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Attention:	
FAX NUMBER:	As above
FROM:	Meg Wallace

NUMBER OF PAGES: *(INCLUDING THIS COVER)*	7

☐ Urgent ☒ For Review ☐ ☐ Please Reply

COMMENTS: RAFFERTY: RULING ON AN APPLICATION FOR A NON-PUBLICATION ORDER

Decision of Justice T. A. Heeney, dated December 16, 2010. There will be a clean copy mailed to your addresses. The Crown's office will also receive their copy.

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CITATION: R. v. Rafferty, 2010 ONSC 6980
COURT FILE NO.: 21/10
DATE: 2010-12-16

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
HER MAJESTY THE QUEEN Prosecutor	Brian E. Crockett and Michael B. Carnegie, for the Crown
– and –	
MICHAEL THOMAS CHRISTOPHER STEPHEN RAFFERTY Accused	Dirk Derstine and Scott Reid, for the Accused
– and –	
SUN MEDIA CORPORATION, CANADIAN BROADCASTING CORPORATION, CTV TELEVISION INC. (A DIVISION OF CTVGLOBEMEDIA INC.), and POST MEDIA NEWS SERVICE (the "Media Coalition")	Iain A.C. MacKinnon, for the Media Coalition, Respondents
	HEARD: November 30, 2010 at Woodstock, Ontario

HEENEY J.:

[1] In this application, the Crown seeks an order banning the publication, broadcast or transmission (inclusive of internet or other electronic dissemination) of any information respecting pre-trial applications in this case, pursuant to s. 648 of the *Criminal Code*. In order that the interests of the media could be represented at the hearing of the application, I made an *ex parte* order on November 24, 2010 which provided for service of the

Crown's materials on a long list of potential respondents, including all of the major print and broadcast media outlets. Mr. MacKinnon has filed responding materials on behalf of a group of those who have chosen to take part, who collectively refer to themselves as the Media Coalition.

[2] This case concerns the alleged abduction and murder of a young child, Victoria Stafford. It has attracted intense interest from the media. A number of pretrial motions are contemplated, although at this point only this application, by the Crown, and a Fisher application, by the accused, have formally been filed. It is expected that the supporting materials to be filed in the motions to come will contain many references to the evidence to be called in this case, as well as other information which may be prejudicial to the fair trial interests of the accused if allowed to be published. Accordingly, the Crown seeks the direction of the court concerning the extent to which the automatic publication ban provided for under s. 648 of the Code applies to these pretrial motions.

[3] The issue before the court relates to the interplay between s. 645(5) and s. 648 of the Code. They read as follows:

> **645(5)** In any case to be tried with a jury, the judge before whom an accused is or is to be tried has jurisdiction, before any juror on a panel of jurors is called pursuant to subsection 631(3) or (3.1) and in the absence of any such juror, to deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn.
>
> ...
>
> **648(1)** After permission to separate is given to members of a jury under subsection 647(1), no information regarding any portion of the trial at which the jury is not present shall be published in any document or broadcast or transmitted in any way before the jury retires to consider its verdict.

[4] Section 648(1) is a statutory ban prohibiting the publication of any information regarding any portion of the trial where the jury is absent. Prior to the enactment of s. 645(5), all *voir dires* concerning the admissibility of evidence and most procedural motions occurred after the jury was selected and sworn, but in the absence of the jury. The obvious purpose of s. 648(1) is to preclude the possibility that the jury might be exposed, though publication, to evidence and other information that is ultimately never tendered in open court in front of the jury, either because it has been ruled to be inadmissible or for some other reason. Once the jury retired to consider its verdict, the media could publish all other information about the case that the jury did not hear during the trial. It is not, therefore, strictly speaking a publication ban, but rather a mandatory delay on publication.

[5] Section 645(5) was enacted to permit motions, which would otherwise have been brought after the jury had been sworn but in their absence, to be brought before the trial judge prior to the selection of the jury. The benefit of doing so is to avoid keeping a jury on hold while the often lengthy pretrial motions are argued and ruled upon.

[6] A motion brought during the trial, after the jury is sworn but in their absence, is undoubtedly covered by s. 648(1), and there is a blanket prohibition against publishing any information about that motion. The question before me is whether or not that same motion, which is brought prior to empanelment of the jury pursuant to s. 645(5), receives the same protection.

[7] I considered this issue at length in *R. v. Sandham et al*, which is reported as *R. v. Canadian Broadcasting Corp.*, [2008] O. J. No. 5637 (S.C.J.) ("*C.B.C.*"), and concluded that s. 648(1) should be broadly interpreted so as to cover pretrial motions to which s. 645(5) applies. My conclusion on this question is in accord with the overwhelming weight of authority: *R. v. Bernardo*, [1995] O.J. No. 247 (Gen. Div.) per LeSage A.C.J.; *R. v. Ross*, [1995] O.J. No. 3180 (Gen. Div.) per Salhany J.; *R. v. Regan*, [1997] N.S.J. No. 427 (S.C.) per MacDonald J.; *R. v. Brown*, [1998] O.J. No. 482 (Gen. Div.) per Trafford J.; *R. v. Malik*, [2002] B.C.J. No. 3223 (S.C.) per Josephson J.; *R. v. Pickton*, [2005] B.C.J. No. 3243 (S.C.) per Williams J.; *R. v Ahmad*, [2009] O.J. No. 6150 (S.C.J.) per Dawson J.; and *R. v. Valentine*, [2009] O.J. No. 5954 (S.C.J.) per Pardu J..

[8] I acknowledge that the courts in Alberta have followed a different path, and have taken a strictly literal approach to s. 648(1): *R. v. Cheung* [2000] A.J. No. 1463 (Q.B.) per Binder J.; *R. v. Trang*, [2001] A.J. No. 682 (Q.B.) per Watson J.; and *R. v. Twitchell*, 2010 ABQB 692 (Q.B.) (unreported) per Clackson J.. For reasons stated in *C.B.C.*, which I do not need to repeat here, I am not persuaded that the narrow approach reflected by that line of cases is correct.

[9] Concluding that s. 648(1) applies to pretrial motions brought pursuant to s. 645(5) does not, however, completely answer the question now before the court. Two recent decisions of my colleagues, in *Ahmad* (*supra*) and *Valentine* (*supra*), both of which were decided after my decision in *C.B.C.*, require a reconsideration of the precise scope of s. 648(1). Does it apply to all pretrial motions and applications brought before the trial judge, or only to some of them? Does the *Charter of Rights and Freedoms* require that s. 648(1) be read down so as to permit the trial judge to grant leave to publish where satisfied that publication would not impair the right of an accused to a fair trial?

[10] I will begin with a summary of my own approach to the scope of s. 648(1), as modified by s. 645(5), since that approach was expressly considered by Dawson J. in *Ahmad* and then apparently rejected. In *C.B.C.* I said the following, at para. 20:

> It seems to me that the key to approaching this issue lies in focusing on the nature of the motion or application under consideration. Is it one which would ordinarily or necessarily be heard before the trial judge in the absence of the jury after it has been empanelled? If it is such a motion, and if it is only being heard in advance of the trial proper pursuant to s. 645(5), then there is no reason to treat it any differently than a similar motion heard during the course of the trial, where s. 648(1) would be engaged so as to ban publication. On the other hand, if it is a motion that could be heard by a judge other than the trial judge, or be heard before the jury is sworn, then s. 648(1) has no application.

[11] It should be pointed out that there was no Charter challenge to the legislation before me, and my analysis was strictly one of statutory interpretation. The publication ban imposed by s. 648(1), on its strict wording, only applies to motions brought during the trial, in the absence of the jury. Where those "in-trial" motions are now brought before the jury is empanelled, pursuant to s. 645(5), they are to be given the same protection from publication. It is, therefore, necessary to consider the precise words of s. 645(5) to determine what category of motions that section applies to. On its plain wording, it only applies to "any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn".

[12] I therefore ruled that all motions dealing with the admissibility of evidence were caught by s. 648(1), since at common law "a trial judge sitting with a jury could not make evidentiary rulings until after a jury had been selected and the accused had been placed in their charge": *R. v. Curtis* (1991), 66 C.C.C. (3d) 156 (Ont. Gen. Div.), at p. 157 per Ewaschuk J..

[13] However, I recognized, as did LeSage A.C.J. in *Bernardo*, that there are certain other motions and applications that would not ordinarily or necessarily be dealt with in the absence of the jury after it had been sworn. Since motions of that kind did not fit within the words of s. 645(5), I concluded that s. 648(1) did not apply, and a request for a non-publication order would have to meet the test in *Canadian Broadcasting Corporation v. Dagenais*, [1994] 3 S.C.R. 878 and *R. v. Mentuck*, [2001] 3 S.C.R. 442 (collectively "*Dagenais*").

[14] In *Ahmad*, Dawson J. considered this approach, and offered the following analysis, at paras. 11 to 13:

> Before learning of Heeney J.'s decision I was inclined to take the same approach. However, after hearing submissions from all counsel I have decided not to adopt it or the other submissions made by Ms. Fischer. In my view, in the absence of a challenge to the constitutional validity of s. 648 I have no jurisdiction to restrict its application.
>
> I agree with the submissions made by counsel for some of the accused that Parliament deliberately used broad language for the purpose of ensuring a fair trial. I also agree with counsel's submissions that prejudice to fair trial interests can flow from procedural motions, as well as from evidential motions. By prohibiting the publication of "any information regarding any portion of the trial at which the jury is not present," Parliament ensured that prejudice from any pretrial proceeding before the trial judge would be caught. I also note that such motions will generally take place shortly before the jury is selected when the risk of prejudice is heightened.
>
> *Although some of the motions I am dealing with could have been brought before another judge of this court, counsel brought them before me on the basis that they are best dealt with in the context of the evidence in this case by the judge who will preside once the jury has been empanelled. Once such a determination was made s. 648 applied pursuant to s. 645(5).* As there is no ambiguity in the legislation itself which would allow me to cast an interpretation upon s. 648 that would minimize its potential impairment of the interests protected by s. 2(b) of the *Charter*, this court has no role altering the breadth of

> the section as enacted by Parliament in the absence of a constitutional challenge to the section. [*emphasis added*]

[15] At para. 18, he concluded as follows:

> As matters now stand, I conclude s. 648 of the *Criminal Code* applies to all pretrial motions and applications that have proceeded before me since the direct indictment was preferred on September 24, 2007.

[16] Since there was no Charter challenge before him, Dawson J. declined to determine whether s. 648(1) should be "read down" to permit the publication of some information relating to pretrial motions, as had been done in *Regan*, *Brown*, and *Malik*. I agree. There is no Charter challenge before me either, and in my view the plain words of s. 648(1) prohibiting the publication of "any information" must be given their ordinary meaning. In stating that he was not inclined to take the approach I took in *C.B.C.*, Dawson J. may have interpreted my decision to have opened the door to publishing information about a motion to which s. 648(1) applied. That is not my view. If s. 648(1) applies, that is the end of it, subject only to a Charter challenge. My decision stood for the proposition that there are certain motions which are not caught by the language of s. 645(5), and therefore do not fall within the statutory ban provided for in s. 648(1). With respect to that narrow class of motions only, the issue of whether to publish or not would have to be decided through the application of the *Dagenais* test.

[17] The key question, then, is whether s. 648(1) applies to the motion in question.

[18] It appears that, in the opinion of Dawson J., the key consideration that engages s. 645(5) (and therefore s. 648(1)) is that counsel chose to bring the motion before him, as the trial judge. This is reflected in the emphasized passage quoted at para. 14 above. To the extent that this represents an expansive interpretation of the category of motions that would "ordinarily" be brought before the trial judge, after empanelment of the jury but in its absence, I am inclined to agree. Section 645(5) is not restricted to motions which were *required*, prior to the passage of that section, to be brought during the trial before the trial judge in the absence of the jury, such as motions dealing with the admissibility of evidence. It could also include procedural motions that could be brought have been brought prior to the selection of the jury, and before a judge other than the trial judge, but which counsel choose to bring before the trial judge so as to have the benefit of the continuity and knowledge of the case that the trial judge offers. Prior to the passage of s. 645(5), counsel may have "ordinarily" chosen to bring such motions before the trial judge during the trial, in order to obtain that continuity, even though these motions could have been brought earlier before someone else. Such motions fall with s. 645(5), and the statutory ban in s. 648(1) therefore applies.

[19] What was not addressed in *Ahmad*, though, was how to deal with a motion that simply *could not* have been brought before the trial judge, after the jurors had been sworn and in their absence. One obvious example of this is a motion for a challenge for cause. By definition, it must be dealt with before the jury is sworn, because it determines the methodology by which the jury will be selected. Another example is a motion for a

change of venue, which the defence intends to bring in the case at bar, but which has yet to be formally filed. Pursuant to s. 599(1), such a motion may be brought before any judge who sits in the court before which an accused is to be tried, "at any time before or after the indictment is found". Clearly, therefore, this is not a motion which is "necessarily" dealt with by the trial judge in the absence of the jury after it is sworn. Nor can it be said to be one that is "ordinarily" dealt with after the jury is sworn. The venue of a trial has to be established before a trial is even scheduled, let alone a jury selected. It is impossible to imagine an accused moving for a change of venue after having participated in the selection of the jury that will try him.

[20] Prior to the enactment of s. 645(5), such a motion would not have been covered by the publication ban in s. 648(1) because such motions did not and could not take place during the trial, after the jury had been empanelled and given permission to separate. If counsel wanted to ban publication of a motion for a change of venue, they would have had to rely on the court's common law jurisdiction to do so. The situation can be no different after the enactment of s. 645(5). As that section has been interpreted by the caselaw, s. 648(1) applies to "in-trial" motions that are now brought prior to the trial. There is, however, no basis in logic for extending s. 648(1) to cover motions that were never "in-trial" motions in the first place.

[21] Counsel for the Crown and the defence interpret *Ahmad* as standing for the proposition that s. 648(1) automatically bans publication of any information respecting all pretrial motions and applications of any kind, including motions that could never have been brought during the trial in the absence of the jury. I do not interpret the decision that broadly. While Dawson J. did rule that s. 648(1) applied to all pretrial motions and applications that had proceeded before him since Sept. 24, 2007, we do not know what those motions and applications were. It may well be that they did not include any motions in the narrow category discussed above, such as a change of venue, that could not have been brought during the trial in the absence of the jury. That may explain why the point I have been discussing was never addressed in *Ahmad*.

[22] The other decision which requires a re-examination of my decision in *C.B.C.* is *Valentine* (*supra*). That case involved the Boxing Day shooting of Jane Creba, and was one that also attracted a great deal of media attention. For that reason, a similar motion came before the trial judge. Pardu J. relied on the line of cases cited at para. 7 above in concluding that s. 648(1) applied to pretrial motions brought prior to empanelment of the jury pursuant to s. 645(5). She said the following, at paras. 5 and 6:

> Defence counsel submit that s. 648(1) should be "read up" so as to apply to motions heard before selection of a jury, and read literally so as to ban publication of all such motions, whether or not publication would pose a risk to the fair trial interests of an accused. They argue that is difficult to assess whether any particular motion will contain material prejudicial to the interests of an accused, even for motions which do not deal with the admissibility of evidence to be adduced at trial. The possibility of prejudice is sufficient to support a blanket ban. Defence counsel do not have the financial or temporal resources to repeatedly deal with applications for discretionary publication bans. Most of the pretrial motions in this case deal with the admissibility of evidence at

> trial. Jurors should not hear evidence that may not be admitted at trial. These motions are usually heard just before jury selection. This is a substantial benefit to jurors who do not then have to be kept on standby while motions are argued, and reduces the risk of mistrials caused by the loss of jurors. The protection offered to an accused should not depend on the happenstance of whether a motion is heard before or after jury selection.
>
> There is substantial authority supporting the extension of s. 648(1) to apply to motions heard in a jury trial before a jury is selected [*footnote omitted*], and I agree with the reasoning in those cases. This promotes the orderly disposition of matters which must be heard in the absence of the jury.

[23] However, unlike both *Ahmad* and the case at bar, a Charter challenge was mounted in *Valentine*. Pardu J. appears to have proceeded on the assumption that s. 648(1) provided for a "blanket ban" on all pretrial motions and applications. I draw this conclusion from her comments above, and at para. 7:

> The media intervenors argue that the blanket ban envisaged by defence counsel is unconstitutional. They have served a notice of constitutional challenge.

[24] As in *Ahmad*, the narrow question I have been discussing here was not addressed. The focus of the reasons of Pardu J. was to consider the constitutionality of s. 648(1). She held that a blanket publication ban violates s. 2(b) of the Charter, because it infringes on freedom of the press. She then considered whether it could be justified under s. 1, according to the test in *R. v. Oakes*, [1986] 1 S.C.R. 103.

[25] She relied upon the decision of the Ontario Court of Appeal in *Toronto Star v. Canada* (2009), 94 O.R. (3d) 82 (C.A.), which considered the constitutionality of the mandatory publication ban provided for in s. 517 of all evidence taken, information produced, representations made and reasons given at a bail hearing. The majority decision of Feldman J.A. (Laskin and Simmons JJ.A. concurring) held that the mandatory publication ban could be justified in cases that were to be heard by a jury, but with respect to cases that could not be heard by a jury it failed both the rational connection and minimal impairment tests in *Oakes*. In dissent, Rosenberg J.A. (Juriansz J.A. concurring) was of the view that s. 517 met the rational connection and minimal impairment aspects of the proportionality test, but that it had not been demonstrated that the salutary effects of the law outweighed its deleterious effects.

[26] After considering *Toronto Star*, Pardu J. concluded, at para. 12 of *Valentine*, that "a blanket ban fails the proportionality test in so far as it mandates a prohibition of information which poses no substantial risk to the rights of an accused to a fair trial." She ruled, at para. 15, that the section should be read down to comply with the Charter:

> Accordingly I conclude that the blanket publication ban expressed in s. 648(1) is not justified and read in the following, in order to render it compatible with both Charter rights to freedom of expression and the right of an accused to a fair trial:
>
> > Except that, in the case of a motion heard before selection of the jury, a judge before whom an accused is or is to be tried may grant leave for the publication

> of information relating to a motion other than a motion about the admissibility of evidence where satisfied that publication would not impair the right of an accused to a fair trial.

[27] As to the mechanism for applying s. 648(1), she said the following, at para. 14:

> While there may be matters of intense public interest, which may be published without impairing an accused's right to a fair trial, I am conscious of the need to avoid overburdening criminal jury trials with more pretrial motions. Most motions in this context will deal with the admissibility of evidence, and there is no dispute that these matters should not be published just before or during jury selection. Many pretrial motions which do not deal with admissibility of evidence may nonetheless contain information obviously prejudicial to the fair trial interests of an accused, and responsible media will avoid publication of information related to those matters. It would be inappropriate to require counsel to apply for pre-emptive *Dagenais* orders banning publication of pretrial motions in every case. In those few cases where media identify a matter of public interest, and it is not obviously prejudicial to the fair trial interests of an accused, it is not overly burdensome to require the media to seek leave to publish information related to that pretrial motion. This will avoid the real possibility of mistake as to what may be published, respect the principle of openness of the courts and avoid undue encumbrance of most trials.

[28] In other words, a blanket prohibition was put in place with respect to all pretrial motions and applications, but it was open to the media to seek leave to publish with respect to any particular motion.

[29] Mr. Carnegie, for the Crown, submits that it is not open to me to follow *Valentine*, because the decision of Pardu J. is a decision of the same court, and is not binding upon me. Since there is no Charter challenge in the case before me, he submits that I cannot conclude that s. 648(1) must be read down.

[30] While it is accurate to say that this decision is not binding upon me, as a decision of the Ontario Court of Appeal or the Supreme Court of Canada would be, there is more to the doctrine of *stare decisis* than that. In *Holmes v. Jarrett*, [1993] O.J. No. 679 (Gen. Div.), Granger J. provides a helpful review of the authorities, and concludes that a decision of a judge of concurrent jurisdiction should be followed unless there are strong reasons not to do so, such as:

1. subsequent decisions have affected the validity of the judgment;

2. it is demonstrated that some binding authority in case law or some relevant statute was not considered; or

3. the judgment was an unconsidered, *nisi prius* judgment, delivered where the exigencies of trial required an immediate decision without the opportunity to fully consult authority.

[31] In this case, I am disinclined to follow *Valentine* not because I disagree with it, but because in arriving at her decision, Pardu J. relied upon the decision of the Ontario Court of Appeal in *Toronto Star*, which has since been overruled by the Supreme Court of Canada: [2010] S.C.J. No. 21. In allowing the cross-appeal in *Toronto Star*, Deschamps J., writing for McLachlin C.J. and Binnie, LeBel, Fish, Charron, Rothstein and Cromwell JJ., held that s. 517 was a justifiable infringement under s. 1 of the Charter. Mr. Justice Deschamps specifically disagreed with the majority opinion of Ontario Court of Appeal that the rational connection and minimal impairment tests in *Oakes* had not been met, and also disagreed with the dissenting opinion of Rosenberg J.A. that the salutary effects of the ban did not outweigh its deleterious effects.

[32] Since this subsequent decision may well have affected the validity of Pardu J.'s decision, I am not prepared to read down s. 648(1), absent a Charter challenge where the full impact of the Supreme Court's decision in *Toronto Star* could be argued and explored.

[33] Having said that, there is much in the mechanics of her ultimate approach that I find very appealing. As Pardu J. recognized, in a major case such as this, having to litigate a publication ban motion with every pretrial motion and application requires an enormous expenditure of time and financial resources. Deschamps J. in *Toronto Star* identified the resources issue as comprising an aspect of trial fairness. At para. 22, he quoted with approval the following passage from the dissenting reasons of Rosenberg J.A.:

> The interest in a fair trial embraces not simply the narrow interest of preventing potential jurors from being influenced by prejudicial material that might be disclosed at a bail hearing, but other interests intended to safeguard the accused's and society's interest in a fair trial. Those interests include preventing diversion of the accused's scarce resources to fight opposition to a publication ban and preventing delay of the bail hearing. As regards the latter, keeping accused in custody interferes with their ability to defend the case. The objectives of ensuring expeditious bail hearings, avoiding unnecessary detention of accused and allowing accused to retain scarce resources to defend their cases are all inextricably linked to the objective of ensuring a fair trial. [para. 38]

[34] Deschamps J. returned to this issue again at para. 35:

> To determine whether the limit impairs a right as little as possible, it must be assessed in light of the other measures adopted to meet Parliament's objectives. I touched on this issue above in the discussion on the rational connection. I would stress here that the fairness of the decision whether to grant bail, which is one of the components of the constitutional protection, will depend to a large extent on its timeliness. As pointed out by Rosenberg J.A. in the Ontario case (para. 38) and Slatter J.A. in the Alberta case (para. 36), if the justice were to hold a publication ban hearing, the accused would have to prepare for that hearing in addition to preparing a rebuttal to the grounds the prosecution might raise to justify detaining him or her. The hurdles the accused would face in such a hearing are real.

[35] Requiring the accused to prepare for and argue a publication ban hearing every time a pretrial motion or application is argued would clearly result in the diversion of scarce

resources that are needed to provide for his defence. Having a blanket prohibition in place, but permitting the media to seek leave to publish on particular motions that are of public interest and will not obviously compromise the ability of the accused to obtain a fair trial, would serve to limit the number of publication ban hearings to a manageable number.

[36] However, given that I do not agree that s. 648(1), as modified by s. 645(5), mandates a blanket publication ban on all motions and applications of any kind, is it appropriate to impose one, and only conduct publication ban hearings where the media specifically request them?

[37] To begin with, the vast majority of pretrial motions deal with evidentiary issues. As I previously ruled in *C.B.C.*, I am of the view that s. 648(1) clearly applies to such motions. The Supreme Court of Canada confirmed in *Toronto Star*, at para. 18, that the *Dagenais* test does not apply to statutory publication bans. Absent a Charter challenge, the plain words of s. 648(1) apply, and no hearing is necessary.

[38] A blanket ban is, therefore, a useful starting point because s. 648(1) applies to most pretrial motions typically brought in a criminal case.

[39] As to other motions, such as procedural motions, while they may not relate to the admissibility of evidence there is inevitably some factual basis for the motion that is rooted in the evidence. Even purely procedural motions are rarely considered in a factual vacuum. The relevant facts of the case are frequently found in the affidavits filed in support of the motion, which often contain references to evidence heard at the preliminary inquiry.

[40] Here, one must look beyond s. 648(1) to the other analogous provisions of the Code. There are three stages to a criminal proceeding that involve the taking of evidence, prior to the point where the jury retires to consider its verdict: the bail hearing; the preliminary inquiry; and the trial (including pretrial motions). Section 517 imposes a mandatory blanket publication ban, at the request of the accused, on all evidence and other information emanating from the bail hearing, until the trial is ended. That section has now been held to be constitutional. Section 539 imposes a mandatory publication ban, at the request of the accused, on the publication of the evidence taken at the preliminary inquiry. As noted at para. 231 of the majority reasons of the Ontario Court of Appeal in *Toronto Star*, the constitutionality of that provision remains unchallenged.

[41] When combined with the publication ban provided for under s. 648(1), the net effect of all of these provisions is this: the public, via the media, will hear the evidence at the same time as the jury hears it in open court, and not before.

[42] Even if a motion in the narrow class discussed above, such as a motion for a change of venue, is not caught by s. 648(1), publication of the argument and the information contained in the supporting material for that motion is likely to contain references to some evidence. Accordingly, a blanket publication ban is appropriate until a hearing is

held to determine what can and cannot be published. This will involve both a consideration as to what statutory bans are applicable, as well as a consideration of the *Dagenais* test where a statutory ban is found not to apply.

[43] I therefore conclude that an order modelled on the approach taken Pardu J., of a blanket publication ban with the option to apply for leave to publish, provides the appropriate mechanism both to ensure compliance with applicable statutory bans, as well as to act as a temporary stay on publication until such time as a publication ban hearing can be held and the merits of a common law ban determined.

[44] An order will go in the following terms:

1. This court orders and declares that s. 648(1) of the Criminal Code applies to all motions and applications heard and determined in this proceeding before trial pursuant to s. 645(5) of the Criminal Code, where the subject-matter of the motion or application is or relates to evidence to be heard at trial. Pursuant to s. 648(1), no information concerning any part of such motion or application shall be published in any newspaper or broadcast by any means, including posting or distribution over the internet;

2. This court orders that no information concerning any part of any other pretrial motion or application shall be published in any newspaper or broadcast by any means, including posting or distribution over the internet, without prejudice to the right of the Media Coalition to seek leave to publish all or part of the information relating to such motion or application;

3. A scheduling session shall be held at a time to be fixed by the Court, for the purpose of scheduling all pretrial motions and applications. The Crown and defence shall provide counsel for the Media Coalition with timely notice of that scheduling session, as well as particulars of any pretrial motions and applications that they intend to bring. Counsel for the Media Coalition shall be entitled to attend and make representations, with a view to screening out all motions and applications which are clearly caught by s. 648(1), and identifying those other matters where the Media Coalition intends to seek leave to publish;

4. As to the those motions and applications where the Media Coalition intends to seek leave, the Crown and defence shall serve counsel for the Media Coalition with electronic copies of the materials as and when they are filed with the Court, subject to the undertaking of counsel for the Media Coalition not to publish, copy or otherwise disseminate such documents unless and until permission to do so is granted by the Court;

5. The issue as to whether leave to publish should be granted shall be argued after the motion or application itself is heard. Such argument may occur immediately following argument on the motion or application, or grouped with other similar requests for leave and argued together at a subsequent date, as is determined by

the Court. Counsel for the Media Coalition may make their submissions in writing, without the necessity of appearing in person;

6. This court orders that, where publication is banned pursuant to this order, publication is also banned by any means, including the internet, of information that would tend to identify websites or other sources from which prohibited information about the pretrial proceedings can be accessed;

7. This court orders that this order, and any subsequent order that is made on any application for leave, expire once the jury retires to consider its verdict, unless otherwise provided in the order.

[45] The only remaining matter is to determine what happens with respect to publication of information relating to the present application, as well as to the Fisher application which has been filed and the change of venue motion which has not. None of them are, in my view, caught by s. 648(1), and thus publication could only be banned if the *Dagenais* test is satisfied. The statutory ban on publishing evidence taken at the preliminary inquiry is not relevant here, because there has been a direct indictment under s. 577, without having had a preliminary inquiry.

[46] The present application is now complete. From Mr. MacKinnon's submissions at the hearing of the motion, I understand that his clients wish to publish information relating to this motion, so I will presume that they are seeking leave. My preliminary view is that there is nothing that was said at the hearing or contained in the materials that offends a statutory ban or meets the *Dagenais* test for non-publication, but if counsel for the Crown or defence object to the publication of any particular information, they may serve on Mr. MacKinnon and file with the Court brief written argument in that regard within 30 days. Counsel for the Media Coalition will have 20 days thereafter to file his responding submissions.

[47] As to the Fisher application, that has been adjourned sine die and may well become moot. If it is going to be pursued, Mr. Derstein will advise Mr. MacKinnon. If the Media Coalition intends to seek leave to publish, Mr. MacKinnon will so advise counsel, following which he shall be served electronically with materials on the terms set out in para. 4 of my order. Similarly, with respect to the motion for a change of venue, counsel for the Media Coalition should advise the Crown and defence counsel if leave is being sought to publish. If so, they shall be electronically served once materials are prepared and filed, on the same terms. The publication issue will be dealt with at the conclusion of argument on each motion. Counsel for the Media Coalition may make their submissions in writing, without the need for a personal appearance.

Mr. Justice T. Heeney

Released: December 16, 2010

CITATION: R. v. Rafferty, 2010 ONSC 6980
COURT FILE NO.: 21/10

ONTARIO

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

– and –

MICHAEL THOMAS CHRISTOPHER STEPHEN RAFFERTY

RULING ON AN APPLICATION FOR A NON-PUBLICATION ORDER

Heeney J.

Released: December 16, 2010