

R. v. Regan

Re "The Chronicle-Herald" et al. and The Queen

124 C.C.C. (3d) 77

Nova Scotia Supreme Court

Court File No. C.R. 97-13768

Macdonald J.

October 14, 1997;

OCTOBER 15, 1997

Trial — Pre-trial motions — Publication ban — Section 648 of Criminal Code prohibiting publication of information regarding any portion of trial conducted in absence of jury — Mandatory publication ban under s. 648 of Criminal Code applicable to motions heard before jury selection pursuant to s. 645 of Criminal Code — However, s. 648(1) of Criminal Code should be interpreted so as to minimally impair freedom of press — Ban applying only to information which would reasonably be expected to taint juror's impression of accused — Alternatively, common law publication ban should be imposed — Cr. Code, ss. 645(5), 648.

Trial — Publicity — Publication ban — Section 648 of Criminal Code prohibiting publication of information regarding any portion of trial conducted in absence of jury — Mandatory publication ban under s. 648 of Criminal Code applicable to motions heard before jury selection pursuant to s. 645 of Criminal Code — However, s. 648(1) of Criminal Code should be interpreted so as to minimally impair freedom of press — Ban applying only to information which would reasonably be expected to taint juror's impression of accused — Alternatively, common law publication ban should be imposed — Cr. Code, ss. 645(5), 648.

Trial — Conduct of trial — Publication ban — Section 648 of Criminal [page78] Code prohibiting publication of information regarding any portion of trial conducted in absence of jury — Mandatory publication ban under s. 648 of Criminal Code applicable to motions heard before jury selection pursuant to s. 645 of Criminal Code — However, s. 648(1) of Criminal Code should be interpreted so as to minimally impair freedom of press — Ban applying only to information which would reasonably be expected to taint juror's impression of accused — Alternatively, common law publication ban should be imposed — Cr. Code, ss. 645(5), 648.

Charter of Rights — Freedom of the press — Publication ban — Section 648 of Criminal Code prohibiting publication of information regarding any portion of trial conducted in absence of jury — Provision violating s. 2 of Charter, but justified under s. 1 — Guarantee of fair trial constituting pressing and substantial objective — Publication ban rationally connected to objective — Properly interpreted, s. 648 of Criminal Code impairing freedom of press as minimally as possible — Ban applying only to information which would reasonably be expected to taint juror's impression of accused and terminating when jury retires to consider verdict or

when case otherwise disposed of — Canadian Charter of Rights and Freedoms, s. 2(b) — Cr. Code, ss. 645(5), 648.

Charter of Rights — Limitation of rights and freedoms — Freedom of press — Publication ban — Section 648 of Criminal Code prohibiting publication of information regarding any portion of trial conducted in absence of jury — Provisions violating s. 2 of Charter, but justified under s. 1 — Guarantee of fair trial constituting pressing and substantial objective — Publication ban rationally connected to objective — Properly interpreted, s. 648 of Criminal Code impairing freedom of press as minimally as possible — Ban applying only to information which would reasonably be expected to taint juror's impression of accused and terminating when jury retires to consider verdict or when case otherwise disposed of — Canadian Charter of Rights and Freedoms, s. 2(b) — Cr. Code, ss. 645(5), 648.

Trial — Pre-trial motions — Common law publication ban — In event that s. 648(1) of Criminal Code not applicable to prevent publication of motions heard prior to jury selection pursuant to s. 645(5) of Criminal Code, common law publication ban should apply to ban publication of information which would reasonably be expected to taint juror's impression of accused — Ban necessary to prevent real and substantial risk to fairness of trial — Salutary effect of ban outweighing deleterious effects to freedom of press — In addition, common law publication ban imposed on evidence or submissions alleging systemic abuse on part of Crown, police or accused — Fairness of trial may require such complaints to be addressed in court, yet may taint prospective jurors — Cr. Code, ss. 645, 648.

Trial — Publicity — Common law publication ban — In event that s. 648(1) of Criminal Code not applicable to prevent publication of motions heard prior to jury selection pursuant to s. 645(5) of Criminal Code, common [page79] law publication ban should apply to ban publication of information which would reasonably be expected to taint juror's impression of accused — Ban necessary to prevent real and substantial risk to fairness of trial — Salutary effect of ban outweighing deleterious effects to freedom of press — In addition, common law publication ban imposed on evidence or submissions alleging systemic abuse on part of Crown, police or accused — Fairness of trial may require such complaints to be addressed in court, yet may taint prospective jurors — Cr. Code, ss. 645, 648.

The accused was charged with numerous sex-related offences. Preliminary defence motions were expected to be heard prior to jury selection, including applications for further disclosure, a stay of proceedings and severance. Both the accused and the Crown sought a publication ban on these proceedings. This was opposed by the media.

Held, a publication ban was granted.

Section 648(1) of the Criminal Code prohibits publication of information regarding any portion of a trial at which the jury is not present until the jury retires to consider its verdict. Section 645(5) of the Criminal Code provides that the judge before whom an accused is or is to be tried has jurisdiction, before a jury is selected, to deal with any matter that would ordinarily or

necessarily be dealt with in the absence of the jury after it has been sworn. Whether or not the publication ban under s. 648(1) of the Criminal Code applied to the proposed motions under s. 645(5) of the Criminal Code depended on whether or not these proposed motions would be considered part of the accused's trial. When an accused's trial actually begins can vary depending on the particular circumstances of each case. At the time s. 648 of the Criminal Code was enacted, virtually all motions relative to a jury trial were conducted after the jury was selected. The fundamental purpose of this legislation was that a jury's verdict should be based solely upon admissible evidence presented at trial, which would be jeopardized if juries were exposed to media reports about hearings conducted in their absence. With the enactment of s. 645 of the Criminal Code, the trial judge may now, before the jury is selected, entertain any matter that would ordinarily be heard in the absence of the jury. The purpose of each section is clear and simple: The press should not publish evidence flowing from voir dres and a trial judge can now conduct voir dres before jury selection. When put in its historical context, there is nothing in s. 645(5) of the Criminal Code that should in any way diminish or qualify the safeguard provided in s. 648(1) of the Criminal Code. For the purposes of s. 648(1) of the Criminal Code, the proposed motions should be considered part of the accused's trial, thereby invoking the mandatory ban.

Section 648(1) of the Criminal Code offends s. 2 of the Canadian Charter of Rights and Freedoms. However, in the context of the proposed hearings, it was saved by s. 1 of the Charter. The guarantee of a fair trial is a sufficiently pressing and substantial objective so as to justify a limitation of the freedom of the press. Section 648 of the Criminal Code is designed to ensure a fair and unbiased jury. The publication ban is rationally connected to this objective. Properly interpreted, *[page80]* s. 648 of the Criminal Code will impair the freedom of the press as minimally as possible and the effects of s. 648 are proportional to the stated objective. The reference to "information" in the section should be narrowly interpreted to mean only that information which would reasonably be expected to taint a juror's impression of the accused. The ban should be interpreted so as to terminate when the jury retires or when the case is otherwise disposed of.

Even if s. 648 of the Criminal Code were inapplicable or unconstitutional in the context of these proceedings, an identical common law ban should be imposed. Such a ban was necessary in the circumstances of this case. Without the ban there was a real and substantial risk to the fairness of the trial. The salutary effects of the ban as interpreted, outweighed deleterious effects to the freedom of the press.

Counsel's reciprocating allegations of impropriety were also a grave concern. These were so serious that a supplementary common law ban was warranted. The ban should cover only that which was absolutely necessary, meaning all evidence or submissions of counsel, during pre-selection hearings, that alleged systemic abuse on the part of the Crown, including the police or on the part of the accused, including his counsel. Such reciprocating allegations were expected to be relevant in some of the proposed motions. The airing of such complaints in court could not be prevented if a fair trial was to be ensured. Nonetheless, publication of such complaints may very easily taint a prospective juror, thereby jeopardizing the fair trial process. This common law ban was absolutely necessary to balance the need for a fair trial against the right of the press to publish.

Cases referred to

Dagenais v. Canadian Broadcasting Corp. (1994), 94 C.C.C. (3d) 289, 120 D.L.R. (4th) 12, [1994] 3 S.C.R. 835, 34 C.R. (4th) 269, 25 C.R.R. (2d) 1, 76 O.A.C. 81, 175 N.R. 1, 51 A.C.W.S. (3d) 1045, 25 W.C.B. (2d) 304 -- refd to

R. v. Barrow (1987), 38 C.C.C. (3d) 193, 45 D.L.R. (4th) 487, [1987] 2 S.C.R. 694, 61 C.R. (3d) 305, 87 N.S.R. (2d) 271, 81 N.R. 321 -- refd to

R. v. Basarabas (1982), 2 C.C.C. (3d) 257, 144 D.L.R. (3d) 115, [1982] 2 S.C.R. 730, 31 C.R. (3d) 193, [1983] 4 W.W.R. 289, 46 N.R. 69 -- refd to

R. v. Chabot (1980), 55 C.C.C. (2d) 385, 117 D.L.R. (3d) 527, [1980] 2 S.C.R. 985, 18 C.R. (3d) 258, 34 N.R. 361 -- refd to

R. v. Corbett (1988), 41 C.C.C. (3d) 385, [1988] 1 S.C.R. 670, 64 C.R. (3d) 1, 34 C.R.R. 54, [1988] 4 W.W.R. 481, 28 B.C.L.R. (2d) 145, 85 N.R. 81, 4 W.C.B. (2d) 148 -- refd to

R. v. Curtis (1991), 66 C.C.C. (3d) 156, 13 W.C.B. (2d) 312 -- refd to

R. v. Oakes (1986), 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 19 C.R.R. 308, 14 O.A.C. 335, 65 N.R. 87, 53 O.R. (2d) 719n, 16 W.C.B. 73 -- refd to

R. v. Ross (1995), 28 W.C.B. (2d) 565, [1995] O.J. No. 3180 (QL) -- refd to

R. v. Swain (1991), 63 C.C.C. (3d) 481, [1991] 1 S.C.R. 933, 5 C.R. (4th) 253, 3 C.R.R. (2d) 1, 47 O.A.C. 81, 125 N.R. 1, 12 W.C.B. (2d) 582 -- refd to

Schachter v. Canada (1992), 93 D.L.R. (4th) 1, [1992] 2 S.C.R. 679, 92 C.L.L.C. 14,036, 10 C.R.R. (2d) 1, 139 N.R. 1, 53 F.T.R. 240n, 34 A.C.W.S. (3d) 1090 -- refd to

Statutes referred to Canadian Charter of Rights and Freedoms s. 1 s. 2 Criminal Code s. 645(5) [enacted R.S.C. 1985, c. 27 (1st Supp.), s. 133] s. 648 Interpretation Act, R.S.C. 1985, c. I-21 s. 45(3)

Authorities referred to Driedger on the Construction of Statutes, 3rd ed., by Ruth Sullivan (Toronto: Butterworths, 1994)

RULING in relation to a publication ban on applications heard prior to the selection of the jury pursuant to s. 645 of the Criminal Code, at the accused's trial on numerous sex-related offences.

Douglas W. Lutz, for The Herald-Chronicle and Mail-Star Newspapers.

Alan V. Parish, Q.C., for The Daily News.

David G. Coles, for C.B.C. News.

James B. Boudreau, for A.T.V. News.

Edward L. Greenspan, Q.C., for accused.

MACDONALD J. (ORALLY)

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 of 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 s. 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 not present shall be published, after the permission is granted, in any newspaper or broadcast before the jury retires to consider its verdict. *[page82]*

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 with in the absence of the jury after it has been sworn.

Alternatively, and in the event that s. 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, s. 648(1) is unconstitutional, in that it restricts the press' freedom under s. 2 of the Canadian Charter of Rights and Freedoms in a manner that is not saved by s. 1 of the Charter; and
- (c) In the further alternative, s. 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 s. 648(1) apply to the proposed motions?
- (2) If so, is s. 648(1) constitutionally valid in this context?
- (3) If so, how should it be interpreted?
- (4) If, for whatever reasons, s. 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 s. 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. [page83]*

Basarabas (1982), 144 D.L.R. (3d) 115, 2 C.C.C. (3d) 257, 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 3rd ed., 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 s. 648 was enacted, virtually all motions relative to a jury trial were conducted after the jury was selected. In fact, the opening words of s. 648 presume this.

See *R. v. Chabot* (1980), 18 C.R. (3d) 258, 55 C.C.C. (2d) 385 (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 dres).

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 [page84] became impractical for trial judges to entertain all prospective applications after jury selection. Thus, Parliament enacted 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 s. 648(1), was recently explained by Salhany J., in *R. v. Ross*, [1995] O.J. No. 3180 (QL) [summarized 28 W.C.B. (2d) 565] 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 (Ont. Ct. (Gen. Div.)) at pages 157-58, explains the evolution of s. 645(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 dres and a trial judge can now conduct voir dres before jury selection. When put in [page85] its historical context, there is nothing in s. 645(5) that should in any way diminish or qualify the safeguard provided in s. 648(1). There would be no logical purpose for Parliament to jeopardize the "648 safeguard" when it enacted s. 645(5). It simply attempted to alter the timing of voir dres. 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 s. 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 s. 648 and s. 645, leads to the inescapable conclusion that a s. 648 ban applies only to hearings conducted by the trial judge. I agree that this is expressed in s. 645 and arguably implied in s. 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 s. 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, s. 648 would apply. If I am not making evidentiary rulings, s. 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 [page86] 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 pages 85-86: 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 s. 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: **[page87]** "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, R.S.C. 1985, c. I-21, 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 s. 648(1) offends s. 2 of the Charter. The real issue before me is whether or not, in the context of the proposed hearings, it is saved by s. 1 of the Charter. This involves an application of the "Oakes test" (R. v. Oakes (1986), 26 D.L.R. (4th) 200, 24 C.C.C. (3d) 321 (S.C.C.)), as summarized by Lamer C.J., in Schacter v. Canada (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: **[page88]** (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, s. 648 is designed to ensure a fair and unbiased jury. The publication ban is rationally connected to this objective.

Furthermore, s. 648, properly interpreted, will impair the press' freedom as minimally as possible and the effects of s. 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. 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 are enacted by an elected body which must respond to the competing interests 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 [page 89] Of course, in the case at bar I am dealing with a challenge to a Parliamentary rule.

(d) Most importantly, I feel that s. 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 pp. 323- 24: 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 *[page 90]* 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 dices, such as allegations against an accused as referred to in:

-- similar fact evidence applications;

-- disclosure applications; and

-- Corbett applications [see *R. v. Corbett* (1988), 41 C.C.C. (3d) 385 (S.C.C.)].

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 s. 648.

As well, because s. 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 s. 648, in the context of these proceedings, I would, nevertheless, impose a common-law ban identical to the ban I have confirmed under s. 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 [see *Dagenais v. Canadian Broadcasting Corp.* (1994), 120 D.L.R. (4th) 12, 94 C.C.C. (3d) 289]:. . . 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." [page91]

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 do so out of court.

Furthermore, I confirm that s. 648, as I have interpreted it, should extend to the present media application. [page92]

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.

Order accordingly.