CITATION: Rowat v. the Crown, the CBC et al 2021 ONSC 2215
COURT FILE NO.: -DV6659
DATE: 2021/03/23

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Ronald Rowat		
	)	Lawrence Greenspon, for the Applicant
Applicant	)	
	)	
– and –	)	
	)	
	)	
	)	
	)	
Her Majesty the Queen, the Canadian Broadcasting Corporation, The Ottawa Citizen, The Ottawa Sun	)	Moiz Karimjee, for the respondent Crown Richard G. Deardon, and Hunter Fox For the CBC, The Ottawa Citizen and The Ottawa Sun.
Respondents	)	
	)	
	)	
	)	
	)	**HEARD:** January 31, February 1, 10 and 24 2021

REASONS FOR DECISION

MARANGER J.

Overview:

[1] This was an Application by Mr. Ronald Rowat to ban the publication of his name and any information that can identify him relating to multiple charges of criminal harassment he faces contrary to s. 264 (1) of the *Criminal Code of Canada*.

[2] The applicant is also known as J.J. Clarke, a very affable media personality who has been an Ottawa television broadcaster and local household name for several decades.

[3] Mr. Rowat has lent his time and name to numerous charities and performed good works for his community his entire adult life. He has without doubt developed a well-earned reputation as a humanitarian and a community leader.

[4] The applicant is now retired from broadcasting. He is 66 years of age and in poor health.

[5] He swore an affidavit dated February 9, 2021 attesting to the following:

a) I have been charged with seven counts of criminal harassment and I believe that if my name were to be published /broadcasted in connection with these charges, I would suffer permanent irreparable damage to my reputation as a community leader and humanitarian.

b) I believe that publication of my name in connection with these charges would undermine my legal right to be presumed innocent until proven guilty.

[6] Mr. Rowat was cross-examined on his affidavit by counsel for the media and agreed with the following propositions:

a) That media reports could include statements from himself or his lawyer stating that he is innocent and that the allegations will be strongly defended in the courts.

b) That he will be tried by an unbiased judge who will decide the case based on the evidence presented in court and not based upon media reports.

c) That he will be presumed innocent until the allegations against him are proven beyond a reasonable doubt.

d) That in his career as a broadcaster he has reported the names of well-known persons charged with criminal offences. That it was nothing new.

Chronology of court attendances and applicable court orders:

[7] The following is a chronology of the court attendances, and existing orders applicable to this matter:

a) On January 29, 2021 a section 517 publication ban was requested by the Applicant and ordered in the Ontario Court of Justice, s. 517 of the Criminal Code provides for a mandatory publication ban in respect of bail hearings. It states that a justice "shall" make the order on application by the accused, and that "evidence taken, the information given or the representations made and the reasons if any by the justice shall not be published…"

b) On Sunday, January 31, 2021 the Court granted an *ex-parte* interim order banning the publication of Mr. Rowat's name in connection with the criminal harassment allegations. This was at the behest of his counsel Mr. Greenspon.

c) The order was in place until February 1, 2021 at 2 PM, to allow counsel representing the Crown, and counsel representing the media to address the matter. At that time the court and counsel set a date for February 10, 2021 for a one-day hearing to argue the application. The interim publication ban order remained in effect.

d) The hearing was not completed on February 10, 2021 and was adjourned to February 24, 2021 for continuation. The interim order of January 31, 2021 remained in effect. On that date the Crown sought a publication ban pursuant to section 486.5 (1) of the *Criminal Code* and an order was granted directing that any information that could identify certain victims and witnesses in the proceeding would not be published in any document or broadcasted or transmitted in any way.

e) The application was taken under reserve. The ban order was to remain in effect until the matter was decided.

[8] The *Criminal Code of Canada* does not provide for a specific ban on the publication of the identity of an accused person. In certain circumstances publication bans ordered pursuant to sections 517, 486.4 or 486.5 by reason of who the complainant is, will necessitate banning the publication of the name of the accused. This was not one of those instances.

Arguments advanced on behalf of the Applicant:

[9] Mr. Greenspon's arguments in support of the relief sought in this application could be framed as requiring the court to accept either one of two propositions:

1) That the publication of Mr. Rowat's name in connection with these criminal charges would be a violation of his section 7 and section 11 (d) rights as guaranteed by the *Canadian Charter of Rights and Freedoms*. The remedy sought pursuant to section 24 (1) of the *Charter* is a ban on the publication of his name until the completion of the criminal trial.

2) That the publication ban in the circumstances of this case is also justified by application of the common law *Mentuck* test as it should be interpreted today.

The s.7 and s.11(d) Charter violation argument:

[10] Section 7 of the *Charter* provides: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[11] The position advocated on behalf of the applicant and the breach of his s. 7 rights can be summarized as follows:

a) S. 7 protects the right to privacy lifting the ban would violate that right.

b) In the decisions of *R v. DB* [2008] SCJ No. 25 and in *R v. Dyment* [1988] SCJ No. 82 the Supreme Court of Canada found that a person's right to privacy can be considered a part of one's s. 7 right to liberty and security.

c) The current level of information sharing present in our society warrants considering increased protection of an accused's privacy.

[12] Section 11(d) of the *Charter* provides: Any person charged with an offence has the right: to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

[13] The propositions put forward on behalf of the applicant regarding the breach of his rights pursuant to s.11(d) can be summarized as follows:

a) That the rationale of the Supreme Court of Canada in *Toronto Star Newspapers Limited v. Canada*, 2010 SCC 21 in upholding the constitutionality of s. 517 which mandates a ban on the publication of evidence taken at a bail hearing can be applied to the proposition that publishing an accused person's name prior to trial is a violation of section 11(d); including the recognition that the media telling a one-sided story is problematic and prejudicial.

b) That the presumption of innocence is axiomatically compromised by publishing a person's name in advance of the full adjudication of his guilt or innocence.

c) That Mr. Rowat will be the subject of a trial by media if his name is published at this stage in the proceedings because in the public mind he will be convicted, before a judicial pretrial even takes place. This is contrary to the administration of justice and the presumption of innocence.

[14] The remedy sought under s. 24(1) is that the ban currently in place remain so until the completion of Mr. Rowat's trial.

Common Law/Mentuck argument.

[15] The applicant also relies upon the common law – and the application of the test set out in *R v Mentuck* 2001 SCC 76 to justify the publication ban in this case, the decision reformulated the test set out in *Dagenais v. CBC*, [1994] 3 SCR 385. Paragraphs 32/33 of *Mentuck* read as follows:

> 32 The *Dagenais* test requires findings of (a) necessity of the publication ban, and (b) proportionality between the ban's salutary and deleterious effects. However, while *Dagenais* framed the test in the specific terms of the case, it is now necessary to frame it more broadly so as to allow explicitly for consideration of the interests involved in the instant case and other cases where such orders are sought in order to protect other crucial aspects of the administration of justice. In assessing whether to issue common law publication bans, therefore, in my opinion, a better way of stating the proper analytical approach for cases of the kind involved herein would be:
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> A publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.
>
> 33 This reformulation of the *Dagenais* test aims not to disturb the essence of that test, but to restate it in terms that more plainly recognize, as Lamer C.J. himself did in that case, that publication bans may invoke more interests and rights than the rights to trial fairness and freedom of expression. This version encompasses the analysis conducted in *Dagenais*, and Lamer C.J.'s discussion of the relative merits of publication bans remains relevant. Indeed, in those common law publication ban cases where only freedom of expression and trial fairness issues are raised, the test should be applied precisely as it was in *Dagenais*. For cases where concerns about the proper administration of justice other than those two *Charter* rights are raised, the present, broader approach, will allow these concerns to be weighed as well. There may also be other cases which raise interests other than the administration of justice, for which a similar approach would be used, depending of course on the particular danger at issue and rights and interests at stake.

[16] The position advocated was that the ban should continue in effect to the completion of the trial because it is it is in the interests of the proper administration of justice and that the accused's right to a fair trial and the continuation of the publication ban outweigh the interests of the parties and the public to the right to free expression.

Analysis/conclusion:

[17] While Mr. Rowat presents as a sympathetic applicant, and Mr. Greenspon a zealous, passionate, convincing advocate for his client. I would nonetheless deny the application, based upon my interpretation of the state of the law and acceptance of many of the arguments presented by counsel for the media and Crown counsel.

[18] My analysis and conclusions in this regard is as follows:

a) S. 32 of the *Canadian Charter of Rights and Freedoms* stipulates: This Charter applies; to the Parliament and the government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and the Northwest Territories; and to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

b) It is arguable that the charter application as framed cannot be advanced against the media. There is no specific law or government action being performed by having the media publish an accused person's name. The media is not the government nor a branch thereof, it is a private entity.

c) In any event, failing the s. 32 argument, as regards the proposition that publishing an accused person's name constitutes a breach of s. 7 of the *Charter*. *R v. Dalzell*

2 OR (3d) 498 in my estimation is still the state of the law. In that decision the Ontario Court of Appeal rejected the notion that an accused can assert a s.7 *Charter* right based upon a privacy interest to prevent the publication of his or her name by the media in the context of criminal proceedings.

d) In *Dalzell* Justice Finlayson indicated the following:

> In my opinion, it is a contradiction in terms to assert that a person can suffer a deprivation of his Charter rights when he is undergoing a trial which is conducted in accordance with the principles of fundamental justice. The publicity attendant upon a public trial must in almost every case cause prejudice to the accused, but the law recognizes that prejudice by providing safeguards before the institution of criminal proceedings. Such proceedings can only be commenced on a sworn information setting forth the basis for the affiant's belief that there are reasonable and probable grounds for believing that a specific criminal offence has been committed.
>
> The position of the respondent must come down to an assertion that a public trial is a right of the accused person and therefore, being for his protection, it is a right that he can waive. The right to a public trial is constitutionally enshrined in s. 11(d) of the Charter which provides that:
>
> Any person charged with an offence has the right ... to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.
>
> In my opinion 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. Section 7 embraces a broader protection than simply providing for the criminal trials specifically dealt with in ss. 10 and 11 of the Charter, and yet, it is s. 7 and not s. 11(d) that the respondent invokes in seeking a waiver of his s. 11(d) rights. Once he does that, he engages larger interests than those of an accused alone.
>
> The proposition that a particular accused can waive any portion of his right to a public hearing is antithetical to the right of every person to be satisfied that no person has received special treatment, favourable or unfavourable, and that the institutions are in place to ensure the principles of fundamental justice to us all.

e) The words of Justice Finlayson are as valid today as they were 30 years ago.

f) The breach of 11(d) "presumption of innocence" argument as a means of ordering a publication ban for an accused until the end of trial was made some 38 years ago by the applicants counsel, Mr. Greenspon in *R. v. Robinson* 41 O.R. (2d) 764.

g) Justice Boland in dismissing the application said the following:

> "I am satisfied that the publication of the name of the applicant, who has been charged with murder, would not infringe or deny his right to be presumed innocent and his right to a fair trial.
>
> The presumption of innocence referred to in s. 11(d) of the Charter is a presumption in favour of an accused which operates at trial and gives rise to the burden of proof beyond a reasonable doubt which rests upon the Crown throughout the trial. That presumption does not create a right in an accused person to undermine the statutory power to secure fingerprint identification or affect the conduct of a bail hearing or remain anonymous until after trial. Such a right would have to be based on statutory or common law.
>
> The right to a fair trial is fundamental to our system of justice. There is nothing new about this concept. Moreover there are numerous procedural safeguards to ensure the accused a fair trial in the face of pre-trial publicity such as the juror's oath, the trial judge's instructions to the jury with respect to the media, the rights of the accused in jury selection, the screening of jurors by the trial judge, the criminal standard of proof and possibly a change of venue.
>
> Furthermore, the essential quality of the criminal process in a democracy is the absence of secrecy. From the information to the acquittal or conviction, our judicial process is characterized by public access. The public has the right to be informed and the media has a duty to advise the public what is happening in our courts. Openness prevents abuse of the judicial system and fosters public confidence in the fairness and integrity of our system of justice. The press is a positive influence in assuring fair trial."

h) The words of Justice Boland have stood the test of time, they are as valid today as they were almost 4 decades ago.

i) In fact, the applicant during his testimony recognized and indicated without hesitation that he will be presumed innocent up to and only when the allegations he faces are proven beyond a reasonable doubt in a court of law.

j) Mr. Rowat with obvious candour said of "course" when asked if he agreed that his case will be heard by an impartial Judge who will decide the matter based upon evidence and not media reports. The presumption of innocence in the Canadian Criminal Justice system is an immutable concept it remains so regardless of whether an accused's name and the charges he or she faces are being reported.

k) The test for ordering a publication ban at common law is set out in the Supreme Court of Canada decision of *R v. Mentuck*, 2001 SCC 76: the fundamentals of the test can be summarized as follows:

- a publication ban should only be ordered when: a) it is necessary in order to prevent a serious risk to the administration of justice…. b) the salutary effects of the publication ban outweigh the deleterious effects.

- The necessity component of the test and the risk to the proper administration of justice must be well grounded in the evidence. The court must have a convincing evidentiary basis before issuing a ban.

- The burden of establishing the test is on the applicant.

l) In *MEH v. Williams* 2012 ONCA 35 Justice Doherty held as follows:

> [25] Mentuck describes non-publication and sealing orders as potentially justifiable if "necessary in order to prevent a serious risk to the proper administration of justice". A serious risk to public interests other than those that fall under the broad rubric of the "proper administration of justice" can also meet the necessity requirement under the first branch of the Dagenais/Mentuck test: Sierra Club of Canada, at paras. 46-51, 55. The interest jeopardized must, however, have a public component. Purely personal interests cannot justify non-publication or sealing orders. Thus, the personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test:

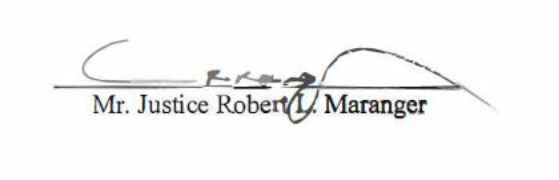
m) Mr. Rowat's desire for a publication ban is based almost entirely out of concerns over the impact publishing his identity regarding criminal charges could have on

his good name. There is no public interest component. The necessity component cannot be made out in his case.

n) Furthermore, in that I do not accept the proposition that the publication of the applicant's name will compromise his right to be presumed innocent, I also find that doing so would not in any material way negatively impact the proper administration of justice.

o) Finally, to grant a publication ban in this case, based upon the arguments made, would mean that virtually every accused person could justify preventing the media from reporting their identity in criminal proceedings. This would be wrong in my view because the hallmark of a free and democratic society is a criminal justice system that is open, visible, and subject to being reported on and scrutinized by, a free press.

[19] Therefore, the publication ban put in place pending this decision is hereby rescinded.



March 23, 2021

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SUPERIOR COURT OF JUSTICE

B E T W E E N:

RONALD ROWAT

Applicant

– and –

HER MAJESTY THE QUEEN et al

Respondents

REASONS FOR DECISION

Maranger J.

Released: March 23, 2021