Court of Queen's Bench of Alberta

Citation: R. v. White, 2007 ABQB 359

Date: 20070531
Docket: 0508 30629Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Respondent (Crown)

- and -

Michael James White

Respondent (Accused)

- and -

Canadian Broadcasting Corporation, Edmonton Journal, a division of CanWest MediaWorks Publications Inc., Bell Globemedia Publishing Inc., carrying on business as the Globe and Mail and CTV Television Inc.

Applicants

- and -

The Edmonton Sun, a division of Sun Media Corporation

Applicant

Reasons for Judgment
of the
Honourable Mr. Justice C.S. Brooker

INTRODUCTION

[1] These are applications challenging the constitutionality of the provision for a mandatory publication ban upon the accused's request, under s.517 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] Michael James White ("the Accused") was charged with the second degree murder of his wife. He applied to the trial court for a publication ban in relation to his bail hearing. He was granted the ban under s. 517.

[3] In these Applications, the Canadian Broadcasting Corporation, Edmonton Journal, Bell Globemedia Publishing Inc., CTV Television Inc. and the Edmonton Sun (collectively "the Applicants") argue that s. 517 of the *Criminal Code* violates s. 2(b) of the *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. Specifically, they argue that s. 517 unjustifiably infringes their freedom of speech. They seek a declaration of unconstitutionality of s. 517, and an order or declaration allowing them to publish material that is subject to the publication ban in this case.

FACTS

[4] The Accused sought and obtained the publication ban on October 7, 2005 pursuant to s. 517. That section provides in part:

> (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 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the information given or the representations made and the reasons, if any, given or to be given by the justice shall not be published in any document, or broadcast or transmitted in any way ...

Since the Accused was the party seeking it, the publication ban was mandatory.

[5] S. 517 as reproduced above is an amended version of the section. It was amended in January of 2006, after the publication ban was ordered, by S.C. 2006, c. 32, s. 17. The amendment replaces the word "newspaper" with the word "document". The media Applicants are aware of the amendment and it does not affect these Reasons.

[6] In accordance with the usual practice of our trial courts where mandatory publication bans are legislated, the media were not given notice of the Accused's application for a publication ban.

[7] On November 18, 2005, the Court of Appeal granted the Crown's request to review my bail order, pursuant to s. 680 of the *Criminal Code*. The Accused applied for a publication ban in connection with those proceedings. A mandatory publication ban was unavailable at the Court of Appeal since s. 517 relates exclusively to bail orders given by pre-trial or trial judges. However, a

discretionary common law temporary publication ban was ordered prohibiting the publication of evidence, written argument and oral submissions presented at the Court of Appeal in connection with the s. 680 application. The temporary ban was issued in order to give the media notice of the application. (*R. v. White*, (2005), 57 Alta L. R. (4th) 54, 2005 ABCA 403.)

[8] On December 9, 2005, Berger J. A. ordered a publication ban on the evidence, representations and information given in the bail proceedings before the Court of Appeal. In his written reasons, Berger J.A. characterized this as a common law publication ban. He acknowledged the test set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 but declined to apply it in the face of s. 517, absent a constitutional challenge to that section. (*R. v. White*, (2005), 56 Alta. L. R. (4th) 255, 2005 ABCA 435.)

[9] On February 22, 2006, a panel of three judges of the Court of Appeal allowed the Crown's appeal and revoked the Accused's bail. The Accused applied for a publication ban relating to the proceedings in front of that panel. That Court applied the common law test from *Dagenais* and denied a publication ban on the proceedings before it. The Court observed that requiring an accused to bear the burden of justifying a publication ban on proceedings at the appellate level, but not at the trial court level, is an unfortunate and unfair legislative omission that "presents a tremendous additional burden on an accused who is already overwhelmed." (*R. v. White*, (2006), 380 A.R. 188, 2006 ABCA 65 at para. 34). Nevertheless, the Court of Appeal noted at para. 37 that "we are required to take the law as we find it." Since neither the Crown nor the Accused made any effort to justify a publication ban, the application failed.

[10] On May 9, 2006 and July 5, 2006, the Applicants filed Notices of Motion challenging the constitutionality of s. 517 of the *Criminal Code*.

PRELIMINARY OBJECTIONS

Mootness

[11] In its written argument, the Crown conceded that if the Accused does not rescind his original application for a publication ban, the constitutional challenge is technically not moot. However, they argued that in the context of this case, since much of the information has already been published as a result of the proceedings in the Court of Appeal, this Court should decline to hear constitutional arguments on the basis that the challenge is practically moot.

[12] In oral argument, the Crown resiled from that position and acknowledged that the within Applications are not moot since the trial had not yet commenced. The Accused and the Applicants agreed that mootness was not in issue. As a result, I need not address the Crown's written argument in that regard.

Functus Officio

[13] In its brief, the Crown argues that this Court does not have jurisdiction to hear these Applications on the basis that it is *functus officio*.

[14] The Accused and the Applicants submit that this Court is not *functus* since it has not heard these Applications before. Specifically, the Canadian Broadcasting Corporation, Edmonton Journal and Globe and Mail take the position that, as this Court has not previously heard a s. 517 constitutional challenge in these proceedings, it is not *functus*. These parties stress that this challenge is not an attack on the publication ban, but an attack on the constitutionality of s. 517. Alternatively, the Edmonton Sun has focussed on this Court's authority to hear argument from an affected party who was not given notice of the bail hearing.

[15] The Crown concedes that the Applicants can bring the challenge in this Court if they are really attacking s. 517 of the *Criminal Code*, and not the Order itself. However, it argues that the Applicants are in fact attacking the publication ban and, accordingly, the issues they raise must be heard as appeals. It points out that there are no provisions allowing third parties to challenge interlocutory orders to Courts of Appeal in the *Criminal Code*. Thus, they submit that any such appeals are required to be brought before the Supreme Court of Canada.

[16] Both the Crown and the Applicants rely on *Dagenais* to support their respective positions. The Canadian Broadcasting Corporation, Edmonton Journal and Globe and Mail refer to p. 874 of *Dagenais*, where Lamer C. J. states:

> Challenges to publication bans may be framed in several different ways, depending on the nature of the objection to the ban. If legislation requires a judge to order a publication ban, then any objection to that ban should be framed as a *Charter* challenge to the legislation itself.

These Applicants argue that this is exactly what they are doing.

[17] The Crown contends that p. 874 can not be read in isolation, and that *Dagenais* stands for the proposition that any third party constitutional challenges to publication bans are appeals that must be made directly to the Supreme Court of Canada.

[18] I agree that p. 874, which comments on mandatory publication bans, can not be read in isolation. It must be read in conjunction with 875:

> Challenges to publication bans may be framed in several different ways, depending on the nature of the objection to the ban. If legislation requires a judge to order a publication ban, then any objection to that ban should be framed as a *Charter challenge to the legislation itself.* Similarly, if a common law rule requires a judge to order a publication ban or authorizes a judge to order a publication ban that infringes *Charter* rights in a manner not reasonable and demonstrably justified in a free and democratic society, then any objection to that

> ban should be framed as a *Charter* challenge to the common law rule.
>
> In the case at bar, we are dealing with a common law rule which provides judges with the discretion to order a publication ban in certain circumstances. Discretion cannot be open-ended. It cannot be exercised arbitrarily.... Discretion must be exercised within the boundaries set by the principles of the *Charter*; exceeding these boundaries results in a reversible error of law. In this case, then, we are dealing with an *error of law challenge* to a publication ban imposed under a common law discretionary rule. [Emphasis added.]

[19] Lamer C.J. characterizes discretions exercised outside the boundaries of *Charter* principles as "reversible errors of law." Challenges in those cases are to be framed as "error of law challenge[s] to a publication ban." On the other hand, challenges involving mandatory publication bans are to be framed as "*Charter* challenge[s] to the legislation itself." The latter situation challenging the *legislation* or rule itself is very different from the error of law challenge to the *order* made under a rule, which is the language of appeals and must be made to the Supreme Court absent legislative intervention. The Charter challenge to the legislation itself can and should be brought in this Court.

[20] I do not believe the Supreme Court intended at p. 874 to require that constitutional challenges to mandatory legislation be heard at the Supreme Court of Canada at the first instance. Moreover, Lamer C. J. states more than once in his reasons that he is confining his discussion to "publication bans issued under common law or legislated discretionary authority [and not to] publication bans required by common law or statute." (At 856. See also 868.)

[21] The normal procedure for bringing a challenge to legislation which, during the course of a proceeding, has resulted in the infringement of constitutionally protected rights or freedoms, is to bring the challenge in the court hearing the matter. As Professor Peter Hogg in *Constitutional Law of Canada*, looseleaf edition (Toronto: Carswell, 1997) explains, at 37-22:

> Whenever the [constitutional] validity of a statute (or other official act) is relevant to the outcome of a dispute, the court that is seized of the dispute has the power and the duty to determine whether or not the statute (or other act) is valid.

[22] The publication ban is relevant to the outcome of the dispute, since one of the reasons for its imposition is to prevent contamination of the jury pool. Therefore, this Court, being the court seized of the criminal matter, has a duty to consider the constitutionality of s. 517 of the *Criminal Code*.

[23] Although the challenging party is not a party to the proceedings, the publication ban significantly affects the media. The courts of this country have repeatedly recognized the significance of publication bans to the media. For example, in *R. v. Toronto Star Newspapers Ltd.* (2003), 67 O.R. (3d) 577 at para. 14, the Ontario Court of Appeal acknowledged that the

media has "an important role to play in applications brought to prohibit public access to court records or to prohibit publication of court proceedings."

[24] For the reasons given above, I find that the Applicants have brought the constitutional challenge of s. 517 in the proper forum, and that this Court is not *functus officio*. I need not, as a result, consider issues of notice or material change which would arise in an application to vary or revoke an order.

[25] Finally, I have not been persuaded by the Respondents to use any discretion I may have to deprive the Applicants of arguing the Applications. For example, they have not breached the Order and then attempted to argue constitutional infringement to justify the breach, thereby invoking the doctrine of collateral attack.

CHARTER ISSUES

Section 517

[26] S. 517 (formerly s. 457.2) of the *Criminal Code* was enacted in 1972 as part of a larger bail reform initiative. One motivation behind the 1972 *Bail Reform Act* (R.S.C. 1970, c. 2 (2nd Supp)) was to ensure that financial ability to obtain bail would not be a factor in determining who was kept in custody. Another was to bring some certainty to the law.

[27] Prior to 1972, it was not clear who bore the burden of demonstrating that an arrested or detained person should be retained in custody or released. The 1972 *Bail Reform Act* placed the burden upon the Crown. Section 457.2(1) read:

> Where the prosecutor intends to show cause under subsection 457(1) [now s. 515], he shall so state to the justice and the justice may, 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 newspaper or broadcast 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 committed for trial, the trial is ended.

[28] Bail procedure was revisited in 1976 in the context of the *Criminal Law Amendment Act* (S.C. 1974-6, c. 93, s.48). There was a concern at that time that certain accused people were abusing the measures enacted in 1972 and re-offending on their release. The legislature shifted the burden to show cause from the Crown to the accused in certain situations. S. 457.2(1) was amended to read:

> Where 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 upon 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.

These amendments were not debated in Parliament.

[29] In Re *Global Communications and Attorney-General for Canada* (1984), 10 C.C.C. (3d) 97 (Ont. C.A.), the Ontario Court of Appeal considered the issue of whether s. 517 violates s. 2(b) of the *Charter*. The Court held that although there was an infringement of s. 2(b), it was reasonably justified under s. 1 of the *Charter*. *Global Communications* was decided before courts in Canada had the benefit of *Charter* jurisprudence such as *R. v. Oakes*, [1986] 1 S.C.R. 103, where the s. 1 analysis was clarified by the Supreme Court and *Dagenais* where, among other things, the Supreme Court emphasized at para. 72 that in contrast to pre-*Charter* jurisprudence which "emphasized the right to a fair trial over the free expression interests of those affected by the ban", there is no hierarchy of *Charter* rights. Therefore, I think it is timely to revisit the issue. I note that the Ontario Superior Court of Justice in *Toronto Star Newspapers Ltd. v. Ontario*, [2007] O.J. No. 752 recently declined to revisit this issue. That Court felt bound by the Ontario Court of Appeal decision in *Global Communications*. In light of *Charter* jurisprudence post-dating *Global Communications*, and in light of the fact that I am not bound by the Ontario Court of Appeal, I do not feel so constrained.

[30] The Crown and the Accused have conceded that s. 517 of the *Criminal Code* infringes s. 2(b) of the *Charter*. I agree. Therefore, the onus is on the Crown to demonstrate that the infringement of the Applicant's *Charter* rights is reasonably justified in a free and democratic society. In order to save the provision, the Respondents have the burden of demonstrating that the objective of the impugned legislation is pressing and substantial; that the *Charter* infringement is rationally connected to the legislation's objective; that the impairment on the *Charter* right is minimal; and that the salutary effects of the legislation are proportionate to its deleterious effects: *Oakes.*

1 Is the objective of the legislation pressing and substantial?

[31] In *R. v. Bryan*, 2007 SCC 12 at para. 32, the Supreme Court noted that this stage of ths s. 1 analysis requires the Respondents to *assert* a pressing and substantial objective. No evidentiary basis is required for the s. 1 analysis to continue. The Crown has asserted a general objective, to protect the accused's right to a fair trial by an impartial jury. The Applicants concede this general objective is pressing and substantial. I agree. Although the Crown has asserted a number of additional objectives, this is enough to continue to the rational connection step of the s. 1 analysis.

2 Proportionality Analysis

What is the objective of the legislation?

[32] The remainder of the s. 1 analysis requires the true objective of the impugned legislation be examined. Therefore, the true objective of the legislation must be determined before proceeding to the proportionality analysis.

[33] The Applicants argue that the objective of s. 517 is to protect the accused's s. 11(d) *Charter* right to a fair trial by preventing jury contamination. The Accused agrees that this is the objective of s. 517.

[34] The Crown argues that although the general objective of the publication ban in s. 517 is to protect the accused's right to a fair trial by an impartial jury, the mandatory nature of the ban aims more specifically to address three additional objectives: (1) facilitating the accused's right to expedient bail proceedings; (2) alleviating the accused from the burden of litigation; and (3) allowing the accused to waive his right to a public forum, which the Crown argues is a right of the accused pursuant to s. 11(d) of the *Charter*.

[35] In my view, the objective of the mandatory publication ban in s. 517 is to protect the accused's right to a fair trial in front of an impartial jury by seeking to avoid contamination of the jury pool. The Court of Appeal in its February 22, 2006 reasons for revoking bail in this case similarly explained at para. 29 that ss. 517, 539 and 542(2) are "provisions ... aimed at preserving the presumption of innocence and the right to a fair trial by ensuring that prospective jurors have no preconceived notions about guilt prior to trial." Similarly, both the trial and the appellate court in *Global Communications* addressed this same objective in their reasons.

[36] The first two of the three additional "objectives" suggested by the Crown are considerations that flow from the decision to draft legislation. They arise because of how the legislation is drafted, but do not form the actual objective of s. 517. The Accused does not need to apply for a publication ban in order to protect his right to expedient bail. The ban is accordingly not aimed at protecting this right. Rather, the ban is aimed at protecting the accused's right to a fair trial in front of an impartial jury.

[37] This distinction between the objective of an impugned provision and the manner in which

it is addressed by Parliament is an important one. As the Supreme Court explained at para. 130 in *Thomson Newspapers v. Canada*, [1998] 1 S.C.R. 877, the harm sought to be addressed is one consideration. The way in which the harm is actually addressed is another. In *Thomson Newspapers*, a temporary blackout on election poll results was implemented by Parliament and later found to be unconstitutional. The Court held the legislation was defective "not with regard to its purpose, but with regard to the fact that the means chosen to carry out that purpose did not satisfy the minimal impairment and proportionality tests."

[38] I do not agree that the third specific objective put forward by the Crown is a valid objective. I will address the reasons for that later in this decision, under the minimal impairment analysis.

[39] In summary, I find the true purpose of s. 517 of the *Criminal Code* is to protect the accused's right to a fair trial in front of an impartial jury by seeking to avoid contamination of the jury pool. The way in which the purpose is met, by imposing a mandatory publication ban at the request of the accused, is the means by which that purpose is addressed.

What sort of evidence must the Crown present?

[40] As explained by the Supreme Court of Canada in several freedom of expression cases including *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, *Thomson Newspapers*, *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, 2004 SCC 33 and *Bryan*, the type of evidence required in order to meet the burden under s. 1 depends upon the context of the case. Similarly, the deference the court will give to Parliament's legislative choice will depend upon the context of the case. Bastarache J. in *Bryan* reconciles the concepts of deference and the nature and sufficiency of evidence required at para. 28:

> What is referred to in *Harper* and *Thomson Newspapers* as a "deferential approach" is best seen as an approach which accepts that traditional forms of evidence (or ideas about their sufficiency) may be unavailable in a given case and that to require such evidence in those circumstances would be inappropriate.

[41] Four contextual factors have been laid out by the Supreme Court to assist in the determination of the sufficiency of the evidence in the context of the deference to be afforded to Parliament in a particular case.

(a) The Nature of the Harm and the Inability to Measure It

[42] In a situation such as this one, evidence akin to scientific proof is not required. As McLachlin J. (as she was then) explains at para. 137 in *RJR-MacDonald*, "the balance of probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view." Bastarache J. at para. 116 in *Thomson Newspapers* further explains that "[w]hile courts should not use common sense

as a cover for unfounded or controversial assumptions, it may be appropriately employed in judicial reasoning where the possibility of harm is within the everyday knowledge and experience of Canadians, or where factual determination and value judgments overlap." Thus, logic assisted by some social science evidence may be sufficient proof if warranted by the context (*Harper, Bryan*).

[43] In this case, the effect of publishing the items listed in s. 517 on an accused's right to a fair trial in front of an impartial jury is difficult to measure scientifically. Similarly, the effect of banning publication of the items listed in s. 517 on an accused's right to a fair trial in front of an impartial jury is difficult to measure scientifically.

[44] The Applicants presented expert evidence in the form of an affidavit and the transcript of cross-examination of Dr. Jonathan Freedman. Dr. Freedman is a professor of psychology at the University of Toronto, and is currently the Vice-President of that University and the Principal of the University of Toronto, Scarborough. He has been studying the impact of pre-trial publicity on jurors since approximately 1994 and has specifically focussed on the impact of pre-trial publicity on jurors' abilities to reach impartial verdicts. He has performed a number of experiments to assess the effects of pre-trial publication of various types of information on trial fairness He has been qualified by courts in Ontario, Saskatchewan and Alberta on approximately five occasions to give expert evidence on the effects of pre-trial publicity on jurors in Canada. Neither Dr. Freedman's qualifications nor his evidence was challenged by the Respondents.

[45] The 1969 *Report of the Canadian Committee on Corrections, Toward Unity: Criminal Justice and Corrections* (the "Ouimet Report"), though not submitted by either of the Respondents, was discussed in *Global Communications* and *Toronto Star*. It recommends a mandatory ban at the request of the accused. However, there is no discussion as to how that recommendation was arrived at, apart from the brief statement, "[t]he Committee considers that legislation is also necessary to correct abuses and misconceptions which have crept into the Canadian bail system."

[46] In sum, this is a situation where the various relationships at issue can not be precisely quantified. However, some efforts in social science can and have been made in order to better understand the relationships at issue.

(b) Vulnerability of the Group

[47] The group intended to be protected by the mandatory publication ban in s. 517 is accused persons facing bail hearings. As stressed by counsel for the Accused in this case, this is a difficult time for accused persons who are about to be pitted against the power of the state. It is for this reason that *Charter* protections, from ss. 7 to 14, are guaranteed to persons involved with the criminal justice system.

[48] Here, the expression at issue is media reporting. There is no suggestion that it is intended

to harm accused persons or influence potential jury members It is not intended to manipulate nor oppress, rather it intends to inform the general public of court proceedings, to generate public discussion about the criminal justice system and to make bail decisions transparent.

(c) That Group's Subjective Fears and Apprehension of Harm

[49] Counsel for the Accused presented the common experience of accused persons facing bail hearings. There is a fear of unfair and inadmissible information being made public, resulting in an unfair trial process. There is a fear that bail hearings will be delayed and as a result, pre-trial detention will be lengthened where a publication ban is not automatic. There is a fear that the litigation burden on the accused will increase.

[50] At the same time, counsel conceded that publication bans can be negative for accused persons since society is not reminded of the presumption of innocence and the right to reasonable bail. In this case, counsel conceded that the publication ban was not essential to the Accused's fair trial, a discretionary ban would not have prolonged detention, and s. 517 did not prevent unfair evidence from being disseminated. Lamer C.J. in *Dagenais* similarly recognized at p. 882:

> [I]t is not the case that freedom of expression and the accused's rights to a fair trial are always in conflict. Sometimes publicity serves important interests in the fair trial process. For example, in the context of publication bans connected to criminal proceedings, these interests include the accused's interest in public scrutiny of the court process, and all of the participants in the court process.

(d) Nature of the Infringed Activity: Courtroom Reporting

[51] The Applicants argue that the right to freedom of the press belongs to the public as well as the media, and any curtailment should only occur in exceptional circumstances.

[52] Section 2(b) of the *Charter* reads as follows:

> Everyone has the following fundamental freedoms:
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media communication;

[53] In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, La Forest J., speaking for the Court, held that public access to the courts is fundamental to a democratic society. He held that s. 2(b) encompasses a right of the public to obtain information about court proceedings from the media, and a right of the media to gather such information. This right may be restricted where it is required the administration of justice.

[54] At para. 25-27 of *Re Vancouver Sun*, [2004] 2 S.C.R. 332, 2004 SCC 43, Iacabucci and Arbour JJ. explain (cites omitted):

> Public access to the courts guarantees the integrity of judicial processes by demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law". Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.
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> The open court principle is inextricably linked to the freedom of expression protected by s. 2(*b*) of the *Charter* and advances the core values therein. The freedom of the press to report on judicial proceedings is a core value. Equally, the right of the public to receive information is also protected by the constitutional guarantee of freedom of expression. The press plays a vital role in being the conduit through which the public receives that information regarding the operation of public institutions. Consequently, the open court principle, to put it mildly, is not to be lightly interfered with.
>
> Furthermore, the principle of openness of judicial proceedings extends to the pretrial stage of judicial proceedings because the policy considerations upon which openness is predicated are the same as in the trial stage.

[55] The media, albeit a private and often for-profit enterprise, is the public's eyes and ears to the formal justice system. The public depends upon the media for information about the court process. Cory J., in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 explains, "[t]he press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny."p.1339. He goes on in the following paragraph, "[d]iscussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media."p.1340.

[56] Freedom of the press to report on court proceedings, pre-trial or otherwise, is at the core of the s. 2(b) guarantee and should not be interfered with lightly.

Summary on Contextual Factors

[57] As explained in *Bryan* at para. 29:

> The contextual factors are essentially directed at determining to what extent the case before the court is a case where the evidence will rightly consist of "approximations and extrapolations" [from the available evidence] as opposed to more traditional forms of social and science proof, and therefore to what extent

arguments based on logic and reason will be accepted as part of the s. 1 case.

[58] In this case, the harm being targeted, ensuring the fair trial of accused persons in front of an impartial jury, is not easily measurable. Some social science evidence has been presented by the Applicants. Evidence of the vulnerability of the protected group and the subjective fears of that group may be important to consider. The type of expression at issue, which is not inherently or intentionally harmful, is closely connected with the open court principle and is at the core of the s. 2(b) guarantee.

[59] In my opinion, considering all of these contextual factors, the type of evidence that the Crown must present in order to meet its burden under s. 1 can be described as "some social science evidence, assisted by logic." This was the description used in *Harper* and *Bryan*. I would add, however, that the expression at issue in this case is closer to the core of the s. 2(b) guarantee than was the expression at issue in *Harper* and *Bryan*. In *Harper*, although the expression at issue was political in nature, it was subject to manipulation (*Harper* at par. 85). In *Bryan*, the court commented at para. 30 that "restricting access to [election results] before polls close carries less weight than after they close... [S]uch information... is at the periphery of the s. 2(b) guarantee." In addition, the subject matter of the expression at issue in *Harper* and *Bryan* was political. Parliament has considerable expertise in political matters. The subject matter of the expression at issue here has to do with criminal process, an area in which Parliament may enjoy less expertise.

[60] Accordingly, I find that the standard of evidence required in the case at bar is higher than the standard required in *Harper* and *Bryan*. This can be seen as a somewhat deferential approach.

[61] The Crown has chosen to rely solely on logic and common sense, a risky decision considering the social science evidence presented by the Applicants.

2.1 Is the infringement of s. 2(b) rationally connected to the objective?

[62] The Crown must demonstrate that the breach of s. 2(b) of the *Charter* by s. 517 of the *Criminal Code* is logically connected to the objective of protecting the accused's right to a fair trial by an impartial jury. As Dickson C.J. explains at p. 139 in *Oakes*, "the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective."

[63] The jurisprudence suggests that some connection between the legislation and its objective will suffice at the "rational connection" stage of the analysis.

[64] In *Thomson Newspapers*, Bastarache J. noted at para. 110 that there was a rational connection "to some degree" between legislation banning the reporting of polls for a three-day period before elections and its purpose. However, there was also an "infirmity" in the connection between the purpose and the means. He declined to determine whether the rational connection had

been made out and instead focussed on the remaining portions of the analysis.

[65] In *Harper*, The Court of Appeal found there was no rational connection between the legislation limiting third party political spending and its purpose of promoting equality in political discourse on the basis that the evidence presented was inconclusive according to expert analysis. On appeal, at para 106, Bastarache J. found that the Court of Appeal held the Crown to too high a standard. It was sufficient for the Crown to persuade the Court that the impugned speech had a negative effect *some of the time*. Beyond that, "that political advertising influences voters accords with logic and reason." The impugned legislation was held to be rationally connected to the objective.

[66] Similarly, in *Bryan*, a rational connection was found between the legislation prohibiting reporting of election results before all polls in the country were closed and the objective of preserving public confidence in the electoral system by ensuring informational equality. It was sufficient for the Attorney General to provide "some evidence that public confidence depends on a perception that all Canadians have equal access to information before voting," para. 41 and to rely on logic and reason beyond that.

[67] The Applicants, in their brief, attacked the rational connection between the legislation and its objective on three grounds. I will discuss each in turn.

(a) Faith in the Jury System

[68] The Applicants argue that the system of justice in this country is premised on faith in the ability of jurors to follow the directions of trial judges in performing their duties. To this end, they cite a number of Supreme Court cases. They quote Dickson C.J. in *R v. Corbett*, [1988] 1 S.C.R. 670 at 693: "[I]t is logically incoherent to hold that juries are incapable of following explicit instructions of a judge". They cite *Dagenais* and *Vermette*, [1988] 1 S.C.R. 985 where the majority of the Supreme Court commented on the jury's ability to follow instruction and ignore information not presented during the proceedings. Similarly, the Supreme Court in *Philips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 noted at para. 133:

> I cannot accept the contention that increasing mass media attention to a particular case has made this vital institution either obsolete or unworkable. There is no doubt that extensive publicity can prompt discussion, speculation, and the formation of preliminary opinions in the minds of potential jurors. However, the strength of the jury has always been the faith accorded to the good will and good sense of the individual jurors in any given case.

[69] In this case, there has been considerable media coverage. Some of the same information presented at the bail hearing is already public, for example through the police and the Reasons of the Court of Appeal. Even then, the Accused concedes the publication ban may have been

detrimental to him since it kept the public ignorant of the accused's right to reasonable bail and the presumption of innocence.

[70] The Applicants argue that given the court's faith in the jury system, to assume that potential jurors will be prejudiced by the publication of the items listed in s. 517 is mere speculation and does not meet the Crown's burden.

(b) Expert Evidence

[71] Dr. Freedman opined that pre-trial publicity is unlikely to negatively impact the impartiality of jurors, save possibly for situations where a single piece of information that essentially decides the case is given to jurors before a trial and not presented during the trial. An example taken from one of his experiments is where jurors were told that the murder weapon was found in the possession of the accused, but this evidence was not admitted at trial.

[72] When presented with excerpts from the banned reasons for interim release in this trial during cross examination, Dr. Freedman opined that he would not be concerned with the effect of their publication on the jury's ability to follow instructions.

[73] The Crown did not present any expert evidence or reports. However, it argued that such evidence is unnecessary, since common sense dictates that s. 517 is rationally connected to the three specific objectives put forward by the Crown.

[74] The Accused argued that any steps that can be taken to prevent jury members from hearing such evidence are desirable because inadmissible evidence is unfair evidence. Counsel for the Accused also cautioned the Court that Dr. Freedman's research does not consider the influence of the internet and, specifically, of "blogs," which are unchecked and not held to the same ethical standards as the media.

[75] These submissions on behalf of the Accused beg the question of whether pre-trial publicity is generally prejudicial to the accused's fair trial rights when a jury is properly instructed and other appropriate peremptory screening processes, such as challenges for cause, have been implemented. The burden of establishing this rational connection as part of the s. 1 analysis rests with the Crown.

(c) Publication Generally

[76] The Applicants point out that the s. 517 publication ban does not prevent more general pre-trial publicity and is therefore ineffective for its purpose. They do not specifically characterize this as under-inclusiveness. The Accused and the Crown admit that in this case, much of the pre-trial publicity was generated by members of the police force outside of the s. 517 ban.

[77] On the other hand, the legislation applies to situations where a jury trial is not even

possible. The Accused has conceded that this makes the impugned provision over broad. The Crown repeatedly reminded the Court in oral argument that over-breadth is not fatal to legislation as long as Parliament has employed means which are among the range of reasonable alternatives. This argument is properly made at the minimal impairment stage of the *Oakes* analysis. Since it is not required in my determination of whether a rational connection has been established, I will address it at the minimal impairment stage.

[78] The Applicants argue, and the Accused concedes, that the banned items listed in s. 517 may not be prejudicial in every case, and the publication may even be beneficial in some situations.

[79] Finally, the Applicants note that the media are already precluded from publishing unduly prejudicial information that would jeopardize the fairness of trials once a case has entered the judicial process, by the common law of contempt *sub judice*.

Analysis on Rational Connection

[80] I accept that there can be special circumstances where a court might find it necessary to exercise its discretion, either under statute or the common law, to ban the publication of certain information to protect an accused's right to a fair trial by an impartial jury. However, I think something specifically targeted at the items listed in s. 517, is required to establish a rational connection between the s. 517 mandatory publication ban and its purpose of avoiding jury contamination.

[81] The Applicants have presented unchallenged expert evidence and have argued that in any case, s. 517 is ineffective in preventing the dissemination of the very information it seeks to withhold from the public. In light of this and of the faith this Court must have in jury members, along with the actual experience of the Accused in this case, I agree with the Applicants that the Crown's burden to present sufficient evidence to establish a rational connection between the mandatory publication ban in s. 517 and the protection of the Accused's *Charter* right to a fair trial has not been met. The Crown has presented no evidence to indicate that publication of the items listed in s. 517 presents a risk to the fair trial process. Its reliance on logic and reason alone is insufficient to establish the required rational connection.

[82] Even after a consideration of the recent more relaxed practice of the Supreme Court under the rational connection analysis, the Crown has failed to convince me that there is a rational connection between the infringement on the media's s. 2(b) *Charter* right through the publication ban in s. 517 of the *Criminal Code,* and the objective of s. 517 to protect an accused's right to a fair trial by an impartial jury.

2.2 Does s. 517 minimally impair s. 2(b)?

[83] The Crown has also failed to demonstrate that the mandatory publication ban in s. 517 is the least intrusive means available to meet the legislative objective.

[84] The Applicants argue that although some leeway is accorded to Parliament in fashioning legislation to meet its objectives, s. 517 extends beyond what is allowable and is significantly over broad. They argue that less intrusive alternatives exist, such as challenges for cause, admonitions to the array, strong jury instructions, changing venues, sequestering jurors and *voir dires* during jury selection.

[85] Citing *RJR-MacDonald*, the Crown argues that over breadth is not fatal to legislation aimed at a pressing and substantial objective. Specifically, quoting from para. 160 of that case, "If the law falls within a range of reasonable alternatives, the courts will not find it over broad merely because they can conceive of an alternative which might better tailor objective to infringement...." That may be so, however as explained by the Supreme Court, the measures enacted by Parliament must fall within the reasonable alternatives available to it.

[86] With respect to other available alternatives, the Applicants argue that discretionary publication bans would allow for a tailoring of the appropriate remedy to reflect the balance between the media's right to freedom of expression and the accused's right to be tried by an impartial jury. Parliament could choose to list criteria that should be considered in determining the appropriateness of a discretionary ban. Alternatively, Parliament could direct publication bans with respect to very specific materials, such as the ban on publishing confessions in s. 542(2) of the *Criminal Code*. There could also be a requirement that provisos be attached to publications. The Applicants submit that a temporary publication ban could be imposed in order to assess which evidence may fall into the "exception" category pointed out by Dr. Freedman, and that the judge is in the best position to tailor any publication ban. In sum, they argue that the Crown's specific concerns can be addressed in a less obtrusive way.

[87] The Crown argues that given Parliament's constraints, s. 517 is the path of minimum impairment. The ban is temporary, does not exclude observers from the courtroom, and the outcome of the hearing is publishable. At the same time, Parliament is able to address the issues of expeditious bail and financial burden on the accused by imposing a mandatory ban that does not require notice nor require the accused to face the media in litigation.

[88] With respect to the argument of a temporary ban, there are a number of situations in which a temporary ban is, *de facto*, a permanent ban. This is such a situation. Where the media is prevented from reporting on bail proceedings at the time of bail, it will not generally have incentive to report on such proceedings after the trial is over. The speaker will have "lost his audience." (*R. v. Domm* (1996), 31 O.R. (3d) 540 at 555 (C.A.)). Public scrutiny of the bail process will not occur. Nor, importantly, will the public be informed of the bail judge's reasons in order to understand the rational for granting or denying bail.

[89] The Crown also argues that just as the accused has a right to be tried in a public forum, he

or she also has a right to waive that right. The mandatory ban in s. 517 allows for this. The Crown has cited *R. v. Richard*, [1996] 3 S.C.R. 525 in support of its argument that the s. 11(d) right to a public forum can be waived by an accused. In that case, the Supreme Court of Canada discussed situations in which the accused, by his or her conduct, waives the s. 11(d) rights. Such conduct could include failing to appear in court on a relatively minor traffic violation, or pleading guilty to a criminal charge. The situation we are considering is not analogous. The Crown in this situation has essentially argued that an accused can, whenever he or she pleases, "clear the courtroom" by waiving his or her 11(d) Charter right. I do not agree that s. 11(d) grants that right.

[90] The Ontario Court of Appeal, in *R. v. D. (G.)* (1991), 2 O.R. (3d) 498 at 508 considered the proposition that a public trial is the right of the accused under s. 11(d) of the *Charter* and can be waived by the accused. Finlayson J.A., writing for the Court, wrote, "the assertion that such a right can be waived is untenable. The public has as much of an interest in the conduct of the trial as does the accused and the accused is no more entitled to waive a *public* hearing than he is a *fair* one." In the following paragraph, Finlayson J.A. goes on to explain, "Even in a case of citizen against citizen, the public interest remains paramount and as Wilson J. stated in *Edmonton Journal*, 1362 S.C.R., "there would have to be very powerful considerations in order to justify inroads into the open court process." I agree. The s. 11(d) right to a public hearing is not accompanied by a corresponding unqualified right to be free from a public forum. As noted by our courts on numerous occasions and discussed above, the right to an open forum also belongs to the public.

[91] The Accused, in his brief, agreed with Dr. Freedman that the determination of whether a publication ban related to bail hearings should be issued is best made on a case-by-case basis. However, the Accused also argued that given the practical realities of the bail process and the *Charter* requirement of an expeditious bail process, it would be difficult if not impossible to devise a more sensitive and proportionate provision than s.517.

[92] The Accused also argued in his brief that although it is true that the vast majority of trials do not take place in front of a jury, the mode of trial is not usually known at the time of the bail hearing. Protection from jury tainting is needed at the outset, since it is only hindsight that determines whether an accused's fair trial rights were affected. This argument fails to take into account the fact that s. 517 applies to *all* bail hearings, even those where there is no possibility of a jury trial.

[93] With respect to a hearing delay, the Accused conceded that where charges are serious, issues of notice to the media would not generally hinder bail hearings. This is because bail hearings are typically heard several weeks after an arrest is made in serious cases. Furthermore, in cases such as Mr. White's, great efforts are taken to present accurate evidence. The Accused also conceded that it can be in an accused persons' best interest that the public be informed as to the bail process and reasons, and be reminded of the presumption of innocence.

[94] A concern was also raised regarding the internet as a source of unregulated information

that can taint jurors. However, no evidence with respect to the effect of the internet has been tendered, apart from Dr. Freedman's cross-examination wherein he opined that any effect in this regard is minimal.

[95] In my view s. 517 is overly broad. All parties have conceded this. S. 517 covers the situation where no jury trial is possible, and situations where although a jury trial is possible, the trial is ultimately by judge alone. At the same time, as discussed under the rational connection analysis, it is ineffective for its purpose by leaving open the possibility that the information may be disseminated to the public outside of the ban. Furthermore, the publication ban of the items listed in s. 517 does not necessarily result in a more fair trial for the accused. In fact, in hindsight, the ban may be detrimental to the Accused's fair trial rights by leaving the public in the dark. The judge is not afforded any discretion when the Accused requests a ban under s. 517.

[96] There are a number of less intrusive courses of action that can be taken by Parliament in achieving its objective outside of simply removing s. 517 or even making it purely discretionary. These include:

- inserting a proviso to allow the ban to be lifted upon application by the media during a specified notice period
- allowing reasons to be published subject to judicial discretion
- putting the onus on the media to show publication will not taint the jury pool
- abridging notice requirements to the media
- limiting the ban to specific items that, based on the research available and common sense, have a higher likelihood of contaminating a jury even when proper instructions are given
- using challenges for cause and *voir dires* during jury selection
- admonitions to the array and strong jury instructions
- listing specific factors that ought to be considered by the official hearing the bail application

[97] Accordingly, I find that Parliament has failed to tailor the impugned provision so as to minimally impair the Applicants' *Charter* rights, notwithstanding the leeway it is permitted.

2.3 Are the salutary effects of the mandatory publication ban, including its objective, proportionate to the deleterious effects, including the effects on the Applicants' Constitutional rights?

[98] The Crown has the burden of proving that the salutary effects of the impugned legislation are proportionate to its deleterious effects.

[99] The salutary effects of the legislation are minimal, since even if the required rational connection could be established, the impugned provision does not prevent publication of materials

outside of those listed in s. 517. I agree that alleviating the accused from the burden of litigating a publication ban, and from the requirement of giving the media notice of an application for a publication ban, is a salutary effect of Parliament's choice to enact a mandatory ban as a means to meet its objective.

[100] In cases where the evidence at a bail hearing is of the type that may affect potential jury members and the s. 517 ban is effective, that is the information is not provided to the public by other means, there is a salutary effect in preventing the possibility of the jury being influenced by that information. There is no evidence that such cases occur with any appreciable frequency, if at all.

[101] The deleterious effects of this legislation include, in addition to the infringement of the right to freedom of expression: hindering public awareness and understanding of the bail process and associated *Charter* rights, and a compromise of the open court principle which includes public scrutiny, awareness and discussion of that system. This leads to the potential for public speculation, misunderstanding and mistrust of the justice system.

[102] In my opinion, the deleterious effects of the legislation are disproportionate to the salutary effects. The Crown has not met its burden of showing that the salutary effects of the ban are proportionate to the deleterious effects. Accordingly, I find that the impugned legislation also fails on this ground.

Remedy

[103] Since these Reasons for Judgment are being released following the conclusion of the Accused's trial, I need not consider the granting of an individual remedy. Similarly, I need not discuss the doctrine of collateral attack as argued by the Crown. Therefore, I will only consider the appropriate remedy under s. 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c.11 which reads:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[104] The Applicants seek to have s. 517 declared of no force or effect. In the alternative, they seek to have the mandatory language struck from s. 517, leaving only a discretionary ban.

[105] *Schachter v. Canada*, [1992] 2 S.C.R. 679 provides guidelines for a s. 52 analysis. Lamer C.J. explained that the phrase "to the extent of the inconsistency" could be interpreted to mean striking down legislation; striking down and temporarily suspending legislation; severing the legislation, which he also referred to as reading down the legislation; or reading in to the legislation. Determining which of the interpretations applies depends upon the provision in question. The over-arching principles of respect for the role of the legislature and respect for the

purposes of the Charter guide the analysis.

[106] The first step in the analysis is to define the extent of the inconsistency. Lamer C.J. found it helpful to relate the extent of the inconsistency with the point at which the impugned provision fails the *Oakes* test. Therefore, where the purpose of the legislation is held not to be sufficiently pressing and substantial to violate a *Charter* right, the inconsistency should be defined broadly, possibly resulting in striking the legislation in its entirety. Where the impugned provision fails the rational connection requirement, the inconsistency should be defined more narrowly, possibly resulting in striking down the particular portion of legislation that fails the test. Where the impugned provision fails the minimal impairment or effects portions of the *Oakes* test, the extent of the inconsistency should be defined flexibly. Options such as reading in and severing may be appropriate.

[107] In the situation at bar, the impugned provision is inconsistent to the extent that

> 1) the publication ban is mandatory should the Accused apply for it, and
> 2) the publication ban applies to accused persons who are not eligible for jury trials.

I am also not convinced that the content of the mandatory publication ban is rationally connected to its purpose, however as very little argument was presented on this point by the Respondents, I will focus on remedying the mandatory nature and the over breadth of the ban.

[108] I have found that the legislation fails at all three stages of the *Oakes* proportionality analysis. Its objective is pressing and substantial but not rationally connected to the means by which Parliament has sought to meet its objective in s. 517. Not surprisingly, then, it also fails the minimal impairment and proportionality aspects of the *Oakes* test.

[109] The second step in the s. 52 analysis is to decide whether severance or reading in is appropriate. These options are used so that the court will interfere with the legislation and the legislative purpose as little as possible. They are to be used where the legislative objective is obvious or becomes obvious through evidence adduced at the section 1 stage.

[110] In the case of severance, the court is guided by the consideration of whether it is safe to assume that the legislature would have enacted the surviving portion of the legislation without the offending portion, and whether what remains substantially changes the legislation. If it is not safe to assume the legislature would have enacted the surviving portion, the court must also strike any part which it cannot safely assume would have been enacted without the offending portion. Previous versions of the legislation may be helpful.

[111] In the case of reading in, the court is guided by similar considerations of whether the legislature would have enacted the legislation as altered to make it constitutionally permissible. The question of how the legislation ought to be extended should be answerable with a sufficient

degree of precision, considering the requirements of the Constitution. If it is not, the court is not to fill the legislature's gaps, so reading in is not appropriate and severance or striking down must be used.

[112] Finally, the court may consider which course of action would be "constitutionally encouraged."

[113] S. 517 of the *Criminal Code* stipulates when a publication ban can or must be issued, as well as the duration for which any ban issued under the section will continue. As explained above, for our purposes, the offending portions of s. 517 are the portion dealing with mandatory granting of a publication ban at the accused's request and the over breadth of the legislation. These portion are not inextricably linked to the time lines listed in s. 517(1)(a) and (b). Furthermore, the relevant provision in the 1972 *Bail Reform Act*, which preceded the current provision, contained the same time lines and provided only for a discretionary publication ban. These factors lead to the conclusion that it is safe to assume the legislature would have enacted s. 517 without the offending provision, namely the words "and shall on application by the accused". Furthermore, all sides have conceded to the over breadth of the section. It is safe to assume the legislature would have restricted s. 517 to situations in which a jury trial is possible, considering the purpose of s. 517. This can be achieved by inserted at the beginning of s. 517, "Where a jury trial is possible,".

[114] Such a severing of and reading in to the provision would interfere with the legislation and the legislative purpose as little as possible. However, as explained below, considering the current practicalities and requirements of criminal practice under a discretionary ban, Parliament may be required to enact replacement legislation in order to avoid the unconstitutional treatment of accused persons that would likely occur as an result of the severance. The *Charter* does not provide a sufficiently precise roadmap as to what that replacement legislation should be, so the court is not able to fill the resulting and critical legislative gap. Fortunately, *Schachter* provides a third step for the court in such a situation.

[115] The third step in the *Schachter* analysis is to decide whether a temporary suspension of the declaration of invalidity is appropriate. Lamer C.J. explained in *Schachter* at 719 that such a delay is a serious matter, and should only be exercised in certain situations, namely where striking down legislation without enacting something in its place would (1) pose a danger to the public, (2) threaten the rule of law or (3) in the case of under-inclusiveness, would result in the deprivation of benefits from deserving persons without benefiting individuals whose rights have been violated. The decision should not hinge on considerations of the role of the courts versus the legislature.

[116] Counsel for the Accused argued that if s. 517 or its mandatory language is to be declared of no force or effect, the Court should order a temporary suspension on the declaration in order that alternative or additional legislation that provides some protection to the accused can be drafted.

[117] The Applicants urge against a declaration of temporary validity. They argue that none of

the three situations described in *Schachter* exist in the case at bar: severing the offending words from the legislation will not result in a legislative vacuum in light of the existence of the common law ban. Nor will it pose a danger to the public or threaten the rule of law.

[118] I disagree with the Applicants on this point. In my view, to remove the mandatory portion of s. 517 would offend the Rule of Law and result in a legislative gap. This is because, in light of the current notice requirements to the media and restrictions on bail hearing adjournments, such a severance without replacement legislation would have the effect of potentially denying accused persons their constitutional right not to be arbitrarily detained under s. 9 of the *Charter*, which forms part of the fundamental law of this country.

[119] Expedient access to Judicial Interim Release is essential to the *Charter* rights of an accused. Severing all or part of s. 517, leaving only a discretionary publication ban, would require an application to determine the merits of a publication ban in every case where a ban was sought. It would also require the notice requirements be met unless the court abridged or waived them.

[120] As pointed out by the Crown, under s. 9 of the *Charter* the accused is not to be arbitrarily detained. Accordingly, an accused is required by section 503 of the *Criminal Code*, to be taken before a Justice within 24 hours of arrest or soon thereafter, without unreasonable delay. Similarly, s. 516 limits adjournments of bail hearings to 3 days without the consent of the accused.

[121] These rights and the legislation that is designed to protect them dictate against lengthy notice periods to the media. Considering the relatively lengthy notice requirements outlined in this Court's Criminal Practice Note #4, requesting a discretionary publication ban would result in unjustifiable delays to accused persons while being held in custody. The potential for the breach of the accused's section 9 rights as an effect of simply severing the provision is manifest.

[122] The timeliness demanded between the time of arrest and the bail hearing requires careful consideration of the balancing of the s. 2(b) rights of the public and the accused's rights under s. 9. Parliament passed s. 517 in 1976, before the *Charter* came into existence but after the *Canadian Bill of Rights*, S.C. 1960, c. 44 was in existence. Consequently, it did not have the opportunity to consider the options available in order to achieve a proper balancing of these rights. As a result, Parliament enacted legislation that is unnecessarily overboard.

[123] As demonstrated by the parties' submissions, there are a variety of possibilities available to Parliament for filling this gap and constitutionally meeting its objective. A number of them are listed above under the third step of the proportionality analysis. Any attempt by this Court to further modify s. 517 of the *Criminal Code* in accordance with these Reasons will amount to judicial legislative drafting, an exercise in which I decline to engage. Considering the significance of the legislative gap that must be filled, this is therefore a situation in which a temporary suspension of a declaration of invalidity is appropriate under the "Rule of Law" scenario from *Schachter*.

[124] A temporary suspension with respect to the severance remedy can also be granted on other grounds. In *Schachter*, the legislation in question was under-inclusive. A section 15 challenge was brought seeking inclusion of a group of individuals who did not receive benefits under a certain legislative regime. Since then, the Supreme Court has applied *Schachter* to overboard legislation even where it is not apparent that one of the three criteria for temporary suspension listed in *Schachter* are satisfied.

[125] In *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, *U.F.C.W. v. Kmart Canada,* [1999] 2 S.C.R. 1083 and *R. v. Guignard,* [2002] 1 S.C.R. 472, the Supreme Court held that some restrictions on the Applicants' s. 2(b) *Charter* rights were justifiable, but the impugned provisions as they read at the time were overboard. In *Kmart* and *Guignard*, which were decided with the benefit of the guidelines in *Schachter*, the Supreme Court found that since there were many factors to consider in developing appropriate legislation, it was best left to Parliament to fashion a remedy. Therefore, temporary suspensions of invalidity were ordered in each case.

[126] The situation at bar is similar in that s. 517 is an overboard provision. The severing of over-inclusive legislation without replacement legislation can result in unacceptable deprivations to individuals just as the severing of under-inclusive legislation can under the third *Schachter* criterion. This accords with the principle enunciated in *Schachter* that the court should not treat legislation differently based on the manner in which it is drafted, that is whether it is drafted to be under-inclusive or over-inclusive. The court in *Schachter* was not required to turn its mind to this possibility, but it did do so subsequently.

[127] Some further comments are appropriate here. In addition to the inherent delay in determining a publication ban application between arrest and release, there are other practical considerations to be examined. As demonstrated by this case, applications concerning publication bans can be lengthy and require opinion evidence. Following a charge an accused is immediately pitted against the state and all of the resources it may bring to bear. This observation applies not just to the ultimate trial, but to every step in the process, including the determination of a publication ban. To add the media's resources against the accused in this already inequitable circumstance would only aggravate this reality. The Court of Appeal in its February 22, 2006 [2006 ABCA 65] reasons for this case made the following comments:

> 34 .... Not only is the accused required to plead for his liberty, in the process he must also defend against pre-trial publication of mere allegations which may be ruinous to his career and standing in the community, and which may, at trial, be found to be unsubstantiated or even false. A reputation lost in that manner may be impossible to recover.
>
> 35 .... Anyone who has defended people in such jeopardy as this accused will understand the additional effort and resources required to justify what, until

> recently, has been considered a pre-trial right. Not only is an accused pitted against the resources of the state, but now also against the vast resources of the media if he or she wishes to invoke a publication ban at [the Court of Appeal] level.

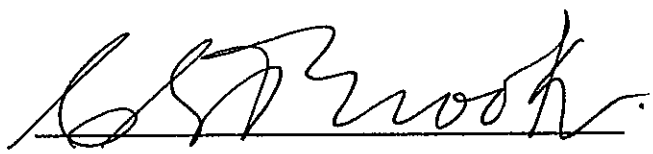
[128] I agree that removal of the provision for the mandatory bail publication ban would amplify the inequities that already exist within the adversarial system. Some middle ground must be found.

[129] As a result, I find that it is appropriate to allow Parliament a reasonable time within which to fashion legislative provisions that are rationally connected to its objective in a manner that accommodates all of the *Charter* rights that bear on this issue. Accordingly, I suspend the declaration of invalidity of the words "and shall on application by the accused" from s. 517 for a period of twelve months. This will allow Parliament sufficient time to draft an alternative provision. After that time, the mandatory language in s. 517, "and shall on application by the accused," will be considered of no force of effect.

[130] I recognize that allowing an unconstitutional law to remain in force is less than ideal. However, the alternative, a discretionary ban following an application on notice is significantly more problematic.

[131] However, there is no reason to suspend the declaration to add the words "Where a jury trial is possible," to the beginning of s. 517. That declaration will take place immediately.

Heard on the 28th day of August, 2006 to the 29th day of August, 2006.
Dated at the City of Edmonton, Alberta this 31st day of May, 2007.



C.S. Brooker
J.C.Q.B.A.

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