THE PRESS AND THE COURTS

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HIGHLIGHTS

Anniversary edition: The Charter of Rights and Freedoms

This issue of The Press and The Courts contains the following:

- Privacy: Privacy theft victims gain legal recourse
- Free expression: Election Broadcast ban to be repealed
- Open courts: Williams' divorce can't be shrouded in secrecy; Role of social media examined by Top Judge
- Access to records: Judge decides young offender material off-limits; FOI fees cause bureaucratic row
- Production orders: Riot photos must be turned over to police
- Cameras in court: Goal of broadcasting trials gets complicated
- Comment: The Charter of Rights and Freedoms

SUMMARY

This bulletin is the first for 2012 providing quarterly roundups of court cases affecting the media.

In court, media lawyers often refer to The Charter of Rights and Freedoms for defence of press rights. On the 30th anniversary of the Charter, some of those lawyers tell us (see the Comment section) how they view the influence of the Charter over these past three decades.

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PRIVACY

Privacy theft victims gain legal recourse

ONTARIO - A non-media case has created a new form of lawsuit that might have negative ramifications for investigative journalism.

On Jan. 18, 2012, a three-judge Ontario Court of Appeal panel created a new legal tort—a basis for a lawsuit—titled "intrusion upon seclusion."

The change will provide a legal avenue for those whose sexual practices, private correspondence or personal records have been snooped on for no legitimate reason.

Still, the court did acknowledge privacy claims can never be absolute and "will have to be reconciled with, and even yield to…competing claims," such as free expression and public interest.

Or, in short, media cases may involve different considerations.

The Court of Appeal decision permitted a Toronto woman, Sandra Jones, to sue a fellow Bank of Montreal employee, Winnie Tsige, for allegedly gaining improper access to Jones's banking records on 174 occasions over a four-year period. At the time, Tsige was in a common-law relationship with Jones's former husband.

The court said information is being generated and stored at a staggering rate, but legislation has not kept pace--leaving aggrieved parties no recourse against those who violate their privacy, Justice Robert Sharpe observed on behalf of Chief Justice Warren Winkler and Justice J.D. Cunningham.

The judge suggested that awards should rarely rise above $20,000 and should be assessed based on the nature and harmfulness of the wrongful act; the effect it has on the plaintiff's health, welfare, social, business or financial position; and whether the defendant has shown regret or offered to make amends.

The key to success will be to establish that an intrusion would be "highly offensive" to the average reasonable person, he said.

"Claims from individuals who are sensitive or unusually concerned about their privacy are excluded," Justice Sharpe said.

In the Jones case, however, "we are presented in this case with facts that cry out for a remedy. While Tsige is apologetic and contrite, her actions were deliberate, prolonged and shocking. Any person in Jones's position would be profoundly disturbed by the significant intrusion into her highly personal information."

Having created the new legal tort, Justice Sharpe went on to award Jones $10,000 in damages.

Scott Fenton, a Toronto lawyer with expertise in technology law, said the decision is a landmark in the development of privacy.

"Privacy is a fundamental value in a free and democratic society. It is essential for a person's well-being," he said.

-sources, decision, The Globe and Mail

FREE EXPRESSION

Election Broadcast ban to be repealed

OTTAWA – Using Twitter, the Conservative government announced that the ban on publishing early election results country-wide would be repealed.

On Jan. 13, democratic reform minister Tim Uppal tweeted: "The ban, which was enacted in 1938, does not make sense with the widespread use of social media and other modern communications technology."

The change will allow bloggers, broadcasters, news websites and Twitter users to freely communicate election results as they become available. The repeal is expected to be in place before the next election.

Uppal said at a later news conference that staggered voting hours, first introduced in the 1990s, have already rendered the ban moot.

"There is only a small window in which less than 10 percent of polls could be (available) to late voters in western Canada."

In addition, Elections Canada no longer opposes on-time publishing country-wide, despite having fought tooth and nail against repeal when software developer Paul Bryan, backed by the National Citizens' Coalition led by Stephen Harper, took the 1938 law all the way to the Supreme Court of Canada (SCC).

Uppal gave credit to Bryan "for his tireless advocacy on this issue."

Bryan published Atlantic Canada results of the 2000 election before B.C. polls closed, and while he lost in provincial court and was fined $1,000, he won on appeal to the B.C. Court of Appeal before finally losing at the SCC.

-source, Toronto Star

ACCESS TO RECORDS – YOUNG OFFENDERS

Judge decides young offender material off limits

ONTARIO - A youth court judge has ruled the public does not have the right to access records crucial to the sentencing of violent young offenders.

The Toronto Star sought access to the documents as part of an investigation into the youth criminal justice system.

The newspaper earlier won access to photos filed in evidence and a recording of a 911 call, but Ontario Court Justice Marion Cohen denied access to two pre-sentence reports.

One relates to a youth convicted of shooting a paintball gun at homeless people, the other to a teen who committed knife-point robberies.

The Star also requested a copy of a victim impact statement, written by the principal of a school where a 16-year-old carrying a handgun and crack cocaine struggled with police. The judge did not rule on whether the Star could have the statement, effectively denying access.

The Youth Criminal Justice Act prohibits identifying kids for fear that doing so would harm their rehabilitation.

However, courts in Ontario are open to the public and the youth crime law says information about youth justice and the effectiveness of the court "should be publicly available."

Bound by the ban on identifying youth and with no intention of violating it, the Star asked for the records in July, 2011. Judges rely on pre-sentence reports when deciding how to sentence a youth convicted of a serious crime. The documents are often not read aloud in court and redacted versions, where the identifying information is blacked out, are not made available to the public.

While Justice Cohen said "our highest courts have repeatedly stated that publicity is the soul of justice" she ruled that releasing the documents, even redacted versions, would risk identifying the youths.

Cohen said pre-sentence reports often contain sensitive information about an offender's mental health, learning disabilities and family problems. She said releasing the documents could scare young offenders from providing information to probation officers and other court officials trying to find the most appropriate sentence.

Star media lawyer Daniel Stern said: "This is a very disappointing decision. It is of great public importance that the public understand the justice system — including youth justice."

-source, Toronto Star

OPEN COURTS

Williams' divorce can't be shrouded in secrecy

ONTARIO - An attempt by the wife of serial killer Russell Williams to keep the details of their upcoming divorce proceedings secret was stopped by the Ontario Court of Appeal.

The court said Jan. 24, 2011 that Mary Elizabeth Harriman failed to produce the sort of cogent, first-hand evidence that would be required to persuade a court to suppress press freedoms.

The ruling overturned an earlier decision that granted Harriman a publication ban and sealing order on the bulk of the evidence in the divorce proceeding. The banned material included photographs or likenesses of Harriman, information that might identify her, her address or her employer.

The order was appealed by the Ottawa Citizen, Ottawa Sun, CTV, CBC and Global Television, who argued through media lawyers Richard Dearden and Ryan Kennedy that it ran counter to a line of decisions that affirm the importance of open courts.

The media did not appeal certain aspects of the ban, effectively Harriman's social insurance number, date of birth, bank account information, domestic contract and some medical information.

The justices expressed sympathy for the avalanche of publicity Harriman has struggled with since her husband was unmasked as a wanton criminal.

However, it said that her divorce proceedings were unlikely to provoke nearly as much public interest as Williams' arrest and trial did.

"She has endured and, I would say, overcome the worst of the media storm surrounding Williams," Justice David Doherty said, writing on behalf of Justices Robert Armstrong and Alexandra Hoy.

The court said that Harriman did not back up her contention that the press has been irresponsible and would stop at nothing to meddle in her life if her divorce proceedings were open to the public.

Williams, once commander of a major military base in Trenton, Ont., pleaded guilty in 2010 to two murders and a series of sex-related crimes.

-sources, decision, The Globe and Mail

PRODUCTION ORDERS

Riot photos must be turned over to police, court rules

BRITISH COLUMBIA – On Jan. 23, 2012, the Vancouver Sun and Vancouver Province handed over all photos and video shot during the June 15, 2011 Stanley Cup riot to Vancouver police.

It was the second police attempt at obtaining the videos. An earlier production order for the images failed because of errors made in it by police, but a corrected application was accepted by the court Dec. 21, 2011.

Choosing not to appeal, the newspapers decided to make every image available to readers first, posting nearly 5,500 photos taken during the riot at pngphoto.com.

The Sun was concerned that giving the photos to the police involved turning over hundreds of photos of innocent people.

"Our lawyer, Dan Burnett, has written asking police to confirm that images of innocent citizens will be destroyed out of respect for their civil liberties after the investigation is completed," the Sun's deputy managing editor Harold Munro said.

The postings by the Sun and Province should allow readers to see whether their images are included in the massive police file assembled for the riot investigation.

Many people in the photos came downtown to watch hockey on an outdoor screen and did not participate in the riot.

Munro said the decision to turn over the material was done "reluctantly," and the newspapers remain concerned that the production order "turns journalists into evidence gatherers for police."

"Police should only make such demands on the media as a last resort," he added. "In this case, they have many thousands of [non-media] photos and videos from the public that are still being reviewed."

The production order also applied to The Globe and Mail, Global Television, CBC and CTV.

-source, Postmedia News

CAMERAS IN THE COURTROOM

Goal of broadcasting trials gets more complicated

BRITISH COLUMBIA – After a judge said no to the broadcasting of the sentencing in the first guilty plea in the Stanley Cup hockey riots, the province backed down on its desire to televise trials.

In a Feb. 13, 2012 announcement, the province said it had rescinded an order to Crown counsel to seek from the courts' permission to broadcast the proceedings.

After the June 15, 2011 riot, Premier Christy Clark suggested those who "had no problems doing their crimes…in public with all kinds of people taking pictures and doing videos all around them…should have no problem being tried in public either."

She framed it as an open courts issue.

But Provincial Court Judge Malcolm MacLean dismissed the Crown's broadcast application on Feb. 12, 2012 in the case of Ryan Dickinson, who pleaded guilty in January, 2012 to participating in a riot and breach of recognizance.

"In view of the constraints, including the imminent sentencing of…Dickinson, the lack of his consent, the lack of relevant and all necessary information, and the need for the assistance of amicus curiae, I am satisfied that proceeding further with the broadcast application in this particular case is not appropriate," Judge MacLean said

The lack of an amicus--a lawyer appointed to assist the court with issues that the parties wouldn't otherwise address--appeared to doom the application.

Judge MacLean said the amicus would be needed to assess the effects of cameras on witnesses, and to provide assistance with technology and costs.

But he also worried about the impact of cameras on the testimony of character witnesses and courtroom employees at sentencing.

Attorney-General Shirley Bond explained the provincial back down this way: "The province had two goals--timely justice and greater transparency to the justice system. If we must choose between the two, we will pursue timely justice. Accordingly, the direction issued to Crown counsel has been rescinded."

The decision signified the end of what opponents, including the NDP legislative opposition and Vancouver's mayor, called Riot TV.

But it is unlikely to finish the efforts of broadcasters, espe-

cially the CBC, to gain expanded access to the courts.

-source, decision, The Globe and Mail.

OPEN COURTS

Role of social media examined by Top Judge

OTTAWA—The verdict is in from the country's top judge: the justice system must learn to deal with social media such as Twitter and Facebook.

That's because a free press and an independent judiciary have an "indispensable" role to play in a democracy that is committed to the rule of law, Chief Justice Beverley McLachlin said.

But social networking presents challenges to how trials are run and judges behave, she said.

In a Jan. 31, 2012 speech to students at Carleton University, McLachlin said the media in general are essential to building public trust in the administration of justice.

But she says newspapers, radio and television are "old technology" at a time when anyone with a keyboard can create a blog and call themselves a journalist.

She wondered whether fairness and accuracy might be lost in the world of Facebook, tweets and instant messaging, which she said was part of a profound, cultural shift in how people communicate.

"Some bloggers will be professionals and academics providing thoughtful commentary and knowledge. Others will fall short of basic journalistic standards. Will accuracy and fairness be casualties of the social media era?" she asked.

"What will be the consequences for public understanding of the administration of justice and confidence in the judiciary? How can a medium such as Twitter inform the public accurately or adequately in 140 characters or less of the real gist of a complex constitutional decision?"

McLachlin said that North American judges "are already grappling with some of these questions. Should judges tweet? Should they be on Facebook? And other, more complex queries wait in the wings."

She spoke as the Shafia "honour-killing" trial ended, where the judge banned tweeting from his courtroom and allowed the use of electronic devices such as laptop computers for the purposes of note-taking only.

In contrast, the recent Russell Williams murder trial featured live tweeting from the courtroom.

-source, Toronto Star

ACCESS TO RECORDS

FOI fees cause bureaucratic row

OTTAWA — Foreign Affairs Minister John Baird said he won't change the way his department handles access to information requests despite a formal recommendation to do so by Canada's information commissioner Suzanne Legault.

She slammed bureaucrats in Baird's department in a ruling released Feb. 17, 2012, which said their practice of charging high and arbitrary fees for records created "a barrier to access" for government records that Canadians have a right to see.

Since 2008, Foreign Affairs has been arbitrarily charging "preparation fees," a practice that, by its own admission, had the effect of preventing the release of more than 160,000 pages of records.

Those records included everything from the new trade deals to the NATO materials Maxime Bernier once left at his girlfriend's home.

An internal Foreign Affairs memo (actually obtained through the Access to Information Act) made clear that while the bureaucrats at Foreign Affairs knew the "prep fee" policy was controversial, they defended it as an effort to reduce workload and better service.

The argument is that the Act needs updating for an age of e-mail and electronic documents.

Journalists filed an official complaint with the information commissioner, arguing only a bureaucrat could be convinced "better service" means frustrating requesters with high fees that prevent the release of requested records.

Last November, after a three-year investigation, Legault told Baird his department should change its ways.

But she said he's ignoring her.

"I have concluded that the minister has refused to agree with the findings of my investigation and does not intend to implement my recommendations," Legault wrote. She did not accept that the Act needed updating.

-source, SunMedia

COMMENT

The Charter of Rights and Freedoms

Thirty years ago on March 29, 1982, the Canadian Constitution's Charter of Rights and Freedoms received royal assent and became the law of the land, essentially subordinating the laws passed by the legislatures of Canada to judicial accep-

tance.

We thought we might pose the question of how this has worked out as it affects the media by asking for a comment from the lawyers on the executive of the Canadian Media Law Association/AdIdem.

Specifically, we asked the following questions:

1. Overall, has the Charter been good or bad for journalism during those 30 years?

2. From the media perspective, what is the best 'good' to have come out of Charter rulings?

3. Contra-wise, where has the Charter failed the media most?

2012 CMLA/AdIdem president Dan Burnett (Owen Bird) in Vancouver commented:

1. Overall, the Charter has been good for journalism, principally on open court issues and more recently in cases reforming defamation law. There are still many frustrations, and it often seems that pronouncement from the Supreme Court do not register with lower courts (who still, for example, routinely seal warrants despite the strong language to the contrary in the Toronto Star decision). Still, we are better off today than we were before the Charter.

2. The most important "good" for media out of Charter rulings is that freedom of expression no longer takes a back seat to other values. It used to be that even speculative concerns about publicity impacting a trial resulted in publication bans, but that approach is now rejected. Similarly, the traditional law of defamation so aggressively protected reputation that freedom of expression seriously suffered, but the Supreme Court has recently begun to take a more balanced approach to accord with Charter values.

3. Where the Charter has failed media the most is on the high cost of exercising rights that should be presumptive. The media is expected to hire lawyers to challenge overreaching publication bans. Reporters still cannot get the exhibits at the heart of an important case except at great legal expense and usually terrible delay. Yet that same reporter is the one everyone in the system relies upon to inform the public.

2012 CMLA/AdIdem vice-president Christian Leblanc (Faskin Martineau duMoulin) in Montreal commented:

The Charter was good for journalism because we got the freedom of expression clause, 2b, and the corresponding section in the Quebec Charter. With the Charter came advances for freedom of information--and the freedom to gather information. Even confidential sources protection, while not recognized as a Charter right by the courts, was influenced by the Charter in Supreme Court of Canada rulings.

Best of all, we got the Dagenais decision. Philosophically, it set the template for freedom of expression. While free expression does not trump other rights, at least others no longer supersede free expression. Until Dagenais there was a presumption that in courts freedom of expression was second at the finish line compared to the right to privacy or the right to a fair trial. We are still using Dagenais today to fight publication bans and for the importance of free expression.

From a Quebec perspective, the Neron ruling – and while not directly linked to the Charter, it was a free expression case – is a key decision in defamation matters. To state that truth is not a defence in defamation cases, but merely one criterion – and not even the most important – has had a chilling effect. When you can't rely on truth, it places an undue burden on the media. We are now stuck with proving in every defamation case that the journalist used the skills of the job properly while doing a story.

[Note: In Dagenais, 1994, the Supreme Court said freedom of expression, under Charter section 2{b), is on the same footing as the constitu¬tional right of an accused person to a fair trial, free of prejudicial publicity. The court decreed that bans must be limited in scope and the party seeking one must prove there's a real risk to fair trial rights unless a ban is imposed, and there are no alternative means to eliminate that risk. The ruling came on Dec. 8, 1994, when the CBC successfully appealed a judge's banning of the television show The Boys of St. Vincent.]

2012 CMLA/AdIdem Secretary-Treasurer Nancy Rubin (Stewart McKelvey) in Halifax commented:

It is axiomatic that the Charter has been good for journalists covering court proceedings. As Charter-wielding lawyers, we pound the table for our media clients using words such as "democracy" and "open courts" and s.2(b) which guarantees freedom of expression, including freedom of the press. We remind Judges that freedom of expression guarantees the media not only the right to express news but also the right to gather news. We object to limits on access to documents and exhibits, and to publication bans, sealing orders, the use of pseudonyms and efforts to close the courtroom. What the Charter has done is enlighten court participants to the rights of the public and the media. On a practical level, in Nova Scotia media are required to be notified of a request for a confidentiality order and the Dagenais/Mentuck test is codified.

This is not to say that all is utopian; front-line Judges will continue to grapple with the evidentiary necessity for a requested confidentiality order and to weigh the rights and interests in order to achieve a fair result.

Apart from court coverage, recently and dramatically, Chief Justice McLachlin relied on the Charter to modernize the law

of defamation to strike a better balance between protection of individual reputation and freedom of the press. The Court defined a "responsible communication" defence where there is a public interest in the communication and the speaker has been diligent in attempting to verify the allegations. The defence shifts the focus to how a story is reported rather than proving every fact reported. The responsible communication defence has the potential to encourage good investigative journalism with thorough research, reliable sources, and fair and balanced reporting.

Looking ahead the next 30 years, if grey is the new black, we can expect that privacy rights will be the new "fair trial rights" balanced against s.2(b). Increasingly, despite the growth of social media, people are asserting a right to choose what remains private. Journalists must be vigilant.

[Note: The operative cases in the "responsible communication" defence are Grant v TorStar, 2009 and Cusson v Quan, 2009]

Former CMLA/AdIdem President Fred Kozak (Reynolds, Mirth, Richards, and Farmer) in Edmonton commented:

The Charter has had a significant and overwhelmingly positive impact for journalists in Canada. Many pre-Charter decisions restricted media rights, in spite of paying lip service to the open court principle by describing freedom of expression as the "life blood" of our democratic system. It took the enactment of the Charter to give that life blood an effective, beating heart.

Courts no longer question the media's important role in making our judicial system more transparent, and the Charter has been an indispensable tool in significantly reducing the circumstances where courts impose some sort of reporting restriction on judicial proceedings pursuant to its inherent jurisdiction, or a statutory discretion. In practical terms, the Charter has also made it less likely that journalists will have their newsroom searched, their work product seized, be punished for contempt, be forced to disclose the identity of confidential sources, or pay damages when expressing opinions, or responsibly communicating on matters of public interest.

The Charter has been less helpful to the media in striking down statutory, non-discretionary reporting restrictions, or addressing the cumbersome practical obscurity inherent in freedom of information legislation, and the limitations on media access to important government information. And while importing Charter values into a contextual analysis makes it less likely that a reporter will ultimately be compelled to disclose a confidential source, the Charter will never provide any sufficient degree of certainty to a journalist at the time she makes her promise to her source.

The focus of section 2(b) jurisprudence for the first 30 years of the Charter has largely pitted free expression against two competing values: the right to a fair trial before impartial jurors, and the right to protect one's reputation. While those historical issues will continue to shape the boundaries of free speech in Canada, the contest looming on the immediate horizon will also undoubtedly pit free expression against emerging privacy concerns.

Former CMLA/AdIdem President Brian Rogers (BMR Law) in Toronto commented:

1. Free expression concerns were freed from the shackles of the common law by the Charter. It provided a new impetus to challenge and re-examine social and legal conventions. Arguing from first principles, social values and public policy, it was no longer necessary to contort arguments to fit within the words of dead judges. It meant journalism could harken back to its roots as the primary means for a democratic society to be informed and to engage in public debate.

2. Access to courts and tribunals was the first step, and doors that had often been closed were dramatically opened. The common law provided some important precedents as well, and these eased the transition. The arguments for closed or secret proceedings simply could not stand up to scrutiny. Publication bans came next. Dagenais was a watershed that forced courts to re-examine whether bans were really necessary. Most importantly, the Supreme Court of Canada overturned the common law's presumption that protecting fair trial rights, however speculative, should always come first. The instinctive response of "sub judice" to draw curtains across investigations and proceedings of great and legitimate public interest was no longer sufficient. The traditional law of contempt was finally seen as an emperor without clothes. Contentious stories in the public interest about crimes and court proceedings could be published without jeopardizing fair trials. The question became "why not publish?"

3. Unfortunately, to date, the Charter has had very limited impact on compelling disclosure by governments. Freedom of information legislation is seen as a limited privilege bestowed by legislation that should be strictly construed. Coupling public access with protection for privacy has muddied the waters. The fundamental importance of transparency and providing the public with much needed information seems to have been lost. Hence, governments can thumb their noses with impunity at legislative time-lines and requirements. Media or political requests can be given "special treatment", and use of delaying tactics means that access is simply not available in a timely and effective way--especially to information that may be particularly important or contentious. At all levels of government, no jobs have been lost by redacting or delaying too much.