Recent Developments

EDMONTON JOURNAL v. ATTORNEY GENERAL OF ALBERTA

June Ross

The value to our society of freedom of the press received an important acknowledgement by the Supreme Court in the recent decision of Edmonton Journal v. Attorney General of Alberta.[1] While the direct result of the case will have little impact, as it involved an archaic and generally ignored law, the Court's emphasis of the importance of this freedom and of the public reporting of court proceedings will hopefully influence future decisions pertaining to more controversial issues.

The case involved challenges to two provisions of the Alberta Judicature Act[2]: a permanent publication ban relating to matrimonial court proceedings in s.30(1), and an interlocutory publication ban relating to all civil proceedings in s.30(2). Both had been upheld by the Alberta Queen's Bench and Court of Appeal.[3] Both were struck down by the Supreme Court of Canada. All seven judges who took part in the decision agreed that s.30(2) was unconstitutional, and four of the seven reached the same conclusion with regard to s.30(1).[4]

The first constitutional question before the Court was whether the publication bans infringed s.2(b) of the Charter. The Trial Judge had found that s.2(b) was not infringed, or in the alternative, that any infringement was justified under s.1. The Court of Appeal disagreed with the first conclusion, applying a "valued activity" test to find that the guarantee in s.2(b) extended to protect reports of judicial proceedings. By the time the case was argued in the Supreme Court the Court had issued its decision in Ford v. Attorney General of Quebec[5] which, together with the subsequent case of Irwin Toy Ltd. v. Attorney General of Quebec[6], established a broad definition of the scope of freedom of expression. It is thus not surprising that the Attorney General conceded this point, nor that the majority judgment of Cory J. found that "there [could] be no doubt" that s.2(b) had been infringed.[7]

The first issue addressed in the majority judgment was the importance of s.2(b) and the reporting of court proceedings. The reason for this discussion is not clear, given the concession referred to above. What seems likely is that the majority implicitly recognized, as Wilson J. explicitly stated in her concurring judgment, that a guaranteed right or freedom may have different degrees of importance or value in different contexts, and that these can affect the application of the s.1 test. The implicit acceptance of this notion is supported by the following points in the majority judgment:

(1) The fact that the judgment included a substantial discussion of the value of s.2(b) in context, when an infringement had been conceded, suggests that the value and the context must be relevant to the only remaining issue, namely the application of s.1.

(2) The majority focused on the relationship of freedom of expression to the proper functioning of democratic institutions, including the courts, and held in this context that s. 2(b) rights should "only be restricted in the clearest of circumstances".[8]

(3) The application by the majority of the s.1 test was strict, including a detailed review of both purported objectives and potential alternative measures. Evidence was found to be required and absent, and no deference to the legislature was indicated.

(4) Both the Irwin Toy[9] and Edwards Books[10] decisions were distinguished with regard to their less strict application of s.1. The majority justified this distinction on the basis that the legislation in issue was different than that in the Irwin Toy and Edwards Books cases which struck "a balance between the claims of competing groups"[11] or attempted to improve "the condition of less advantaged persons".[12] In contrast, the Judicature Act required a balancing of "the interest of society as a whole in freedom of expression and the right of the public to know of court proceedings against the bans imposed on publication".[13] Yet, surely this legislation could have been characterized as protecting a vulnerable group, namely those persons required to resort to the courts for the resolution of matrimonial disputes with interests in privacy, from a group with competing interests, namely the media or the interested public.[14] It seems that the different approaches to s.1 cannot be wholly explained by the nature of the challenged legislation, and that the nature of the affected right or freedom may also be relevant.

Two additional important points were made in the discussion of the value of s.2(b) and the reporting of court proceedings. Firstly, with regard to the purposes served by an open court system, Cory J. considered the public interest in observing the operation of the courts, not only from an external perspective, but also its internal significance to the courts themselves. An open examination of witnesses is "more conducive to the clearing up of truth" than would be private proceedings.[15] This point was further elaborated in the decision of Wilson J., who noted that openness improves the quality of testimony in two ways: by the pressure of public opinion; and by the fear of exposure of false testimony should informed persons hear of it and provide contradictory evidence.

This willingness to look at the purposes of an open court system broadly within the context of s.2(b) contrasts with the approach in Canadian Newspapers v. Attorney General of Canada.[16] In that case the Court, in overturning an Ontario Court of Appeal decision that a mandatory ban on the disclosure of a rape complainant's name unjustifiably

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interfered with freedom of the press, refused to give any weight to the possibility that publication of the name of the complainant might bring forth witnesses with helpful testimony. The Court held that this would be of relevance only when determining the degree of impairment of an accused's right to a fair trial and not when considering an infringement of freedom of the press. The position in the Edmonton Journal case better protects the broad public interest in open courts, which foster not just public knowledge and the public ability to criticize, but also the fair and proper operation of the courts.

Secondly, while the Supreme Court did not suggest that freedom of the press conferred any different or greater rights than freedom of expression, the press' role as a surrogate for the public was emphasized. Through the press, and largely only through the press, is the general public able to exercise its right to receive information, in this instance about the court system, a right which is equally protected under s.2(b) as is the right to communicate information.[17] The position of the press as a surrogate, and the need for it to be able to fulfil this role effectively, may form the basis for special applications of s.2(b) relating, for instance, to the use of recording devices or cameras.

The Court then turned to the effect of the publication bans. The majority found that the permanent ban on the reporting of matrimonial proceedings had a sweeping effect, as it would encompass proceedings pertaining to custody of, or access to, children, division of property, and payment of maintenance. Relating to these issues of public importance, the ban would prevent the public from learning what kind of evidence was likely to be called and what kind of questioning could be expected. Even comments of counsel and the presiding judge would be excluded from publication. Thus the public might be prevented from discovering improper or biased remarks that suggest that the legal system is not reflecting enlightened social policy. With regard to the interlocutory publication ban for civil proceedings, the Court found that this created "an almost total restriction on providing information pertaining to pleadings or documents filed in civil proceedings", including those involving matters of administrative law or constitutional law, even though these may have "a vital impact on the lives of all the residents of the province".[18]

The dissenting judgment of Laforest J. construed the effect of the permanent publication ban applicable to matrimonial proceedings more narrowly, as "confined to the broad publication of details of particulars of the evidence",[19] and not applicable to comments of counsel or judges. This construction was essential to the dissent's conclusion that the ban was justified under s.1.

The final issue addressed was the application of s.1. The Attorney General submitted there were three objectives of s.30(1) of the Judicature Act. Firstly, it was intended, at least historically, to protect public morals. The majority found that this objective "must be reviewed by current standards" and did not "remain pertinent in today's society".[20] The dissenting judgment also did not rely on this objective in its s.1 analysis.

The second objective was to ensure access to the courts by persons wishing to litigate matrimonial matters who might be deterred by the knowledge that their cases could be publicized. Again there was evidence that this was historically an aim of the legislation, and also that the legislation may have at one time been successful in pursuing that aim. However, while the dissent was prepared to take judicial notice that the "inhibitory effect of publicity ... continues to be a relevant factor"[21] the majority was not prepared to take account of this objective in the absence of evidence that elimination of the ban would deter litigants in modern circumstances.

The third objective, the protection of privacy, was recognized by all judges to be of self-evident importance. It is interesting that all of the judges felt that this was an important objective as it related not only to the privacy of children and witnesses, but also to the privacy of the parties to the proceedings. This contrasts with the Court of Appeal decision in the case,[22] and with the British Columbia Court of Appeal in Re Hirt and College of Physicians and Surgeons of British Columbia,[23] both of which focused on the

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privacy of non-parties, such as children or witnesses. The appellate courts may have been concerned that any significant degree of protection of the privacy of parties would contravene the holding by the Supreme Court in the Attorney General of Nova Scotia v. MacIntyre that, "as a general rule, the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings".[24]

The majority and concurring judgements concluded that while protection of privacy was a legitimate objective, the permanent and mandatory publication ban was an overly restrictive measure to pursue that objective. Alternatives, such as a discretionary ban or a ban on the publication of identities only, would achieve the same objective in a less restrictive fashion. The dissent, as noted earlier, construed the scope of the publication ban more narrowly, was more sceptical as to the legitimate public interest in publication of evidence in matrimonial cases, and was willing to consider the objective of ensuring access to the courts in addition to the protection of privacy objective. These factors, as well as a less strict application of s.1, together with an express statement of deference to the legislature, gave rise to the different conclusion on s.1. With regard to s.30(2), all judges were agreed that while the objectives of protection of privacy and ensuring a fair trial were legitimate, the broad mandatory ban was overly restrictive.

An additional point was raised by the dissent relating to an exception found in s.30(3)(c) of the Judicature Act, pursuant to which matters might be reported if permitted by court order. The dissent was of the view that a court in its discretion could permit reporting "in those rare cases where the interest of the public in the publication of details overrode the right to privacy".[25] Indeed, as the case of Slaight Communications Inc. v. Davidson[26] indicates, a statutory discretion must be exercised in a manner that protects Charter rights and freedoms, so it might well be that a court order which did not permit publication in such circumstances would itself violate s.2(b).

These comments of the dissent raise one final point of interest, the question of constitutional exemption. The Alberta Court of Appeal had relied on this concept in refusing to strike down the Judicature Act provisions. The Court of Appeal found that where a Charter right was valid under s.1, "save that it was overly broad in that it unnecessarily caught a relatively small group of specially situated persons"[27], the court could leave the legislation in place and grant those persons on a case by case basis a constitutional exemption. The application of this remedy was not discussed in the Supreme Court decision. Presumably the majority would have found the constitutional exemption to be inappropriate in view of its conclusion that the publication bans created a broad and sweeping infringement on freedom of expression. The dissent did not need to create a constitutional exemption as it found that there already existed an appropriate statutory exemption.

However, the adequacy of either the statutory exemption or a constitutional exemption in the circumstances of this case can be seriously questioned. The statutory exemption creates a prior restraint on free expression. By the time a judicial order is obtained, and any appeal proceedings concluded, the newsworthiness of the subject information may well have passed. While the concept of a constitutional exemption does not create a prior restraint as such, in circumstances where its application is very difficult to predict, as would be the case here, the press could only be reasonably certain of avoiding prosecution by obtaining a declaration prior to publication. This would effectively create another form of prior restraint.

In summary, this decision is a significant step towards the establishment of a meaningful protection of freedom of the press under the Charter. The Court's comments on the importance of s.2(b), its broad examination of the purposes of an open court system, and its acknowledgement of the press' role as a surrogate for the public will be valuable in future cases. Further, its strict application of s.1 in this context provides further insight into the operation of that pervasive provision.

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1. The Supreme Court of Canada, unreported judgment, December 21, 1989.
2. R.S.A, 1980, c.J-1.
3. Edmonton Journal v. Attorney General of Alberta, [1986] 1 W.W.R. 453 (Alta. Q.B.); aff'd [1987] 5 W.W.R. 385 (Alta. C.A.).
4. The majority judgment was written by Cory J. and concurred in by Dickson C.J. and Lamer J.. Wilson J. concurred with separate reasons. La Forest J., writing for L'Heureux-Dubé and Sopinka JJ., dissented in part.
5. [1988] 2 S.C.R. 712.
6. [1989] 1 S.C.R. 927.
7. Supra, fn.1, at 12, per Cory J.
8. Ibid., at 5, per Cory J.
9. Supra, fn.6.
10. R. v. Edwards Books and Art Ltd. [1986] 2 S.C.R. 713.
11. Supra, fn.6, at 993.
12. Supra, fn.10, at 779.
13. Supra, fn.1, at 23, per Cory J.
14. The dissent implied such a characterization: "I should observe interstitially that recent cases of this Court recognize that in considering issues of this kind, the relative power of those whose activities are restricted and those for whose benefit the restriction is made is a relevant factor to weigh in the equation; ..." Supra, fn.1, p.13, per La Forest J.
15. Blackstone's Commentaries on the Laws of England (1768), Book III, .23, p.373, cited in supra, fn.1, at 7, per Cory J.
16. [1988] 2 S.C.R. 122.
17. Supra, fn.5.
18. Supra, fn.1, at 12, per Cory J.
19. Ibid., at 5, per La Forest J.
20. Ibid., at 13, per Cory J.
21. Ibid., at 14, per Cory J.
22. Supra, fn.3, (Alta. C.A.).
23. (1985) 17 D.L.R. (4th) 472 (B.C.C.A.).
24. [1982] 1 S.C.R. 175, at 185.
25. Supra, fn.1, at 17, per La Forest J.
26. [1989] 1 S.C.R. 1038.
27. Supra, fn.3, at 403 (Alta. C.A.).