1997 **C.R. No. 97-137468**

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

HER MAJESTY THE QUEEN

- and -

GERALD AUGUSTINE REGAN

- and -

THE CHRONICLE-HERALD and MAIL STAR NEWSPAPERS, THE DAILY NEWS, THE CBC NEWS and ATV NEWS

INTERVENORS

DECISION - MEDIA APPLICATION

HEARD: before the Honourable Justice J. Michael Macdonald, at Halifax, Nova Scotia, on October 14, 1997

DECISION: October 15, 1997 (Orally)

WRITTEN RELEASE OF DECISION: October 16, 1997

COUNSEL: Adrian C. Reid, Q.C., counsel for the Crown
Douglas W. Lutz, counsel for the applicant, the Chronicle-Herald and the Mail-Star Newspapers
Alan V. Parish, Q.C., counsel for the applicant, the Daily News
David G. Coles, counsel for the applicant, the CBC News
James B. Boudreau, counsel for the applicant, ATV News
Edward L. Greenspan, Q.C., counsel for the accused

BAN ON PUBLICATION

Publishers of this case please note that this decision is the subject of a publication ban.

M. MacDONALD, J.: **(Orally)**

The accused is charged with numerous sex related offences. Over the next several months I am expected to hear preliminary defence motions. Although not exhaustive, these include applications for:

(a) further disclosure;

(b) a stay proceedings; and

(c) severance

This initial application involves the scope to which the media may report on these upcoming pre-jury selection applications.

The accused maintains that by virtue of **Section 645(5)** of the **Criminal Code**, all pre-trial proceedings are caught by the statutory ban prescribed by **Section 648** of the **Criminal Code**. The relevant sections provide:

> **648. (1) Where permission to separate is given to members of a jury under subsection 647(1), no information regarding any portion of the trial at which the jury is present shall be published, after the permission is granted, in any newspaper or broadcast before the jury retires to consider its verdict.**

Section 645. (5) provides:

> **645.(5) In any case to be tried with a jury, the judge before whom an accused is or is to be tried has jurisdiction, before any juror on a panel of jurors is called pursuant to subsection 631(3) and in the absence of any such juror, to deal with any matter that would ordinarily or necessarily be dealt within the absence of the jury after it has been sworn.**

Alternatively, and in the event that **Section 648** is found to be inapplicable, the accused seeks a common-law publication ban.

The Crown's position is not much different from that of the accused. Additionally, it stresses the Crown's right to a fair trial.

The media, as represented by the Chronicle Herald/Mail Star; The Daily News; ATV and CBC, maintain that:

(a) **Section 648(1)** does not apply to the proposed preliminary motions;

(b) Alternatively, **Section 648(1)** is unconstitutional, in that it restricts the

press' freedom under **Section 2** of the **Charter** in a manner that is not saved by **Section 1** of the **Charter**; and

(c) In the further alternative, **Section 648(1),** as it applies to the proposed preliminary motions, is unconstitutional.

In synthesizing the parties' respective positions, I have therefore identified the following issues:

(1) Does **Section 648(1)** apply to the proposed motions?

(2) If so, is **Section 648(1)** constitutionally valid in this context?

(3) If so, how should it be interpreted?

(4) If, for whatever reasons, **Section 648(1)** does not apply to the proposed motions, should the court exercise its inherent jurisdiction by imposing an appropriate common law publication ban?

1. DOES SECTION 648(1) APPLY TO THE PROPOSED MOTIONS?

The answer to this question depends to a large extent on whether or not these proposed motions would be considered part of the accused's trial. In other words, I must determine when an accused's trial actually begins for the purposes of **Section 648(1)**. After all, *when* an accused's trial actually begins can vary depending upon the particular circumstances of each case.

I refer to The Supreme Court of Canada decision of **R. v. Basarabas** (1982), 144 D.L.R. (3d) 115, where at page 123, Dickson J., (as he then was), noted:

> **"The question of fixing the time of the commencement of a jury trial has been the subject of some difficulty in the past. It seems possible, however, on the authorities and on principle to reach the following conclusions:**
>
> **First, the time of commencement of a jury trial will vary according to the circumstances and the language of the section of the *Criminal Code* being applied."**

See also **R. v. Barrow** (1987), 38 C.C.C. (3d) 193, (S.C.C.).

I begin my analysis by exploring the legislative purposes of these two sections. This involves some consideration of their legislative evolution. **Driedger On the Construction of Statutes** (3d) at page 449, cites this as a good starting point.

> **"It is well established that the evolution of legislation may be relied on by the courts to assist interpretation. The meaning or purpose of a provision is often clarified by viewing it in its original context and, with the assistance of permissible extrinsic aids, tracing it through successive versions. As Pigeon J. wrote in *Gravel v. City of St. Leonard*:**
>
> > **Legislative history [evolution] may be used to interpret a statute because prior enactments may throw some light on the intention of the legislature in repealing, amending, replacing or adding to it.**
>
> **In *Hills v. Canada (A.G.)* L'Heureux-Dube wrote:**
>
> > **A good starting point to interpret a statute properly is to examine, however briefly, its legislative history [evolution].**

At the time **Section 648** was enacted, virtually all motions relative to a jury trial were conducted after the jury was selected. In fact, the opening words of **Section 648** presume this.

See **R. v. Chabot** (1980), 18 C.R. (3d) 258, (S.C.C.).

The fundamental purpose of this legislation was clear. A jury's verdict should be based solely upon admissible evidence presented at trial. This goal would be jeopardized if juries were exposed to media reports about hearings conducted in their absence (*voir dires*).

Obviously, Parliament found this safeguard to be necessary, despite the precautions inherent in the existing jury selection process; such as the necessity for a juror's solemn oath and the accused's right to challenge prospective jurors.

With the emergence of protracted wire tap based motions, it became impractical for trial judges to entertain all prospective applications after jury selection. Thus, Parliament enacted **s.-s. 645(5)** of the **Criminal Code** to solve this problem. Now, before the jury is selected, the trial judge may entertain any matter

that would ordinarily be heard in the absence of the jury.

The purpose of this amendment, and its interplay with **Section 648(1)**, was recently explained by Salhany J., in **R. v. Ross**, [1995] O.J. No. 3180, where at page 2 he states:

> **"Prior to the enactment of Section 645(5), all pre-arraignment matters such as motions to quash the indictment, sever counts, sever accused etc., could not be heard in advance of the trial since such motions could not be brought until the indictment had been preferred. In *Chabot* (1980) 18 C.R. (3d) 258 (S.C.C.) the Supreme Court of Canada held that an indictment was preferred against an accused when it was lodged with the trial court at the accused's trial with the court ready to proceed. In other words, there had to be a jury ready to [sic] empanelled otherwise it could not be said that there was a court ready to proceed. Section 645(5) was enacted to remedy that problem. It enables the trial judge to resolve all procedural and evidentiary matters in advance of the day when the jury panel is summoned. In my view, this application to stay proceedings falls within section 645(5) of the *Code*.**

As well, Ewaschuk, J., in **R. v. Curtis** (1991), 66 C.C.C. (3d) 156 at page 157, explains the evolution of **Section 654(5)**:

> **"At common law, a trial judge sitting with a jury could not make evidentiary rulings until after a jury had been selected and the accused had been placed in their charge. Only then did a jury trial commence: See *Morin v. The Queen* (1890), 18 S.C.R. 407.**
>
> **Following the introduction in 1974 of the *Criminal Code* provisions relating to the admissibility of wire-tap evidence (1974-75, c. 50) lengthy jury trials became the norm in drug conspiracy prosecutions. As a result, juries were often selected in those lengthy trials and then sent home often for weeks and even months at a time so that the trial judge could determine the admissibility of the wire-tap evidence prior to the actual tendering of evidence before the jury.**
>
> **This procedure created various logistical and administrative nightmares. To eliminate those problems, the federal government enacted s. 645(5) of the *Criminal Code*; See R.S.C. 1985, c 27 (1st Supp.) s. 133"**

Thus, the purpose of each section is clear and simple: The press should not publish evidence flowing from *voir dires* and a trial judge can now conduct *voir dires* before jury selection. When put in its historical context, there is nothing in **Section 654(5)** that should in any way diminish or qualify the safeguard provided in **Section 648(1)**. There would be no logical purpose for Parliament to jeopardize the "**648**

safeguard" when it enacted **Section 654(5)**. It simply attempted to alter the timing of *voir dires.* The fact that they can now be held earlier should not be seen as allaying Parliament's concerns. Parliament has already expressed its concern about pre-indictment publicity when it imposed statutory bans on bail hearings and preliminary inquiries.

Thus, for the purposes of **Section 648 (1)**, the proposed motions should be considered part of the accused's trial, thereby invoking the mandatory ban.

In reaching this conclusion, I have carefully considered the submissions of lead media counsel, Mr. Lutz. In essence, he asserts that the combined effect of **Section 648** and **Section 645**, leads to the inescapable conclusion that a **Section 648** ban applies only to hearings conducted by the trial judge. I agree that this is expressed in **Section 645** and arguably implied in **Section 648.** He argues, when hearing the proposed applications, I am acting only as a "Motions judge" who just happens to be the trial judge. In other words, the proposed motions are not evidentiary motions that must be heard by the trial judge. Instead, they are simply procedural motions to be entertained by any judge of this court. As such, he argues that **Section 648**, if it applies at all to pre-selection hearings, should apply exclusively to hearings involving my jurisdiction as a trial judge.

I simply cannot accept this submission. To do so, would lead to endless confusion and delay. Before hearing any motion, I would have to first determine whether or not I am acting as the trial judge or as a so-called "Motions judge". This determination would then have significant procedural consequences. If I am making evidentiary rulings, **Section 648** would apply. If I am not making evidentiary rulings, **Section 648** would not apply. Yet, the publication of non-evidentiary rulings can be more harmful to the accused than evidentiary rulings. As an example, the upcoming disclosure application will deal with allegations against the accused that are outside the scope of the indictment. Publication of these facts could be more prejudicial than publication of preliminary inquiry evidence. Accepting this interpretation would lead to an absurd result. "Absurd" not in the literal sense, but "absurd" in the sense that its result would be unreasonable. Again, I refer to **Driedger on the Construction of Statutes** at page 85:

> **"The modern view of the "golden" rule may be summarized by the following propositions.**
>
> **(1) It is presumed that legislation is not intended to produce absurd consequences.**
>
> **(2) Absurdity is not limited to logical**

> **contradictions and internal incoherence; it includes violations of justice, reasonableness, common sense and other public standards. Also, absurdity is not limited to what is shocking or unthinkable; it may include any consequences that are judged to be undesirable because they contradict values or principles that are considered important by the courts.**
>
> **(3) Where the words of a legislative text allow for more than one interpretation, avoiding absurd consequences is a good reason to prefer one interpretation over the other. Even where the words are clear, the ordinary meaning may be rejected if it would lead to an absurdity.**
>
> **(4) The more compelling the reasons for avoiding an absurdity, the greater the departure from ordinary meaning that may be tolerated. However, the interpretation that is adopted should be plausible."**

As stated, there are very compelling reasons to avoid Mr Lutz' interpretation.

Media counsel also rely on the proposed amendment to **Section 648** which was passed by the House of Commons recently, but defeated in the Senate. The argument has been summarized at page 5 of Mr. Lutz' brief and I quote:

> **"It is also interesting that in 1994 Parliament**

proposed an amendment to s. 648(1), and the effect of this amendment is described in *Bernardo* (tab 4) at paragraphs 22-23. The proposed amendment read:

> 648(1) Information regarding any portion of a trial shall not be published in any newspapers or broadcast
>
> a) in respect of any matter dealt with by a judge before any juror is sworn, until the jury that is eventually sworn retires to consider its verdict; and
>
> (b) in respect of any matter dealt with after the jury is sworn but when the jury is not present and permission to separate is given to members of the jury, until the jury retires to consider its verdict. [emphasis added]

LeSage A.C.J. discusses (at para. 22) how this section was part of a legislative package of amendments to the *Criminal Code*, which was initially passed by the House of Commons. However, after review by the Senate, the bill was approved except for the revisions to s. 648 and one other section. LeSage A.C.J. describes how the rejected amendment would have broadened the scope of s. 648(1), at paragraph 23:

> It appears to me that the proposed amendments were structured in a

> **broad manner so as to apply to all "in-trial" and "pre-trial" proceedings which occur in the presence of "a judge" as opposed to "the trial judge" during "in-trial" proceedings, which includes evidentiary rulings made by the trial judge prior to the empanelling of the jury.**
>
> **In other words, Parliament has considered amending the scope of s. 648(1) to cover pre-trial matters such as the Motions, but the proposed amendment was not enacted."**

In other words, the media asserts that it would take a legislative amendment to have **s. 648** apply to the proposed motions. This amendment was tried and failed. In essence, I am asked to consider, therefore, a proposed amendment when interpreting an existing statute. Despite my earlier reference to the use of legislative evolution, I am nonetheless statutorily prohibited from doing this by virtue of **s. 45(3)** of the **Interpretation Act**, which provides:

> **"45. ...**
>
> **(3) The repeal or amendment of an enactment in whole or in part shall not be deemed to be or to involve any declaration as to the previous state of the law."**

Therefore, if I am not to consider the effects of fully enacted amendments, there is all the more reason for me to ignore the effects of amendments that were never made law.

Therefore, in conclusion on this issue, I accept the following passage from Salhany J., in **R. v. Ross,** supra, where at paragraph [6], it is noted:

> **"Mr. Schabas has not attacked the constitutionality of section 648(1) of the *Code*. He may wish to do so but there is no such application before me. Accordingly, until the constitutionality of section 648(1) is ruled upon, it stands as an absolute prohibition against the publication or broadcast of any portion of the trial conducted in the jury absence."**

2. IS SECTION 648(1) CONSTITUTIONALLY VALID IN THE CONTEXT OF THE PROPOSED HEARINGS?

It is clear that **Section 648(1)** offends **Section 2** of the **Charter**. The real issue before me is whether or not, in the context of the proposed hearings, it is saved by **Section 1** of the **Charter**. This involves an application of the **"Oakes** test" (**R. v. Oakes** (1986), 2 D.L.R. (4th) 200 (S.C.C.)) as summarized by Lamer, C.J., in **R. v. Schacter** (1992) 93 D.L.R. (4th) 1 (S.C.C.), where at p. 16, he noted:

> **"It is useful at this point to set out the two-stage s.1 test developed by this court in *R. v. Oakes* (1986), 26 D.L.R. (4th) 200, 24 C.C.C. (3d) 321, [1986] 1 S.C.R. 103:**
>
> **(1) Is the legislative objective which the measures limiting an individual's rights or freedoms are designed to serve sufficiently pressing and substantial to justify the limitation of those rights or freedoms?**
>
> **(2) Are the measures chosen to serve that objective proportional to it, that is:**
>
> **(a) Are the measures rationally connected to the objective?**
>
> **(b) Do the measures impair as little as possible the right and freedom in question? and,**
>
> **(c) Are the effects of the measures proportional to the objective identified above?**

Dealing with the first arm of the **"Oakes** test", it is clear to me that the guarantee of a fair trial is a sufficiently pressing and substantial objective so as to justify a limitation of the press' freedom.

Turning to the proportionality test, **Section 648** is designed to ensure a fair and unbiased jury. The publication ban is rationally connected to this objective.

Furthermore, **Section 648**, properly interpreted, will impair the press' freedom as minimally as possible and the effects of **Section 648** are proportional to the stated objective. I say this for the following reasons:

(a) **Section 648** provides for a temporary, as opposed to a permanent, ban.

(b) Press coverage can be intense. The case at bar is an example.

(c) Parliament need not always choose the least intrusive measure as

long as it falls into range of minimally intrusive measures.

I refer to **R. v. Swain** (1991), 63 C.C.C. (3d) 481 (S.C.C.), at p.p. 513-514, where Lamer, C.J.C., stated:

> **"This court has stated on a number of occasions that the absolutely least intrusive means need not be chosen in order for a law to pass the "as little as possible test"**
>
> . . .
>
> **However, as I have indicated above, it is my view that the *Oakes* analysis requires somewhat different considerations when, as here, a judge-made rule is being challenged under the *Charter*.**
>
> **In cases where legislative provisions have been challenged under s. 52(1) of the *Constitution Act, 1982*, this court has been cognizant of the fact that such provisions have been enacted by an elected body which must respond to the competing interest of different groups in society and which must always consider the polycentric aspects of any given course of action. For this reason, this court has indicated that Parliament need not always choose the absolutely least intrusive means to attain its objectives, but must come within a range of means which impair *Charter* rights as little as is reasonably possible. However, as was indicated above, in cases where a common law, judge made rule is challenged under the *Charter*, there is no room for judicial deference."**

Of course, in the case at bar I am dealing with a challenge to a Parliamentary rule.

(d) Most importantly, I feel that **Section 648** can be reasonably interpreted in a manner that minimally impairs the press' freedom, thereby satisfying the "**Oakes** test". In other words, this section should be interpreted so as to uphold its validity, if such an interpretation is plausible.

Again, referring to **Driedger on the Construction of Statutes**, at p. 323:

> **"Where possible and appropriate, the courts prefer interpretations that uphold rather than defeat the initiatives of the legislature. As Cartwright, J. wrote in *McKay v. The Queen*:**
>
> **...[I]f an enactment . . . is capable of receiving a meaning according to which its operation is restricted to matters within the power of the enacting body it shall be interpreted accordingly. An alternative form in which the rule is expressed is that if words in a statute are fairly susceptible of two constructions of which one will result in the statute being *intra vires* and the other will have the contrary result, the former is to be adopted.**

> **This preference for the validating interpretation is based on a presumption that the legislature intends to respect the constitutional limits on its jurisdiction when it enacts legislation.**
>
> **The limits to be respected include all those imposed by Canada's entrenched constitution, including the Charter. In *Slaight Communications Inc. v. Davidson*, Lamer J. wrote:**
>
> > **Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect.**
>
> **Where a validating interpretation is plausible and appropriate in the circumstances, it is not necessary to declare legislation invalid in order to secure compliance with constitutional norms. To strike down legislation unnecessarily would show disregard for the work of the legislature."**

I believe that the aforesaid passage is equally applicable to pre-**Charter** legislation, as it would be post-Charter legislation.

3. HOW SHOULD SECTION 648 BE INTERPRETED?

Section 648 should be interpreted in a manner that minimally impairs freedom of the press. Therefore, the reference to "information" in that section should be narrowly interpreted. Specifically, I find that the reference to information should mean only that information which would reasonably be expected to taint a juror's impression of the accused. This would, therefore, involve a ban on details of any and all allegations of wrongdoing or impropriety on the part of the accused. Such allegations should not be limited to those set out in the indictment. By deductive reasoning, this would include details of most conventional *voir dires*, such as allegations against an accused as referred to in:

- similar fact evidence applications;

- disclosure applications; and

- **Corbett** applications.

There will be, at the same time, details contained in prospective applications

that do not allege impropriety on the part of the accused. This information should not be covered by **Section 648**.

As well, because **Section 648** will now apply to pre-selection hearings, it is important to clarify the temporary nature of such bans. In the event of pre-selection applications, the ban should be interpreted so as to terminate when the jury retires or when the case is otherwise disposed of, whichever is sooner.

4. A COMMON-LAW PUBLICATION BAN

Even if I am wrong on the inapplicability and constitutionality of **Section 648,** in the context of these proceedings, I would, nevertheless, impose a common-law ban identical to the ban I have confirmed under **Section 648.** Such a ban is necessary in the circumstances of this case. It would meet the two-fold test set out in **Dagenais**, where at page 38, Lamer, C.J.C., noted:

> **"...I believe that the common-law rule must be adapted so as to require a consideration both of the objectives of a publication ban, and the proportionality of the ban to its effect on protected *Charter* rights. The modified rule may be stated as follows:**

A publication should be ordered when:

(a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and

(b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban."

Without the ban, as described above, there is a real and substantial risk to the fairness of the trial. Furthermore, the salutary effects, of the ban, as interpreted, outweigh deleterious effects to freedom of the press.

In the case at bar, I am also gravely concerned about counsel's reciprocating allegations of impropriety. These allegations, if they persist, will have the effect of tainting many prospective jurors. They are so serious that I feel a supplementary common-law ban is warranted. In keeping with **Dagenais**, the ban should cover only that which is absolutely necessary. In this regard, I am imposing a ban on all evidence or submissions of counsel, during these pre-selection

hearings, that allege systemic abuse on the part of the Crown, including the police or on the part of the accused, including his counsel.

In a very spirited argument, counsel for the media urged me not to impose such a ban. They argued that if counsel acted improperly, then the media and ultimately the public, should not be punished by their wrongdoing. I was instead urged to control counsel by directing that they stop such allegations. With respect, this is not a feasible solution. There may be legitimate complaints by one party against the other. In fact, I expect such reciprocating allegations to be relevant in some of the proposed motions. I, therefore, cannot prevent the airing of such complaints in court if I am to ensure a fair trial. Nonetheless, publication of such complaints may very easily taint a prospective juror, thereby jeopardizing the fair trial process. Therefore, this common-law ban is absolutely necessary to balance the need for a fair trial against the press' right to publish.

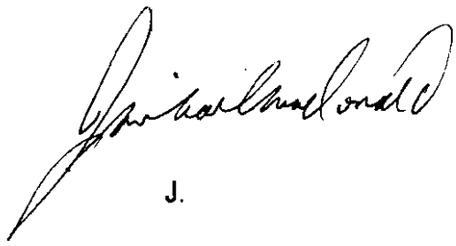
However, let me reiterate that my ruling applies only to trial motions in the absence of the jury. It only deals with what happens in court. I have stated that there may be legitimate reasons for the parties to be critical of each other while before me presenting their cases. I may have to respond to such criticisms and act accordingly. However, if the parties through counsel, or otherwise, continue to

criticize each other out of court, they will do so at their own peril. There may be reason to criticize the opposition in court, there should be no reason to so out of court.

Furthermore, I confirm that **Section 648,** as I have interpreted it, should extend to the present media application.

Finally, I trust that my directions are clear. However, I would be happy to modify my ruling should the need to do so become apparent in the future.

I want to thank counsel for their able representation and valuable assistance.



J.