Toronto Star Newspapers Ltd. v. Canada – Freedom of Expression and Publication Bans (2010)

The news media play an essential role in informing the public about the criminal justice system. However, there are times when the law provides for a ban on reporting the details of court proceedings. For instance,section 517 of the *Criminal Code* provides that if an accused requests a ban on media reporting about his bail hearing, a publication ban must be granted. This is called a "mandatory publication ban." In Alberta, a man charged with murdering his wife was granted bail and released prior to his trial. He had invoked section 517 and so the public was denied any information about the reason for his release.[1] In Ontario, seventeen people were charged with terrorism-related offences. Some of them were released on bail, but a blanket publication ban kept news media out of the courtroom during their bail hearings.[2] These two incidents prompted several media organizations, including The Toronto Star newspaper, to challenge the constitutionality of section 517. They argued that a mandatory publication ban is contrary to the open court principle of Canadian justice, and also to freedom of expression, as guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms*. In its 8-1 ruling in *Toronto Star Newspapers Ltd. v. Canada*, the Supreme Court of Canada recognized that "access to courts is central to democracy."[3] Publication bans unquestionably limit access to the courts and the *Charter* guarantee of freedom of expression. Having identified that mandatory publication bans breach a *Charter* right, the Court had to consider whether they are nonetheless a "reasonable limit prescribed by law" that "can be demonstrably justified in a free and democratic society," as provided by section 1 of the *Charter*.[4]

Trial Fairness: A Pressing and Substantial Objective

The mandatory publication ban is a part of a larger set of measures to reform the rules on bail.[5] The objective identified by the Justice Deschamps in her majority decision for the Supreme Court is "to safeguard the right to a fair trial" and "to ensure expeditious bail hearings."[6] In an earlier ruling, the Supreme Court dealt with trial fairness in the limited sense of averting jury bias.[7] In the *Toronto Star* case, Justice Deschamps identified a broader sense of trial fairness, which includes avoiding a criminal stigma which might stick even if the accused is acquitted.[8]

The Rational Connection between a Publication Ban and Trial Fairness

To allow bail hearings to proceed quickly, the process is somewhat informal. The rules of evidence are much more relaxed than in a trial. "The prosecutor may lead any evidence that is 'credible or trustworthy,' which might include evidence of a confession that has not been tested for voluntariness or consistency with the*Charter*, bad character, information obtained by wiretap, hearsay statements, ambiguous post-offence conduct, untested similar facts,

prior convictions, untried charges, or personal information on living and social habits."[9] The mandatory ban is meant to "prevent prejudicing the accused at his trial by the dissemination of prejudicial matter which would not be admissible at his trial."[10]

Do Mandatory Publication Bans Impair Expression as Little as Possible?

The suggested alternative to a mandatory publication ban was a discretionary publication ban based on the findings of a preliminary hearing. Justice Deschamps ruled out this alternative as ineffective in preserving trial fairness. If the accused had to make his case for a ban, it would be "an additional burden" at a time when the accused is "overwhelmed by the criminal process" and "extremely vulnerable."[11] Preparing arguments takes time and resources that the accused needs to be putting towards his trial defense rather than an additional publication ban hearing.[12] Justice Deschamps pointed out that this sort of ban is not absolute. The media may publish the identity of accused, comment on the facts and the charged offence, and the report that there is an application for bail.[13] Also, the ban is temporary. It ends after trial or when the accused is discharged.[14] The majority of the Supreme Court concluded that "in light of the delay and the resources a publication ban hearing would entail, and of the prejudice that could result if untested evidence were made public, it would be difficult to imagine a measure capable of achieving Parliament's objective that would involve a more limited impairment of freedom of expression."[15]

Justice Abella's Dissent

Justice Abella disagreed with the other Supreme Court judges. She would have struck down the mandatory publication ban on the grounds that its negative effects outweigh its positive effects.[16] She would have taken away the mandatory aspect of section 517 and left judges with discretion to order a publication ban.[17] In her opinion, granting an automatic ban, without requiring the accused to demonstrate that it is necessary, goes further than the requirement of trial fairness and unduly encroaches on the right of the public to be informed of trial proceedings.[18] The bail system is a fundamental part of the criminal justice system and debate must not be shut off; the public should not have to speculate about why the accused was released.[19] Justice Abella recognized that there may be legitimate concerns about pre-trial publicity. But in her view, these concerns may be remedied by other less impairing means, such as a change of venue. Furthermore, a properly instructed jury can disregard irrelevant information.[20] Another flaw, in Abella's opinion, is that the publication ban is ineffective in responding to concerns about trial fairness. The ban only deals with the bail hearing. There are other sources of information. Because the ban is porous and ineffective, it cannot be justified.[21] Finally, Abella disputes the idea that the hearings involved in a discretionary ban would cause undue delay. Most criminal cases do not attract media attention. Only the small minority that involve high-profile accused or egregious crimes will provoke public interest and be the subject of potential publication bans. In her opinion, the added burden to the justice system would be insignificant compared with the importance of protecting the open courts principle.[22]
Jim Young (June 18, 2010)

Further Reading

Christina Kellowan, "News Update: Mandatory Publication Bans Are Constitutional" *TheCourt.ca* (14 June 2010).

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[1] 2010 SCC 21 at para. 4. [2] *Ibid.* at paras. 6-7. [3] *Ibid.* at paras. 1, 65. [4] *Ibid.* at para. 2. [5] *Ibid.* at para 21. [6] *Ibid.* at para 23 [7] *Ibid.* at para 22, *Dagenais v. Canadian Broadcasting Corp.*,[1994] 3 S.C.R. 835. [8] *Ibid.* at para. 22. [9] *Ibid.* at para 28, 32. [10] *Ibid.* at para. 30. [11] *Ibid.* at para. 36 [12] *Ibid.* at para. 44. [13] *Ibid.* at para. 39. [14] *Ibid.* [15] *Ibid.* at para. 37. [16] *Ibid.* at para. 66. [17] *Ibid.* [18] *Ibid.* at para. 71. [19] *Ibid.* at para. 68. [20] *Ibid.* at para. 72. [21] *Ibid.* at para. 73. [22] *Ibid.* at para. 75.