CITATION: R. v. Wright, 2020 ONSC 7049
COURT FILE NO.: 1087-19
DATE: 2020/11/18

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
HER MAJESTY THE QUEEN Respondent	*R. Parsons and J. Ostapiw*, for the Respondent
– and –	
ROBERT STEVEN WRIGHT Applicant	*B. Keaney and M. Venturi*, for the Applicant
– and –	
POSTMEDIA NETWORK INC., THE CANADIAN BROADCASTING CORPORATION, CTV NEWS, A DIVISION OF BELL MEDIA INC., and VILLAGE MEDIA INC. Intervenors	*B. Hughes*, for the Intervenors
	HEARD: September 11, 2020

ELLIES R.S.J.

REASONS FOR DECISION ON PUBLICATION BAN

INTRODUCTION

[1] Section 645(5) of the *Criminal Code* (the "*Code*") permits a judge to decide matters before a jury is chosen that would ordinarily be heard in the absence of the jury only after it has been chosen. Section 648(1) of the *Code* bans publication of information relating to any portion of a jury trial occurring in the absence of the jury until the jury retires to consider its verdict. The question I must resolve is whether these sections operate to ban publication of information relating to the change of venue application brought before me in this case, in which not even the trial judge has yet been selected.

[2] During the hearing of the application, counsel argued that publication of the mere fact that the application had been brought was enough to justify granting it. In response, I imposed a temporary ban on publication of any information relating to the application. In an endorsement dated July 22, 2020, I pointed out that there were conflicting lines of authority as to the basis upon which such a publication ban could be imposed. I invited submissions from the Crown and the defence on which line of authority should be followed and I invited the media to participate.

[3] On September 11, 2020, I heard submissions and reserved my decision. On October 8, 2020, I released my decision on the change of venue application (2020 ONSC 6021, "the venue reasons"), denying the application. I ordered that certain portions of my reasons could be published and undertook to explain in separate reasons my conclusion that the *Code* does not impose an automatic blanket ban on all pre-trial applications and, in any event, does not impose one in this case. These are those reasons.

FACTUAL BACKGROUND

[4] The facts underlying the charge and those relating to the change of venue application can be found in the venue reasons. I will not repeat them here so that these reasons can be published in full.

LEGAL BACKGROUND

[5] Sections 645(5) and 648(1) the *Code* read as follows:

> 645 (5) In any case to be tried with a jury, the judge before whom an accused is or is to be tried has jurisdiction, before any juror on a panel of jurors is called pursuant to subsection 631(3) or (3.1) and in the absence of any such juror, to deal with any matter that would

> ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn.
>
> 648 (1) After permission to separate is given to members of a jury under subsection 647(1), no information regarding any portion of the trial at which the jury is not present shall be published in any document or broadcast or transmitted in any way before the jury retires to consider its verdict.

[6] Taken alone, the effect of each of these sections seems relatively straightforward. Section 645(5) permits a judge to hear any matter before a jury is sworn that the judge could ordinarily or would necessarily hear in the absence of the jury if the trial were underway. Section 648(1) prohibits the publication of any information about any part of a trial that takes place in the absence of the jury where the jury is not sequestered (kept together) throughout the trial.

[7] The problem arises where an application is heard under s. 645(5) before the jury is even chosen. What is the effect of s. 648(1) where that happens? At the time I imposed the temporary publication ban, I highlighted only two conflicting lines of authority on the issue. However, there are actually three. These three groups of cases fit along a continuum.

[8] At one end of the continuum is a group of cases represented by the decision in *R. v. Cheung*, 2000 ABQB 905. These cases hold that s. 648(1) has no application to proceedings which occur before a jury is empanelled: *Cheung*, para. 60. Instead, these cases rely entirely on the court's common law power to control its own process to determine when, and to what extent, publication of information concerning pre-trial applications should be banned in a criminal case involving a jury.

[9] The court's power to control its own process is constrained by the *Canadian Charter of Rights and Freedoms* ("*Charter*"). In a criminal case, a common law publication ban must strike the right balance between an accused's right to a fair trial and the right to freedom of the press. As articulated by the Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *R. v. Mentuck*, [2001] 3 S.C.R. 442, neither right is more important than the other. In *Dagenais*, Lamer C.J. set out the appropriate test as follows (at p. 878):

> A publication ban should only be ordered when:
>
> > (a) Such a ban is <u>necessary</u> in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
> >
> > (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

[10] The wording of the test was broadened in *Mentuck* to account for the fact that publication bans must occasionally be made to protect more than just an accused's fair trial rights: *Mentuck*, para. 31. However, for the purposes of this case, in which Mr. Wright's fair trial rights are the only rights to be balanced against those of a free press, the test is exactly as worded above: *Mentuck*, at para. 33. Nonetheless, I will refer to the test as the *Dagenais/Mentuck* test, as it is commonly called.

[11] In *Cheung*, Binder J. found that to interpret s. 648(1), which refers to matters capable of occurring only *after* a jury is chosen, as applying to pre-trial applications "strained" the plain meaning of the section. Instead, he held that the threat of publication to an accused's fair trial interests would best be dealt with by applying the common law test set out in *Dagenais*. *Cheung* has been followed in subsequent cases in both Alberta and Quebec: *R. v. Trang*, 2001 ABQB 437; *R. v. Twitchell*, 2010 ABQB 692; *R. v. Bebawi*, 2019 QCCS 4393.

[12] At the other end of the continuum are a group of cases that hold that ss. 648(1) and 645(5) interact to automatically ban publication of information regarding applications heard by the trial judge before a jury is even chosen. This group is composed of two sub-groups.

[13] In the first sub-group, the courts have held that s. 648(1) bans publication of any information about *any* application heard by the trial judge prior to the jury being chosen. Perhaps the best example of this sub-group is the decision of Trafford J. in one of two rulings related to this issue coming from the same case. In *R. v. Brown*, 1997 CarswellOnt 5989 (Ont. Ct. (Gen. Div.)) ("*Brown #1*"), Trafford J. examined the object and scheme of the *Code*, which provided for publication bans when requested at bail hearings (s. 517) and at preliminary inquiries (s. 539). He concluded that Parliament's intentions would be defeated if s. 648(1) did not apply to applications heard under s. 645(5) before a jury was chosen. Relying on s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-23, which deems every enactment to be remedial and calls for "fair, large and liberal construction" to attain the objects of the act, Trafford J. held that a complete ban of all information relating to pre-trial applications heard by the trial judge is compatible with the *Charter* values underlying the decision in *Dagenais* and made no exception to the ban. According to these cases, there is no room to apply the *Dagenais/Mentuck* test for publication bans because the ban is automatically imposed by the combination of ss. 645(5) and 648(1) of the *Code*.

[14] The second sub-group of cases is one in which the courts have held that, although s. 648(1) applies to all applications heard even before a jury is chosen, it does not preclude the publication of *some* information about the application. This group is represented by the second decision of Trafford J. in the case discussed above. In *R. v. Brown*, 1998 CarswellOnt 477 (Ont. Ct. (Gen. Div.)) ("*Brown #2*"), Trafford J. reached a somewhat different conclusion than he had earlier. Rather than holding that s. 648(1) required a blanket ban on publication, he held that the ruling in *Dagenais* required that the word "information" in s. 648(1) be interpreted to permit the reporting of some information and ordered that a judicial summary of the facts surrounding a stay of proceedings against one of four accused could be published.

[15] The third group of cases fits somewhere in the middle on the continuum. In these cases, the courts have held that s. 648(1) operates to ban publication of information relating only to some *types* of pre-trial applications, namely those referred to in s. 645(5) ("any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn"). According to these cases, publication bans relating to pre-trial applications falling outside of the ambit of s. 645(5), including change of venue applications, must be determined having regard to the *Dagenais/Mentuck* test. The decision in *R. v. Sandham*, 2008 CarswellOnt 9319 (Ont. S.C.) stands as an example of this group of cases.

[16] I am not bound by the principles of *stare decisis* to follow any of these cases. However, I believe that the principles of statutory interpretation compel me to the result reached in *Cheung*.

ISSUES

[17] Three issues arise from these different lines of authority:

(1) Does section 648(1) ban publication of information regarding the change of venue application in this case?

(2) If s. 648(1) does not apply, should publication of any information be banned based on the *Dagenais/Mentuck* test?

(3) If so, what information should be banned?

[18] I have already addressed the second and third issue in the venue reasons. The present reasons relate only to the first.

ANALYSIS

Does s. 648(1) ban publication of information regarding the change of venue application?

[19] As I said in the venue reasons, I have concluded that s. 648 does not ban publication in this case. I have reached this conclusion for three reasons:

a. With great respect for those who have held otherwise, I am unable to agree that s. 648(1) applies to any application heard before a jury is chosen.

b. Even if I accept that s. 648(1) applies before a jury is chosen, I agree with those cases in which it has been held that it only applies to the those matters "ordinarily or necessarily" dealt with in the absence of the jury, as per s. 645(5).

c. Even if I accept that s. 648(1) applies to matters not ordinarily dealt with in the absence of the jury, all of the cases in which this has been held are based on the premise that the pre-trial application is being heard by the trial judge and I am not the trial judge in this case.

a. Section 648(1) does not apply to applications heard before a jury is chosen.

[20] I will begin this part of my reasons by setting out in a very general way the governing principles of statutory interpretation. I will then go on to explain why I believe that the courts in Ontario have been engaging in impermissible judicial legislative gap-filling, as opposed to permissible judicial statutory interpretation.

The Principles of Modern Statutory Interpretation

[21] Of course, determining the effect of s. 648(1) on pre-trial applications is an exercise in statutory interpretation. The "modern" principle of statutory interpretation was first described by Elmer A. Driedger in his seminal text, *The Construction of Statutes* (Toronto: Butterworths, 1974), at p. 67:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[22] This principle of statutory interpretation was adopted by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 and has been applied by that court many times since: see *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65, at paras. 117-118. The principle requires a court to consider not only the text of the statutory provisions in issue, but also the context in which they appear, as well as the scheme and the object of the legislation in question.

[23] The text of s. 648(1), taken alone, would lead to the conclusion that there is no statutory publication ban whatsoever applicable to pre-trial applications. Section 648(1) clearly applies only once a trial has begun, as no permission to separate is needed before a jury is chosen. However, as the Supreme Court has often said, the plain meaning of words alone is not determinative. Words that appear clear and unambiguous may, in fact, prove to be ambiguous once placed in their context: see *R. v. Alex*, 2017 SCC 37.

[24] In *Alex*, Moldaver J. referred to the oft-cited successor text to that of Drieger in describing the interpretive process, at para. 31:

> Ruth Sullivan makes a similar point in *Sullivan on the Construction of Statutes* (6th ed. 2014), at § 2.9:
>
> > At the end of the day . . . the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with accepted legal norms; it is reasonable and just.

[25] There is no dispute in the caselaw about the purpose of the provisions at issue. Section 648(1) was enacted by Parliament in 1972. Its purpose is clear: to ensure that the jury decides the case based only on the evidence heard in the courtroom. Section 645(5) was enacted years later, in 1985. Its purpose is also clear: to avoid the problem of juries being chosen and then sent home for weeks or even months while the trial judge deals with issues relating to the admissibility of evidence at trial: *R. v. Curtis*, 1991 CarswellOnt 738 (Ont. Ct. (Gen. Div.)), at. para. 4. The problem is that, when Parliament enacted s. 645(5), it created a gap in the legislation by failing to address the question of a publication ban where applications are heard before the jury is even chosen. My trouble with the Ontario decisions turns on the plausibility of the interpretation adopted in those cases.

Permissible Statutory Interpretation v. Impermissible Legislative Gap-filling

[26] As I stated above, in *Cheung*, the court commented that the Ontario cases strained the plain meaning of the opening words of s. 648(1): para. 65. In her text, at §7.22-7.26, Sullivan explains that straining the meaning of words is a well-established principle of statutory interpretation. However, as she also explains, the meaning adopted must still be one the words of the text can reasonably bear. I believe that the interpretation of s. 648(1) adopted by the Ontario cases strains the opening words of that section beyond what they can reasonably bear.

[27] The effect of the Ontario cases is to give *no* meaning to the words "[a]fter permission to separate is given to members of a jury under subsection 647(1)" in s. 648(1). As Sullivan points out, at §7.23, in *Paul v. R.*, [1982] 1 S.C.R. 621, the Supreme Court of Canada did something similar in interpreting s. 645(4)(c) of the *Code*, which provided that an accused could be given consecutive sentences where he or she was "convicted of more offences than one before the same court at the same sittings." In concluding that these words should be interpreted to mean "before the same judge", Lamer J. wrote:

> I am not unmindful of the stress I am suggesting we put on Parliament's words and the fact that little or no meaning is being given to the words "at the same sittings"; but I am encouraged in this endeavour when considering the absurd results we are led into by the alternative.

[28] Just as the result was in *Paul*, I believe that the results in the Ontario cases were driven by a concern about absurdity. Unlike the legislation at issue in *Paul*, however, the legislation at issue in this case *precludes* the meaning given to it in the Ontario cases and those that have followed them. Section 648(1) specifically limits the applicability of the section temporally. It is not possible to merely strain the meaning of those words to make the section applicable to a period of time before the jury is chosen. In order to interpret the section in the way it has been interpreted in the Ontario cases, these words must be ignored. I believe that crosses a line.

[29] In her text, Sullivan explains the distinction between permissible judicial statutory interpretation, on the one hand, and impermissible judicial legislative amendment, on the other. As she explains, while courts can cure legislative defects that result in over-inclusion

by "reading down" legislation, they cannot cure under-inclusion by "reading in", except in the context of a constitutional challenge (at §12.16):

> When language is over-inclusive, it applies not only to circumstances within the mischief the legislature sought to cure, but also to circumstances outside that mischief and therefore outside the intended scope of the legislation. Over-inclusion is cured by adding words of qualification which limit the legislation to applications that are appropriate given the legislature's intent. When legislation is under-inclusive, it fails to apply to circumstances which need to be covered or to address a matter that must be dealt with to achieve the intended goals. That is what is meant by a gap in the legislative scheme. Although under-inclusion could also be cured by the courts, they are generally unwilling to do so. As explained elsewhere, reading down to cure over-inclusion is considered interpretation, provided it can be justified, whereas reading in to cure under-inclusion is considered amendment and must be left to the legislature. This point is made in a telling way by J.A. Corry in his seminal article on the interpretation of statutes. He wrote:
>
> > [I]n many of these cases where the judges refuse to extend the operation of the legislation, the particular expressions used are not at all capable of the extended meaning which is sought and nothing short of the common-law technique of inducing a general principle from the particulars would suffice. Therefore, one who holds that words do impose limits cannot quarrel with many of these decisions.
>
> As Corry points out, the words used in legislative text impose an outer limit on meaning, and normally there is only limited room for expansion between the ordinary meaning of a provision and the outer limit fixed by its words. If a court wishes to go beyond that limit, it must add new words to the text to cover the overlooked circumstance, replace the specific words with more general words or *strike out words of qualification*. These are considered types of amendment rather than interpretation. [Footnotes omitted. Emphasis added.]

[30] The problem with s. 648(1) is that, once s. 645(5) was passed, it became under-inclusive, creating a legislative gap. The meaning given to s. 648(1) by the courts in Ontario essentially ignores or strikes out the opening words of the section in an effort to fill that gap. None of the cases that I have examined have explained how that can be done as a legitimate exercise of statutory interpretation. Indeed, many of them have not even acknowledged that it has occurred.

[31] For these reasons, and with great respect for my colleagues, I have concluded that the Ontario courts have engaged in impermissible legislative amendment, rather than

permissible statutory interpretation. In my view, s. 648(1) does not apply to applications heard under s. 645(5). As the court pointed out in *Cheung*, however, this does not leave a gap in protection for the accused given the availability of the common law publication ban envisioned by the *Dagenais/Mentuck* test.

b. If s. 648(1) applies to applications heard before a jury is empanelled, it does not apply to change of venue applications.

[32] In the majority of cases decided between 1995 and 2008 in which it had been held that s. 648(1) applied even before a jury was empanelled, it was also held that the section applied to *all* pre-trial applications. Where the court did permit publication, it was based on an interpretation of the word "information" in s. 648(1) that sought to balance the competing *Charter* rights of the accused and the press.

[33] In *R. v. Sandham*, 2008 CarswellOnt 9319 (Ont. S.C.), however, Heeney J. introduced a new line of reasoning. While he, too, proceeded on the assumption that s. 648(1) applied to pre-trial applications heard before a jury was empanelled, he also held that s. 648(1) did not apply to applications that are "not ordinarily or necessarily dealt with in the absence of the jury after it has been sworn", within the meaning of s. 645(5): para. 30. Heeney J. held that, where s. 648(1) applies, it is a blanket ban that permits no exceptions. However, he held that, although s. 648(1) did not apply to a change of venue application, it was still subject to a publication ban under the *Dagenais/Mentuck* test: para. 38.

[34] The *Sandham* approach was rejected in *R. v. Ahmad*, 2009 CarswellOnt 9301 (Ont. S.C.). In *Ahmad*, Dawson J. held that, once a determination is made that s. 648(1) applies to pre-trial applications heard under s. 645(5), the court cannot narrow the breadth of the publication ban in the absence of a constitutional challenge: para. 13. The same conclusion was reached later that year by Glass J. in *R. v. Badhwar*, 2009 CarswellOnt 9958 (Ont. S.C.).

[35] The constitutional challenge referred to in *Ahmad* was brought before Pardu J. (as she then was) in *R. v. Valentine*, 2009 CarswellOnt 5190 (Ont. S.C.) just a few months after *Ahmad* was decided. Pardu J. agreed with the Ontario cases extending the application of s. 648(1) to motions heard before a jury is selected: para. 6. However, she held that a blanket publication ban unjustifiably violated the right to freedom of the press under s. 2(b) of the *Charter* and, accordingly, she read into s. 648(1) an exception allowing a judge to grant leave to publish information which would not impair the right of an accused to a fair trial: para. 15. She acknowledged that this is what had been done by the courts in earlier cases like *Brown #2*. However, she agreed with the decision in *Ahmad* that the court had no jurisdiction to narrow the application of s. 648(1) once it was found to apply, absent a constitutional challenge. She wrote (at para. 16):

> The preferable course is to interpret a statute to make it comply with *Charter* values, but, in my view, it does too much violence to the unequivocal language of the statutory provision to interpret it in that fashion, and to that extent, I agree with the comments by Dawson J.

> in *R. v. Ahmad*, that such "reading in" could not take place, absent a constitutional challenge.

[36] Heeney J. had the chance to revisit his ruling in *Sandham* after the *Ahmad* and *Valentine* decisions were rendered. In *R. v. Rafferty*, 2010 ONSC 6980, 2010 CarswellOnt 18591, Heeney J. held that, while s. 648(1) does apply even to applications that would not ordinarily be heard in the absence of the jury, it will not apply to applications that *could* not have been brought after the jury was chosen, such as a change of venue application: para. 20.

[37] Heeney J. declined to follow *Valentine* because it had been based on a case that had held that the blanket ban on publication of information at a bail hearing under s. 517 was unconstitutional, which case had subsequently been overturned. However, he agreed with the approach taken by Pardu J. and held that a blanket ban "was a useful starting point", even in applications that could not ordinarily be heard during a jury trial. He reasoned that this would avoid the onerous consequences of requiring a party to bring an application for a *Dagenais/Mentuck* publication ban in every pre-trial application in which an accused's fair trial right might be jeopardized by publication of information about the application: paras. 33 and 38. He concluded (at para. 43):

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

[38] Heeney J.'s approach in *Rafferty* has found favour outside of Ontario: *R. v. Stobbe*, 2011 MBQB 293. However, at least one recent Ontario case has refused to follow it.

[39] In *CBC v. Millard and Smich*, 2015 ONSC 6583, Goodman J. rejected the approach taken in *Rafferty* and adopted, instead, the approach of Dawson J. in *Ahmad*. He held that s. 648(1) operates to ban publication of information regarding *all* pre-trial applications heard by the trial judge before the jury is chosen

[40] With respect, if s. 648(1) applies at all to applications heard before the jury is chosen, I prefer the approach in *Rafferty* for two reasons.

[41] The first is similar to my reason for concluding that s. 648(1) does not apply at all to applications heard before a jury is chosen. In my view, there is no ambiguity in s. 645(5) with respect to the types of applications to which it applies, namely "any matter ordinarily or necessarily" dealt with in the absence of the jury. I am unable to see how these words can bear an interpretation by virtue of which s. 648(1) imposes an automatic blanket ban on pre-trial applications that cannot possibly be heard after a jury is chosen. Such an interpretation does more than merely strain the ordinary and grammatical meaning of the words in question. It completely writes them out of the section.

[42] I agree with those judges who have recognized that there may be, and often is, information prejudicial to an accused's fair trial rights in pre-trial applications which are not ordinarily or necessarily heard after the jury has been chosen and I understand their concerns. However, those concerns can, as the court held in *Cheung*, be dealt with at common law by applying the *Dagenais/Mentuck* test. Indeed, this is what the Ontario courts have been doing when they make excepts to the statutory ban.

[43] My second reason for preferring the approach in *Rafferty* is based on the principle that, once a court finds the kind of "ambiguity" that the Ontario courts say is created by the interaction of s. 645(5) and s. 648(1), the court is bound to resolve that ambiguity in a way that best ensures *Charter* compliance: *R. v. Bernshaw*, [1995] 1 S.C.R. 254, at p. 275; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Eaton v. Brant County Board of Education* , [1997] 1 S.C.R. 241, at para. 3. In *Slaight*, Lamer J. wrote, at p. 1078:

> Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the Charter, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the Charter and hence of no force or effect.

[44] In my respectful view, the courts in *Ahmad* and *Millard* erred by failing to resolve the ambiguity they say is created by the interaction of ss. 645(5) and 648(1) in a way that best reflects the balance that must be struck between the competing *Charter* rights of the accused and the press. As the court in *Valentine* recognized, s. 648(1) violates the right to freedom of the press contained in s. 2(b) of the *Charter*. In my respectful view, any ambiguity arising from the interaction between s. 648(1) and s. 645(5) should be resolved by restricting the automatic blanket ban on publication to only those applications contemplated by the plain wording of s. 645(5), leaving other pre-applications to be dealt with under the *Dagenais/Mentuck* test.

c. If s. 648(1) applies to change of venue applications, it only applies where they are heard by the trial judge.

[45] I turn now to my third reason for concluding that s. 648(1) does not apply to this change of venue application. This one is also based on the language of s. 645(5).

[46] Section 645(5) is a textbook example of the importance of good statutory draftsmanship, in general, and the use of proper punctuation, in particular. For ease of reference, I will set the text of the section out again:

> 645 (5) In any case to be tried with a jury, the judge before whom an accused is or is to be tried has jurisdiction, before any juror on a panel of jurors is called pursuant to subsection 631(3) or (3.1) and in the absence of any such juror, to deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn.

[47] The phrase "is or is to be tried" is capable of two interpretations, each of which becomes obvious if one adds commas in different places within the phrase.

[48] The first possible interpretation becomes apparent when one places a comma after the first "is" and a second comma after the word "tried":

> ... before whom an accused is, or is to be tried, ...

[49] When interpreted this way, the section empowers any judge to deal with the matters referred to therein. Prior to August 15, 2011, this interpretation would have been at odds with prevailing legal norms. Until then, it was generally accepted that only the trial judge could hear certain applications, such as those related to the admissibility of evidence at trial.

[50] However, on August 15, 2011, s. 551.3(1)(g) of the *Code* came into effect, permitting the appointment of a case management judge. As the section now stands, it permits a case management judge to hear certain applications in advance of trial that would previously only have been dealt with by the trial judge, including applications relating to the admissibility of evidence. Thus, it can now be argued that, if s. 648(1) applies to applications heard before the jury is chosen, the intent of Parliament would be defeated if it applies only to those applications heard by the trial judge: *Stobbe*, at para. 41. As I will point out, the fact that the applications were being heard by the trial judge was the premise upon which all of the Ontario cases were based. I see this change in legislation as another reason not to interpret s. 648(1) as applying at all to pre-trial applications and to rely, instead, on the *Dagenais/Mentuck* test to determine what should be published.

[51] The second possible interpretation of s. 645(5) becomes apparent when one places the second comma *before* the word "tried", rather than after it:

> ... before whom an accused is, or is to be, tried ...

[52] When interpreted this way, only the trial judge is empowered to hear the applications referred to in the section. As the media parties submit, by interpreting it this way, s. 645(5) merely expands the time at which the trial judge can hear such applications. This is the interpretation given to the section by all of the Ontario cases to which I have referred, although it appears to have been arrived at by adding an entire word, rather than by adding punctuation. In *Curtis*, cited above, Ewaschuk J. wrote (at para. 8):

> It is patent from a reading of the plain words of the enactment that the judge before whom the accused is [tried] or is to be tried has jurisdiction pursuant to s. 645(5) to rule on the admissibility of statements...(The words "is to be tried" are used simply to indicate that the accused has yet to be placed in charge of the jury who will be the judges of the facts whereas the judge is the judge of the law and may make rulings prior to the jury being sworn.) [All parentheses appear in the original.]

[53] The earliest case I can find in which the interaction of ss. 645(5) and 648(1) was considered is *R. v. Bernardo*, 1995 CarswellOnt 7200 (Ont. Ct. (Gen. Div.)). In *Bernardo*, LeSage A.C.J. cited the passage above from *Curtis* in support of his conclusion that s. 645(5) "deems the jury to be empanelled for the purpose of 'in-trial' motions of an evidentiary nature": para. 41. It appears that every case dealing with this issue since then has been decided on the premise that the pre-trial application is being heard by the trial judge. In every one of the cases I have cited, the judge making the decision was, in fact, the trial judge: *Bernardo*, at para. 10; *Brown #1*, at para. 1; *Brown #2*, at para. 2; *Malik*, at para. 12; *Sandham*, at para. 30; *Ahmad*, at para. 13; *Badhwar*, at para. 15; *Rafferty*, at para. 9; *Millard*, at para. 64.

[54] I am not the trial judge in this case. I heard the application to change the venue of the trial in my role as Regional Senior Judge because of the defence request to move the trial out of the Northeast Region. By analogy to the practice followed in civil cases, I felt it would be best to have the application proceed before me. Thus, even if I were able to agree with those cases in which it has been held that s. 648(1) applies to ban publication of information regarding change of venue applications made before the jury is chosen, those cases would not apply here because I am not the trial judge. For that reason, I imposed a publication ban using the court's inherent power to control its own process and the *Dagenais/Mentuck* test to strike the appropriate balance between Mr. Wright's *Charter* rights and those of the press.

CONCLUSION

[55] I am unable to agree with those cases that hold that s. 648(1) of the *Code* applies to pre-trial applications heard before a jury is chosen under s. 645(5). In my respectful opinion, it is not possible to interpret s.648(1) that way without crossing the line from permissible judicial statutory interpretation to impermissible judicial legislative gap-filling.

[56] I acknowledge that the cases in which s. 648(1) has been interpreted as applying to pre-trial applications have been based on Parliament's intention to ban publication of information prejudicial to an accused's right to a fair trial in other contexts. However, I believe that Parliament's intention must be fulfilled by applying the common law test set out in *Dagenais/Mentuck*, rather than by writing words right out of the statutory provision.

[57] If I am wrong in my conclusion about the applicability of s. 648(1), then I would also respectfully disagree with those who have held it applies to all pre-trial applications heard by the trial judge. In my respectful view, such an interpretation fails to give effect to all of the words in s. 645(5) and, like the interpretation given by some courts to s. 648(1), impermissibly expands the automatic ban on publication in a way that fails to strike the right *Charter* balance between the accused's right to a fair trial and freedom of the press.

[58] Instead, if s. 648(1) does apply, I would respectfully follow the decision of Heeney J. in *Sandham* and limit the application of that section to applications "ordinarily or necessarily heard in the absence of the jury".

[59] Finally, even if s. 648(1) applies to ban information about all applications heard before the jury is chosen, all of the cases to which I have referred were based on the premise that the trial had begun before the trial judge at the time the applications were heard. I am not the trial judge and the trial in this case has not yet begun. Therefore, s. 648(1) does not apply even based on these cases. Instead, the decision as to what information may be published must be based on the court's inherent power to control its own process using the *Dagenais/Mentuck* test.

M.G. Ellies R.S.J.

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ONTARIO

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

– and –

ROBERT STEVEN WRIGHT

REASONS FOR DECISION

M.G. ELLIES R.S.J.

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