication of Information Given at Bail Hearings

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Cases Considered:

R. v. White, 2008 ABCA 294

In these days of flagrant disregard of publication restrictions, especially by "electronic ban breakers" (in the case of Karla Homolka, for example), it is interesting to see yet another case where various traditional media sought to strike down a provision of the *Criminal Code* dealing with the publication of evidence heard in bail proceedings.

Michael White was charged with the murder of his wife. He applied for judicial interim release, and applied for a restriction on publication of the proceedings based on *Criminal Code* s. 517, which states:

> (1) 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the information given or the representations made and the reasons, if any, given or to be given by the justice shall not be published in any document, or broadcast or transmitted in any way before such time as .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 CBC, Edmonton Journal, Globe and Mail, CTV and Edmonton Sun applied before a Judge in Chambers (Justice C.S. Brooker) for a declaration that *Criminal Code* s. 517 violated the freedom of expression guarantee in s. 2(b) of the *Charter* and could not be saved as a reasonable limit under s.1 of the *Charter*. Alternatively, they applied for a declaration that would give judges some discretion as to whether to grant publication restrictions (rather than the mandatory ones that are required if the accused person asks for one).

While there were a number of significant procedural issues that arose in this case, this post focuses on the issue of the publication restriction. Justice Brooker agreed that the publication restriction offended the right to free expression found in s. 2(b) of the *Charter*. He also concluded that these restrictions could not be justified in a free and democratic society and therefore could not be saved by *Charter* s. 1. In particular, Justice Brooker concluded that s. 517

is aimed at preventing jury contamination and that the Crown had not shown a rational connection between the restriction on publication and the protection of the accused's right to a fair trial by an impartial jury. He also concluded that the section does not minimally impair the *Charter* rights involved, because the section even applies when a jury trial is not contemplated. Justice Brooker ordered that s. 517 should be read as if it opened with the words "Where a jury trial is possible". He also directed that the phrase "and shall on application by the accused" be struck out, and he deferred this aspect of his order for one year to allow Parliament to address the issue (cited in *White* at para. 7).

The decision was appealed by the Crown to the Alberta Court of Appeal. At the Court of Appeal of Alberta (heard by Justices Carole Conrad, Keith Ritter and Frans Slatter), the Crown conceded that s. 517 infringes freedom of expression found under *Charter* s. 2(b). Thus, the Court dealt with whether that infringement can nevertheless be justified under s. 1 of the *Charter*.

Charter s. 1 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 test for whether an infringement of a Charter right may be justified under s.1 was set out in *R. v. Oakes*, [1986] 1 S.C.R. 103 (*Oakes*):

> (a) The objective of the legislation must be sufficiently important to justify limiting the *Charter* right.
> (b) The legislation must be rationally connected to the objective at which it is directed.
> (c) The law must impair the right no more than is necessary to achieve the objective.
> (d) The negative effects of the law must not be disproportionate to its benefits.
> (White at para. 32)

While s. 517 had been found to be constitutional by the Ontario Court of Appeal in *Re Global Communications Ltd. v. Canada (Attorney General)* (1984), 44 O. R. (2d) 609, the media argued that *Re Global* was decided before *Oakes* and *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and is inconsistent with those cases.

The Alberta Court of Appeal performed a detailed analysis of s. 517 using the *Oakes* test:

A. Objectives of the Legislation

Justice Brooker had concluded that the objective of s. 517 was to protect the accused's right to a fair trial by an impartial jury and concluded that this object was sufficiently pressing and substantial to meet the first stage of the *Oakes* test.

The Crown and White asserted that the section has other objectives that were not considered by Justice Brooker. They argued that publication restrictions also support an accused person's right to a fair bail hearing and to bail on reasonable terms as set out in *Charter* s. 11(e). The Crown also argued that s. 517 enhances the efficiency of the criminal trial process. The Alberta Court of Appeal listed (at para. 36) a number of objectives for s. 517 that have been recognized in other legal decisions:

- The provisions of s. 517 are mandatory because placing any burden on the accused to justify a publication restriction would undermine the presumption of innocence and the right to remain silent.
- The accused is already pitted against the Crown, and it is unfair to expect the accused to also defend his entitlement to judicial interim release on fair terms against the interests of the media. Often the accused is unrepresented at bail hearings.
- Where the Crown has the burden of introducing evidence, it is not logical to expect the accused to be able to identify in advance the specific evidence that would justify a publication limitation of that evidence. Because bail proceedings are informally conducted, the rules of evidence are not strictly applied and hearsay is relied on, it is unrealistic to expect the accused to anticipate everything on which the Crown may rely.
- A judge would often find it impossible to rule on whether there should be a publication restriction without first hearing the evidence, and this could require the accused to gamble on whether any temporary restriction ordered by the judge will be made permanent.
- A delay in the availability of bail significantly reduces the value of the bail because requiring the accused to justify a limitation on publication would require more preparation and if the media were given notice of the application and participated in the hearing, even further delay would result.
- Requiring the accused to justify a publication restriction will lengthen the proceedings, with potential interventions by third parties, such as the media.
- Because of the number of bail applications, the expenditure of time and resources that would be required if the accused had to justify a publication restriction cannot be justified on a systemic basis.

The Court of Appeal noted that the mandatory aspect of s. 517 is largely directed at these objectives and not the objective of preserving an untainted jury. These objectives were found to be pressing and substantial.

B. Rational Connection

Justice Brooker held that s. 517 is not rationally connected to its objectives. The Court of Appeal held that he made this conclusion because he focused only on the effect of the restrictions on ensuring that the jury was not tainted. However, the mandatory aspect of s. 517 is actually based on the objectives listed above under: "A. Objectives of the Legislation". The Court of Appeal held that when examined in this broader context, the mandatory aspect of s. 517 is rationally related to the following objectives of the section: the protection of the right to reasonable bail and a fair bail hearing, the protection of the presumption of innocence and the enhancement of

the efficiency of the trial process. Thus, the Court of Appeal concluded that s. 517 does bear a rational connection to the objectives of the legislation.

C. Minimal Impairment

The Court of Appeal held that no restriction short of a mandatory restriction on publication would be effective in protecting the accused's right to a fair bail hearing and access to reasonable bail, and thus the impairment is as minimal as it can be. The Court of Appeal noted that publication is not banned permanently; it is merely postponed until after the trial.

D. Proportionate Effect

Finally, the Court examined whether the benefits of the legislation are proportionate to its negative effects. The Court of Appeal recognized that freedom of the press and openness of Canadian courts are core constitutional values. However, the right to a fair trial and the right to reasonable access to bail are also core values. The Court of Appeal noted that the publication of the information is merely delayed or restricted and not permanently banned. The Court was also mindful of the quality of the information provided in bail hearings, with the Crown often relying on untested or inadmissible evidence. Because the rights being balanced were also *Charter* rights, the Court held that the benefits of the restrictions on publication in s. 517 outweigh the negative effects of those restrictions.

Thus, while s. 517 infringes s. 2(b) of the *Charter*, it is justified under s. 1 of the *Charter*.

The Court of Appeal commented on the fact that publication restrictions will not be totally effective. There was evidence that some of the restricted information from White's bail hearing was published on the Internet. However, that there had been a breach of the order did not affect the analysis. The Court noted that a provision need not be infallible to be constitutional (citing *R. v. Bryan*, [2007] 1 S.C.R. 527).

This case brings to light a current movement toward recognition that in criminal cases publication restrictions and bans are ineffective and should be severely limited. The argument is that publication bans only deny information to those of us who rely solely on traditional media rather than the Internet for our news. Further, by limiting publication bans, the legal system can ensure that the public has access to accurate information, rather than rumour. Also, even temporary bans are not benign because timely information about the workings of the criminal courts has a great value to society and the bans bestow "information privileges" on some members of the public: Daniel Henry, "Free Expression and Publication Bans: Towards a More Open Criminal Justice System" (2005) 19 National Journal of Constitutional Law 337.