R. v. White

Publication ban upheld
(Freedom of the Press)

The Alberta Court of Appeal has upheld the *Criminal Code* provisions which delay the publication of bail proceedings. In *R. v. White*,[1] a group of media outlets petitioned the court to strike down section 517 of the *Criminal Code*, which allows prosecutors or the accused to delay the publication of bail proceedings until a trial has ended. The media argued that section 517 violates the constitutional right to freedom of expression enshrined in section 2 of the *Charter of Rights and Freedoms*. Justice Slatter wrote the majority opinion. He found that while section 517 of the *Criminal Code* violated section 2(b) of the *Charter*, the violation was justified by the *Charter*'s section 1.

In the case at issue, Michael White, who was charged with murdering his wife, applied for judicial interim release. He also applied for a publication ban on the judicial interim release proceedings. Section 517 of the*Criminal Code* provides for a temporary publication ban on hearings related to the interim release of the accused before trial:

(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the information given or the representations made and the reasons, if any, given or to be given by the justice shall not be published in any document, or broadcast or transmitted in any way…[after the trial].[2]

If the accused applies for a publication ban on the pre-trial hearing, the justice is required to grant it. On the other hand, a justice has the discretion to grant the publication ban if the prosecutor applies. Here, since the accused applied for the ban, it was mandatory.

The Lower Court

The media, including the CBC, the Edmonton Journal, Sun Media, the Globe and Mail, and CTV, subsequently applied to strike down section 517 as being contrary to section 2 of the *Charter*, which guarantees the freedom of expression and the freedom of the press. Section 2 reads that everyone has the right to freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.[3] The chambers judge agreed with the media. The lower court declared section 517 violated the *Charter* right to freedom of expression.[4] Further, because the section could not be justified in a free and democratic society, it was ruled to be unconstitutional.[5]

The Court of Appeal

Justice Slatter of the Alberta Court of Appeal found that while section 517 of the *Criminal Code* violated section 2 of the *Charter*, it was justified by section 1 of the *Charter* under

the *Oakes* test.[6] The Crown conceded that section 517 violated the right to freedom of expression. At issue was whether the *Criminal Code* provision was justifiable under section 1 of the *Charter*, which reads that:

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.[7]

The first part of the examination of whether section 517 is justifiable under the *Oakes* test is to determine whether the legislation is sufficiently important to justify limiting the right to freedom of expression. According to the court, it was. The legislation is primarily aimed at preserving a fair bail hearing, an untainted jury, and a fair trial.[8] All are important objectives.

The second part of determining whether the legislation is justified by section 1 is identifying whether or not the effects of the legislation are rationally connected to these objectives. The court found that the legislation was rationally connected to the objectives of 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."[9].

The third part of the *Oakes* test is whether or not the law impairs the violated right to freedom of expression more than is necessary. The court was of the opinion that it did not significantly impair the right to free speech. For one, the publication ban is not permanent. It ends when the trial ends. Additionally, the press is not prohibited from accessing the pre-trial hearing. It is only temporarily prohibited from publishing any information related to the hearing. Justice Slatter also rejected the argument that the pre-trial hearing information is only newsworthy immediately after occurring, saying that the trial conclusion often precipitates the publishing of embargoed and re-capped information.[10]

Finally, the court examined whether any negative effects caused by the legislation were disproportionate to its benefits. The court found that the legislation struck the appropriate balance. Striking down the legislation and allowing the press to publish pre-trial bail hearings against the accused's consent "[compromise] the accused's right to a fair trial, a fair bail hearing, and reasonable access to fair and timely bail, all to accelerate the time at which bail proceedings can be publicized, does not achieve the appropriate balance."[11]

---

[1] 2008 ABPC 294 .
[2] *Criminal Code.*, R.S.C. 1985, c. C-46, s. 517
[3] *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to theCanada Act 1982 (U.K.), 1982, c. 11, s. 2(b).*
[4] *R. v. White, 2007 ABQB 359.*
[5] See Terry Romaniuk, "The Oakes Test."

[6] *Ibid*.
[7] *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to theCanada Act 1982 (U.K.), 1982, c. 11, s. 1.*
[8] *White*, *supra* note 1 at para. 36.
[9] *Ibid*. at para. 41.
[10] *Ibid*. at para. 47.
[11] *Ibid*. at para. 52.