

R. v. White Appeal

On January 29th, the Supreme Court of Canada granted leave to appeal an Alberta Court of Appeal decision that upheld a mandatory publication ban in bail proceedings.[\[1\]](#)

Michael White, an Edmontonian charged with the second-degree murder of his wife, applied for and received a publication ban under section 517 of Canada's Criminal Code.[\[2\]](#) This section provides for a mandatory publication ban on bail proceedings upon the request of an accused. Several media outlets brought an application challenging the constitutionality of section 517, arguing the section unjustifiably violated their freedom of expression as guaranteed by section 2(b) of the Charter of Rights and Freedoms.[\[3\]](#)

The Court of Queen's Bench held that the mandatory ban unjustifiably violated the Charter and ordered section 517 to be read as if it opened with the words "Where a jury trial is possible." The court also ordered the words "and shall on application of the accused" be struck out, but it deferred this aspect of the order for one year to allow Parliament to address the issue.[\[4\]](#) The court concluded there to be no rational connection between the infringement on the media's freedom of expression and the objective of protecting an accused's right to a fair trial by an impartial jury.[\[5\]](#) The court also held the Crown failed to show both that the mandatory publication ban was the least intrusive means available to meet the legislature's objective, and that the salutary effects of the ban were proportionate to its deleterious effects.[\[6\]](#)

Michael White appealed the decision to the Alberta Court of Appeal. That court unanimously held the infringement of section 2(b) of the Charter was justified under section 1 and set aside the Queen's Bench decision.[\[7\]](#) The court determined that a rational connection between the challenged provision and the legislative objective was present, and the impairment of section 2(b) was minimal, because section 517 was not a "publication ban," but merely a "publication deferral" until after the trial was complete.[\[8\]](#) The court also held the benefits of restricting publication outweighed the negative effects of the restriction on expression in this context, because a fair trial and fair access to bail were also Charter rights.[\[9\]](#)

Resources:

Section 517 of the Criminal Code reads:

517. (1) If the prosecutor or the accused intends to show cause under section 515, he or she shall so state to the justice and the justice may, and shall on application by the accused, before or at any time during the course of the proceedings under that section, make an order directing that the evidence taken, the information given or the representations made and the reasons, if any, given or to be given by the justice shall not be published in any document, or broadcast or transmitted in any way before such time as

a. if a preliminary inquiry is held, the accused in respect of whom the

- proceedings are held is discharged; or
- b. if the accused in respect of whom the proceedings are held is tried or ordered to stand trial, the trial is ended.

Further Reading:

Chris Younger, "[Freedom vs. Privacy](#)" (18 February 2009) online: Centre for Constitutional Studies.

[1] *R. v. White*, SCC Case Information.

[2] *Criminal Code of Canada*, R.S.C. 1985, c. C-46 (CanLII).

[3] [Canadian Charter of Rights and Freedoms](#), Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (CanLII).

[4] *Ibid.* at paras. 113, 129.

[5] *R. v. White*, 2007 ABQB 359 at para. 82 (CanLII).

[6] *Ibid.* at paras. 83, 102.

[7] *R. v. White*, 2008 ABCA 294 at para. 58 (CanLII).

[8] *Ibid.* at paras. 42, 46.

[9] *Ibid.* at para. 57.