S.C.A. No. 02766

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Cite as: Legros v. Canadian Broadcasting Corporation, 1992 NSCA 40

B E T W E E N:

CHARLES ROBERT LEGROS appellant	) Joel E. Pink, Q.C.) for appellant
- and -	
CANADIAN BROADCASTING CORP. and THE DAILY NEWS respondents	) David G. Coles and) Paula M. Arab) for respondents
- and -	
HER MAJESTY THE QUEEN	) James C. Martin) for respondent)) Application Heard:) November 12, 1992))) Judgment Delivered:) November 19, 1992

BEFORE THE HONOURABLE MR. JUSTICE G.B. FREEMAN IN CHAMBERS

FREEMAN, J.A.:

This chambers application is for the stay of an order granting the news media the right to report the evidence called in the appellant's extradition hearing; the order quashed the publication ban ordered by the extradition judge.

The appellant, Charles Legros, is facing extradition on murder charges arising from the deaths of his wife's parents in California. The judge appointed under the **Extradition Act**,. Mr. Justice David MacAdam of the Trial Division, granted a ban under s. 539 of the **Criminal Code**. prohibiting the publication of evidence at the hearing until after the outcome of proceedings against Mr. Legros.

Despite the ban, evidence led earlier at the extradition hearing was published in newspapers in California.

On an application by the Canadian Broadcasting Corporation and the Daily News, claiming status as intervenors, Mr. Justice Peter Richard granted the following order dated November 12:

> **WHEREAS** the applicants appeared on October 27, 1992 applying pursuant to s.24(1) of the **Canadian Charter of Rights and Freedoms** and s. 52(1) of the **Constitution Act, 1982** for an Order quashing the Order of Mr. Justice MacAdam sitting as an Extradition Judge pursuant to the **Extradition Act** made October 21, 1992 banning the publication of evidence to be adduced at the extradition hearing of Mr. Charles Legros until such time as the accused is discharged or the trial concluded in California; . . .
>
> **AND UPON BEING SATISFIED** that the aforementioned Order of Mr. Justice MacAdam pursuant to s. 539(1)(b) of the **Criminal Code** infringed the Applicants' rights pursuant to s. 2(b) of the **Canadian Charter of Rights and Freedoms** and not being satisfied the infringement is a reasonable limit in a free and democratic society pursuant to s. 1 of the **Canadian Charter of Rights and Freedoms;**
>
> **NOW UPON MOTION:**
>
> **IT IS ORDERED** that the Order of the Inferior, Statutory Court banning the publication of evidence to be tendered at the extradition hearing of the Respondent, Mr. Charles Legros, as issued by the Honourable Mr. Justice David MacAdam acting as a judge of the Extradition Court be hereby quashed.

The appeal is from Mr. Justice Richard's order. In the present application the appellant seeks two stays:

> (1) a stay pending appeal of the order of the honourable trial division (chambers) judge quashing the non-publication order of the learned extradition judge; and
>
> (2) a stay pending appeal of the proceedings of the Extradition court which is set to resume on November 30, 1992.

No appeal has been brought respecting proceedings in the extradition court.

Section 13 of the **Extradition Act** is as follows:

> 13. The fugitive referred to in section 12 shall be brought before a judge who shall, subject to this Part, hear the case, in the same manner, as nearly as may be, as if the fugitive was brought before a justice of the peace, charged with an indictable offence committed in Canada

The hearing has therefore been held to be analogous to a preliminary hearing under the **Criminal Code**, and the provisions of the **Criminal Code** relating to preliminary hearings have been held to apply to **Extradition Act** hearings. (see **Re: Global Communications Ltd. and Attorney General for Canada** (1984), 10 C.C.C. (3d) 97)

Section 539(1) of the **Criminal Code** provides:

> 539(1) Prior to the commencement of the taking of evidence at a preliminary inquiry, the justice holding the inquiry
>
> (a) may, if application therefor is made by the prosecutor, and
>
> (b) shall, if application therefor is made by any of the accused,
>
> make an order directing that the evidence taken at the inquiry shall not be published in any newspaper or broadcast before such time as, in respect of each of the accused,
>
> (c) he is discharged; or
>
> (d) if he is ordered to stand trial, the trial is ended.

I am satisfied that an extradition hearing is analogous to a preliminary inquiry, and that provisions of the **Criminal Code** relating to preliminary inquiries must govern. I am aware of

no authority for applying those provisions selectively. In my opinion Mr. Justice MacAdam was bound to issue the publication ban at the request of the fugitive.

The issue is whether the operation of Mr. Justice Richard's order should be stayed pending appeal, and whether proceedings in Extradition Court should be likewise stayed, regardless of whether the first order is stayed, as the appellant requests.

Rule 62.10 states:

> (1) The filing of a notice of appeal shall not operate as a stay of execution of the judgment appealed from.
>
> (2) A judge on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution of any judgment appealed from or of any judgment or proceedings of or before a magistrate or tribunal which is being reviewed on an appeal under Rules 56 or 58 or otherwise.
>
> (3) An order under rule 62.10 may be granted on such terms as the judge deems just. . . .
>
> (5) Nothing herein prevents the staying of execution or proceedings by the court appealed from, as authorized by rule of court or by an enactment.

I am satisfied I have jurisdiction under Rule 62.10 to deal with the order of Mr. Justice Richard. I am equally satisfied I have no authority under that rule to order a stay of proceedings in the extradition court.

While it may be questioned whether I have authority sitting alone as a chambers judge to exercise the inherent jurisdiction of the court to order such a stay, as the appellant urges, I do not find it necessary to answer that question. If I had such jurisdiction, I would decline to exercise it in the present circumstances. The extradition court proceedings are not under appeal, and there is nothing before me by way of factual submission or legal argument which persuades me that justice requires they be stayed.

With respect to the requested stay of Mr. Justice Richard's order, I have been referred to **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 in which Mr. Justice Hallett, after a thorough review of the case law, set out the test for granting stays of execution.

The issue in that case involved payment of money. This test has been widely accepted in practice in this province; the criteria it sets out are appropriate to the present issues. Mr. Justice Hallett stated:

> "In my opinion, stays of execution of judgment pending dispositions of the appeal should only be granted if the appellant can either:
>
> (1) satisfy the court on each of the following: (i) that there is an arguable issue raised on the appeal; (ii) that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that it is difficult to, or cannot be compensated for by a damage award. This involves not only the theoretical consideration whether the harm is susceptible of being compensated in damages but also whether if the successful party at trial has executed on the appellant's property, whether or not the appellant if successful on appeal will be able to collect, and (iii) that the appellant will suffer greater harm if the stay is granted than the respondent would suffer if the stay is granted; the so-called balance of convenience or:
>
> (2) failing to meet the primary test, satisfy the court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case".

There can be no doubt the first requirement of the primary test has been met. Mr. Justice Richard's decision upholds the right of free speech guaranteed by the **Charter.** The publication ban reflects the individual's right to a fair trial as provided for by the **Criminal Code**. The conflict between them must be resolved by a panel of this court on the hearing of the appeal. It would be most improper for me as chambers judge to speculate upon the outcome because of the risk this could colour my conclusions.

If the appellant is successful, and the quashing of the publication ban is found to have adversely affected the appellant's right to a fair trial, it would be impossible to compensate him by way of a damage award. The second criterion of the primary ground is therefore met.

The issue turns on the balance of convenience, the third criterion.

The respondent states its case as follows:

> "By staying the decision of Justice Richard the Canadian Broadcasting Corporation would be deprived for all time of its ability to report on the

> proceeding in a timely, contemporaneous manner--it would suffer irreparable harm not compensable in damages. In short, a stay of the decision of Justice Richard would effectively constitute determination of the appeal as against the Respondent. In this case the granting of a stay would not operate to preserve the status quo."

A similar argument was dealt with in the **Global Communications** case, **supra**, in which the Ontario Court of Appeal upheld the right of a fugitive under the **Extradition Act** to bail under the **Criminal Code**, as well as the right of such a person to a ban on publication of proceedings at the bail hearing in the interests of ensuring a fair trial. Thorson, J.A., writing for the court, stated at p. 108:

> "With regard to the argument made by counsel for the respondent, the Attorney General of Canada, that the only result of the making of a non-publication order under s. 457.2(1) is a 'temporary' restriction on the media's freedom to publish or broadcast the evidence given at the hearing, and even this restriction does not extend to the reporting of the result of the hearing, counsel for the appellant countered that the value of news lies in its immediacy, and thus it is no answer that the same news can be published later since by then its value as news will have been lost. I accept that this is a valid observation looked at from the media's point of view, although it will not be valid in every case. Once again, however, it is implicit in the choice which Parliament made in 1976 that it was prepared to see some loss or curtailment of media freedom in the interest of avoiding what it saw to be the larger evil which could follow from the immediate publication or broadcasting of this particular kind of news."

Timeliness of access to news is an essential ingredient of the freedom of the news media guaranteed in s. 2 (b) of the **Charter.** The ultimate purpose of guaranteeing that freedom is to ensure that citizens of a free and democratic society be informed of matters of public interest or importance as they unfold; immediacy is a key to gripping the public attention. On the other hand, as Thorson, J.A., remarked at p. 113, "the right to a fair trial is a fragile right. It is quite capable of being shattered by the kind of publicity that can attend a bail hearing and, once shattered, it may, like Humpty Dumpty, be quite impossible to put back together again."

In determining the balance of convenience between two interests of such fundamental importance one distinction asserts itself: as valuable as timeliness may be in inducing public

awareness, if it is lost, the public can nevertheless be informed at a later date, perhaps by other means, before actual harm results. If an individual is unfairly tried, in all likelihood the damage can never be undone.

It is unfortunate that the publication ban was violated in California. However, that is not a matter over which control can be exercised through the present application. The appellant is in a Canadian court; he is entitled to the protection of Canadian laws. I will grant the stay of Mr. Justice Richard's order, thus extending to the appellant the protection of the **Criminal Code** until the issues can be determined on appeal. Success has been divided. The parties will bear their own costs.

Freeman, J.A.