

CANADIAN MEDIA LAW UPDATE

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FREEDOM OF EXPRESSION

Introduction

[327] As well as concerns about publication bans, the anaemic guarantee of freedom of expression contained in s 2(b) of the *Canadian Charter of Rights and Freedoms*² continues to frustrate the news media. Unlike the First Amendment to the *Constitution of the United States*, s 2(b) has no direct application to civil defamation law which is the basis of most litigation against publishers and broadcasters. Although the *Charter* does apply to ‘government action,’ Canadian courts seem less interested in expanding freedom of expression than in shaping new protection for individual privacy,³ which is not expressly protected by the Charter.

Statutory publication bans — enforcement

In May 2001 the House of Commons passed the *Youth Criminal Justice Act*,⁴ which amends and repeals the *Young Offenders Act*, including its publication ban provisions. This new statute will not become law until it is passed by the Senate and receives Royal Assent.

The *Young Offenders Act* prohibited publication ‘by any means of a any report (a) of an offence committed or alleged to have been committed by a young person ... in which the name of the young person, a child or a young person who is a victim of the offence, or a child or a young person who appeared as a witness in connection with

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² Part I of the *Constitution Act 1982*, being Sch B to the *Canada Act 1982* (UK) c 11.

³ Eg *Canadian Broadcasting Corp v New Brunswick (Attorney General) (Re R v Carson)* [1996] 3 SCR 480, para 34. La Forest J, speaking for a unanimous court, held that s 486(1) of the *Criminal Code*, which permits a criminal court to exclude the media and the public from the courtroom, was a justifiable limit on freedom of expression because it advanced ‘core values including the protection of ... privacy interests’. In *R v Sharpe* (2001) SCC 2, speaking for the majority, Chief Justice McLachlin stated that ‘the freedoms of conscience, thought and belief are particularly engaged in the private setting’ and struck down a portion of the *Criminal Code* prohibition against possession of child pornography [s 163.1(4)] on the ground, *inter alia*, that ‘at the margins of its application, prohibits deeply private forms of expression’.

⁴ Bill C-7.

[328] the offence, or in which any information in serving to identify such young person or child, is disclosed' unless an order had been made transferring the young person to adult court.⁵

Under the current wording of the *Youth Criminal Justice Act*, there will be an automatic ban on publication of any identifying information of accused youths up until the time of sentencing, even where they are being tried in adult court.⁶ Where a youth receives an adult sentence, his or her identity is automatically reportable.⁷ If a youth receives a youth sentence for or where the youth receives a youth sentence for first or second degree murder, attempted murder, manslaughter or aggravated sexual assault, the Court may on application of the young person or the Attorney General ban the publication of information that would identify the young person if the court considers it appropriate in the circumstances, taking into account the importance of rehabilitating the young person and the public interest.⁸ The onus is on the news media to make an application to court for an order permitting the publication of names of 14 to 17 year olds who receive youth sentences for murder, attempted murder, manslaughter, aggravated assault or repeat serious violent offences.

A provision in the *Youth Criminal Justice Act* which benefits the media permits deceased youth victims to be identified if the parents consent.⁹ Further, youth witnesses and victims can consent to being identified if they choose, but parental consent or a court order is also required.¹⁰ A young offender may only consent to publication of his or her identity if the Court makes an order to that effect upon being satisfied that publication would not be contrary to the young person's best interests or

⁵ *Young Offenders Act* s 38(1); see *R v CJH* no YOA2593, Penticton Registry, where the BC Supreme Court considered the effect of a 1995 amendment which added a new subsection (1.01) which provided that charges of murder, attempted murder, manslaughter, and aggravated sexual assault brought against a 16 or 17 year old accused 'shall be proceeded with in ordinary court in accordance with the law ordinarily applicable to an adult charged with an offence' unless the youth court makes an 'order' that the accused 'should be proceeded against in youth court': s 16(1.01). The Court concluded that where the accused youth has filed an application to have the charge tried in youth court, section 38(1) prohibits publication of his or her identity unless and until the youth court dismisses that application.

⁶ Section 110(1), (2).

⁷ Section 2(1) 'presumptive offence'; s 110(2)(a), (b).

⁸ Section 110(b), s 75.

⁹ Section 111(2)(b).

¹⁰ Section 111(2), (3).

the public interest.¹¹ However, young offenders, as well as young victims and witnesses may identify themselves as such once they are 18 years of age without first seeking court permission, provided they are not in custody at the time of publication.¹²

None of the provisions of the *Youth Criminal Justice Act* permit the news media to identify a young offender, victim or witness without their consent. As was the case under the former *Young Offenders Act*, only a police officer is permitted to seek a Court order permitting publication of the identity of a young offender before conviction and then only where a dangerous young offender or accused is avoiding apprehension.¹³

Privacy — a looming threat to freedom of expression?

A ground breaking decision of the Manitoba Court of Appeal in April, 2001, may chill future communications by government spokespersons to the media where disclosure is not specifically authorized by legislation, regulations, or lawful codes of practice.

[329] In *Uni-Jet Industrial Pipe Ltd v Canada (Attorney General)*,¹⁴ the Manitoba Court of Appeal ruled that a designated media relations officer with the Royal Canadian Mounted Police was liable to pay civil damages totalling \$65,000 to an individual and his company for tipping off three of his media contacts that search warrants were about to be executed by the Commercial Crimes Section on the premises of the individual and corporate plaintiffs. The tip resulted in extensive reporting of the event including newspaper stories, photographs and television coverage showing police officers carrying boxes out of the premises on 30 May 1997. It was not until mid-February 1998 that the plaintiffs or the public were advised that no charges would be laid against the plaintiffs.

The plaintiffs in *Uni-Jet* pleaded neither defamation nor a breach of the Manitoba

¹¹ Section 110(6).

¹² Section 110(3).

¹³ Section 110(4).

¹⁴ 2001 MBCA 40.

Privacy Act,¹⁵ presenting their case instead on the basis of negligence or abuse of public office. It was not disputed that in tipping off the media, the RCMP media relations officer had failed to comply with guidelines set forth in the RCMP Operational manual with respect to 'Media/RCMP Relations'.¹⁶ The Court of Appeal rejected negligence as a basis of liability, stating that liability was grounded on abuse of public office and that damages should be assessed on the basis it was an 'intentional' tort.¹⁷ Ruling that the tort does not require an actual intention to harm a particular person, merely knowledge by the defendant that he or she did not possess the power which they purported to exercise, the Court of Appeal increased the \$20,001 damage award made at trial by awarding the corporate plaintiff general damages for injury to goodwill and by awarding punitive damages to both plaintiffs.¹⁸ With respect to punitive damages, the court held that although the RCMP were not vindictive or malicious, a police officer was to be judged by a stricter standard than those who command less power and less respect.¹⁹

In Quebec, several recent decisions have reinforced the message that invasion of privacy can result in significant liability for the news media. In January 2001, the Quebec Court of Appeal sustained a lower court award of \$24,900 to a woman who had accompanied a man to his criminal court appearance on charges relating to the alleged posting of lewd pictures of himself on the internet. The defendant newspaper, which had photographed the couple when they emerged from the courthouse, was held liable for invasion of privacy for publishing her picture without her consent.²⁰

¹⁵ CCSM, c P125.

¹⁶ The manual provided, inter alia, E.1.b Do not reveal the names of suspects until charges have been laid. F.4. Ensure the information released to the media does not: F.4.c. result in injury, injustice or embarrassment to the innocent or accused. The trial judge made no finding concerning the tort of abuse of public office and made no finding of acts of negligence except to say at para 19 that the media relations officer had 'breached the said provisions of the Operational Manual and, as a result, caused injury, injustice, and embarrassment to Baziuk and injustice to Uni-et ... My finding as a fact that officer Jennings did not abide by the provisions of the policy manual is the basis for attributing negligence to him.'

¹⁷ Per Kroft JA, speaking for the Court, at para 16.

¹⁸ The appellate court increased the damage award to \$65,000, consisting of \$45,000 general damages and \$20,000 punitive damages; 2001 MBCA 40.

¹⁹ Per Kroft JA at para 94: 'when an officer of the RCMP acts contrary to his statutory authority to advance his own self-interest knowing that damage might well result, this court is bound to express its disapproval publicly and forcefully.'

²⁰ *Thomas v Les Publications Photo-Police*, Quebec Court of Appeal, 500-09-005371-976, 25 January 2001.

[330] In March 2001, the Quebec Superior Court held that a radio show host, who called a competitor who was also broadcasting live and represented himself as an ordinary listener, invaded the competitor's privacy by mocking his rival and broadcasting the exchange live over his own radio station's airways. The competitor was awarded general damages of \$15,000 because he had not consented to have the interview broadcast by the defendant.²¹

Intellectual property — internet rights

Unlike free speech rights, traditional intellectual property rights of the media enjoy reasonable protection. In March 2001, the Saskatchewan Court of Queen's Bench awarded \$5,000 general damages and a permanent injunction to the *StarPhoenix*, a daily newspaper, against defendant who had created an internet website with the domain name and address saskatoonstarphoenix.com, which was designed to look exactly like the main page of the plaintiff's website www.thestarphoenix.com which carried the current days lead news stories from the Starphoenix, along with advertising paid for by the newspaper's customers.²² The defendant's website, however, substituted his own advertising for the plaintiff's top banner advertising and contained advertisement's for the defendant's web hosting services. The defendant's website also contained metatags that contained repeated variations of 'StarPhoenix', 'Saskatoon StarPhoenix', 'newspaper', and other combinations of those words, designed to attract members of the public who were looking for the plaintiff's website. When contacted by the plaintiff's lawyer, the defendant had offered to sell the plaintiff certain domain names he had registered, including 'thestarphoenix.com' and 'starphoenix.com'.

The Court held that the plaintiff had succeeded in establishing the tort of passing off, by proving the existence of goodwill, the deception of the public due to a misrepresentation, and actual or potential damage to the plaintiff. Although the plaintiff could not point to any direct pecuniary loss as a result of the defendant's activities in the form of cancelled subscriptions or lost advertising revenue, it did claim actual and potential loss of reputation for being unable to control its own

²¹ 176100 *Canada Inc v Réseau des Appalaches FM Ltée* [2001] JQ no 1171 (Que SC).

²² *Saskatoon Star Phoenix Group Inc v Noton* 2001 SKQB 153.

website and advertising, and successfully relied on the presumption that when passing off has been established, damage will be presumed.²³

In May 2001, the Ontario Superior Court began hearing a class action by freelance journalists alleging a national daily newspaper breached copyright in works originally written and published in hard copy by making them available, for a fee, in an electronic database called InfoGlobe.²⁴ There was no express pre-publication agreement for this use between the freelancers and the newspaper. The newspaper will argue, among other things, that acceptance of the freelance materials gave it first publication rights in a hard copy collective work (newspaper or magazine), thereby creating a 'collective work' copyright interest permitting dissemination in any form including electronic. Whatever the Superior Court's decision, it is likely to be appealed.

Search warrants against the media

If a Canadian police officer wishes to seize news media footage or stills of a violent demonstration, the courts will almost certainly permit them to do so, as long as certain formalities are satisfied. The guarantee of freedom of expression in s 2(b) of the Charter has not appreciably reduced police searches of newsrooms; it has merely added to police paperwork.

A search warrant against the media must satisfy two requirements: (1) those prescribed in s 487(1(b) of the Criminal Code, RSC 1985, c C-46 — that is, the warrant and affidavit in support must identify the [331] items to be seized and their relationship to specified offences; the media should know in a reasonable manner the circumstances of the crime underlying the search and be able to identify in a similarly reasonable manner the things to be seized; and (2) the special requirements prescribed for media search warrants by the Supreme Court of Canada in *CBC v Lessard*²⁵ and *CBC v New Brunswick (Attorney General)*.²⁶ There are six special requirements.²⁷

²³ *Draper v Trist et al* [1939] 3 All ER 513 followed.

²⁴ *Roberston v The Thomson Corporation* [1999] 43 OR (3d) 161 (Gen Div), certifying the class action.

²⁵ (1991) 67 CCC (3d) 517.

²⁶ (1992) 85 DLR (4th) 57.

In *R v Canadian Broadcasting Corporation*,²⁸ the Ontario Court of Appeal in March 2001 unanimously dismissed an appeal by the CBC and a number of other media organizations from a lower court decision upholding the validity of search warrants obtained by the Toronto Police Service in the course of their investigation of a demonstration organized by the Ontario Coalition Against Poverty which took place on the grounds of the Ontario Legislature in June 2000. The media appellants failed to persuade the Court of Appeal that a model of *ex parte* authorization, followed by a right of judicial review, violates the guarantee of freedom of expression contained in s 2(b) of the Canadian Charter of Rights and Freedoms. The media argued that in addition to the special criteria identified in *CBC v New Brunswick (Attorney General)*, a justice should afford the media notice and right to make submissions before issuing a search warrant, where the media is not the target of the search but an innocent third party; the destruction, alteration, or concealment of the material sought is not a realistic possibility; there is not urgency to the application; and the media has valid concerns bearing directly on when the warrant should issue and if [332] so, on what terms and conditions.

In the case before the Court, the search warrants were sought on the basis of police belief that the media cameras had captured images of individuals involved in criminal

²⁷ (1) Even if the conditions in s 487(1)(b) of the Criminal Code have been met, the justice of the peace should consider all of the circumstances in determining whether to exercise the discretion to issue a warrant. (2) The justice of the peace should ensure that a balance is struck between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news gathering and news dissemination. It must be borne in mind that the media play a vital role in the functioning of a democratic society. Generally speaking, the news media will not be implicated in the crime under investigation. They are truly an innocent third party. This is particularly important factor to be considered in attempting to strike an appropriate balance, including the consideration of imposing conditions on that warrant. (3) The affidavit in support of the application must contain sufficient detail to enable the justice of the peace to properly exercise his or her discretion as to the issuance of a search warrant. (4) Although it is not a constitutional requirement, the affidavit material should ordinarily disclose whether there are alternative sources from which the information may reasonably be obtained and, if there is an alternative source, that it has been investigated and all reasonable efforts to obtain the information have been exhausted. (5) If the information sought has been disseminated by the media in whole or in part, this will be a factor which will favour the issuing of the search warrant. (6) If a justice of the peace determines that a warrant should be issued for the search of media premises, consideration should then be given to the imposition of some conditions on its implementation, so that the media organization will not be unduly impeded in the publishing or dissemination of the news. If, subsequent to the issuing of a search warrant, it comes to light that the authorities failed to disclose pertinent information that could well have affected the decision to issue the warrant, this may result in a finding that the warrant is invalid. Similarly, if the search itself is unreasonably conducted, this may render the search invalid.

²⁸ *R v CBC* [2001] OJ No 706 (CA).

acts which the police and legislative surveillance had failed to capture, or if images were otherwise available to the police, those from media cameras were of superior quality.

The Court of Appeal rejected the argument that *Dagenais* supported the media proposition that prior notice is required, stating there is 'a world of difference between depriving the media of notice in criminal proceedings, where openness has traditionally been the rule, not the exception, and where a publication ban or in camera order will have a direct and immediate impact on the media's ability to gather and disseminate news in a timely fashion, and 'depriving the media of notice of an investigatory proceeding that has traditionally been conducted in private on an ex parte basis and which contains built-in safeguards designed to protect and preserve the media's ability to carry out its important function.' In the circumstances, the Court of Appeal held that the existing regime of post-search warrant review provides 'adequate protection' to the media.

**Non-media judgments — Charter guarantee of freedom of expression
occasionally negates government action**

Canadian judges seem to be more comfortable using s 2(b) of the Charter as a shield against government action where the free speech guarantee is relied upon by an accused facing criminal or quasi-criminal sanctions than when the media cite that provision to attack restrictions on expression.

In January 2001, the Ontario Superior Court of Justice dismissed criminal charges against certain individuals who had violated a ban by the Speaker of the Ontario Legislature against their presence on the grounds of the Legislature. The Court held that where individuals are charged under Ontario's *Trespass to Property Act*,²⁹ they are protected by the free speech guarantee in s 2(b) of the *Canadian Charter of Rights and Freedoms* if they were only involved in a non-violent and non-mischievous demonstration on public property. Accordingly, because the Charter is the supreme law of Canada, the Speaker's 'no entry' ban directed at these specific individuals became 'dormant' when the non-destructive expressive activities were taking place on

²⁹ RSO 1990 c T21.

the grounds of the Legislature. ‘The government should not wantonly use the law of trespass to evict legitimate peaceful protestors or stop their voices.’³⁰

In January 2001, the Supreme Court of Canada ruled in *R v Sharpe*³¹ that the possession of child pornography³² is a form of expression protected by s 2(b) of the *Charter*. Although the main impact of [333] s 163.1(4) of the *Criminal Code*, which makes possession an offence, was held to be a justifiable limit under s 1 of the *Charter*, the majority held that the law improperly captured two categories of material that one would not normally think of as ‘child pornography’ and that raise little or no risk of harm to children, namely (1) written materials or visual representations created and held by the accused alone, exclusively for personal use; and (2) visual recordings

³⁰ *R v Behrens* [2001] OJ No 245.

³¹ 2001 SCC 2.

³² *R v Sharpe* 2001 SCC 2, para 6–8 (McLachlin CJ):

In 1993, Parliament enacted s 163.1 of the *Criminal Code*, creating a number of offences relating to child pornography. The provision supplemented laws making it an offence to make, print, publish, distribute, or circulate obscene material (s 163), and to corrupt children (s 172). With the enactment of s 163.1, the *Criminal Code* contains a comprehensive scheme to attack child pornography at every stage — production, publication, importation, distribution, sale and possession. Subsections (2) and (3) of s 163.1 criminalize possession of child pornography for the purpose of publication and possession for the purpose of distribution or sale. Section 163.1(4) extends the prohibition to possession *simpliciter*: 163.1 ... (4) Every person who possesses any child pornography is guilty of (a) an indictable offence and liable to imprisonment for a term not exceeding five years; or (b) an offence punishable on summary conviction. The scope of this offence depends on the definition of ‘child pornography’ in subs. (1): (1) In this section, ‘child pornography’ means (a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means, (i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or (ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years; or (b) any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act. The offence is subject to a number of defences, set out in subs (6) and (7): ‘(6) Where the accused is charged with an offence under subs (2), (3) or (4), the court shall find the accused not guilty if the representation or written material that is alleged to constitute child pornography has artistic merit or an educational, scientific or medical purpose. (7) Subsections 163(3) to (5) apply, with such modifications as the circumstances require, with respect to an offence under subsection (2), (3) or (4).’ Subsection (7) imports the ‘public good’ defence from the obscenity provisions of the *Criminal Code*: ‘163. ... (3) No person shall be convicted of an offence under this section if the public good was served by the acts that are alleged to constitute the offence and if the acts alleged did not extend beyond what served the public good. (4) For the purposes of this section, it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good. (5) For the purposes of this section, the motives of an accused are irrelevant.’

created by or depicting the accused that do not depict unlawful sexual activity and are held by the accused exclusively for private use. Accordingly, the majority held that s 163.1(4) should be read as containing an exception for those two categories, which also should be treated as exceptions to the offence of creating child pornography under s 163.1(2) of the *Criminal Code*.

Personal information protection — a potential threat to freedom of expression

The most recent legislative encroachment on freedom of expression is buried in the Regulations to the federal *Protection of Personal Information and Electronic Documents Act* (PIPEDA) which came into force on 1 January 2001.³³

The PIPEDA restrictions relating to collection, use and disclosure of personal information do not apply where the information is 'publicly available' and specified in regulations passed pursuant to PIPEDA. The Federal Government's bizarre view of what should constitute 'publicly available' information is articulated without apologies in the *Regulations Specifying Publicly Available Information*,³⁴ which list:

- (a) personal information consisting of the name, address and telephone number of a subscriber that appears in a telephone directory that is available to the public, where the subscriber can refuse to have the personal information appear in the directory;
- (b) personal information including the name, title, address and telephone number of an individual that appears in a professional or business directory, listing or notice, that is available to the public, where the collection, use and disclosure of the personal information relate directly to the purpose for which the information appears in the directory, listing or notice;
- (c) personal information that appears in a registry collected under a statutory authority and to which a right of public access is authorised by law, where the [334] collection, use and disclosure of the personal information relate directly to the purpose for which the information appears in the registry;
- (d) personal information that appears in a record or document of a judicial or quasi-

³³ Part 1 of the *Personal Information Protection and Electronic Documents Act*, SC 2000 c 5.

³⁴ PC 2000-1777 13 December 2000.

judicial body, that is available to the public, where the collection, use and disclosure of the personal information relate directly to the purpose for which the information appears in the record or document; and

- (e) personal information that appears in a publication, including a magazine, book or newspaper, in printed or electronic form, that is available to the public, where the individual has provided the information.

The restrictive nature of these categories is explained in a government commentary published with the Regulation, which states for example that the Regulation should 'encourage the courts or other authorities to take into consideration privacy concerns in making decisions about the extent of public access to court records (especially those to which internet access is available)'. Under category (e) for example, an autobiography would be 'publicly available' information but a biography would not except to the extent its contents reflected information supplied directly by its subject.

As a result of extensive lobbying by the Canadian Newspaper Association, PIPEDA contains a journalistic exemption. Section 4(1)(c) provides that the Act 'does not apply to ... any organisation in respect of personal information that the organisation collects, uses or discloses for journalistic, artistic or literary purposes and does not collect, use or disclose for any other purpose.' Whether this exemption will adequately protect the interests of the news media remains to be seen. It is unclear whether it entitles a private company to disclose personal data to the news media that it could not disclose to someone else.

It seems, however, that the Federal Government will seek to give the journalistic exemption limited scope. In testimony before the House of Commons Standing Committee on Industry on 2 December 1998, a government official explaining the draft legislation stated that a journalist 'can request information from an institution or an organization on an individual, but again, the law provides a protection for the individual that the information is not to be disclosed without that individual's consent. So how a journalist obtains information may therefore be an issue, or whether or not that information is freely given may be an issue. Then the individual can have recourse if the information was given and it should not have been given by an

institution or a company.'³⁵

³⁵ Ms Michelle d'Auray also stated: 'So there are checks and balances throughout the legislation. We also have to provide for the Charter right of free speech, so it is a balancing act at that level as well. If there is information that is inaccurate, the individual also has recourse through libel and other means. But we need to create a balance. It's not just on the internet; it also applies to any form of artistic or journalistic activity — paper, internet or otherwise.'