

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE ONTARIO COURT OF APPEAL)

B E T W E E N:

TORONTO STAR NEWSPAPERS LTD., ET AL.

Appellants

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA ET AL.

Respondents

- and -

ATTORNEY GENERAL OF ONTARIO ET AL.

Interveners

Court File Number: 32865

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

B E T W E E N:

CANADIAN BROADCASTING CORPORATION ET AL.

Appellants

- and -

MICHAEL JAMES WHITE ET AL.

Respondents

- and -

DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA ET AL.

Interveners

Factum of the Intervener, the Canadian Civil Liberties Association

ORIGINAL TO: Roger Bilodeau, Q.C.
Registrar, Supreme Court of Canada

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Part 1 – Overview and Statement of Facts

1. Section 517 of the *Criminal Code* imposes a complete and mandatory publication ban on all content of a bail proceeding, including the judge's reasons.
2. The ban applies, over the objections of a co-accused, across the country, to all forms of media without regard to the nature of the offence and offender. It applies whether or not the offence is indictable, hybrid or summary. It treats media conglomerates reporting the 'Toronto 18' bail hearing the same way as a grade nine student posting a message on Facebook about a bail hearing he watched for his civics class. It bars a Newfoundlander from learning why an accused in Vancouver was granted bail.
3. This is not "the most benign" of the publication orders.¹ This provision tramples our open court principle. It makes no effort to balance competing constitutional values. It violates s. 2(b) and falls well short of the constitutional baseline of proportionality.
4. The CCLA relies on the facts as stated by the Appellants in both cases and by the Courts of Appeal below,² however, certain facts bear emphasis.

Key Facts

5. In *Toronto Star*, by the time a publication ban was imposed, details of the plot had been disclosed by the police, CSIS and defence counsel. The case attracted worldwide attention. Five thousand articles were published in less than 10 days.³
6. Only one of the adult accused requested a publication ban.⁴ Others, for a variety of reasons, wanted the public to receive information about their bail hearing. But section 517 banned the co-accused from providing information to the public, the media from publishing that information, and the public from receiving that information.

¹ Factum of the Respondent, Attorney General of Alberta (SCC File #32865), at para 129.

² *R. v. White*, 2008 ABCA 294 [White] [CCLA's Authorities, Tab 10]; *R. v. Ahmad [Toronto Star Newspapers Ltd. v. Canada]*, 2009 ONCA 59 [CCLA's Authorities, Tab 6] [Toronto Star].

³ *Toronto Star*, *ibid.* at para. 4 [CCLA's Authorities, Tab 6].

⁴ Decision of Justice Durno, 27 July 2006, Appeal Book of the Appellants Toronto Star Newspapers Ltd. et. al., Tab 3, para. 9.

7. On 18 July 2005, Mr. White was charged with the murder of his wife.⁵ The case attracted “considerable media attention”⁶, an “enormous amount of publicity.”⁷ Mr. White generated much of this publicity by using the media to ask the public to help find his wife.⁸ But, when he sought bail *three months after his arrest*, a s. 517 publication ban was imposed at his request.⁹

Part II – Questions in Issue

8. Does s. 517 of the *Criminal Code* infringe s. 2(b) of the *Charter*? If so, is the infringement justified under s. 1?

9. There is no debate that s. 517 infringes s. 2(b) of the *Charter*. The CCLA submits that the section, as it is currently drafted, cannot be saved under s. 1.

Part III – Argument

The importance of the public’s right to receive information

10. A free press, with all its warts, is democracy’s essential ally. “The media have a vitally important role to play in a democratic society. It is the media that, by gathering and disseminating news, enable members of our society to make an informed assessment of the issues which may significantly affect their lives and well-being.”¹⁰

11. Freedom of expression is the core of the open court principle, the “hallmark” of a democratic society.¹¹ Openness extends to the pre-trial stage of judicial proceedings.¹²

12. At the point of bail, the coercive power of the state over the individual, still presumed innocent, is at its apex. The public, in modern society, cannot in any meaningful way attend

⁵ Factum of the Respondent, *supra* note 1, Tab H, p. 87; Respondents Joint Record of the Attorney General of Alberta and Michael James White (SCC File #32865) (“White Respondents’ Joint Record”), pp. 2, 20. In December 2006, Mr. White was convicted by a jury, and sentenced to life imprisonment; Factum of the Respondent, Her Majesty the Queen (SCC File #32865), Tab H, p. 87.

⁶ White Respondents’ Joint Record, p. 21.

⁷ White Respondents’ Joint Record, p. 22.

⁸ White Respondents’ Joint Record, p. 26.

⁹ Factum of the Respondent, *supra* note 1, Tab H, p. 87.

¹⁰ *Canadian Broadcast Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459 at pg. 475 [Canadian Broadcast Corp] [CCLA’s Authorities, Tab 1].

¹¹ *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332 at para 23 [CCLA’s Authorities, Tab 12].

¹² *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at pg. 1365 citing *Scott v. Scott*, [1913] A.C. 417, at p. 440 [CCLA’s Authorities, Tab 3].

court. The press is our proxy. By banning publication, the section effectively bars public access to bail hearings.

13. Section 517 is “a dramatic curb on freedom of expression.”¹³ It bans the publication and receipt of information about a critical element of our criminal justice system. It stymies all communication about bail court proceedings as well as the “further freedom of the members of the public to develop and to put forward informed opinions about the court.”¹⁴

The infringement cannot be saved under section 1

14. Section 517 is not consistent with the values of an open society.

15. Notwithstanding the absence of Parliamentary debate and lack of language in the impugned provision, the CCLA accepts that the purpose of s. 517 is to protect the pressing and substantial interests of the right to a fair trial and timely bail.

No Rational Connection

16. The rational connection requirement of the *Oakes* proportionality test demands a demonstration by government of ‘careful design’ intended to minimize the legislation’s constitutional footprint. There is no evidence of careful design in this provision. Its automatic application to non-jury trials, its unrestricted geographic reach, its failure to make any effort to balance conflicting interests of co-accused and its lack of regard for the kind of information that is banned belie any assertion of careful design.

17. Notably, s. 517 permits the Crown to seek a discretionary publication ban over the objection of the accused¹⁵. Where the Crown *does* seek a ban, the expediency of the trial is at issue and the court must apply the *Dagenais/Mentuck* test. It is irrelevant to the accused whether the Crown seeks the ban rarely, sometimes, or all of the time – his bail process may be delayed. The legislation thus acknowledges that fair trial interests can co-exist with a constitutional balancing mechanism.

¹³ *Toronto Star*, *supra* note 2 at para 32.

¹⁴ *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 at para 26 [CCLA's Authorities, Tab 2].

¹⁵ *R. v. O.N.E.*, [2001] 3 S.C.R. 478 [CCLA's Authorities, Tab 9].

18. Witnesses and potential jurors may be exposed to prejudicial media reports about many aspects of a case from the occurrence of the offence to disposition and, in many cases, appeal and re-trial. Moreover, there is rightly no prohibition against people attending a bail hearing and speaking to others about any aspect of it. In smaller population centres this impact can be significant. In this context a mandatory and automatic publication ban cannot be considered carefully designed and rational.

The Impairment is Not Minimal

19. Section 517 is completely unresponsive to the nuances of geography, form of offence, wishes of the accused and the nature of the information banned. The provision makes no effort to balance the interests of those who perceive that their fair trial interests are advanced by publication, and those who perceive their interests to be advanced by a ban. In *Toronto Star*, the publication ban was requested by one of the accused, contrary to the desires of other accused who preferred instead "...to allow a live feed of proceedings from the court to counteract the frenzy that's been manufactured by the Crown."¹⁶

20. Framing the need to strike a meaningful constitutional balance as forcing an accused to 'choose between fairness or freedom'¹⁷ mischaracterizes the constitutional issue, assumes an impact for which there is no reliable evidence and denies the capacity of the accused to make a meaningful choice regarding the conduct of their bail hearing.

21. Notably, in 1996 the Uniform Conference of Canada (U.C.C.), in its annual proceedings, recommended that s. 517 be 'repaired' by removing the requirement of a mandatory ban at the request of the accused. The Criminal Section of the U.C.C., uniting prosecutors from federal, provincial and territorial governments with defence counsel and judges, raised the following red flag:¹⁸

The court possesses no discretion when the request for a publication ban upon the evidence is advanced by the accused. In that particular circumstance, the presiding judge must impose a ban. As a consequence, no balancing is permitted whereby the effect a publication ban may have upon freedom of the press may be

¹⁶ Transcript, Ontario Court of Justice (June 12, 2006) in Appellant's Appeal Book, Vol 1. (May 16, 2007) at pg. 204.

¹⁷ Factum of the Respondent, *supra* note 1, Tab H, at paras 39-47.

¹⁸ Uniform Law Conference of Canada, "Proceedings of Annual Meetings - 1996 Ottawa, ON" online: <<http://www.ulcc.ca/en/poam2/index.cfm?sec=1996&sub=1996af>> [CCLA's Authorities, Tab 18].

assessed ... It would appear that both section 517 and section 539 are premised on the belief that the right to a fair trial is exclusively the prerogative of an accused person, otherwise, the order would not be automatic at the behest of the defence. However, it is now beyond dispute that there is also an important societal value achieved by ensuring the fair trial of an individual charged with a criminal offence... In view of this obvious flaw, sections 517 and 539 need repair.

22. The Respondents submit that the mandatory nature of the ban is required to enable an expeditious bail process in service of the liberty interests of the accused.¹⁹ There is no evidence, nor reason to believe, that a tailored provision would not serve this goal. Witnesses and jurors have access to all forms of media throughout the trial. There are means available to weed out jurors spoiled by bias. Public awareness does not necessarily result in prejudice against the accused. And, expediency alone cannot shield a provision from refinement or justify a dramatic infringement of a constitutional freedom.²⁰ The mandatory ban of everything from everyone is just too blunt an instrument.

23. By prohibiting the publication of “the evidence taken, the information given or the presentations made and the reasons, if any, given or to be given by the justice”²¹ s. 517 draws no distinction between prejudicial and non-prejudicial information. It makes no allowance for judge alone trials or situations where the recipient of the information will never be a juror.²² It does not fall “within a range of reasonable alternatives.”²³ It functions as a gag order on the media and the public alike.

24. Contrary to the assertion of the Attorney General of Alberta, content-oriented orders make good sense and reduce the provision’s footprint on s. 2(b). It is true that an accused may

¹⁹ Factum of the Respondent, *supra* note 1, Tab H, at para 30; Factum of the Intervener Attorney General of Ontario (SCC File #32865), at para 16.

²⁰ In *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at pgs. 218-219, this Court says, “[c]ertainly the guarantees of the *Charter* would be illusory if they could be ignored because it was administratively convenient to do so” [CCLA’s Authorities, Tab 11].

²¹ *Criminal Code*, R.S.C. 1985, c. C-46, s.517.

²² Subsection (1) is to be broadly interpreted to include even non-prejudicial information: *R. v. Daly* (2003), 178 C.C.C. (3d) 31 (B.C.S.C.), *aff’d* on other grounds 198 C.C.C. (3d) 185, 256 D.L.R. (4th) 372 (B.C.C.A.) [CCLA’s Authorities, Tab 7]. This can also be inferred from the following statements by Feldman J. in *Toronto Star*:

[207] One of the alternative measures that Rosenberg J.A. considers and initially rejects at the minimal impairment stage of his analysis, is a discretionary, tailored ban limited to specific types of prejudicial information that would be inadmissible at trial, such as an involuntary confession, bad character evidence, similar fact evidence or an accused’s full criminal record.

²³ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para 160 [CCLA’s Authorities, Tab 5].

not in every case ‘know with certainty’ all the information that may prejudice his position at trial. But he, as well as the presiding justice, Crown and duty counsel, can recognize the obvious: alleged confessions and other inculpatory statements, prior convictions, pending charges, and physical evidence likely to be subject to *Charter* challenge.

25. That a ban as extensive as this one is required because the system is incapable of identifying information that may prejudice a fair trial is an extravagant proposition. The identification of the appropriate place to draw the line is not insurmountable.

26. For example, the *American Bar Association Criminal Justice Standards, Fair Trial and Free Press, Third Edition*²⁴ has, in consultation with the judiciary, academia, prosecution and defence bar developed standards which identify a number of subjects which should not be the subject of extra-judicial comment in the press. These include the accused’s reputation or character, prior criminal record, arrests, indictments or other charges, the performance of any examinations or tests, the refusal to submit to such tests, evidence known or likely to be inadmissible at trial and the existence of confessions or statements to the police. The same principles have been largely incorporated in American press association rules.²⁵

27. In *Nebraska Press Association v. Stuart*, the United States Supreme Court confirmed that “any prior restraint on expression comes to this Court with a “heavy presumption” against its constitutional validity.” Chief Justice Warren E. Burger referred to such restraints on speech and publication as a “most serious and least tolerable infringement”:

²⁴ American Bar Association, “ABA Standards for Criminal Justice: Fair Trial and Free Press”, 3d ed. online: American Bar Association < http://www.abanet.org/crimjust/standards/fairtrial_toc.html> [CCLA's Authorities, Tab 13].

²⁵ To regulate prejudicial pre-trial publicity, the American Bar Association (ABA) approved the “Standards Relating to Fair Trial and Free Press”, *ibid.*, in order to guide the legal community when speaking to the press. The standards were first developed in 1968 and have been revised twice since then. Standard 8-1.1, *ibid.*, in particular, governs extra-judicial statements by attorneys and identifies certain categories of information which, if disclosed to the press, will prejudice the rights of a defendant in criminal proceedings. These standards were recommended in 1968 by the ABA Advisory Committee, headed by Massachusetts Supreme Court Justice Paul C. Reardon and have subsequently influenced numerous voluntary press-bar agreements which set out guidelines for the coverage of criminal trials. (Dwight L. Teeter & Bill Loving, *Law of Mass Communications: Freedom and Control of Print and Broadcast Media*, 12th ed. (United States: Foundation Press, 2008) at 605) [CCLA's Authorities, Tab 15]. These standards have been adopted by Courts seeking to regulate prejudicial pre-trial publicity in a number of criminal cases in the United States. (Travis Dixon & Daniel Linz “Television News, Prejudicial Pretrial Publicity, and the Depiction of Race” (2002) 46 J. of Broadcasting & Electronic Media at 112) [CCLA's Authorities, Tab 17].

The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights...

A prior restraint, by contrast and by definition, has an immediate and irreversible sanction... If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time. The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events.²⁶

28. To determine whether to apply a publication ban, courts in the United States use a "clear and present danger" test to determine whether "the gravity of the evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger. To overcome the presumption of constitutional invalidity, the following three factors must exist: (1) the publicity must impair the right to a fair trial; (2) no less restrictive alternative to prior restraint is available or practicable to mitigate effects of the publicity; and (3) a prior restraint would effectively prevent the harm to a defendant's rights:

We turn now to the record in this case to determine whether, as Learned Hand put it, "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." To do so, we must examine the evidence before the trial judge when the order was entered to determine (a) the nature and extent of pre-trial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pre-trial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger. The precise terms of the restraining order are also important. We must then consider whether the record supports the entry of a prior restraint on publication, one of the most extraordinary remedies known to our jurisprudence.²⁷

²⁶ *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976) at para 558, 559 [CCLA's Authorities, Tab 4]. [Nebraska Press].

²⁷ *Ibid.* at para 562. The CCLA does not endorse the following approach in the United Kingdom but would like to direct this Court's attention to the *Contempt of Court Act, 1981*, (U.K.), 1981 c. 49. The Act is activated once a suspect is charged or arrested. (s. 2(3)) It creates a strict-liability rule with respect to publication of legal proceedings but only where such publication creates "a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced." (s. 2(2)) The Act balances competing values through a number of statutory defences available to the media. For instance, section 5 contains a public interest defence for media reporting material that allows public debate to flourish. The Act also contains a contemporaneous defence that allows the media to publish or broadcast a fair and accurate report of legal proceedings held in public if it is published contemporaneously and in good faith. (s. 4) A judge has residual discretion to restrict publication of fair and accurate reports on a trial but such discretion is to be used only where there is a "substantial risk of prejudice to that trial or other imminent proceedings". (s. 4(2))

The deleterious effects outweigh the salutary effects

29. The deleterious effects of a mandatory ban that applies across the country, to all offences and offenders and all information manifestly outweigh the salutary effect. In the case of offences that will be tried by judge alone, or where the recipient of the information could never by virtue of location be a juror, there are no salutary effects at all.

The right to a fair trial can be better served through judicial reasoning rather than public rumour

30. The bail hearing is a critical entry point to the criminal justice system. As Justice Rosenberg correctly noted below, prohibiting the justice's reasons is a "serious infringement of freedom of expression, especially in high visibility cases. The public is left to wonder, for example, why in light of the serious allegations against the accused at the pre-hearing press conference a justice or judge nevertheless released the accused."²⁸ This secrecy contributes to the misperceptions of the criminal justice system which undermines public confidence. McLachlin C.J. in *R. v. Hall* held that "without public confidence, the bail system and the justice system generally stand compromised."²⁹

31. An accused should have the benefit at least of a justice's reasons to help strike a balance between appropriately controlling information about allegations made and surrendering the judicial process over to rumours posted on YouTube, Facebook, and independent blogs.

The public has a right to be informed and a right to participate

32. From the perspective of the media and public, the bail hearing represents a critical step in the criminal justice process. This exposure can be vital to the community's knowledge of our criminal justice system, to the scrutiny of the courts by the people, and to the analysis and understanding of Canadian law. In the *Toronto Star* case, Paul Schneidereit, President of the Canadian Association of Journalists, said "[t]his trial is the single biggest test of Canada's new anti-terrorism laws and a matter of vigorous public interest ... Canadians care deeply about

²⁸ *Supra* note 3 at para 76.

²⁹ *R. v. Hall*, [2002] 3 S.C.R. 309 at para 31[CCLA's Authorities, Tab 8].

what's happening in the one forum where these issues are being heard. The court should reconsider the ban in light of these facts."³⁰

33. The ability of the public to scrutinize government process, including the court system, is central to our democratic process. In order for this scrutiny to occur, the public must have access to the processes. As the Department of Justice stated:

Of signal importance as well, a free flow of information encourages feedback and debate among members of the public, thereby promoting the accountability of institutions which exercise coercive powers against individuals.³¹

34. The ban applies against all members of the public who are interested and who choose to participate. In our federation, the criminal law applied in Alberta is of significant interest to a resident of Ottawa and vice versa. Where there are no sound reasons for a publication ban or where an accused prefers to have the public informed and engaged, what purpose does the ban serve? The current mandatory ban is a blunt instrument that has the effect of inhibiting the public's full awareness and discussion of the bail hearing process. It can also lead to serious misunderstandings about the crime and the accused.

Parts IV and V – Submissions on Costs and Order Sought

35. The CCLA seeks no costs and asks that none be awarded against it.

36. The CCLA asks this Court to allow the appeal. Section 517 cannot be saved under s. 1 and ought to be struck.

37. In the alternative, the CCLA submits that the legislation can be read down and amended to comply with *Charter* principles. The CCLA submits that the section must be read to apply only to cases where there is reasonable possibility of a jury trial, as held by the Ontario Court of Appeal. Second, the provision can only be mandatory when requested by all of the accused charged together, and must be discretionary when requested by only one or some of the accused.

³⁰ National Press Club, "CAJ comments on publication ban" online: Canadian Association of Journalists <<http://www.pressclub.on.ca/caj.html>>[CCLA's Authorities, Tab 16].

³¹ Department of Justice, "Victim Privacy and the Open Court Principle" online: Department of Justice <http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_vic1/p4.html>[CCLA's Authorities, Tab 14].

Finally, the Court ought to strike the words “and the reasons, if any, given or to be given by the justice.”

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of October, 2009.

Jonathan C. Lissus

Alexi N. Wood
McCarthy Tétrault LLP
Solicitors for the Intervener

PART VI – TABLE OF AUTHORITIES

No.	Authority	Paragraph Reference
Judgements		
1	<i>Canadian Broadcast Corporation v. New Brunswick (Attorney General)</i> , [1991] 3 S.C.R. 459.	10
2	<i>Canadian Broadcasting Corp. v. New Brunswick (Attorney General)</i> , [1996] 3 S.C.R. 480 (QL).	13
3	<i>Edmonton Journal v. Alberta (Attorney General)</i> , [1989] 2 S.C.R. 1326.	11
4	<i>Nebraska Press Association v. Stuart</i> , 427 U.S. 539 (1976).	27
5	<i>RJR-MacDonald Inc. v. Canada (Attorney General)</i> , [1995] 3 S.C.R. 199 (QL).	23
6	<i>R v. Ahmad [Toronto Star Newspapers Ltd. v. Canada]</i> , 2009 ONCA 59 (QL).	4, 5, 13, 30
7	<i>R. v. Daly</i> 2003 BCSC 1143, affd on other grounds 2005 BCCA 389 (QL).	23
8	<i>R. v. Hall</i> , [2002] 3 S.C.R. 309 (QL).	30
9	<i>R. v. O.N.E.</i> , [2001] 3 S.C.R. 478 (QL).	17
10	<i>R. v. White</i> , 2008 ABCA 294.	4
11	<i>Singh v. Minister of Employment and Immigration</i> , [1985] 1 S.C.R. 177.	22

12	<i>Vancouver Sun (Re)</i> , [2004] 2 S.C.R. 332 (QL).	11
Articles and Texts		
13	American Bar Association, “ABA Standards for Criminal Justice: Fair Trial and Free Press”, 3d ed. online: American Bar Association < http://www.abanet.org/crimjust/standards/fairtrial_toc.html >.	26
14	Department of Justice, “Victim Privacy and the Open Court Principle” online: Department of Justice < http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_vic1/p4.html >.	33
15	Dwight L. Teeter & Bill Loving, <i>Law of Mass Communications: Freedom and Control of Print and Broadcast Media</i> , 12th ed. United States: Foundation Press, 2008.	26
16	National Press Club, “CAJ comments on publication ban” online: Canadian Association of Journalists < http://www.pressclub.on.ca/caj.html >.	32
17	Travis Dixon & Daniel Linz “Television News, Prejudicial Pretrial Publicity, and the Depiction of Race” (2002) 46 <i>Journal of Broadcasting & Electronic Media</i> .	26
18	Uniform Law Conference of Canada, “Proceedings of Annual Meetings - 1996 Ottawa, ON” online: < http://www.ulcc.ca/en/poam2/index.cfm?sec=1996&sub=1996af >.	21

PART VII – LIST OF STATUTES

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11, s. 2(b):

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

Charte canadienne des droits et libertés, Partie I de la Loi Constitutionnelle de 1982 (R.-U.), constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11, s. 2(b) :

2. Chacun a les libertés fondamentales suivantes :

- a) liberté de conscience et de religion;
- b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;
- c) liberté de réunion pacifique;
- d) liberté d'association.

Criminal Code, R.S.C. 1985, c. C-46, s.517:

517. (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 directing 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

- (a) if a preliminary inquiry is held, the accused in respect of whom the proceedings are held is discharged; or
- (b) if the accused in respect of whom the proceedings are held is tried or ordered to stand trial, the trial is ended.

Failure to comply

(2) Every one who fails without lawful excuse, the proof of which lies on him, to comply with an order made under subsection (1) is guilty of an offence punishable on summary conviction.

(3) [Repealed, 2005, c. 32, s. 17]

R.S., 1985, c. C-46, s. 517; R.S., 1985, c. 27 (1st Supp.), s. 101(E); 2005, c. 32, s. 17.

Code criminel (L.R., 1985, ch. C-46), s.517:

517. (1) Si le poursuivant ou le prévenu déclare son intention de faire valoir des motifs justificatifs aux termes de l'article 515 au juge de paix, celui-ci peut et doit, sur demande du prévenu, avant le début des procédures engagées en vertu de cet article ou à tout moment au cours de celles-ci, rendre une ordonnance enjoignant que la preuve recueillie, les renseignements fournis ou les observations faites et, le cas échéant, les raisons données ou devant être données par le juge de paix, ne soient ni publiés ni diffusés de quelque façon que ce soit :

a) si une enquête préliminaire est tenue, tant que le prévenu auquel se rapportent les procédures n'aura pas été libéré;

b) si le prévenu auquel se rapportent les procédures subit son procès ou est renvoyé pour subir son procès, tant que le procès n'aura pas pris fin.

Omission de se conformer

(2) Quiconque, sans excuse légitime, dont la preuve lui incombe, omet de se conformer à une ordonnance rendue en vertu du paragraphe (1) est coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

(3) [Abrogé, 2005, ch. 32, art. 17]

L.R. (1985), ch. C-46, art. 517; L.R. (1985), ch. 27 (1er suppl.), art. 101(A); 2005, ch. 32, art. 17.

Contempt of Court Act, 1981, (U.K.), 1981 c. 49

Strict liability

1 The strict liability rule

In this Act “the strict liability rule” means the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so.

2 Limitation of scope of strict liability

(1)The strict liability rule applies only in relation to publications, and for this purpose “publication” includes any speech, writing, or other communication in whatever form, which is addressed to the public at large or any section of the public.

(2)The strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.

(3)The strict liability rule applies to a publication only if the proceedings in question are active within the meaning of this section at the time of the publication.

(4)Schedule 1 applies for determining the times at which proceedings are to be treated as active within the meaning of this section.

...

4 Contemporary reports of proceedings

(1)Subject to this section a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.

(2)In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose.

Court File No.: 32865
Court File No.: 33085

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURTS OF APPEAL OF
ALBERTA AND ONTARIO)

BETWEEN:

CANADIAN BROADCASTING
CORPORATION, et al..
TORONTO STAR NEWSPAPERS LTD., et al.

Appellants

- and -

HER MAJESTY THE QUEEN, et al.

Respondents

**Factum of the Intervener,
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