

Case Name:

R. v. Pickton

**Between
Regina, and
Robert Pickton**

[2002] B.C.J. No. 2830

2002 BCPC 526

Port Coquitlam Registry No. 64232-6

British Columbia Provincial Court
Port Coquitlam, British Columbia

Stone Prov. Ct. J.

Oral judgment: December 6, 2002.

(36 paras.)

Criminal law -- Preliminary inquiry -- Powers of judge -- Prohibition or ban on publication of evidence -- In camera hearing, challenge to -- Civil rights -- Trials, due process, fundamental justice and fair hearings -- Criminal and quasi-criminal proceedings -- Right to just and fair trial.

Application by the accused, Pickton, to exclude the public from the courtroom during his preliminary inquiry. Pickton argued that because of the circumstances of the case, and as a result of the state of modern publication technology, an order simply banning publication of the proceedings would not effectively protect his right to a fair trial. Specifically, he argued that American media were not bound by Canadian law, and were entitled to broadcast the details of the preliminary inquiry via the American media. Pickton argued that because of this, the reports would leak their way back into Canada and the potential jury pool would be tainted, resulting ultimately in a prejudiced jury.

HELD: Application dismissed. The remedy of closing the courtroom for the entirety of the proceedings during a preliminary inquiry was highly exceptional and only to be ordered in the rarest of cases. The test was whether it appeared that the ends of justice would be best served by so doing. The court was not prepared to accept, at this stage of the proceeding, that the justice system was so

fragile that appropriate corrective measures could not be taken so as to ensure that Pickton's right to a fair trial was not jeopardized.

Statutes, Regulations and Rules Cited:

Criminal Code, ss. 486(1), 537, 537(1)(h), 539(1), 539(1)(b).

Counsel:

M. Petrie, for the Crown.

P. Ritchie, for the defendant.

RULING

1 STONE PROV. CT. J. (orally):-- The Criminal Code contains two sections under which members of the public may be excluded from the courtroom: s. 486(1) and s. 537(1)(h). Section 486 is a section of general application contained under the part of the Criminal Code titled "Special Procedure and Powers". Section 537 is contained in the section of the Criminal Code titled "Preliminary Inquiry" and is applicable specifically to that proceedings.

2 Section 537(1)(h) reads as follows:

A justice acting under this Part may . . .

(h) order that no person other than the prosecutor, the accused and their counsel shall have access to or remain in the room in which the inquiry is held, where it appears to him that the ends of justice will best be served by so doing.

3 Section 539(1)(b):

Prior to the commencement of the taking of evidence at a preliminary inquiry, the justice holding the inquiry

(b) shall, if application therefore is made by any of the accused,

make an order directing 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,

a. he is discharged, or

b. if he is ordered to stand trial, the trial is ended.

4 Section 486(1) reads:

Any proceedings against an accused shall be held in open court, but where the presiding judge, provincial court judge or justice, as the case may be, is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice . . . to exclude all or any members of the public from the court room for all or part of the proceedings, he . . . may so order.

5 The defendant in this proceeding has brought an application pursuant to s. 537(1)(h) of the Criminal Code of Canada. The defence also seeks an order pursuant to s. 539(1) of the Criminal Code of Canada. Because of the particular circumstances of this case, and as a result of the state of modern-day publication technology, the applicant submits that an order simply banning publication of the proceedings cannot effectively protect his right to a fair trial and that the circumstances of this case require the court to exercise its jurisdiction, pursuant to s. 537(1)(h) of the Criminal Code, to exclude the public from the preliminary hearing.

6 The usual procedure is for the defence or Crown, prior to the commencement of evidence being taken at the preliminary inquiry, to request that I order a ban on publication. This application is as of right for the accused, and I have no discretion to refuse to make the order under s. 539.

7 It is unusual for the court to take the next step which is being requested by the accused. That is, to have everyone excluded from the courtroom during the preliminary inquiry other than the prosecutor, the accused and his counsel, pursuant to s. 537(1)(h) of the Criminal Code. Because of the unusual nature of the application, the Crown and defence have requested that I first hear submissions from the parties regarding this application prior to imposing the usual publication ban under s. 539.

8 Mr. Ritchie, on behalf of his client, indicated that he felt the submissions should be open to the media and public to allow an understanding of, if such an order was made, the rationale behind it. Mr. Ritchie also indicated at the outset of the application that he would consent to allowing various counsel for the media to make representations as to whether or not the media should be banned from the courtroom for the duration of the preliminary inquiry. Mr. Petrie for the Crown also agreed that I should hear all the submissions and make a ruling before imposing the usual ban under s. 539.

9 As a result, I have had the opportunity to review the written submissions, affidavits and other material filed by Mr. Ritchie on behalf of the accused, Robert William Pickton. Mr. Skene, on behalf of CTV and Kate Corcoran; Mr. Gibson and Mr. Burnett on behalf of The Province, The Sun, the CTV and the CBC; and Mr. Sutherland on behalf of the American media; and, of course, Mr. Petrie acting for the Crown.

10 I want to make some comments about the various sections referred to prior to doing an analysis of the case law. Any order made pursuant to s. 539 banning publication must be made prior to the commencement of the taking of the evidence at the preliminary inquiry. Therefore, there is a time limitation for making the application. There is no time restriction on when an application can be made for an order under s. 537(1)(h) of the Criminal Code when conducting the preliminary inquiry. Similarly, there is no restriction on when an order can be made pursuant to s. 486(1) of the Criminal Code.

11 Numerous cases have considered the conflicts which arise between our tradition of open access to the courts and the principles encompassed by the right of freedom of expression versus the rights provided to an accused person in order to ensure that he or she receives a fair trial. Mr. Ritchie argues that even if I impose the usual ban on publication, that it will not be enough to ensure

that his client receives a fair trial. He submits that the American media are not bound by Canadian law and are entitled to broadcast the details of the preliminary inquiry via the American media. Mr. Ritchie says that because of this, the ban reports will leak their way back into Canada and the potential jury pool will be tainted, resulting ultimately in a prejudiced jury as it relates to his client.

12 Mr. Ritchie further submits that this situation is exacerbated by the Internet and our current technological age. He has filed an affidavit outlining the coverage up to date, which indicates extensive coverage of the pre-trial investigation of this case by the media on the Internet, radio, television and newspapers.

13 Mr. Ritchie also emphasizes that this is a preliminary inquiry, not a trial, and as a result it is more open to me to make the order banning the publication from people from the courtroom.

14 Mr. Petrie, for the Crown, opposes the application, as do counsel who have spoken for the media. Mr. Sutherland, for his clients, has gone so far as to say that his clients will undertake to file statutory declarations indicating that the TV stations he represents will blackout the feed to Canada of any broadcast information, subject to the publication ban. He had stated that if they were unable to do so, his clients would not broadcast United States viewers, although I have given an opportunity to file such a document with such an undertaking and as of today's date the document he has filed does not indicate that they will not broadcast United States viewers if they are unable to broadcast, so this undertaking filed today falls short of that. In any event, that is what he told us a couple days ago.

15 It is recognized that the court may, where circumstances justify, exercise its discretion to exclude the public from a courtroom, but those circumstances will be exceptional and rare where the order sought is to conduct all proceedings in camera, and the exercise of the discretion must balance the rights of the accused against those who would be affected by the order excluding the public.

16 The test set out in s. 537(1)(h) is contained in the words "where it appears to him that the ends of justice will be best served by so doing". Guidance with respect to the principles invoked by these words can be found in cases where either partial or temporary closures of the courtroom have been granted pursuant to this section in the past and in cases where bans on publication have been considered. The latter have most frequently occurred in the superior courts in cases where no statutory ban on publication is applicable, those courts being asked to exercise inherent jurisdiction to ban publication and/or exclude the public in furtherance of the proposed or existing ban.

17 As I indicated, earlier, the remedy of closing the courtroom for the entirety of the proceedings during a preliminary inquiry is highly exceptional. The only authority that I have been referred to where the court granted such an order during a preliminary inquiry was *R. v. Sayegh* (No. 1) (1982), 66 C.C.C. (2d) 430 and No. 2, 66 C.C.C. (2d) 432, which was an Ontario Provincial Court decision.

18 Prior to taking evidence on a preliminary inquiry, counsel for the accused applied for a publication ban on evidence being taken at the preliminary inquiry, pursuant to the section which entitles an accused to such an order upon request. The accused also applied for an order pursuant to what is now s. 537(1)(h) to have the courtroom closed. The matter before the court had received a certain amount of publicity to that point. The court determined that the American media had been present at the proceedings and that it was their intent to publish evidence from the preliminary inquiry. The court ultimately made an order pursuant to what is now s. 537(1)(h). I have had an opportunity to read the case. It was decided before *Dagenais v. Canadian Broadcasting Corp.* [1994] 3 S.C.R. 835, Supreme Court of Canada which sets out the test respecting publication bans and, by analogy, pro-

vides assistance in the interpretation of the test involved under s. 537(1)(h). *R. v. Sayegh* has also never been referred to in any other case that I am aware of. In my view, it puts a very narrow interpretation on the powers of the court to ban parties from the courtroom during the course of a preliminary inquiry, and I decline to follow it.

19 I have also been referred to *R. v. Bernardo* [1993] O.J. No. 2047. In the Bernardo case, the Crown applied at trial for a publication ban and to limit access to the courtroom. The accused, Carla Bernardo, was charged with two counts of manslaughter relating to the deaths of two teenage girls, which were also to be the subject of a subsequent murder trial of her husband. The case had received substantial media attention and the Crown was concerned about the impact the publication of evidence from Carla Bernardo's trial might have on the jury, and consequently the fairness of the trial at Paul Bernardo's subsequent murder trial.

20 The court noted that there had been a great deal of media attention and that the United States media had been covering the proceedings. The court also recognized the difficulties associated with attempting to curtail publication in areas close to the American border where American media may not feel bound by a publication ban when they are outside the Canadian borders.

21 Kovacs J. referred to numerous cases where courts have taken steps to protect the rights of an accused to a fair trial in a manner which limited in some way the freedom of the press. He recognized the difficulties caused by the sensational nature of the case which had attracted American media interest, noting that any American media coverage would be readily available to a potential jury pool, that any order of the court would essentially be useless against American media, and that the court could have no power to enforce such an order against the American media.

22 He ultimately ordered that there be a ban on publication of all proceedings pursuant to s. 486, and that all persons be excluded from the courtroom with the exception of the parties, their counsel, families of the two victims and accused, counsel for Paul Bernardo, members of the Canadian media, and court and security staff.

23 One case which is of great assistance is *R. v. Murrin* [1997] B.C.J. No. 3182. This is a B.C. Supreme Court decision of Mr. Justice Oppal. Mr. Murrin applied for an order prohibiting the broadcast or publication of all evidence, submissions and arguments in a trial in which he was being called as a Crown witness prior to his own trial for first degree murder. It was argued that a temporary ban of the whole of the evidence in the case was necessary in order to protect Mr. Murrin's right to a fair trial and to protect the integrity of the justice system. The Crown supported Mr. Murrin's application.

24 Mr. Justice Oppal noted, at page 2:

Extensive media coverage has linked the murder investigation with the investigation involving this case. Mr. McMurray, counsel for Murrin, has argued that particular parts of the evidence against the three accused will render a fair trial for Murrin impossible if the evidence is not subject to a ban.

25 Mr. Justice Oppal stated further:

The aforementioned evidence relating to the interviews of Murrin, the conversations he apparently had with undercover officers will not be subjected to any of the usual exclusionary rules. At the same time, evidence which may be admissi-

ble at this trial and reported at large by the media may not be admissible at the trial of Murrin.

Of particular note and concern are the so-called confessions. Counsel in support of the ban have argued that the conventional measures or methods of dealing with deleterious effects of such evidence involving judicial caution, challenge for cause, change of venue, and sequestering jurors are not practicable alternatives in the circumstances.

It is argued that the temporary ban of the whole of the evidence in this case is necessary in order to protect Murrin's right to a fair trial and to protect the integrity of the justice system.

In opposition to the application, I have before me the affidavit of Margo Harper, a reporter with the CBC. In her affidavit she deposes that the Canadian Broadcasting Corporation has an ongoing interest in following and reporting of all serious criminal matters and that this case is of particular interest because it relates broadly to the public interest and the widely reported Mindy Tran disappearance and investigation and also because it involves already made publicly and widely reported improprieties by investigating police officers which raise a significant public interest in all of the evidence.

26 Justice Oppal then goes on to review the applicable principles governing bans on prohibition orders and cites Dagenais as setting out the established guidelines which courts ought to follow in applications of this nature. He states, at page 3, referring to Dagenais:

The Court attempted to balance the accused person's right to a fair trial with the right of freedom of expression. It is trite to say that these rights at times conflict one with the other.

The court pointed out that prior to the enactment of the Charter, the right to a fair trial "inappropriately" took precedence over the right to freedom of expression.

27 After referring to the guidelines set out by the Supreme Court of Canada in Dagenais, Justice Oppal refused the application and said, at page 4:

The remedy sought is extremely wide. The banning of broadcast or publication of the whole of a trial, albeit temporary, is, to my knowledge, unprecedented and, accordingly, ought to be ordered, if at all, only in the rarest of cases.

28 He stated further:

The fact of Murrin testifying for the Crown in this case and then facing a first degree murder charge in his own case and the allegations of the R.C.M.P. engaging in vigilantism are but two of the noteworthy and unusual aspects of the evidence which will be led, but much of this evidence has already been broadcast and has been available to the public.

29 Mr. Justice Oppal notes:

It should also be noted that in the past, in this jurisdiction and in this country, there have been some noteworthy cases that involved an inordinate amount of pretrial publicity followed by multiple trials. The cases are *R. v. Huenemann* (1993), 38 B.C.A.C. 20, *R. v. Pesic* (1993), 22 B.C.A.C. 170 (C.A.), *R. v. Charalambous*, New Westminster Registry No. X035780, (January 1994 (S.C.)) *R. v. Bernardo* (1995) 38 C.R. (4th) 229 (Ont. Gen. Div.) are some examples of cases that have preceded apparently in an uneventful manner in spite of extensive pretrial publicity and overlapping evidence.

Moreover, the case of *Phillips v. Nova Scotia (Commission of Inquiry America Local into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, 98 C.C.C. (3d) 20 also involved significant pretrial publicity.

30 Mr. Justice Oppal says further:

We live in an era that is often marked by high degrees of pretrial publicity which often features revelations of prejudicial pretrial evidence. In fact, it can be safely said that sometimes media coverage can be described as frenzied. However, I do not think that the justice system is so fragile that appropriate corrective measures cannot be taken in certain cases so as to ensure that an accused's right to a fair trial is not jeopardized.

I agree with Mr. Burnett, counsel for the CBC, CTV and CKNW, that the issue in this application must be viewed globally and the question which must be asked is as follows: At the end of the day can 12 impartial jurors be found in order to try the case of Murrin? I believe that for the reasons already stated, 12 such jurors can be found.

31 He then went on to dismiss the application. I also recall that Mr. Murrin was eventually acquitted on the charge, so one would assume he suffered no prejudice as a result of the ruling by Mr. Justice Oppal. The comments of Mr. Justice Oppal apply, in my view, to the application made at this stage to ban the public and media from the courtroom for the duration of the preliminary inquiry.

32 I am not prepared to accept, at this stage of the proceeding, that the justice system is so fragile that appropriate corrective measures cannot be taken so as to ensure that an accused's right to a fair trial is not jeopardized. As a result, I decline to make an order pursuant to s. 537(1)(h) of the Criminal Code.

33 I indicated earlier in my reasons that there is no time limitation for an application pursuant to s. 537 or s. 486 of the Criminal Code. As Mr. Petrie readily conceded, it may be that new applications will be put before the court at later stages of the preliminary inquiry and that he may also be requesting such an order.

34 Mr. Ritchie, would you like me to impose the ban under 539 at this stage?

35 MR. RITCHIE: Yes.

36 THE COURT: I will make that order, then. There will be a ban pursuant to s. 539(1)(b) banning any evidence being published in any newspaper or broadcast, pursuant to that section.

STONE PROV. CT. J.

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