

CITATION: Canadian Broadcasting Corporation v. Ontario, 2011 ONCA 624
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COURT OF APPEAL FOR ONTARIO

Doherty, Weiler and Laskin JJ.A.

BETWEEN

Canadian Broadcasting Corporation

Applicant

(Respondent in appeal/Moving party)

and

Her Majesty the Queen

Respondent

(Respondent in appeal/Responding party)

and

Isahaq Omar

Respondent

(Appellant in appeal/Responding party)

Iain A.C. MacKinnon, for the moving party

Gail Glickman, for the responding party Her Majesty the Queen

Dirk Derstine, for the responding party Isahaq Omar

Heard: September 22, 2011

On a motion to quash the appeal from the order of Justice Mary Lou Benotto of the Superior Court of Justice dated July 28, 2010, with reasons at 2010 ONSC 4221 (unreported).

Doherty J.A.:

I

[1] The Canadian Broadcasting Corporation (“CBC”) applied to the Superior Court for an order granting it access to a video in the custody of the Ontario Court of Justice. The video had been entered as an exhibit at the appellant Mr. Omar’s bail hearing.

[2] Mr. Omar and the Crown opposed the CBC’s application. The application judge granted CBC access provided that the appellant’s identity would be obscured in any subsequent use of the video by the CBC. Mr. Omar appeals from that order.

[3] The CBC moved to quash the appeal on the basis that this court has no jurisdiction and that Mr. Omar’s appeal is to the Supreme Court of Canada with leave from that court pursuant to the *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40(1). The Crown supported the CBC’s motion. Mr. Omar resisted the motion and submitted that the appeal lies to this court under s. 6(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[4] Counsel agreed that the outcome of the motion turned on the proper characterization of the application before the Superior Court judge. If that application

was a civil proceeding, an appeal could be taken to this court under the *Courts of Justice Act*. If, however, the proceeding was properly characterized as criminal, there was no appeal to this court under the *Criminal Code*, R.S.C. 1985, c. C-46 or any other statute.

[5] At the end of oral submissions, we advised counsel that the motion to quash failed. These are our reasons for dismissing the motion.

II

[6] The video was seized from Mr. Omar on August 11, 2005 at the time of his arrest on weapon charges. It shows Mr. Omar and other young Somali-Canadians displaying gang symbols, making threatening gestures and showing off various weapons.

[7] The video remained in the possession of the police until 2008, when Mr. Omar and two others were charged with various weapons-related offences. These charges were unrelated to the 2005 charges.

[8] At Mr. Omar's bail hearing on the 2008 charges, the Crown introduced excerpts from the video and the video itself was filed as an exhibit. Mr. Omar was ultimately detained in custody. The justice of the peace indicated, however, that he did not rely on the video in deciding the application for bail.

[9] Mr. Omar was ultimately acquitted on all the charges in July 2009. There was no appeal by the Crown.

[10] Sometime after Mr. Omar's acquittal, the CBC approached the Crown prosecutor and requested access to the video filed on the bail hearing. The CBC planned to use all or part of the video in a program examining the disproportionately high number of murders of young male Somali-Canadians and the connection of those murders to gang-related activity. The Crown prosecutor advised the CBC that a copy of the video was in the Ontario Court of Justice court file but that, in keeping with the policy of the court, the CBC would require a court order to obtain access to that copy of the video. The CBC launched this application in March 2010.

[11] In allowing the CBC application, the application judge applied the controlling authorities in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *R. v. Mentuck*, [2001] 3 S.C.R. 442. She concluded that the CBC was entitled to access the video, but that it must obscure Mr. Omar's face if it used the video in a broadcast.

III

[12] We agree with counsel that this court's jurisdiction to hear the appeal turns on the characterization of the proceedings before the application judge. If the proceeding is civil, the appeal is properly brought in this court under the *Courts of Justice Act*. If the proceeding is criminal, there is no appeal to this court and the appellant's only appeal route is to the Supreme Court of Canada with leave of that court under s. 40(1) of the *Supreme Court Act*.

[13] Counsel for the CBC argues that the proceedings are criminal for two reasons. First, the video came into the possession of the court in the course of a criminal proceeding. Second, the effect of the order sought by the CBC is to deny to the Crown and Mr. Omar what would be tantamount to a sealing order in respect of the video. Counsel submits that applications that engage the s. 2(b) rights of third parties in connection with access to materials filed in a criminal proceeding are criminal in nature. Counsel also observes that to the extent that the form and venue of the application are relevant to the characterization of the proceeding, this application was treated as a criminal matter in the Superior Court.

[14] Crown counsel supports the CBC's position and goes somewhat further. She submits that any application for the return of, or access to, an exhibit filed in a criminal proceeding is itself a criminal proceeding no matter when, where, why, or by whom that application is brought.

[15] Counsel for Mr. Omar begins with the observation that the criminal proceedings against his client are long over and that the non-publication order made on the bail hearing terminated with his acquittal. He further submits that the application brought by the CBC does not in any way engage any order that was made in his criminal proceedings. Counsel submits that the CBC mischaracterizes the application as one in which the Crown and Mr. Omar seeks to "continue the publication ban". Counsel argues that by its application, the CBC sought access to Mr. Omar's property which, as it

happens, continues to be held by the Ontario Court of Justice. As counsel succinctly put it, “this case is about property”.

IV

[16] It is important for the administration of justice that litigants be able to readily determine the appropriate forum in which to bring a proceeding, including an appeal. Appeals are purely creatures of statute: see *R. v. Meltzer*, [1989] 1 S.C.R. 1764, at p. 1773. Appeals in civil matters are governed by provincial legislation, most notably the *Courts of Justice Act*. Appeals in criminal matters are governed by federal legislation, most notably the *Criminal Code*: see *Kourteassis v. Canada (Minister of National Revenue – M.N.R.)*, [1993] 2 S.C.R. 53, at pp. 69-75. The characterization of a proceeding as civil or criminal is, therefore, a crucial first step in determining the appropriate forum, if any, in which to launch an appeal.

[17] Usually, it will not be difficult to distinguish a criminal proceeding from a civil proceeding. An application for an order made in the course of a criminal proceeding, an application for an order directly impacting on an ongoing or pending criminal proceeding, or an application for an order rescinding or varying an order made in a criminal proceeding will all be criminal proceedings: see *Canadian Broadcasting Corp. v. The Queen*, [2011] 1 S.C.R. 65; *R. v. Adams*, [1995] 4 S.C.R. 707; *Dagenais*; *French Estate v. Ontario (Attorney General)* (1998), 122 C.C.C. (3d) 475 (Ont. C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 139.

[18] The order under appeal does not fit into any of the categories set out above. It was not made in the course of a criminal proceeding and has no effect on any ongoing criminal proceeding. Indeed, there is no ongoing criminal proceeding. Nor does the order obtained by the CBC rescind or vary any order made in a criminal proceeding. The only order made in the criminal proceeding that could potentially be affected is the non-publication order made at the bail hearing. However, all counsel agree that the non-publication order ended with the acquittal.

[19] Counsel for the CBC relies heavily on *Dagenais*. In that case, four accused sought injunctions prohibiting the broadcast of a television program that they claimed would prejudice their right to a fair trial. The trial of one of the accused was underway, pre-trial proceedings were ongoing for the second, and the trials of the other two were scheduled to begin in the immediate future.

[20] Chief Justice Lamer, for the majority, described the issue before the court in these terms at p. 856:

This case turns in part on the issue of jurisdiction – *what court(s) have jurisdiction to hear a third party challenge to a publication ban order sought by the Crown and/or the defendant(s) in a criminal proceeding* and made by a provincial or superior court judge under his or her common law or legislated discretionary authority? [Emphasis added.]

[21] Lamer C.J.C. characterized the application in that case as a publication ban sought in a criminal proceeding even though the applicants had styled the application as a request for an injunction, a civil remedy.

[22] In rejecting the contention that the proceedings were civil in nature and gave rise to a right of appeal under the *Courts of Justice Act*, the Chief Justice said at p. 864:

Second, we are dealing here with media challenges to publication bans ordered by judges under their common law or legislated discretionary authority in *response to a request for a ban made by the Crown and/or by individuals charged (or at risk of being charged) with criminal offences*. Such challenges are criminal matters, not civil ones. [Emphasis added.]

[23] At p. 879, the Chief Justice's characterization of the orders as being made in a criminal proceeding flowed directly from what he saw to be the purpose underlying the orders made at first instance:

The objective of the ban ordered in the case at bar was the diminution of the risk that the trial of the four accused persons might be rendered unfair by adverse pre-trial publicity. This objective reflects the interest that the accused persons shared with both the public and the courts in ensuring both that a trial be held and that it be fair.

[24] On the Chief Justice's analysis, the orders requested in *Dagenais*, while styled as applications for injunctions, were in reality applications to prohibit publication of certain information that was seen as posing an immediate threat to the fair trial rights of several accused who were engaged in criminal proceedings that were either underway or were

scheduled to begin in the immediate future. The orders were seen as protective of the administration of criminal justice and, in particular, the accuseds' right to a fair trial. Viewed in that light, it is hardly surprising that the Chief justice characterized the proceedings as criminal.

[25] In *Mentuck*, a second authority relied on by the CBC, the impugned order was made by the trial judge during the criminal trial. The proceedings could not be characterized as anything but criminal.

[26] Similarly, in *Adams*, the third authority relied on by the CBC, the order lifting a publication ban on the name of the complainant was made by the criminal trial judge at the same time that he acquitted the accused. Once again, the order was clearly made during the criminal trial by the trial judge.

[27] The present case is readily distinguishable from the cases relied on by the CBC. Here, the criminal proceedings are over. Mr. Omar's fair trial rights are no longer at play. Nor does the order under appeal rescind or vary any order made in the criminal proceedings. In short, it has nothing to do with any criminal proceeding other than that it provides access to an exhibit tendered in a criminal proceeding.

[28] I would characterize the order sought as simply a request that the Superior Court exercise its authority over exhibits in the possession of the Ontario Court of Justice. This

motion is, of course, not concerned with the existence or extent of that authority.¹ However, the exercise of that authority is neither inherently criminal nor civil. I see no reason to characterize an application for access to an exhibit exclusively by regard to the nature of the proceedings in which the exhibit was filed when those proceedings are no longer in existence.

[29] I also cannot accept the CBC's submission that the nature of the issues raised on the application for access should dictate whether the proceeding is criminal or civil. Why should a dispute between two parties over ownership of an exhibit in the possession of the court be characterized as civil, but a dispute over CBC's access to the exhibit for its journalistic purposes be characterized as criminal? Constitutional concerns that arise on an application like that brought by the CBC can and do arise in both criminal and civil proceedings: see *Hollinger Inc. v. The Ravelston Corp.* (2008), 89 O.R. (3d) 721 (C.A.), leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 260.

[30] On the application, the CBC relied on the open court principle and, more broadly, the principles underlying s. 2(b) of the *Charter* in seeking access to the exhibit. Mr. Omar relied on his property rights and his privacy rights in resisting the CBC's request for access. The Crown raised concerns about protecting innocent third parties, the

¹ Nor is this motion concerned with the jurisdiction of the Ontario Court of Justice to order access to the video, or assuming that jurisdiction the proper characterization of that proceeding.

effective investigation of other criminal activity and the maintenance of the integrity of the material in the possession of the criminal courts. All of these interests can be fully vetted and assessed under the *Dagenais/Mentuck* principles regardless of the characterization of the proceedings as criminal or civil. Those principles will apply regardless of the characterization. The ability of each of the parties to present their issues and make the case for or against access is in no way prejudiced by the characterization of the proceeding as criminal or civil.

[31] In characterizing the proceeding, however, it is important to emphasize what is not at stake. Mr. Omar's fair trial rights and any other right he has arising from his former status as an accused are not in any way engaged by this application. Whatever order is made, it will not impact on his criminal trial rights or the criminal proceedings that were brought against him. Those proceedings were fully and finally disposed of well before this application was brought.

[32] Where the criminal proceedings in which the exhibit was tendered are complete and the order sought does not affect any order made in the criminal proceedings, or the criminal trial rights of any accused, there is no reason to characterize the proceedings as criminal. Those proceedings should be subject to the generally applicable rights of appeal granted in civil proceedings.

[33] The conclusion I reach is consistent with the assumption of jurisdiction by this and other courts in cases where appeals were taken from orders granting or denying access to exhibits after the criminal matters in which the exhibits were filed were completed. None of those cases, however, addressed the jurisdictional question: see *Vickery v. Nova Scotia Supreme Court (Prothonotary)* (1989), 91 N.S.R. (2d) 126 (N.S.C.A.), aff'd [1991] 1 S.C.R. 671; *CTV Television Inc. v. Ontario Superior Court of Justice (Toronto Region)* (2002), 59 O.R. (3d) 18 (C.A.); *R. v. Hogg* (2006), 208 Man. R. (2d) 244 (C.A.); *R. v. Fry* (2010), 254 C.C.C. (3d) 394 (B.C.C.A.).²

[34] The characterization of the proceedings as civil also has a functional benefit. If the proceedings are characterized as civil, the losing party enjoys a right of appeal to this court. If the proceedings are characterized as criminal, that party would have no right of appeal to any court, but would be required to seek leave to appeal to the Supreme Court of Canada and hope to secure one of the necessarily limited orders granting leave to appeal made by that court. Access to appellate review is enhanced if the proceeding is a civil one.

[35] Characterizing this proceeding as civil also enhances the overall effectiveness of the administration of justice by allowing the matter to proceed through all stages of the

² I note that in *Fry*, the criminal trial had been completed when the application was made for access, but an appeal was pending in the criminal proceeding.

judicial hierarchy beginning with the initial hearing, through the intermediate court of appeal and, if necessary, to the Supreme Court of Canada. Intermediate courts of appeal play a meaningful role in the resolution of individual cases and the development of a coherent and effective jurisprudence. Appeal routes that pass through intermediate courts of appeal allow those courts to perform those functions. Furthermore, in the circumstances of this case where there is no ongoing criminal proceeding, a right of appeal to an intermediate court does not raise the spectre of delays in an ongoing criminal proceeding while a third party appeal works its way through the civil appellate process.

[36] For the reasons set out above, Mr. Omar's appeal is properly brought to this court pursuant to s. 6(1) of the *Courts of Justice Act*. The motion to quash is dismissed. The appeal should proceed.

RELEASED: "DD" "OCT 05 2011"

"Doherty J.A."
"I agree K.M. Weiler J.A."
"I agree J.I. Laskin J.A."