Case Name:

R. v. Pilarinos

BCTV, a division of Global Communication Limited, CKVU, a division of Global Communications Limited, CTV Inc., CTV Television Inc. CIVT, a division of CTV Television Inc. (d.b.a. CTV BC, formerly Vancouver Television), The Radio Television News Directors Association of Canada, and AD IDEM - Advocates in Defence of Expression in Media
v.
Her Majesty the Queen, Dimitrios Pilarinos and Glen David Clark, Attorney General of British Columbia, and Josiah Wood, Q.C. (Amicus Curiae)

[2001] S.C.C.A. No. 497

File No.: 28823

Supreme Court of Canada

Record created: October 4, 2001.

Appeal From:

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA

Status:

Motion to quash appeal granted December 2, 2002.

Catchwords:

Canadian Charter of Rights and Freedoms -- Freedom of expression -- Freedom of the press -- Whether the common law prohibits television and radio access to courtroom proceedings -- Whether a prohibition (or a prohibition but for the consent of all parties) of television or radio access to court proceedings is an infringement of s. 2(b) of the Charter -- What legal and constitutional principles must a judge follow when considering applications for television or radio access to court proceedings -- Whether the trial judge fettered her inherent jurisdiction by embracing the Policy on Television in the Courtroom adopted by the Supreme Court of British Columbia on May 9, 2001, effectively giving each party a veto power over radio and television access.

Counsel:

Daniel W. Burnett (Owen, Bird), for the motion.
William Smart, Q.C. (Smart & Williams), contra.

At motion to quash:

M. David Lepofsky, for the intervener the Attorney General for Ontario.
Daniel Burnett, for the appellants Global B.C. et al. (via video conference).
Ian Donaldson, Q.C., for the respondent Dimitrios Pilarinos (via video conference).
Richard S. Fowler, for the respondent Glen David Clark (via video conference).
George H. Copley, Q.C., for the respondent the Attorney General of British Columbia (via video conference).
Robert MacKinnon, for the intervener the Attorney General of Canada.

Chronology:

1. Application for leave to appeal:

FILED: October 4, 2001. S.C.C. Bulletin, 2001, p. 1817.

2. Motion to expedite the application for leave to appeal dismissed October 18, 2001. Before: Arbour J. S.C.C. Bulletin, 2001, p. 1939. Revised: November 15, 2001. S.C.C. Bulletin, 2001, p. 2078.

[Revised version]

The applicants BCTV, CKVU, CTV INC et al (the media) are seeking an order expediting their application for leave to appeal from a decision of Madam Justice Bennett dismissing their application for Expanded Media Coverage of the respondents' trial. The judgment of Bennett J. was rendered Sept. 25, 2001, at the opening of the trial. The first four weeks of the trial have been occupied by voir dire proceedings, and the trial proper, which is expected to last eight weeks before judge alone, was to begin around October 15.

The applicants argue that the issue of radio and television access to courtrooms is a question of national importance and that they will not be granted the access that they claim they are entitled to in this case unless they can get immediate appellate review.

All respondents oppose the motion. In short, counsel for the accused submit that they are fully occupied in the defence of their case, which is now at trial, and that they do not have the means and the capacity to respond adequately to the proposed appeal on an expedited basis. As for the Crown, it opposes the application to expedite unless the applicants undertake not to seek a delay of the trial, regardless of the outcome of the leave application. The media being unwilling to commit to that position, the Crown opposes the motion.

This brings home the reality of the situation. Even if this matter were to be expedited as per the media's request, (the respondents would have 10 days to respond to the leave application, and the applicants 3 days to reply), and even if the leave panel could render

its decision within days thereafter, it is obvious that if leave were granted, the appeal could not possibly be prepared, (including with the participation of hypothetical interveners), argued and decided in time to permit the coverage of this trial on the terms requested by the applicants.

This illustrates once again the obvious fact that this Court is not designed to have first-level, error-correcting appellate jurisdiction. That function is normally performed by provincial courts of appeal, which can respond in a timely fashion to situations that present a time-sensitive issue. Matters such as this one cannot be appealed to courts of appeal under the terms of the Criminal Code. Appeal rights being entirely statutory, the applicants must avail themselves of s. 40 of the Supreme Court Act since the judgment at trial on their Charter claim is final and not subject to review by any other court.

This statutory deficiency has been noted in the past (see Dagenais v. CBC, [1994] 3 S.C.R. 835, at paras. 18 & 66; R. v. McClure, [2001] 1 S.C.R. 445 at para. 66). In Dagenais, Lamer C.J.C. made the following forceful comments:

> It is important to note once more that the current situation is deplorable. Fundamental rights are at stake, but no truly satisfactory avenue of appeal has been established by statute. I hope that Parliament will soon consider filling this jurisdictional lacuna and establishing statutory rights of appeal for third parties such as the media [At para. 66].

I am conscious of the fact that while the applicants may succeed in pursuing their broad-based legal claim ultimately before this Court, the reality of the situation is that they have no forum in which to obtain redress, assuming redress is due, in the case at bar. The corrective measure to this situation can only come from Parliament.

In these circumstances, the motion to expedite must fail. It would serve no practical purpose while unduly distracting trial counsel from the important task of trying the case. If and when this issue comes before this Court, it should be accorded all the time and attention that it deserves, without interfering with the proper administration of justice at the trial level.

Motion dismissed.

3. Motion to extend the time in which to serve and file the response of the respondent Glen David Clark granted November 8, 2001. Time extended to November 16, 2001. Before: A. Roland, Registrar. S.C.C. Bulletin, 2001, p. 2035.
4. Motion to extend the time in which to serve and file the response of the respondent Dimitrios Pilarinos granted November 19, 2001. Time extended to November 19, 2001. Before: A. Roland, Registrar. S.C.C. Bulletin, 2001, p. 2142.
5. Application for leave to appeal:

SUBMITTED TO THE COURT: December 31, 2001. S.C.C. Bulletin, 2002, p. 9.
GRANTED: January 17, 2002 (without reasons). S.C.C. Bulletin, 2002, p. 77.

Before: McLachlin C.J. and Iacobucci and Arbour JJ.

6. Notice of appeal filed February 15, 2002. S.C.C. Bulletin, 2002, p. 286.
7. Motions for leave to intervene:

By: Attorney General of Canada
Procureur général du Québec
British Columbia Civil Liberties Association

Granted May 15, 2002. Before: Iacobucci J. S.C.C. Bulletin, 2002, p. 813.

UPON APPLICATION by the Attorney General of Canada, the Attorney General of Québec and the British Columbia Civil Liberties Association for leave to intervene in the above appeal;

AND HAVING READ the material filed;

IT IS HEREBY ORDERED THAT:

1. The motion for leave to intervene of the applicant Attorney General of Canada is granted and the applicant shall be entitled to serve and file a joint factum not to exceed 20 pages in length.
2. The motion for leave to intervene of the applicant Attorney General of Québec is granted and the applicant shall be entitled to serve and file a joint factum not to exceed 20 pages in length.
3. The motion for leave to intervene of the applicant British Columbia Civil Liberties Association is granted and the applicant shall be entitled to serve and file a factum not to exceed 20 pages in length.

The request to present oral argument is deferred to a date following receipt and consideration of the written arguments of the parties and the interveners.

The interveners shall not be entitled to adduce further evidence or otherwise to supplement the record of the parties.

Pursuant to Rule 18(6) the interveners shall pay to the appellants and respondents any additional disbursements occasioned to the appellants and respondents by the interventions.

La version française:

À LA SUITE DE DEMANDES du Procureur général du Canada, du Procureur général du Québec et de la British Columbia Civil Liberties Association visant à obtenir l'autorisation d'intervenir dans l'appel susmentionné;

ET APRÈS AVOIR LU la documentation déposée;

L'ORDONNANCE SUIVANTE EST RENDUE;

1. La demande d'autorisation d'intervenir présentée par le Procureur général du Canada est accueillie; le requérant aura le droit de signifier et déposer un mémoire n'excédant pas 20 pages.
2. La demande d'autorisation d'intervenir présentée par le Procureur général du Québec est accueillie; le requérant aura le droit de signifier et déposer un mémoire n'excédant pas 20 pages.
3. La demande d'autorisation d'intervenir présentée par la British Columbia Civil Liberties Association est accueillie; le requérant aura le droit de signifier et déposer un mémoire n'excédant pas 20 pages.

La demande visant à présenter une plaidoirie sera examinée après la réception et l'examen de l'argumentation écrite des parties et des intervenants.

Les intervenants n'auront pas le droit de produire d'autres éléments de preuve ni d'ajouter quoi que ce soit au dossier des parties.

Conformément au par. 18(6) des Règles de la Cour suprême du Canada, les intervenants paieront aux appelants et aux intimés tous débours supplémentaires résultant de leur intervention.

8. Motion to state a constitutional question granted July 10, 2002. Before: McLachlin C.J. S.C.C. Bulletin, 2002, p. 1077.

Notices of intervention are to be filed on or before September 3, 2002.

[La version française se trouve ci-dessous]

1. Is there a common law rule prohibiting the recording or transmitting of images or sound or both using any non-manual device ("recording") by media in the courtroom during a trial or other proceeding ("the rule")?
2. If question 1 is answered in the affirmative, is the rule an infringement or denial of rights guaranteed by section 2(b) of the Canadian Charter of Rights and Freedoms?
3. If question 2 is answered in the affirmative, is the infringement or denial a reasonable limit prescribed by law which can be demonstrably justified in a free and democratic society under section 1 of the Charter?
4. Is a modification of the rule to permit recording only where the parties to the proceeding consent an infringement or denial of rights guaranteed by section 2(b) of the Charter?
5. If question 4 is answered in the affirmative, is the infringement or denial a reasonable limit prescribed by law which can be demonstrably justified in a free and democratic society under section 1 of the Charter?

Version française :

1. Existe-t-il une règle de common law prohibant l'enregistrement ou la transmission au moyen de dispositifs non manuels d'images, de sons, ou les deux ("enregistrement") par les médias lorsqu'ils se trouvent dans une salle d'audience durant un procès ou une autre procédure ("la règle")?
2. Si la réponse à la question est affirmative, la règle a-t-elle pour effet de violer ou nier les droits garantis par l'al. 2b) de la Charte canadienne des droits et libertés?
3. Si la réponse à la question 2 est affirmative, la violation ou la négation en question constitue-t-elle, suivant l'article premier de la Charte, une limite raisonnable prescrite par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique?
4. La modification de la règle afin de permettre l'enregistrement dans les seuls cas où les parties aux procédures y consentent aurait-elle pour effet de nier les droits garantis par l'al. 2b) de la Charte canadienne des droits et libertés ou d'y porter atteinte?
5. Si la réponse à la question 4 est affirmative, la violation ou la négation en question constitue-t-elle, suivant l'article premier de la Charte, une limite raisonnable prescrite par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique?

9. Notices of intervention:

By: Attorney General of Canada
Attorney General of Ontario

Filed July 17, 2002. S.C.C. Bulletin, 2002, p. 1099.

10. Motion to extend the time in which to serve and file the respondent's factum, record and book of authorities granted August 21, 2002. Before: A. Roland, Registrar. S.C.C. Bulletin, 2002, p. 1187.

The motion by the respondent Attorney General of B.C. to extend the time in which to serve and file its factum, record and book of authorities to September 3, 2002 is granted.

11. Notice of intervention:

By: Procureur général du Québec

Filed August 27, 2002. S.C.C. Bulletin, 2002, p. 1189.

12. Notice of intervention:

By: Attorney General of Manitoba

Filed August 29, 2002. S.C.C. Bulletin, 2002, p. 1209.

13. Motion to extend the time in which to serve and file the factum and book of authorities of the intervener the Attorney General of Ontario to December 13, 2002 granted in part October 7, 2002. Time extended to December 9, 2002. Before: A. Roland, Registrar. S.C.C. Bulletin, 2002, p. 1434.
14. Motion to extend the time in which to serve and file the factum of the intervener the Attorney General of Manitoba granted October 7, 2002. Time extended to October 25, 2002. Before: A. Roland, Registrar. S.C.C. Bulletin, 2002, p. 1435.
15. Motion to extend the time in which to serve and file the factum and book of authorities of the intervener the Attorney General of Quebec granted October 16, 2002. Time extended to October 18, 2002. Before: A. Roland, Registrar. S.C.C. Bulletin, 2002, p. 1498.
16. Motion to extend the time in which to serve and file the factum of the intervener British Columbia Civil Liberties Association granted November 15, 2002. Time extended to October 30, 2002, nunc pro tunc. Before: A. Roland, Registrar. S.C.C. Bulletin, 2002, p. 1643.
17. Miscellaneous motion dismissed November 22, 2002. Before: McLachlin C.J. S.C.C. Bulletin, 2002, p. 1733.

UPON APPLICATION by the appellants for an order adjourning the hearing of the motion to quash from December 2, 2002 to January 13, 2003;

AND HAVING READ the material filed;

IT IS HEREBY ORDERED THAT:

> The application of the appellants for an order adjourning the hearing of the motion to quash from December 2, 2002 to January 13, 2003 is dismissed.

18. Motion to quash granted December 2, 2002 (video-conference - Vancouver). Before: McLachlin C.J. and Iacobucci, Major, Bastarache and LeBel JJ. S.C.C. Bulletin, 2002, p. 1764.

JUDGMENT: The motion to quash the appeal from the judgment of the Supreme Court of British Columbia, Number CC0011402, dated September 25, 2001, is granted.

We are all of the view that the appeal is now moot and we see no reason to exercise our discretion to allow the appeal to proceed. We would therefore quash the proceedings.

JUGEMENT: La requête en cassation de l'appel interjeté contre la décision de la Cour suprême de la Colombie-Britannique numéro CC0011402, datée du 25 septembre 2001, est accordée.

Nous sommes tous d'avis que l'appel est devenu théorique et nous ne voyons aucune raison d'exercer notre pouvoir discrétionnaire pour permettre que l'appel suive son cours. En conséquence, nous cassons la procédure.

Procedural History:

Judgment on application: Application for Expanded Media Coverage denied.
British Columbia Supreme Court, Bennett J., September 25, 2001.
158 C.C.C. (3d) 1; [2001] B.C.J. No. 1936.

ver/rpl