SCC Court File No.: 38004

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF NEWFOUNDLAND AND LABRADOR)

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Appellant
(Appellant)

- and -

ALBERT PENUNSI

Respondent
(Respondent)

- and -

DIRECTOR OF PUBLIC PROSECUTIONS,
ATTORNEY GENERAL OF ONTARIO,
YUKON LEGAL SERVICES SOCIETY,
CANADIAN CIVIL LIBERTIES ASSOCIATION,
CANADIAN BROADCASTING CORPORATION and
CANADIAN ASSOCIATION OF PROGRESS IN JUSTICE

Interveners

FACTUM OF THE INTERVENER
CANADIAN BROADCASTING CORPORATION
(Pursuant to Rule 37 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND QUESTIONS IN ISSUE

1. This appeal asks whether the state can impose conditions on an innocent person, not accused or suspected of a crime, in advance of peace bond proceedings under s. 810.2 of the *Criminal Code*, by way of a "show cause hearing" held pursuant to s. 515.

2. The power the Crown seeks to exercise, namely the imposition of conditions, including detention, on a person who is not accused of a criminal offence and before a judge has concluded that there are reasonable grounds to fear the commission of a criminal offence, is extraordinary, and should be subject to very close public examination.

3. As the eyes and the ears of the public in courtrooms across the country, the media plays an essential role in ensuring that the criminal justice system is accountable to members of the public. However, the proposal offered by the Appellant may be particularly harmful to the role of the media and the public's right to scrutinize the proper functioning of public institutions. As a result, this Court must consider whether the approach advanced by the Crown is proper, as well as its impact on the public's right to monitor the courts.

4. The Appellant has raised two issues: a) whether this Court should hear the matter notwithstanding its mootness; and b) whether the judicial interim release provisions of the *Criminal Code* contained in s. 515 are applicable to peace bond proceedings.

PART II – CONCISE OVERVIEW ON QUESTIONS IN ISSUE

5. CBC/Radio-Canada takes no position on the first issue. On the second question, CBC/Radio-Canada submits that the proper statutory interpretation of the *Code* leads to a finding that the judicial interim release provisions in s. 515 do not apply to peace bond proceedings as now proposed by the Appellant.

6. Canadian Broadcasting Corporation/Radio-Canada ("CBC/Radio-Canada") submits that the legislative route relied on by the Appellant is not correct:

a) It is not supported by a plain and ordinary reading of the words of the *Code*, read harmoniously with the intention of Parliament in their entire statutory context;

b) It is not supported by the purposive analysis provided by this Court of s. 515 of the *Code* which demonstrates that it is not intended to apply to peace bond proceedings; and

c) It creates an absurdity in the *Code* that cannot be explained or resolved.

In the alternative, if the proposed interpretation is correct, section 517 of the *Code* must be interpreted in a manner that permits a very close public examination of the state's power over its residents.

7. The full scope of the show cause provisions can be seen when s. 515 of the *Code* is placed in context of the entire legislative scheme that surrounds it. Section 517 of the *Code* creates a statutory publication ban applicable exclusively to show cause hearings, and prescribes the proceedings to which the show cause regime can apply, which do not include applications for a peace bond.

8. Furthermore, this Court has found the show-cause regime and its associated publication ban arise in the sole context of matters that will proceed to "trial". As a trial is not possible outcome in an application for a peace bond, s. 515 simply has no application to those proceedings.

9. As well, while the Appellant submits the *Code* permits necessary modifications to s. 515 to suit its purpose, the result leads to related sections of the *Code* being rendered unintelligible, absent significant additional modifications.

10. While CBC/Radio-Canada believes its position in the interpretation of s. 515 is preferable, in the alternative, if s. 515 is found to apply to peace bond proceedings, the Court must consider the wider impact of that finding. If the statutory interpretation put forth by the Crown is accepted and peace bond proceedings can give rise to a hearing pursuant to s. 515 of the *Criminal Code,* then it is possible that such hearings will be permanently hidden under a cloak of secrecy through the application of the publication ban in s. 517.

11. Since the public has a clear right and interest in understanding the basis for the exercise of extraordinary powers of the state against individuals, including detention, who are neither accused, nor suspected of committing a crime, s. 517 must be read so as not to apply to show-cause hearings held in connection with peace bond proceedings.

PART III – ARGUMENT

12. CBC/Radio-Canada submits the interpretation of the *Criminal Code* proposed by the Appellant is incorrect, and states:

a) The Reading of the Code Advanced by the Crown is Inconsistent with the Rules of Statutory Interpretation:

i. A proper reading of the section must consider its entire legislative context;

ii. A proper reading of the section must consider the intention and purpose of the legislative scheme; and

iii. A proper reading of the section must avoid creating an absurdity in the legislation.

b) In the alternative, the publication ban in s. 517 of the Code must be interpreted not to apply to show cause hearings preceding peace bond applications.

A) The Reading of the Code Advanced by the Crown is Inconsistent with the Rules of Statutory Interpretation

i) A proper reading of the section must consider its entire legislative context

13. The position advanced by the Crown is that through the operation of s. 795, found in Part XXVII of the *Code*, necessary modifications may be applied to Part XVI, including s. 515, thereby permitting a show-cause hearing in advance of peace bond proceedings. However, the route proposed by the Crown fails to appropriately consider s. 515 in context with the

other provisions contained in Part XVI of the *Code* and the intention and purpose of the overall scheme.

14. While CBC/Radio-Canada takes no position as to whether the Crown should or does have the power to subject a defendant to conditions in advance of peace bond proceedings, the legislative route relied upon by the Crown in this appeal fails to consider the words of the *Code* in their entire context, and the intention of Parliament. This context includes consideration of the wording contained in s. 517, which supports a finding that s. 515 does not arise in the context of peace bond proceedings.

15. The modern approach to statutory interpretation requires reading the words of the Act "in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[1] With respect to the statutory interpretation of the *Code,* the interpretation must be consistent with the scheme and purpose of the relevant Part.[2] Applying that approach to the statutory scheme at issue in this appeal, CBC submits the interpretation proposed by the Crown is not correct.

16. Section 517 of the *Code* has no purpose outside a show-cause hearing held pursuant to section 515. As a result, it is only natural that the scope of the latter section is informed by the wording of the former. Notwithstanding this natural connection, and despite stating it has considered "all of the relevant provisions" in context,[3] the Appellant has ignored the impact of s. 517 on its interpretation. When properly considered, that section supports the view that s. 515 cannot be "imported" into Part XXVII as proposed.

17. Section 517 of the *Code* provides as follows:

> 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

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[1] *R. v. Sharpe,* 2001 SCC 2, [2001] 1 S.C.R. 45 at para. 33.
[2] *R. v. Jones*, [2017] 2 SCR 696, 2017 SCC 60 at para. 59.
[3] See *Appellant's Factum* at para. 44.

> 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.

18. The section is written in one continuous sentence, which when simplified, can be re-written as follows:

> If the prosecutor … intends to show cause under section 515, …the justice … shall on application by the accused, … make an order directing that … the information … shall not be published … before such time as… the accused … is discharged; or …the trial is ended.

19. Since s. 517 applies in no other context outside of a show-cause hearing under s. 515, it must be understood as establishing the full scope of proceedings captured by the show cause regime. The grammatical construction of s. 517 demonstrates that Parliament intended the only instances where a show cause hearing is available are ones in which the accused may be discharged at a preliminary inquiry [s. 517(1)(a)]; or ones that may result in a trial [s. 517(1)(b)].

20. Since peace bond proceedings cannot result in either of those outcomes, CBC/Radio-Canada submits Parliament clearly did not intend for s. 515 to apply in that context.

ii) A proper reading of the section must consider the intention and purpose of the legislative scheme

21. The nature of the show cause hearings, as previously determined by this Court in *Toronto Star Newspapers Ltd. v. Canada*, cannot be reconciled with its application in the peace bond context. As this Court underlined in *R. v. Jones,* in the statutory interpretation of the

Criminal Code, the scheme and undergirding purpose of the Part must support the proposed interpretation.[4]

22. Section 517 of the *Code* contemplates that there will be "evidence taken", "information given", "representations made" and "reasons given" during a show-cause hearing held under s. 515. This Court in *Toronto Star*, confirmed that the ban on publication of this information serves to foster trial fairness:

> In this context, Parliament's primary objective can be defined on the basis of an understanding of trial fairness that is not limited to averting jury bias. Given the particular emphasis placed in the Ouimet Report on ensuring expeditious bail hearings, I would define Parliament's objectives as (1) to safeguard the right to a fair trial; and (2) to ensure expeditious bail hearings. These objectives were to be achieved by establishing a process that facilitated early release of an accused in order to mitigate the harshness of his or her interaction with the criminal justice system, limit the stigma as far as possible, and ensure that the trier of fact remains impartial.[5]

23. As the purpose of the publication ban over information presented during s. 515 hearing is to protect "trial fairness", it can be understood that such hearings are intimately connected to matters that are headed for trial. In other words, a proper reading of s. 515 is that it only applies to bail hearings of a person accused of an offence, and no other context.

24. Fair trial rights are simply not a consideration in peace bond proceedings. No trial is contemplated by the *Code* and there is no potential jury which could be tainted. At most, there can be a hearing where the merits of the peace bond application are considered by a judge. The above comments from *Toronto Star* thus militate in favour of a finding that s. 515 was not contemplated to apply to peace bond applications. The very nature of the information presented during the show cause regime, as evidenced through the purpose of the s. 517 publication ban, is thus at odds with their application to peace bond proceedings.

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[4] *R. v. Jones*, [2017] 2 SCR 696, 2017 SCC 60 (CanLII) at para. 59.

[5] *Toronto Star Newspapers Ltd. v. Canada*, [2010] 1 SCR 721, 2010 SCC 21 (CanLII) at para. 23.

25. Consequently, CBC submits the path laid out by the Crown, whereby s. 515 permits a show cause hearing in the context of a peace bond application, is inconsistent with both the plain and ordinary reading of the section when viewed in its statutory context, as well as its purposive context as explained by this Court.

iii. A proper reading of the section must avoid creating an absurdity in the legislation

26. The changes proposed by the Appellant are substantial, as underlined by the court below with respect to similar changes to s. 515,[6] and significantly undermine the intelligibility of the *Code*. On its face, s. 517 establishes a publication ban that terminates upon the occurrence of very precise events: a trial or a discharge. However, the interpretation now offered by the Crown through so-called "necessary modifications" to s. 515 creates an absurdity in the legislation.

27. When viewed in context with s. 517, the modifications to s. 515 proposed by the Appellant render the former section unintelligible without significant additional read-ins, which would serve to modify its purpose. The absurdity is easily seen when the modifications proposed by the Appellant flow through to s. 517:

> If the *applicant for a peace bond* [in place of prosecutor]… intends to show cause under section 515, …the justice … shall on application by the *defendant* [in place of accused], … make an order directing that … the information … shall not be published … before such time as… the *defendant* [in place of accused]… is discharged; or …the trial is ended.

28. Such a reading is unintelligible, as peace bond applications cannot result in a trial or a discharge. In order to avoid that absurdity, the Court would have to do one of three things:

a) interpret the terms "prosecutor" and "accused" differently in sections 515 and 517, by not importing the modifications into s. 517;

b) re-write sections 517(1)(a) and 517(1)(b) completely; or

[6] *R. v Penunsi*, 2018 NLCA 4 (CanLII) at para 57.

c) ignore those sub-sections entirely, making the publication ban a perpetual one .

29. Parliament cannot have intended to create an absurdity in s. 517 of the *Code* through "necessary modifications" arising under s. 795 which are applicable to s. 515. It is also highly improbable that Parliament intended the terms "prosecutor" and "accused" to have two different meanings in sections of the *Code* that are so intimately connected with one another. Nor can it have intended such modifications to require the complete redrafting, or distortion of s. 517 in order to accommodate a show-cause hearing arising from a peace bond application as now proposed by the Appellant.

30. Consequently, CBC/Radio-Canada submits the better answer is that the interpretation of the *Code* now offered by the Appellant is simply incorrect.

B. The publication ban in s. 517 of the Code must be interpreted not to apply to show cause hearings preceding peace bond applications

31. In the alternative, if this Court determines that peace bond proceedings can give rise to a show cause hearing, it should also interpret the *Code* in a manner that recognizes the significant public interest that would attach to a decision to detain an innocent person not even suspected of a crime, in keeping with freedom of expression and freedom of the press, and the fundamental role the media play in keeping the criminal justice system accountable to the public.

32. The media plays an integral role in ensuring that the public can assess the criminal justice system and the courts generally. As noted by Justice Cory in *Edmonton Journal v. Alberta (Attorney General),* the public relies on the media to remain informed and to ensure that the legal system is fair:

> It is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples nor mothers or fathers house-bound with young children, would find it possible to attend court. Those who cannot attend rely in large measure upon the press to inform them about court proceedings -- the nature of the evidence that was called, the arguments presented, the comments made by the trial judge -- in order to know not only what rights they may have, but how their problems might be dealt

> with in court. It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.[7]

33. More recently, this Court has reaffirmed the media's role in assuring accountability of the courts in a world of increasingly complex and lengthy legal proceedings:

> …openness "helps to maintain and to enhance public confidence in, and serves in a way as a guarantee of, the integrity of the court system" and that "to provide adequate support for this multifaceted role of openness, journalists must have access to information relating to the courts and must be able to broadcast it as freely as possible."[8]

34. It would be shocking if Canadians did not have the right to know the exact basis on which the Crown could seek the detention of a person not even suspected of a crime. The effect of this appeal may be the removal of an important check on the exercise of state power, namely a knowledgeable and informed citizenry.

35. To that end, CBC submits that if "modifications" are to be applied to s. 515 as proposed by the Crown, they should not spill over to the publication ban contained in s. 517, and that provision should continue to be read as written. Its plain and ordinary reading would mean it does not apply to bail hearings arising from peace bond proceedings, as there is no "prosecutor" or "accused" who can request the ban. Such a reading would be entirely consistent with the purpose of the *Code,* as described above, given that there are no fair trial rights to protect in peace bond proceedings.

36. In light of the foregoing and in order to interpret the *Code* in a manner that recognizes the fundamental role of the media in informing the public about the scope of the state's power

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[7] *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 SCR 1326, 1989 CanLII 20 (SCC) at pp. 1339-1340.

[8] *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] 1 SCR 19, 2011 SCC 2 at para 28.

over Canadian residents, and the proper functioning of the court in a just and democratic society, s. 517 should be interpreted such that it does not apply to bail hearings arising from peace bond proceedings.

C. *Conclusion*

37. In short, CBC/Radio-Canada submits the following:

a) the interpretation of s. 515 of the *Criminal Code* now proposed by the Appellant should be rejected as:

   i) it is contrary to a contextual analysis of the entire legislative scheme,

   ii) it is contrary to the intended purpose of show-cause hearings, being the first step in a proceeding that will head to trial, and

   iii) it creates an absurdity in the legislation which can only be avoided with significant revisions to existing provisions of the *Code*.

b) In the alternative, if the interpretation offered by the Appellant is correct, the Court must find that the associated publication ban found in s. 517 does not apply to peace-bond proceedings to ensure that Canadians have the full ability to properly evaluate the functioning of the courts in an exercise of extraordinary power of the state over its residents.

PART IV – SUBMISSIONS REGARDING COSTS

37. Consistent with this Court's usual practice, CBC/Radio-Canada seeks no order as to costs and asks that no award of costs be made against it.

PART V – ORDER SOUGHT

38. CBC/Radio-Canada takes no position with respect to the outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of February, 2019.

per **Sean Moreman**
Farid Muttalib
Judith Harvie
CANADIAN BROADCASTING CORPORTAION

PART VI – TABLE OF AUTHORITIES & LEGISLATIVE PROVISIONS

Case Law:	**Paragraph References:**
Canadian Broadcasting Corp. v. Canada (Attorney General), [2011] SCR 19, 2011 SCC 2	33
Edmonton Journal v. Alberta (Attorney General), [1989] 2 SCR 1326, 1989 CanLII 20 (SCC)	32
Toronto Star Newspapers Ltd. v. Canada, [2010] 1 SCR 721, 2010 SCC 21 (CanLII)	22
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Legislation:	
Criminal Code of Canada, R.S.C., 1985 c. C-46, sections 515, 517, 795	