

Publication Bans: Who, What, Where, When and Why?

L'ordonnance de non-publication: qui vise-t-elle?

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In the course of the last year or so publication bans in one form or another have generated lively debate and comment not only in the media and within the legal community but in the public arena in general.

Avant 1982, l'ordonnance de non-publication était assujettie aux règles de droit commun auxquelles s'ajoutaient certaines dispositions statutaires ciblées à des situations particulières. De nos jours, ces règles constituent encore le véhicule par lequel l'ordonnance de non-publication est imposée mais avec une autre dimension soit celle que ces règles doivent être appliquées dans le cadre de la Charte. Dans un article portant le titre *Open Justice*, M^e David Lepofsky a fait état des concepts divergents comme suit à la page 5:

As documented in Open Justice several fundamental values vie for vindication when one explores open justice's core content. These include freedom of expression and press, the public's so-called "right to know" about the events occurring in court, the accused's interest in having a fair trial, the court participants' interest in their personal privacy and their reputation, the maintenance of the authority of courts, and the public's interest in winning the war on crime and in ensuring that justice is properly administered. In fashioning a society's system of open justice, the most efficacious way to reconcile and further these often-competing goals is neither easy nor obvious.

Since the Charter, a number of potentially conflicting rights, now elevated to constitutional status, come ever more frequently into collision. On one hand the statutory restrictions operate as before but the Charter, given the interpretation ascribed to it, mandates generally that these restrictions be applied only in the narrowest of circumstances. On the other hand the continuing articulation of the rights of accused persons and of victims of crime operates in counterpoint to bring into being an ever increasing list of exceptions to the principle of "openness". Each case necessarily has been considered on its own merits and, indeed, this will always be so.

C'est peut-être en vain que nous recherchons un consensus. L'augmentation constante des ordonnances de non-publication dans un système judiciaire traditionnellement transparent exige que la question des ordonnances de non-publication et du huis clos soit examinée de façon à tenter de développer une approche logique, conforme, garantissant les droits de tous et chacun.

Un jour ou l'autre, nous devons faire face aux questions difficiles de: quand, où, pourquoi, dans quelles circonstances et par rapport à qui, les ordonnances de non-publication peuvent-elles être imposées?

Perhaps the greatest criticism of these bans resides in the fact that their effectiveness is open to serious question. We live in a world of instant communication not only at a local or national level but also internationally. Satellite communications are now common and will greatly expand in the next few years. Add to this the implications of the "information super highway" which is in fact upon us. This contemplates instant computerized communication between hundreds of thousands of subscribers throughout the world as well as the dissemination of specialized information on a multitude of networks, bulletin boards and electronic mail. These developments boggle the mind. They have the potential not only for frustrating the effectiveness of whatever ban may be imposed but for calling into question the "raison d'être" for any ban at all.

In keeping with the purposive interpretation which the Supreme Court has applied to the Charter there may be some value in attempting to define generally the purposes for which bans may be resorted to, the individuals whom they are aimed at protecting and the mechanisms by which that protection can be afforded. That is the "stuff" of this afternoon's panel.

I. INTRODUCTION OF SPEAKERS

This afternoon panel comprises three persons eminently qualified to discuss these questions from differing point of view.

Mr. Ian Binnie after graduating from McGill University with a Bachelor of Arts degree continued his studies at the University of Cambridge picking up a second B.A. in 1962 and perhaps more importantly since he is a lawyer, an LL.B. in 1963. He was called to the Bar of England in 1966 and of Ontario in 1967 and was appointed Queen's Counsel in 1979. In 1988 he was awarded an LL.M. degree from University of Toronto. A specialist in civil litigation, he has frequently appeared before all levels of courts including the Supreme Court of Canada. He has represented Canada before the International Court of Justice at the Hague and before the International Court of Arbitration. He was Associate Deputy Minister of Justice from 1982 to 1986 and was closely involved in Constitutional negotiations which marked the latter part of the 80's. A member of the firm of McCarthy Tétrault, he has recently appeared on behalf of the media in matters involving just the subject which we are about to discuss.

Mr. Gordon Sinclair is Director of Information Programming, News and Public Affairs for radio station CJAD in Montreal. In that capacity, he directs a team of reporters whose job it is to discover, report upon and in some instances comment upon newsworthy stories as they break. Born and raised in Toronto, Mr. Sinclair has been a Montrealer for over 40 years. In 1960 he launched, in partnership with others, radio station CFOX on the West Island Area of Montreal which he operated until the station was sold in 1972. In addition to being News and Public Affairs Director at CJAD, he is a regular on-air editorialist, a talk show host as well as a columnist for the Financial Post and West Island Chronicle. He has his finger on the public pulse. He travels widely and this has permitted him to have a comparative appreciation of what goes on in the news world in North America as opposed to elsewhere. Questions of what merits being reported and situations where restraint dictated by journalistic ethic is called for are matters with which he is familiar. Some may find his views uncompromising but then I do not know whether today he has decided to take a "hard-boiled" approach or whether you will see the "kinder and gentler" Gordon Sinclair.

Mr. Justice Roger Kerans really needs no introduction, he has been this route on a number of previous occasion and it can be counted upon to be incisive and thought-provoking. Mr. Justice Kerans is a member of the Court of Appeal of Alberta since 1980.

Before that, he spent ten years as a trial judge first of all on the District Court and later as a member of the Court of Queen's Bench. Born in Lashburn, Saskatchewan, he was appointed to the judiciary in 1970 at the age of 36. In 1975, he was asked to move to Calgary as Associate Chief Judge after residing for 30 years in Edmonton as a student, lawyer and judge. He has also been, since 1972, a judge of the Supreme Court of the Yukon, and is a member of the Court of Appeal for the Northwest Territories.

II. INTRODUCTION

The four situations which follow comprise purely hypothetical situations, one of which the reader will easily recognize as being similar to a matter presently under active judicial consideration. It is not intended to play "fast and loose" with the "sub justice" rule for it is not, in any sense, a solution which the panellists will attempt to propose. Rather the situations, whether taken separately or together, are intended to serve as a springboard or channel for a discussion of the principles which are brought into play whenever the question of a publication ban or an "in camera" hearing arises.

III. AVANT-PROPOS

Les quatre mises en situation sont hypothétiques et le lecteur reconnaîtra sûrement une ressemblance avec une question présentement en délibéré. Nous n'avons aucunement l'intention d'abuser de la règle de *sub judice* parce que les participants ne proposeront pas de solution. Ces mises en situation hypothétiques, prises séparément ou ensemble, sont proposées uniquement dans le but de servir de tremplin afin de susciter une discussion des principes en jeu, chaque fois qu'une ordonnance de non-publication ou de huis clos est prononcée.

A. Situation # 1

X, a judge and happily married woman, attended a legal conference in the national capital. Following a social function she repaired to the apartment of Y, a male friend from her student days, a bachelor, and now a prominent national politician. Some further drinking took place to the accompaniment of soft music and eventually an intimate relationship occurred. Unfortunately, following the festivities, Y fell into a deep sleep, snoring loudly, and X, unable to awaken him, discretely returned to her hotel.

In the course of the next few hours, a fire broke out in the apartment resulting in the demise of Y. Immediately upon hearing of the tragedy, X contacted the police and made a full statement relating to the previous evening. The cause of the fire was believed to be due to careless smoking, although this was disputed by Y's insurers. Civil proceedings were eventually instituted against Y's estate by the insurers of the building owner. At the trial, X was summoned as a witness. Her counsel moved for a publicity ban

in relation to her testimony arguing personal embarrassment, the serious potential for harm to her marriage and, finally, that the publicity may impair public confidence in her as a judge.

Juge X, une femme mariée, assistait à un colloque juridique dans la capitale nationale. Après s'être acquittée de ses obligations mondaines, elle se rendit à l'appartement d'un copain de faculté, célibataire et maintenant un politicien bien en vue. Après quelques consommations, accompagnées de musique langoureuse, une relation intime s'est produite. Y, après les ébats amoureux, s'est endormi profondément et X, incapable de le réveiller, retourna discrètement à son hôtel.

Dans les heures qui suivirent, un incendie se déclara dans le logement d'Y, causant son décès. Immédiatement après avoir entendu la nouvelle de la tragédie, X contacta la police et fit une déclaration relatant les événements de la soirée précédente.

La négligence d'un fumeur serait à l'origine de l'incendie bien que cette hypothèse fut réfutée par les assureurs d'Y. Des procédures civiles furent éventuellement intentées contre la succession d'Y.

Lors du procès, X a été appelée comme témoin. Son avocat demanda une ordonnance de non-publication alléguant que son témoignage aurait potentiellement des effets désastreux dans sa vie privée, de même que sur sa crédibilité sur le plan professionnel.

B. Situation # 2

Bonnie in concert with Clyde, both just over eighteen years of age, masterminded a series of armed robberies of convenience stores. The robberies were in turn carried out by a number of minors acting on the instructions of both Bonnie & Clyde. In several instances, victims were confined and viciously beaten. The incidents terrorized the urban/rural community in which they occurred. The external circumstances of each incident were well publicized.

Following their arrest, Bonnie made a statement to the police admitting her part in the enterprise but claimed that the robberies were the brainchild of Clyde as a means of financing the operation of a clandestine week-end camping commune. There, under a cloak of secrecy and in a drug and alcohol enhanced atmosphere, ritualistic sexual acts regularly took place. Evidence emerged of the murder of a vagrant. According to Bonnie, Clyde was the main actor in this event in which Bonnie claimed not to be directly implicated.

Bonnie undertook to testify on behalf of the Crown and to plead guilty to three counts of conspiracy to commit armed robbery, one count of armed robbery and one count of being an accessory after the fact in relation to the murder. At Bonnie's trial, which generated wide media attention, the Crown sought a total ban on all publicity so as not to prejudice the right of Clyde to be tried by an impartial jury. Counsel for the defence was

mute. Counsel for Clyde sought permission to speak and indicated that he did not favour such a ban. He hinted that, in any event, he intended to move for a change of venue.

Deux jeunes adultes, Bonnie & Clyde ont manigancé une série de vols à main armée dans divers petits commerces ou boutiques. Les vols furent commis par plusieurs mineurs suivant les instructions de B & C. Dans plusieurs cas, les victimes furent séquestrées et battues. Ces incidents ont terrorisé les membres de la communauté où ils se sont produits. Les circonstances de chacun des incidents furent très largement rapportées par les médias.

Suite à l'arrestation des deux protagonistes, Bonnie a fait une déclaration aux policiers admettant une part de responsabilité dans l'entreprise, mais prétendit que Clyde en était le cerveau car c'est lui qui planifiait les vols et finançait ainsi les fins de semaines clandestines qui se déroulaient dans une atmosphère de drogue, de boisson et de débauche.

Bonnie accepta de témoigner pour la Couronne et elle plaida coupable aux trois chefs d'accusation de complicité dans le but de commettre des vols à main armée, sur un chef de vol à main armée et sur un chef de complicité après le fait relativement au meurtre d'un clochard. Selon sa version, Bonnie n'était pas impliquée directement dans l'événement; Clyde en était le principal acteur. Lors du procès de Bonnie, qui généra une vaste couverture par les médias, la Couronne a demandé une ordonnance totale de non-publication afin de ne pas nuire aux droits de Clyde d'avoir une défense pleine et entière et d'être jugé par un jury impartial. Le procureur de la défense est resté muet. Le procureur de Clyde a demandé la permission de parler et a indiqué qu'il n'était pas en faveur de la non-publication et que de toute façon il avait l'intention de demander le renvoi dans un autre district judiciaire.

C. Situation # 3

A, an employee of the Defense Ministry is accused of a number of violations of the *Official Secrets Act*. In substance, the Crown contends that he removed, copied and then returned, classified material for the purpose of passing it to a representative of a foreign government. The Crown applied for a total publicity ban and an "in camera" hearing on the basis that the sensitive nature of evidence involved nothing less than national interest.

A, un employé du ministère de la Défense est accusé d'avoir violé plusieurs secrets d'État. L'essentiel de la preuve se résume ainsi: il a pris des documents confidentiels dans un classeur, les a photocopiés et les a replacés, tout cela dans le but de passer les renseignements ainsi obtenus à un représentant d'un gouvernement étranger.

La Couronne demanda une ordonnance totale de non-publication alléguant la nature particulière de la cause qui impliquait rien de moins que l'intérêt national.

D. Situation # 4

A, a child psychologist is charged with sexual assault in relation to one of his patients. The fact of the charge is reported in the local newspaper following the arraignment of the accused but without his name or any other details being published. After disclosure of the Crown's evidence, the accused waives preliminary inquiry and is committed to trial. He elects to be tried by judge alone. At trial, counsel for the accused applies for a publication ban citing the devastating effects on the accused's professional career. The judge imposes the ban, and is roundly criticized by the media. The accused is eventually acquitted.

A, un psychologue pour enfants est accusé d'agression sexuelle sur un de ses patients. Suite à son arrestation, des détails de l'accusation furent rapportés dans les journaux locaux sans y mentionner son nom ou autres renseignements. Après la divulgation de la preuve par la Couronne, l'accusé a subi son enquête préliminaire et fut cité à son procès. Il choisit d'être jugé par un juge seul.

Au procès, le procureur de l'accusé demanda une ordonnance de non-publication alléguant que la publicité aurait des effets désastreux sur la carrière professionnelle de son client. Le juge a émis une ordonnance de non-publication et fut amèrement critiqué par les médias.

L'accusé fut éventuellement acquitté.