Supreme Court Judgments

Canadian Newspapers Co. v. Canada (Attorney General)

Collection	Supreme Court Judgments
Date	1988-09-01
Report	[1988] 2 SCR 122
Case number	19298
Judges	Dickson, Robert George Brian; McIntyre, William Rogers; Lamer, Antonio; Wilson, Bertha; La Forest, Gérard V.; L'Heureux-Dubé, Claire
On appeal from	Ontario
Subjects	Constitutional law
Notes	SCC Case Information: 19298

canadian newspaper co. *v.* canada (a. g.), [1988] 2 S.C.R. 122

Her Majesty the Queen *Appellant*

v.

Canadian Newspapers Company Limited *Respondent*

and

The Attorney General for Ontario and the Attorney General of Quebec *Interveners*

and

Women's Legal Education and Action Fund, Ontario Coalition of Rape Crisis Centres, Barbra Schlifer Commemorative Clinic, Women's College Hospital Sexual Assault Care Centre Team, Metropolitan Toronto Special Committee on Child Abuse, Metro Action Committee on Public Violence Against Women and Children, Broadside Communications, Ltd., and Women HealthSharing, Inc. *Interveners*

INDEXED AS: CANADIAN NEWSPAPERS CO. *v.* CANADA (ATTORNEY GENERAL)

File No.: 19298.

1988: March 2; 1988: september 1.

Present: Dickson C.J. and Estey*, McIntyre, Lamer, Wilson, La Forest and L'Heureux-Dubé.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law -- Charter of Rights -- Freedom of the press -- Mandatory ban on publication of identity of a complainant in sexual case when request made by complainant -- Whether s. 442(3) of the Criminal Code violates s. 2 (b) of the Canadian Charter of Rights and Freedoms -- If so, whether such violation justifiable under s. 1 of the Charter.

Constitutional law -- Charter of Rights -- Right to a public hearing -- Mandatory ban on publication of identity of a complainant in sexual case when request made by complainant -- Whether s. 442(3) of the Criminal Code violates s. 11 (b) of the Canadian Charter of Rights and Freedoms -- If so, whether such violation justifiable under s. 1 of the Charter.

An accused was charged with sexual assault, contrary to s. 246.2 (*a*) of the *Criminal Code*. The complainant, the accused's wife, applied for an order under s. 442(3) of the *Code* directing that her identity and any information that could disclose it should not be published in any newspaper or broadcast. Such an order is mandatory under that section when the applicant is the complainant. Respondent, appearing at the accused's trial, opposed the complainant's application on the basis that s. 442(3) violated the right of freedom of the press guaranteed by s. 2 (*b*) of the *Canadian Charter of Rights and Freedoms*. The trial judge made an interim order granting the complainant's application. The respondent then made a civil application for a declaration that s. 442(3) is unconstitutional. The trial judge upheld the validity of s. 442(3), dismissed the application and ordered a publication ban. he also rejected the accused's argument raised informally that s. 11 (*d*) was violated. On appeal, the Court of Appeal held that s. 442(3) infringed s. 2 (*b*) of the *Charter* and that the government had failed to demonstrate the need for a mandatory prohibition section, and as a result, severed from 442(3) the words "of if application is made by the complainant or prosecutor, shall". The Court held also that s. 442(3) did not violate the right to a fair and public hearing contained in s. 11 (*d*) of the *Charter*.

Held: The appeal should be allowed.

Section 442(3) of the *Code* infringes the freedom of the press guaranteed by s. 2 (*b*) of the *Charter*. Freedom of the press is an important and essential attribute of a free and democratic society, and measures which prohibit the media from publishing information deemed of interest obviously restrict that freedom.

The limit imposed by s. 442(3) on the freedom of the press is justifiable under s. 1 of the *Charter*. Section 442(3) purports to foster complaints by victims of sexual assault by protecting them from the trauma of wide-spread publication resulting in embarrassment and

humiliation. Encouraging victims to come forward and complain facilitates the prosecution and conviction of those guilty of sexual offences. The overall objective of suppression of crime and to improve the administration of justice. This objective undoubtedly bears on a "pressing and substantial concern" and is of sufficient importance to warrant overriding a constitutional right. The provision has a rational connection to the objective it is designed to serve and imposes only minimal limits on the media's rights. Section 442(3) applies only to sexual offence cases, it restricts publication of facts disclosing the victim's identity and it does not provide for a general ban but is limited to instances where the complainant or prosecutor requests the order or the court considers it necessary. Nothing prevents the media from being present at the hearing and reporting the facts of the case and the conduct of the trial. Only information likely to reveal the complainant's identity is concealed from the public. Therefore, it cannot be said that the effects of s. 442(3) are such an infringement on the media's rights that the legislative objective is outweighed by the abridgement of freedom of the press. A discretionary provision under which a judge would retain the power to decide whether to grant or refuse the ban on publication would not be effective in attaining Parliament's pressing goal, since it would deprive the complainants of the assurance that, upon request, their identity would not be disclosed, an important factor in their decision to report the crime.

Section 442(3) of the *Code* does not infringe the accused's right to a public hearing guaranteed by s. 11 (*d*) of the *Charter*. The mandatory ban on publication does not prevent the public or the press from attending trial proceedings; it only restricts publication of facts disclosing the complainant's identity.

The question as regards the accused's right to a fair hearing should not be answered since it was not an issue properly raised before this Court.

Cases Cited

Applied: *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713;**referred to**: *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175.

Statutes and Regulations

Canadian Charter of Rights and Freedoms, s. 1, 2(*b*), 7, 11(*d*), 24(1).

Constitutional Act, 1982, s.52.

Criminal Code, R.S.C. 1970, c. C-34, ss. 246.2 [ad. 1980-81-82-83, c. 125, s. 19], 442(3) [rep. & subs. 1974-75-76, c. 93, s. 44; rep. & subs. 1980-81-82-83, c. 125, s. 25].

APPEAL from a judgment of the Ontario Court of Appeal (1985), 49 O.R. (2d) 557, 7 O.A.C. 161, 16 D.L.R. (4th) 642, 17 C.C.C. (3d) 385, 44 C.R. (3d) 97, 14 C.R.R. 276, allowing in part respondent's appeal from an order of Osborne J., dismissing respondent's civil application for a declaration that s. 442(3) of the *Criminal Code* is unconstitutional. Appeal allowed.

J. E. Thompson, for the appellant.

Sheila R. Block and *James C. Tory*, for the respondent.

David Lepofsky, for the intervener the Attorney General for Ontario.

Jean Bouchard and *France Bonsaint*, for the intervener the Attorney General of Quebec.

Elizabeth J. Shilton Lennon and *Helena P. Orton*, for the interveners Women's Legal Education and Action Fund *et al*.

The judgment of the Court was delivered by

1. LAMER J. --

The facts

2. A man was tried in Ontario for committing a sexual assault, contrary to s. 246.2(*a*) of the*Criminal Code*, R.S.C. 1970, c. C-34. At the outset of the trial, the complainant, who was the accused's wife, applied through counsel for an order under s. 442(3) of the *Code*, directing that the identity of the complainant and any information that could disclose it not be published in any newspaper or broadcast. At the time, that is in October 1983, s. 442(3) read as follow:

> **442.** ...
>
> (3) Where an accused is charged with an offence mentioned in section 246.4, the presiding judge, magistrate or justice may, or if application is made by the complainant or prosecutor, shall, make an order directing that the identity of the complainant and any information that could disclose the identity of the complainant shall not be published in any newspaper or broadcast.

3. Howland C.J.O., writing for the Court, has, in his reasons for judgment ((1985), 17 C.C.C. (3d) 385), set out with great clarity and precision the various proceedings and phases thereof that took place below. One of these proceedings has not been appealed to us, and some questions below have ceased to be in issue. I will accordingly refer only to that which needs be considered in order to dispose of the issues that are properly before us.

4. Respondent, appearing at the accused's trial, opposed the application on the basis that s. 442(3) violated s. 2 (*b*) of the *Canadian Charter of Rights and Freedoms*. Section 2 (*b*) read as follows:

> **2.** Everyone has the following fundamental freedoms:
>
> ...
>
> (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

5. The trial judge adjourned the proceedings to a later date, and, for reasons irrelevant to this appeal, eventually ordered a mistrial. At the time of the adjournment, he granted the application under s. 442(3) on an interim basis.

6. In the meantime, respondent made a civil application for a declaration that s. 442(3) is unconstitutional, returnable before the trial judge at the date the trial was to resume. Respondent also asked to be granted leave to intervene in the criminal proceedings. At trial, counsel for the accused adopted respondent's position and expanded its argument by emphasizing the accused's right to a fair and public hearing. The judge dismissed the civil application, refused leave to intervene in the criminal proceeding and ordered a publication ban.

7. I should say right now that at no time did the accused make an application under s. 24(1) of the *Charter* invoking a violation of his right to a fair and public hearing, as guaranteed by s. 11 (*d*) of the *Charter*, nor did he attack the validity of s. 442(3) claiming an unjustified restriction of his right to a fair and public trial. The accused merely raised the matter in argument when he was called upon to make

submission. As a result, at trial level, s. 11 (*d*) was not formally invoked to challenge the constitutional validity of s. 442(3).

8. Respondent appealed the dismissal of the civil application and the refusal of leave to intervene in the criminal proceeding, and both appeals were heard together. Asked whether they wanted to be heard on the merits, counsel for the accused and for the complainant advised the Court of Appeal that they did not wish to make submissions in ether of the appeals. The Attorney General for Ontario moved to have both appeals quashed. The Court quashed the appeal in the criminal proceeding and allowed the appeal in part in the civil proceeding. The Crown now comes to us in the civil proceeding, but not in the criminal proceeding.

The Judgments Below

9. In the Supreme Court of Ontario, Osborne J. held that s. 442(3) clearly infringed the freedom of the press guaranteed by s. 2 (*b*) of the *Charter*. The sole issue was to determine whether s. 442(3) was a reasonable limitation justified in a free and democratic society. The trial judge thus narrowed down his analysis to s. 1 of the *Charter*.

10. Osborne J. found that the objective of s. 442(3) was to facilitate disclosure by sexual assault victims, by making it easier for the complainant to participate in the prosecution of offenders. In his view, given the purpose of the impugned provision, the mandatory ban on publication was more than reasonable. He considered that a mere discretion n the rial judge would not be an effective remedy to the problem s. 442(3) seeks to resolve, since the complainant would have no assurance that the order sought would be issued upon request. Moreover, Osborne J. stated that the issuance of an order under s. 442(3) did not preclude the public from being present at trial, nor did it prevent

publication of information about the hearing. The judge also rejected the argument raised informally by the accused that s. 11 (*d*) was violated. In his opinion, s. 442(3) was a protection for complainants which had no adverse effects on the fairness or public nature of the rial. Osborne J. concluded that s. 442(3) was a reasonable limit on freedom of the press justified in a free and democratic society, and he dismissed the application.

On appeal, Howland C.J.O. emphasized the importance of freedom of the press with respect to the integrity of judicial proceedings. He agreed with Osborne J. that s. 442(3) *prima facie* infringed the freedom of the press, under s. 2 (*b*) of the *Charter*, to report what transpired at a public trial. On the s. 1 issue, Howland C.J.O. applied the test laid down in *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, and held that the party seeking to uphold the legislation must show that the limits imposed are not more extensive than are necessary to protect social values of superordinate importance. In his view, s. 442(3) did protect a social value of superordinate importance.

11. Howland C.J.O. however took issue with the mandatory aspect of the publication ban. He noted that in some instances the complainant might have made false allegations, or might have previously accused a number of persons without justification. In these cases, publication of the complainant's name may bring forth other witnesses to testify on behalf of the accused. In light of this and of the fact that in other countries similar provisions retained some discretion in the trial judge, the government had failed to demonstrate the need for a mandatory prohibition section. As a result, Howland C.J.O. severed from s. 442(3) the words "or if application is made by the complainant or prosecutor, shall" and left untouched the rest of the section.

12. Howland C.J.O. also dealt briefly with the right to a fair and public hearing under s. 11 (*d*) of the *Charter*, noting that s. 442(3) did not preclude the media from

attending the trial in open court. He concluded that there was no violation of s. 11 (*d*) since this provision protected the right of a person charged with an offence to a fair and public hearing and not the media's right to report proceedings.

The issues

13. Dickson C.J.C. stated the following constitutional questions:

1. Does section 442(3) of the *Criminal Code*, R.S.C. 1970, c. C-34, infringe or deny:

(a) the freedom to the press guaranteed in s. 2 (*b*) of the *Canadian Charter of Rights and Freedoms*? or

(b) the right to be presumed innocent until proven guilty according to law in a fair and public hearing guaranteed in s. 11 (*d*) of the *Canadian Charter of Rights and Freedoms*; and if so,

2. Is section 442(3) of the *Criminal Code*, R.S.C. 1970, c. C-34, justified on the basis of s. 1 of the *Canadian Charter of Rights and Freedoms*?

14. Both courts below held that s. 442(3) infringes the freedom of the press guaranteed by s. 2 (*b*) of the *Charter*. In this Court, appellant conceded that point. Freedom of the press is indeed an important and essential attribute of a free and democratic society, and measures which prohibit the media from publishing information deemed of interest obviously restrict that freedom. Therefore, the main issue before us is whether the impugned provision can be salvaged under. s. 1 of the *Charter*, which states:

> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

15. The test to be applied has been set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, and restated in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. In order to justify a limitation of a *Charter* right in a free and democratic society, two requirements must be met. The first one is related to the importance of the legislative objective which the limitation is designed to achieve. In the present case, the impugned provision purports to foster complaints by victims of sexual assault by protecting them from the trauma of wide-spread publication resulting in embarrassment and humiliation. Encouraging victims to come forward and complain facilitates the prosecution and conviction of those guilty of sexual offences. Ultimately, the overall objective of the publication ban imposed by s. 442(3) is to favour the suppression of crime and to improve the administration of justice. This objective undoubtedly bears on a "pressing and substantial concern" and respondent conceded that it is of sufficient importance to warrant overriding a constitutional right. The first requirement under s. 1 is thus satisfied and we must now turn to the second part of the *Oakes* test.

16. To determine whether the means chosen in furtherance of the recognized objective are reasonable and demonstrably justified, a proportionality test balancing the various interest involved must be applied. The proportionality requirement has three aspects: the existence of a rational link between the means and the objective, a minimal impairment on the right or freedom asserted, and a proper balance between the effects of the limiting measures and the legislative objective. As to the first aspect, respondent conceded that there is a rational connection between s. 442(3) and the objective it is designed to serve, and I agree.

17. Respondent contended that s. 442(3) cannot be justified because a mandatory ban on publication is not a measure that impairs freedom to the press as little as possible. It submitted that only a provision which gives to the trial judge a discretion to determine if publication is appropriate in the circumstances of the case would satisfy the second criterion of the proportionality test. Respondent also argued that appellant had

failed to adduce any evidence demonstrating that a mandatory ban impairs the right as little as possible. The Court of Appeal agreed, but this was predicated upon the fact that the only evidence brought forward by the Attorney General of Canada was the testimony of Doreen Carole Boucher, co-ordinator of a rape crisis center. The Court further held that this witness had testified that she was aware of some instances where a rape was imagined and the alleged victim wanted to humiliate a person. With respect, the Court of Appeal, probably as a result of an oversight, failed to consider other material that was before the Court. Indeed, contrary to what Howland C.J.O. wrote, Carole Boucher's testimony was not the only evidence adduced before the trial judge, as the Attorney General also tendered in evidence various studies and reports on sexual assaults and other criminal offences. Moreover, with respect, the Court of Appeal misread what Carole Boucher said. While acknowledging that there may be cases whereby the person charged with the offence is falsely accused, the witness never stated that these false allegations were intended to humiliate the accused. During cross-examination, Carole Boucher answered:

Q. So it is quite conceivable that there are cases whereby the real victim is the person accused by the alleged victim.

A. Yes, I could say yes to that.

...

Q. Therefore you have been exposed to cases where an alleged victim wanted to humiliate a person --

A. -- Well I don't know whether the intention was to humiliate the person, but the proportion that we have had is very small in proportion to the actual rapes.

Q. Oh I agree.

A. But there has been a small percentage, not only here but in other centres. [Emphasis Added.]

18. When considering all of the evidence adduced by appellant, it appears that, of the most serious crimes, sexual assault is one of the most unreported. The main reasons stated by those who do not report this offence are fear of treatment by police or prosecutors, fear of trial procedures and fear of publicity or embarrassment. Section 442(3) is one of the measures adopted by Parliament to remedy this situation, the rationale being that a victim who fears publicity is assured, when deciding whether to report the crime or not, that the judge must prohibit upon request the publication of the complainant's identity or any information that could disclose it. Obviously, since fear of publication is one one of the factors that influences the reporting of sexual assault, certainty with respect to non-publication at the time of deciding whether to report plays a vital role in that decision. Therefore, a discretionary provision under which the judge retains the power to decide whether to grant or refuse the ban on publication would be counterproductive, since it would deprive the victim of that certainty. Assuming that there would be a lesser impairment of freedom of the press if the impugned provision were limited to a discretionary power, it is clear, in my view, that such a measure would not, however, achieve Parliament's objective, but rather defeats it.

19. With respect, there seems to be a certain inconsistency in respondent's position. While it concedes the importance of the objective and the existence of a rational link between that objective and s. 442(3), respondent argues that the judge should retain a discretion. It is difficult to reconcile these submissions, because once these concessions are made, one is forced to admit that an absolute ban on publication is the only means to reach the desired objective. Respondent goes even further by contending that a case-by-

case approach should be adopted to ensure that publication will not be banned, except where the social values competing with freedom of the press are of superordinate importance. If we were to adopt this submission, the legislative objective embodied in s. 442(3) would never be met, because publication would be the rule and a sexual assault victim could rarely predict whether the circumstances of the case would be viewed as an exception warranting a non-publication order. As a result, while it might impair less the freedom of the press, the discretionary ban is not an option as it is not effective in attaining Parliament's pressing goal.

20. While freedom of the press is nonetheless an important value in our democratic society which should not be hampered lightly, it must be recognized that the limits imposed by s. 442(3) on the media's rights are minimal. The section applies only to sexual offence cases, it restricts publication of facts disclosing the complainant's identity and it does not provide for a general ban but is limited to instances where the complainant or prosecutor requests the order or the court considers it necessary. Nothing prevents the media from being present at the hearing and reporting the facts of the case and the conduct of the trial. Only information likely to reveal the complainant's identity is concealed from the public. Therefore, it cannot be said that the effects of s. 442(3) are such an infringement on the media's rights that the legislation objective is outweighed by the abridgement of freedom of the press.

21. Respondent further argued that s. 442(3) has a potential chilling effect on the media because in any given case it is difficult to ascertain what evidence could disclose the identity of the complainant. There is thus a risk that the press will choose not to publish any meaningful report on some trials. In my view, it is sufficient to say that media people are certainly competent enough to determine which information is subject to the ban; if not, the judge in his or her order can clarify the matters which cannot by published.

22. To support his opinion that a judicial discretion is a lesser impairment of freedom of the press than a mandatory ban, Howland C.J.O. stated (at p. 405):

> Doreen Carole Boucher testified that she was aware of some instances where a rape was imagined and the alleged victim wanted to humiliate a person. There may also be instances where an alleged victim has accused a number of persons previously of sexual offences without justification. The publication of the name of the complainant may in some cases bring forth other witnesses whose testimony may be helpful.

23. With respect, this is of relevance, indeed of vital importance, when determining the degree of impairment of an accused's right to a fair trial, or to a full answer and defence, as guaranteed by s. 11(*d*) and s. 7. But I fail to see its relevance when weighing the degree of impairment of freedom of the press against the attainment of the objective embodied in s. 442(3).

24. The impairment, if any, by s. 442(3) of the accused's right to a fair trial or to a full answer and defence is not properly in issue before this Court. Indeed, as I have said at the outset, the accused has never applied to any court for a remedy under s. 24(1) of the *Charter*, or for a declaration of unconstitutionality under s. 52 of the *Constitution Act, 1982*. I am not prepared in this case to decide whether anyone other than an accused has standing, under s. 52 of the *Constitution Act, 1982*, to challenge the constitutionality of s. 442(3) on these grounds, the impairment of the accused's right to a fair trial or to a full answer and defence was not formally raised below by Canadian Newspapers. I am thus of the view that, since the impugned provision was not formally attacked before the trial judge and on appeal on the basis that it restricted the accused's right to a fair trial or to a full answer and defence, that issue is not properly before us and should be left to be considered in the appropriate setting. By that, I mean if and when the provision is challenged under s. 11(*d*) or s. 7 of the *Charter*, the Attorney

General of Canada and others will be alerted to that issue, and have the appropriate opportunity to adduce evidence. In the case at bar, the notice of motion served upon the Attorney General of Canada invokes only a violation of s. 2 (*b*) of the *Charter*. This is the challenge the Attorney General was called upon to meet. It would be unfair to Parliament and unwise for the Court to consider in the abstract the impairment of an accused's rights and to rule on the matter absent evidence tendered by the parties addressing the issue.

25. Section 11 (*d*) of the *Charter* holds that an accused has a right to a fair and public hearing. Accordingly, the reasoning set out above also applies to the "public hearing" issue. I propose, however, to address that point now because it was raised below, argued by the parties and adjudicated upon by the Court of Appeal. Indeed, as was said by Howland C.J.O., at p. 409, "a public hearing is one in open court which the public, including the representatives of the media, are entitled to attend". The mandatory ban on publication, provided for in s. 442(3), does not prevent the public or the press from attending trial proceedings; it only restricts publication of facts disclosing the complainant's identity. Therefore, s. 442(3) does not in any way infringe the accused's right to a public hearing.

26. Before concluding I should mention that this case has been argued and decided throughout on the assumption that what is being weighed is a restriction to the freedom of the press in order to ensure to victims of sexual assaults that their identity will not be disclosed through the media, if that is their wish. the section, however, enables an application to be made by the "prosecutor" alone. Obviously, the arguments invoked and successfully so under s. 1 in this case would not necessarily carry the day in a situation where the prosecutor was not acting on behalf of the complainant. As this is not our case, we need not and should not decide the matter. However, it must be understood that the answers to the constitutional questions and the disposition of this

appeal apply only to a case where under the section, the application has been made by or on behalf of the complainant.

27. I would thus allow the appeal and set aside the judgment of the Ontario Court of Appeal. Addressing the constitutional questions, I would answer them in the following way:

1. Does section 442(3) of the *Criminal Code*, R.S.C. 1970, c. C-34, infringe or deny:

(a) the freedom of the press guaranteed in s. 2 (*b*) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

(b) the right to be presumed innocent until proven guilty according to law in a fair and public hearing guaranteed in s. 11 (*d*) of the *Canadian Charter of Rights and Freedoms*?

Answer: Section 442(3) does not infringe or deny the accused's right to a public hearing; as regards the accused's right to a fair hearing, I would not answer the question, since it is not an issue properly raised before this Court.

2. In section 442(3) of the *Criminal Code*, R.S.C. 1970, c. C-34, justified on the basis of s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes, if the application is made by or on behalf of the complainant, to the extent it infringes the freedom of the press guaranteed in s. 2 (*b*) of the *Charter*.

Appeal allowed.

Solicitor for the appellant: Frank Iacobucci, Ottawa.

Solicitors for the respondent: Tory, Tory, DesLauriers & Binnington, Toronto.

Solicitor the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

Solicitor for the intervener the Attorney General of Quebec: The Department of Justice, Ste-Foy.

Solicitors for the intervener the Women's Legal Education and Action Fund et al.: Cavalluzzo, Hayes & Lennon, Toronto.

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[*] Estey J. took no part in the judgment.