Court of Queen's Bench of Alberta

Citation: R v The Canadian Broadcasting Corporation, 2017 ABQB 329

Date: 20170516
Docket: 160339594X1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

The Canadian Broadcasting Corporation

Accused

Judgment
of the
Honourable Mr. Justice T.D. Clackson

I. Circumstances

[1] On Friday, March 4th, 2016, V was found deceased. V was 14 years old at the time. The accused, Canadian Broadcasting Corporation [CBC] had published a report on its website about the death on March 5th and again on March 8th. Both reports provided the name of V, a photograph of her, and some personal information.

[2] On March 16th, 2016, at the first appearance of the person alleged to have killed V, the presiding Provincial Court Judge made an order that: "any information that could identify the victim shall not be published in any document, or broadcast or transmitted in any way" [the Ban]. Shortly thereafter, CBC became aware of the Ban. However, while it did not refer to V by name in any other reports subsequent to the Ban, it did not alter or remove the earlier reports,

both of which remain available on its website. When requested to remove or amend the two reports to comply with the Ban, CBC refused.

[3] In result, CBC was charged with criminal contempt and an application was made for an interim order compelling CBC to comply with the Ban. That application was heard and denied by Justice Michalyshyn (***R v Canadian Broadcasting Corporation***, 2016 ABQB 204, [2016] 9 WWR 613).

[4] The appeal was heard in September 2016, and the Alberta Court of Appeal (Slatter and MacDonald JJA for the majority) granted an interim mandatory injunction. Greckol, JA dissented (***R v Canadian Broadcasting Corporation***, 2016 ABCA 326, [2017] 3 WWR 413 [***CBC, 2016 CA***]).

[5] The Court of Appeal's decision is on appeal to the Supreme Court of Canada, and its order has been stayed pending that appeal.

[6] The criminal contempt trial was heard by me on January 25th, 2017. All of the evidence was presented by agreement in a series of affidavits, except for the evidence of one witness, Mr. Dean Jobb, who was called by the CBC. The parties agreed that Mr. Jobb was an expert and could offer expert opinion: "in the area of journalism ethics as they apply to online media, including the impact of online access to published and archived stories; and the role of aggregators and social media users in disseminating mainstream media reports." His CV and report were made exhibits by agreement. I agreed to receive this evidence, but advised that the weight of Mr. Jobb's opinions would depend on what they were and the consideration of his actual expertise, his impartiality, and the accuracy of the foundational information supporting his opinions.

[7] From the evidence, it is clear that one could, and can still, search the CBC website and gain access to the two impugned articles. Additionally, one could conduct a general Internet search using a search engine, such as "Google," and be directed to the CBC website as well as other news aggregation websites. Many of the aggregation services will direct the searcher to the CBC website where the impugned article may be accessed, although there are a number of other news aggregators and providers that offer access to the same information by directing the searcher to an information originator other than the CBC.

[8] Therefore, even if CBC removes or edits the two stories, the prohibited information can still be obtained from other sources. It is also true that there are newspaper reports created prior to the Ban which disclosed the prohibited information. Therefore, someone could gain access to the information from those organizations which maintain print libraries.

[9] Furthermore, the information can be accessed from the court by requesting access. As such, requiring CBC to remove the prohibited information will not, invariably, translate to its removal from the public domain.

[10] If one accesses the information on the CBC website, one can obviously, share it with others by sending it through a variety social media tools, including Facebook and Twitter. Apparently, the March 5th, story had been shared, in some fashion, over 200 times by the time the Ban prohibiting publication was ordered.

[11] Plainly, Mr. Jobb's evidence was accurate. It is practically impossible to remove a story once it is online. He offered examples of cases where the crime occurred many years before there was an arrest and trial. Mr. Jobb referred to a case involving one Cédrika Provencher, which was

the subject of extensive news coverage as well as online and social media posts. He noted that there had even been a foundation established in Ms. Provencher's name in advance of an arrest regarding her abduction.

[12] Mr. Jobb opined that because of the impracticality and the uneven application of a backward looking ban, the Ban should not apply to information that was published before a publication ban was ordered. Implicit in that opinion is the notion that publishing happens only once. As well, it is implicit that access to that publication and republication by others do not amount to publication by the originator.

[13] Mr. Jobb, relying on a report published by the Canadian Association of Journalists, offered the opinion that un-publishing is unethical and not in the best traditions of journalism. In his view, like print media, once an article is published online, it is a permanent record. In his opinion, it would be unfair to treat online media differently from print media.

[14] However, he did, when pushed, admit that un-publishing, however imperfect, can be done and has been done. In that respect, Mr. Jobb let his personal values color his expert opinion, but nothing really turns on that fact. His opinions served as context.

II. Analysis

A. Criminal Contempt

[15] In ***United Nurses of Alberta v Alberta (Attorney General)***, 1992 1 SCR 901 at para 25, 125 AR 241(WL) [***UNA***], the Supreme Court of Canada defined criminal contempt as follows:

> To establish criminal contempt the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*). The Crown must prove these elements beyond a reasonable doubt. As in other criminal offences, however, the necessary *mens rea* may be inferred from the circumstances. An open and public defiance of a court order will tend to depreciate the authority of the court. Therefore when it is clear the accused must have known his or her act of defiance will be public, it may be inferred that he or she was at least reckless as to whether the authority of the court would be brought into contempt. On the other hand, if the circumstances leave a reasonable doubt as to whether the breach was or should be expected to have this public quality, then the necessary *mens rea* would not be present and the accused would be acquitted, even if the matter in fact became public. While publicity is required for the offence, a civil contempt is not converted to a criminal contempt merely because it attracts publicity, as the union contends, but rather because it constitutes a public act of defiance of the court in circumstances where the accused knew, intended or was reckless as to the fact that the act would publicly bring the court into contempt.

[16] Accordingly, to prove its case, the Crown must establish beyond a reasonable doubt that the CBC:

(a) Disobeyed the publication ban; and
(b) Disobeyed the publication ban in a public way; and

(c) Intended or knew that its disobedience would depreciate or undermine the authority of the court which imposed the Ban; or

(d) Knew that it was likely that its disobedience would depreciate or undermine the authority of the court which imposed the Ban, but went ahead anyway.

[17] The Supreme Court of Canada seemed to use the words "disobey" and "defy" interchangeably. However, I do not think they are absolutely interchangeable. In this regard, I note that while the weight of lexicographic interpretations indicates that "defy" is a synonym of "disobey," there is equal support for the subtle distinction between these two words. One interpretation confirms that: "As verbs the difference between 'defy' and 'disobey' is that defy is to reject, refuse, or renounce while 'disobey' is to refuse to obey an order of (somebody). As a noun 'defy' is a challenge" – online: <http://wikidiff.com/defy/disobey> (emphasis added). As such, in my opinion, disobedience can be quiet or nuanced, whereas defiance connotes a degree of forcefulness or combativeness.

[18] The criminal nature of the act is not therefore determined solely by the attitude of the accused, but also by the nature of the disobedience. Plainly, private disobedience or defiance is not criminal. The accused must publicly disobey. Furthermore, in my view, the more forceful or defiant the public disobedience, the more likely the act alone will support the inference that the act was done with the intent of undermining the court's authority. I think that is what the Supreme Court of Canada meant in its articulation of what the Crown must prove to establish criminal contempt.

[19] There are a variety of ways one can refuse to abide by a court order, but it is only public disobedience which can be criminal. The more strident the public disobedience, the stronger the foundation to infer that the act was done with criminal intent.

1. Did CBC Disobey?

[20] One must first determine whether CBC did disobey the publication ban. The Ban was written in the words of section 486.4 of the *Criminal Code*, RSC 1985, c C-46. The operative words in the legislation are: "shall not be published in any document or broadcast or transmitted in any way." Those words have appeared in that form well before the advent of the Internet.

[21] Before considering the meaning of the words, it is important to remember that this is a criminal prosecution. As with all criminal prosecutions, the accused is entitled to know with some precision what behaviour is prohibited. Therefore, while the words used in section 486.4(2.2), suggest that Parliament intended a broad scope by using the phrase "in any way," where the breach is allegedly criminal, what will constitute an offence needs to be specifically identified. Furthermore, where the Ban limits a *Charter* protected right – here section 2(b) dealing with "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication" – the extent of the limitation must be clearly delineated in order to be justifiable.

[22] The crime of criminal contempt is "neither vague nor arbitrary," and "[a] person can predict in advance whether his or her conduct will constitute a crime": ***UNA*** at para 27. As a result, the words "in any way" do not add anything to the scope of the phrase "published in any document or broadcast or transmitted," as they exist in the provision of the *Criminal Code*, s 486.4.

[23] The common dictionary meaning of "publish" is "to make public, to make generally known, and to disseminate to the public": Merriam-Webster online dictionary – <https://www.merriam-webster.com/dictionary/publish>. The word "access" is not typically part of the definition of "publish." Yet, accessing is plainly what is going on here. There is no evidence that CBC is doing anything but opening its library or allowing access to what has been written to those who might ask.

[24] Section 486.4(2.2) does not specifically limit "accessing" the prohibited information, therefore, neither did the Ban prohibiting publication that was made by the Provincial Court Judge on March 16th, 2016.

[25] The Crown argued that the term "publication" as defined in section 2(1) of the *Youth Criminal Justice Act*, SC 2002, c 1, includes the phrase "making accessible." Therefore, there is no reason to interpret the *Criminal Code* differently. I do not agree.

[26] The *YCJA* provision is a prototype of a more modern provision and a demonstration that Parliament was attuned to the need for specificity. Plainly, the goal is to protect the privacy of youths; and I certainly agree that it makes no sense to offer less protection to the privacy of young people who are victims of adult criminal behaviour. Nonetheless, it is not the court's role to tell Parliament what it must do to be sensible. At least not when identifying what is or is not a criminal behaviour. The courts should not try to legislate by attempting to discern parliamentary intention on a subject that Parliament appears not to have thought about.

[27] Furthermore, subsection 2.2 of section 486.4 is a relatively recent amendment. The fact that Parliament did not see it fit to mirror section 2 of the *YCJA* could be taken as suggesting that Parliament did not wish to extend the scope of the existing provision in section 486.4.

[28] In my view, the issue of what to do with publications which were lawful but subsequently became *potentially* unlawful is one which law makers need to address and debate.

[29] I do not accept that the definition of "publish" in that part of the *Criminal Code* dealing with defamatory libel is of assistance. Obviously, those provisions are specific to a particular delict. It would have been an easy thing for Parliament to simply define "publish" in the definition section of the *Criminal Code*. Failing to do so, but defining the term in specific places in the *Criminal Code* suggests the definition is limited to the crimes thus defined.

[30] In further support of the argument that an article is published every time it is accessed, the Crown made reference to a number of cases dealing with limitation periods, where the time that an article was published was crucial to the defamation litigation.

[31] In ***Breeden v Black***, 2012 SCC 19 at para 20, [2012] 1 SCR 666, Lebel, J wrote:

> It is also well established that every repetition or republication of a defamatory statement constitutes a new publication.

In that case, the initial publication of the offending article was picked up and rebroadcast in Ontario. The issue was whether Ontario was a *forum conveniens*. I agree with the Crown that in the tort of defamation cases, publication occurs every time an article is accessed. I also agree with the Crown that the sense of the word "publication" in that area of the law embraces accessing as well as publication.

[32] Similarly, I agree with the Crown that the Supreme Court of Canada in ***Crooks v Wikimedia Foundation Inc***, 2011 SCC 47, [2011] 3 SCR 269 (WL), determined that the

provider of a hyperlink to an offending publication is not a publisher. The originator remains the publisher. Implicit in that judgment is the notion that access by a third party to the offending piece amounts to republishing by the originator.

[33] Finally, I agree with the Crown that the goal in the tort of defamation cases is the same as that of a publication ban; which is, to stop the dissemination of the impugned prohibited material or information.

[34] However, this is a case of criminal contempt and not a civil case or a private dispute. This is a prosecution by the State. Furthermore, the law dealing with the tort of defamation is premised on the potential defendant taking care to be honest and truthful in all communications or face litigation. In that context, the author knows its obligations from the start. Whereas, in the present matter, the conduct of the accused, the CBC, was perfectly lawful at the point of the original publication. It only became *potentially* unlawful after the fact of initial publication.

[35] Distinctively, the author of defamatory material, having looked to the future, takes a chance and will be responsible, perhaps more extensively so because of the wide dissemination that is the hallmark of the Internet and publication thereon. The *potential* contemnor, in the present case before the court, could not predict the future.

[36] Furthermore, in this case, the CBC had both a right, and in my view, a corresponding duty to report the news. A free and democratic society depends upon a free and active press. We leave to them the judgment as to what is and what is not news. In this case, there is no doubt that the CBC was obliged to report what it wrote on March 5th, and again on March 8th. Therefore, the issue is whether the CBC was obliged to undo the news it had rightfully reported. In my view, the law governing the tort of defamation does not assist with that question. The notion of continuous publishing or republishing on third party access, although well suited to the law of defamation does not seem either fair or compelling in a prosecution for a violation of a subsequent publication ban.

[37] Of note, as well, is the Alberta Court of Appeal's "Public and Media Access Guide," where the following appears:

> A publication ban will prohibit publishing the information in print, radio, television or via the Internet. Publication bans only restrict publication, not access. The publication ban does not limit viewing, searching or copying for private use.

[38] When balanced against the *Charter* right of the CBC and the need for certainty in relation to criminal law, I have concluded that, on the facts of this case, allowing *access* to the impugned reports does not amount to publishing.

[39] The Crown also argued that what occurred here could be "transmitting" or "broadcasting." Again, I do not agree.

[40] In the context of a ban, both the words "transmitting" and "broadcasting" seem comfortably interpreted as relating to broad dissemination. That is consistent with the fact that a publication ban does not prohibit access to the prohibited information in a search of court records, or in conversation with those acquainted with the victim. The CBC is certainly entitled, even in circumstances where a publication ban exists, to pursue the story and all its potential paths, and cannot be stopped from performing that function by the Ban. In keeping with that obligation, CBC could apparently access the prohibited information. It is only restricted from

publishing, transmitting or broadcasting the prohibited identifying information. As the Federal Court said in ***Canadian Broadcasting Corporation v Canada (Attorney General)***, 2016 FC 933 at para 95, 403 DLR (4th) 154 (WL), persons who provide, directly or indirectly, the prohibited information to the CBC are not subject to the Ban. These persons are not broadcasting or transmitting.

[41] Furthermore, neither the words "broadcasting" nor "transmitting" are necessarily a reference to the source of the material. The issue of how the material came to be in the hands of the broadcaster or transmitter is only relevant to the defence of justification. As such, the words "broadcasting" and "transmitting," focus on doing something with what exists. In context, therefore, getting hold of the material or "accessing" it would not be broadcasting or transmitting. Something more must be done. Similarly, allowing access is not good enough to amount to broadcasting or transmitting.

[42] In the end, it is my view that the fact that CBC maintains the original articles in its archives, which can be accessed, does *not* amount to publication, transmission or broadcast.

[43] Consequently, it is neither necessary for me to address the difference between the wording of section 486.4(2.2) in the English and French versions of the *Criminal Code*, nor to assess the impact that those differences might have on the interpretation of the words of this Ban.

[44] Since an essential element of this prosecution is that the CBC must have published, transmitted or broadcast the prohibited information, and since I have concluded that CBC actions do not amount to publishing, transmitting or broadcasting, it follows that CBC must be acquitted.

[45] In fact, given that the *actus reus* of the subject offence requires publication, transmission or broadcasting and requires the Crown to show that the accused knew it was publishing, transmitting or broadcasting; and since I have at least a reasonable doubt as to whether any of those activities occurred, I conclude that CBC would be entitled to the benefit of that doubt. And for that reason as well, CBC must be acquitted.

[46] Ordinarily, the foregoing conclusion would end my consideration of the arguments raised in this case. However, this is an unusual case, and among the remaining issues, findings of fact need to be made. I will, therefore continue my analysis in order to provide a complete record should this decision be reviewed.

[47] In that context, I note that the Crown has argued that even if I do not find criminal contempt, I should find civil contempt and compel the CBC to remove the impugned material. That issue also needs to be addressed.

2. Public Disobedience

[48] The next essential element which must be proved is that the disobedience was public. Plainly, CBC refused to remove the impugned articles. That refusal manifested itself in CBC's responses to agents of the Crown, opposition to the interim application, the ensuing appeals, and obtaining a stay of enforcement of the order of the Court of Appeal requiring removal of the material. All of that was in the public eye.

[49] Although, not the extremely public disobedience demonstrated by the United Nurses of Alberta in ***UNA***, the refusal by the CBC in the present circumstance is public in the sense contemplated in that case.

3. *Mens Rea*

[50] The Crown must prove:

1) That CBC intended its public disobedience to bring the court into contempt; or,
2) That CBC knew that its public disobedience would tend to depreciate the authority of the court; or,
3) That CBC knew its public disobedience would likely tend to depreciate the court's authority, but went ahead and published anyway.

[51] As I said earlier, the *mens rea* can be inferred from the nature of the disobedience. As well, it is reasonable to say that the more strident the disobedience, the more likely the inference of intention. In this case, the CBC disobeyed but not in any manner that could be called strident or even disrespectful. CBC simply refused to accept the Crown's interpretation of the Ban, preferring to accept the judgment of the court. How that stance could undermine the court's authority, escapes me.

[52] CBC took a principled stand on a subject of considerable uncertainty. The Court of Appeal's decision on the interim injunction makes that position a reasonable one. In ***CBC, 2016 CA*** at paras 9-10, the majority offered this:

> The Crown essentially argues that "publishing" is a continuous state of affairs, and that every day that the postings remain on the website, or are accessed, amounts to a publication or transmission in breach of the non-publication order. Under this interpretation, the respondent is not sanctioned *ex post facto* for actions before the non-publication order was granted, because its continuation of the postings clearly occurred after it was advised of the order.
>
> The respondent, on the other hand, argues that things that happened prior to the non-publication order are not caught by that order, because they have not been "published" after the order was granted. While either position is arguable, it cannot be said that the Crown does not have a strong *prima facie* case.

[53] Justice Greckol, in dissent, wrote, at paras 41, 44:

> I agree with the reasons of the majority that either interpretation of the terms in s 486.4(2.2) is arguable. However, I cannot agree that the Crown has shown the requisite strong *prima facie* case of criminal contempt. Where the charging words of the section that form the gravamen of the prohibition in the court order are the subject of two arguable interpretations, the ambit or embrace of the resulting order cannot be clearly determined. There can be no strong *prima facie* case of criminal contempt at this stage where the prohibitory language in the statute that underlies the terms of the court order said to be breached may reasonably bear two meanings, one capturing the impugned activities while the other does not.
>
> ...
>
> Where the reach of a prohibitory term in a statute that forms the basis of the court order is vague, and one cannot predict in advance whether conduct is caught by the terms of that prohibition because two interpretations are reasonable, it cannot be said that there is a strong *prima facie* case of criminal contempt of court, an

> offence that must be proved *strictissimi juris* and beyond a reasonable doubt. (*emphasis added*).

[54] This case is not like the ***UNA*** case where the union, not once but twice, stridently refused to abide by a court order. The union's intent in that case was clear. It put no stock in the Court's order. This case is not like the cases referred to by the Crown where the media offender was found in criminal contempt because it published prohibited information *after* it was aware of the prescription against doing so.

[55] Rather, this is a case where the challenge is not to the Court's authority but a challenge to the Crown's interpretation of the Court's order. That kind of challenge is to be expected and even encouraged in a free and democratic society. The scope or reach of a law or a Court's order can surely be challenged and questioned instead of being blindly adhered to. The development of our law has depended upon just that kind of debate. Surely, a difference of opinion is not criminal. And certainly, a reasonable position taken against the weight of authority does not become a criminal act because it is taken.

[56] The nature of the disobedience here does not compel the inference of the existence of the necessary *mens rea*. Indeed the evidence supports the opposite conclusion and serves to undermine the proposed inference. The doubt created is real as well as reasonable, and benefits the CBC.

B. Civil Contempt

[57] The parties agree that the elements of civil contempt must also be proved beyond a reasonable doubt. Given my findings on the act of disobedience, it follows that CBC cannot be found to be in civil contempt. Therefore, it is unnecessary for me to determine if civil contempt can be properly considered as a kind of included offence in a criminal contempt prosecution.

[58] Similarly, it is unnecessary for me to decide whether permanent injunctive relief is appropriate. I do note however, that the Ban on publication will expire once the guilt or innocence of the accused in the homicide prosecution is finally determined. At that point, there would be no basis upon which one could prohibit publication of the identifying information. In fact, CBC could, had it been directed to remove the offending material, restore it as originally written. One cannot help wondering about the utility of the exercise in the first place.

III. Conclusion

[59] The Crown has failed to establish that CBC violated the publication Ban imposed by the Provincial Court of Alberta on March 16th, 2015. In the result, CBC stands acquitted, and the charge is dismissed.

Heard on the 29th day of March, 2017.
Dated at the City of Edmonton, Alberta this 16th day of May, 2017.

T.D. Clackson
J.C.Q.B.A.

Appearances:

Ms. Julie Snowdon
for the Crown

Mr. Sean Ward
Ms. Tess Layton
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for the Defence