

Freedom vs. Privacy

In a recent 3-2 decision, the Ontario Court of Appeal ruled that section 517 of the *Criminal Code* (giving the right of an accused to invoke a publication ban on pre-trial hearings) was constitutional and therefore did not infringe section 2(b) of the *Charter of Rights and Freedoms*, which protects freedom of expression.

The case, *Toronto Star Newspapers Ltd. v. Canada*, involved seventeen defendants who had allegedly been involved in terrorist plots to blow up various public buildings, including the Parliament building.^[1] After applying for and receiving a publication ban on their bail hearings, a group of media companies led by the *Toronto Star* launched an action challenging the publication ban, arguing that the ban violates section 2(b) of the *Charter*.

Three justices representing the majority ruled that “a publication ban is needed in jury cases to protect an accused’s right to a fair trial under sections 11(d) and 7 of the *Charter*, by preventing potential jurors from learning of prejudicial information from bail hearings which may never be heard at trial.”^[2] Justice Rosenberg, speaking for the dissent, found that the mandatory publication ban violated section 2(b) of the *Charter* and cannot be saved by section 1, which allows for reasonable limits on *Charter* rights.^[3]

Although the majority upheld the constitutionality of the mandatory publication ban, the court was unanimous in finding that the mandatory nature of the ban was unsatisfactory. The court narrowed the rule to apply only in cases that may be decided by a judge alone. However, a lawyer for the appellant media outlets highlighted the problem that while few cases are tried by jury, many more have the *potential* to be tried by jury.^[4] Justice Feldman for the majority said that the ban was too broad,^[5] while Justice Rosenberg argued that it cut off “meaningful and informed public debate.”^[6] As there is a rule that in split decisions on a point of law before an appeal court, there is an automatic right of appeal to the Supreme Court of Canada, it is likely that this issue has yet to be resolved.^[7]

^[1] *Toronto Star Newspapers Ltd. v. Canada*, 2009 ONCA 59 at para. 4 .

^[2] Tracey Tyler, “[Court eases media rules for reporting bail hearings](#)” *Toronto Star* (27 January 2009).

^[3] *Toronto Star*, *supra* note 1 at para. 3.

^[4] Robert Todd, “Bail Hearing Battle an Issue of “National Importance” *Law Times* (2 February 2009).

[5] *Toronto Star*, *supra* note 1 at 159.

[6] *Ibid.* at para. 32.

[7] *Law Times*, *supra* note 4.