COMMISSION OF INQUIRY RESPECTING THE MUSKRAT FALLS PROJECT

IN THE MATTER OF an Application by
Paul Harrington, seeking a determination
by the Commissioner pursuant to
Rules 40 and 42 of the Rules of Procedure

APPLICATION FOR EXCLUDING EVIDENCE FROM THE INQUIRY,
EXCLUDING THE PUBLIC FROM A HEARING AND
TO ENTER EXHIBITS AS CONFIDENTIAL EXHIBITS

The Application of Paul Harrington (the "Applicant" or "Mr. Harrington") states as follows:

Nature of Application

1. This Application the ("Inquiry Application") is brought to request a determination from the Commissioner as to whether Mr. Harrington's rate of pay and other details of his compensation (including that of his Consulting Company) (the "Compensation Evidence") must be disclosed to the Inquiry, and whether any record, document or thing which discloses the Compensation Evidence must be produced to the Commission.

2. Upon a review of sections 12 and 13 of the *Public Inquiries Act, 2006*, SNL 2006 c. P.38-1, it was uncertain as to whether the Supreme Court of Newfoundland and Labrador or the Commission had jurisdiction to determine the matter. Mr. Harrington's lawyer, Deborah LJ. Hutchings, Q.C., therefore made the Originating Application under number action number 2018 01 G 7843 (the "Court Application") attached as Tab 1 to the within Inquiry Application, as a parallel proceeding to the Inquiry Application. At a hearing of the Court Application in the afternoon of Friday, November 16, 2018, it was agreed between the parties that the Court Application would be adjourned *sine die*, and the Inquiry Application would be made to the Commissioner. If the Commissioner takes jurisdiction to determine the matter, the Court Application shall be withdrawn. The Applicant reserves his right to apply for judicial review of the Commissioner's

decision of the merits of the Inquiry Application. If the Commissioner declines jurisdiction, the Court Application shall proceed. In this way, the uncertainty of jurisdiction is taken into account, without the spectre arising of duplicate proceedings.

3. Mr. Harrington is scheduled to appear before the Inquiry, commencing November 19, 2018 and to continue thereafter through to November 22, 2018, to testify on matters concerning his involvement with the Muskrat Falls Project (the "Project").

4. Counsel for the Commission (hereinafter referred to as "Commission Counsel") has indicated to Mr. Harrington's lawyer, Deborah LJ. Hutchings, Q.C., that he will be asked during his testimony to disclose publicly his rate of pay for the services he provided to Nalcor. Mr. Harrington takes the position that disclosure of this information will compromise his commercial competitiveness in the marketplace for future consultancy work and will seriously prejudice his right to continue his action pursuant to the *Access to Information and Protection of Privacy Act, 2015*, SNL 2015 c. A-1.2 ("ATIPPA"). Therefore, he does not wish to disclose this information and has brought the Inquiry Application for a determination from the Commissioner as to whether he shall be required to disclose such information at the Inquiry.

Nature and Procedural History of the ATIPPA Action

5. Mr. Harrington is party to an appeal to the Supreme Court, General Division under matter number 2018 01 G 4864 (hereinafter the "ATIPPA Action") and made pursuant to s. 53 of ATIPPA. In the ATIPPA Action, Mr. Harrington is seeking an order to prevent the disclosure of certain documentation and records in possession of Nalcor relating to his charged rates and other compensation in connection with the services he and his Consulting Company provided to Nalcor. This disclosure is being sought by third parties, pursuant to an ATIPPA request filed on June 5th, 2018. Further, and in connection to the ATIPPA Action, Mr. Harrington is seeking an order from the Court, pursuant to s. 60 of ATIPPA, that the Respondent in the ATIPPA Action, being Stan Marshall, CEO of Nalcor, be prohibited from disclosing the documentation and records requested.

6. A copy of the Originating Application and Affidavit filed in the ATIPPA Action is attached as **Exhibit "A"** to the Affidavit of Mr. Harrington filed with the Court Application. The facts and procedural history of the ATIPPA Action is set out therein.

7. A similar issue to that of the ATIPPA Action has been adjudicated before the Supreme Court of Newfoundland at the General and Appellate divisions in the matter of *Newfoundland and Labrador Teachers Assn v. Newfoundland and Labrador English School District* (the "NLTA Action"). As a result of the decision from the Court of Appeal (*Newfoundland and Labrador Teachers Assn v. Newfoundland and Labrador English School District* [2018] N.J. 278 (NLCA) (the "NLTA Decision"), the Newfoundland and Labrador Teachers Assn. ("NLTA") is now seeking leave to appeal this decision to the Supreme Court of Canada, which application for leave was filed on November 15, 2018.

8. Since the outcome of the NLTA Action will affect the outcome of the ATIPPA Action, it has been agreed between the parties to the ATIPPA Action to adjourn the progress of the ATIPPA Action pending the conclusion of the NLTA Action. The ATIPPA Action is presently adjourned to December 4, 2018 for a status update and it is anticipated that the ATIPPA Action will be adjourned *sine die* pending the outcome of the application for leave to the Supreme Court of Canada of the NLTA Action.

Law and Argument with Respect to the Inquiry Application

I. The ATIPPA Action

9. Section 22 of ATIPPA (attached as Tab 2) reads as follows:

> ***22.*** *(1) The head of a public body may refuse to disclose a record or part of a record that*
>
> > *(a) is published and is available to the public whether without cost or for purchase; or*
> >
> > *(b) is to be published or released to the public within 30 business days after the applicant's request is received.*

(2) The head of a public body shall notify an applicant of the publication or release of information that the head has refused to give access to under paragraph (1)(b).

(3) Where the information is not published or released within 30 business days after the applicant's request is received, the head of the public body shall reconsider the request as if it were a new request received on the last day of that period, and access may not be refused under paragraph (1)(b).

10. Mr. Harrington states that if the Commission discloses the Compensation Evidence, the ATIPPA Action will suffer irredeemable prejudice. As stated above, it is anticipated that the ATIPPA Action will be adjourned pending the decision of the Supreme Court of Canada regarding the application for leave to appeal of the NLTA Decision. Disclosure by the Commission would effectively render the ATIPPA Action moot. Section 22 of the Act would come into play, as the personal information would be "published and available to the public", published by the Commission. Mr. Harrington would be denied this opportunity to have his day in court. His right to have his privacy rights adjudicated and determined by the Court would be summarily denied him, since regardless of a decision to which the Court may come in the ATIPPA Action, the Compensation Evidence would already be "published". Mr. Harrington's situation engages a fundamental principle of the administration of justice, that every person coming before the Court has a right to have their matter heard and adjudicated. It is one of the founding doctrines upon which our democratic society under the rule of law is based. It should not be overturned lightly. Disclosure of the Compensation Evidence by the Commission would have the direct effect of violating that right.

11. In the alternative, if questions surrounding the Compensation Evidence are to be asked of Mr. Harrington (and the Applicant submits that they should not be asked), the questions are more applicable to the second phase of the Inquiry, as they are more related to the execution of the Project. Mr. Harrington will undoubtedly be called as a witness for the second phase. If it is the decision of the Commissioner that the Compensation Evidence should be before the Inquiry, then the questions may be asked at the second phase. This will allow ample time for the resolution of the ATIPPA Action. Mr. Harrington will have his day in Court, and the Commission's work will not be prejudiced. By the same token, it is open to the Commissioner to defer the adjudication of this application to the second phase of the Inquiry; leaving for the

present the Compensation Evidence redacted, the questions unasked, and adjourning the Inquiry Application.

II. Relevance of the Compensation Evidence

12. Mr. Harrington submits that the Compensation Evidence is not relevant to the Inquiry's mandate, at the very least, at this stage of the Inquiry which is dealing solely with matters prior to the sanction of the Project.

13. The Affidavit of Kirsten Morry (the "Morry Affidavit") (Tab 3), filed in the Court Application, sets out the rationale of Commission Counsel in wishing to adduce the Compensation Evidence before the Inquiry:

> *3. The compensation paid to Mr. Harrington or his company was included in the cost estimates for the project and forms part of the construction costs of the Muskrat Falls Project. It is thus, in my belief, relevant to s. 4(b) of the Terms of Reference.*
>
> *4. As a primary project manager, Mr. Harrington was a key decision-maker within Nalcor Energy before and after sanction of the Muskrat Falls Project. The compensation Mr. Harrington or his company received could have had an effect on his motives or actions. It is my belief that this compensation is this relevant to s. 4(a), (b) and (d) of the Terms of Reference.*

14. The Terms of Reference of interest to Commission Counsel relating to the Compensation Evidence are ss. 4(a), (b) and (d). Of those the relevant provisions read:

> ***4.** The commission of inquiry shall inquire into*
>
> *(a) the consideration by Nalcor of options to address the electricity needs of Newfoundland and Labrador's Island interconnected system customers that informed Nalcor's decision to recommend that the government sanction the Muskrat Falls Project, including whether*
>
> *[...]*
>
> > *(iii) Nalcor's determination that the Muskrat Falls Project <u>was the least-cost option</u> for the supply of power to Newfoundland and Labrador Island interconnected system over the period 2011-2067 was reasonable with the knowledge available at that time;* (Emphasis added)

(b) why there are significant differences between the estimated costs of the Muskrat Falls Project at the time of sanction and the costs by Nalcor during project execution, to the time of the conclusion of the project including whether

> *(i) Nalcor's conduct in retaining and subsequently dealing with contractors and suppliers of every kind was in accordance with best practice, and, if not, whether Nalcor's supervisory oversight and conduct contributed to project cost increases and project delays,* (Emphasis added)

[...]

(d) whether the government was fully informed and was made aware of any risks or problems anticipated with the Muskrat Falls Project, so that the government had sufficient and accurate information upon which to appropriately decide to sanction the project and whether the government employed appropriate measures to oversee the project particularly as it relates to the matters set out in paragraphs (a) to (c), focusing on governance arrangements and decision-making processes associated with the project. (Emphasis added)

15. Mr. Harrington states that the Compensation Evidence is not relevant to the determination of these questions. Section 21 of the Rules of Procedure casts a broad meaning of the term "relevant" as including:

> *"anything that touches or concerns the subject matter of the Inquiry or that may directly or indirectly lead to other information that touches or concerns the subject matter of the Inquiry."*

16. Section 4(a) of the Terms of Reference deal with the question of whether the Project was the least-cost option for the Province. The interpretation of the Terms of Reference state in part:

> *35. [...] Furthermore, the Decision Gate process and the reasonableness of capital cost estimates used fall within the mandate of the Commission.* (Emphasis added)
>
> *[...]*
>
> *[37] As regards section 4(a), it will be necessary for me to consider whether appropriate costing and accounting processes were utilized in determining costs for the options considered and ultimately was the Muskrat Falls Project the least cost option for the Province.* (Emphasis added)

17. Section 4(b) of the Terms of Reference deal with the project execution and cost escalation. From the Interpretation of the Terms of Reference:

> *[41] [...] Matters for consideration under 4(b) will include such things as . . . . . whether the contractual arrangements with contractors . . . . . were appropriately entered into in accordance with industry best practice . . . . .* (Emphasis added)

18. Section 4(d) of the Terms of Reference deal with government oversight. From the Interpretation of the Terms of Reference:

> *[43] [...] the question that ultimately arises is whether or not the Government was appropriately informed and in a position to determine that the Muskrat Falls Project was the least cost option for the supply of power to the island portion of the Province.*

19. With respect to s. 4(a), the Commission will consider the "reasonableness of the capital cost estimates." With respect to s. 4(b), the Commission will consider "whether the contractual arrangements with contractors were appropriately entered into in accordance with industry best practices." With respect to s. 4(d), the Commission will consider whether Government was "appropriately informed."

20. There are two stated motives in the Morry Affidavit for Commission Counsel's wanting to introduce the Compensation Evidence:

    a. It is relevant because it is included in the capital cost estimates;

    b. It is relevant because the compensation could have had an effect on Mr. Harrington's motives or actions in carrying out his duties, with the implication being that he may have sought sanctioning of the Project in order to guarantee his continued employment.

21. With reference to para. 3 of the Morry Affidavit, engaging s. 4(b) of the Terms of Reference it is obvious that Mr. Harrington could not have approved his own compensation, nor had the authority to decide whether it would be included in the cost estimate. Someone in the upper management of Nalcor, above Mr. Harrington in the organisation, would have made those decisions. The details of those decisions can be obtained by the Inquiry from witnesses other than Mr. Harrington. More particular to the matter at hand, and as will be discussed more

fulsomely hereinafter, the Compensation Evidence is not required, nor relevant to the subject matter of the Inquiry.

22. The real question before the Commission is not the actual level of Mr. Harrington's compensation. It is whether that level is reasonable, and whether it was entered into by Nalcor in accordance with industry best practices. As such s. 4(b) is the key to the matter, as the answer to whether Mr. Harrington's compensation was entered into in accordance with industry best practices informs 4(a), the reasonableness of the costs estimates. 4(a) in turn informs 4(d), whether Government was appropriately informed.

23. Testimony on this issue is best gleaned from those in a position to testify to the best practices in the industry, and from those in a position to testify to the practices undertaken by Nalcor in entering into such contracts. With respect to compensation, the material question to be answered is the industry standard range of compensation paid to such contractors, and whether the compensation paid to Nalcor's contractors is in alignment with that standard. The Inquiry may engage the services of an expert in this field, who may examine the relevant items in the costs estimates, in addition to the relevant contracts, and provide testimony as to whether the levels of compensation therein are in keeping with industry norms, and if they are not, whether they are above or below the norm. The degree of variation, if any, may be expressed as a percentage, without revealing the details of the Compensation Evidence. This testimony will provide the Inquiry with the information it needs to accomplish its objectives, without subjecting Mr. Harrington to the deleterious effects of the revealing of the Compensation Evidence. Evidence of Mr. Harrington's compensation, without the context of the industry standards, does not advance the Inquiry, and also harms Mr. Harrington.

24. With respect to the allegation that Mr. Harrington's motives and actions in carrying out his duties were affected by his compensation (i.e. that he somehow manipulated the Government into sanctioning a Project that allegedly should not have been sanctioned, so that he would continue to be employed by Nalcor), Mr. Harrington rejects any such assertion. Such an allegation is based upon pure speculation. Nevertheless, it is clear that the Compensation Evidence is not relevant to this line of questioning. Relevant evidence would include whether the compensation was in accordance with industry standards and best practices, which as

discussed above, does not require the Compensation Evidence to be adduced. Also relevant would be Mr. Harrington's skills and experience, the state of the labour market for those with skills and experience commensurate to Mr. Harrington's, and his prospects of employment on other projects, during the period leading up to sanction. This evidence does not require the introduction of the Compensation Evidence.

III. Relief Sought

25. Mr. Harrington pleads and relies on Rule 40 of the Rules of Procedure, which reads:

> *All hearings are open to the public; however, the Commissioner may exclude the public from a hearing, or from part of it, where he decides that the public interest in holding the hearing, or a part of it, in public is outweighed by another consideration, including the consequences of possible disclosure of personal matters, public security or the right of a person to a fair trial.* (Emphasis added)

26. Mr. Harrington submits that testimony disclosing the Compensation Evidence would not serve the public interest, but would cause undue financial harm to him and his Consulting Company. Further, the disclosure of the Compensation Evidence would place Mr. Harrington at a competitive disadvantage with other consultants with whom he would be in competition for subsequent contracts. His competitors, knowing his rates and compensation details, would be able to underbid him with ease. He would not have the advantage of knowing their compensation details. For that matter, project proponents would also lose the advantage of a fair and open competition.

27. Further, Mr. Harrington pleads and relies on Rule 42 of the Rules of Procedure:

> *Exhibits may be entered as confidential exhibits. Confidential exhibits will not be viewable by the public during the hearings and will not be made public. Public exhibits may be redacted to remove information that is privileged or of a sensitive or confidential nature. The transcripts and public exhibits from the hearings will be made available as soon as reasonably possible for public viewing and shall be placed on the Commission's website (www.muskratfallsinquiry.ca). If any part of the hearings is held in the absence of the public, the transcripts and exhibits from that part of the hearing will only be made available for public viewing at the Commissioner's discretion and then on such terms as he may direct.*

28. Mr. Harrington submits that any public exhibit which disclosed the Compensation Evidence would have the same deleterious effects as his *viva voce* testimony on the subjects.

29. The test for the exclusion of the public from a public inquiry hearing was set out by the Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corp.* [1994] 3 SCR 835 (Tab 4), *R. v. Mentuck* [2001] 3 SCR 442 (Tab 5), *Canadian Broadcasting Corp. v. New Brunswick* [1996] 3 SCR 480 (Tab 6), and summarised in Ratushny, *Conduct of Public Inquiries* (pp. 331-332) (Tab 7):

> *'A publication ban should only be ordered when:*
>
> *(a) Such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and*
>
> *(b) The salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice'.*
>
> *The test for ordering in camera proceedings is essentially the same. In applying this test, it must be kept in mind that:*
>
> > *'The relevant rights and interests will be aligned differently in different cases, and the purposes and effects invoked by the parties must be taken into account in a case-specific manner.'*
>
> *The test must be applied in a 'flexible and contextual manner'.*

30. Mr. Harrington submits that the deleterious effects to his personal matters outweighs the negligible value of the Compensation Evidence to the subject matter of the Commission.

31. Mr. Harrington therefore respectfully requests of the Commissioner a determination that any testimony and exhibits disclosing the Compensation Evidence be granted the following protections:

    a. That the Compensation Evidence not be disclosed;

b. In the alternative:

i. The public shall be excluded from any part of the hearing which discloses the Compensation Evidence;

ii. The exclusion shall include all parties, save and except:

1. The Commissioner and Commission Counsel;
2. Nalcor's representative and Nalcor's Counsel;
3. Mr. Harrington and Mr. Harrington's Counsel;

iii. All exhibits disclosing the Compensation Evidence shall be confidential, and redacted such that the only parties to whom the exhibits shall be disclosed unredacted are those named above in subparagraph (b)(ii).

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of St. John's, in the Province of Newfoundland and Labrador, this 17 day of November, 2018.

BENSON BUFFETT PLC. INC.

for Per: Deborah LJ Hutchings, Q.C.
Solicitors for the Applicant
whose address for service is:
Suite 900, Atlantic Place
215 Water Street
P.O. Box 1538
St. John's, NL A1C 5N8

TO: Commission of Inquiry Respecting the Muskrat Falls Project
5th Floor, Suite 502
Beothuck Building
20 Crosbie Place
St. John's, NL A1B 3Y8

LIST OF AUTHORITIES

1. Court Application in action 2018 01 G 7843.
2. Section 22, *Access to Information and Protection of Privacy Act, 2015*, SNL 2015 c. A-1.2.
3. Morry Affidavit, dated November 16, 2018, filed in action 2018 01 G 7843.
4. *Dagenais v. Canadian Broadcasting Corp.* [1994] 3 SCR 835.
5. *R. v. Mentuck* [2001] 3 SCR 442.
6. *Canadian Broadcasting Corp. v. New Brunswick* [1996] 3 SCR 480.
7. Ratushny, *Conduct of Public Inquiries,* pp. 329 - 337.

2018 01 G 7843

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

IN THE MATTER OF an application pursuant to Section 13(1) of the *Public Inquiries Act*, SNL 2006, c. P-38.1 and Rule 20(b) of the Rules of Procedure of the Commission of Inquiry Respecting the Muskrat Falls Project

BETWEEN:

PAUL HARRINGTON — **APPLICANT**

AND:

COMMISSION OF INQUIRY RESPECTING THE MUSKRAT FALLS PROJECT — **RESPONDENT**

ORIGINATING APPLICATION
(Inter Partes)

SUMMARY OF CURRENT DOCUMENT	
Court File Numbers	2018 01 G 7843
Date of Filing of Document	November 15, 2018
Name of Filing Party or Person	Deborah Hutchings QC, solicitor for Paul Harrington
Application to which Document being filed relates:	Originating Application
Statement of purpose in filing	Application requesting a determination of an evidentiary matter pursuant to Section 13(1) of the *Public Inquiries Act*, SNL 2006, c. P-38.1 and Rule 20(b) of the Rules of Procedure of the Commission of Inquiry Respecting the Muskrat Falls Project
Court Sub-File Number, if any	N/A

To the Chief Justice of the Supreme Court of Newfoundland and Labrador, General Division, or his designate:

The Application of the Applicant states as follows:

Nature of the Application

1. **As the Applicant is scheduled to testify before the Inquiry Respecting the Muskrat Falls Project (the "Inquiry") commencing Monday, November 19, 2018 and continuing thereafter through to Thursday, November 22, 2018, it is respectfully requested that this Honourable Court hear the within Application as soon as possible.**

2. The Applicant, Paul Harrington (hereinafter referred to as "Mr. Harrington") is an individual and an employee of a consulting company which is contracted by Nalcor Energy (hereinafter 'Nalcor'), to provide certain consulting services in relation to work leading up to the sanctioning and the execution of the Lower Churchill Project. Mr. Harrington owns the said consulting company (hereinafter referred to as the "Consulting Company"), which will not be named herein. Mr. Harrington, through his Consulting Company, received compensation for the services which he provided to Nalcor.

3. The Commission of Inquiry, the Respondent herein, (hereinafter the "Commission" or the "Inquiry") is a public inquiry constituted pursuant to the *Public Inquiries Act* SNL 2006, c. P-38.1 to review various matters arising from the Muskrat Falls hydroelectric project, (hereinafter referred to as the "Project").

4. As noted above, Mr. Harrington is scheduled to appear before the Inquiry, commencing November 19, 2018 and to continue thereafter through to November 22, 2018, to testify on matters concerning his involvement with the Project.

5. Counsel for the Commission (hereinafter referred to as "Commission Counsel") has indicated to Mr. Harrington's lawyer, Deborah LJ. Hutchings, Q.C., that he will be asked during his testimony to disclose publicly his rate of pay for the services he provided to Nalcor. Mr. Harrington takes the position that disclosure of this information will compromise his commercial competitiveness in the marketplace for future consultancy work and will seriously prejudice his right to continue his action pursuant to the *Access to Information and Protection of Privacy Act, 2015*, SNL 2015 c.

A-1.2 (hereinafter "ATIPPA"). Therefore, he does not wish to disclose this information and has brought this Application for a determination from this Honourable Court as to whether he shall be required to disclose such information at the Inquiry.

Facts and Procedural History

6. Commission Counsel has indicated that among the questions to be posed to Mr. Harrington are questions directed to the compensation which he and his Consulting Company have received from Nalcor.

7. Mr. Harrington is party to an appeal to this Honourable Court under matter number 2018 01 G 4864 (hereinafter the "ATIPPA Action") and made pursuant to s. 53 of ATIPPA. In the ATIPPA Action, Mr. Harrington is seeking an order to prevent the disclosure of certain documentation and records in possession of Nalcor relating to his charged rates and other compensation in connection with the services he and his Consulting Company provided to Nalcor. This disclosure is being sought by third parties, pursuant to an ATIPPA request filed on June 5th, 2018. When the disclosure of these documents and records are made and become associated with Mr. Harrington, an unreasonable invasion of his personal privacy under ATIPPA will be constituted. Further, and in connection to the ATIPPA Action, Mr. Harrington is seeking an order from this Honourable Court, pursuant to s. 60 of ATIPPA, that the Respondent in the ATIPPA Action, being Stan Marshall, CEO of Nalcor, be prohibited from disclosing the documentation and records requested. The documentation and records containing the information respecting remuneration by the Consulting Company and Mr. Harrington, shall hereinafter be referred to as the "Personal Information".

8. A copy of the Originating Application and Affidavit filed in the ATIPPA Action is attached hereto as **Exhibit "A"** to the Affidavit of Mr. Harrington filed herewith. The facts and procedural history of the ATIPPA Action is set out therein.

9. A similar issue to that of the ATIPPA Action has been adjudicated before the Supreme Court of Newfoundland at the General and Appellate divisions in the matter of *Newfoundland and Labrador Teachers Assn v. Newfoundland and Labrador English School District* (the "NLTA Action"). As a result of the decision from the Court of Appeal (*Newfoundland and Labrador Teachers Assn v. Newfoundland and Labrador English School District* [2018] N.J. 278 (NLCA)) (the "NLTA Decision"), the Newfoundland and Labrador Teachers Assn. ("NLTA") is now seeking leave to

appeal this decision to the Supreme Court of Canada, which application for leave was filed on November 15, 2018.

10. Since the outcome of the NLTA Action will affect the outcome of the ATIPPA Action, it has been agreed between the parties to adjourn the progress of the ATIPPA Action pending the conclusion of the NLTA Action. The ATIPPA Action is presently adjourned to December 4, 2018 for a status update and it is anticipated that the ATIPPA Action will be adjourned *sine die* pending the outcome of the application for leave to the Supreme Court of Canada of the NLTA Action.

Law and Argument

11. The relevant sections of the *Public Inquiries Act* read as follows:

> ***12.*** *(1) A person has the same privileges in relation to the disclosure of information and the production of records, documents or other things under this Act as the person would have in relation to the same disclosure and production in a court of law.*
>
> *(2) Notwithstanding subsection (1) but subject to subsection (4), a rule of law that authorizes or requires the withholding of records, documents or other things or a refusal to disclose information, on the grounds that the disclosure would be injurious to the public interest or would violate Crown privilege, does not apply in respect of an inquiry under this Act.*
>
> *(3) Notwithstanding subsection (1) but subject to subsection (4), a person shall not refuse to disclose information to a commission or a person authorized by a commission on the grounds that the disclosure is prohibited or restricted by another Act or regulation.*
>
> *(4) Notwithstanding another provision of this section, subsections (2) and (3) do not apply to quality assurance information as defined in the Patient Safety Act in a proceeding in which evidence is or may be given before a committee of a governing body of a regulated health profession.*
>
> ***13.*** *(1) A person may apply to the court for an order excluding a person or a record, document or thing from the operation of subsections 12 (2) and (3), and the court may, after considering the application and the submission of the commission and other interested parties, order that*
>
> *(a) the person may refuse to disclose information;*
>
> *(b) a record, document or thing may be withheld from the commission; or*
>
> *(c) the information shall be disclosed or the record, document or thing produced on conditions that the court may provide.*
>
> *(2) There is no right of appeal from a decision of a judge made under this section.*

12. The relevant sections of ATIPPA read as follows:

2. *(u) "personal information" means recorded information about an identifiable individual, including the individual's name, address or telephone number,*

[...]

(vii) information about the individual's educational, financial, criminal or employment status or history,

2. *(x) "public body" means*

[...]

(iii) a corporation, commission or body, the majority of the members of which, or the majority of members of the board of directors of which are appointed by an Act, the Lieutenant-Governor in Council or a minister,

22. *(1) The head of a public body may refuse to disclose a record or part of a record that*

(a) is published and is available to the public whether without cost or for purchase; or

(b) is to be published or released to the public within 30 business days after the applicant's request is received.

(2) The head of a public body shall notify an applicant of the publication or release of information that the head has refused to give access to under paragraph (1)(b).

(3) Where the information is not published or released within 30 business days after the applicant's request is received, the head of the public body shall reconsider the request as if it were a new request received on the last day of that period, and access may not be refused under paragraph (1)(b).

40. *(1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.*

(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where

[...]

(f) the information is about a third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;

(g) the disclosure reveals financial and other details of a contract to supply goods or services to a public body;

[...]

(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where

(c) the personal information relates to employment or educational history;

(g) the personal information consists of the third party's name where

(i) it appears with other personal information about the third party, or

(ii) the disclosure of the name itself would reveal personal information about the third party; or

[...]

(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny;

[...]

(e) the third party will be exposed unfairly to financial or other harm;

(f) the personal information has been supplied in confidence;

[...]

(h) the disclosure may unfairly damage the reputation of a person referred to in the record requested by the applicant;

13. The Commission is a 'public body' as defined by ATIPPA, and the information being requested, including Mr. Harrington's name and information about his financial status and employment history (with their Consulting Company), as well as his personal signature, is 'personal information'. As a result, ATIPPA applies to the information that will be requested of him through the Inquiry.

14. It is the position of Mr. Harrington that when it is disclosed through the Inquiry his name and the name of his Consulting Company in combination with other personal information such as income/revenue earned, hours worked, type of work completed, services provided, position within the Company, personal signature and contract details, a presumed unreasonable invasion of his personal privacy under s. 40(4)(c) and s. 40(4)(g) of ATIPPA that cannot be justified under s. 40(5) is constituted.

15. Mr. Harrington anticipates that the Commission may rely on s. 40(2)(g) of ATIPPA to justify this disclosure and submits that this is based on an incorrect reading of ATIPPA. The ATIPPA Action recites that Nalcor, in correspondence dated July 4, 2018, indicated that the information presumed not to be an unreasonable violation of privacy under s. 40(2)(g) includes "financial information regarding payments made to a company, individual name, company name, company address, and other business contact information". Mr. Harrington submits that the 'financial and other details of a contract' permitted under s. 40(2)(g) does not state that names of employees, the names of companies, their addresses, or the signatures of individuals are a presumptively reasonable disclosure under ATIPPA, only that the 'contract details' are a presumptively reasonable disclosure. Section 40(2)(g) is silent on whether 'financial or other details of a contract' includes these things.

16. In the face of such legislative silence, ATIPPA provides further clarification in the 'deemed unreasonable' section of ATIPPA at 40(4). This section deems it an unreasonable invasion of personal privacy to disclose information that relates to a person's employment history, or the disclosure of a person's name where it appears with other personal information (in this case, the 'other personal information' would be employment history, remuneration paid to the Consulting Company for Mr. Harrington's services, and financial information). Mr. Harrington submits that a reading of s. 40(2)(g) and s. 40(4)(g) together supports the conclusion that the names of third-party company employees, including Mr. Harrington, are not included under the requirement to disclose contract and financial details. In the within Application, the *NLTA Decision* may be distinguished in that Mr. Harrington's rate of pay is not within the subject matter of the Inquiry, as will be discussed more fully hereinafter.

17. Once the requested information is deemed to be an unreasonable violation under s. 40(4), the Court must then consider a wide range of relevant circumstances to determine if such an invasion of personal privacy can be otherwise justified. Mr. Harrington submits that the disclosure of his name, the name of the Consulting Company, and his signature, when provided alongside other details of a contract, would not serve the public interest, but would cause undue financial harm to him and his Consulting Company. Further, the disclosure of Mr. Harrington's rate of pay would place him at a competitive disadvantage with other consultants with whom he would be in competition for subsequent contracts.

18. Mr. Harrington repeats the foregoing and therefore seeks an Order pursuant to s. 60 of the *Access to Information and Protection of Privacy Act, 2015*, SNL 2015 c. A-1.2 that the personal information shall not be disclosed by the Commission pursuant to s. 40.

19. Section 12(3) of the *Public Inquiries Act* would normally operate to require the disclosure of the personal information. This Application is taken pursuant to s. 13(1) of that Act, seeking an order excluding the information from the operation of s. 12(3), namely that Mr. Harrington may refuse to disclose the personal information and that the records, documents and things in which the personal information is set out may be withheld from the Commission.

20. Mr. Harrington states that if the Commission discloses his personal information, the ATIPPA Action will suffer irredeemable prejudice. As stated above, it is anticipated that the ATIPPA Action will be adjourned pending the decision of the Supreme Court of Canada regarding the application for leave to appeal of the NLTA Decision. Disclosure by the Commission would effectively render the ATIPPA Action moot. Section 22 of the Act would come into play, as the personal information would be "published material", published by the Commission. Mr. Harrington would be denied this opportunity to have his day in court. His right to have his privacy rights adjudicated and determined by this Honourable Court would be summarily denied, since regardless of a decision to which this Honourable Court may come in the ATIPPA Action, his personal information would already be "published material".

21. Mr. Harrington also submits that the personal information is not relevant to the Inquiry's mandate, at the very least, at this stage of the Inquiry which is dealing solely with matters prior to the sanction of the Project. Among the provisions of the Terms of Reference, s. 4(b)(i) states in part that the Commission shall inquire into:

> *"whether Nalcor's conduct in retaining and subsequently dealing with contractors and suppliers of every kind was in accordance with best practice, and, if not, whether Nalcor's supervisory oversight and conduct contributed to project cost increases and project delays."* (Emphasis added)

22. The Interpretation of the Terms of Reference, para. 41, states in part that:

> *"Matters for consideration under 4(b) will include such things as . . . . . whether the contractual arrangements with contractors . . . . . were appropriately entered into in accordance with industry best practice . . . . ."* (Emphasis added)

23. Mr. Harrington acknowledges that the Rules of Procedure cast a broad meaning of the term "relevant" as including:

> *"anything that touches or concerns the subject matter of the Inquiry or that may directly or indirectly lead to other information that touches or concerns the subject matter of the Inquiry."*

24. Investigation into the foregoing question does not require the disclosure of Mr. Harrington's personal information. Testimony on this issue is best gleaned from those in a position to testify to the best practices in the industry, and from those in a position to testify to the practices undertaken by Nalcor in entering into such contracts. With respect to compensation, the material question to be answered is the industry standard range of compensation paid to such contractors, and whether the compensation paid to Nalcor's contractors is in alignment with that standard. The particulars of the compensation and other financial information related to Mr. Harrington is not relevant to the subject matter of the Commission.

25. Mr. Harrington therefore requests an Order under s. 13(1) of the *Public Inquiries Act* that he may refuse to disclose information related to his rate of pay and compensation to the Inquiry, and that any record, document or thing which discloses this information may be withheld from the Commission.

Summary of Relief Sought

26. Mr. Harrington seeks an Order pursuant to s. 60 of the *Access to Information and Protection of Privacy Act, 2015*, SNL 2015 c. A-1.2 that the personal information shall not be disclosed by the Commission pursuant to s. 40.

27. Mr. Harrington requests an Order under s. 13(1) of the *Public Inquiries Act* that he may refuse to disclose information related to his rate of pay and compensation to the Inquiry, and that any record, document or thing which discloses this information may be withheld from the Commission.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of St. John's, in the Province of Newfoundland and Labrador, this 16th day of November, 2018.

BENSON BUFFETT PLC. INC.

Per: Deborah L. Hutchings, Q.C.
Solicitors for the Applicant
whose address for service is:
Suite 900, Atlantic Place
215 Water Street
P.O. Box 1538
St. John's, NL A1C 5N8

Issued at the City of St. John's, in the Province of Newfoundland and Labrador, this 16th day of November, 2018.

Kim Mercer
COURT OFFICER

TO: Commission of Inquiry Respecting
the Muskrat Falls Project
5th Floor, Suite 502
Beothuck Building
20 Crosbie Place
St. John's, NL A1B 3Y8

TO: **Supreme Court of Newfoundland and Labrador**
Trial Division
P.O. Box 937
Duckworth Street
St. John's, NL
A1C 5M3

2018 01 G 7843

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

IN THE MATTER OF an application pursuant to Section 13(1) of the Public Inquiries Act, SNL 2006, c. P-38.1 and Rule 20(b) of the Rules of Procedure of the Commission of Inquiry Respecting the Muskrat Falls Project

BETWEEN:

PAUL HARRINGTON and LANCE CLARKE — **APPLICANTS**

AND:

COMMISSION OF INQUIRY RESPECTING THE MUSKRAT FALLS PROJECT — **RESPONDENT**

NOTICE TO THE RESPONDENT

You are hereby notified that the foregoing Application will be made to the Judge presiding in Chambers at the Supreme Court of Newfoundland, Trial Division, at Duckworth Street, St. John's, Newfoundland, on the day of , 2018, at a.m. or so soon thereafter as the Application can be heard.

2018 01 G 7843

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

IN THE MATTER OF an application pursuant to Section 13(1) of the Public Inquiries Act, SNL 2006, c. P-38.1 and Rule 20(b) of the Rules of Procedure of the Commission of Inquiry Respecting the Muskrat Falls Project

BETWEEN:

PAUL HARRINGTON and LANCE CLARKE — **APPLICANTS**

AND:

COMMISSION OF INQUIRY RESPECTING THE MUSKRAT FALLS PROJECT — **RESPONDENT**

AFFIDAVIT

I, Paul Harrington, of the City of St. John's, in the Province of Newfoundland and Labrador, make oath and say as follows:

1. I am an Applicant herein and thereby have personal knowledge of the matters therein;
2. I have read and understand the foregoing application;
3. I make this affidavit conscientiously believing that the information contained herein is true and correct, and knowing that it is of the same force and effect as if made under oath, and knowing that it is a criminal offence to make a false affidavit.
4. Attached as Exhibit "A" is my Application and Affidavit in matter no. 2018 01 G 4864.

SWORN TO before me at the City of St. John's, in the province of Newfoundland and Labrador, this 16th day of November, 2018:

John Truscott Hood
a Barrister (NL)

P. Harrington

PAUL HARRINGTON

2018 01 G 4864

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

BETWEEN:

PAUL HARRINGTON **APPLICANT**

AND:

STAN MARSHALL, CEO of NALCOR ENERGY **RESPONDENT**

ORIGINATING APPLICATION
(Inter Partes)

SUMMARY OF CURRENT DOCUMENT	
Court File Numbers	2018 01 G 4864
Date of Filing of Document	~~July 23rd, 2018~~ July 24, 2018
Name of Filing Party or Person	Paul Harrington
Application to which Document being filed relates:	Originating Application
Statement of purpose in filing	Application seeking an order pursuant to s. 53 and 40 of the *Access to Information and Protection of Privacy Act, 2015*, SNL 2015 c. A-1.2
Court Sub-File Number, if any	N/A

O'Dea Earle
Solicitors for the Applicant
323 Duckworth Street
St. John's, NL
PO Box 5955
A1C 5X4
Per: Thomas E. Williams, Q.C.

Stan Marshall, CEO Nalcor Energy
c/o Susanne Hollett, Privacy Officer
500 Columbus Drive
St. John's, NL
PO Box 12800
A1B 0C9

To the Supreme Court of Newfoundland and Labrador, or one of the Honourable Judges thereof:

This is Exhibit "A" of the Affidavit of Paul Harrington sworn (or affirmed) before me this 16 day of Nov., 2018

a Barrister (NL)

The Application of the Applicant, Paul Harrington says that:

Nature of the Application

1. The Applicant is an individual employed with a Company which has a contract with the Respondent, Nalcor Energy (hereinafter 'Nalcor'). The Applicant is the owner of a consulting company (hereinafter referred to as 'the Applicant's Company', which will not be named herein), which holds a contract with Nalcor to provide services related to the Lower Churchill Project. As a result of this contract, the Applicant and his Company received compensation for services provided to Nalcor.

2. The Respondent is a body corporate pursuant to the *Energy Corporation Act*, SNL 2007 ch. E-11.01 as amended with address at 500 Columbus Drive, in the City of St. John's, Province of Newfoundland and Labrador, A1B 0C9. Nalcor is a Public Body as defined under the Act.

3. The Applicant appeals to this Honourable Court pursuant to s. 53 of the *Access to Information and Protection of Privacy Act, 2015*, SNL 2015 c. A-1.2 (hereinafter the 'Act') on the basis that information sought pursuant to an ATIPPA request filed on June 5th, 2018 for certain records related to the Applicant's charge rates and other compensation, when combined with the Applicant's name, constitutes an unreasonable invasion of his personal privacy under the Act. The Applicant seeks an order from this Honourable Court pursuant to s. 60 of the Act that the Respondent is prohibited from disclosing the information as requested, as well as his costs.

Facts and Procedural History

4. By correspondence dated July 4th, 2018, the Applicant was advised by Nalcor that a request pursuant to the Act had been received for information held by Nalcor, which included the personal information of the Applicant. That request was as follows:

"Records related to the corporation and/or recruitment agency contracted for the position of project director-generation on the Lower Churchill Project. Request includes contract signed between Nalcor and the corporation/agency, costs billed to Nalcor in the 2016 calendar year, and any invoices that detail breakdown of those costs." (hereinafter 'the Request')

5. In this July 4th, 2018 correspondence, which served as notice to the Applicant under s. 19 of the Act, the Respondent indicated that it would be releasing the personal information of the Applicant, including the name the Applicant, the name of the Applicant's Company, as well as the financial and contract information associated with the Applicant and his Company. The Respondent provided the Applicant with a copy of the Applicant's personal information which it decided to provide pursuant to the Request.

6. While the Respondent determined that the Applicant's information responsive to the Request was 'personal information' as defined under the Act, it determined that the disclosure of that personal information would not constitute an unreasonable invasion of privacy, as it was information that reveals "financial and other details of a contract to supply services to a public body."

7. While the Applicant agrees that the contract details may be available under the Act, other personal information, such as the Applicant's name, his signature, and the name of his Company, may not be provided alongside their financial and contract information.

8. As a result of the foregoing, the Applicant submits that the Applicant's personal information, as outlined in the Request, may not be disclosed under the Act, and seeks on Order of the Court accordingly.

Law and Argument

9. The relevant sections of ATIPPA read as follows:

2. *(u) "personal information" means recorded information about an identifiable individual, including*

(i) the individual's name, address or telephone number,

[...]

(vii) information about the individual's educational, financial, criminal or employment status or history,

40. *(1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.*

(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where

[...]

(f) the information is about a third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;

(g) the disclosure reveals financial and other details of a contract to supply goods or services to a public body;

[...]

(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where

(c) the personal information relates to employment or educational history;

(g) the personal information consists of the third party's name where

(i) it appears with other personal information about the third party, or

(ii) the disclosure of the name itself would reveal personal information about the third party; or

[...]

(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny;

[...]

(e) the third party will be exposed unfairly to financial or other harm;

(f) the personal information has been supplied in confidence;

(h) the disclosure may unfairly damage the reputation of a person referred to in the record requested by the applicant;

10. Nalcor is a 'public body' as defined by the Act, and the information being requested is 'personal information', including the Applicant's name and information about the Applicant's financial status and employment history (with his Company), as well as his personal signature. As a result, the Act applies to the information requested.

11. It is the position of the Applicant that the disclosure of the name of the Applicant and the name of his Company, when combined with other personal information such as income/revenue earned, hours worked, type of work completed, services provided, position within the Company, personal signature and contract details, constitutes a presumed unreasonable invasion of personal privacy under s. 40(4)(c) and s. 40(4)(g) of the Act that cannot be justified under s. 40(5).

12. The Applicant submits that the Respondent's reliance on s. 40(2)(g) of the Act to justify disclosure is based on an incorrect reading of the Act. The Respondent, in its July 4th, 2018 correspondence indicates that the information presumed not to be an unreasonable violation of privacy under s. 40(2)(g) includes "financial information regarding payments made to a company, individual name, company name, company address, and other business contact information". The Applicant submits that the 'financial and other details of a contract' permitted under s. 40(2)(g) does not state that names of employees, the names of companies, their addresses, or the signatures of individuals are a presumptively reasonable disclosure under the Act, only that the 'contract details' are. S. 40(2)(g) is silent on whether 'financial or other details of a contract' includes these things.

13. In the face of such legislative silence, the Act provides further clarification in the 'deemed unreasonable' section of the Act at 40(4). This section deems it an unreasonable invasion of personal privacy to disclose information that relates to a person's employment history, or the disclosure of a person's name where it appears with other personal information (in this case, the 'other personal information' would be employment history, remuneration paid to the Applicant's

Company for the Applicant's services, and financial information). The Applicant submits that a reading of s. 40(2)(g) and s. 40(4)(g) together supports the conclusion that the names of third-party company employees, including the Applicant, are not included under the requirement to disclose contract and financial details.

14. Once the Requested Information is deemed to be an unreasonable violation under s. 40(4), the Court must then consider a wide range of relevant circumstances to determine if such an invasion of personal privacy can be otherwise justified. The Applicant submits that the disclosure of his name, the name of his Company and his signature, when provided alongside other details of a contract, would not serve the public interest, and would cause undue financial harm to him and his Company.

15. The Applicant repeats the foregoing and therefore seeks an Order pursuant to s. 60 of the *Access to Information and Protection of Privacy Act, 2015*, SNL 2015 c. A-1.2 that the Requested Information shall not be disclosed by the Respondent pursuant to s. 40, and an order awarding the Applicant his costs, and such further relief as this Honourable Court deems just.

16. All of which is respectfully submitted.

DATED at the City of St. John's, in the Province of Newfoundland and Labrador, this day of July, 2018.

THOMAS E. WILLIAMS, Q.C. (Ret'd)
O'DEA EARLE
Solicitors for the Applicant
323 Duckworth Street
St. John's, NL A1C 5X4

Issued at the City of St. John's, in the Province of Newfoundland and Labrador, this 24 day of July, 2018.

Rhonda Hiscock

COURT OFFICER

TO: **Office of the Information and Privacy Commissioner**
Privacy Commissioner, Donovan Molloy, Q.C.
P.O. Box 13004, Station "A"
St. John's, NL
A1B 3V8
Per: Donovan Molloy, Q.C.

TO: **Naicor Energy**
Respondent
500 Columbus Drive
St. John's, NL
A1B 0C9
Per: Susanne Hollett, Privacy Officer

TO: **Government of Newfoundland and Labrador**
4th Floor, East Block
Confederation Building
P.O. Box 8700
St. John's, NL
A1B 4J6
Per: The Minister of Justice and Public Safety, the Honourable **Andrew Parsons, Q.C.**

TO: **Supreme Court of Newfoundland and Labrador**
Trial Division
P.O. Box 937
Duckworth Street
St. John's, NL
A1C 5M3

2018 01 G 4864

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

BETWEEN:

PAUL HARRINGTON — APPLICANT

AND:

STAN MARSHALL, CEO of NALCOR ENERGY — RESPONDENT

AFFIDAVIT

I, Paul Harrington, of the City of St. John's, in the Province of Newfoundland and Labrador, make oath and say as follows:

1. I am the Applicant herein and thereby have personal knowledge of the matters therein;
2. I have read and understand the foregoing application;
3. I make this affidavit conscientiously believing that the information contained herein is true and correct, and knowing that it is of the same force and effect as if made under oath, and knowing that it is a criminal offence to make a false affidavit.

SWORN TO before me at the City of St. John's, in the province of Newfoundland and Labrador, this _____day of July, 2018:

Barrister, NL

P. Harrington

PAUL HARRINGTON

2018 01 G 4864

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

BETWEEN:

PAUL HARRINGTON — APPLICANT

AND:

STAN MARSHALL, CEO of NALCOR ENERGY — RESPONDENT

NOTICE TO THE RESPONDENT

You are hereby notified that the foregoing Application will be made to the Judge presiding in Chambers at the Supreme Court of Newfoundland, Trial Division, at Duckworth Street, St. John's, Newfoundland, on Wednesday the 19 day of September, 2018, at 10:00 a.m. or so soon thereafter as the Application can be heard.

Rhonda Luscombe

COURT OFFICER

This is an official version.

Important Information
(Includes details about the availability of printed and electronic versions of the Statutes.)

Table of Public Statutes **Main Site** **How current is this statute?**

Responsible Department

SNL2015 CHAPTER A-1.2

ACCESS TO INFORMATION AND PROTECTION OF PRIVACY ACT, 2015

Amended:

2016 c6 s2; 2016 cR-15.2 s30 (not in force-not included); 2017 c10 s3; 10/18 s2; 2018 c1 s1; 2018 cI-7.1 s24

CHAPTER A-1.2

AN ACT TO PROVIDE THE PUBLIC WITH ACCESS TO INFORMATION AND PROTECTION OF PRIVACY

(Assented to June 1, 2015)

Analysis

(c) that the person who made the request may appeal the decision of the head of the public body to the Trial Division under subsection 52 (1).

2015 cA-1.2 s21

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Published material

22. (1) The head of a public body may refuse to disclose a record or part of a record that

(a) is published and is available to the public whether without cost or for purchase; or

(b) is to be published or released to the public within 30 business days after the applicant's request is received.

(2) The head of a public body shall notify an applicant of the publication or release of information that the head has refused to give access to under paragraph (1)(b).

(3) Where the information is not published or released within 30 business days after the applicant's request is received, the head of the public body shall reconsider the request as if it were a new request received on the last day of that period, and access may not be refused under paragraph (1)(b).

2015 cA-1.2 s22

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Extension of time limit

23. (1) The head of a public body may, not later than 15 business days after receiving a request, apply to the commissioner to extend the time for responding to the request.

(2) The commissioner may approve an application for an extension of time where the commissioner considers that it is necessary and reasonable to do so in the circumstances, for the number of business days the commissioner considers appropriate.

(3) The commissioner shall, without delay and not later than 3 business days after receiving an application, decide to approve or disapprove the application.

(4) The time to make an application and receive a decision from the commissioner does not suspend the period of time referred to in subsection 16 (1).

(5) Where the commissioner does not approve the application, the head of the public body shall respond to the request under subsection 16 (1) without delay and in any event not later than 20 business days after receiving the request.

(6) Where the commissioner approves the application and the time limit for responding is extended, the head of the public body shall, without delay, notify the applicant in writing

(a) of the reason for the extension;

(b) that the commissioner has authorized the extension; and

(c) when a response can be expected.

2015 cA-1.2 s23

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Extraordinary circumstances

KM

2018 G 7843

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

IN THE MATTER OF an application pursuant to Section 13(1) of the *Public Inquiries Act, SNL 2006 P-38.1* and Rule 20(b) of the Rules of Commission of Inquiry Respecting the Muskrat Falls Project

BETWEEN

PAUL HARRINGTON

APPLICANT

AND

COMMISSION OF INQUIRY RESPECTING THE MUSKRAT FALLS PROJECT

RESPONDENT

Affidavit of Kirsten Morry

I, Kirsten Morry, a Solicitor of the Supreme Court of Newfoundland and Labrador, affirm as follows:

1. The Commission of Inquiry Respecting the Muskrat Falls Project (the "**Commission**") was constituted by Order-in-Council 2017 -339 (attached as Appendix 1) in order to inquire into certain Terms of Reference as described therein.
2. I currently act as Associate Counsel to the Commission.
3. The compensation paid to Mr. Harrington or his company was included in the cost estimates for the project, and forms part of the construction costs

of the Muskrat Falls Project. It is thus, in my belief, relevant to s. 4(b) of the Terms of Reference.

4. As a primary project manager, Mr. Harrington was a key decision-maker within Nalcor Energy before and after sanction of the Muskrat Falls Project. The compensation Mr. Harrington or his company received could have had an effect on his motives or actions. It is my belief that this compensation is thus relevant to s. 4(a), (b) and (d) of the Terms of Reference.

Affirmed at St. John's, this 16th day of November, 2018.

Barrister + Solicitor NL

Signature of Person Authorized to Administer Oath

Signature of Kirsten Morry

EXHIBIT 1

Kristen Morey
Nov 16, 2018.

THE NEWFOUNDLAND AND LABRADOR GAZETTE

EXTRAORDINARY

PART II

PUBLISHED BY AUTHORITY

ST. JOHN'S, MONDAY, NOVEMBER 20, 2017

NEWFOUNDLAND AND LABRADOR
REGULATION

NLR 101/17

FK4

NEWFOUNDLAND AND LABRADOR
REGULATION 101/17

Commission of Inquiry Respecting the Muskrat Falls Project Order
under the
Public Inquiries Act, 2006
(O.C. 2017 - 339)

(Filed November 20, 2017)

Under the authority of section 3 of the *Public Inquiries Act, 2006*, the Lieutenant-Governor in Council makes the following Order.

Dated at St. John's, November 20, 2017.

Ann Marie Hann
Clerk of the Executive Council

ORDER

Analysis

Short title

1. This Order may be cited as the *Commission of Inquiry Respecting the Muskrat Falls Project Order.*

Definitions

this inquiry together with reliable estimates of the costs to the conclusion of the project including whether

(i) Nalcor's conduct in retaining and subsequently dealing with contractors and suppliers of every kind was in accordance with best practice, and, if not, whether Nalcor's supervisory oversight and conduct contributed to project cost increases and project delays,

(ii) the terms of the contractual arrangements between Nalcor and the various contractors retained in relation to the Muskrat Falls Project contributed to delays and cost overruns, and whether or not these terms provided sufficient risk transfer from Nalcor to the contractors,

(iii) the overall project management structure Nalcor developed and followed was in accordance with best practice, and whether it contributed to cost increases and project delays,

(iv) the overall procurement strategy developed by Nalcor for the project to subdivide the Muskrat Falls Project into multiple construction packages followed industry best practices, and whether or not there was fair and competent consideration of risk transfer and retention in this strategy relative to other procurement models,

(v) any risk assessments, financial or otherwise, were conducted in respect of the Muskrat Falls Project, including any assessments prepared externally and whether

(A) the assessments were conducted in accordance with best practice,

(B) Nalcor took possession of the reports, including the method by which Nalcor took possession,

(C) Nalcor took appropriate measures to mitigate the risks identified, and

(D) Nalcor made the government aware of the reports and assessments, and

Findings and recommendations

6. The commission of inquiry shall make findings and recommendations that it considers necessary and advisable related to section 4.

Conclusion or recommendations limited

7. The commission of inquiry shall not express any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization.

Special expertise services

8. The commission of inquiry may engage the services of persons having special expertise or knowledge including those with financial, engineering and construction expertise.

Final report

9. The commission of inquiry shall terminate its work and deliver the final report to the Minister of Natural Resources, who shall be the minister responsible for the commission of inquiry, on or before December 31, 2019.

Extraordinary Gazette Index

Title of Act and Subordinate Legislation made thereunder	CNLR or NL Reg.	Amendment	NL Gazette Date & Page No.
Public Inquiries Act, 2006			
Commission of Inquiry Respecting the Muskrat Falls Project Order	NLR 101/17	New	Nov 20/17 p. 3

Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835

Supreme Court Reports

Supreme Court of Canada

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

1994: January 24; 1994: December 8.

File No.: 23403.

[1994] 3 S.C.R. 835 | [1994] 3 R.C.S. 835 | 1994 CanLII 39 | [1994] S.C.J. No. 104 | [1994] A.C.S. no 104

Canadian Broadcasting Corporation and National Film Board of Canada, appellants; v. Lucien Dagenais, Léopold Monette, Joseph Dugas and Robert Radford, respondents, and John Newton Smith and The Canadian Association of Journalists, interveners, and The Attorney General for the Province of Ontario, intervener.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Criminal law — Publication bans — Four members of Catholic order charged with physical and sexual abuse of young boys in Catholic training schools — Superior court judge restraining CBC from broadcasting anywhere in Canada fictional program dealing with child sexual and physical abuse in Catholic orphanage until end of criminal trials in Ontario — Whether CBC can appeal publication ban — If so, whether judge erred in ordering ban — Standard applicable.

Criminal law — Procedure — Publication bans — General principles governing publication bans and their application.

Appeal — Publication bans — Publication ban imposed in criminal proceedings — Ban issued under judge's common law or legislated discretionary authority — Avenues available for third parties to challenge ban.

Constitutional law — Charter of Rights — Freedom of expression — Fair trial — Publication bans — Whether common law rule governing publication bans inconsistent with Charter principles — Canadian Charter of Rights and Freedoms, ss. 2(b), 11(d).

Courts — Supreme Court of Canada — Jurisdiction — Publication bans — Whether Supreme Court has jurisdiction to hear third party challenge to publication ban issued in criminal proceedings — Supreme Court Act, R.S.C., 1985, c. S-26, s. 40(1), (3) — Criminal Code, R.S.C., 1985, c. C-46, s. 674.

The respondents, former and present members of a Catholic religious order, were charged with physical and sexual abuse of young boys in their care at training schools in Ontario. They applied to a superior court judge for an injunction restraining the CBC from broadcasting the mini-series The Boys of St-Vincent, a fictional account of sexual and physical abuse of children in a Catholic institution in Newfoundland, and from publishing in any media any information relating to the proposed broadcast of the program. At the time of the hearing, the trials of the four respondents were being heard or were scheduled to be heard in the Ontario Court of Justice (General Division) before a judge and jury. LD's trial was in its final stage and a trial judge had been appointed for LM's case. The

superior court judge granted the injunction, prohibiting the broadcast of the mini-series anywhere in Canada until the end of the four trials, and granted an order prohibiting publication of the fact of the application, or any material relating to it. The Court of Appeal affirmed the decision to grant the injunction against the broadcast but limited its scope to Ontario and CBMT-TV in Montreal and reversed the order banning any publicity about the proposed broadcast and the very fact of the proceedings that gave rise to the publication ban.

Held (La Forest, L'Heureux-Dubé and Gonthier JJ. dissenting): The appeal should be allowed and the publication ban order set aside.

Per Lamer C.J. and Sopinka, Cory, Iacobucci and Major JJ.: To have a publication ban issued under a judge's common law or legislated discretionary authority, the Crown and/or the accused's motion should be made before the trial judge, if one has been appointed, or before a judge in the court at the level where the case will be heard. If the level of court has not been established and cannot be established definitively by reference to statutory provisions, the motion should be made before a superior court judge. In a jury trial, the motion must be heard in the absence of the jury. To challenge a ban on appeal, the Crown and the accused should follow the avenues of appeal available through the Criminal Code. When the initial ban order is made by a judge other than the trial judge, some flexibility should be recognized in the application of the rule against collateral attacks.

The judge hearing a motion for a publication ban has the discretion to direct that third parties be given notice and to grant them standing in accordance with the provincial rules of criminal procedure and the common law principles. If third parties wish to oppose the motion, they should attend at the hearing, argue to be given status, and if given status, participate in the motion. When third parties, usually the media, seek to challenge publication bans ordered by judges under their common law or legislated discretionary authority, no direct appeal is available through the Criminal Code. If the publication ban was ordered by a provincial court judge, the third party should make an application for certiorari to a superior court judge. The common law rule does not authorize publication bans that limit Charter rights in an unjustifiable manner, so an order implementing such a ban is an error of law on the face of the record. While certiorari has traditionally been limited remedially, when a judge exceeds his authority under the common law rule governing publication bans, the remedies available through a certiorari challenge to the judge's action should be enlarged to be the same as the remedies that would be available under the Charter. To challenge a denial of certiorari, third parties should appeal the superior court judge's decision to the Court of Appeal under s. 784(1) of the Criminal Code. To challenge a dismissal of an appeal to the Court of Appeal, they should apply for leave to appeal to the Supreme Court of Canada under s. 40(1) of the Supreme Court Act. If the publication ban was ordered by a superior court judge, third parties should challenge the ban by applying for leave to the Supreme Court under s. 40(1). A publication ban order issued by a superior court judge can be seen as a final or other judgment of the highest court of final resort in a province or a judge thereof in which judgment can be had in the particular case. Neither s. 40(3) of the Act nor s. 674 of the Criminal Code precludes an appeal to the Supreme Court under s. 40(1) in such cases.

Section 24(1) of the Charter is unavailable to challenge a publication ban since such a challenge can be framed in terms of error of law and since certiorari and s. 40(1) are available. Furthermore, given that a motion for a publication ban in the context of criminal proceedings is criminal in nature, the civil procedures avenues to challenge a ban are not available.

Here, the superior court judge who issued the publication ban order had jurisdiction to hear only the motions for a ban made by JD and RR, since a trial judge had already been appointed for LD and LM. The Court of Appeal did not have jurisdiction to hear the CBC's appeal, and this Court had jurisdiction to grant leave to appeal the Court of Appeal's decision and to draw these conclusions on the issue of jurisdiction. This Court also had jurisdiction under s. 40(1) to grant leave to appeal the initial order of the superior court judge. The CBC, however, did not seek leave to appeal this order. Because it would be unfair to penalize the CBC for not following the correct procedure where the correct procedure was unknown, because the issue of publication bans is of national importance, and because no one is prejudiced by the granting of leave, leave to appeal from that order should be granted under s. 40(1) proprio motu, nunc pro tunc, ex post facto.

This case deals with an error of law challenge to a publication ban imposed under a common law discretionary rule. Discretion conferred by a common law rule must be exercised within the boundaries set by the Charter; exceeding these boundaries results in a reversible error of law. The traditional common law rule governing

publication bans -- that there be a real and substantial risk of interference with the right to a fair trial -- emphasized the right to a fair trial over the free expression interests of those affected by the ban and, in the context of post-Charter Canadian society, does not provide sufficient protection for freedom of expression. When two protected rights come into conflict, Charter principles require a balance to be achieved that fully respects the importance of both rights. A hierarchical approach to rights must be avoided, both when interpreting the Charter and when developing the common law. The common law rule governing publication bans must thus be reformulated in a manner that reflects the principles of the Charter and, in particular, the equal status given by the Charter to ss. 2(b) and 11(d). Given that publication bans, by their very definition, curtail the freedom of expression of third parties, the common law rule must be adapted so as to require a consideration of both 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 ban should only 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. If the ban fails to meet this standard, then the judge committed an error of law in making the order and the challenge to the order on this basis should be successful. This standard reflects the substance of the Oakes test, which itself should be rephrased to recognize in the third step of the proportionality branch that there must be a proportionality not only between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, but also between the deleterious and the salutary effects of the measures.

Publication bans, however, should not always be seen as a clash between freedom of expression for the media and the right to a fair trial for the accused. The clash model is more suited to the American constitutional context and should be rejected in Canada. Other important concerns have a place at each stage of the analysis that is required when considering whether a particular publication ban can be justified under the common law rule. The efficacy of a publication ban is also a relevant factor in this analysis.

The party claiming under the common law rule that a publication ban is necessary to avoid a real and serious risk to the fairness of the trial bears the burden of justifying the limitation on freedom of expression. He must prove that the proposed ban is necessary, in that it relates to an important objective that cannot be achieved by a reasonably available and effective alternative measure, that the proposed ban is as limited as possible, and that there is a proportionality between the salutary and deleterious effects of the ban. The fact that the party seeking the ban may be attempting to safeguard a constitutional right must be borne in mind when determining whether the proportionality test has been satisfied. The judge should, where possible, review the publication ban at issue. He must consider all other options besides the ban and find that there is no reasonable and effective alternative available. He must also limit the ban as much as possible. Lastly, the judge must weigh the importance of the objectives of the particular ban and its probable effects against the importance of the particular expression that will be limited to ensure that the positive and negative effects of the ban are proportionate.

The publication ban in this case cannot be upheld. While the ban was clearly directed toward preventing a real and substantial risk to the fairness of the trial of the four respondents, the initial ban was far too broad. It prohibited broadcast throughout Canada and even banned reporting on the ban itself. In addition, reasonable alternative measures were available to achieve the objective without circumscribing the expressive rights of third parties. The publication ban therefore cannot be supported under the common law. In purporting to order the ban under her common law discretionary authority, the superior court judge thus committed an error of law.

Per McLachlin J.: Court orders in the criminal sphere which affect an accused's Charter rights or his ability to enforce them are themselves subject to the Charter. The ban at issue in this case falls into this category. The publication ban was related to the protection of the respondents' constitutional right to a fair trial and may be viewed as a case of the criminal law being applied to vindicate the rule of law and the fundamental freedoms protected by the Charter. The ban was not made by Parliament or a legislature but can be considered an act of "government" in relation to a matter within the authority of Parliament or the legislatures.

Courts must be able to provide a full and effective remedy for any Charter infringement. This requires more than the opportunity to address the trial court prior to the issuance of the ban and must include recourse to an appellate tribunal. The appellate procedures proposed by Lamer C.J. for third party challenges of publication ban orders satisfy this minimal requirement. While they involve some extension of the common law remedy of

certiorari, this extension is warranted in the case of appeals from publication bans and hence justified under s. 24(1) of the Charter. The extension is warranted because there is no other way that overbroad publication bans can effectively be limited on appeal. Given that the Charter applies to a court-ordered publication ban, such a ban might be challenged on the basis of error of law in that it constitutes a direct violation of the Charter. The proposed appellate procedures should not, however, be understood to derogate from the principle that criminal trials should not be interrupted and delayed for the purpose of pursuing interlocutory appeals.

The right to broadcast a fictional cinematic work falls squarely within the ambit of s. 2(b) of the Charter and the limits on freedom of expression imposed by the ban must be justified under s. 1. The objective of the ban was to preserve the respondents' rights to a fair trial and, in particular, to avoid the risk that an impartial jury could not be sworn, or if sworn, could not render a true verdict because of the poisonous effects of the publication. Under the proportionality branch of the Oakes test, a publication ban may be justified where there are special circumstances in a case which indicate a serious risk (as opposed to a speculative possibility) to the fairness of the trial, and provided that the ban goes no further than required to avoid the demonstrated risk of an unfair trial. It is not a question of deciding where the balance should be struck between a fair trial and freedom of expression. The right to a fair trial is fundamental and cannot be sacrificed. In general, the clash model is also largely inappropriate. The common law test governing the issuance of publication bans, properly applied, meets the requirements of justification of an infringing measure under s. 1. What is required is that the risk of an unfair trial be evaluated after taking full account of the general importance of the free dissemination of ideas and after considering measures which might offset or avoid the feared prejudice. Here, the judge ordering the ban failed to direct herself to the considerations which go to establishing rational connection and minimal impairment. It follows that the ban cannot be supported and must be set aside.

Per Gonthier J. (dissenting): The superior court judge was a court of competent jurisdiction to issue a publication ban in the cases of JD and RR; and, in doing so, she was bound to apply the Charter and her decision constituted the implementation of a Charter remedy under s. 24(1). She had no jurisdiction, however, to issue a ban on the applications of LD and LM who could only apply to their appointed trial judge. The question of whether there is a right of review or appeal of the ban order bearing on its correctness and conformity with the Charter rights of the persons affected thereby is a distinct issue. By referring to a "court of competent jurisdiction", s. 24(1) does not create courts of competent jurisdiction, but merely vests additional powers in courts which are already found to be competent independently of the Charter. Further, s. 24(1) does not of itself create a right of review or appeal from a decision of a court of competent jurisdiction where such a right is already provided by law. In this case, Lamer C.J.'s views as to rights of review by way of certiorari of publication ban orders by provincial court judges pursuant to the Charter and rights of appeal pursuant to s. 40 of the Supreme Court Act were agreed with.

Publication bans can be ordered to protect the fairness of a pending or current trial. The fact such bans restrict freedom of expression and freedom of the press means that they should be imposed only in exceptional cases. The exceptional nature of publication bans has been assured at common law by requiring that there be a real and substantial risk to the fairness of the trial. The application of the Charter to the evaluation of publication bans, while not directly altering the common law test, restructures the analysis to some extent. In terms of Charter review, determining the correct balance between fair trial and freedom of expression rights falls to the s. 1 analysis. Under s. 1, each party bears an initial burden of showing a Charter infringement. After that initial burden is discharged, the balancing of competing Charter rights is incompatible with a burden on either party and the s. 1 analysis should be carried on without privileging or disadvantaging either of the rights at issue. The validity of imposing a ban under s. 1 will be determined almost exclusively at the second and third branches of the proportionality part of the Oakes test since the other elements of the test are easily satisfied. The second or minimal impairment branch requires that bans be carefully limited both in terms of temporal and geographic application, and requires evaluation of alternative measures to protect the right to a fair trial. The third branch requires proportionality between the effects of the measure limiting the freedoms in question and the objective, and also proportionality between the salutary and deleterious effects of that measure.

Thus, in analysing publication bans through s. 1, the essence of the decision to issue a ban or not is a balancing of various factors to determine whether such a preventive measure is a necessary and reasonable response to the facts of any given case. The trial judge must consider the nature of the threat to the fairness of the trial,

including the susceptibility of juries to being influenced, the extent of the restriction on freedom of expression and the availability of alternative measures. It is not necessary, however, for the trial judge to determine with certainty that the alternative measures would be insufficient to protect the fairness of the trial. What is required is that the trial judge be satisfied that the publication will create a real and substantial risk to the fairness of the trial, which available alternative measures will not prevent. Where circumstances permit it is desirable for the trial judge to review the proposed publication as part of the evidence before determining whether to issue a ban. Finally, the decision of a trial judge, made after weighing all the factors, should not be interfered with unless it is based on an error in principle or it cannot be reasonably supported on the evidence.

Here, the superior court judge did not err in banning the broadcast of the mini-series until the end of the pending trials some eight months later. The mini-series was a work of fiction based on a number of similar, "almost interchangeable", cases which was to be shown in prime time to a potentially huge audience. On the basis of the evidence, it was open to the judge to find that even though the mini-series was not directly about any of the respondents, it would have seriously compromised the possibility of finding an impartial jury given the context of widespread prior publicity, and that the alternative measures were bound to be ineffective. Though this test differs on a formal level from the "real and substantial risk" test, they are equivalent in substance. While the ban temporarily denied the appellants their freedom of expression, this impairment was very minor. The mini-series is a work of fiction, not a news event, and could be broadcast later with minimal inconvenience. Commercial loss cannot justify risking an accused's right to a fair trial, especially when a portion of the losses can be recouped when the mini-series is eventually broadcast. Finally, the purpose of provoking public exploration of the issues of child physical and sexual abuse, as an integral part of a process of seeking solutions, was not frustrated by the temporary ban. These issues would still have been topical at the end of the pending trials. The geographic scope of the ban, however, was clearly overly broad. Since there was no legal possibility that the trials could be moved outside Ontario, the ban should have been limited to any broadcast in the province and to CBMT-TV in Montreal.

Per La Forest J. (dissenting): There is no direct appeal to this Court under s. 40 of the Supreme Court Act from the superior court judge's order. On the basis of the reasoning in support of such an appeal, applications for leave from any number of interlocutory rulings in criminal proceedings could be made to this Court. The appellants, however, are not without remedy. Apart from declaratory actions, a remedy might well be available under s. 24(1) of the Charter even against a decision of a superior court judge. Since a decision made under that provision is not otherwise open to appeal, it is a final order within the meaning of s. 40 of the Supreme Court Act, and so open to appeal with leave to this Court. No other avenue or appeal route was available to the appellants to challenge the ban.

The ban order is not immune from Charter scrutiny by reason only that it is a court order. The order is one exercised pursuant to a discretionary power directed at the governmental purpose of ensuring a fair trial. It is a by-product, in this case having effect outside the criminal process, of the institution by the Crown of criminal proceedings. The fact that the rule under which it was made was judicially created does not matter. The Charter applies to common law as well as to statutes. Since the effect of the order was the infringement of the appellants' Charter right to freedom of expression to serve a governmental purpose, the order may be subjected to Charter scrutiny.

If an expansion of certiorari jurisdiction is to be permitted when publication bans made by provincial court judges are being challenged, discretion to grant such a remedy should be exercised in a restrained manner to avoid undue interference with the trial process. It might, in fact, be as well simply to leave third parties the right to apply for a remedy under s. 24(1) of the Charter. That remedy is itself discretionary. It is akin to a court's discretionary power to grant a declaration and should be exercised with similar restraints.

Although it is unnecessary to consider the substantive issue, the following comments could be made in light of the disposition of the case by the Court. There is agreement with Lamer C.J. that the common law rule did not give sufficient protection to freedom of expression, and substantial agreement with his list of factors a judge should consider in determining whether a ban should issue. The extent to which a ban could disrupt the trial is another factor that should be weighed.

Per L'Heureux-Dubé J. (dissenting): Freedom of expression is a fundamental value in our free and democratic society. The jurisdictional issue raised in this case, however, concerns the right of appeal, not the right to

freedom of expression. The right to freedom of expression is protected by access to an initial remedy. While the axiom "where there is a right, there is a remedy" may not be absolute, when a person alleges a wrong, that person is entitled to submit his case to a forum in order to try to obtain redress. Here, the CBC was provided with such an opportunity: the CBC had standing and was heard by a court of law prior to the issuance of the publication ban. Even though the CBC was unsuccessful in preventing the issuance of the publication ban, it still had access to an initial remedy. Consequently, the jurisdictional question raised by this appeal is not whether the CBC should have access to a remedy but whether the CBC should have a right to appeal a decision with which they are not satisfied.

In this respect, the jurisdictional question has broad implications. If the media are permitted to appeal a publication ban issued in the criminal context then every third party will be able to appeal any interlocutory order issued in the criminal context which they believe infringes their Charter rights. Such a broad interlocutory right of appeal will result in significant delay to the trial process, will adversely impact upon the accused's Charter right to be tried within a reasonable time and will adversely affect the administration of justice.

With this broad context in mind, this Court is found to have no jurisdiction to entertain this appeal. Similarly, there was no jurisdiction in the Court of Appeal to hear this appeal. In our free and democratic society, a right of appeal is not available in every situation. With the exception of the possibility of a limited common law jurisdictional appeal, a right of appeal exists only if specifically provided by statute. Here, the Criminal Code does not provide for such a right. Furthermore, since this appeal qualifies as a proceeding in respect of an indictable offence, s. 674 of the Code does not authorize any other proceedings through which the ban can be challenged. Even assuming, however, that s. 674 does not restrict the scope of s. 40(1) of the Supreme Court Act, s. 40(1) still does not provide this Court with jurisdiction to hear an appeal such as this one from an interlocutory criminal order. To hold otherwise would be inconsistent with the jurisprudence of this Court. Section 40(1) was intended to confer broad appellate jurisdiction on this Court, but it was not intended to override the principle against interlocutory criminal appeals. This principle is equally applicable to the accused, the Crown and third parties. While an order affecting a third party issued during a criminal proceeding may be final with respect to that third party, it is interlocutory with respect to the accused. Since the focus in criminal proceedings must be on the accused and the determination of guilt and innocence, to the extent that the order is interlocutory from the accused's point of view it should not be subject to a third party appeal unless the right to such an appeal is specifically and clearly provided by statute. Section 40(1) does not meet this test. Just as it has not been interpreted to provide parties to criminal proceedings with an interlocutory right of appeal, it should not be so interpreted with respect to third parties. Finally, the Charter does not confer appellate jurisdiction. Section 24(1) cannot provide a right of appeal where none is provided by law. It is only if there were no access whatsoever to an initial remedy that s. 24(1) might confer jurisdiction to provide an initial remedy, such as giving a third party standing to raise the issue. However, this is not such a case. If third party interlocutory criminal appellate procedures are needed, it is Parliament, not the courts, which must develop such procedures.

With respect to the applicability of the Charter to court orders, while some judicial activity may be subject to the Charter, a court order per se is not. The Charter therefore does not apply to the impugned publication ban. The Charter does, however, apply to the common law governing the issuance of publication bans.

The initial motion for a publication ban should be made before the appointed trial judge wherever possible. Since a trial judge had already been appointed for LD and LM, the superior court judge had no jurisdiction to hear their motions for a publication ban.

On the substantive issue, had jurisdiction been found in this Court to entertain this appeal, Gonthier J.'s reasons would have been agreed with. The common law rule governing the issuance of publication bans in the criminal law context is consistent with the Charter and the superior court judge did not commit any reviewable error in exercising her discretion and applying the common law rule to the facts of this case and determining that a publication ban was necessary.

Cases Cited

By Lamer C.J.

Referred to: Steiner v. Toronto Star Ltd., *[1956] O.R. 14*; R. v. Begley *(1982), 38 O.R. (2d) 549*; Fraser v. Public Service Staff Relations Board, *[1985] 2 S.C.R. 455*; Mills v. The Queen, *[1986] 1 S.C.R. 863*; R. v. Meltzer, *[1989] 1 S.C.R. 1764*; Hill v. The Queen, *[1977] 1 S.C.R. 827*; R. v. Gardiner, *[1982] 2 S.C.R. 368*; R. v. Barnes, *[1991] 1 S.C.R. 449*; R. v. Vaillancourt (1990), 76 C.C.C. (3d) 384; R. v. Swietlinski, *[1994] 3 S.C.R. 481*; Kourtessis v. M.N.R., *[1993] 2 S.C.R. 53*; Nelles v. Ontario, *[1989] 2 S.C.R. 170*; Wilson v. The Queen, *[1983] 2 S.C.R. 594*; R. v. Litchfield, *[1993] 4 S.C.R. 333*; Slaight Communications Inc. v. Davidson, *[1989] 1 S.C.R. 1038*; R. v. Salituro, *[1991] 3 S.C.R. 654*; RWDSU v. Dolphin Delivery Ltd., *[1986] 2 S.C.R. 573*; Ford v. Quebec (Attorney General), *[1988] 2 S.C.R. 712*; Irwin Toy Ltd. v. Quebec (Attorney General), *[1989] 1 S.C.R. 927*; Rocket v. Royal College of Dental Surgeons of Ontario, *[1990] 2 S.C.R. 232*; R. v. Keegstra, *[1990] 3 S.C.R. 697*; R. v. Zundel, *[1992] 2 S.C.R. 731*; Canadian Newspapers Co. v. Canada (Attorney General), *[1988] 2 S.C.R. 122*; Edmonton Journal v. Alberta (Attorney General), *[1989] 2 S.C.R. 1326*; R. v. Généreux, *[1992] 1 S.C.R. 259*; R. v. Lippé, *[1991] 2 S.C.R. 114*; Ex parte Telegraph Plc., [1993] 2 All E.R. 971; R. v. Corbett, *[1988] 1 S.C.R. 670*; R. v. Vermette, *[1988] 1 S.C.R. 985*; R. v. Oakes, *[1986] 1 S.C.R. 103*; Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), *[1990] 1 S.C.R. 1123*; R. v. Hess, *[1990] 2 S.C.R. 906*.

By McLachlin J.

Referred to: RWDSU v. Dolphin Delivery Ltd., *[1986] 2 S.C.R. 573*; R. v. Rahey, *[1987] 1 S.C.R. 588*; B.C.G.E.U. v. British Columbia (Attorney General), *[1988] 2 S.C.R. 214*; Mills v. The Queen, *[1986] 1 S.C.R. 863*; R. v. Oakes, *[1986] 1 S.C.R. 103*; Fraser v. Public Service Staff Relations Board, *[1985] 2 S.C.R. 455*.

By Gonthier J. (dissenting)

Mills v. The Queen, *[1986] 1 S.C.R. 863*; Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976); R. v. Keegstra (No. 2) *(1992), 127 A.R. 232*; Re Global Communications Ltd. and Attorney-General for Canada *(1984), 10 C.C.C. (3d) 97*; Attorney General v. Times Newspapers Ltd., [1974] A.C. 273; Eur. Court H. R., Sunday Times case, judgment of 26 April 1979, Series A No. 30; R. v. Parks *(1993), 15 O.R. (3d) 324*; Ex parte Telegraph Plc., [1993] 2 All E.R. 971; CBC v. Keegstra, *[1987] 1 W.W.R. 719*.

By La Forest J. (dissenting)

RWDSU v. Dolphin Delivery Ltd., *[1986] 2 S.C.R. 573*; Kourtessis v. M.N.R., *[1993] 2 S.C.R. 53*; Mills v. The Queen, *[1986] 1 S.C.R. 863*; R. v. Rahey, *[1987] 1 S.C.R. 588*.

By L'Heureux-Dubé J. (dissenting)

R. v. S. (T.), *[1994] 3 S.C.R. 952*, aff'g *(1993), 109 Sask. R. 96*; Reference re Alberta Statutes, *[1938] S.C.R. 100*; Boucher v. The King, *[1951] S.C.R. 265*; Switzman v. Elbling, *[1957] S.C.R. 285*; Edmonton Journal v. Alberta (Attorney General), *[1989] 2 S.C.R. 1326*; Committee for the Commonwealth of Canada v. Canada, *[1991] 1 S.C.R. 139*; Mills v. The Queen, *[1986] 1 S.C.R. 863*; R. v. Meltzer, *[1989] 1 S.C.R. 1764*; R. v. C. (T.L.), *[1994] 2 S.C.R. 1012*; Kourtessis v. M.N.R., *[1993] 2 S.C.R. 53*; R. v. Laba, *[1994] 3 S.C.R. 965*; R. v. Swietlinski, *[1994] 3 S.C.R. 481*; R. v. Vaillancourt (1990), 76 C.C.C. (3d) 384; R. v. Gardiner, *[1982] 2 S.C.R. 368*; Hill v. The Queen, *[1977] 1 S.C.R. 827*; R. v. Barnes, *[1991] 1 S.C.R. 449*; Bar of the Province of Quebec v. Ste-Marie, *[1977] 2 S.C.R. 414*; R. v. Morgentaler, Smoling and Scott *(1984), 41 C.R. (3d) 262*; R. v. Cranston *(1983), 60 N.S.R. (2d) 269*; Nelles v. Ontario, *[1989] 2 S.C.R. 170*; RWDSU v. Dolphin Delivery Ltd., *[1986] 2 S.C.R. 573*; Young v. Young, *[1993] 4 S.C.R. 3*; R. v. Rahey, *[1987] 1 S.C.R. 588*; B.C.G.E.U. v. British Columbia (Attorney General), *[1988] 2 S.C.R. 214*; Slaight Communications Inc. v. Davidson, *[1989] 1 S.C.R. 1038*; R. v. Salituro, *[1991] 3 S.C.R. 654*; Schachter v.

Canada, *[1992] 2 S.C.R. 679*; Watkins v. Olafson, *[1989] 2 S.C.R. 750*.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 7, 11(b), (d), 12, 13, 14, 24(1), 32.
Constitution Act, 1982, s. 52.
Contempt of Court Act 1981 (U.K.), 1981, c. 49, s. 2(2).
Courts of Justice Act, *R.S.O. 1990, c. C.43, s. 6*.
Criminal Code, 1892, S.C. 1892, c. 29, s. 743.
Criminal Code, R.S.C., 1985, c. C-46, ss. 9 [rep. & sub. c. 27 (1st Supp.), s. 6], 10, 468, 469 [am. c. 27 (1st Supp.), s. 62], 517, 539 [idem, s. 97], 553 [rep. & sub. idem, ss. 104; am. 1992, c. 1, s. 58(1) (Sch. 1, item 11)], 555 [am. c. 27 (1st Supp.), ss. 106 and 203], 674, 784(1), 798.
Freedom of Information and Protection of Privacy Act, *R.S.O. 1990, c. F.31, s. 14*(1)(f).
Ontario Court of Justice Criminal Proceedings Rules, SI/92-99, r. 6.04(1).
Supreme Court Act, R.S.C., 1985, c. S-26, s. 40(1) [rep. & sub. 1990, c. 8, s. 37], (3).
Young Offenders Act, R.S.C., 1985, c. Y-1, s. 5 [am. c. 24 (2nd Supp.), s. 3].

Authors Cited

Bailey, S. H. "The Contempt of Court Act 1981" (1982), 45 Mod. L. Rev. 301.
Canada. Law Reform Commission. Working Paper 56. Public and Media Access to the Criminal Process. Ottawa: The Commission, 1987.
Ergec, Rusen. "La liberté d'expression, l'autorité et l'impartialité du pouvoir judiciaire", [1993] Rev. trim. dr. h. 171.
Harris, D.J. "Decisions on the European Convention on Human Rights During 1979" (1979), 50 Brit. Y.B. Int. L. 257.
Hogg, Peter W. Constitutional Law of Canada, vol. 2, 3rd ed. (Supplemented). Scarborough, Ont.: Carswell, 1992 (loose-leaf).
Jamal, Mahmud, and H. Patrick Glenn. "Selective Legality: The Common Law Jurisdictional Appeal" (1994), 73 Can. Bar Rev. 142.
Lepofsky, M. David. Open Justice: The Constitutional Right to Attend and Speak About Criminal Proceedings. Toronto: Butterworths, 1985.
Linden, Allen M. "Limitations on Media Coverage of Legal Proceedings: A Critique and Some Proposals for Reform". In Philip Anisman and Allen M. Linden, eds., The Media, the Courts and the Charter. Toronto: Carswell, 1986, 301.
Mann, F.A. "Contempt of Court in the House of Lords and the European Court of Human Rights" (1979), 95 L.Q.R. 348.
Sopinka, John, and Mark A. Gelowitz. The Conduct of an Appeal. Toronto: Butterworths, 1993.
Toronto Star, November 29, 1992, p. H1, "Film gives voice to abuse victims".

APPEAL from a judgment of the Ontario Court of Appeal *(1992), 12 O.R. (3d) 239*, *59 O.A.C. 310*, *99 D.L.R. (4th) 326*, *12 C.R.R. (2d) 229*, varying a publication ban order made by Gotlib J. Appeal allowed, La Forest, L'Heureux-Dubé and Gonthier JJ. dissenting.

W. Ian C. Binnie, Q.C., Malcolm Mercer and Daniel J. Henry, for the appellants. Peter A. E. Shoniker and Joseph J. Markson, for the respondents. James K. Stewart and Lori Sterling, for the intervener the Attorney General for

Ontario. Julius H. Grey, for the intervener John Newton Smith. Richard G. Dearden and Randall J. Hofley, for the intervener the Canadian Association of Journalists.

Solicitors for the appellants: McCarthy Tétrault, Toronto. Solicitors for the respondents: Fedorsen, Shoniker, Toronto. Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto. Solicitors for the intervener John Newton Smith: Grey Casgrain, Montreal. Solicitors for the intervener the Canadian Association of Journalists: Gowling, Strathy & Henderson, Ottawa.

The judgment of Lamer C.J. and Sopinka, Cory, Iacobucci and Major JJ. was delivered by

LAMER C.J.

I. Factual Background

1 This is an appeal from the judgment dated December 5, 1992 of the Ontario Court of Appeal restraining the Canadian Broadcasting Corporation ("CBC") from broadcasting a mini-series co-produced by the National Film Board of Canada ("NFB") anywhere in Ontario or on the English-language station CBMT-TV in Montreal until the completion of the criminal trials of the four respondents.

2 The respondents (Lucien Dagenais, Léopold Monette, Joseph Dugas and Robert Radford) are either former or present members of a Catholic religious order known as the Christian Brothers. They were all charged with physical and sexual abuse that allegedly took place in Catholic training schools where the respondents were teachers and the victims were young boys in their care.

3 At the time of the hearing on the publication ban, the trials of the four respondents were being heard or were scheduled to be heard in the Ontario Court of Justice (General Division) in front of judge and jury. All of the respondents had been pre-tried and there was no prospect of pre-trial resolution. Dagenais was in week five of his trial before Soublière J. Monette was scheduled to be tried before Cusson J. from February 1 to February 26, 1993. Trial judges had not yet been named for Radford or Dugas, but Radford's trial was scheduled to run from April 5 to May 4, 1993, and Dugas' trial was scheduled to commence some time between May 31 and July 2, 1993.

4 In early November, the appellant CBC began advertising the nation-wide broadcast of a four-hour mini-series entitled The Boys of St. Vincent, a fictional account of sexual and physical abuse of children in a Catholic institution. The broadcast was to be in two two-hour segments, one on Sunday evening, December 6, 1992, and the other on the following evening.

5 Soublière J. was scheduled to charge the jury in Dagenais' trial on December 7. On December 3, defence counsel brought an application before Soublière J. requesting that he charge the jury on December 4 instead of on December 7 or that he sequester the jury over the weekend of December 5 and 6. Soublière J. declined to do either but he did direct the jury not to watch the broadcast.

6 On December 4, 1992, the respondents turned to Madam Justice Gotlib, a colleague of Soublière J. in the Ontario Court of Justice (General Division). They applied for an interlocutory injunction under the Ontario Courts of Justice Act, *R.S.O. 1990, c. C.43*, restraining the CBC from broadcasting The Boys of St. Vincent and from publishing in any media any information relating to the proposed broadcast of that program. At the beginning of the hearing the application was amended to indicate that the application was for an injunction to last until the end of the

four trials. Gotlib J. of the Ontario Court of Justice granted an interlocutory injunction prohibiting the broadcast of The Boys of St. Vincent anywhere in Canada until the completion of the trials of the respondents.

7 The respondents also requested and were granted an order permitting the hearing of the application on short notice. In addition, they requested and were granted an order prohibiting the publication of the fact of the application, or any material relating to it, pending completion of the four trials (but not including any time involved in an appeal process).

8 The NFB, John Newton Smith, and Thomson Newspapers Company Limited were added as appellants on appeal. The Court of Appeal heard the appeal from Gotlib J.'s judgment on December 5, 1992, affirmed the lower court's decision to grant the injunction against the broadcast but limited the scope of the injunction to Ontario and CBMT-TV in Montreal and reversed the order banning any publicity about the proposed broadcast and the very fact of the proceedings that gave rise to the publication ban.

II. Decisions Below

Ontario Court of Justice (General Division)

9 Gotlib J. made the following orders:

1. THIS COURT ORDERS that this matter be heard on short notice.
2. THIS COURT FURTHER ORDERS AND PROHIBITS any publication of the fact of this Application or any of the material relating to it, until the completion of the criminal trials of the four Applicants, but not extending to any appeals therefrom.
3. THIS COURT FURTHER ORDERS that the Respondent, Canadian Broadcasting Corporation, be and is hereby restrained from broadcasting the program "The Boys of St. Vincent" and from publishing in any media any information relating to the proposed broadcast of the program until the completion of the four criminal trials of the four applicants but not extending to any appeals therefrom.
4. THIS COURT FURTHER ORDERS that this Court file be sealed, until the completion of the four criminal trials of the four applicants but not extending to any appeals therefrom.

10 In deciding to restrain the broadcast of the mini-series until after the trials of the respondents, Gotlib J. stated:

> I, too, have great faith in the jury system, as indicated in the cases, and by counsel before me. Juries are not stupid. They come, for the most part, from a variety of sophisticated backgrounds, and can understand and follow instructions from a judge. What we have here, however, is, in the particular charges against the four [respondents], a highly explosive and inflammatory issue to be decided by, in effect, four separate juries in four separate courts.
>
> There has already been wide-spread publicity, and I take judicial notice of the large amount of publicity. There has been a substantial amount of publicity involving the Mount Cashel charges, and other educational institutions operated by the Christian Brothers, both in Ontario, Newfoundland, and elsewhere. It may well be that in future trials (and I have no idea how, in the case before Justice Soublière, jury selection proceedings have been conducted) that potential jurors will have to be challenged for cause as to, first of all, their contact with publications already available, and secondly, if they have seen or read the material that pertains to other trials of a similar nature whether or not they feel that they can render an impartial verdict. I see, however, no need to add fuel to the fire, particularly in view of the imminent dates for trial of the three remaining accused persons. Those trials will be concluded, for the most part, by the fall of 1993.

She summarized her position in the following manner:

> In all, I am satisfied that the harm that would be caused by the showing of this particular film before the jury trials of the three remaining accused persons would be such that the possibility of impartial jury selection virtually anywhere in Canada would be seriously compromised. For that reason, I grant an interim injunction restraining the Canadian Broadcasting Corporation from broadcasting the TV programme, "The Boys of St. Vincent", and from publishing further media information relating to the proposed broadcast until such time as the three remaining criminal trials are completed.

Court of Appeal for Ontario *(1992), 12 O.R. (3d) 239*

11 The Court of Appeal made the following orders:

> 1. THIS COURT ORDERS that the Judgment of Madam Justice Gotlib dated December 4, 1992 be varied and the same is varied as follows:
>
> (a) Paragraphs 2 and 4 of the Judgment are hereby deleted and the Orders therein are set aside;
>
> (b) Paragraph 3 of the Judgment shall read:
>
> "THIS COURT FURTHER ORDERS that the Respondent, Canadian Broadcasting Corporation, be and hereby is restrained from broadcasting the program "The Boys of St. Vincent" to the Province of Ontario and by the television station CBMT-TV in Montreal until the completion of the four criminal trials of the four applicants but not extending to any appeals therefrom."
>
> 2. THIS COURT FURTHER ORDERS that in all other respects the appeals of the Appellants be and hereby are dismissed.

12 Dubin C.J.O. for the court noted that it was the common law courts that first recognized the importance of freedom of expression and the crucial role of the press in informing the public in a free and democratic society. It was also the common law courts that first recognized, as a fundamental legal right, the right of an accused to a fair trial and the right of public access to their proceedings. Dubin C.J.O. indicated, however, that where there was a conflict between the two values, the courts had persistently held that the right to a fair trial is paramount (Steiner v. Toronto Star Ltd., *[1956] O.R. 14* (H.C.), and R. v. Begley *(1982), 38 O.R. (2d) 549* (H.C.)). Since the two values have been given constitutional status with the enactment of the Canadian Charter of Rights and Freedoms, the courts have again struck a balance between the two values and have held that the right to a fair trial must be given priority over freedom of the press (Fraser v. Public Service Staff Relations Board, *[1985] 2 S.C.R. 455*).

13 After referring to the unique circumstances of the case at bar, Dubin C.J.O. concluded at pp. 247-48 that:

> The risk of denying the respondents a fair trial far outweighs any inconvenience which the appellant, Canadian Broadcasting Corporation, may suffer by not airing the film when it proposed to do so. No pressing need was shown why the film had to be aired before the conclusion of the four trials. The film will still be timely when it is shown at a later date and the interests of justice dictate postponing its airing rather than running the risk attendant upon showing it at the time proposed.
>
> In order to assure the four respondents a fair trial, the learned motions court judge had a broad discretion and I cannot say that she erred in the exercise of her discretion in directing that the airing of the film be postponed.
>
> However, I think, with respect, that she erred in directing that the airing of the film be postponed throughout Canada and should have limited the postponement of the showing of the film to the Province of Ontario and the appellant's television station in Montreal, the signal of which reached L'Orignal.

I also think the motions court judge erred by prohibiting the publishing in any media of any information relating to the proposed broadcast of the program until the completion of the criminal trials of the four respondents, as well as banning publication of the fact of the proceedings before her.

III. Analysis

A. Introduction

14 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? This case also turns in part on the issue of publication bans -- on what grounds should a publication ban be ordered by a judge under his or her discretionary authority and on what grounds should it be altered or set aside by a higher court?

15 I should note in passing that, for the sake of convenience, I use the expression "publication ban" throughout my reasons to denote a ban on publishing in print and/or broadcasting on television, film, or radio. I should also note that I will be discussing publication bans issued under common law or legislated discretionary authority and will not be discussing publication bans required by common law or statute.

B. Jurisdiction

(1) General Principles

16 In cases involving publication bans issued in the context of criminal proceedings, the Crown and the accused have established avenues to follow when seeking or challenging a ban. These avenues are consistent with and informed by the common law principle against interlocutory appeals in criminal matters (see McIntyre J.'s reasons in Mills v. The Queen, *[1986] 1 S.C.R. 863*, at p. 959, and R. v. Meltzer, *[1989] 1 S.C.R. 1764*, at p. 1774). To seek a ban under a judge's common law or legislated discretionary authority, the Crown and/or the accused should ask for a ban pursuant to that authority. This request should be made to the trial judge (if one has been appointed) or to a judge in the court at the level the case will be heard (if the level of court can be established definitively by reference to statutory provisions such as ss. 468, 469, 553, 555, 798 of the Criminal Code, R.S.C., 1985, c. C-46, and s. 5 of the Young Offenders Act, R.S.C., 1985, c. Y-1). If the level of court has not been established and cannot be established definitively by reference to statutory provisions, then the request should be made to a superior court judge (i.e., it should be made to the highest court that could hear the case, in order to avoid later having a superior court judge bound by an order made by a provincial court judge). To seek or challenge a ban on appeal, the Crown and the accused should follow the regular avenues of appeal available to them through the Criminal Code (Parts XXI and XXVI).

17 It has been argued before this Court that third parties (specifically, the media) have a range of possible avenues open to them to appeal publication bans. These include: criminal procedures; s. 40 of the Supreme Court Act, R.S.C., 1985, c. S-26; civil procedures; extraordinary remedies; and s. 24(1) of the Charter. I have considered each of these in turn and conclude that the extraordinary remedy of certiorari should be used for bans ordered by provincial court judges and that s. 40 of the Supreme Court Act should be used for bans ordered by superior court judges.

18 I should note at the outset that none of these avenues is absolutely satisfactory. I am forced to choose the least unsatisfactory of a set of unsatisfactory options. I offer the following overview of each of the possible avenues in an effort to convey to all the jurisdictional difficulties confronting the courts as well as the Bar and in the hope that my doing so will prompt Parliament to rectify this situation by enacting legislation that provides for a right of appeal for third parties (usually the media) seeking to challenge publication bans ordered by judges under their common law or legislated discretionary authority.

(i) Criminal Code

19 Section 674 of the Criminal Code provides that:

> 674. No proceedings other than those authorized by this Part and Part XXVI shall be taken by way of appeal in proceedings in respect of indictable offences.

Parts XXI and XXVI do not authorize any proceedings through which the media can challenge a ban. Therefore, there is no direct appeal available to the media through the Criminal Code.

(ii) Supreme Court Act

20 While on a literal reading, s. 674 of the Criminal Code could be taken as excluding any resort to s. 40 of the Supreme Court Act "in respect of indictable offences", such literal interpretation cannot be adopted, given the legislative history and purpose of these provisions.

21 What is now s. 674 was first enacted in 1892 to abolish the writ of error: Criminal Code, 1892, S.C. 1892, c. 29, s. 743. This was part of the transition from a system for review employing such procedures as the case reserved by the trial judge, the prerogative writs and the writ of error to the current approach of a statutorily mandated system of appeals. The purpose of s. 743 and its successors was to make clear that the new statutory appeals were a substitute for, not in addition to, the former procedure in error.

22 Section 40 of the Supreme Court Act has as its object the conferral upon the Supreme Court of Canada of comprehensive jurisdiction in federal and provincial laws. As Pigeon J. expressed it in Hill v. The Queen, *[1977] 1 S.C.R. 827*, at p. 850:

> Section 41 [now s. 40] was enacted substantially in its present form at the time when appeals to the Privy Council were being abolished and this court was being made truly supreme. The Privy Council had enjoyed unlimited jurisdiction by special leave and it is apparent that the new provision was intended to effect the change from a limited specific jurisdiction to a broad general jurisdiction. To hold that the inconsistencies resulting from this sweeping change indicate the intention of leaving some wide gaps open is, in my view, entirely unwarranted. On the contrary, the enactment of a provision that undoubtedly confers some jurisdiction in criminal matters beyond that existing under the Criminal Code, clearly indicates Parliament's will to remedy the omission to extend the jurisdiction of this Court in criminal cases when the Privy Council's jurisdiction in such cases was effectively abolished after the Statute of Westminster.

23 This reasoning was cited with approval and relied upon by a majority of this Court in R. v. Gardiner, *[1982] 2 S.C.R. 368*. I note as well that in R. v. Barnes, *[1991] 1 S.C.R. 449*, in which a majority found that the Court did not have jurisdiction, such jurisdiction was excluded by s. 40(3) of the Supreme Court Act, not s. 674 of the Code.

24 Section 40 of the Supreme Court Act contains its own limiting provision in s. 40(3). That subsection excludes the granting of leave under s. 40(1) from a judgment "acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence". However, s. 40(3) does not prevent this Court from granting leave under s. 40(1) to consider questions of criminal law not excluded by s. 40(3) such as those arising in the sentencing process as in Gardiner, supra, and those arising from the provisions in the Criminal Code authorizing the review of the parole eligibility date for those convicted of high treason and first or second degree murder as in R. v. Vaillancourt (1990), 76 C.C.C. (3d) 384 (S.C.C.), and R. v. Swietlinski, *[1994] 3 S.C.R. 481*.

25 For these reasons, I find that s. 674 of the Criminal Code does not limit our jurisdiction to grant leave in cases such as this under s. 40(1) of the Supreme Court Act.

26 At first glance, s. 40(3) of the Supreme Court Act might also appear to preclude an appeal to this Court under s.

40 of the Supreme Court Act. Section 40(3) states that:

> 40. . . . (3) No appeal to the Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

However, an appeal against an order issuing a publication ban is not an appeal from a judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence. Therefore, it is not precluded by s. 40(3).

27 Section 40(1) states that:

> 40. (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

28 A publication ban order can be seen as a final or other judgment of the highest court of final resort in a province or a judge thereof in which judgment can be had in the particular case. Therefore, the Supreme Court of Canada may grant leave to appeal under s. 40 of the Supreme Court Act.

29 The advantage of this avenue is that it uses established procedures and is not inconsistent with previous Supreme Court of Canada case law. This may be thought to be problematic on the grounds that it is expensive and time-consuming. However, a direct appeal to the Supreme Court of Canada can be faster than an appeal to most courts of appeal in the country. In addition, it is less expensive to come directly to the Supreme Court of Canada than it is to go through a court of appeal before getting to the Supreme Court of Canada. Concerns about cost and delay are, therefore, misplaced.

30 This avenue is problematic in so far as it provides for an appeal only by leave of the Supreme Court of Canada. It therefore does not provide optimal protection for important rights (e.g., freedom of expression). It also could result in an increased number of applications for leave coming before this Court and an increased number of cases needing to be heard by this Court -- all cases involving individuals charged with indictable offences and publication bans made by superior court judges could potentially seek leave and, depending upon the length and breadth of the bans, a number of these applications could raise issues of national importance (significant publication bans arguably go beyond the interest of the immediate litigants to the interests of Canadians generally).

31 However, despite the difficulties, I find that this is the least unsatisfactory avenue and I therefore adopt it for third party challenges to publication ban orders made by superior court judges under their common law or legislated discretionary authority in the context of criminal proceedings.

32 Some concern was voiced that this appeal could lead to appeals brought directly to this Court by witnesses at criminal trials. There is no need for such concern. The problem for a witness most frequently arises out of a citation for contempt for refusal to testify. It is true that pursuant to s. 9 of the Criminal Code a judge may cite persons, including witnesses, for contempt of court. Yet s. 10 of the Code sets out the procedure for bringing a conviction for contempt before a court of appeal. This decision will not change or affect that statutory procedure and right of appeal.

(iii) Civil

33 Provincial Judicature Acts provide for appellate jurisdiction over civil matters. For example, according to s. 6 of the Ontario Courts of Justice Act:

> 6. -- (1) An appeal lies to the Court of Appeal from,
>
> (a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave as provided in the rules of court;
>
> (b) a final order of a judge of the Ontario Court (General Division), except an order referred to in clause 19(1)(a) [certain claims involving not more than $25,000 exclusive of costs];
>
> (c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court.
>
> (2) The Court of Appeal has jurisdiction to hear and determine an appeal that lies to the Divisional Court or the Ontario Court (General Division) if an appeal in the same proceeding lies to and is taken to the Court of Appeal.
>
> (3) The Court of Appeal may, on motion, transfer an appeal that has already been commenced in the Divisional Court or the Ontario Court (General Division) to the Court of Appeal for the purpose of subsection (2).

If an application challenging an order banning publication is characterized as a criminal matter, then the Judicature Acts do not provide jurisdiction. If it is characterized as a civil matter, then it may be argued that these Acts do provide jurisdiction.

34 This avenue has the advantage that it uses established procedures. Furthermore, it has intuitive appeal to those who think that the object of an application by the media is a civil remedy which affects a civil right (the right of the media to free speech). Nevertheless, I reject this avenue.

35 First, it is important to keep in mind what La Forest J. said in Kourtessis v. M.N.R., *[1993] 2 S.C.R. 53*, at p. 80:

> The admixture of provincial civil procedure with criminal procedure could, I fear, result in an unpredictable mish-mash where, in applying federal procedural law, one would forever be looking over one's shoulder to see what procedure the provinces have adopted (and this may differ from province to province) to see if there was something there that one judge or another would like to add if he or she found the federal law inadequate. And I see no reason in principle why appeals could not be read in for other interlocutory proceedings, or indeed why other provincial rules of procedure might not be adopted, as was attempted in Lafleur. That, barring federal adoption, is in my view constitutionally unacceptable. It is certainly impractical. In dealing with procedure, and particularly criminal procedure, it is important to know what one should do next. That is why, no doubt, Parliament adopted a comprehensive procedure under the Criminal Code....

36 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.

37 Third, Judicature Acts cannot be used to provide jurisdiction to review publication ban orders of provincial court judges because with limited exceptions, provincial court judges (in all provinces except Quebec) can only exercise criminal jurisdiction and so such orders made by them cannot be characterized as civil matters. Judicature Acts cannot be used to provide jurisdiction to review publication ban orders of superior court judges because it is not desirable to have a situation in which essentially the same order made for the same purposes affecting the same rights can be characterized as civil when it is made by a superior court judge but must be characterized as criminal when it is made by a provincial court judge.

(iv) Extraordinary Remedies

38 Provincial superior courts have jurisdiction to hear applications for the extraordinary remedy of certiorari against provincial court judges for excesses of jurisdiction and for errors of law on the face of the record. As I will explain in Part C of these reasons, the common law rule governing the issuance of orders banning publication must be consistent with the principles of the Charter. Since the common law rule does not authorize publication bans that limit Charter rights in an unjustifiable manner, an order implementing such a publication ban is an error of law on the face of the record. Therefore, if a publication ban order is made by a provincial court judge, the media can apply to the superior court for certiorari and argue that the ban is not authorized by the common law rule. If this is the case, the ban will then constitute an error of law on the face of the record. By virtue of s. 784(1) of the Criminal Code, an appeal lies to the Court of Appeal from a decision granting or refusing the relief sought in proceedings by way of certiorari.

39 This avenue uses established procedures and is not inconsistent with previous Supreme Court of Canada case law. In addition, the certiorari avenue provides for appeals (through s. 784(1) of the Criminal Code). It therefore avoids the undesirable situations of: (a) important rights being left without the protection of review and appeal; and (b) an increased number of leave applications being made to this Court and cases needing to be heard by this Court.

40 The most important problem with this avenue is that, at common law, certiorari does not lie against a decision of a superior court judge. In Kourtessis, supra, at p. 90, the possibility that certiorari might lie against a superior court judge was left open by some members of this Court. However, I am not willing to adopt an avenue that requires that one superior court judge review the decision of another superior court judge. Therefore, this avenue is available against a provincial court judge but not against a superior court judge. The following odd situation thus results: essentially the same order made for the same purposes affecting the same rights (of the defendant, the Crown, and the media) will be subject to different avenues of review and appeal depending upon whether the order is made by a superior court judge or a provincial court judge.

41 Another problem with this avenue comes from the apparently limited remedial powers of certiorari. Traditionally, certiorari has been limited remedially. That is it could only be used to quash an order. Thus, if the media were seeking an additional or alternative remedy, the desired remedy would appear to be unavailable through certiorari.

42 However, it is open to this Court to enlarge the remedial powers of certiorari and I do so now for limited circumstances. Given that the common law rule authorizing publication bans must be consistent with Charter principles, I am of the view that the remedies available where a judge errs in applying this rule should be consistent with the remedial powers under the Charter. Therefore, the remedial powers of certiorari should be expanded to include the remedies that are available through s. 24(1) of the Charter. It should be emphatically noted that it is not necessary in this case for this Court to decide whether or not the Charter applies directly to court orders. I am simply saying that when a judge exceeds his authority under the common law rule governing publication bans, then the remedies available through a certiorari challenge to the judge's action should be the same as the remedies that would be available under the Charter.

43 Despite the difficulties with this avenue, I find that it is the least unsatisfactory avenue and I therefore adopt it for third party challenges to publication ban orders made by provincial court judges under their discretionary authority in the context of criminal proceedings.

(v) Charter

44 Section 24(1) of the Charter provides that:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

45 I wrote about s. 24(1) in Nelles v. Ontario, *[1989] 2 S.C.R. 170*, at p. 196:

> When a person can demonstrate that one of his Charter rights has been infringed, access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the Charter which surely is to allow courts to fashion remedies when constitutional infringements occur.

46 However, in Mills, supra, at p. 971, La Forest J. wrote:

> It should be obvious from the foregoing remarks that I am sympathetic to the view that Charter remedies should, in general, be accorded within the normal procedural context in which an issue arises. I do not believe s. 24 of the Charter requires the wholesale invention of a parallel system for the administration of Charter rights over and above the machinery already available for the administration of justice.

If a challenge to a publication ban could not be framed in terms of an error of law, then the certiorari and Supreme Court Act avenues might be unavailable and s. 24(1) might therefore be available. However, since a challenge to a publication ban ordered by a judge under his or her common law or legislated discretionary authority can be framed in terms of an error of law, the certiorari and Supreme Court Act avenues are available and therefore we need not here decide the issue of the application of the Charter, to publication bans ordered by judges under their common law or legislated discretionary authority in particular, and to court orders in general.

(2) General Guidelines for Practice

(i) Preliminary Comments

47 I have three preliminary comments to make before proceeding with general guidelines for practice with regard to publication bans issued under a judge's common law or legislated discretionary authority.

48 First, in a jury trial, a motion for a publication ban must be heard in the absence of the jury. Consider, for example, a case in which the media propose to broadcast information that would be inadmissible as evidence in the normal course of the criminal trial. The accused will have to introduce this information into evidence in order to demonstrate the risk to a fair trial. And yet, if the risk is demonstrated and substantial, the jury should not hear this evidence. The accused must not be placed in the intolerable position of having to present the inadmissible information before the jury in an attempt to secure an impartial jury. Consider also, a case in which the media propose to broadcast information that would undercut a particular defence strategy. The accused will have to reveal his or her defence strategy in order to demonstrate the risk to a fair trial. And yet, it would be unfair to require the defence to reveal defence strategy prior to the closing of the Crown's case -- the accused must not be placed in the position of having to risk prejudice to one aspect of his or her right to a fair trial in order to protect another aspect of this right.

49 Second, the issue of giving notice to the media of motions for publication bans may appear to raise a number of practical problems. Which media are to be given notice, and how is such notice to be given? Do the media include all newspapers, television stations, and radio stations potentially affected by the ban? How is notice to be served? Given that I have concluded that motions for publication bans made in the context of criminal proceedings are criminal in nature, the solution to these practical problems is to be found in the provincial rules of criminal procedure and the relevant case law. For example, Rule 6.04(1) of the Ontario Court of Justice Criminal Proceedings Rules, *SI/92-99*, states that:

> 6.04 (1) The notice of application shall be served on all parties and, where there is uncertainty whether anyone else should be served, the applicant may make a motion without notice to a judge for an order for directions.

The judge hearing the application thus has the discretion to direct that third parties (e.g., the media) be given notice. Exactly who is to be given notice and how notice is to be given should remain in the discretion of the judge to be exercised in accordance with the provincial rules of criminal procedure and the relevant case law.

50 Third, the issue of standing may also appear to raise problems. Which members of the media are to be given standing? Does standing include standing to do any or all of the following: cross-examine witnesses, call viva voce evidence, file affidavit evidence, and present oral and/or written arguments? Again, given that I have concluded that motions for publication bans made in the context of criminal proceedings are criminal in nature, the solution to these practical problems is to be found in the provincial rules of criminal procedure and the relevant case law. The judge hearing the application thus has the discretion to grant standing to interested third parties (e.g., the media) and this standing can include any or all of the activities listed above.

51 I now proceed with some general guidelines for practice for the Crown, the accused, the media, and the courts in turn.

(ii) For the Crown and the Accused

52 To get a publication ban issued under a judge's common law or legislated discretionary authority, the Crown and/or the accused should make a motion for a ban pursuant to that authority. This motion should be made before the trial judge (if one has been appointed) or before a judge in the court at the level the case will be heard (if the level of court can be established definitively by reference to statutory provisions such as ss. 468, 469, 553, 555 and 798 of the Criminal Code and s. 5 of the Young Offenders Act). If the level of court has not been established and cannot be established definitively by reference to statutory provisions, then the motion should be made before a superior court judge (i.e., it should be made before the highest court that could hear the case, in order to avoid later having a superior court judge bound by an order made by a provincial court judge). To seek or challenge a ban on appeal, the Crown and the accused should follow the regular avenues of appeal available to them through the Criminal Code (Parts XXI and XXVI).

53 A complication arises, however, when the initial order is made by a judge other than the trial judge (i.e., in cases where a trial judge has not yet been appointed). In this situation, neither the accused nor the Crown could ordinarily attack the initial order, either at trial or through the regular routes of appeal, without running afoul of the "rule against collateral attack": Wilson v. The Queen, *[1983] 2 S.C.R. 594*, and Meltzer, supra. This rule states that a court order may not be attacked "in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment" (Wilson, supra, per McIntyre J., at p. 599). Since the specific object of the trial is not the reversal or variation of the initial publication ban, the rule against collateral attacks would, if strictly applied, prevent a reconsideration of the initial order by the trial judge and, by extension, a review of the order by the appellate courts under the normal routes of appeal (since the jurisdiction of the appellate courts is restricted to errors of law made at trial).

54 In R. v. Litchfield, *[1993] 4 S.C.R. 333*, a majority of this Court noted that the rule against collateral attacks is "not intended to immunize court orders from review" (per Iacobucci J., at p. 349), and held that in situations where the purposes underlying the rule are not engaged, some flexibility in the rule's application should be recognized. Iacobucci J., writing for the majority, discussed the rationale for the rule in the following terms (at p. 349):

> The rationale behind the rule is powerful: the rule seeks to maintain the rule of law and to preserve the repute of the administration of justice. To allow parties to govern their affairs according to their perception of matters such as the jurisdiction of the court issuing the order would result in uncertainty. Further, "the

> orderly and functional administration of justice" requires that court orders be considered final and binding unless they are reversed on appeal (R. v. Pastro [*(1988), 42 C.C.C. (3d) 485*], at p. 497).

He continued, however, by observing that the order in question in the case before him (a pre-trial division and severance order made by a judge other than the trial judge) would have been reviewable on appeal had it been made by the trial judge. He stated (at p. 350):

> To permit an order to stand which is so erroneous that it results in a trial process that is fundamentally flawed would result in procedure governing substance; a result that cannot be accepted.

Although Litchfield involved orders of a different nature than the publication bans under consideration here, I am of the view that it is similarly appropriate to recognize some flexibility in the rule against collateral attacks when what is at issue is a publication ban.

55 This problem does not, of course, arise in the case at bar, so it is unnecessary to consider the matter further at this time. I have mentioned it here simply to highlight the fact that none of the avenues of appeal currently available is entirely satisfactory. As I noted earlier, until Parliament acts to rectify the situation by enacting appropriate legislation I am forced to choose the least unsatisfactory of a number of unsatisfactory alternatives.

(iii) For the Media

56 If the media wish to oppose a motion for a ban brought in provincial court, they should attend at the hearing on the motion, argue to be given status, and if given status, participate in the motion. To challenge a ban once ordered, the media should make an application for certiorari to a superior court judge. To challenge a denial of certiorari, the media should appeal the superior court judge's decision to the Court of Appeal under s. 784(1) of the Criminal Code. To challenge a dismissal of an appeal to the Court of Appeal, the media should make an application for leave to appeal to the Supreme Court of Canada under s. 40 of the Supreme Court Act.

57 If the media wish to oppose a motion for a ban brought in a provincial superior court, then they should attend at the hearing on the motion, argue to be given status, and, if given status, participate in the motion. To challenge a ban once ordered, the media should make an application for leave to appeal to the Supreme Court of Canada under s. 40 of the Supreme Court Act.

(iv) For the Court

58 Upon a motion for a ban under the common law rule, the court should give standing to the media who seek standing (according to the rules of criminal procedure and the established common law principles) and follow the general guidelines for practice set out in Part C of these reasons.

(3) Application of Principles and Practice to the Case at Bar

(i) The Facts

59 All of the cases were being heard or were scheduled to be heard in the Ontario Court of Justice (General Division) before a judge and jury. All of the accused were pre-tried with no prospect of resolution. Dagenais was in week five of his trial. The jury was to be charged three days following the motion for the ban. Monette already had his trial judge named (Cusson J.). His trial was to run from February 1 to February 26, 1993. Radford's trial was to run from April 5 to May 4, 1993. Dugas' trial was to begin some time between May 31 and July 2, 1993.

(ii) The Application of the Law to these Facts

60 Dagenais should have gone to his trial judge. If the ban had been refused, he would have had no right of appeal beyond his normal right to appeal if convicted at the end of the trial.

61 Monette should also have gone to his trial judge. If the ban had been refused, he would have had no right of appeal beyond his normal right to appeal if convicted at the end of the trial.

62 Radford and Dugas, however, were correct to go to a provincial superior court judge. If the ban had been refused, they would have had no right of appeal beyond their normal right to appeal if convicted at the end of the trials.

63 When the publication ban order was given, the CBC should have sought leave to appeal from the Supreme Court of Canada under s. 40 of the Supreme Court Act.

(iii) Conclusions about Jurisdiction

64 Gotlib J. did not have jurisdiction to hear the motions from Dagenais or Monette, but she did have jurisdiction to hear the motions from Radford and Dugas. The Court of Appeal did not have jurisdiction to hear from the CBC This Court had jurisdiction to grant leave to appeal the Court of Appeal decision and to draw these conclusions on the issue of jurisdiction.

65 The Supreme Court of Canada had jurisdiction under s. 40 of the Supreme Court Act to grant leave to appeal Gotlib J.'s order. However, the CBC did not seek leave to appeal Gotlib J.'s order. It would therefore appear at first glance that the Supreme Court of Canada does not have jurisdiction to rule on the order itself. However, I have decided to grant leave to appeal Gotlib J.'s order under s. 40 proprio motu, nunc pro tunc, ex post facto (of its own motion, now as of the previous date, for something done after). I do this because I believe that it would be unfair to penalize the CBC for not following the correct procedure where the correct procedure was not known until we decided this case. I also do this because the issue of publication bans is of national importance, the case was fully argued before us, and no one is prejudiced by the granting of leave.

66 It is important to note once more that the current situation is deplorable. Fundamental rights are at stake, but no truly satisfactory avenue of appeal has been established by statute. I hope that Parliament will soon consider filling this jurisdictional lacuna and establishing statutory rights of appeal for third parties such as the media.

C. Publication Bans

(1) The Analytical Approach

67 Challenges to publication bans may be framed in several different ways, depending on the nature of the objection to the ban. If legislation requires a judge to order a publication ban, then any objection to that ban should be framed as a Charter challenge to the legislation itself. Similarly, if a common law rule requires a judge to order a publication ban or authorizes a judge to order a publication ban that infringes Charter rights in a manner not reasonable and demonstrably justified in a free and democratic society, then any objection to that ban should be framed as a Charter challenge to the common law rule.

68 In the case at bar, we are dealing with a common law rule which provides judges with the discretion to order a publication ban in certain circumstances. Discretion cannot be open-ended. It cannot be exercised arbitrarily. More to the point, as I stated in Slaight Communications Inc. v. Davidson, *[1989] 1 S.C.R. 1038*, at p. 1078, in the context of legislative conferrals of discretion:

> As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the Charter, unless, of course, that power is expressly conferred

> or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1.

I would extend this reasoning, and hold that a common law rule conferring discretion cannot confer the power to infringe the Charter. Discretion must be exercised within the boundaries set by the principles of the Charter; exceeding these boundaries results in a reversible error of law. In this case, then, we are dealing with an error of law challenge to a publication ban imposed under a common law discretionary rule.

69 The common law rule governing publication bans has been traditionally understood as requiring those seeking a ban to demonstrate that there is a real and substantial risk of interference with the right to a fair trial. This rule accorded some protection to freedom of expression, in so far as it prevented publication bans from being imposed for no reason, or in response to merely speculative concerns. The question that must be addressed, however, is whether the rule provides sufficient protection for freedom of expression in the context of post-Charter Canadian society. As Iacobucci J., speaking for the Court, stated in R. v. Salituro, *[1991] 3 S.C.R. 654*, at p. 675:

> Where the principles underlying a common law rule are out of step with the values enshrined in the Charter, the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with Charter values . . . then the rule ought to be changed.

70 Like the right of an accused to a fair trial, a fundamental principle of our justice system which is now expressly protected by s. 11(d) of the Charter, freedom of expression, including freedom of the press, is now recognized as a paramount value in Canadian society, as demonstrated by its enshrinement as a constitutionally protected right in s. 2(b) of the Charter. Section 2(b) guarantees the rights of all Canadians to "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". The importance of the s. 2(b) freedoms has been recognized by this Court on numerous occasions (see, for example, RWDSU v. Dolphin Delivery Ltd., *[1986] 2 S.C.R. 573*; Ford v. Quebec (Attorney General), *[1988] 2 S.C.R. 712*; Irwin Toy Ltd. v. Quebec (Attorney General), *[1989] 1 S.C.R. 927*; Rocket v. Royal College of Dental Surgeons of Ontario, *[1990] 2 S.C.R. 232*; R. v. Keegstra, *[1990] 3 S.C.R. 697*; and R. v. Zundel, *[1992] 2 S.C.R. 731*).

71 As I said, for the Court, in Canadian Newspapers Co. v. Canada (Attorney General), *[1988] 2 S.C.R. 122*, at p. 129:

> Freedom of the press is indeed an important and essential attribute of a free and democratic society, and measures which prohibit the media from publishing information deemed of interest obviously restrict that freedom.

Similarly, in Edmonton Journal v. Alberta (Attorney General), *[1989] 2 S.C.R. 1326*, Cory J. remarked (at pp. 1336-37):

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized.
>
> . . .
>
> . . . The principle of freedom of speech and expression has been firmly accepted as a necessary feature of modern democracy.

In Zundel, supra, at p. 752, McLachlin J. distilled the commentary and case law on the subject of freedom of expression, and declared that the interests protected by s. 2(b) are "truth, political or social participation, and self-fulfilment".

72 The pre-Charter common law rule governing publication bans emphasized the right to a fair trial over the free expression interests of those affected by the ban. In my view, the balance this rule strikes is inconsistent with the principles of the Charter, and in particular, the equal status given by the Charter to ss. 2(b) and 11(d). It would be inappropriate for the courts to continue to apply a common law rule that automatically favoured the rights protected by s. 11(d) over those protected by s. 2(b). A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.

73 It is open to this Court to "develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution": Dolphin Delivery, supra, at p. 603 (per McIntyre J.). I am, therefore, of the view that it is necessary to reformulate the common law rule governing the issuance of publication bans in a manner that reflects the principles of the Charter. Given that publication bans, by their very definition, curtail the freedom of expression of third parties, 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 ban should only 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.

If the ban fails to meet this standard (which clearly reflects the substance of the Oakes test applicable when assessing legislation under s. 1 of the Charter), then, in making the order, the judge committed an error of law and the challenge to the order on this basis should be successful.

(2) The Application of the Analytical Approach to the Case at Bar

74 To assess the validity of the order in the case at bar, it is necessary to consider the objective of the order, to examine the availability of reasonable alternative measures that could achieve this objective, and to consider whether the salutary effects of the publication ban outweigh the deleterious impact the ban has on freedom of expression. If the publication ban in question cannot be justified under the common law rule set out above, then, in making her order, Gotlib J. committed an error of law.

75 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. The interest that Dagenais, Monette, Radford and Dugas have in receiving a fair trial is of such importance that it has been entrenched as a constitutional right, in both ss. 7 and 11(d) of the Charter. In addition to the accused's interest in the fairness of their trial, the public had an interest in their being acquitted or convicted through trials that were fair and that had the appearance of fairness: R. v. Généreux, *[1992] 1 S.C.R. 259*, at p. 283. Similarly, the courts had an interest in ensuring that justice was done, and an interest in safeguarding the repute of the administration of justice by ensuring that justice was seen to be done.

76 In most cases where publication bans are sought, including the case at bar, attention is focused on a particular potential source of trial unfairness -- the possibility that adverse pre-trial publicity might make it difficult or impossible to find an impartial jury. In Généreux, supra, in the context of a discussion of s. 11(d), I noted (at pp. 282-83):

> [One of s. 11(d)'s objectives is] to ensure that a person is tried by a tribunal that is not biased in any way and is in a position to render a decision which is based solely on the merits of the case before it, according to law. The decision-maker should not be influenced by the parties to a case or by outside forces except to the extent that he or she is persuaded by submissions and arguments pertaining to the legal issues in dispute.

It must be noted, however, that while the Charter provides safeguards both against actual instances of bias and against situations that give rise to a serious risk of a jury's impartiality being tainted, it does not require that all conceivable steps be taken to remove even the most speculative risks. As I noted in R. v. Lippé, *[1991] 2 S.C.R. 114*, at p. 142, "the Constitution does not always guarantee the 'ideal'". This must be borne in mind when the objective of a publication ban imposed under the common law rule is specified, since one of the primary purposes of the common law rule is the protection of the constitutional rights of the accused. As the rule itself states, the objective of a publication ban authorized under the rule is to prevent real and substantial risks of trial unfairness -- publication bans are not available as protection against remote and speculative dangers.

77 It is also important to note the extent to which a publication ban trenches upon the rights of individuals to freedom of expression. In the case of the publication ban at issue here, the specific freedom of expression interests engaged by the ban included: the film director's interest in expressing himself; the CBC's interest in broadcasting the film; the public's interest in viewing the film; and society's interest in having the important issue of child abuse presented to the public. All of these interests were limited by the publication ban ordered in the case at bar.

78 In my view, the publication ban in the case at bar was clearly directed towards preventing a real and substantial risk to the fairness of the trial of the four accused. What must next be considered in order to determine whether the ban was supportable under the common law rule was whether a publication ban was necessary on the facts of this case. This requires a consideration of whether reasonable alternative measures were available that would have guarded against the risk of the trial being unfair without circumscribing the expressive rights of third parties. As I will explain, I do not consider it necessary in the case at bar to consider the question of whether the salutary effects of the publication ban outweighed the deleterious impact the ban had on freedom of expression, because I find that there were, in fact, reasonable alternative measures available.

79 The publication ban in the case at bar would have passed the first stage of analysis under the common law rule if: (1) the ban was as narrowly circumscribed as possible (while still serving the objectives); and (2) there were no other effective means available to achieve the objectives. However, the initial ban in the case at bar was far too broad. It prohibited broadcast throughout Canada and even banned reporting on the ban itself. In addition, there were other effective means available to achieve the objectives. The publication ban ordered by Gotlib J. has, in fact, expired, making it unnecessary to discuss in great detail the particular alternative measures that were available in the case at bar. Possibilities that readily come to mind, however, include adjourning trials, changing venues, sequestering jurors, allowing challenges for cause and voir dires during jury selection, and providing strong judicial direction to the jury. Sequestration and judicial direction were available for the Dagenais jury. Apart from sequestration, all of the other effective alternatives to bans were available for the other three accused. For this reason, the publication ban imposed in the case at bar cannot be supported under the common law. As a result, in purporting to order the ban under her common law discretionary authority, Gotlib J. committed an error of law.

(3) Some General Comments About Publication Bans

80 Before concluding, I would like to make some general comments about publication bans issued under the common law rule. First, I believe that it is important to recognize that publication bans should not always be seen as a clash between two titans -- freedom of expression for the media versus the right to a fair trial for the accused. Second, I have some concerns about the efficacy of some publication bans. Useful discussions of some of the issues that I raise in this section can be found in A. M. Linden, "Limitations on Media Coverage of Legal Proceedings: A Critique and Some Proposals for Reform", in P. Anisman and A. M. Linden, eds., The Media, the Courts and the Charter (1986), 301; M. D. Lepofsky, Open Justice: The Constitutional Right to Attend and Speak

About Criminal Proceedings (1985); and the Law Reform Commission of Canada, Working Paper 56, Public and Media Access to the Criminal Process (1987).

(i) Rejecting the Clash Model

81 There are at least three reasons for rejecting the clash model. First, it is more suited to American than to Canadian jurisprudence, since the American Constitution has no equivalent of s. 1 of our Charter, which, as I discussed earlier, is also a source of the fundamental principles informing the development of the common law in Canada.

82 Second, it is not the case that freedom of expression and the accused's right to a fair trial are always in conflict. Sometimes publicity serves important interests in the fair trial process. For example, in the context of publication bans connected to criminal proceedings, these interests include the accused's interest in public scrutiny of the court process, and all of the participants in the court process.

83 Third, the analysis of publication bans should be much richer than the clash model suggests. Rather than simply focusing on the fact that bans always limit freedom of expression and usually aim to protect the right to a fair trial of the accused, it should be recognized that ordering bans may:

- limit freedom of expression (and thus undercut the purposes of s. 2(b) discussed above);

- prevent the jury from being influenced by information other than that presented in evidence during the trial (for example, information presented in a tabloid television show and evidence discussed in the absence of the jury and held to be inadmissible);

- maximize the chances that witnesses will testify because they will not be fearful of the consequences of publicity;

- protect vulnerable witnesses (for example, child witnesses, police informants, and victims of sexual offences);

- preserve the privacy of individuals involved in the criminal process (for example, the accused and his or her family as well as the victims and the witnesses and their families);

- maximize the chances of rehabilitation for "young offenders";

- encourage the reporting of sexual offences;

- save the financial and/or emotional costs to the state, the accused, the victims, and witnesses of the alternatives to publication bans (for example, delaying trials, changing venues, and challenging jurors for cause); and

- protect national security.

84 It should also be recognized that not ordering bans may:

- maximize the chances of individuals with relevant information hearing about a case and coming forward with new information;

- prevent perjury by placing witnesses under public scrutiny;

- prevent state and/or court wrongdoing by placing the criminal justice process under public scrutiny;

- reduce crime through the public expression of disapproval for crime; and

- promote the public discussion of important issues.

85 These are intended to be illustrative rather than comprehensive lists of reasons for and against bans. They are simply intended to illustrate the breadth of issues that deserve a place but are not often found in the analysis of the

justification of particular publication bans. These concerns have a place in each step of the analysis required under the common law rule outlined above -- they are relevant to the initial consideration of whether a ban is necessary to safeguard the fairness of a trial, to the question of whether reasonable alternatives are available, and to the issue of the balance struck between the salutary and deleterious effects of a publication ban.

(ii) The Efficacy of Some Publication Bans

86 There are several reasons to be concerned about the efficacy of some publication bans (i.e., bans aimed at preventing the jury from being influenced by information gathered outside the criminal proceedings).

87 To begin, I doubt that jurors are always adversely influenced by publications. There is no data available on this issue. However, common sense dictates that in some cases jurors may be adversely affected. Assuming this, I nevertheless believe that jurors are capable of following instructions from trial judges and ignoring information not presented to them in the course of the criminal proceedings. As Lord Taylor C.J. wrote in Ex parte Telegraph Plc., [1993] 2 All E.R. 971 (C.A.), at p. 978:

> In determining whether publication of matter would cause a substantial risk of prejudice to a future trial, a court should credit the jury with the will and ability to abide by the judge's direction to decide the case only on the evidence before them.

This Court has also made some strong statements about the reliability of juries. In R. v. Corbett, *[1988] 1 S.C.R. 670*, Dickson C.J. wrote (at pp. 692-93):

> The very strength of the jury is that the ultimate issue of guilt or innocence is determined by a group of ordinary citizens who are not legal specialists and who bring to the legal process a healthy measure of common sense. The jury is, of course, bound to follow the law as it is explained by the trial judge. Jury directions are often long and difficult, but the experience of trial judges is that juries do perform their duty according to the law. . . .
>
> It is of course, entirely possible to construct an argument disputing the theory of trial by jury. Juries are capable of egregious mistakes and they may at times seem to be ill-adapted to the exigencies of an increasingly complicated and refined criminal law. But until the paradigm is altered by Parliament, the Court should not be heard to call into question the capacity of juries to do the job assigned to them. The ramifications of any such statement could be enormous. Moreover, the fundamental right to a jury trial has recently been underscored by s. 11(f) of the Charter. If that right is so important, it is logically incoherent to hold that juries are incapable of following the explicit instructions of a judge. [Emphasis in original.]

Corbett was about the issue of whether evidence of prior convictions could be presented to the jury given that such evidence has both proper and improper uses. The case at bar is, in part, about the issue of whether juries are irremediably adversely influenced by publications. However, the difference of issue is irrelevant here. What matters is that this Court has strongly endorsed the ability of a jury to follow the explicit instructions of a judge. This endorsement surely applies as much to the instruction to ignore all information not presented in the course of the criminal proceedings as it applies to the instruction to use evidence of prior convictions for one purpose and not another. I am comforted in my extension of Corbett to the case at bar by R. v. Vermette, *[1988] 1 S.C.R. 985*, at pp. 993-94, in which La Forest J. wrote in the context of the impact of publicity that "[t]his Court has recently had occasion to underline the confidence that may be had in the ability of a jury to disabuse itself of information that it is not entitled to consider; see R. v. Corbett".

88 These observations are particularly apt in a case, such as this, in which the publication ban relates to identifiable and finite sources of pre-trial publicity. More problematic is the situation in which there is a period of sustained pre-trial publicity concerning matters that will be the subject of the trial. In such circumstances, the effect of instructions is considerably lessened. Impressions may be created in the minds of the jury that cannot be

consciously dispelled. The jury may at the end of the day be unable to separate the evidence in court from information that was implanted by a steady stream of publicity.

89 It should also be noted that recent technological advances have brought with them considerable difficulties for those who seek to enforce bans. The efficacy of bans has been reduced by the growth of interprovincial and international television and radio broadcasts available through cable television, satellite dishes, and shortwave radios. It has also been reduced by the advent of information exchanges available through computer networks. In this global electronic age, meaningfully restricting the flow of information is becoming increasingly difficult. Therefore, the actual effect of bans on jury impartiality is substantially diminishing.

90 These concerns about the efficacy of some publication bans fit into the analytical approach under the common law rule outlined previously at several stages, since it is necessary to consider how efficacious a publication ban will be before deciding whether a ban is necessary, whether alternative measures would be equally successful at controlling the risk of trial unfairness, and whether the salutary effects of the ban are outweighed by its negative impact on freedom of expression.

91 If any adverse influence of a publication on jurors can be remedied by means short of banning the publication, then it might well be argued that there is no rational connection between the publication ban and the objective of preventing the jury from being adversely influenced by information other than that presented in evidence during the trial. In such a case, it could not be asserted that a ban was necessary to protect the fairness of the trial. I should note, however, that although it is possible that a publication ban will have a total absence of influence on the fairness of the trial, such cases will be rare. As a result, one will generally have to go further and consider the availability of reasonable alternative measures when assessing whether, in a given case, a publication ban was necessary.

92 If the actual beneficial effects of publication bans are limited, then it might well be argued in some cases that the negative impact the ban has on freedom of expression outweighs its useful effects. The analysis that is required at this stage of the application of the common law rule is very similar to the third part of the second branch of the analysis required under s. 1 of the Charter, as set out by this Court in R. v. Oakes, *[1986] 1 S.C.R. 103*. As Dickson C.J. stated in Oakes (at p. 140), "[e]ven if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve". In many instances, the imposition of a measure will result in the full, or nearly full, realization of the legislative objective. In these situations, the third step of the proportionality test calls for an examination of the balance that has been struck between the objective in question and the deleterious effects on constitutionally protected rights arising from the means that have been employed to achieve this objective. At other times, however, the measure at issue, while rationally connected to an important objective, will result in only the partial achievement of this object. In such cases, I believe that the third step of the second branch of the Oakes test requires both that the underlying objective of a measure and the salutary effects that actually result from its implementation be proportional to the deleterious effects the measure has on fundamental rights and freedoms. A legislative objective may be pressing and substantial, the means chosen may be rationally connected to that objective, and less rights-impairing alternatives may not be available. Nonetheless, even if the importance of the objective itself (when viewed in the abstract) outweighs the deleterious effects on protected rights, it is still possible that the actual salutary effects of the legislation will not be sufficient to justify these negative effects.

93 While the third step of the Oakes proportionality test has often been expressed in terms of the proportionality of the objective to the deleterious effects, this Court has recognized that in appropriate cases it is necessary to measure the actual salutary effects of impugned legislation against its deleterious effects, rather than merely considering the proportionality of the objective itself. For example, in Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), *[1990] 1 S.C.R. 1123*, Dickson C.J. (who characterized the objective of the impugned Criminal Code solicitation provisions as the curtailment of the social nuisance caused by the public display of the sale of sex) applied the third step of the proportionality analysis by considering (at p. 1139) whether "the obtrusiveness linked to the enforcement of the provision, when weighed against the resulting decrease in the social

nuisance associated with street solicitation, can be justified in accordance with s. 1" (emphasis added). In the same case, I noted that a factor to be considered in the third part of the second branch of the Oakes analysis was the fact that Parliament had taken steps to ensure that the effectiveness of the provision in question would be reviewed three years after its enactment.

94 Similarly, in R. v. Hess, *[1990] 2 S.C.R. 906*, Wilson J. (writing for a majority of the Court) was of the view that while the imposition of absolute liability for the offence of having sexual intercourse with a female person under the age of 14 (in what was then s. 146(1) of the Criminal Code, R.S.C. 1970, c. C-34) was rationally connected to the pressing and substantial objective of protecting young girls from premature sexual intercourse, the measure nonetheless failed both the second and third parts of the second branch of Oakes, since "[t]he potential benefits flowing from the retention of absolute liability are far too speculative to be able to justify a provision that envisages the possibility of life imprisonment for one who is mentally innocent" (p. 926).

95 In my view, characterizing the third part of the second branch of the Oakes test as being concerned solely with the balance between the objective and the deleterious effects of a measure rests on too narrow a conception of proportionality. I believe that even if an objective is of sufficient importance, the first two elements of the proportionality test are satisfied, and the deleterious effects are proportional to the objectives, it is still possible that, because of a lack of proportionality between the deleterious effects and the salutary effects, a measure will not be reasonable and demonstrably justified in a free and democratic society. I would, therefore, rephrase the third part of the Oakes test as follows: there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures.

96 A similar view of proportionality must inform the common law rule governing publication bans (this is, of course, apparent from the way I have expressed the second part of the rule). This suggests that when a ban has a serious deleterious effect on freedom of expression and has few salutary effects on the fairness of a trial, the ban will not be authorized at common law.

97 It is also important to recognize, however, that the objective usually underlying such bans -- the diminution of the risk that a trial might be tainted by unfairness -- is directly related to the accused's constitutionally protected right to a fair trial. Although, as I noted earlier (at pp. 881-83), it is incorrect to oversimplify the relationship between the right to a fair trial and the right to freedom of expression by blindly applying the "clash of rights" model, there are times when the rights of the accused will be in direct conflict with the expressive rights of the media. In such cases, I believe it is necessary to apply the common law proportionality analysis in a manner that reflects the fact that two fundamental rights are in jeopardy. That is, it is essential in these circumstances to recognize that the pressing and substantial objective at issue is itself a fundamental right, and that, as such, it is a matter of exceptional importance. This will be of particular significance when considering whether there are reasonable alternative measures available, and when assessing the balance between the salutary and deleterious effects of the ban. When examining alternative measures, it will be important to carefully consider both rights at issue, so as to ensure that any alternative measures that impair free expression to a lesser degree than a publication ban also reasonably protect the right to a fair trial. Similarly, when considering the proportionality of the impact of the ban on free expression to its salutary effects on the fairness of the trial it will be necessary to bear in mind the fundamental importance of trial fairness, both to the accused and to society.

(4) General Guidelines

98 In order to provide guidance for future cases, I suggest the following general guidelines for practice with respect to the application of the common law rule for publication bans:

(a) At the motion for the ban, the judge should give the media standing (if sought) according to the rules of criminal procedure and the established common law principles with regard to standing.

(b) The judge should, where possible, review the publication at issue.

(c) The party seeking to justify the limitation of a right (in the case of a publication ban, the party seeking to limit freedom of expression) bears the burden of justifying the limitation. The party claiming under the common law rule that a publication ban is necessary to avoid a real and serious risk to the fairness of the trial is seeking to use the power of the state to achieve this objective. A party who uses the power of the state against others must bear the burden of proving that the use of state power is justified in a free and democratic society. Therefore, the party seeking the ban bears the burden of proving that the proposed ban is necessary, in that it relates to an important objective that cannot be achieved by a reasonably available and effective alternative measure, that the proposed ban is as limited (in scope, time, content, etc.) as possible, and there is a proportionality between the salutary and deleterious effects of the ban. At the same time, the fact that the party seeking the ban may be attempting to safeguard a constitutional right must be borne in mind when determining whether the proportionality test has been satisfied.

(d) The judge must consider all other options besides the ban and must find that there is no reasonable and effective alternative available.

(e) The judge must consider all possible ways to limit the ban and must limit the ban as much as possible; and

(f) The judge must weigh the importance of the objectives of the particular ban and its probable effects against the importance of the particular expression that will be limited to ensure that the positive and negative effects of the ban are proportionate.

IV. Disposition

99 On the jurisdictional issue, I find that Gotlib J. had jurisdiction to hear a motion from Radford and Dugas. The Court of Appeal did not have jurisdiction to hear an appeal from this order. The Supreme Court of Canada has jurisdiction under s. 40 of the Supreme Court Act to hear both the appeal of the Court of Appeal decision and an appeal from the order of Gotlib J.

100 On the publication ban issue, I find that the Court of Appeal erred in hearing the appeal. Accordingly, I set aside the order of the Court of Appeal. I also find that the terms of the ban ordered by Gotlib J. cannot be justified by the common law rule governing the issuance of publication bans. She thereby committed an error of law. Accordingly, I set aside her order.

101 The appeal is allowed.

The following are the reasons delivered by

La FOREST J. (dissenting)

102 Like Justice L'Heureux-Dubé, I respectfully do not agree that there is a direct appeal to this Court under s. 40 of the Supreme Court Act, R.S.C., 1985, c. S-26, from Gotlib J.'s decision. On the basis of the reasoning in support of such an appeal, I fear applications for leave from any number of interlocutory rulings in criminal proceedings could be made to this Court. This is not to say that the appellants have no remedy. Apart from declaratory actions (which may be the most appropriate remedy here), a remedy might well be available by virtue of s. 24(1) of the Canadian Charter of Rights and Freedoms even against a decision of a superior court judge; see R. v. Rahey, *[1987] 1 S.C.R. 588*. Since a decision made under that provision is not otherwise open to appeal, it is a final order within the meaning of s. 40 of the Supreme Court Act, and so open to appeal, with leave, to this Court (see my reasons in Kourtessis v. M.N.R., *[1993] 2 S.C.R. 53*). This specific point did not arise in Mills v. The Queen, *[1986] 1 S.C.R. 863*; indeed I there specifically referred to the possibility that an appeal might lie to this Court (p. 978).

103 I should say that I do not think Gotlib J.'s decision is immune from Charter scrutiny by reason of the fact that it is a court order. This case is distinguishable from RWDSU v. Dolphin Delivery Ltd., *[1986] 2 S.C.R. 573*. The order

here, unlike Dolphin Delivery, is one exercised pursuant to a discretionary power directed at a governmental purpose, i.e., ensuring a fair trial. It is not the invocation of the law by a private individual. It is a by-product, in this case having effect outside the criminal process, of the institution by the Crown of criminal proceedings. The fact that the rule under which it was made was judicially created does not matter. The making of such laws emanates from the role historically assigned to the Queen's judges. They were exercising powers flowing from the sovereign as the fountain of justice. The Charter applies to common law as well as to statutes. The effect of the order here was the infringement of the appellants' Charter right to freedom of expression to serve a governmental purpose and is in consequence subject to Charter scrutiny. I find Justice McLachlin's comments on this issue particularly helpful.

104 I do not think any other appeal route is open to the appellants. In particular, the proposal advanced by McLachlin J. that s. 24(1) of the Charter can itself be used to create a right of appeal is, in my view, inconsistent with the policy thrust in Mills. As well, I agree with the Chief Justice that civil appeal procedures are unavailable and that certiorari would not lie under the circumstances of this case. The situation in Kourtessis where I contemplated the extension of certiorari to cover the situation there was entirely different from the one arising here; see my reasons in that case, at pp. 90-92.

105 I should say, however, that I am concerned with the Chief Justice's obiter remarks concerning certiorari. I think what is called for is a discretionary form of review, so as to avoid undue interference with the trial process. Unless the discretion to issue certiorari as the Chief Justice would expand it is exercised in a restrained manner, it, along with the appeals from it, might delay or otherwise seriously interfere with criminal proceedings. Should this expansion of certiorari jurisdiction be permitted, discretion to exercise it should be restrained in the manner I have indicated in Kourtessis, at p. 92. It might, in fact, be as well to simply leave the appellants the right to apply to a superior court judge for a remedy under s. 24(1) of the Charter. That remedy is itself discretionary. As I see it, it is akin to a court's discretionary power to grant a declaration and should be exercised with similar restraints; see the discussion of the nature of the discretion to be exercised in relation to declaratory actions in Kourtessis, at pp. 86-87.

106 I reiterate the Chief Justice's hope that Parliament will provide for an appeal from publication bans to the provincial courts of appeal, though I think an appeal with leave would be better suited to the task. It will be evident from what I have earlier said that I share the concerns of L'Heureux-Dubé J. about the dangers of delay and interference with the trial process that could result from uncontrolled access to judicial review or appeal of interlocutory orders in criminal proceedings.

107 Given my view on jurisdiction, I would not ordinarily say anything about the merits. In light of the disposition of this case by the Court, however, I will make the following comments. I am in agreement with the Chief Justice that the common law rule did not give sufficient protection to freedom of expression. I am also in substantial agreement with the list of factors he gives that should be considered by a judge in determining whether a ban should issue. I would, however, add another factor that should be weighed in determining whether a ban should issue -- the extent to which a ban could disrupt the trial, particularly by creating the risk that the trial would not take place within a reasonable time.

108 I would dismiss the appeal.

The following are the reasons delivered by

L'HEUREUX-DUBÉ J. (dissenting)

109 This case and the companion case of R. v. S. (T.), *[1994] 3 S.C.R. 952*, in which judgment is handed down contemporaneously with this one, concern third party challenges to publication bans issued during criminal proceedings. Both cases raise similar procedural and substantive issues.

110 In the case before us, the appellants are challenging an interlocutory publication ban issued by Gotlib J. of the

Ontario Court (General Division) and upheld with several modifications by the Ontario Court of Appeal. The impugned publication ban prevented the Canadian Broadcasting Corporation ("CBC") from broadcasting a four-hour mini-series entitled The Boys of St. Vincent until after the completion of the criminal trials of the respondents, Dagenais, Monette, Dugas and Radford.

111 This appeal raises two principal issues, the first procedural and the second substantive. The procedural issue concerns whether or not this Court has the jurisdiction to hear this appeal. This requires a determination of whether third parties, such as the CBC, have the right to appeal interlocutory court orders, such as publication bans, arising out of criminal proceedings. The substantive issue concerns the merits of the appellants' challenge of the impugned publication ban on the grounds that it infringes s. 2(b) of the Canadian Charter of Rights and Freedoms. Furthermore, both issues require this Court to consider whether or not the Charter applies to court orders.

112 Before proceeding with an analysis of these issues, it is important to note that the jurisdictional question raised in this case and in the companion case of R. v. S. (T.) has broad implications. While on a narrow reading it deals only with the question of whether or not third parties can appeal publication bans issued in the criminal context, in effect it has broad implications with respect to third party appeals from all interlocutory criminal orders. If the media can appeal a publication ban issued in the criminal context then every third party, including witnesses, experts, members of the public who are expelled from the courts, lawyers, etc., will be able to appeal any interlocutory order issued in the criminal context which they believe infringes their Charter rights. Such a broad interlocutory right of appeal will result in significant delay to the trial process, will adversely impact upon the accused's Charter right to be tried within a reasonable time and will adversely affect the administration of justice. While both the Chief Justice and McLachlin J. argue that these negative consequences may not arise, I do not find their arguments convincing.

113 First, McLachlin J. argues that delays in the trial process will not necessarily result from allowing third parties to appeal interlocutory court orders issued in the criminal context. However, this is inconsistent with her argument that a third party must have access to a "full and effective remedy" which includes "recourse to an appellate tribunal" where that third party alleges an infringement of its Charter rights. In many, if not most cases, a third party appeal from an interlocutory criminal order will only be "effective" if the related criminal proceedings are delayed until the resolution of the appeal. Accordingly, the negative consequences described above seem inevitable.

114 Similarly, I do not find convincing the Chief Justice's suggestion that there is no need to be concerned that allowing third parties to appeal publication bans issued in the criminal context will open the door to a large number of witnesses appealing interlocutory criminal orders. The Chief Justice states (at p. 862):

> The problem for a witness most frequently arises out of a citation for contempt for refusal to testify. . . . [Section] 10 of the Code sets out the procedure for bringing a conviction for contempt before a court of appeal. This decision will not change or affect that statutory procedure and right of appeal.

While it is true that witnesses currently have a statutory right of appeal where they are cited for contempt of court, I must emphasize that this right of appeal is only available to the small proportion of witnesses who are actually cited for contempt. If the appellants are permitted to appeal the impugned publication ban in the case at hand, however, a broad third party interlocutory right of appeal, available to all witnesses, will result. This will enable all witnesses, whether or not they are cited for contempt of court, to appeal interlocutory criminal orders which they believe infringe their Charter rights.

115 Accordingly, despite the comments of both the Chief Justice and McLachlin J. to the contrary, I believe that permitting the appellants to appeal the impugned publication ban in the case at hand will enable a large number of third parties to appeal interlocutory criminal orders they would otherwise be unable to appeal, and will therefore have a significant adverse impact on an accused's right to be tried within a reasonable time and on the proper administration of justice.

116 With this broader context in mind, I turn to the case currently before us. I have had the opportunity to read the reasons of my colleagues. Unlike the Chief Justice, Gonthier and McLachlin JJ., I do not believe that this Court has

the necessary jurisdiction to hear this appeal. In light of this, it is not strictly necessary for me to consider the substantive issue. However, had I found that this Court had jurisdiction to hear this appeal, I would have agreed with Gonthier J., and disagreed with the Chief Justice, McLachlin and La Forest JJ., on the substantive issue. Accordingly, my reasons will focus on the jurisdictional question.

I. Jurisdiction

117 In concluding that the appellants have a right to appeal in the case at hand, the Chief Justice and McLachlin J. appear to rely on the axiom "where there is a right, there is a remedy". While this axiom may not be absolute, I agree that when a person alleges a wrong, be it a constitutional wrong, a civil wrong or a criminal wrong, she is entitled in our free and democratic society to submit her case to a forum in order to try to obtain redress. This is the basis upon which our judicial system is premised. The fact that a person has standing and is permitted to appear and be heard before a court of law or any other judicial forum, as was the case here, is the first step in the process of providing a remedy for an alleged wrong. The second step is the rendering of a decision by a court of law or other judicial forum. Together, these two steps constitute a remedy. Whether the decision is affirmative or negative does not alter the fact that there was access to a remedy.

118 In the present case, had the CBC been successful before Gotlib J. in avoiding a publication ban, the CBC would have had their remedy. The fact that they were not successful does not alter the fact that they had access to a remedy. Thus, the axiom "where there is a right, there is a remedy" is satisfied. There was a remedy available: the CBC had standing, was heard, and a decision was reached to issue a publication ban despite their arguments to the contrary. Consequently, the jurisdictional question raised by this appeal is not whether the CBC should have access to a remedy, but whether the CBC should have a right to appeal a decision with which they are not satisfied.

119 In approaching this question, it is important to note that it is distinct and independent from the substantive question concerning freedom of expression and publication bans. While I will find that this Court does not have jurisdiction to hear this appeal, this determination should not be understood as calling into question the fundamental importance of freedom of expression. Freedom of expression is, in my view, a fundamental right. Recognition of this fact in Canadian law predates the Charter. In Reference re Alberta Statutes, *[1938] S.C.R. 100*, Duff C.J. recognized (at p. 133) that:

> . . . it is axiomatic that the practice of this right of free public discussion of public affairs . . . is the breath of life for parliamentary institutions.

Furthermore, in Boucher v. The King, *[1951] S.C.R. 265*, Rand J. also emphasized (at p. 288) that:

> Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life.

In Switzman v. Elbling, *[1957] S.C.R. 285*, at p. 306, Rand J. described freedom of political expression as "little less vital to man's mind and spirit than breathing is to his physical existence".

120 Since the proclamation of the Charter, freedom of expression has obtained explicit constitutional protection and the courts have reiterated the fundamental importance of this right. In Edmonton Journal v. Alberta (Attorney General), *[1989] 2 S.C.R. 1326*, Cory J. stated (at p. 1336) that it would be "difficult to imagine a guaranteed right more important to a democratic society than freedom of expression". As well, in Committee for the Commonwealth of Canada v. Canada, *[1991] 1 S.C.R. 139*, I wrote at p. 174:

> Freedom of expression, like freedom of religion, serves to anchor the very essence of our democratic political and societal structure.

121 Nonetheless, these and other affirmations of the fundamental importance of freedom of expression do not

change the fact that the jurisdictional issue raised by this case concerns the right of appeal, not the right to freedom of expression. The right to freedom of expression is protected by access to an initial remedy. I cannot accept McLachlin J.'s suggestion that a "full and effective remedy" for an infringement of freedom of expression "must include recourse to an appellate tribunal". Access to a remedy and the right to appeal the refusal of a remedy are entirely different issues.

122 In our free and democratic society, a right of appeal is not available in every situation. (See, for example, Mills v. The Queen, *[1986] 1 S.C.R. 863*; R. v. Meltzer, *[1989] 1 S.C.R. 1764*; R. v. C. (T.L.), *[1994] 2 S.C.R. 1012*; and Kourtessis v. M.N.R., *[1993] 2 S.C.R. 53*.) As Sopinka and Gelowitz noted in The Conduct of an Appeal (1993), at p. vii:

> Counsel contemplating an appeal must first ensure that he or she has a right of appeal. This right is purely statutory and each appellate court is governed by the applicable statutes and rules with their own jurisdictional criteria, time limits and appeal routes.

Furthermore, even where a right of appeal is available, it is frequently subject to a requirement of leave to appeal. As a result, the term "right" of appeal is somewhat misleading in that it is not a "right" in the same sense as those provided in the Charter. Instead, it is a right which is created by a simple act of the legislature and which can be just as easily eliminated by such an act. La Forest J., with whom I concurred, held as follows in Kourtessis, supra, at pp. 69-70:

> Appeals are solely creatures of statute; see R. v. Meltzer, *[1989] 1 S.C.R. 1764*, at p. 1773. There is no inherent jurisdiction in any appeal court. Nowadays, however, this basic proposition tends at times to be forgotten. Appeals to appellate courts and to the Supreme Court of Canada have become so established and routine that there is a widespread expectation that there must be some way to appeal the decision of a court of first instance. But it remains true that there is no right of appeal on any matter unless provided for by the relevant legislature. [Emphasis added.]

123 As an exception to the principle that a right of appeal must be created by statute, it was recently suggested that a limited common law jurisdictional appeal may be available (see M. Jamal and H. P. Glenn, "Selective Legality: The Common Law Jurisdictional Appeal" (1994), 73 Can. Bar Rev. 142). However, the jurisdiction of the Ontario Court (General Division) to issue the impugned publication ban is not attacked in the present case. Thus, if there is a right of appeal in the present case, it can only be provided by statute. Neither the Criminal Code, R.S.C., 1985, c. C-46, the Supreme Court Act, R.S.C., 1985, c. S-26, nor any other applicable statute provides for such a right of appeal. Furthermore, the Charter does not confer appellate jurisdiction. Consequently, I conclude that there is no jurisdiction in our Court, nor was there in the Court of Appeal, to entertain this appeal.

124 Although this is the general basis for my opinion on the jurisdictional question, I will discuss the particulars in more detail in the following order:

1. The Criminal Code does not provide this Court with jurisdiction to hear this appeal;
2. The Supreme Court Act does not provide this Court with jurisdiction to hear this appeal;
3. Section 24(1) of the Charter does not confer appellate jurisdiction; and
4. The Charter does not apply to court orders.

I will not discuss certiorari, the rules of which are well known and are clearly not applicable in this case, as the Chief Justice himself has noted.

1. The Criminal Code

125 As I have already mentioned, it is well established that a right of appeal exists only if specifically provided by

statute. Given the fact that the appeal at issue arises out of criminal proceedings, the logical first place to look for a statutory right of appeal is the Criminal Code. No such right of appeal is provided therein. Furthermore, s. 674 of the Criminal Code states:

> 674. No proceedings other than those authorized by this Part and Part XXVI shall be taken by way of appeal in proceedings in respect of indictable offences.

126 I agree with the Chief Justice when he says (at p. 864) that:

> . . . 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.]

In my view, this appeal therefore qualifies as a proceeding in respect of an indictable offence. Similarly, I note that Bayda C.J.S., writing for the Saskatchewan Court of Appeal in the companion case of R. v. S. (T.), held that:

> No one, including the C.B.C., questioned that this appeal was "in proceedings in respect of indictable offences" within the meaning of s. 674.
>
> ([*(1993), 109 Sask. R. 96*](), at p. 103.)

127 Accordingly, pursuant to s. 674 of the Criminal Code, the appellants are only entitled to challenge the impugned publication ban by way of appeal if such a right is established in the Criminal Code, which, as I have already noted, it is not. However, the Chief Justice argues that s. 674 of the Criminal Code does not limit the broad jurisdiction conferred upon this Court by s. 40(1) of the Supreme Court Act. Furthermore, he asserts that s. 40(1) of the Supreme Court Act provides this Court with the necessary jurisdiction to hear this appeal. I turn now to this argument.

2. Section 40(1) of the Supreme Court Act

128 Despite the express wording of s. 674 of the Criminal Code, the Chief Justice suggests that s. 40(1) of the Supreme Court Act provides this Court with jurisdiction to hear this appeal. As he does in R. v. Laba, [*[1994] 3 S.C.R. 965*](), the Chief Justice argues at p. 860 that:

> . . . s. 674 of the Criminal Code does not limit our jurisdiction to grant leave in cases such as this under s. 40(1) of the Supreme Court Act.

In support of this proposition, he relies on cases such as R. v. Swietlinski, [*[1994] 3 S.C.R. 481*](); R. v. Vaillancourt (1990), 76 C.C.C. (3d) 384 (S.C.C.); R. v. Gardiner, [*[1982] 2 S.C.R. 368*](); Hill v. The Queen, [*[1977] 1 S.C.R. 827*](); and R. v. Barnes, [*[1991] 1 S.C.R. 449*](). However, as I noted in Laba, supra, at p. 992:

> . . . while these cases all appear to implicitly hold that s. 40(1) of the Supreme Court Act is not limited by s. 674 of the Criminal Code, none of these cases explicitly refer, in this respect, to s. 674 of the Criminal Code or to its interaction with s. 40(1) of the Supreme Court Act. [Emphasis added.]

Nonetheless, even assuming that s. 674 of the Criminal Code does not restrict the scope of s. 40(1) of the Supreme Court Act, this does not mean that s. 40(1) of the Supreme Court Act is unlimited in scope. For example, although s. 40(1) of the Supreme Court Act has been held to provide this Court with jurisdiction to entertain interlocutory appeals in civil matters (Bar of the Province of Quebec v. Ste-Marie, [*[1977] 2 S.C.R. 414*]()), it has not been so interpreted with respect to interlocutory criminal appeals. In fact, Mills, supra, and Meltzer, supra, clearly establish that "there should be no interlocutory appeals in criminal matters". At page 959 of Mills, supra, McIntyre J. stated:

> The question has been raised as to whether there can be something in the nature of an interlocutory appeal in which a claimant for relief under s. 24(1) of the Charter may appeal immediately upon a refusal of his claim and before the trial is completed. It has long been a settled principle that all criminal appeals are statutory and that there should be no interlocutory appeals in criminal matters. This principle has been reinforced in our Criminal Code (s. 602 [now s. 674], supra) prohibiting procedures on appeal beyond those authorized in the Code. It will be observed that interlocutory appeals are not authorized in the Code. [Emphasis added.]

129 Discussing the availability of interlocutory criminal appeals, Sopinka and Gelowitz, supra, at p. 78, state that:

> It would appear to be settled law that there are no appeals in interlocutory criminal proceedings, as there is no statutory basis for such appeals. . . .
>
> This position was not altered by the proclamation of the Canadian Charter of Rights and Freedoms. The Supreme Court of Canada has held in Mills v. R., and R. v. Meltzer, that the Charter does not create new rights of appeal. Any Charter ground sought to be appealed must, accordingly, be taken pursuant to existing rights of appeal as established in the Code.

130 Consequently, to the extent that this appeal is from an interlocutory order, permitting it to proceed, as the Chief Justice does, by virtue of s. 40(1) of the Supreme Court Act is inconsistent with the jurisprudence of this Court.

131 This brings me to the issue of whether or not this appeal can be fairly characterized as interlocutory in nature. I begin by noting that the impugned publication ban is clearly an interlocutory order from the point of view of the accused. However, from the point of view of the appellants, this order is, for all intents and purposes, final. In fact, any court order made in a criminal context which affects a third party, including any order directed at witnesses, could likely be characterized as "final" from the point of view of the affected third party. Accordingly, the argument can be made that a third party appeal against such an order would not be precluded by the principle against interlocutory criminal appeals and could therefore proceed by virtue of s. 40(1) of the Supreme Court Act. This argument, in my view, cannot succeed.

132 The focus in criminal proceedings is on the accused and on the determination of guilt or innocence. While a publication ban or any other order affecting a third party issued during a criminal proceeding may be final with respect to that third party, it is interlocutory with respect to the accused. Since the focus in criminal proceedings must remain on the accused, to the extent that the order is interlocutory from the accused's point of view it should not be subject to a third party appeal unless the right to such an appeal is specifically provided by statute.

133 To hold otherwise would be to ignore the policy behind the principle against interlocutory criminal appeals. Specifically, as I noted in Laba, supra, such appeals are not permitted because of the likelihood that they would fragment the criminal trial process and cause potentially lengthy delays: R. v. Morgentaler, Smoling and Scott *(1984), 41 C.R. (3d) 262* (Ont. C.A.), at pp. 273-74, and R. v. Cranston *(1983), 60 N.S.R. (2d) 269* (C.A.). These policy reasons are applicable whether the appellant is a party to the criminal proceedings or a third party. In fact, in light of the right of the accused, guaranteed by s. 11(b) of the Charter, to be tried within a reasonable time, these policy concerns are particularly applicable where the appellant is a third party. It is of particular importance that third parties not be permitted to cause an accused's trial to be unreasonably delayed. Furthermore, even if the trial continued while the third party appeal proceeded, as it did in this case, but which will often not be the case, there remains the problem of requiring an accused to defend two cases at the same time, given that the accused will likely have a legitimate interest in both proceedings. This may unduly complicate the accused's criminal defense and should therefore be avoided wherever possible. Finally, I note that if third party interlocutory criminal appeals were permitted, this would result in a strange and unacceptable situation where third parties would benefit from greater appellate rights in criminal proceedings than would the accused whose very liberty hinges on the outcome of the proceedings.

134 In light of all the above, I conclude that the principle against interlocutory criminal appeals is equally applicable

to the accused, the Crown and third parties. Only if a right of appeal is explicitly established by statute should an appeal against an interlocutory court order arising out of criminal proceedings be permitted to proceed.

135 Turning now to s. 40(1) of the Supreme Court Act, I note that, while it was intended to confer broad appellate jurisdiction on this Court, it was not, in my opinion, intended to override the principle against interlocutory criminal appeals. For such a sweeping interpretation to be given to s. 40(1) of the Supreme Court Act requires, in my opinion, that Parliament use the clearest of language. Section 40(1) of the Supreme Court Act does not meet this test. Consequently, just as it has not been interpreted to provide parties to criminal proceedings with an interlocutory right of appeal, it should not be so interpreted with respect to third parties. Accordingly, I find that s. 40(1) of the Supreme Court Act does not provide this Court with jurisdiction to hear this appeal. I leave open, however, the question of whether it provides this Court with jurisdiction to hear a third party appeal from a court order in a criminal context where the order in question is "final" with respect to both the parties to the criminal proceeding and the affected third party.

3. Section 24(1) of the Charter

136 A final possible source of jurisdiction for this appeal was raised in the companion case of R. v. S. (T.). The appellant in that case suggested that s. 24(1) of the Charter provides third parties with a right to appeal publication bans issued in the criminal context. This suggestion appears to have been accepted by McLachlin J. in her reasons in this case. Specifically, McLachlin J. implies that the Charter imposes minimal procedural requirements which include "recourse to an appellate tribunal" where a third party is challenging a publication ban on Charter grounds. I disagree.

137 In my view, it is well settled that the Charter does not and cannot provide the appellants with a right of appeal. In Mills, supra, McIntyre J. stated at pp. 956-57:

> As has been said on many occasions, the Charter was not enacted in a vacuum. It was created to form a part -- a very important part -- of the Canadian legal system and, accordingly, must fit into that system. It will be noted at once that s. 24(1) gives no jurisdictional or procedural guide. This absence makes it clear that the procedures presently followed must be adapted and used for the accommodation of applications for relief under s. 24(1). [Emphasis added.]

Later, at p. 958, he repeated:

> Again, it must be observed that the Charter is silent on the question of appeals and the conclusion must therefore be that the existing appeal structure must be employed in the resolution of s. 24(1) claims. [Emphasis added.]

138 As I stated at the outset, appeal rights are statutory. In the absence of a statutory right of appeal, this Court has no jurisdiction to hear this appeal. The appellants cannot rely on s. 24(1) of the Charter to create appellate jurisdiction. While, as I observed earlier, it has been said on many occasions that for every right there should be a remedy (see, for example, Mills, supra, at pp. 971-72 (per La Forest J.) and at p. 958 (per McIntyre J.); and Nelles v. Ontario, *[1989] 2 S.C.R. 170*, at p. 196 (per Lamer J.)), this does not mean that s. 24(1) can confer appellate jurisdiction where the appellants, as here, had access to a remedy and are unsatisfied with the result. Were this a case where the appellants had no access whatsoever to an initial remedy then s. 24(1) might confer jurisdiction to provide an initial remedy, such as giving the appellants standing to raise the issue. However this is not such a case.

139 Finally, I find it important to emphasize, once more, that this case concerns an appeal from an interlocutory criminal order. The ability of s. 24(1) to confer appellate jurisdiction with respect to interlocutory criminal appeals was conclusively determined in Mills, supra, and Meltzer, supra. In this respect, I adopt the following comments of Bayda C.J.S. of the Saskatchewan Court of Appeal from his reasons (at p. 104) in the companion case of R. v. S.

(T.):

> . . . if the present appeal is properly characterized as in respect of an interlocutory ruling by a trial court judge in the course of a criminal proceeding, then the decisions by the Supreme Court of Canada in R. v. Mills, *[1986] 1 S.C.R. 863*, R. v. Meltzer, *[1989] 1 S.C.R. 1764* and Kourtessis make it clear that the Charter component does not vest a court of appeal with any special power to hear an appeal and the right of appeal is governed by the same principles as those which apply to an appeal from any ordinary interlocutory ruling. Those same cases confirm that there is no appeal from an interlocutory ruling made in a criminal proceeding. [Emphasis added.]

140 Therefore, for all the reasons outlined above, I conclude that s. 24(1) does not provide this Court with jurisdiction to hear this appeal.

4. The Applicability of the Charter to Court Orders

141 McLachlin J. argues in her reasons, apparently with the support of La Forest J., that the Charter applies to the impugned publication ban. In my view it does not.

142 The principle that court orders per se are not subject to the Charter was first established in RWDSU v. Dolphin Delivery Ltd., *[1986] 2 S.C.R. 573*. Dolphin Delivery concerned an appeal against an injunction which prevented certain secondary picketing on the grounds that it abridged the Charter guarantee of freedom of expression. Factually, it was quite similar to the case at hand in that it involved a private party (a union) challenging a court order on the ground that it was inconsistent with s. 2(b) of the Charter. McIntyre J., writing for the majority, stated at pp. 600-601:

> While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive, and judicial, I cannot equate for the purposes of Charter application the order of a court with an element of governmental action. . . . To regard a court order as an element of governmental intervention necessary to invoke the Charter would, it seems to me, widen the scope of Charter application to virtually all private litigation. All cases must end, if carried to completion, with an enforcement order and if the Charter precludes the making of the order, where a Charter right would be infringed, it would seem that all private litigation would be subject to the Charter. In my view, this approach will not provide the answer to the question. A more direct and more precisely-defined connection between the element of government action and the claim advanced must be present before the Charter applies. [Emphasis added.]

143 I considered this Court's decision in Dolphin Delivery, supra, in Young v. Young, *[1993] 4 S.C.R. 3*, and noted (at pp. 90-91) that:

> . . . Dolphin Delivery . . . articulated the principle which established the threshold for judicial review under the Charter: the Charter applies to the legislative, executive and administrative branches of government but does not apply to judicial orders made in the resolution of private disputes.

144 The rule in Dolphin Delivery, however, does not fully insulate a judge from the Charter in all circumstances and does not apply to certain adjudicators. Thus, in R. v. Rahey, *[1987] 1 S.C.R. 588*, this Court concluded that a trial judge's conduct in according 19 adjournments and taking 11 months to reach a decision on an application for a directed verdict contravened the Charter and specifically the accused's right to be tried within a reasonable time. Furthermore, in B.C.G.E.U. v. British Columbia (Attorney General), *[1988] 2 S.C.R. 214*, an order to prevent picketing in front of the court, issued by the court on its own motion, originating in the inherent power of the courts to control their process, and issued without notice to the affected party, was reviewed on Charter grounds and found not to violate the Charter. Finally, in Slaight Communications Inc. v. Davidson, *[1989] 1 S.C.R. 1038*, this Court found that an order of an adjudicator pursuant to the Canada Labour Code was subject to Charter review,

since such an adjudicator, unlike a judge, is a creature of statute who is appointed pursuant to a legislative provision and derives all of his or her powers from statute. These three cases clearly demonstrate that Dolphin Delivery does not fully insulate a judge or an adjudicator from the Charter. Specifically, these cases demonstrate that the Charter applies to certain judicial conduct, to the exercise by the courts of their inherent right to control their process, and to adjudicators under the Canada Labour Code. However, this is by no means inconsistent with the holding in Dolphin Delivery that court orders per se are not subject to the Charter. While some judicial activity may be subject to the Charter, a court order per se is not. In light of the above, I conclude that in the case at hand the impugned publication ban is not subject to the Charter.

145 Having said this, I believe it is important to review some of the policy justifications for the general principle that the Charter does not apply to court orders per se. First, as McIntyre J. notes, if court orders were subject to the Charter then all private litigation could become subject to the Charter. This is clearly inconsistent with s. 32 of the Charter which says that the Charter applies only to the "Parliament and government of Canada" and the "legislature and government of each province". Furthermore, if the Charter applied to court orders then, at least theoretically, individuals adversely affected by a court order could seek a remedy, be it damages or otherwise, pursuant to s. 24(1) of the Charter, against the judge who originally issued the impugned court order. Such a result is, in my view, unacceptable. Finally, applying the Charter to court orders could result in endless loops of litigation where even final orders of the Supreme Court of Canada, the highest court in the land and the court of final appeal, could be challenged at first instance on Charter grounds. This would be a strange and unjustifiable situation which could paralyse our judicial system by removing the certainty from supposedly final judgments. The Charter could not have been intended to produce such a result. For all of these reasons, and in light of the decision of this Court in Dolphin Delivery, supra, and my reasons in Young, supra, I conclude that the Charter does not apply to court orders per se.

146 This does not mean, however, that the Charter does not apply to the common law, or for that matter to the Civil Code, the Criminal Code or other statutory laws, which govern the issuance of court orders. For example, as I noted at p. 92 of Young, supra:

> . . . Charter values nonetheless remain an important consideration in judicial decision-making. Courts must strive to uphold Charter values, and preference should be given to such values in the interpretation of legislation over those which run contrary to them (Slaight Communications, supra; Hills v. Canada (Attorney General), *[1988] 1 S.C.R. 513*, at p. 558; Canada (Attorney General) v. Mossop, *[1993] 1 S.C.R. 554*).

Similarly, in Dolphin Delivery, supra, McIntyre J. held that the courts were under an obligation to "apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution" (p. 603).

147 Furthermore, in R. v. Salituro, *[1991] 3 S.C.R. 654*, Iacobucci J., speaking for the Court, stated (at p. 675) that:

> Where the principles underlying a common law rule are out of step with the values enshrined in the Charter, the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with Charter values, without upsetting the proper balance between judicial and legislative action that I have referred to above, then the rule ought to be changed.

148 Finally, it is important to recall that s. 52(1) of the Constitution Act, 1982 provides that:

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. [Emphasis added.]

All laws of Canada, including the common law, are therefore subject to the Charter. This is particularly important with respect to the second issue raised in this appeal, the substantive merits of the appellants' challenge of the impugned publication ban on the ground that it contravenes the Charter. While the publication ban is not subject to the Charter, the common law governing its issuance is subject to Charter scrutiny.

5. Summary

149 For all of the reasons outlined above, I conclude that this Court has no jurisdiction to hear this appeal. I realize that this may leave some with a sense of unease. Bayda C.J.S. of the Saskatchewan Court of Appeal noted (at p. 107) in the companion case of R. v. S. (T.) that:

> The nature of the C.B.C.'s complaint and its legal inability to have the propriety of the ruling it received respecting that complaint immediately tested on appeal, leaves one with a sense of unease. Given the structure of our appellate law, it is Parliament, and Parliament alone, that is empowered to relieve that unease by providing some form of immediate appellate review. . . .

150 I agree with Bayda C.J.S. that it is Parliament, not the courts, which must develop appellate procedures for third parties challenging interlocutory orders such as publication bans which arise out of criminal proceedings. In Schachter v. Canada, *[1992] 2 S.C.R. 679*, this Court discussed the appropriate boundary between the judiciary and the Parliament with respect to the fashioning of remedies when legislation violates the Charter. In Watkins v. Olafson, *[1989] 2 S.C.R. 750*, this Court outlined when it was appropriate for the judiciary to modify common law rules. The policy considerations discussed in both these cases also apply here and clearly support the conclusion that it is Parliament, not the Court, which should develop third party interlocutory criminal appellate procedures. However, were it to be our responsibility to develop such procedures, I would lean against providing third parties with the right to appeal interlocutory criminal orders. As I have already noted, there are strong policy reasons against permitting interlocutory criminal appeals. It is imperative that criminal trials proceed within a reasonable time and not be delayed and fragmented by numerous interlocutory appeals. If the CBC were allowed to appeal the publication ban ordered in this case, then witnesses, experts and others would also be able to appeal court orders requiring them to testify or provide documentary evidence at criminal trials. This would result in unreasonable delays and would compromise the accused's s. 11(b) rights under the Charter. On the other hand, if the trial continued while the third party appeal proceeded, as it did in this case, then the accused would be required to defend two proceedings at the same time. This may complicate the accused's criminal defense and should be avoided wherever possible. Consequently, were it up to this Court to develop third party interlocutory criminal appellate procedures, which it is not, I would hold that no such procedures should be created. While third parties must have access to a remedy where they allege a Charter violation, they need not have access to an appeal.

151 In conclusion, I would resolve the jurisdictional question by holding that this Court has no jurisdiction to hear this appeal. For the sake of clarity, and to prevent future litigation, I would also note, as my colleague the Chief Justice did, that the Ontario Court of Appeal did not have jurisdiction to hear this appeal.

152 Finally, I turn briefly to the jurisdiction of Gotlib J. to issue the publication ban in question. I agree with the Chief Justice that wherever possible a motion for a publication ban should be made before the appointed trial judge. Accordingly, since a trial judge had already been appointed for the respondents Dagenais and Monette, they should have applied to their appointed trial judge and not to Gotlib J. for a publication ban with respect to The Boys of St. Vincent. Therefore, I agree with the Chief Justice when he concludes that "Gotlib J. did not have jurisdiction to hear the motions from Dagenais or Monette" (p. 873).

II. Substantive Merits of the Challenge to the Publication Ban

153 In light of my conclusions on the jurisdictional issue, it is not strictly necessary for me to consider the substantive merits of the appeal. However, seeing as many of my colleagues have held that we do have jurisdiction to hear this appeal, I feel it necessary to address this issue as well. Specifically, had I found that we had jurisdiction to hear this appeal, I would have agreed fully with the reasons of my colleague Gonthier J. and would have disposed of the appeal as he does.

154 In my view, the substantive issue raised by this appeal requires this Court to perform two analytical steps. The first is to apply the Charter to the common law governing the issuance of publication bans in the criminal context. As

I noted earlier, the common law is subject to Charter scrutiny and must be consistent with Charter values. The second step is to ensure that the judge ordering the impugned publication ban did not make a reviewable error in exercising her discretion and applying the common law of publication bans to the case at hand. While it is true that appellate courts should not in general interfere with a trial judge's exercise of discretion, an appellate court can interfere where that discretion has not been exercised judicially and judiciously. Specifically, an appellate court can overturn a discretionary decision of a trial judge where it is made, inter alia, on wrong principles, a misapprehension of significant facts or in a non-judicial manner.

155 With respect to both of the two analytical steps outlined above, I agree fully with the reasons of my colleague Gonthier J. In my view, the common law rule governing the issuance of publication bans in the criminal context is consistent with the Charter and Gotlib J. did not commit any reviewable errors in exercising her discretion and applying the common law rule to the facts of this case and determining that a publication ban was necessary.

156 In this respect, I find it necessary to stress my disagreement with the Chief Justice when he states in his reasons that the common law rule governing publication bans, in criminal matters, does not accord sufficient protection to freedom of expression "in the context of post-Charter Canadian society" (p. 875). Specifically, the Chief Justice argues (at p. 877) that:

> The pre-Charter common law rule governing publication bans emphasized the right to a fair trial over the free expression interests of those affected by the ban. In my view, the balance this rule strikes is inconsistent with the principles of the Charter, and in particular, the equal status given by the Charter to ss. 2(b) and 11(d).

I cannot agree. The common law rule is based on a recognition and appreciation of both the right to freedom of expression and the right to a fair trial. In balancing these two rights, the common law provides that where there is a real and substantial risk of interference with the right to a fair trial a publication ban can be ordered. Effectively, the common law provides that where freedom of expression and the right to a fair trial cannot both be simultaneously and fully respected, it is appropriate in our free and democratic society to temporarily curtail freedom of expression so as to guarantee an accused a fair trial. While this common law balancing of fundamental rights was developed in the pre-Charter era, the proclamation of the Charter does not render it invalid. After all, the pre-Charter balancing was an expression of the very rights protected by the Charter. In this respect, I agree fully with Gonthier J.'s statement (at pp. 928-929) that:

> It might be suggested that my references to the common law tradition are irrelevant in the age of the Charter. In my view, however, the Charter does not oblige departing from this tradition in any substantive respect. . . . The impact of the Charter will be minimal in areas where the common law is an expression of, rather than a derogation from, fundamental values.

157 For the reasons outlined above and those canvassed by Gonthier J. in his judgment, had I found that this Court has jurisdiction to hear this appeal, which I do not, I would have disposed of this case as does my colleague Gonthier J.

III. Conclusion

158 Canada, as a free and democratic society, has always strived to respect the fundamental rights of its citizens including the right of freedom of expression. The Charter has constitutionalized such basic rights. As well, as part of our democratic tradition, judges have always had the discretion to order in camera hearings or issue full or partial publication bans related to judicial proceedings, be it under the criminal, civil or common law. When issued during the course of a criminal trial, such publication bans were not, even to this day, ever subject to appeal either by the Crown, the accused or a third party. The rule against interlocutory criminal appeals insured that no such appeals were permitted. The rationale for this rule is obvious: (i) interlocutory appeals could delay trials indefinitely or, at least substantially; (ii) such delays could result in denying an accused the right to be tried within a reasonable time;

and (iii) such delays could considerably impede the administration of justice and open floodgates for those intent on obstructing justice. Avoiding these negative consequences is as important today as it was hundreds of years ago. The Charter has not altered the need to avoid undue delay to the trial process just as it has not guaranteed every citizen of this country a right of appeal on any matter alleged to have infringed a Charter right. Parliament could, of course, legislate to provide for such a right of appeal. However, it has not chosen to do so. This is true even though the Charter has now been in force for some 12 years. It is not up to this Court, or any other court for that matter, to reverse a rule which has existed for hundreds of years in this free and democratic Canadian society without any disastrous effect or even complaint. Such a radical change in the way our criminal law has operated for hundreds of years must be made by Parliament. Parliament is the appropriate body to consider the implications of any changes to criminal appellate procedures and to decide on the appropriate measures to implement them. Therefore, until such time as Parliament provides for a third party right of appeal from interlocutory criminal orders, third parties, including the CBC, cannot appeal from such orders.

IV. Disposition

159 For the reasons expressed above, I would dismiss the appeal for lack of jurisdiction. However, had I found that we had jurisdiction to hear this appeal, I would have disposed of it as my colleague Gonthier J. does.

The following are the reasons delivered by

GONTHIER J. (dissenting)

160 I have had the benefit of the reasons of my colleagues.

161 On the issue of jurisdiction, I agree that the Canadian Charter of Rights and Freedoms must inform and govern the determination of the rights of the accused in criminal matters. This remains so where third parties are affected, in which case their Charter rights must be considered. I agree that Gotlib J., a superior court judge, was a court of competent jurisdiction to issue a publication ban in the cases of Radford and Dugas but not in the cases of Dagenais and Monette who could only apply to their appointed trial judge. In doing so, she was bound to apply the Charter and her decision constituted the implementation of a Charter remedy under s. 24(1). The issue of a right of review or appeal of this decision bearing on its correctness and conformity with the Charter rights of the persons affected thereby is a distinct and different one. Our Court has identified courts of competent jurisdiction within the meaning of s. 24(1) by reference to the general law governing the jurisdiction of each court as well as rights of review and appeal therefrom. As McIntyre J. stated in Mills v. The Queen, *[1986] 1 S.C.R. 863*, s. 24(1) by referring to a "court of competent jurisdiction" does not create courts of competent jurisdiction, but merely vests additional powers in courts which are already found to be competent independently of the Charter. Further, s. 24(1) does not of itself create a right of review or appeal from a decision of a court of competent jurisdiction where such a right is already provided by law. I find it unnecessary in this case to pronounce as to rights of appeal or review under s. 24(1) in other circumstances and I refrain from doing so. In this case, I share the views expressed by the Chief Justice as to rights of review by way of certiorari of publication ban orders by provincial court judges pursuant to the Charter and rights of appeal pursuant to s. 40 of the Supreme Court Act, R.S.C., 1985, c. S-26. As regards provincial court judges, Charter remedies are within the superintending and reforming power of superior courts and certiorari as outlined by the Chief Justice is an appropriate instrument for the exercise of that power with reference to publication ban orders but, being discretionary, should be exercised with restraint so as to avoid undue interference with the trial process.

162 In the result, I am in agreement with the Chief Justice that the appeal should be allowed in respect of the publication ban that applied to the proceedings before Gotlib J. and in respect of her order to seal the record. I also agree that Gotlib J. had no jurisdiction to issue a ban on the application of the respondents Dagenais and Monette. With all due respect, however, I cannot agree that Gotlib J. erred in banning the broadcast of the mini-series until the end of the pending trials of the two respondents, Dugas and Radford. I do, however, share the opinion

expressed by the Ontario Court of Appeal *(1992), 12 O.R. (3d) 239* that the ban should have been limited to broadcasting in the province of Ontario and to CBMT-TV in Montreal.

163 The central substantive issues in this case are now moot. My concern in writing therefore is in regard to the general principles governing broadcast/publication bans and their application. I generally support many of the Chief Justice's statements of principle and general considerations. I respectfully differ, however, with some of these and with his treatment of the facts of this case as well as the application of principle thereto. I do not agree with his statement as to the balance between fair trial and freedom of expression rights under the common law nor that the Charter has changed this balance. My purpose in writing is to make clear that the discretion to order publication bans in exceptional cases such as the one now before the Court continues to exist and deal further with the basis upon which that discretion should be exercised.

164 I begin by stressing a number of points pertaining to the balancing of the fundamental rights at issue in this case and to appellate review of a trial judge's discretion to order a broadcast ban with particular emphasis on the criterion of real and substantial risk to the fairness of a trial and its application to the assessment of the effectiveness of alternatives to a publication ban. After having reviewed these basic principles, I turn to the ban issued in this case.

1. The Balancing of Fundamental Rights in the Context of the Discretion to Issue Broadcast Bans

165 Determining whether to issue a broadcast ban in order to protect the fairness of a trial requires the court to balance two fundamental values which have received equal protection under the Charter. Refusing to issue a ban may put at risk the fairness of the criminal trial. Acceding to such a request, on the other hand, is a clear restraint of freedom of expression. The starting point of any analysis of broadcast or publication bans must be these two values.

166 One of the crucial elements of a fair trial is the right to be tried solely on the evidence before the court and not on any information received outside that context. Section 11(d) of the Charter guarantees the right of any person charged with an offence to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. The fairness of a trial, however, is also of general public interest. The fairness and integrity of the criminal process is a cornerstone of the legal system. In protecting the fairness of the trial, both under the Charter and at common law, courts have frequently recognized that the potential for prejudice relates not only to the accused, but to society in general.

167 Freedom of expression, as this Court has reiterated on numerous occasions, is essential to truth, democracy and personal fulfilment. Freedom of expression and freedom of the press are also crucial to the public nature of the administration of justice and the potential for scrutiny that comes with such openness. The importance of freedom of expression and freedom of the press, however, should not censure debate as to their limitation. Though I agree with the Chief Justice that any limitation on these freedoms or on the public nature of the administration of justice will be highly exceptional, restrictions will occasionally be necessary and acceptable in a free and democratic society.

168 At common law, the exceptional nature of publication bans has been assured by requiring that those seeking a ban demonstrate a real and substantial risk of interference with the right to a fair trial. Some courts have formulated the test in terms of impossibility, but in my view the focus is one of risk and not certainty. There is an inevitable element of speculation in such an analysis. What is not history, and often even history, is necessarily speculation. The United States Supreme Court has focused on the speculative nature of prior restraints as one of the reasons for treating them with extreme caution (see Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976)). I agree that a court faced with an application for a publication ban must review the factual record and not substitute imagination for careful analysis. Nevertheless, the tradition in this country and in the United Kingdom has been to accept the propriety of bans even though it cannot be said with certainty that the fairness of a trial will be denied (see R. v. Keegstra (No. 2) *(1992), 127 A.R. 232* (C.A.), and Re Global Communications Ltd. and Attorney-General for Canada *(1984), 10 C.C.C. (3d) 97* (Ont. C.A.); see also the general discussion of precedent in Attorney-General v.

Times Newspapers Ltd., [1974] A.C. 273 (H.L.), though the case dealt primarily with a publication ban to protect the authority of the judiciary (as I will explain later in these reasons, the decision of the European Court of Human Rights did not affect the general approach taken by British courts or the relevance of the precedents discussed in that decision)). I will return to the differences between the American and Anglo-Canadian traditions below, but to reiterate, all that is needed in this country to justify a publication ban at common law is that there be a real and substantial risk to the fairness of the trial.

169 The application of the Charter to the evaluation of publication and broadcast bans, while not directly altering the common law test, will restructure the analysis to some extent. In terms of Charter review, determining the correct balance between fair trial and freedom of expression rights falls to the s. 1 analysis. The existence of two equally fundamental rights in potential conflict informs this analysis.

170 An initial question which arises in proceeding with any form of s. 1 balancing is who bears the burden of justifying an infringement. Each party bears an initial burden of showing a Charter infringement. After that initial burden is discharged, however, the balancing of competing Charter rights is incompatible with a burden on either party. Burdens are simply means of allocating uncertainty. It is appropriate in a normal s. 1 analysis to place the burden on the government because it is required to justify legislation or action which infringes a single Charter right. Burdens are completely inappropriate where a prima facie case has been made out that the alternative courses of action (i.e., to issue a ban or not) will infringe two different Charter rights. In this context, the balancing which is at the heart of the s. 1 analysis should be carried on without privileging or disadvantaging either of the rights at issue.

171 Turning to the actual s. 1 analysis, it would seem that the validity of imposing a ban will be determined almost exclusively at the second and third branches of the proportionality part of the Oakes test. The first part of the Oakes test, that there be a pressing and substantial objective, is easily satisfied given that the ban is aimed at protecting a Charter right. Similarly, the requirement that the impugned measure be rationally connected to the objective, which is the first branch of the proportionality portion of the test, is also easily satisfied. As the Chief Justice notes, though possible it will rarely be the case that the impugned material will have a total absence of influence.

172 As stated above, the heart of the s. 1 analysis of publication and broadcast bans is to be found in the second and third branches of the proportionality part of the Oakes test. The second or minimal impairment branch is perhaps the aspect of the s. 1 analysis that is most altered when the task is to reconcile two Charter rights. The fact that the court must balance fair trial and freedom of expression rights forces a measure of flexibility into the analysis. If applied blindly or dogmatically, minimal impairment of one of the rights could theoretically mean maximal impairment of the other.

173 There is no question, as the Chief Justice has noted, that minimal impairment requires that bans be as narrowly circumscribed as possible in protecting the fairness of a trial. Just as injunctions aimed at preserving the status quo must be crafted narrowly, the restraint imposed by publication bans must be limited to only that which is necessary to protect the right to a fair trial. A ban must thus be carefully limited both in terms of temporal and geographic application.

174 Minimal impairment also requires evaluation of alternative measures to protect the right to a fair trial. This evaluation is clearly present, though not necessarily explicit, in the common law requirement that a publication create a real and substantial risk to the fairness of a trial before a ban can be ordered. In applying his modified version of the common law rule, the Chief Justice would require trial judges to make a finding that there is no reasonably available alternative measure to a publication or broadcast ban. The existence of alternative measures to protect the fairness of the trial such as sequestration, careful scrutiny of potential jurors and change of venue has been relied on in the United States as the basis for the virtual total rejection of prior restraint orders (see Nebraska Press, supra, and its aftermath). In my view, the mere existence of alternatives to publication bans, alternatives which are available in almost every case, does not of itself support the denial of a publication ban. Rather, what is required is the more difficult assessment of the likely effect of the proposed publication ban on freedom of expression and the effectiveness as well as the cost or burden of alternative measures. An examination of the

Anglo-Canadian tradition and the potential burdens of alternative measures will put the existence of such alternatives in perspective.

175 Thorson J.A. usefully summarized the difference between the traditional Canadian and American approaches in Global Communications, supra, at pp. 111-12:

> Generally speaking, however, the approach taken in the United States seems to be to allow for the widest possible latitude in media reporting of events transpiring prior to and during the course of the trial of an accused person. This is counterbalanced, in the interests of ensuring an impartial and unbiased jury, in a number of ways including, during the jury selection process, by an often searching examination into the attitudes, biases and even the personal and financial affairs of potential jurors and, after the jury selection process has been completed, by the sequestration of the members of the jury while the trial is in progress to reduce the risk of their exposure to the media and other publicity generated by it.
>
> In Canada, by contrast, the process of jury selection is neither as prolonged nor as exhaustive as a general rule; indeed the kind of questioning and probing into the affairs of potential jurors that is sometimes seen in the United States would be unlikely to be permitted under our system. Moreover, in Canada the sequestration of jurors throughout a trial occurs only exceptionally. The strong bias of our system is to prevent the dissemination before the conclusion of the trial of media publicity that might be prejudicial to the accused's fair trial.

A recent illustration of this openness to preventive measures is Keegstra (No. 2), supra. In that case, the Alberta Court of Appeal upheld an order prohibiting the production of a play about the life of James Keegstra during Mr. Keegstra's second trial. In upholding the order, the Court of Appeal rejected the appellant theatre's assertion that there were less drastic remedies to protect the trial process. In coming to this conclusion, Kerans J.A. provided some insight into the view point at the foundation of a preventive approach, at p. 236:

> But, while urging a juror to be faithful to his or her oath, courts traditionally also try to help the juror by removing undue, unnecessary, and excessive temptations, if possible. That is what the rule in this case is all about. Mr. Shea [for the appellant theatre], it seems to us, offers a counsel of despair: because perfect isolation of the jury is impossible, do not try any form of protection. We will not succumb to that approach. We commend the effort of the first judge. His sole interest in this matter is to help that jury.

176 Examples of the resort to preventive measures can be found in both the Criminal Code, R.S.C., 1985, c. C-46, and access to information legislation. Sections 517 and 539 of the Criminal Code are two such examples. Section 517 applies to the publication of evidence adduced at a bail hearing. Section 539 deals with the publication of evidence adduced during a preliminary inquiry. In the case of access to information legislation, there are usually provisions that protect government documents, such as investigative reports, which could influence the fairness of a trial (see, for example, s. 14(1)(f) of the Freedom of Information and Protection of Privacy Act, *R.S.O. 1990, c. F.31*). Clearly the alternative measures, and most notably challenge for cause, are available in these situations. Parliament and the provincial legislatures, however, have expressly opted for the preventive response.

177 In the United Kingdom, as in Canada, the power to order a publication ban was historically seen as part of the ability of the courts to deal with ex facie criminal contempt. Reference to the position and tradition in the United Kingdom may strike some as odd in the face of the condemnation of that country by the European Court of Human Rights in the Sunday Times case, judgment of 26 April 1979, Series A No. 30; condemnation: 11 votes to 9. The condemnation in the Sunday Times case, however, has been viewed as being based only on differing opinions as to whether an interference with freedom of expression was necessary in the circumstances of the particular case (see D. J. Harris, "Decisions on the European Convention on Human Rights During 1979" (1979), 50 Brit. Y.B. Int. L. 257, at p. 259; S. H. Bailey, "The Contempt of Court Act 1981" (1982), 45 Mod. L. Rev. 301, at p. 303; contra: F. A. Mann, "Contempt of Court in the House of Lords and the European Court of Human Rights" (1979), 95 L.Q.R. 348, at pp. 352-53). In fact, the majority of the European Court made it clear that it was not condemning the English law of contempt and that there would be cases where restraint would be necessary to avoid "trial by newspaper"

(see paras. 63, 43 and 65-66; see also the comments of R. Ergec, "La liberté d'expression, l'autorité et l'impartialité du pouvoir judiciaire", [1993] Rev. trim. dr. h. 171, at pp. 178-79). Following the decision in the Sunday Times case, the law of contempt was consolidated and to some extent reformed by the Contempt of Court Act 1981 (U.K.), 1981, c. 49. The Contempt of Court Act 1981 preserves the power of the courts to deal with publications which imperil the administration of justice. The test for contempt in regard to publications commenting on legal proceedings is whether the publication "creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced" (s. 2(2)). The Contempt of Court Act 1981 thus preserves the ability for courts to intervene in circumstances similar to those now before this Court and implicitly requires an assessment of the suitability of alternative measures.

178 In assessing the suitability of alternative measures, judges must keep in mind that these measures impose distinct costs and burdens. The minimal impairment arm of the proportionality analysis therefore requires the trial judge to do a comparative analysis of effectiveness, feasibility and cost of all possible measures. Adjourning trials or changing venues imposes obvious costs for all concerned and raises the possibility of a violation of the s. 11(b) Charter guarantee of a trial within a reasonable time. Sequestration of the jury is a very exceptional remedy which Kerans J.A. termed a "monstrous suggestion" given that it imposes a heavy burden on those citizens who offer the greatest contribution to the right to a fair trial (Keegstra (No. 2), supra, at p. 235). Providing strong judicial direction to the jury reflects the confidence we place in the jury system and will be a very real solution when the application is made to a trial judge who has had the opportunity to observe the conduct of the jury throughout the trial. This was the case for Soublière J. in the trial of the respondent Dagenais. Where the trial has yet to begin, a judge may not be satisfied that the remedy would be sufficient. Such an opinion does not undermine the trust we place in juries, rather, as Kerans J.A. suggested, it would simply reflect a concern to remove undue, unnecessary and excessive temptations.

179 In the case of broadcast bans of docudramas related to pending trials, the most obvious alternative remedy is extensive challenges for cause and voir dires during jury selection. As noted above, the bias against pre-trial bans in the United States has led to a sometimes gruelling jury selection process which has occasionally lasted for up to six weeks. As Thorson J.A. noted, such a practice does not reflect the tradition in this country. The recent Ontario Court of Appeal decision in R. v. Parks *(1993), 15 O.R. (3d) 324*, may be seen as a departure from this tradition. While refraining from pronouncing upon its correctness, I would point out that that case reflected particular issues outside the context of publication bans. The exceptional concern to prevent racial discrimination from interfering with an accused's right to a fair trial does not justify sweeping away the Canadian tradition of minimal challenge nor does it justify the potentially huge costs associated with more extensive challenge.

180 At the minimal impairment stage, therefore, the trial judge must consider the alternatives to a publication ban but is not bound to find that they would be insufficient. The concern to help juries in exceptional cases by taking preventive measures requires that trial judges not feel constrained by an overly strict test which would impose costs that we have historically not been prepared to accept. The flexibility implicit in this formulation means that trial judges will have a wide discretion in evaluating the various means available to protect the right to a fair trial and that the facts of each case will be of great importance in determining what measure is appropriate.

181 It might be suggested that my references to the common law tradition are irrelevant in the age of the Charter. In my view, however, the Charter does not oblige departing from this tradition in any substantive respect. Clearly this was the opinion of Kerans J.A. and Thorson J.A. in Keegstra (No. 2) and Global Communications, respectively. I disagree with those who argue that the Charter requires that we emulate American society and discard the unique balance of fundamental values which existed in this country prior to 1982. The Charter provides a means to assure that the enumerated fundamental rights and freedoms are respected. It does not give primacy to any of those rights. The impact of the Charter will be minimal in areas where the common law is an expression of, rather than a derogation from, fundamental values. The common law pertaining to publication and broadcast bans is an example of one such area. As I have noted, the requirement that there be a real and substantial risk to the fairness of the trial process is a clear expression of this balance.

182 The final step in the Oakes test requires proportionality between the effects of the measures which are

responsible for limiting the rights or freedoms in question and the objective. The Chief Justice would now add a further requirement of proportionality between the salutary and deleterious effects of a measure limiting rights or freedoms. In order to determine whether there is the requisite proportionality, a court should begin by carefully determining the nature of the infringement. The nature of any infringement and the effects will vary with the extent of the ban imposed.

183 The general purposes of docudramas would appear to support the suggestion that a temporary ban until the end of a trial may well be a minor restriction of the right to freedom of expression. One purpose of such productions may be to examine current issues of general public importance in an effort to spark discussion and assist in the process of seeking solutions. A related and less ambitious purpose may simply be to present a thorough account of events of public interest. Delaying the presentation of a docudrama until the end of a trial would not hinder either of these purposes. Unlike news, immediacy is not the essence of docudramas.

184 I also note that the temporary ban of a docudrama does not in any way affect the fundamental principle of open courts. Such a ban does not restrict access to the courts nor does it prevent publication in respect of court proceedings. Those situations present formidable deleterious effects and their analysis should be carefully distinguished from bans pertaining to docudramas (for a recent British examination of this question, see Ex parte Telegraph Plc., [1993] 2 All E.R. 971 (C.A.)).

185 On the salutary side of the equation, concerns have been expressed as to the efficacy of publication bans. It is said that the actual effect of bans on jury impartiality is increasingly negligible given technological advances which make bans difficult to enforce. With all due respect, it is wrong to simply throw up our hands in the face of such difficulties. These difficulties simply demonstrate that we live in a rapidly changing global community where regulation in the public interest has not always been able to keep pace with change. Current national and international regulation may be inadequate, but fundamental principles have not changed nor have the value and appropriateness of taking preventive measures in highly exceptional cases.

186 In the particular case of docudramas, the salutary effects of temporary bans derive from the potential influence of docudramas on prospective jurors. In part, the impact of docudramas derives from the power of omniscience afforded to the viewer. The viewer sees all and therefore knows all in a way that can only exist in fictional works. What the viewer actually sees, however, is the expression of the agendas of the writer, director and producer. What the viewer sees is also only partly fiction with little indication of the line between documentary and drama. Furthermore, the particular agendas of those involved may mean that fiction becomes worse than reality. As will be seen below, the mini-series now before the Court is a prime example of this possibility. Finally, the fact a docudrama is being shown on television, perhaps at prime time, accentuates its overall potential influence. Television is in many ways more powerful than print. Few would argue that vivid images are often more firmly etched in memory than even the best prose. All of these factors serve to demonstrate that the potential of docudramas to influence prospective jurors may be significant. Much will depend, however, on the particular facts of each case.

187 Analysing publication and broadcast bans through the prism of s. 1 is a useful analytical exercise, but in doing so I do not wish to be taken as laying out a rigid process which lower courts must follow. The essence of the decision to issue a ban or not is a balancing of various factors to determine whether such a preventive measure is a necessary and reasonable response to the facts of any given case. Thus the trial judge must consider the nature of the threat to the fairness of the trial, including the susceptibility of juries to being influenced, the extent of the restriction on freedom of expression and the availability of alternative measures.

188 Though there is a tendency in post facto assessments to say trials were either fair or not, the determination of whether to take preventive measures is by its very nature neither black nor white. The balancing which underpins the decision to order or refuse a ban is necessarily an imprecise science. Judges approaching such decisions either at first instance or at a review stage should keep this reality in mind.

189 Appellate review of such findings must therefore respect the discretion accorded to trial judges. The findings

as to whether there is a real and substantial risk to the fairness of the trial process is a question of mixed fact and law. If the trial judge uses the correct standard and applies it in a reasonable manner, then an appellate court should not overturn the decision. The crucial question is whether the finding was arbitrary or whether there is a basis for it in the evidence. If there is a basis in the evidence for the conclusion, then deference will be in order even though the appellate court might not have arrived at the same result.

190 The preceding discussion can be usefully summarized in the following general points. Publication and broadcast bans can be ordered to protect the fairness of a pending or current trial. These bans should be seen as possible complements to other measures available to guarantee the fairness of the trial process. The fact such bans restrict freedom of expression and freedom of the press means that they should be imposed only in exceptional cases. Trial judges should carefully consider the alternative measures available since they have the advantage of not restricting freedom of expression and freedom of the press. It is not necessary, however, for the trial judge to determine with certainty that the alternative measures would be insufficient to protect the fairness of the trial. What is required is that the trial judge be satisfied that the publication will create a real and substantial risk to the fairness of the trial, which available alternative measures will not prevent. The Anglo-Canadian tradition, as distinct from the American, allows greater scope for prophylactic measures. Consistent with this tradition and the distinct balance between the fundamental rights it implies, trial judges will possess an important discretion to issue publication and broadcast bans. In the special case of docudramas, the impairment of freedom of expression where a judge issues a temporary broadcast ban may well be minimal in comparison to the risk which such productions represent to the right to a fair trial. A judge may thus be fully justified in issuing a temporary ban where the surrounding circumstances and the nature of the publication create a real and substantial risk to the fairness of the trial. As the Chief Justice has noted, where circumstances permit it is desirable for the trial judge to review the proposed publication as part of the evidence before determining whether to issue a ban. Finally, the decision of a trial judge, made after weighing all the factors, should not be interfered with unless it is based on an error in principle or it cannot be reasonably supported on the evidence. Mere disagreement with her/his conclusion is not enough. With these general principles in mind, I turn to the specific facts of this case.

2. Applying the General Principles to the Facts of this Case

191 Perhaps the best way to understand the facts of the case on appeal is through the affidavits which were before Gotlib J. The affidavit of Ronald F. Caza in support of the application for a broadcast ban provided the judge with an overview of the two-part mini-series. Mr. Caza viewed the film at a special screening organized by the National Film Board ("NFB"). At that time and when he gave affidavit evidence, Mr. Caza was retained by the Brothers of the Christian Schools of Ottawa. The following excerpts usefully summarize the content of the mini-series:

> 3. The film is divided into two parts. The first part covers a certain time period during which physical and sexual abuse is inflicted upon children residing in an orphanage run by a lay religion order of brothers. The second part takes place 15 years later, when a brother and a former brother undergo criminal trials and a public inquiry looks into allegations of a cover-up at the orphanage.
>
> . . .
>
> 10. In the film, it seems that the majority of the brothers are abusing the children. In fact, there only seems to be one brother who is not abusing the children and he is seemingly intimidated by the other brothers. . . .
>
> . . .
>
> 12. In the second part of the film, the audience witnesses the trials of the superintendent and another brother. The lawyers representing the brother and former brother are portrayed as being cruel and

> insensitive. They are also portrayed as treating the victims in a seemingly heartless and unnecessary manner.
>
> . . .
>
> 15. Because the audience has witnessed all of the actual physical and sexual assaults, the contentions of the defence lawyers seem ridiculous and misleading. The audience is left with the feeling that the victims, no matter what problems there may be with their testimony, should be believed because all of their problems are due to the abuse inflicted upon them by the brothers.

Mr. Caza's general view of the mini-series was echoed in an article entitled "Film gives voice to abuse victims" published in the Toronto Star on 29 November 1992. A copy of this article was attached as an exhibit to the affidavit of Angelo S. Callegari in support of the application. The article demonstrates poignantly the relevance of the mini-series to the trials of the respondents (at p. H1):

> Yes, it's the Mount Cashel saga, with echoes of other cases recently prosecuted in Ontario, in Canada's Western provinces, and in the United States. Direct references are thinly veiled, and Smith and his producers at the NFB and CBC are careful to include a disclaimer assuring viewers that this is not a re-enactment of any specific series of events, nor a portrayal of real people.
>
> Each of those cases was so similar, however, even to the degree of government disinterest in legitimate complaints, that they are almost interchangeable. Given recent revelations, The Boys of St. Vincent takes on the semblance of a modern morality play; its plot points and characters are ubiquitous, almost part of contemporary folk lore.

192 The CBC did not seek to cross-examine in respect of these two affidavits nor did they request that Gotlib J. view the mini-series. The CBC relied on a single affidavit in opposing the application. The essence of the CBC's response to the application as reflected in the affidavit of Michael Hughes was that the mini-series was not about the respondents and that by setting the series in Newfoundland there was no risk of confusion. This assertion, however, stands in stark contrast to the disclaimer which appeared at the beginning of the film and which explained that though the series was not a reenactment of any actual event, it was "inspired by recent events in Newfoundland and elsewhere in Canada". Mr. Hughes went on to explain, referring to the briefing note from the NFB, that "THE BOYS OF ST. VINCENT reflects a national issue currently receiving widespread media attention, and is intended to help bring the public to better understand this very serious issue of sexual abuse". Finally, Mr. Hughes pointed to the losses which CBC would suffer if the broadcast ban was granted. These damages included approximately $600,000 in lost advertising revenues and expenditures.

193 Gotlib J. noted that the four charges involved "a highly explosive and inflammatory issue to be decided by, in effect, four separate juries in four separate courts" and that there had "already been widespread publicity". She saw no reason "to add fuel to the fire", given the imminence of the three remaining trials and the fact that they would be finished by the fall of 1993, some eight months later. Gotlib J. rejected the alternative remedies proposed by the CBC stating that they begged the question. Finally, she concluded:

> In all, I am satisfied that the harm that would be caused by the showing of this particular film before the jury trials of the three remaining accused persons would be such that the possibility of impartial jury selection virtually anywhere in Canada would be seriously compromised.

Gotlib J. thus believed she was faced with a situation in which the gathering of an impartial jury would have been seriously compromised given the substantial publicity. The "fire" was burning strong and thus the alternative measures were bound to be ineffective. She therefore believed she had little choice but to temporarily ban the mini-series in order to protect the fairness of the pending trials.

194 The affidavit evidence reviewed above clearly supports Gotlib J.'s findings. The mini-series was a work of

fiction, but it was based on a number of similar, "almost interchangeable" cases. The appellants did not directly challenge this assertion and conceded before the Court of Appeal that there were parallels between the events depicted in the film and the charges which the respondents were facing at the time. These parallels take on great significance in light of the particular way in which the events were portrayed. The two-part dramatization left no doubt as to the accused's guilt, impugned the tactics of the defence and alleged a cover-up. In my view, it was open for Gotlib J. to find on the basis of the evidence before her that even though the mini-series was not directly about any of the respondents, it would have seriously compromised the possibility of finding an impartial jury given the context of widespread prior publicity. Though this test differs on a formal level from the "real and substantial risk" test, I have little difficulty in concluding, as did the Court of Appeal of Ontario, that they are equivalent in substance.

195 On the basis of my examination of the record, I would add the following points in support of Gotlib J.'s position. The mini-series was to be shown in prime time and the CBC had spent $97,000 on radio, billboard and print advertising. The direct audience was thus potentially huge. Furthermore, the risks were particularly great because of the nature of the media attention at the time. Michael Hughes, on behalf of the CBC, noted in his affidavit that "THE BOYS OF ST. VINCENT reflects a national issue currently receiving widespread media attention. . .". The physical and sexual abuse which formed the subject matter of the mini-series therefore was not simply an issue of general public interest or in respect of which there was general public consciousness. Rather, public attention was being focused directly on the specific facts before the courts and the guilt or innocence of the persons who stood accused.

196 The information contained in the documents which appeared as exhibits to the affidavit of Michelle d'Auray, Director of Corporate Affairs for the NFB, and filed before the Court of Appeal buttress Gotlib J.'s concerns. In particular, the Production Notes prepared by the NFB illustrate my earlier point that in some cases docudramas will manipulate fiction so that it is worse than reality. Being provocative and exaggerating reality is one way of making a strong impact on viewers and encouraging discussion. As noted above, the purpose of the production was stated by the NFB in the following terms:

> THE BOYS OF ST. VINCENT reflects a national issue currently receiving widespread media attention, and is intended to help bring the public to better understand this very serious issue of sexual abuse. It is our conviction that the public exploration of important and sensitive issues is an integral part of a process of seeking solutions.

The Production Notes explain some of the techniques used to achieve the desired impact on the viewing public. The voice of Pierre Letarte, the Director of Photography for the mini-series, was used in the Production Notes to describe some of the subtleties of the production design:

> We put a lot of thought into the visual impact of the mini-series. Paintings from these centuries [the 18th and 19th] were very useful as inspiration, because the imagery was so dark and heavy, almost 'medieval'. That's a quality which you see reflected in the interior design of the orphanage, the priests' robes, even in the heavy crucifixes they carry.

All of these elements taken together leave no doubt in my mind that there was a sufficient basis upon which Gotlib J. could legitimately be concerned by the potential influence of the mini-series on the fairness of the trial process.

197 In issuing the ban, there is no question that Gotlib J. temporarily denied the appellants their freedom of expression. In many ways, however, this impairment was of a very minor nature. As I noted above, the mini-series is a work of fiction and not a news event. It therefore could be presented at a later date with minimal inconvenience. At the motion hearing, one of the primary inconveniences pointed to by the CBC was the potential financial loss a ban would cause. Lost advertising revenues or any other sort of commercial loss, however, cannot justify risking an accused's right to a fair trial. The opinion of Kerans J.A. in Keegstra (No. 2), supra, at p. 236, could have been invoked to reject the damages alleged by the CBC:

> We emphasize that no reason is offered why immediate production is essential to the fair exercise of the right of free speech in the circumstances of this case. We accept that a commercial loss looms. And we accept, for the purpose of argument, that deliberate exploitation was not intended. Nevertheless, it seems to us that a person who mounts a production about a case pending before the courts is playing a dangerous game. We would not decide this case on the basis of sympathy for that commercial loss.

Furthermore, one would expect that a portion of these revenues would have been recouped when the mini-series was eventually broadcast.

198 Anytime a ban is issued, the spectre of chilling future endeavours must be a concern. Such a threat was raised in the affidavit of Michelle d'Auray. Ms. d'Auray, as Director of Corporate Affairs for the NFB, explained the mandate of the NFB and the potential consequences of a broadcast ban in respect of the mini-series in the following terms:

> The NFB produces a significant number of dramatic productions that focus on stories derived from current societal circumstances, issues and problems. It is part of the NFB mandate. The consequences for the NFB if it is unable to air such productions if there is an imminent trial on a related subject-matter anywhere in Canada are immense.

With great respect for the opinion to the contrary, I cannot accept the suggestion that the consequences for producers of docudramas are immense. The purpose of the mini-series identified by the NFB and cited above reflects the relative "timelessness" of the production. Furthermore, the ban in this case was only a temporary restriction on the appellants' freedom of expression. Citing CBC v. Keegstra, *[1987] 1 W.W.R. 719*, Gotlib J. correctly limited the temporal scope of the ban to the conclusion of the respondents' trials. In this case, that time frame was some eight months with the three pending trials scheduled to start in February, April and sometime between May and July. There is little doubt that public exploration of the issues of child physical and sexual abuse through the misuse of authority would have remained topical at the end of the eight-month period. I see no basis for concluding that the NFB's stated purpose of provoking public exploration as an integral part of a process of seeking solutions was frustrated by the ban.

199 Though in general the ban did not represent an unreasonable restriction on freedom of expression, its geographic scope was clearly overbroad, as found by the Ontario Court of Appeal. Gotlib J.'s stated reason for extending the ban to all of Canada was her opinion that "the possibility of impartial jury selection virtually anywhere in Canada would be seriously compromised". Regardless of the soundness of this opinion, there was no legal possibility that the trials could be moved outside the province of Ontario and therefore Gotlib J. clearly went well beyond what was necessary to deal with the application of the respondents. For that reason, I would have limited the ban to any broadcast in the province of Ontario and to CBMT-TV in Montreal.

200 My review of the evidence, the reasons supporting the ban and the effect on the appellants' freedom of expression rights lead to the conclusion that, taken as a whole, the order of Gotlib J. reflected correct principle applied in a reasonable manner. Regardless of whether I would have issued a ban in this case, there was clearly a basis for Gotlib J.'s conclusions. Her decision to order a ban was a preventive measure which should be upheld as a legitimate exercise of the crucial discretion of the courts to protect the integrity of the trial process. In upholding Gotlib J.'s decision I think it is appropriate to repeat the words of Kerans J.A. in Keegstra (No. 2). A person who mounts a production about a case pending before the courts is playing a dangerous game. In general, it is prudent to wait until an ongoing or imminent trial is completed before broadcasting or mounting a docudrama.

201 For the foregoing reasons, I would allow the appeal in respect of the broadcast ban but only to the extent of limiting its scope to the province of Ontario and to CBMT-TV in Montreal. I am in agreement with the Chief Justice on the jurisdictional issue.

3. Disposition

202 In the exercise of this Court's jurisdiction under s. 40 of the Supreme Court Act, I would allow the appeal from the judgment of the Court of Appeal and set it aside for lack of jurisdiction. Likewise, in the cases of Dagenais and Monette, I would allow the appeal and set aside the orders of Gotlib J. for lack of jurisdiction. In the cases of Dugas and Radford, being in agreement with the conclusions of the Court of Appeal on the merits, I would dispose as it did of the appeal and uphold the order of Gotlib J. banning the broadcast of the mini-series, The Boys of St. Vincent, but limit its scope to the province of Ontario and to CBMT-TV in Montreal.

The following are the reasons delivered by

McLACHLIN J.

203 The respondents Dagenais, Monette, Dugas and Radford, members or former members of a religious order known as the Christian Brothers, were charged with physical and sexual abuse against boys in their care at training schools in Ontario. The Canadian Broadcasting Corporation ("CBC") proposed to air a four-hour fictional drama called The Boys of St. Vincent during or prior to their trial. The Boys of St. Vincent depicted physical and sexual abuse of boys in a Catholic training school in Newfoundland. The respondents, alleging that the broadcast would prejudice the jurors and deny them fair trials, obtained a publication ban on the broadcast until the completion of their trials. The order was upheld with modifications in the Court of Appeal. The CBC asks this Court to set aside the ban on the ground that it violates the guarantee of freedom of expression under s. 2(b) of the Canadian Charter of Rights and Freedoms.

204 The appeal presents three issues, all of importance. The first is whether the Charter, which applies to "governmental action", applies to a court-ordered publication ban. The second concerns the procedures by which such bans may be challenged. The third issue is the substantive one of whether the publication ban violated the guarantee of free speech found in s. 2(b) of the Charter. I would answer the first and third questions affirmatively. On the second, I would endorse the procedures proposed by the Chief Justice.

205 The Chief Justice does not deal with the first issue directly. He concludes that it can be avoided by focusing on the Charter's application to the common law. A judge exercising judicial discretion to grant a publication ban would commit a reviewable error of law if the ban were not in accordance with the Charter. But this constitutes an implicit acceptance of the fact that judges in applying the law are bound by the Charter. While the question of whether a judicial act is government action is avoided, the practical result is the same as if one had answered that question in the affirmative; in either case, judicial acts must conform to the Charter. Indeed, the practical effect of the Chief Justice's approach may be even broader; it may mean that all court orders would be subject to Charter scrutiny. Even purely private litigation would be subject to review on Charter grounds. In RWDSU v. Dolphin Delivery Ltd., *[1986] 2 S.C.R. 573*, for example, the union would arguably have been able to raise a Charter challenge of the court's injunction, on the basis that if it infringed the Charter, it would not have been authorized by the common law rule which gave the judge the discretion to order it. The judge would have thereby committed a reviewable error of law, and the result in the case would have been different on the issue of jurisdiction. It seems to me better in these circumstances to confront the first issue directly.

1. Does the Charter Apply to a Court-Ordered Publication Ban?

206 Constitutional guarantees of rights may apply in two ways. They may apply "vertically" to relations between the individual and the state. They may also apply "horizontally", governing relations between private individuals and corporations. The Canadian Charter falls into the former category. Section 32 of the Constitution Act, 1982 states that the Charter applies "to the Parliament and government of Canada in respect of all matters within the authority of Parliament" and "to the legislature and government of each province in respect of all matters within the authority of the legislature of each province". The publication ban here in issue was not made by Parliament or a legislature.

So the question is whether it can be considered an act of "government" in relation to a matter within the authority of Parliament or the legislatures.

207 The respondents argue that the ban is not subject to the Charter because it is an order of the court and the courts are not "government" within the meaning of s. 32 of the Charter. They rely on the statement of McIntyre J., writing for the majority of this Court in Dolphin Delivery, at p. 600, that "[w]hile in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive, and judicial", for the purposes of Charter application he could not equate "the order of a court with an element of governmental action".

208 While this statement seems broad, it must be read in the context of the case. At issue in Dolphin Delivery was a court order resolving a dispute between private parties. The argument was that because the court had made the order, the Charter should apply. To accept this argument would have been to take the Charter into the realm of relations between individuals, which s. 32 clearly never contemplated. As Professor Hogg puts it, "the reason for the decision is that a contrary decision would have the effect of applying the Charter to the relationships of private parties that s. 32 intends to exclude from Charter coverage, and that ought in principle to be excluded": Constitutional Law of Canada (3rd ed. 1992), vol. 2, at p. 34-16. The ratio decidendi of Dolphin Delivery, as Professor Hogg asserts, must be that "a court order, when issued as a resolution of a dispute between private parties, and when based on the common law, is not governmental action to which the Charter applies" (p. 34-16).

209 In two subsequent cases, this Court has accepted that the Charter could apply to court orders in some circumstances. In R. v. Rahey, *[1987] 1 S.C.R. 588*, the Court concluded that a trial judge's conduct in ordering 19 adjournments in alleged violation of the accused's rights to a trial within a reasonable time must conform to the Charter. La Forest J. stated that it seemed obvious that "the courts, as custodians of the principles enshrined in the Charter, must themselves be subject to Charter scrutiny in the administration of their duties" (p. 633). In B.C.G.E.U. v. British Columbia (Attorney General), *[1988] 2 S.C.R. 214*, this Court held that a court order directed to maintaining access to the courts attracted Charter scrutiny, reasoning that if Charter rights are to have practical effect, then there must be access to a fair court process which itself complies with the Charter. Dickson C.J., for the majority of the Court, distinguished Dolphin Delivery on the basis that the injunction in that case was issued to resolve "a purely private dispute" (p. 243). Observing that the motivation for the court's action was "entirely 'public' in nature", Dickson C.J. continued (at p. 244):

> The criminal law is being applied to vindicate the rule of law and the fundamental freedoms protected by the Charter. At the same time, however, this branch of the criminal law, like any other, must comply with the fundamental standards established by the Charter.

210 These cases suggest that court orders in the criminal sphere which affect the accused's Charter rights or procedures by which those rights may be vindicated must themselves conform to the Charter. This is consistent with the fact that many Charter rights clearly contemplate review of judicial acts or omissions. As Professor Hogg points out (at p. 34-15), nearly all of the rights guaranteed to criminal defendants by s. 11 of the Charter entail some sort of action on the part of courts. Many of the other legal rights included in the Charter, such as ss. 12, 13 and 14, also contemplate judicial action.

211 L'Heureux-Dubé J. suggests that the Charter is applicable only to certain judicial activity, rather than court orders per se. With respect, I do not see this as a tenable distinction. The judge's order is the effective distillation of judicial activity; consequently it is upon the order that one must focus.

212 The question of what court orders attract the Charter is a large question, the answer to which is best determined on a case-to-case basis. For present purposes, it is sufficient to observe that Rahey and B.C.G.E.U. delineate one area in which orders of a court will be subject to Charter scrutiny. Court orders in the criminal sphere which affect Charter rights or the ability to enforce them are themselves subject to the Charter. This much, at a minimum, is required if Charter rights are to be meaningful.

213 The case at bar falls into this category. The publication ban was related to the protection of the accused's constitutional right to a fair trial, just as in Rahey the order related to the accused's right to a timely trial. In both cases the Charter must apply. From the perspective of B.C.G.E.U., the ban may be viewed as a case of the "criminal law . . . being applied to vindicate the rule of law and the fundamental freedoms protected by the Charter" (p. 244). It follows that the Charter applies to the order under appeal.

2. Procedural Matters

214 If the Charter applies to publication bans, the question arises of the procedure to be followed by a person who wishes to challenge a ban on the ground that it violates the Charter. The parties to the litigation may use the existing procedures. The problem is that these procedures, premised on a simple contest between the Crown and the accused, or between litigating parties, do not contemplate motions and appeals brought by third parties, such as the media. Those parties now may assert Charter rights and guarantees. How are they to assert those rights?

215 The cardinal principle underlying these procedural issues is that the courts must be able to provide a full and effective remedy for any Charter infringement. I am of the view that a full and effective remedy requires more than the opportunity to address the trial court prior to the issuance of the ban. It must include recourse to an appellate tribunal. The scope of Charter rights is often unclear. A person who alleges that his or her Charter rights have been infringed must be permitted to challenge a narrow interpretation and seek resolution of their ambit on appeal. The appellate procedures which the Chief Justice has outlined satisfy this minimal requirement. While they involve some extension of the common law remedy of certiorari, I believe this extension is warranted in the case of appeals from press bans and hence justified under s. 24(1) of the Charter. The extension is warranted because there is no other way that overbroad publication bans can effectively be limited on appeal. Appeals from verdict prescribed by the Criminal Code, R.S.C., 1985, c. C-46, do not cover orders for press bans. Absent an expanded common law appeal remedy such as that proposed by the Chief Justice, parties alleging an infringement of their freedom of expression by reason of the press ban would have no means of resolving the ambit of their rights on appeal. Given the approach to the first issue which I have proposed, a press ban might be challenged on the basis of error of law in that it constitutes a direct violation of the Charter.

216 Applied to press bans, the appeal routes proposed by the Chief Justice do not pose the problem of interrupting and delaying the criminal trial, a consequence against which this Court firmly set its face in Mills v. The Queen, *[1986] 1 S.C.R. 863*. The appeals from a press ban are collateral to the trial, and may proceed at any time without affecting the trial process. If the trial is concluded before the matter is resolved on appeal, that must be accepted as the price of protecting the accused's and the public's interest in prompt and expeditious resolution of criminal trials. The party contesting the ban may be denied an immediate right to report on the proceedings in question. But the appeal may still serve the overarching purpose required by the Charter of allowing the Charter rights at issue to be defined for a future day.

217 This leaves the problem of what would happen in a case of a third party appeal on an issue central to a trial. For example, a witness might decline to testify on certain matters on grounds of privilege. The trial judge might find no privilege and order the witness to testify. Could the witness then follow the same appeal procedures outlined by the Chief Justice? If so might the trial be interrupted? Such concerns lead L'Heureux-Dubé J. to reject any appeal rights in third parties.

218 I agree with L'Heureux-Dubé J. that the interruption of criminal trials by interlocutory and third party appeals must be eschewed. However, I am not convinced that the procedure proposed by the Chief Justice leads to this result. First, matters integral to the trial like whether a witness must divulge material claimed to be privileged, will often fall within the class of matters which may be appealed on an appeal from the verdict under the Criminal Code, arguably undercutting the need for expansion of common law appeal remedies. But more important, even if the third party were found to enjoy an immediate right of appeal, it does not follow that the trial would stop, pending the exercise of that right. Given the primacy of the principle that criminal trials are not to be interrupted by interlocutory

appeals, the reviewing judge, whether proceeding by certiorari or on appeal, might properly defer decision until the termination of the criminal trial. Having said this, I must affirm that these are issues which are better left to a case where they squarely arise. My point is the modest one that adopting the procedures proposed by the Chief Justice should not be understood to derogate from the principle that criminal trials should not be interrupted and delayed for the purpose of pursuing interlocutory appeals.

219 I offer a final comment on this aspect of the case. While the procedures outlined by the Chief Justice meet the minimal requirements of the Charter, they are, as he acknowledges, far from perfect. I endorse his call for legislative action to provide clear and consistent Charter remedies, and strike the appropriate balance between the rights of those who allege their Charter rights are infringed, on the one hand, and the private and public interest that criminal trials proceed expeditiously and without interruption, on the other.

3. Did the Publication Ban Violate the Charter?

220 Freedom of expression is a right fundamental to democratic society. Accordingly, this Court has taken the view that the ambit of the right must be generously interpreted, going so far as to hold that even hate propaganda falls within the guarantee. Limitations on the guarantee may not be assumed; as a general rule, they must be justified, under s. 1 of the Charter.

221 The expression at issue on this appeal -- the right to broadcast a fictional cinematic work -- falls squarely within the ambit of s. 2(b) as defined by previous cases. The ban interfered with the right of the actors, directors and producers of the film to express themselves. There can be no doubt that the ban limited the right of freedom of expression guaranteed by s. 2(b) of the Charter.

222 The more difficult question is whether the ban can be justified under s. 1 of the Charter as a reasonable limit on freedom of expression, judged by the standards of a free and democratic society. Accepting the ban is a "limit" on s. 2(b) rights "prescribed by law", one must weigh the gravity of the infringement of s. 2(b) against the objective to which the ban was directed.

223 Applying the criteria developed by this Court in R. v. Oakes, *[1986] 1 S.C.R. 103*, one looks first to the objective of the ban. It is clear. It was to preserve the respondents' rights to a fair trial -- in particular to avoid the risk that an impartial jury could not be sworn, or if sworn, could not render a true verdict because of the poisonous effects of the publication.

224 The next step is whether the infringement is proportionate to, or justified by, this goal. Proportionality in this sort of case is not a question of deciding where the balance should be struck between a fair trial and freedom of expression. The right to a fair trial is fundamental and cannot be sacrificed. I agree with the Chief Justice that in general, the conflict model is largely inappropriate. Fair trials and open discussion tend to go hand in hand. Nevertheless, in some instances, such as that in the current case, unlimited free expression may interfere with the accused's right to a fair trial. As Dickson C.J. said for the Court in Fraser v. Public Service Staff Relations Board, *[1985] 2 S.C.R. 455*, at pp. 467-68:

> On the other side, however, it is equally obvious that free speech or expression is not an absolute, unqualified value. Other values must be weighed with it. Sometimes these other values supplement, and build on, the value of speech. But in other situations there is a collision. When that happens the value of speech may be cut back if the competing value is a powerful one. . . . We also have laws imposing restrictions on the press in the interests of, for example, ensuring a fair trial or protecting the privacy of minors or victims of sexual assaults.

225 There thus may be cases where special circumstances are presented which indicate a serious risk (as opposed to a speculative possibility) that a fair jury could not be sworn or, where jurors have already been sworn,

that publicity might somehow find its way to them and prejudice them. In these cases, a ban may be justified, provided that it goes no further than required to avoid the demonstrated risk of an unfair trial.

226 The common law test for whether a ban should be ordered is that there is a real and substantial risk that a fair trial would be impossible if publication were not restrained. Properly applied, that test meets the requirements of justification of an infringing measure under s. 1 -- that the infringement be rationally connected to the goal, that it be minimally intrusive, and that it be proportionate to the benefit achieved. What is required is that the risk of an unfair trial be evaluated after taking full account of the general importance of the free dissemination of ideas and after considering measures which might offset or avoid the feared prejudice. What must be guarded against is the facile assumption that if there is any risk of prejudice to a fair trial, however speculative, the ban should be ordered. The courts are the guardians not only of the right to a fair trial but of freedom of expression. Both must be given the most serious consideration.

227 Rational connection between a broadcast ban and the requirements of a fair and impartial trial require demonstration of the following. First, it would seem necessary to show that many people eligible to sit as jurors would see the broadcast; conversely, if a substantial number would not see it, there should be no problem selecting a jury from among them. Second, it must be shown that publication might confuse or predispose potential jurors. In the case of a fictional work, it should be shown that jurors will not be able to separate broadcast fiction from reality. Third, it must be shown that any confusion may not be dispelled by proper direction or by other measures, such as judicial directions, change of the venue of the trial, or more exacting jury selection processes. If after considering all such matters, the judge is still left with a real concern that there is a substantial risk the trial may be rendered unfair, a rational connection between the infringement of freedom of expression and the ban will have been established.

228 Once the rational connection has been established, the judge must go on to ensure that the ban is minimally intrusive, i.e., that it impinges on freedom of expression no further than is actually required to avoid the risk of an unfair trial. It must be confined to the minimum geographical area required. It must not extend to more forms of expression or media of dissemination than necessary. And it must cease at the earliest possible time consistent with removing the risk of an unfair trial.

229 In the case at bar, the judge ordering the ban failed to direct herself sufficiently to the sort of considerations which go to establishing rational connection and minimal impairment. It follows that the ban cannot be supported.

4. Disposition

230 I would allow the appeal and set aside the ban.

End of Document

R. v. Mentuck, [2001] 3 S.C.R. 442

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

2001: June 18 / 2001: November 15.

File No.: 27738

[2001] 3 S.C.R. 442 | *[2001] 3 R.C.S. 442* | *[2001] S.C.J. No. 73* | *[2001] A.C.S. no 73* | *2001 SCC 76*

Her Majesty The Queen, appellant; v. Clayton George Mentuck, respondent, and The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of British Columbia, the Winnipeg Free Press, the Brandon Sun, and the Canadian Newspaper Association, interveners.

ON APPEAL FROM THE MANITOBA COURT OF QUEEN'S BENCH (61 paras.)

Case Summary

Courts — Supreme Court of Canada — Jurisdiction — Publication bans — Criminal proceedings — Trial judge granting one-year ban as to identity of undercover police officers and refusing ban as to operational methods used in investigating accused — Whether Supreme Court of Canada has jurisdiction to hear Crown appeal from trial judge's order — Supreme Court Act, R.S.C. 1985, c. S-26, s. 40(1), (3).

Criminal law — Publication bans — Appropriate scope of publication ban — Undercover police investigation — Crown seeking publication ban protecting identity of police officers and operational methods used in investigating accused — Trial judge granting one-year ban as to identity of officers and refusing ban as to operational methods — Whether trial judge erred in ordering ban.

[page443]

The accused was charged with second degree murder. At his first trial, a stay of proceedings was entered after crucial evidence was ruled inadmissible. The accused was then targeted by the RCMP in an undercover operation. The undercover operation followed a pattern commonly employed by Canadian police. As a result of evidence gathered during this operation, the indictment was reinstated. In the course of opening statements at the second trial, the Crown referred to much of the information now sought to be suppressed. Newspapers reported most of the information. During the trial the Crown moved for a publication ban to protect the identity of the officers and the operational methods employed by those officers in the investigation. The accused and two intervening newspapers opposed the motion. The trial judge granted a one-year ban as to the identity of undercover police officers, but refused a ban as to operational methods used in investigating the accused. Pending the resolution of this appeal, that order was stayed and orders granting the requested publication ban in full and sealing the affidavits filed with the trial judge were granted. Meanwhile, a mistrial was declared in the second trial due to a hung jury. At the accused's third trial, he was acquitted.

Held: The appeal should be dismissed. The order granting a one-year ban as to the identity of the undercover police officers is restored, but the one-year period commences at the date of this judgment.

As Parliament has not seen fit to amend the Criminal Code to provide for clear avenues of appeal in publication ban cases, the reasoning in Dagenais and Adams governs the appeal process. This Court has jurisdiction under s. 40(1) of the Supreme Court Act to hear a direct appeal from the trial judge's order for a publication ban. This

order is ancillary to any issues relating to the guilt or innocence of the accused, and thus the appeal is not barred by s. 40(3) of the Act. No other route of appeal is open to the parties in the case, and the appeal is not explicitly barred by statute.

The ban ordered by the trial judge was properly issued and was of the appropriate scope in light of the requirements of the Charter. A publication ban should only be ordered when such an order is necessary to prevent a serious risk to the proper administration of justice, because reasonable alternative measures will not prevent the risk, and when the salutary effects of the publication [page444] ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice. The party bringing the application has the burden of displacing the presumption of openness. That party must also establish a sufficient evidentiary basis to allow the judge to make an informed application of the test, and to allow for review.

The first branch of the analysis requires consideration of the necessity of the ban in relation to its object of protecting the proper administration of justice. The concept of "necessity" has several elements: (1) the risk in question must be well-grounded in the evidence and must pose a serious threat to the proper administration of justice; (2) "the proper administration of justice" should not be interpreted so widely as to keep secret a vast amount of enforcement information the disclosure of which would be compatible with the public interest; and(3) in order to reflect the minimal impairment branch of the Oakes test, the judge must consider whether reasonable alternatives are available, but he must also restrict the order as far as possible without sacrificing the prevention of the risk. Under the second branch of the analysis, the effect of the ban on the efficacy of police operations, the right of the public to freedom of expression, and the right of the accused to a public trial must be weighed.

A publication ban as to operational methods is unnecessary. Although police operations will be compromised if suspects learn that they are targets, media publication will not seriously increase the rate of compromise. Republication of this information does not constitute a serious risk to the efficacy of police operations, and thus to that aspect of the proper administration of justice. This ground by itself is sufficient to dispose of the ban as to operational methods. However, in this case, publication of the names and identities of the officers in question would create a serious risk to the efficacy of current, similar operations. The ban as to identity is necessary and there is no reasonable alternative. The ban was properly restricted to a period of one year but, as the circumstances of the case may change, that order will be made subject to further order of the issuing court.

Even if a serious risk had been demonstrated, the deleterious effects of the ban as to operational methods on the right of the press to freedom of expression and the [page445] accused's right to a public trial would substantially outweigh the benefits to the administration of justice. The benefits this ban promises are, at best, speculative and marginal improvements in the efficacy of undercover operations and the safety of officers in the field, but the deleterious effects are substantial. Such a ban would seriously curtail the freedom of the press in respect of an issue that may merit widespread public debate. It would also have a deleterious effect on the right of the accused to a fair and public trial, which includes the right to have the media access the courtroom and report on the proceedings. Allowing public scrutiny of the trial process is to the advantage of the accused because it ensures that the trial is conducted fairly, and because it can vindicate an accused person who is acquitted, particularly when the acquittal is surprising and perhaps shocking to the public. However, the salutary effects of the ban as to identity are significant. It will reduce the potential harm to the officers currently in the field and assist in ensuring the efficacy of ongoing operations. Moreover, its deleterious effects are not as substantial. Although, in general, the names of police officers who testify against accused persons need not, and should not, be the subject of publication bans, the detrimental aspects of a time-limited ban in these circumstances is outweighed by the salutary effects of the ban.

Cases Cited

Explained: Dagenais v. Canadian Broadcasting Corp., *[1994] 3 S.C.R. 835*, rev'g *(1992), 12 O.R. (3d) 239*; R. v. Adams, *[1995] 4 S.C.R. 707*; referred to: R. v. O.N.E., *[2001] 3 S.C.R. 478*, *2001 SCC 77*; Canadian Broadcasting Corp. v. New Brunswick (Attorney General), *[1996] 3 S.C.R. 480*; R. v. Hinse, *[1995] 4 S.C.R. 597*; Michaud v. Quebec (Attorney General), *[1996] 3 S.C.R. 3*; Irwin Toy Ltd. v. Quebec (Attorney General), *[1989] 1 S.C.R. 927*; Switzman v. Elbling, *[1957] S.C.R. 285*; R. v. Keegstra, *[1990] 3 S.C.R. 697*; Thomson Newspapers Co. v. Canada (Attorney General), *[1998] 1 S.C.R. 877*; R. v. Big M Drug Mart Ltd., *[1985] 1 S.C.R. 295*; Re B.C. Motor Vehicle Act, *[1985] 2 S.C.R. 486*; Eldridge v. British Columbia (Attorney General), *[1997] 3 S.C.R. 624*; Edmonton Journal v. Alberta (Attorney-General), *[1989] 2 S.C.R. 1326*.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 11(d).
Criminal Code, *R.S.C. 1985, c. C-46, s. 676*(1) [am. c. 27 (1st Supp.) , s. 139(1)].

[page446]

Supreme Court Act, *R.S.C. 1985, c. S-26, s. 40*(1) [rep. & sub. 1990, c. 8, s. 37], (3).

APPEAL from a judgment of the Manitoba Court of Queen's Bench *(2000), 143 Man. R. (2d) 275*, *73 C.R.R. (2d) 52*, *[2000] M.J. No. 69* (QL). Appeal dismissed.

Heather Leonoff, Q.C., and Darrin R. Davis, for the appellant. Timothy J. Killeen and Wendy A. Stewart, for the respondent. Cheryl J. Tobias and Malcolm G. Palmer, for the intervener the Attorney General of Canada. Written submissions only by Christopher Webb, for the intervener the Attorney General for Ontario. John M. Gordon, for the intervener the Attorney General of British Columbia. Jonathan B. Kroft and Brent C. Ross, for the interveners the Winnipeg Free Press and the Brandon Sun. Paul B. Schabas and Tony S. K. Wong, for the intervener the Canadian Newspaper Association.

Solicitor for the appellant: The Attorney General of Manitoba, Winnipeg. Solicitors for the respondent: Killeen Chapman Garreck, Winnipeg. Solicitor for the intervener the Attorney General of Canada: The Attorney General of Canada, Vancouver. Solicitor for the intervener the Attorney General for Ontario: The Attorney General for Ontario, Toronto. Solicitor for the intervener the Attorney General of British Columbia: The Attorney General of British Columbia, Vancouver. Solicitors for the interveners the Winnipeg Free Press and the Brandon Sun: Aikins, MacAuley & Thorvaldson, Winnipeg. Solicitors for the intervener the Canadian Newspaper Association: Blake, Cassels & Graydon, Toronto.

The judgment of the Court was delivered by

IACOBUCCI J.

I. Introduction

1 This appeal raises two questions. First, we must decide in what circumstances this Court has jurisdiction under s. 40(1) of the Supreme Court Act, *R.S.C. 1985, c. S-26*, to hear an appeal of an order for a publication ban directly from the court making the order. Second, we must decide whether an order prohibiting publication of the details of the police practices used in this case ought to have been issued. Along with the appeal in R. v. O.N.E., *[2001] 3 S.C.R. 478*, *2001 SCC 77*, which was heard at the same time, this case raises important questions about publicity rights in trials. It requires us to balance the interests of the public in ensuring [page447] effective policing and society's fundamental interest in allowing the public to monitor the police, as well as the right of the accused to a "fair and public hearing".

2 I conclude that this Court does have jurisdiction to hear this appeal and other direct appeals from orders for publication bans, but only in a limited set of circumstances where no other route of appeal lies. I also find that the full publication ban in this case should not have been issued. A ban that conceals the nature of police practices was rightly not ordered by the trial judge. The improved efficacy of police undercover operations would not be substantial, and in any event, is outweighed by the deleterious effects on the rights protected by ss. 2(b) and 11(d) of the Canadian Charter of Rights and Freedoms. However, the more limited ban on the publication of the involved officers' names and identities for a one-year period, was properly ordered. Accordingly, the order of the Manitoba Court of Queen's Bench is affirmed and this appeal is dismissed.

II. Background

3 On July 13, 1996, 14-year-old Amanda Cook disappeared from the Rossburn Harvest Fair. Her body was discovered on July 17, 1996, in the bush near the fairground. The body was partially clothed and an examination disclosed that she had been killed by a series of blows to her head with a rock. On March 11, 1997, the respondent was charged with second degree murder for the death of Amanda Cook. At his first trial in March 1998, a stay of proceedings was entered after crucial evidence was ruled inadmissible.

4 Following the first trial, the respondent was targeted by the Royal Canadian Mounted Police in an undercover operation code-named Operation Decisive. The undercover operation followed a pattern commonly employed by Canadian [page448] police. The respondent was invited by undercover officers to join a fictitious criminal organization. He was then asked to undertake certain tasks, the claimed importance of which was increased over time. The tasks included counting large sums of money and delivering parcels. The respondent was then told to be honest about his involvement in the murder of Amanda Cook. When he denied involvement, he was told that the "Boss" of the organization was angry with the person who had recruited the respondent as the respondent was a liar. The respondent was again encouraged to discuss the murder honestly. He was told that the criminal organization would arrange for a person dying of cancer to confess to the crime, and thereafter would provide assistance to the respondent in suing the government for wrongful imprisonment.

5 As a result of evidence gathered during this undercover operation, the indictment was reinstated on January 28, 1999. The second trial commenced on January 24, 2000, before a judge and jury. In the course of opening statements, Crown counsel referred to much of the information now sought to be suppressed, and the interveners the Winnipeg Free Press and the Brandon Sun reported most of it.

6 During the trial the Crown brought a motion before the trial judge to prohibit the publication of certain facts that were to be tendered in evidence. The motion sought a ban on the publication of:

> (a) the names and identities of the undercover police officers [involved] in the investigation of the accused, including any likeness of the officers, appearance of their attire and physical descriptions;
>
> (b) the conversations of the undercover operators in the investigation of the accused to the extent that they disclose the matters in paragraphs (a) and (c);
>
> (c) the specific undercover operation scenarios used in investigation... .

In these reasons, the ban set out in paragraph (a) will be referred to as "the ban as to identity"; the ban set out in paragraphs (b) and (c) will be [page449] referred to as "the ban as to operational methods".

7 The respondent opposed the application for a publication ban. The interveners, the Winnipeg Free Press and the Brandon Sun, were granted leave to intervene in the original motion. On February 2, 2000, the trial judge refused to order the ban as to operational methods. He did grant a ban as to identity limited to a period of one year. Pending the resolution of this appeal, I ordered a stay of the trial judge's decision on February 7, 2000, and made an order granting the requested publication ban in full, and an order sealing the affidavits filed with the trial judge. I also ordered that the application for leave to appeal be expedited, and leave was granted on May 25, 2000. On February 18, 2000, the trial judge ordered a mistrial as a result of a hung jury. On September 11, 2000, a third trial was commenced before a judge alone. On September 29, 2000 the respondent was acquitted of the murder of Amanda Cook.

III. Relevant Statutory and Constitutional Provisions

8 Criminal Code, *R.S.C. 1985, c. C-46*

> 676. (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal
>
> (a) against a judgment or verdict of acquittal of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;
>
> (b) against an order of a superior court of criminal jurisdiction that quashes an indictment or in any manner refuses or fails to exercise jurisdiction on an indictment;
>
> (c) against an order of a trial court that stays proceedings on an indictment or quashes an indictment; or
>
> (d) with leave of the court of appeal or a judge thereof, against the sentence passed by a trial court in [page450] proceedings by indictment, unless that sentence is one fixed by law.

Supreme Court Act, *R.S.C. 1985, c. S-26*

> 40. (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.
>
> ...
>
> (3) No appeal to the Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

Canadian Charter of Rights and Freedoms

> 2. Everyone has the following fundamental freedoms:

...

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

11. Any person charged with an offence has the

right

...

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

[page451]

IV. Judgment Below

Manitoba Court of Queen's Bench *(2000), 143 Man. R. (2d) 275*

9 Menzies J. refused the greater part of the Crown's application for a publication ban. He reviewed the decision in Dagenais v. Canadian Broadcasting Corp., *[1994] 3 S.C.R. 835*, and rejected the Crown's argument that the test for a publication ban set out in Dagenais was only applicable to motions by the accused to protect his or her right to a fair trial (p. 277). Instead, he concluded that the right to freedom of expression and to a fair trial must both be considered in applying Dagenais.

10 Menzies J. noted that the burden was on the Crown, as the party seeking the publication ban, to lay an evidentiary foundation for the necessity of such a ban, relying on Canadian Broadcasting Corp. v. New Brunswick (Attorney General), *[1996] 3 S.C.R. 480*, at para. 72. The Crown adduced evidence that the officers involved in this operation continued to be involved in undercover operations, that the identity of officers in the field would be compromised if their undercover techniques were to become known to the public, and that the overall efficacy of these types of undercover operations would also be jeopardized (pp. 278-79). Menzies J. discounted these concerns, finding that the right of the accused to a fair trial and the right to freedom of the press are both protected by the Charter, while "[t]he right of the police to maintain investigative techniques in the name of the proper administration of justice does not bring a constitutional guarantee" (p. 279).

11 He therefore declined to issue the requested ban as to operational methods employed by the police, favouring instead the subjection of police techniques to the "penetrating light of public scrutiny" (p. 279). However, Menzies J. did issue the ban as to identity for a period of one year (p. 280).

[page452]

V. Issues

12 1. Does this Court have jurisdiction under s. 40 of the Supreme Court Act to hear this appeal?

2. What is the appropriate scope of the publication ban in this case?

VI. Analysis

A. Jurisdiction

13 This Court has considered questions of its jurisdiction in respect of appeals of publication bans from the court of first instance in two recent decisions, namely Dagenais, supra, and R. v. Adams, *[1995] 4 S.C.R. 707*. In Adams, the trial judge granted a ban on publication of the name of the complainant in a sexual assault case. Upon acquitting the accused, he also ordered that the ban on publication be lifted. The Crown argued that the ban should not have been lifted. At a subsequent hearing, the trial judge upheld his own ruling revoking the ban. The Crown was not permitted to appeal the decision to the Court of Appeal because of the strictures of s. 676(1) of the Criminal Code, which allows Crown appeals only in limited circumstances. Since the order in issue had been made after the acquittal of the accused, and since no point of law alone was raised, the Crown appeal was barred by s. 676(1).

14 Sopinka J. found that this Court had jurisdiction under s. 40(1) of the Supreme Court Act to hear a direct appeal. Section 40(1) allows this Court to hear appeals by leave from "any ... judgment ... of the highest court of final resort in a province, or a judge thereof". Since the Crown was unable to appeal the order to any other court, the trial court became the "highest court of final resort" with respect to the question at issue. Sopinka J. then considered s. 40(3) of the Supreme Court Act, which removes from this Court's s. 40(1) jurisdiction appeals from the judgment of any court acquitting, convicting, setting aside or affirming a [page453] conviction, or setting aside or affirming an acquittal. He found that the order revoking the ban was not an order "integrally related" to any of the prohibited forms of appeal. Rather, it was "an order ... ancillary to the underlying judgment rendered by the court", and thus not barred by s. 40(3): R. v. Hinse, *[1995] 4 S.C.R. 597*, at para. 28 (emphasis in original). As such, the Court had jurisdiction to hear the appeal pursuant to s. 40(1).

15 Dagenais, supra, raised a similar issue. The appellant Canadian Broadcasting Corporation ("C.B.C.") was enjoined by order of the Ontario Court (General Division) from broadcasting a fictional mini-series about physical and sexual abuse of children in a Catholic institution. The applicants in the case were members of a Catholic religious order, all of whom were charged with physical and sexual abuse of young boys in their care at a Catholic training school. The applicants sought and obtained the order on the basis that their right to a fair trial would be compromised by influencing the jurors both in ongoing cases and in cases in which the juries had not yet been selected. The order was appealed to the Ontario Court of Appeal where the ban on publishing the facts of the proceedings and the sealing of the record were lifted. The broadcast was restrained in Ontario and Montreal until completion of the four criminal trials: Canadian Broadcasting Corp. v. Dagenais *(1992), 12 O.R. (3d) 239*. The remaining order was appealed to this Court.

16 Lamer C.J., writing for a majority of the Court, found that there was jurisdiction under s. 40 of the Supreme Court Act to hear the appeal. After canvassing all of the options for appeal of publication bans by third parties, he found that such orders when made by provincial court judges should be reviewed [page454] by way of certiorari, and such orders when made by superior court judges should be appealed to the Supreme Court under s. 40 of the Act. Because the intention of the jurisdiction-limiting provisions of the Criminal Code was to establish a comprehensive system of appeals that would replace the former system of writs of error, and not to minimize or reduce this Court's jurisdiction, he found that the Supreme Court Act governed our jurisdiction over appeals not explicitly excluded by the Criminal Code. The Court of Appeal did not have jurisdiction to hear the appeal, so the C.B.C. should have appealed directly to the Supreme Court. Because the trial judge issuing the ban in that case was the "court of final resort" in the matter, the Court had jurisdiction under s. 40 to hear the appeal by leave.

17 It remains the case that Parliament has not seen fit to amend the Criminal Code to provide for clear avenues of appeal in publication bans, for the Crown, the accused, or interested third parties such as the media. Faced with this continuing "jurisdictional lacuna", as Lamer C.J. put it in Dagenais, the reasoning in Dagenais and in Adams governs the appeal process to be followed in publication ban cases. I would here reiterate Lamer C.J.'s observation that the current situation, which fails to provide satisfactory routes of appeal despite the fundamental rights at stake, is "deplorable", and again express the hope that Parliament will soon fill this unnecessary and troublesome gap in the law. In that respect, I should like to emphasize that our Court and our judicial system generally greatly benefit from the role of the courts of appeal, and to eliminate their input on these important questions is most regrettable.

18 The reasoning in Dagenais and Adams should be read together in order to define this Court's jurisdiction under

s. 40(1) in cases such as the instant one where no statutory appeal lies. It remains true that the Crown and the accused have, in most cases, [page455] "established avenues to follow when seeking or challenging a ban". Dagenais, supra, at p. 857. But since Dagenais dealt only with the process to be followed by appellants who are third parties to the criminal process giving rise to such a ban, it should not be taken as foreclosing this Court's jurisdiction where s. 40 of the Act can be read to allow it. The direction that the Crown and accused follow the ordinary routes of appeal available in the Criminal Code is obviously restricted to cases where there is an available avenue of appeal.

19 In Adams, Sopinka J. applied the reasoning in Dagenais. Having found that a publication ban order had no statutory appeal process under the Criminal Code, he concluded that such an order by a superior court judge was an order by the "court of final resort". He also concluded that s. 40(3) of the Act precluded appeals to this Court of both those matters set out in the Criminal Code and those matters that are an integral part of any judgment convicting or acquitting the accused. The section thereby prevents a multiplicity of appeals from the "vast array of interlocutory orders and rulings made at trial with respect to the conduct of the proceedings". Adams, supra, at para. 17. However, the section does not preclude appeals from orders that are ancillary, or not integrally related, to the process of conviction or acquittal of the accused. Adams, supra, at para. 18; Hinse, supra, at para. 28.

20 The Supreme Court Act was passed to allow this Court to serve as a "general court of appeal for Canada", and s. 40 must be read in light of the purpose of the Court's enabling legislation. Unless the Court is specifically prohibited from entertaining appeals by s. 40(3) of the Act, it may grant leave to hear any appeal from the decision of any "court of final resort" in Canada. Parliament has seen fit to provide generally for rational routes of appeal in criminal cases. In these cases, we cannot take jurisdiction, nor would we wish to. But a purposive [page456] approach to s. 40 requires the Court to take jurisdiction where no other appellate court can do so, unless an explicit provision bars all appeals. Section 40(1) ensures that even though specific legislative provisions on jurisdiction are lacking, this Court may fill the void until Parliament devises a satisfactory solution. Concomitantly, s. 40(3) ensures that this Court is not overrun by a large volume of appeals on interim and interlocutory orders made in the context of a criminal proceeding, where Parliament has decided it best that such appeals be conducted in an orderly fashion at the conclusion of the trial and in accordance with the procedures provided in the Criminal Code.

21 The situations in which this Court has jurisdiction under s. 40 of the Supreme Court Act over direct appeals from the court of first instance are, therefore, appeals where (a) an order deals with issues ancillary, or not integrally related, to the guilt or innocence of the accused; and (b) where there is no other available right of appeal or any explicit bar to appeal. In this case, the publication ban was not integrally related to the guilt or innocence of the accused. It was neither intended to preserve the fair trial rights of the accused, nor to secure evidence that might lose its value in the context of the trial if widely known. Rather, it was sought in order to maintain the secrecy of police operations in other investigations, where breach of such secrecy was alleged to endanger the efficacy of these investigations. In addition, there was no other possible route of appeal in this case. The publication ban was issued by a superior court judge, not a provincial court judge. An order by a provincial court judge could be reviewed by way of the exceptional remedy of certiorari: Dagenais, supra, at p. 865. The harm caused by the issue or refusal of the ban could not be cured by the outcome of the trial, making this interlocutory order "final". No appeal was available under s. 676(1) of the Criminal Code, and neither the Code nor s. 40(3) of the Supreme Court Act bars the [page457] appeal. I therefore conclude that this Court has jurisdiction to hear the appeal under s. 40 of the Supreme Court Act.

B. The Publication Ban

(1) The Relevant Legal Principles

22 In considering whether this publication ban ought to have been issued, the starting point is once again this Court's decision in Dagenais, supra. In Dagenais, as I discussed above, an order was sought by four accused persons prohibiting the broadcast of a fictional television mini-series depicting factual circumstances extremely similar to the facts in issue at each of their trials, namely, physical and sexual abuse of young boys at religious training institutions. There, as here, the ban was sought on the basis of the court's common law jurisdiction to order

publication bans. However, the specific rationale for the publication ban in that case was, unlike in the instant case, the need to guard the fair trial interests of accused persons.

23 Lamer C.J. found that the "pre-Charter common law rule governing publication bans emphasized the right to a fair trial over the free expression interests of those affected by the ban". (Dagenais, supra, at p. 877). Given the courts' obligation to develop the common law in a manner consistent with Charter values, however, he found that it was inappropriate to continue assigning this priority to the right of the accused to a fair trial, when s. 2(b) of the Charter recognized an equally important right to freedom of expression. Instead, he adopted a new approach to assessing whether a common law publication ban should be ordered. This new approach aimed to balance both the right to a fair trial and the right to freedom of expression rather than enshrining one at the expense of the other. The approach adopted was intended to reflect the substance of the Oakes test [page458] and its valuable function in determining what reasonable limits on the rights to be balanced might be. Accordingly, in Dagenais, supra, Lamer C.J. found at p. 878, that:

> A publication ban should only 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. [Emphasis in original.]

24 This Court considered a similar issue -- the power to exclude media and the public from a trial -- in New Brunswick, supra. In that case, the Crown moved to exclude the public and the media from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused (who had pled guilty). The trial judge, acting pursuant to s. 486(1) of the Criminal Code, granted the order. At the request of the C.B.C., the trial judge gave reasons, which set out that he had granted the order in the interests of "the proper administration of justice", and specifically on the basis that the order would avoid "undue hardship on the persons involved, both the victims and the accused" (para. 79). The C.B.C. then brought a Charter challenge to s. 486(1). The Court of Queen's Bench concluded that s. 486(1) offended the right of freedom of expression in s. 2(b) of the Charter but was justifiable under s. 1. The Court of Appeal affirmed this judgment.

25 La Forest J., writing for a unanimous Court in New Brunswick, supra, found that the exclusion of the public and media from the courtroom under s. 486(1) was a violation of the freedom of the press under s. 2(b). Section 486(1) restricted expressive [page459] activity on its face by providing a "discretionary bar on public and media access to the courts": New Brunswick, supra, at para. 33. However, La Forest J. also found that the violation was a reasonable limit demonstrably justified under s. 1 of the Charter, provided that the discretion was exercised in accordance with the Charter's demands in each individual case. He then found, building on the Court's decision in Dagenais, that the trial judge must conduct a similar exercise in applying s. 486(1) as in applying the common law rule. That is, a judge, in exercising the discretion provided by s. 486(1), must:

> (a) ... consider the available options and consider whether there are any other reasonable and effective alternatives available;
>
> (b) ... consider whether the order is limited as much as possible; and
>
> (c) ... weigh the importance of the ... particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.
>
> (New Brunswick, supra, at para. 69)

26 La Forest J. also noted that the burden of displacing the presumption of openness rested on the party applying for the exclusion of the media and public. Furthermore, he found that there must be a sufficient evidentiary basis on the record from which a trial judge could properly assess the application (which may be presented in a voir dire),

and which would allow a higher court to review the exercise of discretion: New Brunswick, at para. 69. In considering the various factors, La Forest J. found that the order granted to protect the complainants was improperly granted. The evidence of potential undue hardship to the complainants, which primarily rested on the Crown's submission that the evidence to be brought was of a "'delicate' nature", did not displace the presumption in favour of an open court.

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27 Both Dagenais and New Brunswick set out a similar approach to be used in deciding whether to order publication bans, in view of the rights to freedom of expression and freedom of the press protected by s. 2(b) of the Charter. This approach, in ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the Charter than legislative enactment, incorporates the essence of s. 1 of the Charter and the Oakes test. In my view, the same principles are to be applied in cases such as the instant case.

28 Dagenais involved the proper application of a common law rule allowing publication bans. The ban in this case was also sought pursuant to the common law jurisdiction of the Queen's Bench as a Superior Court. However, the facts of this case invoke a different purpose and different interests from those raised by the facts of Dagenais. While the Court in Dagenais was required to reconcile the accused's interest in a fair trial with society's interest in freedom of expression, the accused's right to a fair trial in this case is not, and was never, in issue. Indeed, the accused wishes to have the information disclosed, and views the publication of certain of the details of his arrest and trial as essential to the fulfilment of his fair trial interest. Instead, it is the Crown that seeks a publication ban in order to protect the safety of police officers and preserve the efficacy of undercover police operations. Thus, a literal application of the test as set out in Dagenais will not properly account for the interests to be balanced.

29 The form of the test set out in Dagenais must, therefore, be reconfigured to account for the different purpose for which the order is sought and the different effects it will have. Lamer C.J. recognized in Dagenais that publication bans have a variety of purposes and effects. Significantly, he noted, at p. 882, that:

[page461]

> ... it is not the case that freedom of expression and the accused's right to a fair trial are always in conflict. Sometimes publicity serves important interests in the fair trial process. For example, in the context of publication bans connected to criminal proceedings, these interests include the accused's interest in public scrutiny of the court process, and all the participants in the court process.

30 This appeal implicates precisely that interest. The accused has a Charter right to a "fair and public hearing", guaranteed by s. 11(d), which he has invoked in opposition to the publication ban. The right to freedom of expression, argued by the interveners the Winnipeg Free Press and the Brandon Sun, also falls to the side opposing the publication ban. Were we to simply weigh, as in Dagenais, the accused's right to a fair trial and the public interest in freedom of expression, this would be an open and shut inquiry, since both of the competing interests recognized in the factual context of Dagenais are aligned in opposition to granting the ban.

31 However, the common law rule under which the trial judge considered the publication ban in this case is broader than its specific application in Dagenais. The rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflec[t] the substance of the Oakes test", we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right. Dagenais, supra, at p. 878. Dagenais envisioned situations where the right to a fair trial and the right to free expression directly conflicted, and the specific terms Lamer C.J. used in that case were tailored to apply in that situation. Accordingly, the test we must apply in order to determine whether the common law rule allowing trial judges to issue publication bans in the interest of the proper administration of justice will differ in specific content from the [page462] test used in Dagenais, though not in basic principle.

32 The Dagenais test requires findings of (a) necessity of the publication ban, and (b) proportionality between the ban's salutary and deleterious effects. However, while Dagenais framed the test in the specific terms of the case, it is now necessary to frame it more broadly so as to allow explicitly for consideration of the interests involved in the instant case and other cases where such orders are sought in order to protect other crucial aspects of the administration of justice. In assessing whether to issue common law publication bans, therefore, in my opinion, a better way of stating the proper analytical approach for cases of the kind involved herein would be:

> A publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

33 This reformulation of the Dagenais test aims not to disturb the essence of that test, but to restate it in terms that more plainly recognize, as Lamer C.J. himself did in that case, that publication bans may invoke more interests and rights than the rights to trial fairness and freedom of expression. This version encompasses the analysis conducted in Dagenais, and Lamer C.J.'s discussion of the relative merits of publication bans remains relevant. Indeed, in those common law publication ban cases where [page463] only freedom of expression and trial fairness issues are raised, the test should be applied precisely as it was in Dagenais. For cases where concerns about the proper administration of justice other than those two Charter rights are raised, the present, broader approach, will allow these concerns to be weighed as well. There may also be other cases which raise interests other than the administration of justice, for which a similar approach would be used, depending of course on the particular danger at issue and rights and interests at stake.

34 I would add some general comments that should be kept in mind in applying the test. The first branch of the test contains several important elements that can be collapsed in the concept of "necessity", but that are worth pausing to enumerate. One required element is that the risk in question be a serious one, or, as Lamer C.J. put it at p. 878 in Dagenais, a "real and substantial" risk. That is, it must be a risk the reality of which is well-grounded in the evidence. It must also be a risk that poses a serious threat to the proper administration of justice. In other words, it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained.

35 A second element is the meaning of "the proper administration of justice". I do not wish to restrict unduly the kind of dangers which may make a ban necessary, as discretion is an essential aspect of the common law rule in question. However, judges should be cautious in deciding what can be regarded as part of the administration of justice. Obviously the use of police operatives and informers is part of the administration of justice, as are such practices as witness protection programs. However, courts should not interpret that term so widely as to keep secret [page464] a vast amount of enforcement information the disclosure of which would be compatible with the public interest.

36 The third element I wish to mention was recognized by La Forest J. in New Brunswick, supra, at para. 69, when he formulated the three part test discussed above. La Forest J.'s second step is clearly intended to reflect the minimal impairment branch of the Oakes test, and the same component is present in the requirement at common law that lesser alternative measures not be able to prevent the risk. This aspect of the test for common law publication bans requires the judge not only to consider whether reasonable alternatives are available, but also to restrict the order as far as possible without sacrificing the prevention of the risk.

37 It also bears repeating that the relevant rights and interests will be aligned differently in different cases, and the purposes and effects invoked by the parties must be taken into account in a case-specific manner. Where the accused is seeking the publication ban on the basis that his trial will be compromised, a judge would improperly

apply the test if he relied on the right to a public trial to the disadvantage of the accused. This test exists to ground the exercise of discretion in a constitutionally sound manner, not to command the same result in every case. Trial judges must, at the outset, use their best judgment to determine which rights and interests are in conflict. In most cases this will not be overly onerous. The parties will frame their arguments in terms that make clear the interests they feel are threatened by the issuance or refusal of a publication ban and those they are ready to sacrifice in the face of the threat.

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38 In some cases, however, most notably when there is no party or intervener present to argue the interests of the press and the public to free expression, the trial judge must take account of these interests without the benefit of argument. The consideration of unrepresented interests must not be taken lightly, especially where Charter-protected rights such as freedom of expression are at stake. It is just as true in the case of common law as it is of statutory discretion that, as La Forest J. noted, "[t]he burden of displacing the general rule of openness lies on the party making the application": New Brunswick, supra, at para. 71; Dagenais, supra, at p. 875. Likewise, to again quote La Forest J. (at paras. 72-73):

> There must be a sufficient evidentiary basis from which the trial judge may assess the application and upon which he or she may exercise his or her discretion judicially... .
>
> A sufficient evidentiary basis permits a reviewing court to determine whether the evidence is capable of supporting the decision.

In cases where the right of the public to free expression is at stake, however, and no party comes forward to press for that right, the judge must consider not only the evidence before him, but also the demands of that fundamental right. The absence of evidence opposed to the granting of a ban, that is, should not be taken as mitigating the importance of the right to free expression in applying the test.

39 It is precisely because the presumption that courts should be open and reporting of their proceedings should be uncensored is so strong and so highly valued in our society that the judge must have a convincing evidentiary basis for issuing a ban. Effective investigation and evidence gathering, while important in its own right, should not be regarded as weakening the strong presumptive public interest, which may go unargued by counsel more frequently as the number of applications for publication bans increases, in a transparent court system and in generally unrestricted speech on [page466] matters of such public importance as the administration of justice.

(2) Application to the Present Appeal

(a) Necessity

40 The test set out above requires an initial consideration of what the rights and interests at issue are, and whether they militate for or against the issue of a ban, before proceeding to evaluate the purpose and effects of the ban. In this case, the interest put forward by the Crown, seeking the publication ban, was the interest of proper administration of justice. Therefore we must assess whether the ban was necessary in order to protect the proper administration of justice, not specifically in order to protect the right of the accused to a fair trial. Although the right to a fair trial is certainly a part of the proper administration of justice, the accused opposed the ban on the strength of his other s. 11 right, the right to a public trial. In addition, the trial is now long over and the right to a fair trial no longer has an immediate relevance for this accused. Thus, it would be inappropriate to consider the accused's fair trial rights under the first branch of the analysis. The second stage is the appropriate place to weigh the effects of the ban -- once it has been shown to be necessary in light of its objective -- on other rights and interests. Under the second branch, in this appeal, we must weigh the effects of the ban on (a) the right of the accused to a public trial; (b) the right of the public and the press to freedom of expression; and (c) the efficacy of the administration of justice.

(i) Ban as to Operational Methods

41 In considering the first step of the analysis, it is helpful to review what is sought to be concealed in this case. The Crown contends that undercover police operations such as the one employed against [page467] the respondent may be compromised if the details of such operations are publicized in the mass media. The level of detail claimed to constitute a danger to ongoing and future operations, if disclosed, is relatively general. In the Crown's submission, the following ten facts, the "hallmarks of the operation", must be kept from wide dissemination:

- that Mentuck was given the opportunity to join a criminal organization that would provide him with the potential to earn large sums of money so long as he showed his loyalty by confessing any past criminal activity;
- that he was told that the undercover operator was in trouble with the "Crime Boss" because it was believed that he had recruited a liar;
- that he was asked to pick up a parcel from a bus depot locker and turn the key over to the operator;
- that he was asked to pick up and deliver a vehicle on the instructions of the operator;
- that he was asked to stand guard and report any strange happenings while the undercover operator attended a meeting;
- that he was asked to help count large sums of money;
- that he was paid substantial sums of money for completing these tasks;
- that he met with the "Crime Boss" in a hotel room;
- that he was told he needed to provide details of his involvement in the death of Amanda Cook so that arrangements could be made for a person dying of cancer to confess to the crime;
- that he was told he would be assisted in suing the government for wrongful imprisonment and would be allowed to keep a minimum of $85,000 or 10% of the settlement, which ever was larger.

42 The Crown submits that these "hallmarks of the operation" need not be kept entirely secret by the publication ban, but that they must be kept out of the mass media, since the type of persons targeted [page468] by these operations are much more likely to have access to recent copies of newspapers and to television news reports than to, for instance, legal journals and law reports. Assuming that these publications can be properly identified, this would mean that lawyers, law professors and law students would be aware of the police practices, but not the general public. I find that result disquieting to say the least. But leaving that aside, if persons who are currently, or who may be prospectively, the targets of such operations read accounts of the respondent's investigation, the appellant argues, they may recognize similar experiences that have been orchestrated in the investigations of which they are the target. If this occurs, the operation will be compromised. The suspect will be unlikely to confess once he or she realizes that the criminal organization he or she has joined is a construct of the police. Indeed, the Crown suggests that there may be danger to the persons of the involved officers once the suspect becomes aware that he or she has been "duped".

43 It is my view that, on balance, the appellant does not, at this first stage of the test, make out a case that the ban as to operational methods should have issued. The serious risk at issue here is that the efficacy of present and future police operations will be reduced by publication of these details. I find it difficult to accept that the publication of information regarding the techniques employed by police will seriously compromise the efficacy of this type of operation. There are a limited number of ways in which undercover operations can be run. Criminals who are able to extrapolate from a newspaper story about one suspect that their own criminal involvement might well be a police operation are likely able to suspect police involvement based on their common sense perceptions or on similar situations depicted in popular films and books. While I accept that operations will be compromised if suspects learn that they are targets, I do not believe that media publication will seriously increase the rate of compromise. The media have reported the details of similar operations several times in the past, including this one. In spite of this

publicity, Sgt. German, in his affidavit, was only able to positively [page469] identify one instance in which media reports arguably resulted in the compromise of an operation.

44 The appellant submitted that this Court's decision in Michaud v. Quebec (Attorney General), *[1996] 3 S.C.R. 3*, recognized the legitimacy of weighing the state's interest in protecting investigative techniques and the individual's right to privacy. That much is true. However, that case, in upholding the prior existing judicial interpretation of s. 187 of the Criminal Code (a section which authorizes telephone surveillance by police), invoked different dangers from those in this appeal. Specifically, Michaud recognized the real dangers to which police informants are subject in providing the information necessary to persuade a judge that a wiretap is necessary. Real, not pretextual, criminal organizations and individuals are involved and informants will often be at serious and substantial risk of bodily harm. The concerns which drove the Court's decision in Michaud are also properly considered in this case, but do not rise to the level of danger shown in the earlier appeal.

45 I do not doubt that undercover operations can be risky, and that discovery by the targets may result in the resources and efforts of the police being wasted. There is a personal risk, as well, to the officers involved, which we must take seriously, although this risk is much less serious in this type of targeting operation (in which many officers are engaged with a single suspect) than in lone infiltrations of existing, actual criminal organizations. But, the danger to the efficacy of the operation is not significantly increased by republication of the details of similar operations that have already been well-publicized in the past. It is the incremental effect of the proposed ban, viewed in light of what has already been published before, that must be evaluated in this appeal. That is, in terms of the framework adopted above, republication of this information does not constitute [page470] a serious risk to the efficacy of police operations, and thus to that aspect of the proper administration of justice. Accordingly, in the final analysis and looking at all the circumstances, in my view this ground by itself is sufficient to dispose of the widest part of the ban as to operational methods.

(ii) The Ban as to Identity

46 However, I accept that the publication of the names and identities of the officers in question would create a serious risk to the efficacy of current, similar operations. Given that the officers involved appear to go by their real names in the course of this undercover work, publishing their names could very easily alert targets that their apparent criminal associates are in fact police officers. Furthermore, since the operations in question have already been commenced, it would obviously be unreasonable for officers to adopt pseudonyms now. The targets already know their real names. Accordingly, I agree with Menzies J. that a ban on the publication of officers' names is necessary and that there is no reasonable alternative.

47 I also agree that the ban should be restricted to a period of one year. After ongoing operations have been completed, reasonable alternative measures such as the regular use of pseudonyms, the use of different officers, and the use of different scenarios will become available to the police. Should the circumstances of a particular case change, of course, the ban may need to be shortened or extended. For that reason it will be prudent for such orders of publication bans to be made subject to further order of the court.

(b) Proportionality

(c) Ban as to Operational Methods

48 Although, strictly speaking, it is unnecessary to continue the analysis upon a finding that the ban as to operational methods is not necessary, it will often [page471] be useful to bolster that conclusion by nevertheless conducting the second part of the analysis. In this case, even if there were a serious risk demonstrated, I believe that the ban as to operational methods does not meet the proportionality component of the approach set forth in these reasons.

49 The ban as to operational methods would have the salutary effect on the administration of justice of protecting officers in the field and ensuring that the targets of the operation continue to provide useful information. In so far as

these effects are real and substantial they will constitute a salutary effect. However, as I noted above, I do not regard the proposed ban as substantially increasing the safety of officers. Since I also found above that the requested publication ban was unlikely to have significant effects on the likelihood that suspects will realize that they are being targeted in undercover operations, I do not regard the salutary effects that would be produced by the requested publication ban as significant, compelling benefits. At most this ban would produce speculative and marginal improvements in the efficacy of undercover operations and the safety of officers in the field.

50 The deleterious effects, however, would be quite substantial. In the first place, the freedom of the press would be seriously curtailed in respect of an issue that may merit widespread public debate. A fundamental belief pervades our political and legal system that the police should remain under civilian control and supervision by our democratically elected officials; our country is not a police state. The tactics used by police, along with other aspects of their operations, is a matter that is presumptively of public concern. Restricting the freedom of the press to report on the details of undercover operations that utilize deception, and that encourage the suspect to confess to specific crimes with the prospect of financial and other rewards, prevents the public from being informed critics of what may be controversial police actions.

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51 As this Court recognized in Irwin Toy Ltd. v. Quebec (Attorney General), *[1989] 1 S.C.R. 927*, at p. 976, "participation in social and political decision-making is to be fostered and encouraged", a principle fundamental to a free and democratic society. See Switzman v. Elbling, *[1957] S.C.R. 285*; R. v. Keegstra, *[1990] 3 S.C.R. 697*; Thomson Newspapers Co. v. Canada (Attorney General), *[1998] 1 S.C.R. 877*. Such participation is an empty exercise without the information the press can provide about the practices of government, including the police. In my view, a publication ban that restricts the public's access to information about the one government body that publicly wields instruments of force and gathers evidence for the purpose of imprisoning suspected offenders would have a serious deleterious effect. There is no doubt as to how crucial the role of the police is to the maintenance of law and order and the security of Canadian society. But there has always been and will continue to be a concern about the limits of acceptable police action. The improper use of bans regarding police conduct, so as to insulate that conduct from public scrutiny, seriously deprives the Canadian public of its ability to know of and be able to respond to police practices that, left unchecked, could erode the fabric of Canadian society and democracy.

52 Secondly, the right of the accused to a "fair and public hearing" would be deleteriously affected by the requested publication ban. This Court has not previously had occasion to elaborate at length on the content of the right to a "public hearing" protected by s. 11(d) of the Charter. As it is not squarely before us, I do not wish to be in any way conclusive on the issue either. It is clear, however, that s. 11(d) guarantees not only an open courtroom, but the right to have the media access that courtroom and report on the proceedings. This Court has consistently adopted a purposive approach to interpreting the text of the Charter. See, e.g., R. v. Big M Drug Mart Ltd., *[1985] 1 S.C.R. 295*; Re B.C. Motor Vehicle Act, *[1985] 2 S.C.R. 486*; Eldridge v. British Columbia (Attorney General), *[1997] 3 S.C.R. 624*. The right to a public trial is meant to [page473] allow public scrutiny of the trial process. In light of that purpose, the observations of Cory J. in discussing the right to freedom of expression are also apt when applied to the right to a public trial:

> It is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples nor mothers and 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... . 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.
>
> (Edmonton Journal v. Alberta (Attorney General), *[1989] 2 S.C.R. 1326*, at pp. 1339-40)

Given the realities of modern life and the inconvenience of the open courtroom to members of the public, the right to a public trial must include the right to have media access and report on the trial as well.

53 This public scrutiny is to the advantage of the accused in two senses. First, it ensures that the judicial system remains in the business of conducting fair trials, not mere show trials or proceedings in which conviction is a foregone conclusion. The supervision of the public ensures that the state does not abuse the public's right to be presumed innocent, and does not institute unfair procedures. See Dagenais, supra, at p. 883.

54 Second, it can vindicate an accused person who is acquitted, particularly when the acquittal is surprising and perhaps shocking to the public. In many cases, it is not clear to the public, without the advantage of a full explanation, why an accused person is acquitted despite what a reasonable person might [page474] consider compelling evidence. Where a publication ban is in place, the accused has little public answer. In the present appeal, the public was aware that a confession was in evidence. One might expect public confusion and even anger at such a seemingly nonsensical verdict, as in fact occurred in response to the acquittal underlying the companion to this appeal, O.N.E., supra. If the facts of the police operation were available to the public, the public could make an informed judgment about the reasonableness of the accused's acquittal. The accused could feel vindicated to some extent. On this basis, the publication ban sought would have a deleterious effect on the accused's right to a public trial.

55 It is clear, then, that on balance, even if the requested ban as to operational methods was necessary to prevent a serious risk to the administration of justice, it could not have been granted. The deleterious effects of the proposed ban on the right of the press to freedom of expression and the accused's right to a public trial substantially outweigh the benefits to the administration of justice.

(ii) The Ban as to Identity

56 The situation is, again, different in the case of the requested ban as to identity. The ban will reduce the potential harm to these officers currently in the field. I readily acknowledge that these officers face some degree of risk from their current targets, although the officers will usually outnumber the suspects in these cases. More importantly, the ban will assist in ensuring the efficacy of ongoing operations, since it will prevent the names and descriptions of the officers from reaching the attention of their current targets. I find that the salutary effects of the ban as to identity are significant.

[page475]

57 The deleterious effects of this ban are, on the other hand, not as substantial. The informed public debate about the propriety of the police tactics used in this and similar cases can proceed unhindered without the need for knowledge of which police officers, precisely, were involved. It is largely irrelevant to the accused's desire for public vindication whether the names of the officers are immediately known. It is true that, in general, the names of police officers who testify against accused persons need not, and should not, be the subject of publication bans in a free and democratic society. However, given the time-limited nature of the ban issued by Menzies J., and given the unusual nature of the work performed by these officers in this case, I am satisfied that this concern is outweighed by the salutary effects of the ban.

58 I disagree, however, with the appellant's request that the ban be made indefinite. As a general matter, it is not desirable for this, or any, Court to enter the business of permanently concealing information in the absence of a compelling reason to do so. The appellant suggests that the officers would be in physical danger if their identities were ever revealed. This is not a substantial enough risk to justify permanent concealment. All police officers are subject to the possibility of retributive violence from criminals they have apprehended and other persons who bear them grudges or ill-will. In rare cases this may result in tragic events, and while all efforts must be deployed to prevent such consequences, a free and democratic society does not react by creating a force of anonymous and

unaccountable police. I do not find that these officers are at a substantially greater risk than other police officers. Given a showing on the record of a future case that a specific group of officers indeed suffers a grave and long-term risk to life and limb, a permanent or extended ban would be considered.

[page476]

59 I do not, however, wish to be taken as creating a bright-line rule restricting publication bans to a year. Different cases will involve different considerations, and there may well be times when the danger to officers or to the importance of the administration of justice of police operations rises to a level of seriousness sufficient to justify the deleterious effects inherent in publication bans of a longer duration. Furthermore, these different considerations may authorize a different approach in some cases to the process of tailoring. There may be cases where a longer ban might be tailored to reduce its impact by prohibiting only the publication of the likeness or photograph of an officer, not his name. Should the police choose to adopt the practice of using pseudonyms in undercover operations, this would clearly be a sensible option that would mitigate some of the dangers of long-term secrecy.

VII. Conclusion

60 With the foregoing in mind, I would find that the ban ordered by Menzies J. was properly issued and was of the appropriate scope in light of the requirements of the Charter. It was properly tailored to meet the real concerns about the safety of officers currently in the field, and about the efficacy of operations that are still underway. The ban, and similar bans issued in accordance with the considerations set out above and in Dagenais, supra, is to be supervised by the issuing court, in this case by the Manitoba Court of Queen's Bench. Publication bans designed to protect the identity of officers should be tailored, as was done in this case, to ensure the security and anonymity of the officers while involved in undercover operations. However, such bans should not be indefinite. They should be lifted when the undercover operation comes to an end, or when it may be reasonably expected to end. It would be unwise for this Court to countenance the establishment of a permanently anonymous section of the police force in the absence of more evidence of serious and [page477] long-term danger to the security of particular officers.

61 The appeal is dismissed and the order of Menzies J. affirmed. As a result, I would quash the previous order granting the requested publication ban in full pending this appeal and restore the order of Menzies J. dated February 2, 2000 subject to further order of the Court of Queen's Bench. However, I substitute proprio motu, in calculating the one-year duration of the allowed ban, the date that this judgment is released for the date Menzies J.'s order was released to comply with the spirit of that order. The respondent should have his costs in this Court and the court below.

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Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (Re R. v. Carson), [1996] 3 S.C.R. 480

Supreme Court Reports

Supreme Court of Canada

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

1996: March 29 / 1996: October 31.

File No.: 24305.

[1996] 3 S.C.R. 480 | *[1996] 3 R.C.S. 480* | *[1996] S.C.J. No. 38* | *[1996] A.C.S. no 38*

Canadian Broadcasting Corporation, appellant; v. The Attorney General for New Brunswick, His Honour Douglas Rice and Gerald Carson, respondents, and The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Manitoba, the Attorney General of British Columbia, the Attorney General for Saskatchewan and the Attorney General for Alberta, interveners.

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

Case Summary

Constitutional law — Charter of Rights — Freedom of expression — Freedom of the press — Trial judge excluding public and media from courtroom during part of accused's sentencing proceedings — Whether s. 486(1) of Criminal Code infringes freedoms of expression and of the press — If so, whether s. 486(1) justifiable in a free and democratic society — Canadian Charter of Rights and Freedoms, ss. 1, 2(b) — Criminal Code, R.S.C., 1985, c. C-46, s. 486(1).

Criminal law — Exclusion of public from court — Trial judge excluding public and media from courtroom during part of accused's sentencing proceedings — Whether trial judge exceeded his jurisdiction in making such order — Criminal Code, R.S.C., 1985, c. C-46, s. 486(1).

The accused pleaded guilty to two charges of sexual assault and two charges of sexual interference involving young female persons. On a motion by the Crown, consented to by defence counsel, the trial judge ordered the exclusion of the public and the media from those parts of the sentencing proceedings dealing with the specific acts committed by the accused, pursuant to s. 486(1) of the Criminal Code. The order was sought on the basis of the nature of the evidence, which the court had not yet heard and which purportedly established that the offence was of a "very delicate" nature. The exclusion order remained in effect for approximately 20 minutes. Afterwards, following a request by the CBC, the trial judge gave reasons for making the exclusion order, stating that it had been rendered in the interests of the "proper administration of justice"; it would avoid "undue hardship on the persons involved, both the victims and the accused". The CBC challenged the constitutionality of s. 486(1) before the Court of Queen's Bench. The court held that s. 486(1) constituted an infringement on the freedom of the press protected by s. 2(b) of the Canadian Charter of Rights and Freedoms but that the infringement was justifiable under s. 1 of the Charter. The court also held that the trial judge had not exceeded his jurisdiction in making the exclusion order. The Court of Appeal affirmed the judgment.

Held: The appeal should be allowed.

(1) Constitutional law issue

The open court principle is one of the hallmarks of a democratic society, fostering public confidence in the integrity of the court system and understanding of the administration of justice. This principle is inextricably tied to the rights guaranteed by s. 2(b) of the Charter. The freedom to express ideas and opinions about the operation of the courts and the right of members of the public to obtain information about them are clearly within the ambit of s. 2(b). As well, s. 2(b) protects the freedom of the press to gather and disseminate this information. Members of the public in general rely and depend on the media to inform them and, as a vehicle through which information pertaining to courts is transmitted, the press must be guaranteed access to the courts in order to gather information. Measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press guaranteed by s. 2(b). To the extent that such measures prohibit public access to the courts and to information about the courts, they may also be said to restrict freedom of expression in so far as it encompasses the freedom of listeners to obtain information that fosters public criticism of the courts. The recognition of the importance of public access to the courts as a fundamental aspect of our democratic society should not be understood, however, as affirming a right to be physically present in the courtroom; there may be a shortage of space. Nor should it be seen as extending public access to all venues within which the criminal law is administered. By its facial purpose, s. 486(1) of the Code restricts expressive activity, in particular the free flow of ideas and information, in providing a discretionary bar on public and media access to the courts. This is sufficient to ground a violation of s. 2(b).

The exclusion of the public under s. 486(1) of the Code is a means by which the court may control the publicity of its proceedings with a view to protecting the innocent and safeguarding privacy interests and thereby afford a remedy to the underreporting of sexual offences. This provision constitutes a reasonable limit on the freedoms guaranteed by s. 2(b) of the Charter. Section 486(1) is aimed at preserving the general principle of openness in criminal proceedings to the extent that openness is consistent with and advances the proper administration of justice. In situations where openness conflicts with the proper administration of justice, s. 486(1) purports to further the proper administration of justice by permitting covertness where necessary. This objective is of sufficient importance to warrant overriding a constitutional freedom. Section 486(1) is also proportionate to the legislative objective. First, the means adopted -- a discretionary power in the trial judge to exclude the public where it is in the interests of the proper administration of justice -- is rationally connected to the objective. The trial judge must exercise his discretion in conformity with the Charter and the grant of this judicial discretion necessarily ensures that any order made under s. 486(1) will serve the objective of furthering the administration of justice. If it is not rationally connected to the objective, then the order will constitute an error of law. Second, s. 486(1) impairs the rights under s. 2(b) as little as reasonably possible in order to achieve the objective. The discretion conferred on trial judges by s. 486(1) is not overbroad. Section 486(1) provides an intelligible and workable standard -- the proper administration of justice -- according to which the judiciary can exercise the discretion conferred. It also arms the judiciary with a useful and flexible interpretative tool to accomplish its goal of preserving the openness principle, subject to what is required by the proper administration of justice. Again, since the discretion must be exercised in a manner that conforms with the Charter, the discretionary aspect of s. 486(1) guarantees that the impairment is minimal. An order that fails to impair the rights at stake as little as possible will constitute an error. Third, the salutary effects of s. 486(1) outweigh the deleterious effects. Parliament has attempted to balance the different interests affected by s. 486(1) by ensuring a degree of flexibility in the form of judicial discretion, and by making openness the general rule and permitting exclusion of the public only when public accessibility would not serve the proper administration of justice. The discretion necessarily requires that the trial judge weigh the importance of the interests the order seeks to protect against the importance of openness and specifically the particular expression that is limited. In this way, proportionality is guaranteed by the nature of the judicial discretion. In deciding whether to order exclusion of the public pursuant to s. 486(1), a trial judge should bear in mind whether the type of expression that may be impaired by the order infringes upon the core values sought to be protected.

(2) Criminal law issue

In applying s. 486(1) to order the exclusion of the public, the trial judge must exercise his discretion in conformity with the Charter. He must (a) consider available options and whether there are any other reasonable and

effective alternatives available; (b) consider whether the order is limited as much as possible; and (c) weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate. Additionally, the burden of displacing the general rule of openness lies on the party making the application. The applicant bears the burden of proving: that the particular order is necessary, in terms of relating to the proper administration of justice; that the order is as limited as possible; and that the salutary effects of the order are proportionate to its deleterious effects. In relation to the proportionality issue, if the order is sought to protect a constitutional right, this must be considered. There must also be a sufficient evidentiary basis from which the trial judge may assess the application and upon which he may exercise his discretion judicially. In some cases in which the facts are not in dispute the statement of counsel will suffice. If there is insufficient evidence placed before the trial judge, or there is a dispute as to the relevant facts, the applicant should seek to have the evidence heard in camera.

Since the trial judge considering an application to exclude the public is usually in the best position to assess the demands in a given situation, where the record discloses facts that may support the trial judge's exercise of discretion, it should not lightly be interfered with. In this case, however, the trial judge erred in excluding the public from any part of the proceedings. There was insufficient evidence to support a concern for undue hardship to the complainants or to the accused. The order was unnecessary to further the proper administration of justice and its deleterious effects were not outweighed by its salutary effects. The mere fact that the victims are young females is not, in itself, sufficient to warrant exclusion. The victims' privacy was already protected by a publication ban and there was no evidence that their privacy interests required more protection. While the criminal justice system must be ever vigilant in protecting victims of sexual assault from further victimization, the record before the trial judge did not establish that undue hardship would befall the victims in the absence of a s. 486(1) order. Nor did the record reveal that there were any other reasons to justify an exception to the general rule of openness. Finally, barring exceptional cases, there is no issue of hardship to the accused arising from prejudicial publicity once the accused has pleaded guilty.

Cases Cited

Applied: Dagenais v. Canadian Broadcasting Corp., *[1994] 3 S.C.R. 835*; referred to: Danson v. Ontario (Attorney General), *[1990] 2 S.C.R. 1086*; Edmonton Journal v. Alberta (Attorney General), *[1989] 2 S.C.R. 1326*; Scott v. Scott, [1913] A.C. 419; Re Southam Inc. and The Queen (No.1) *(1983), 41 O.R. (2d) 113*; Attorney General of Nova Scotia v. MacIntyre, *[1982] 1 S.C.R. 175*; Canadian Broadcasting Corp. v. Lessard, *[1991] 3 S.C.R. 421*; Canadian Broadcasting Corp. v. New Brunswick (Attorney General), *[1991] 3 S.C.R. 459*; Canadian Newspapers Co. v. Canada (Attorney General), *[1988] 2 S.C.R. 122*; Irwin Toy Ltd. v. Quebec (Attorney General), *[1989] 1 S.C.R. 927*; R. v. Keegstra, *[1990] 3 S.C.R. 697*; Ross v. New Brunswick School District No. 15, *[1996] 1 S.C.R. 825*; R. v. Oakes, *[1986] 1 S.C.R. 103*; United Nurses of Alberta v. Alberta (Attorney General), *[1992] 1 S.C.R. 901*; B.C.G.E.U. v. British Columbia (Attorney General),[1988] 2 S.C.R. 214; Morris v. Crown Office, [1970] 1 All E.R. 1079; R. v. O'Connor, *[1995] 4 S.C.R. 411*; R. v. L. (D.O.), *[1993] 4 S.C.R. 419*; RJR-MacDonald Inc. v. Canada (Attorney General), *[1995] 3 S.C.R. 199*; R. v. Beare, *[1988] 2 S.C.R. 387*; R. v. Nova Scotia Pharmaceutical Society, *[1992] 2 S.C.R. 606*; Osborne v. Canada (Treasury Board), *[1991] 2 S.C.R. 69*; R. v. Brint *(1979), 45 C.C.C. (2d) 560*; R. v. Lefebvre *(1984), 17 C.C.C. (3d) 277*, *[1984] C.A. 370*; R. v. McArthur *(1984), 13 C.C.C. (3d) 152*; R. v. Vandevelde *(1994), 89 C.C.C. (3d) 161*; R. v. Quesnel and Quesnel *(1979), 51 C.C.C. (2d) 270*.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 11(d).

Criminal Code, R.S.C., 1985, c. C-46, ss. 151 [rep. & sub. c. 19 (3rd Supp.), s. 1], 271(1)(a), 486(1) [am. c. 27 (1st Supp.), s. 203], (3) [rep. & sub. c. 23 (4th Supp.), s. 1].

Authors Cited

Lepofsky, M. David. Open Justice: The Constitutional Right to Attend and Speak About Criminal Proceedings. Toronto: Butterworths, 1985.
Mill, James. "Liberty of the Press". In Essays on Government, Jurisprudence, Liberty of the Press, and Law of Nations. Reprints of Economic Classics. New York: Augustus M. Kelley, 1967.

APPEAL from a judgment of the New Brunswick Court of Appeal *(1994), 148 N.B.R. (2d) 161*, 378 A.P.R. 161, *116 D.L.R. (4th) 506*, *91 C.C.C. (3d) 560*, *32 C.R. (4th) 334*, dismissing the appellant's appeal from a judgment of Landry J. *(1993), 143 N.B.R. (2d) 174*, 366 A.P.R. 174, dismissing its application to quash an order of Rice Prov. Ct. J. excluding the public and media from part of the sentencing proceedings. Appeal allowed.

André G. Richard, Marie-Claude Bélanger-Richard and Jacques McLaren, for the appellant. Graham J. Sleeth, Q.C., for the respondents. Graham Garton, Q.C., and Barbara Kothe, for the intervener the Attorney General of Canada. M. David Lepofsky and James K. Stewart, for the intervener the Attorney General for Ontario. Deborah Carlson, for the intervener the Attorney General of Manitoba. Galvin C. Deedman, for the intervener the Attorney General of British Columbia. Graeme G. Mitchell, for the intervener the Attorney General for Saskatchewan. Written submissions only by Jack Watson, Q.C., for the intervener the Attorney General for Alberta.

Solicitors for the appellant: Stewart McKelvey Stirling Scales, Moncton. Solicitor for the respondents: The Office of the Attorney General, Fredericton. Solicitor for the intervener the Attorney General of Canada: George Thomson, Ottawa. Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto. Solicitor for the intervener the Attorney General of British Columbia: The Ministry of the Attorney General, Vancouver. Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg. Solicitor for the intervener the Attorney General for Saskatchewan: W. Brent Cotter, Regina. Solicitor for the intervener the Attorney General for Alberta: Jack Watson, Edmonton.

The judgment of the Court was delivered by

LA FOREST J.

1 This appeal is brought by the Canadian Broadcasting Corporation ("CBC") from the judgment of the New Brunswick Court of Appeal dismissing an appeal from a decision of Landry J. who had refused to quash an order of Rice Prov. Ct. J. restricting public access to the courtroom. The order in question was made pursuant to s. 486(1) of the Criminal Code, R.S.C., 1985, c. C-46, which reads:

> 486. (1) 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.

The order mandated the exclusion of the public and the media from the courtroom during part of the sentencing proceedings of the respondent, Gerald Carson. A pre-existing non-identification order, made pursuant to s. 486(3) of the Code, was already in effect. The CBC now seeks a declaration that s. 486(1) is of no force or effect as infringing s. 2(b) of the Canadian Charter of Rights and Freedoms and cannot be justified under s. 1 of the Charter. In the alternative, if the provision is held to be constitutionally valid, the CBC seeks a declaration that Rice Prov. Ct. J. exceeded his jurisdiction in making the exclusion order. If such a declaration is made, it further seeks an order quashing the exclusion order and a mandatory order granting access to the media and the public to a transcript of the proceedings held in camera.

I. Facts

2 The facts are straightforward. The respondent, Gerald Carson, a prominent Moncton resident, pleaded guilty to two charges of sexual assault, contrary to s. 271(1)(a) of the Code, and two charges of sexual interference, contrary to s. 151 of the Code. On motion by Crown counsel, consented to by defence counsel, Rice Prov. Ct. J. ordered the exclusion of the public and the media, with the exception of the accused, the victims, their immediate families and a victim services coordinator, from those parts of the sentencing proceedings dealing with the specific acts committed by Carson. The exclusion order remained in effect for approximately 20 minutes. The order was sought on the basis of the nature of the evidence, which the court had not yet heard, and which purportedly established that the offence was of a "very delicate" nature. Crown counsel further pointed to the fact that the case involved young, female persons.

3 André Veniot, a CBC reporter, was excluded from the court along with the other members of the media and the public. Shortly after the public had been invited to reattend the proceedings, a lawyer retained by Veniot was granted permission to address the court. She requested that Rice Prov. Ct. J. give reasons for making the exclusion order. In maintaining his order, Rice Prov. Ct. J. stated that it had been rendered in the interests of the proper administration of justice; it would avoid undue hardship to the victims and the accused.

II. Judicial History

Court of Queen's Bench *(1993), 143 N.B.R. (2d) 174*

4 A constitutional challenge to s. 486(1) of the Code was then made before the Court of Queen's Bench of New Brunswick on the basis of s. 2(b) of the Charter. Landry J., who heard the matter, held that since s. 486(1) limits or prohibits the right of the public and the press to gather and publish information in court proceedings in certain instances, it constitutes an infringement on the freedom of the press protected by s. 2(b).

5 Landry J. then considered whether the infringement could be saved by s. 1 of the Charter as being reasonable and demonstrably justified in a free and democratic society. He found that s. 486(1) addressed a pressing and substantial objective since it was a mechanism to ensure the "proper administration of justice" (p. 179). He also determined that the infringement is proportionate to that objective. He stated: "There exists a rational connection between the section and the objective, the section impairs the freedom as little as possible and there is some balance between the importance of the objective and the injurious effect of the section" (p. 179). He, therefore, concluded that s. 486(1) is saved by s. 1 of the Charter.

6 In deciding whether the trial judge had exceeded his jurisdiction in ordering the exclusion of the public, Landry J. noted that the test was not whether he would have excluded the public in the same circumstances. The proper administration of justice, which Rice Prov. Ct. J. relied on, was an appropriate reason for the exercise of his discretion in this case. Landry J. further noted that the public and the press were excluded for a short period of time only and as such he found no injustice had been done to the parties involved in the proceedings. Finally, he stated (at pp. 181-82):

> It is important for the proper administration of justice to preserve the discretion provided by s. 486(1) and a Court of Appeal should not substitute its judgment for that of a judge who felt compelled to exercise a discretion as did the judge in the present case. Although this is a borderline case I find that the judge acted within his jurisdiction by excluding the public. It would, however, have been preferable if the judge had elaborated more on his reasons for excluding the public and the press.

Court of Appeal *(1994), 148 N.B.R. (2d) 161*

> Hoyt C.J.N.B. (for the majority)

7 In the Court of Appeal, Hoyt C.J.N.B. (speaking for himself and Turnbull J.A.) expressed the view that freedom of expression, as protected by s. 2(b) of the Charter, includes the right of the media, as well as any member of the public, to attend criminal trials. He agreed with Landry J.'s finding that s. 486(1) limits freedom of expression and is, therefore, contrary to s. 2(b), but he also agreed that the provision could be saved by s. 1 of the Charter. The case, he found, illustrates why s. 486(1) can be justified; the failure to have made the order would likely have resulted in the further victimization of the complainants, by permitting details of the offences to be published and the possible identification of the complainants. And this was so notwithstanding that a non-publication order was already in effect.

8 As to the particular exercise of discretion by Rice Prov. Ct. J., he agreed with Landry J. that it was not for him to say whether he would have exercised the discretion in the same fashion. He found it was Rice Prov. Ct. J.'s belief that the young complainants in this case deserved protection. That being so, he concluded: "For this reason alone, I cannot say that he was wrong in making the order, even though, in my view, he may have taken an irrelevant factor into consideration, namely, the protection of the accused from undue hardship" (p. 169). He did not rule out the protection of the accused as a factor in other cases; however, he concluded that Rice Prov. Ct. J.'s other reasons were sufficient.

> Angers J.A.

9 Angers J.A. concurred, but for different reasons. He first observed that most of the issues raised by the appellant were moot since the trial was over and the sentence had been imposed. He further noted that it would be wrong for a non-party to the proceedings to succeed in having an interlocutory order quashed or altered when the parties themselves could not appeal. He next discussed the right to a public trial as a means of protecting the accused. The right was prescribed in s. 486(1) of the Code and guaranteed by s. 11(d) of the Charter. He noted, however, that there was no express right in any legislation, including the Charter, giving the public access to trials; rather, in criminal law the right of the public to be present in court is merely a corollary of the right of the accused to a public trial. As such, it is a subordinate to, and cannot prevail over the principal right. In his view, s. 486(1) provides the necessary guidelines to permit the presiding judge to exercise his or her discretion in a judicial manner. Given the respondent Carson's consent to the order, he found that a possible infringement of the respondent's s. 11(d) right did not arise.

10 Angers J.A. stated that he could not accept that s. 2(b) of the Charter gives the media better access to court proceedings than members of the public. He added (at p. 174):

> The principle of a public trial goes beyond a particular accused and must be approached while keeping in mind the reasons that led to the right: that no person be convicted of a criminal offence behind closed doors or on secret and unknown evidence. It is the duty of all those involved in the administration of the criminal justice system to see that the principle is upheld. While the public, through the Attorney General, is involved in the administration of criminal justice, the media per se is not. Its interests are different. Its duty is to inform, its temptation to entertain. It was given and it should have the constitutional freedom to perform its duty to inform, but the gathering of information involves different considerations such as individual privacy, defamation, due process of law, fair trial. . . .

11 Angers J.A. concluded that s. 486(1) involves a balancing between the constitutional rights of an accused to a public trial and the protection of a certain class of witnesses or potential witnesses. It had nothing to do with, and does not infringe on any freedom of the press to publish what is legally permissible. The argument of the media that freedom to publish necessarily includes freedom to gather information was, in his view, really "misleading and fallacious" (p. 175).

III. Issues

12 The CBC then sought and was granted leave to appeal to this Court. Two major issues arise in this appeal. The first relates to the constitutionality of s. 486(1) of the Code and is conveniently set forth in the constitutional questions stated by the Chief Justice on September 18, 1995:

1. Does s. 486(1) of the Criminal Code, R.S.C., 1985, c. C-46, limit the freedom of expression of the press in whole or in part as guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms?
2. If so, is the limit one that can be justified in accordance with s. 1 of the Charter?

The second issue is whether Rice Prov. Ct. J. exceeded his jurisdiction in making the order excluding members of the media and the public from a part of the sentencing proceedings, thereby committing reversible error.

13 Before turning to these issues, I propose to address some preliminary matters raised by the interveners. The first of these matters, brought to our attention by the Attorney General for Ontario, relates to the sequence in which the Court should deal with the issues. He argued that the constitutionality of the provision should not be considered until it has been determined whether Rice Prov. Ct. J. properly exercised his discretion. If he did not, then he acted without jurisdiction, and the constitutional question need not, and should not, be considered. Such an approach may certainly be appropriate in some situations, but in the present case, I am disposed to deal with the constitutional question with a view to providing guidance to courts faced with the issue in the future.

14 A second preliminary matter, raised by the Attorney General of Canada, concerns the appropriate scope of constitutional review to be undertaken in relation to s. 486(1). Rice Prov. Ct. J. granted the order of exclusion solely on the basis of the "proper administration of justice". The Attorney General of Canada contends that the Court should not go beyond the circumstances of this case and review the constitutionality on each of the three grounds for exclusion set forth in s. 486(1).

15 This Court has in the past exhibited a reluctance to consider the constitutionality of legislative provisions in the absence of a proper factual foundation; see Danson v. Ontario (Attorney General), *[1990] 2 S.C.R. 1086*. To accede to the appellant's contention that the other grounds be constitutionally reviewed would require us to conduct such review in the absence of a factual framework, contrary to this Court's practice. Moreover, it would be dangerous to make a determination of the constitutionality of the other two grounds for exclusion under s. 486(1) by extrapolation from the constitutional review of the proper administration of justice ground; the values and interests invoked may differ depending upon the specific legislative context. It is best, then, to leave to another day the constitutionality of the other two statutory grounds for exclusion, and to focus solely on the ground relied upon by Rice Prov. Ct. J., i.e., the proper administration of justice.

16 I come then to an analysis of the major issues, beginning with the constitutional issue.

IV. The Constitutional Issue

A. Section 2(b) of the Charter

17 This appeal engages two essential issues in relation to s. 2(b). The first is integrally linked to the concept of

representative democracy and the corresponding importance of public scrutiny of the criminal courts. It involves the scope of public entitlement to have access to these courts and to obtain information pertaining to court proceedings. Any such entitlement raises the further question: the extent to which protection is afforded to listeners in addition to speakers by freedom of expression. The second issue relates to the first, in so far as it recognizes that not all members of the public have the opportunity to attend court proceedings and will, therefore, rely on the media to inform them. Thus, the second issue is whether freedom of the press protects the gathering and dissemination of information about the courts by members of the media. In particular, it involves recognition of the integral role played by the media in the process of informing the public. Both of these issues invoke the democratic function of public criticism of the courts, which depends upon an informed public; in turn, both relate to the principle of openness of the criminal courts.

18 The freedom of individuals to discuss information about the institutions of government, their policies and practices, is crucial to any notion of democratic rule. The liberty to criticize and express dissentient views has long been thought to be a safeguard against state tyranny and corruption. James Mill put it this way:

> So true it is, however, that the discontent of the people is the only means of removing the defects of vicious governments, that the freedom of the press, the main instrument of creating discontent, is, in all civilized countries, among all but the advocates of misgovernment, regarded as an indispensable security, and the greatest safeguard of the interests of mankind.
>
> ("Liberty of the Press", in Essays on Government, Jurisprudence, Liberty of the Press, and Law of Nations (1825 (reprint ed. 1967)), at p. 18.)

19 This Court has had occasion to discuss the freedom to criticize encompassed in freedom of expression and its relation to the democratic process in Edmonton Journal v. Alberta (Attorney General), *[1989] 2 S.C.R. 1326*, where Cory J. stated that it is difficult to think of a guaranteed right more important to a democratic society than freedom of expression. At page 1336, he declared:

> Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized.

20 It cannot be disputed that the courts, and particularly the criminal courts, play a critical role in any democracy. It is in this forum that the rights of the powerful state are tested against those of the individual. As noted by Cory J. in Edmonton Journal, courts represent the forum for the resolution of disputes between the citizens and the state, and so must be open to public scrutiny and to public criticism of their operations.

21 The concept of open courts is deeply embedded in the common law tradition. The principle was described in the early English case of Scott v. Scott, [1913] A.C. 419 (H.L.). A passage from the reasons given by Lord Shaw of Dunfermline is worthy of reproduction for its precise articulation of what underlies the principle. He stated at p. 477:

> It moves Bentham over and over again. "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." "The security of securities is publicity." But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: "Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise."

22 The importance of ensuring that justice be done openly has not only survived: it has now become "one of the hallmarks of a democratic society"; see Re Southam Inc. and The Queen (No.1) *(1983), 41 O.R. (2d) 113* (C.A.), at p. 119. The open court principle, seen as "the very soul of justice" and the "security of securities", acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law. In Attorney General of Nova Scotia v. MacIntyre, *[1982] 1 S.C.R. 175*, openness was held to be the rule, covertness the exception, thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice.

23 The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place. Cory J. in Edmonton Journal described the equally important aspect of freedom of expression that protects listeners as well as speakers and ensures that this right to information about the courts is real and not illusory. At pages 1339-40, he states:

> That is to say as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role. 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. [Emphasis added.]

That the right of the public to information relating to court proceedings, and the corollary right to put forward opinions pertaining to the courts, depend on the freedom of the press to transmit this information is fundamental to an understanding of the importance of that freedom. The full and fair discussion of public institutions, which is vital to any democracy, is the raison d'être of the s. 2(b) guarantees. Debate in the public domain is predicated on an informed public, which is in turn reliant upon a free and vigorous press. The public's entitlement to be informed imposes on the media the responsibility to inform fairly and accurately. This responsibility is especially grave given that the freedom of the press is, and must be, largely unfettered. The significance of the freedom and its attendant responsibility lead me to the second issue relating to s. 2(b).

24 Essential to the freedom of the press to provide information to the public is the ability of the press to have access to this information. In Canadian Broadcasting Corp. v. Lessard, *[1991] 3 S.C.R. 421*, I noted that freedom of the press not only encompassed the right to transmit news and other information, but also the right to gather this information. At pp. 429-30, I stated:

> There can be no doubt, of course, that it comprises the right to disseminate news, information and beliefs. This was the manner in which the right was originally expressed, in the first draft of s. 2(b) of the Canadian Charter of Rights and Freedoms before its expansion to its present form. However, the freedom to disseminate information would be of little value if the freedom under s. 2(b) did not also encompass the right to gather news and other information without undue governmental interference. [Emphasis added.]

25 It is by ensuring the press access to the courts that it is enabled to comment on court proceedings and thus inform the public of what is transpiring in the courts. To this end, Cory J. stated in Canadian Broadcasting Corp. v. New Brunswick (Attorney General), *[1991] 3 S.C.R. 459*, at p. 475:

> The media have a vitally important role to play in a democratic society. It is the media that, by gathering and disseminating news, enable members of our society to make an informed assessment of the issues which may significantly affect their lives and well-being.

26 From the foregoing, it is evident that s. 2(b) protects the freedom of the press to comment on the courts as an essential aspect of our democratic society. It thereby guarantees the further freedom of members of the public to develop and to put forward informed opinions about the courts. As a vehicle through which information pertaining to these courts is transmitted, the press must be guaranteed access to the courts in order to gather information. As noted by Lamer J., as he then was, in Canadian Newspapers Co. v. Canada (Attorney General), *[1988] 2 S.C.R. 122*, at p. 129: "Freedom of the press is indeed an important and essential attribute of a free and democratic society, and measures which prohibit the media from publishing information deemed of interest obviously restrict that freedom." Similarly, it may be said that measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press. To the extent that such measures prohibit public access to the courts and to information about the courts, they may also be said to restrict freedom of expression in so far as it encompasses the freedom of listeners to obtain information that fosters public criticism of the courts.

27 At this point, however, I should like to make a number of caveats to the recognition of the importance of public access to the courts as a fundamental aspect of our democratic society. First of all, this recognition is not to be confused with, nor do I wish to be understood as affirming a right to be physically present in the courtroom. Circumstances may produce a shortage of physical space, such that individual members of the media and the public may be denied physical access to the courts. In such circumstances, those excluded may have to rely on those present to relay information about the proceedings.

28 To this I would add a further caveat. I do not accept that the necessary consequence of recognizing the importance of public access to the courts is the recognition of public access to all facets of public institutions. The intervener, Attorney General for Saskatchewan argues that if an open court system is to be protected under s. 2(b) of the Charter on the basis that the public has an entitlement to information about proceedings in the criminal courts, then all venues within which the criminal law is administered will have to be accessible to the public, including jury rooms, a trial judge's chambers and the conference rooms of appellate courts. The fallacy with this argument is that it ignores the fundamental distinction between the criminal courts, the subject of this appeal, and the other venues mentioned by the intervener. Courts are and have, since time immemorial, been public arenas. The same cannot be said of these other venues. Thus, to argue that constitutional protection should be extended to public access to these private places, on the basis that public access to the courts is constitutionally protected, is untenable.

29 Furthermore, this Court has noted on previous occasions that public access to certain judicial processes would render the administration of justice unworkable; see MacIntyre, supra. The importance of ensuring that the administration of justice is not rendered unworkable provides a palpable reason for prohibiting public access to many of the other types of processes of which the intervener makes mention. Indeed, as we have seen in this case, the open court principle itself must yield to circumstances that would render the proper administration of justice unworkable.

B. Does Section 486(1) of the Criminal Code Infringe Section 2(b)?

30 At common law, the rule of public access to the courts was subject to certain exceptions, primarily where it was deemed necessary for the administration of justice. In Scott, supra, Earl Loreburn, at pp. 445-46, described the basis for exclusion of the public from the courts in these terms:

> Again, the Court may be closed or cleared if such a precaution is necessary for the administration of justice. Tumult or disorder, or the just apprehension of it, would certainly justify the exclusion of all from whom such

> interruption is expected, and, if discrimination is impracticable, the exclusion of the public in general. Or witnesses may be ordered to withdraw, lest they trim their evidence by hearing the evidence of others.

31 The common law is effectively reflected in the current Canadian statutory form of the rule, s. 486(1) of the Code, which begins with "[a]ny proceedings against an accused shall be held in open court", thereby preserving and giving statutory effect to the general rule of openness. It then vests in a trial judge the discretion to make an exclusionary order for, among other reasons, the furtherance of the proper administration of justice.

32 The appellant submits that s. 486(1) infringes s. 2(b) of the Charter. Having said that s. 2(b) protects the freedom of the press to gather and disseminate information relating to court proceedings, and protects the freedom of the public to comment upon our criminal courts as an essential attribute of our democratic society, a provision that excludes the public and the media from the courtroom must infringe s. 2(b).

33 By its facial purpose, s. 486(1) restricts expressive activity, in particular the free flow of ideas and information, in providing a discretionary bar on public and media access to the courts. This is sufficient to ground a violation; any provision that has as its purpose the restriction of expression will necessarily violate s. 2(b); see Irwin Toy Ltd. v. Quebec (Attorney General), *[1989] 1 S.C.R. 927*, at p. 974.

34 Admittedly, s. 486(1) only permits such restriction on freedom of expression and freedom of the press where values of superordinate importance so require. To this end, the respondents argue that s. 486(1) supports, as opposed to violates, the values of the Charter, in that it permits the courts to maintain control over their own processes, as well as advancing core values including the protection of victims and witnesses, privacy interests and inherent limitations on freedom of expression such as public order and decency. In answer to the respondents' submissions, however, it is to be noted that this Court has repeatedly favoured a balancing of competing interests at the s. 1 stage of analysis. Specifically, Dickson C.J. stated in R. v. Keegstra, *[1990] 3 S.C.R. 697*, that "s. 1 of the Charter is especially well suited to the task of balancing" and found that freedom of expression jurisprudence supported that view. He continued, at p. 734:

> It is, in my opinion, inappropriate to attenuate the s. 2(b) freedom on the grounds that a particular context requires such; the large and liberal interpretation given the freedom of expression in Irwin Toy indicates that the preferable course is to weigh the various contextual values and factors in s. 1. [Emphasis in original.]

35 This approach was again adopted in the recent case of Ross v. New Brunswick School District No. 15, *[1996] 1 S.C.R. 825*, where the broad, purposive interpretation to be favoured in relation to s. 2(b) is discussed. At para. 75, it is stated that "[t]he important thing is that the competing values of a free and democratic society have to be adequately weighed in the appropriate context." Thus, I conclude that s. 486(1) of the Code infringes s. 2(b) of the Charter and leave to s. 1 an assessment of the competing interests and factors tending to justify restrictions on the guaranteed freedom.

C. Section 1 Analysis

36 I turn now to an examination of whether s. 486(1) is reasonable and demonstrably justified in a free and democratic society within the meaning of s. 1 of the Charter following the analytical framework developed by this Court in R. v. Oakes, *[1986] 1 S.C.R. 103*. But in undertaking this task, it must be remembered, a formalistic approach must be avoided. Regard must be had to all circumstances. The Court thus described the proper approach to be taken in Ross, supra, at para. 78:

> . . . the Oakes test should be applied flexibly, so as to achieve a proper balance between individual rights and community needs. In undertaking this task, courts must take into account both the nature of the infringed right and the specific values the state relies on to justify the infringement. This involves a close attention to context. McLachlin J. in RJR-MacDonald, supra, reiterated her statement in Rocket v. Royal

> College of Dental Surgeons of Ontario, *[1990] 2 S.C.R. 232*, at pp. 246-47, that conflicting values must be placed in their factual and social context when undertaking a s. 1 analysis. [Emphasis added.]

Having affirmed the flexible and contextual approach to be taken, it is apposite to examine the context within which this appeal arises in light of the specific values engaged.

37 The first such value is the power vested in courts of criminal jurisdiction to control their own process in furtherance of the rule of law. This was recognized in United Nurses of Alberta v. Alberta (Attorney General), *[1992] 1 S.C.R. 901*, where McLachlin J. noted that "[t]he rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect" (p. 931). Similarly, in B.C.G.E.U. v. British Columbia (Attorney General), *[1988] 2 S.C.R. 214*, this Court referred to the English decision of Morris v. Crown Office, [1970] 1 All E.R. 1079 (C.A.), where, at p. 1081, it was said:

> The course of justice must not be deflected or interfered with. Those who strike at it strike at the very foundations of our society. To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it.

In B.C.G.E.U., supra, Dickson C.J. affirmed the power of courts to act in furtherance of the proper administration of justice. While said in the context of discussing contempt of court, the principle of permitting a court to control its own process may be said to extend to situations, such as the one at bar, where the court is granted a discretion to act in the interests of the proper administration of justice to exclude the public from criminal proceedings.

38 Related to a court's power to control its own process is the power to regulate the publicity associated with its proceedings. As such, it has been held that a legislative provision mandating a publication ban upon request by the complainant or prosecutor in sexual assault cases is constitutional; see Canadian Newspapers, supra. This Court has also recognized a common law discretion on the part of courts to order a publication ban; see Dagenais v. Canadian Broadcasting Corp., *[1994] 3 S.C.R. 835*.

39 The court's power to regulate the publicity of its proceedings serves, among other things, to protect privacy interests, especially those of witnesses and victims. In MacIntyre, supra, Dickson J., as he then was, noted that "[m]any times it has been urged that the 'privacy' of litigants requires that the public be excluded from court proceedings" (p. 185) and in the course of weighing this interest against the interest of public access to court proceedings held that the protection of the innocent from unnecessary harm "is a valid and important policy consideration" (p. 187). Stating that the "curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance" (pp. 186-87), he identified the protection of the innocent as among these values.

40 While the social interest in protecting privacy is long standing, its importance has only recently been recognized by Canadian courts. Privacy does not appear to have been a significant factor in the earlier cases which established the strong presumption in favour of open courts. That approach has generally continued to this day, and this appears inherent to the nature of a criminal trial. It must be remembered that a criminal trial often involves the production of highly offensive evidence, whether salacious, violent or grotesque. Its aim is to uncover the truth, not to provide a sanitized account of facts that will be palatable to even the most sensitive of human spirits. The criminal court is an innately tough arena.

41 Bearing this in mind, mere offence or embarrassment will not likely suffice for the exclusion of the public from the courtroom. As noted by M. D. Lepofsky in Open Justice: The Constitutional Right to Attend and Speak About Criminal Proceedings (1985), at p. 35: "Proceedings cannot be closed only because the subject of the charges relates to purportedly morality-tinged topics such as sex." In the course of the balancing exercise under s. 1, the exigencies and realities of criminal proceedings must be weighed in the analysis.

42 Nonetheless, the right to privacy is beginning to be seen as more significant. Thus Cory J. in Edmonton Journal, supra, considered that the protection accorded the privacy of individuals in a legislative enactment related to a

pressing and substantial concern and underlined its importance in Canadian law. In this area of the law, however, privacy interests are more likely to be protected where it affects some other social interest or where failure to protect it will cause significant harm to the victim or to witnesses. This is particularly so of sexual assault cases. As L'Heureux-Dubé J. recently put it in R. v. O'Connor, *[1995] 4 S.C.R. 411*, a case involving the production of complainants' medical records in relation to charges of sexual offences (at para. 158):

> This Court has already recognized that society has a legitimate interest in encouraging the reporting of sexual assault and that this social interest is furthered by protecting the privacy of complainants: [R. v. Seaboyer, *[1991] 2 S.C.R. 577*], at pp. 605-6. Parliament, too, has recognized this important interest in s. 276(3)(b) of the Criminal Code.

Similar views had earlier been expressed by Lamer J., in Canadian Newspapers, supra; see also L'Heureux-Dubé J. in R. v. L. (D.O.), *[1993] 4 S.C.R. 419*, at pp. 441-42.

43 So far as s. 486(1) of the Code is concerned, then, exclusion of the public is a means by which the court may control the publicity of its proceedings with a view to protecting the innocent and safeguarding privacy interests and thereby afford a remedy to the underreporting of sexual offences.

44 Having set forth the relevant context, the s. 1 analysis developed in Oakes, supra, may now be undertaken. This approach requires two things to be established: the impugned state action must have an objective of pressing and substantial concern in a free and democratic society; and there must be proportionality between the objective and the impugned measure.

(1) Legislative Objective

45 To constitute a justifiable limit on a right or freedom, Oakes tells us, the objective of the impugned legislation must advance concerns that are pressing and substantial in a free and democratic society. The appellant CBC maintains that the legislative objective of s. 486(1) is "to allow the exclusion of the public in criminal proceedings if it is in the interests of: (1) the safeguard of public morals; (2) the maintenance of order; or (3) the proper administration of justice". I have already indicated my intention to confine this appeal to consideration of the third branch for exclusion, the "proper administration of justice". As to this branch, the CBC concedes its pressing and substantial nature, but notes its imprecision.

46 I would characterize the objective somewhat differently. Section 486(1) aims at preserving the general principle of openness in criminal proceedings to the extent that openness is consistent with and advances the proper administration of justice. There are situations where openness conflicts with the proper administration of justice. The provision purports to further the proper administration of justice by permitting covertness where necessary. This recharacterization of the objective leaves intact that which the appellant conceded was of a pressing and substantial nature: the exclusion of the public from criminal proceedings in three specific cases. In light of the appellant's concession, I do not intend to say more than that this objective clearly passes the first step of the s. 1 analysis.

47 The second step, or the proportionality inquiry, is broken down into three further requirements that must be established, namely: the legislative measure must be rationally connected to the objective; it must impair the guaranteed right or freedom as little as possible; and there must be proportionality between the deleterious effects of the measures and their salutary effects; see RJR-MacDonald Inc. v. Canada (Attorney General), *[1995] 3 S.C.R. 199*, at para. 60.

(2) Proportionality

(a) Rational Connection

48 In an attempt to discern whether the legislative means are rationally connected to the legislative objective,

McLachlin J., in RJR-MacDonald, supra, at para. 154, noted that in some cases, the relationship between the infringement of the rights and the benefit sought to be achieved may not be "scientifically measurable". In such cases, she continued, "this Court has been prepared to find a causal connection between the infringement and benefit sought on the basis of reason or logic, without insisting on direct proof of a relationship between the infringing measure and the legislative objective". It was also my view in RJR-MacDonald, supra, that a common-sense analysis was sufficient to satisfy the rational connection branch. In the present case, where the benefit sought to be realized by the operation of s. 486(1) is the furtherance of the administration of justice, the benefit is not scientifically measurable; nor is the relationship between the benefit and the infringement. As such, it is appropriate to proceed under the rational connection inquiry on the basis of logic and reason.

49 Whether s. 486(1) is rationally connected to the legislative objective requires a determination of whether the particular legislative means adopted -- a discretionary power in the trial judge to exclude the public where it is in the interests of the proper administration of justice -- serves the legislative objective.

50 The discretionary element of s. 486(1) is crucial to the analysis. In this respect, the Court has held discretion to be an essential feature of the criminal justice system. As was noted in R. v. Beare, *[1988] 2 S.C.R. 387*, at p. 410, a "system that attempted to eliminate discretion would be unworkably complex and rigid". In some cases, the Criminal Code provides no guidelines for the exercise of discretion, and yet, as was stated in Beare, supra, "[t]he day to day operation of law enforcement and the criminal justice system nonetheless depends upon the exercise of that discretion" (p. 411).

51 In Dagenais, supra, Lamer C.J. discussed the common law discretion to order a publication ban and held that a discretionary power cannot confer the power to infringe the Charter. The discretion must be exercised within boundaries set by the Charter; an exercise of discretion exceeding these boundaries would result in reversible error. The Chief Justice further held that a publication ban should only be ordered when two things are established: (1) that the ban is necessary to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and (2) that the salutary effects of the ban outweigh the deleterious effects to the free expression of those affected by it. This standard, he noted, "clearly reflects the substance of the Oakes test applicable when assessing legislation under s. 1 of the Charter" (p. 878). Accordingly when a judge orders a ban that contravenes this standard, the judge commits an error of law, and the order is reviewable on that basis.

52 In applying s. 486(1), then, a court must exercise its discretion in conformity with the Charter. In this way, the judicial discretion guarantees that any order made pursuant to s. 486(1) will be rationally connected to the legislative objective of furthering the proper administration of justice. Once we accept the importance of discretion as an integral aspect of our criminal justice system, then the case for discretion in the hands of the courts is perhaps the strongest. In R. v. Nova Scotia Pharmaceutical Society, *[1992] 2 S.C.R. 606*, Gonthier J. discussed the need for limitations on law enforcement discretion. This need is met where the discretion is vested in the courts, because the exercise of discretion is reviewable.

53 Thus, the grant of judicial discretion in s. 486(1) necessarily ensures that any order made will be rationally connected to the legislative objective. If it is not, then the order will constitute an error of law; the proper course in such a case is to review the particular exercise of discretion and provide an appropriate remedy. Section 486(1) sets up a means, logically connected to the legislative objective of furthering the proper administration of justice, which permits a court to order the exclusion of the public where an open court would impede this objective.

54 The appellant contends that vesting in inferior courts the discretion to make a s. 486(1) order on the ground of the proper administration of justice is to provide insufficient guidance to courts in the exercise of their discretion. This contention is essentially an allegation that the legislation is vague or overbroad. I find it more appropriate to deal with the vagueness argument under the minimum impairment branch of the analysis. It is to this that I now turn.

(b) Minimal Impairment

55 In examining whether s. 486(1) impairs the rights under s. 2(b) as little as reasonably possible in order to achieve its objective, I begin by referring to McLachlin J.'s articulation of this requirement in RJR-MacDonald, supra, at para. 160: "The impairment must be 'minimal', that is, the law must be carefully tailored so that rights are impaired no more than necessary." However, she qualified this somewhat by noting that the tailoring process will rarely admit of perfection and thus, if the law "falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement".

56 I have noted the appellant's submission that the discretion conferred on trial judges by s. 486(1), to exclude the public from the courts in the interests of the proper administration of justice, is vague. In Osborne v. Canada (Treasury Board), *[1991] 2 S.C.R. 69*, Sopinka J. discussed the concept of vagueness and the ways in which it could arise (at pp. 94-95):

> Vagueness can have constitutional significance in at least two ways in a s. 1 analysis. A law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. The uncertainty may arise either from the generality of the discretion conferred on the donee of the power or from the use of language that is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools. In these circumstances, there is no "limit prescribed by law" and no s. 1 analysis is necessary as the threshold requirement for its application is not met. The second way in which vagueness can play a constitutional role is in the analysis of s. 1. A law which passes the threshold test may, nevertheless, by reason of its imprecision, not qualify as a reasonable limit. Generality and imprecision of language may fail to confine the invasion of a Charter right within reasonable limits. In this sense vagueness is an aspect of overbreadth. [Emphasis added.]

57 Allegations of overbreadth, of which allegations of vagueness are said to be an aspect, are more appropriately dealt with in relation to minimal impairment; see Osborne, supra, at p. 95. In the present case, the appellant's submission as to vagueness relates more to imprecision and generality, than to an allegation that s. 486(1) is incapable of interpretation with any degree of precision and thus not a limit prescribed by law. (I note that Gonthier J. writing in Nova Scotia Pharmaceutical Society, supra, preferred to reserve the term "vagueness" for the most serious degree of vagueness where the law could not be said to constitute a "limit prescribed by law" and to use overbreadth for the other aspect of vagueness. My use of "vagueness" in this case should be construed as meaning "overbreadth".)

58 In Osborne, Sopinka J. discussed vagueness in relation to the granting of wide discretionary powers and held that "[m]uch of the activity of government is carried on under the aegis of laws which of necessity leave a broad discretion to government officials" (p. 95). He then cited a passage from Irwin Toy, supra, at p. 983, in which this Court held that the law is rarely an exercise in absolute precision and that the question is whether there is an intelligible standard to guide the judiciary in doing its work.

59 Section 486(1) provides an intelligible standard -- the proper administration of justice -- according to which the judiciary can exercise the discretion conferred. The phrase "administration of justice" appears throughout legislation in Canada, including the Charter. Thus, "proper administration of justice", which of necessity has been the subject of judicial interpretation, provides the judiciary with a workable standard.

60 Section 486(1) arms the judiciary with a useful and flexible interpretative tool to accomplish its goal of preserving the openness principle, subject to what is required by the proper administration of justice, and the discretionary aspect of s. 486(1) guarantees that the impairment is minimal. Again relying upon the fact that the discretion must be exercised in a manner that conforms with the Charter, the discretion bestowed upon the court by s. 486(1) ensures that a particular exclusionary order accomplishes just what is necessary to advance the interests of the proper administration of justice and no more. An order may be made to exclude certain members of the public, from part or all of the proceedings, and for specific periods of time. As such, an order that fails to impair the rights at stake as little as possible will constitute an error. This is exemplified by R. v. Brint *(1979), 45 C.C.C. (2d)*

560 (Alta. S.C., App. Div.), where a new trial was ordered when it was found that a trial judge had ordered the entire trial to be held in camera when the facts established that the proper administration of justice only required the complainant's evidence to be taken in camera. The case illustrates that the public should only be excluded from the part of the proceedings where public access would offend against the proper administration of justice.

61 The order should be limited as much as possible. In Dagenais, supra, Lamer C.J. stated that a publication ban should only be ordered where it is necessary, and where reasonably available alternatives would not accomplish the same result. The same is true of the discretion accorded by s. 486(1) of the Code.

(c) Proportional Effects

62 The "proportional effects" stage of the analysis requires a consideration of whether the deleterious effects of s. 486(1) outweigh the salutary effects of excluding the public from the courts where it is required by the proper administration of justice. Parliament has attempted to balance the different interests affected by s. 486(1) by ensuring a degree of flexibility in the form of judicial discretion, and by making openness the general rule and permitting exclusion of the public only when public accessibility would not serve the proper administration of justice. The discretion necessarily requires that the trial judge weigh the importance of the interests the order seeks to protect against the importance of openness and specifically the particular expression that is limited. In this way, proportionality is guaranteed by the nature of the judicial discretion.

63 It is important to stress that the particular expression that is limited in a given case may impact upon the s. 1 balancing. In RJR-MacDonald, supra, I noted that the evidentiary requirements of a s. 1 analysis will vary substantially with the nature of the right infringed. In the case of freedom of expression, this Court has consistently held that the level of constitutional protection to which expression will be entitled varies with the nature of the expression. More specifically, the protection afforded freedom of expression is related to the relationship between the expression and the fundamental values this Court has identified as being the "core" values underlying s. 2(b). I put the matter this way in RJR-MacDonald, at para. 72:

> Although freedom of expression is undoubtedly a fundamental value, there are other fundamental values that are also deserving of protection and consideration by the courts. When these values come into conflict, as they often do, it is necessary for the courts to make choices based not upon an abstract, platonic analysis, but upon a concrete weighing of the relative significance of each of the relevant values in our community in the specific context. This the Court has done by weighing freedom of expression claims in light of their relative connection to a set of even more fundamental values. In Keegstra, supra, at pp. 762-63, Dickson C.J. identified these fundamental or "core" values as including the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process. [Emphasis added.]

This Court has subjected state action that jeopardizes these "core" values to a "searching degree of scrutiny". Where, on the other hand, the expression in question lies far from the "centre core of the spirit" of s. 2(b), state action restricting such expression is less difficult to justify.

64 In the case of s. 486(1), the type of expression impaired will vary from case to case. This makes it difficult to consider the extent to which the expression restricted by s. 486(1) relates to the "core" values under a s. 1 analysis, in light of the fact that the expression will not always be of the same type. For example, some expression that is restricted by s. 486(1) may be connected to the "core" values. The expression may relate to the ability of the public to participate in and contribute to the democratic system. By restricting public access to the expressive content of court proceedings, s. 486(1) inhibits informed public criticism of the court system, thereby directly impeding public participation in our democratic institutions, one of the "core" values protected by s. 2(b) of the Charter. However, in other cases, s. 486(1) may be used to exclude the public from proceedings where the presence of the public would impede a witness's ability to testify, thereby impairing the attainment of truth, another "core" value; see R. v. Lefebvre *(1984), 17 C.C.C. (3d) 277*, *[1984] C.A. 370*; R. v. McArthur *(1984), 13 C.C.C. (3d) 152* (Ont. H.C.). On

the other hand, exclusion may be ordered from that part of the proceedings where the most lurid or violent details of the offence are recounted, such that the restricted expression would lie far from the core of s. 2(b). In the end, the important point is that in deciding whether to order exclusion of the public pursuant to s. 486(1), a trial judge should bear in mind whether the type of expression that may be impaired by the order infringes upon the core values sought to be protected.

65 In sum, it is my view that the means enacted pursuant to s. 486(1) are proportionate to the legislative objective. It must be recalled that the appropriate means of remedying a particular exclusionary order having deleterious effects outweighing its salutary effects is through judicial review of the given order.

66 From the foregoing analysis, I conclude that s. 486(1) constitutes a justifiable limit on the freedom of expression guaranteed by s. 2(b) of the Charter and is thereby saved by s. 1.

V. The Discretion

A. Manner of Exercise

67 Much of my s. 1 analysis has turned on the fact that s. 486(1) vests a discretion in the trial judge. In view of the reliance I have placed on discretion in assessing constitutional validity, I think the manner in which this discretion is to be exercised warrants some discussion beyond the simple assertion that it must comply with the Charter. In doing so, I will restrict my comments to exclusion in the interest of the "proper administration of justice".

68 In Dagenais, supra, this Court reviewed the constitutionality of a publication ban ordered pursuant to the common law rule. As I have already mentioned, Lamer C.J. stated that the common law rule governing the issuance of publication bans must comply with the principles of the Charter. As he put it: "Since the common law rule does not authorize publication bans that limit Charter rights in an unjustifiable manner, an order implementing such a publication ban is an error of law on the face of the record" (p. 865). Holding that the exercise of discretion must be consistent with the Charter, Lamer C.J. set out a list of general guidelines for future cases. These guidelines essentially impose on the trial judge the requirements of a s. 1 balancing at the stage of determining whether or not to order a ban. These include three directives which echo the three steps of the proportionality analysis of the Oakes test.

69 The same directives are equally useful in assisting the trial judge in exercising his or her discretion within the boundaries of the Charter when exercising the judicial discretion to order exclusion of the public under s. 486(1). Stated in the context of such an order, the trial judge should, therefore, be guided by the following:

(a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;

(b) the judge must consider whether the order is limited as much as possible; and

(c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

70 Additionally, I provide the following for guidance on the procedure to be undertaken upon an application for a s. 486(1) order.

71 The burden of displacing the general rule of openness lies on the party making the application. As in Dagenais, supra, the applicant bears the burden of proving: that the particular order is necessary, in terms of relating to the proper administration of justice; that the order is as limited as possible; and, that the salutary effects of the order are proportionate to its deleterious effects. In relation to the proportionality issue, if the order is sought to protect a constitutional right, this must be considered.

72 There must be a sufficient evidentiary basis from which the trial judge may assess the application and upon which he or she may exercise his or her discretion judicially. In some cases in which the facts are not in dispute the statement of counsel will suffice. If there is insufficient evidence placed before the trial judge, or there is a dispute as to the relevant facts, the applicant should seek to have the evidence heard in camera. This may be done by way of a voir dire, from which the public is excluded. For example, in the present case, a voir dire could have been held to permit the Crown to disclose the facts not known to Rice Prov. Ct. J. in an effort to provide him with a more complete record from which to make his decision. The decision to hold a voir dire will be a function of what is necessary in a given case to ensure that the trial judge has a sufficient evidentiary basis upon which to act judicially.

73 A sufficient evidentiary basis permits a reviewing court to determine whether the evidence is capable of supporting the decision. In this regard, in R. v. Vandevelde *(1994), 89 C.C.C. (3d) 161* (Sask. C.A.), Vancise J.A., at p. 171, referred to the concurring reasons of Kaufman J.A. in Lefebvre, supra, at pp. 282-83 C.C.C., who stated:

> . . . public trials are the order . . . and any exceptions (as provided for in s. 442) [now s. 486(1)] must be substantiated on a case by case basis. In my respectful view, it is not good enough to say "the nature of this case is sexual", and an in camera hearing should, therefore, be imposed. Nor, with respect, is it sufficient for a judge to say that he or she would follow the "current practice".
>
> Discretion is an important element of our law. But, it can only be exercised judiciously when all the facts are known . . . . [Emphasis added by Kaufman J.A.]

74 Similarly, in the Alberta Court of Appeal's decision in Brint, supra, McGillivray C.J.A., noting that a trial in open court is "fundamental to the administration of justice in this country", stated that exclusion could only be ordered where "there are real and weighty reasons". A sufficient evidentiary basis allows the judge to determine whether such reasons exist; see R. v. Quesnel and Quesnel *(1979), 51 C.C.C. (2d) 270* (Ont. C.A.), where the court found there was insufficient information before the trial judge to enable him to order any part of the Crown's case held in camera; see also Vandevelde, supra, where the court held that the party seeking the order must place sufficient evidence before the trial judge to permit a judicious exercise of discretion.

75 The information available to the trial judge must also allow a determination as to whether the order is necessary in light of reasonable and effective alternatives, whether the order has been limited as much as possible and whether the positive and negative effects of the order are proportionate.

76 Finally, I must address the exercise of judicial discretion in this case and, specifically, the order made by Rice Prov. Ct. J. In doing this, it is only fair to say that Rice Prov. Ct. J. made his order prior to this Court's decision in Dagenais, supra. He did not, therefore, have the benefit of the three-part inquiry that I have discussed above and adapted to the particular s. 486(1) context.

B. Review of Judicial Discretion

77 In reviewing the trial judge's decision to exclude the public from part of the proceedings, it must be remembered that the trial judge is usually in the best position to assess the demands of the given situation. In Lefebvre, supra, the Quebec Court of Appeal found that the trial judge had acted judicially in excluding the public where a witness might have suffered stress from the circumstances of the case rendering her incapable of testifying. It continued (at p. 280 C.C.C.):

> [Translation] [The trial judge] saw the witness and he could appreciate the stress which she was affected by. Sitting in appeal, and not having had the benefit of seeing and hearing the witness, I am of the opinion that it is not appropriate for this court to question the decision of the trial judge.

The court stated that where a victim of sexual assault does not want to give evidence because of the stress created

by the presence of too many people, this could adversely affect the proper administration of justice. It concluded that the trial judge was in the best position to consider the victim's nervousness and was aware of the facts that would be revealed by that witness.

78 Where the record discloses facts that may support the trial judge's exercise of discretion, it should not lightly be interfered with. The trial judge is in a better position to draw conclusions from the facts he or she sees and hears, and upon which he or she may exercise the judicial discretion. This, however, presupposes that the trial judge has a sufficient evidentiary or factual basis to support the exercise of discretion and that the evidence is not misconstrued or overlooked.

79 In the present case, Rice Prov. Ct. J. had this to say in support of his decision to exclude the public from part of the sentencing proceedings:

> The application made under 486(1) and the ban -- I granted the order on the third ground that is for the proper administration of justice. The reason for that is that I am privy, due to documentation which I have before me, and did have before me prior to the application being made before -- by request -- I had it delivered to me prior to today's hearing which is normal. On the opinion that the proper administration of justice -- in order for the court to have at least on the court record the exact nature of the events including some of the details with regard to those events -- in order for justice to properly be done, it was necessary to do these, to -- sorry, to have these facts presented to me in the manner in which they subsequently were and that was the basis of the order. I quite often make orders in this regard. This is the first time that I have been challenged, but that's alright, you are entitled to challenge it. . . . But, however, if these facts were to be presented for the exposure to the public, it would cause I think a great undue hardship on the persons involved, both the victims and the accused, although no representations were made on behalf of the accused other than Mr. Letcher's consent to Mr. Wood's application for the exclusion, and that is the reason. I think that the important thing is that the court know what the facts -- they were presented to me in the manner in which I think would have embarrassed unnecessarily other people but I think that it was important for me to know. Thus, I think that the ground was, for the proper administration of justice, I say some of the facts I knew beforehand or some I had some idea, I didn't know exactly what the facts were thus the Order.

80 The appellant focuses upon the judge's finding that public access would have embarrassed some people, and submits that this is not a sufficient ground upon which to exclude the public, citing Quesnel, supra, in support of this submission. In Quesnel, the Ontario Court of Appeal held that the embarrassment of witnesses "alone is not reason to suppose that truth is more difficult or unlikely or that the witness will be so frightened as to be unable to testify" (p. 275). While it is true that this would not suffice if it were the only ground for exclusion, the decision to exclude was not solely based upon a finding that a public presence would embarrass the witnesses. Rice Prov. Ct. J. also mentioned "great undue hardship on the persons involved, both the victims and the accused" among his reasons for making the order.

81 With respect to concerns relating to undue hardship, it is my view that where the circumstances and evidence support such concerns, "undue hardship on the persons involved" may, in the interests of the proper administration of justice, amount to a legitimate reason to order exclusion. The question is whether this reason is valid in the circumstances here. My conclusion with respect to this question is that the validity of these concerns is fatally impaired both in relation to the victims and to the accused.

82 I will deal first with the concerns of undue hardship to the victims. Neither the record nor the reasons provided by the Crown support a finding that the proper administration of justice required the exclusion of the public from part of the sentencing proceedings. In making his order, Rice Prov. Ct. J. had the benefit of victim impact statements and a pre-sentence report. The latter, however, was not included in the record before this Court. The victim impact statements did not disclose evidence of undue hardship that would ensue as a result of public attendance during the sentencing proceedings, nor did they disclose the circumstances of the sexual offences that were ultimately divulged during sentencing. Indeed, Rice Prov. Ct. J. expressly stated that he did not have all the facts before him

in making the order: "I say some of the facts I knew beforehand or some I had some idea, I didn't know exactly what the facts were thus the Order."

83 In its submission, the Crown gave the following in support of his application for a s. 486(1) order:

> The nature of the evidence, of which the court hasn't heard, that constitutes the offence is very delicate. It involves young persons, female persons, and I would just ask maybe the court would consider invoking [s. 486(1)] for purposes of --

Most sexual assault cases involve evidence that may be characterized as "very delicate". The evidence did not establish that this case is elevated above other sexual assaults. This point was conceded by the Crown during oral submissions.

84 The mere fact that the victims are young females is not, in itself, sufficient to warrant exclusion. There were other effective means to protect them. Indeed, the privacy of the victims was already protected by a non-publication order by which their identities were withheld from the public. There was no evidence that their privacy interests required more protection. The victims were not witnesses in the proceedings, the evidence of particulars of the offences having been read in by the Crown. As such, no stress could be said to emanate from their having to testify, and the protection of witnesses was in no way jeopardized. While the criminal justice system must be ever vigilant in protecting victims of sexual assault from further victimization, it is my view that the record before Rice Prov. Ct. J. did not establish that undue hardship would befall the victims in the absence of a s. 486(1) order. Nor did the record reveal that there were any other reasons to justify an exception to the general rule of openness.

85 The importance of a sufficient factual foundation upon which the discretion in s. 486(1) is exercised cannot be overstated, particularly where the reasons given by the trial judge in support of an exclusion order are scant. In this case, the record does not reveal that such a foundation existed or that the facts known to Rice Prov. Ct. J. established that the proper administration of justice required exclusion of the public in the interests of the victims.

86 At this point, I would pause to sympathize with the position in which the trial judge found himself. His sensitivity to the complainants cannot be overlooked, nor should it be. And where the record discloses sufficient information to legitimate concerns for undue hardship to the complainants, then exclusion of the public may be necessary for the proper administration of justice. However, in this case, exclusion cannot be justified on this ground in the absence of more than is disclosed by the record.

87 As to the concern expressed for undue hardship to the accused, barring exceptional cases, I cannot think there is any issue of hardship to the accused arising from prejudicial publicity once the accused has pleaded guilty. The publicity associated with a public trial will in almost every case cause some prejudice to the accused. The criminal justice system has addressed much of the potential for prejudice with procedural safeguards to ensure that trials do not proceed in the absence of reasonable and probable grounds, and that fairness is protected. Once an accused has pleaded guilty, however, prejudice is greatly diminished as the risk of having wrongly accused the person being tried is eliminated.

88 The fact that closure of the court was only ordered during the sentencing proceedings bears considerably upon my determination that the accused was not likely to suffer undue hardship in this case. As alleged by the intervener Attorney General for Ontario, the deterrence and public denunciation functions of sentencing are not to be undervalued. Public scrutiny of criminal sentencing advances both these functions by subjecting the process to the public gaze and its attendant condemnation. The type of expression restricted in this case, expression relating to the sentencing process, weighs in favour of maintaining open court. In any criminal case, the sentencing process serves the critically important social function of permitting the public to determine what punishment fits a given crime, and whether sentences reflect consistency and proportionality. In sexual assault cases, the importance of subjecting sentencing to public scrutiny is especially strong. "Sexual assault" in law encompasses a wide array of different types of activities, with varying penalties. It is, therefore, essential to inform the public as to what is encompassed in the term "sexual assault" and the range of punishment it may attract.

89 In this case, there was insufficient evidence to support a concern for undue hardship to the accused or to the complainants. The order was not necessary to further the proper administration of justice and the deleterious effects of the order were not outweighed by its salutary effects. On the whole, and with some reluctance in light of the proper deference to be accorded the exercise of discretion in these types of cases, I conclude that Rice Prov. Ct. J. erred in excluding the public from any part of the proceedings.

VI. Disposition

90 Following oral argument for the appellant on the constitutional issue, the Chief Justice gave judgment for the Court that s. 486(1) of the Code was constitutionally valid. On this aspect, then, all that requires to be done is to respond to the constitutional questions.

91 On the exclusion order of Rice Prov. Ct. J., I find that he improperly exercised his discretion in the circumstances of this case.

92 Accordingly, the appeal is allowed and the judgment of the Court of Appeal on this point is reversed. I would quash the exclusion order and order access to the media and the public to the transcript of that part of the proceedings held in camera. Both constitutional questions are answered in the affirmative.

End of Document

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c) Inconsistent Statements

The *Canada Evidence Act*[39] and comparable provincial legislation specifically addresses this situation. The cross-examiner normally will begin by establishing clearly the specific testimony the witness is giving on the same matters that are contained in the previous written statement. The nature and circumstances of the earlier statement must then be clearly identified and the inconsistent parts brought to his attention. The statement may then be proven and the witness cross-examined on the inconsistencies.

6) Notice Issues

Some constitutional protections and the requirements of the principle of fairness can be traced to evidentiary rules established at common law. For example, the rule in *Brown v. Dunne* was stated by Lord Herschel well over one hundred years ago as follows:

> My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.[40]

This concept is one aspect of the broader constitutional law principle of the "case to meet."[41] The commission of inquiry context was expressed in *Kingsclear* as follows:

> [T]he fact-finding function of an inquiry is an important feature of any investigatory and advisory commission and a commissioner's discretion to make findings on the credibility of witnesses and express his reasons for doing so is part and parcel of the necessary decision-making process of such an inquiry. Finally, it should be noted that a judge sitting alone at a trial is not required to forewarn a witness likely to be disbelieved what he has in mind. He must ensure, however, that a witness whose credibility is suspected has a fair opportunity of rebutting contradictory evidence.[42]

39 Above note 37, ss. 11 & 12.

40 (1893), 6 R. 67 at 70 (H.L.). Quoted in *Lyttle*, above note 35 at para. 64.

41 *R. v. Dubois*, [1985] 2 S.C.R. 350, adopting Ed Ratushny in "The Role of the Accused in the Criminal Process" in Walter S. Tarnopolsky & Gérald A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1982) at 358–59 and in Ed Ratushny, *Self-Incrimination in the Canadian Criminal Process* (Toronto: Carswell, 1979) at 180.

While notice of matters such as this may be given informally in meetings with commission counsel, it is important that they also be addressed on the record at the hearings.

Another category of evidence that should be placed on the record is judicial notice. The rule itself is relatively narrow, permitting notice of facts to be taken without proof only where they are:

> (1) so notorious or generally accepted as not to be the subject of dispute among reasonable persons; or
> (2) capable of immediate and accurate demonstration through readily accessible sources of indisputable accuracy.[43]

Thus, it is notorious that Toronto is a city in Canada or that it is extremely difficult to terminate a heroin addition. Other facts, such as the chemical formula for water or salt, may not be notorious but they are easily ascertainable in textbooks and are indisputable. It is important that the issue of potential judicial notice be raised so that parties may make representations and, if there is a dispute as to facts to be judicially noticed, call contrary evidence. In addition, it is important to place on the record factual issues that have been resolved by consent of all the parties. Also, since the process is not exclusive to the parties, the commissioner should be in a position to explain why that was an acceptable basis for resolving the factual issues in the public interest.

D. RESTRICTIONS ON PUBLICITY

1) *In Camera* and Non-Publication

The process of conducting open and public hearings is one of the essential features of commissions of inquiry that enhance public confidence.

42 *Richards v. New Brunswick (Commission of Inquiry into the Kingslcear Youth Training Centre* (1996), 180 N.B.R. (2d) 1 at para. 30 (Q.B.) [*Kingsclear*] and see the discussion in Chapter 6, Section B(2)(b).

43 *R. v. Krymowski*, [2005] 1 S.C.R. 101. Commissioner Gomery took judicial notice of media coverage and the public reaction in ruling on an application for a publication ban, discussed in the next section.

Lord Justice Salmon elaborated on the importance of transparency in this respect:

> It is . . . of the greatest importance that hearings before a Tribunal of Inquiry should be held in public. It is only when the public is present that the public will have complete confidence that everything possible has been done for the purpose of arriving at the truth . . . .
>
> When there is crisis of public confidence abut the alleged misconduct of persons in high places, the public naturally distrusts any investigation carried out behind closed doors. Investigations so conducted will always tend to promote the suspicion, however unjustified, that they are not being conducted sufficiently vigorously and thoroughly or that something is being hushed up. Publicity enables the public to see for itself how the investigation is being carried out and accordingly dispels suspicion. Unless these inquiries are held in public, they are unlikely to achieve their main purpose, namely, that of restoring the confidence of the public in the integrity of our public life. And without this confidence no democracy can long survive.[44]

Justice Cory spoke of the therapeutic value of open hearings when the inquiry relates to a tragedy in the local community:

> Open hearings function as a means of restoring the public confidence in the affected industry and in the regulations pertaining to it and their enforcement. As well, it can serve as a type of healing therapy for a community shocked and angered by a tragedy. It can channel the natural desire to assign recommendations for reform and improvement.[45]

The basic underlying premise, therefore, is that these hearings should be conducted in public so that all relevant information can be made available to the public.

However, some information may not be accessible because of the law of privilege. Some of the Acts specifically exclude evidence that would be inadmissible by reason of any privilege under the law of evidence.[46] In

44 Great Britain, Royal Commission on Tribunals of Inquiry, *Report of the Commission under the Chairmanship of the Rt. Hon. Lord Justice Salmon* (London: H.M.S.O., 1966) Cmnd 3121.

45 Above note 4 at para. 117.

46 Ontario, s. 11; Alberta, s. 9(1); British Columbia, s. 22(2); Newfoundland and Labrador, s. 12(1).

the other jurisdictions, the common law exclusionary rules would apply even if there were no statutory adoption of them. Privilege is discussed in the next section.

Some of the Acts also specifically provide that hearings are to be conducted in public, but where they do, they also authorize hearings in the absence of the public in certain circumstances.[47] These circumstances relate to public security and privacy rights such as financial or personal matters and must be balanced against the importance of public hearings. Newfoundland and Labrador also specifies the right "to a fair trial" as one of these circumstances. Where no such provision exists, it is simply assumed that hearings will be held in public. But the commissioner would also have the same discretion to proceed in private under the general power to control proceedings, discussed in Section A, above in this chapter.

Restricting public access to information placed before the commissioner can be done in two ways. The first is to hold a portion of the hearings *in camera*. The public and some or all of the parties may be precluded from attending these proceedings. The second manner of limiting public access is through an order of the commissioner banning publication of specified information.

The Supreme Court of Canada established the test for when a publication ban may be ordered in *Dagenais*[48] and *Mentuck*.[49] The party seeking the ban must overcome the strong presumption of openness in relation to the administration of justice, which has been reinforced by the principle of freedom of expression under the *Charter*. The very nature and purpose of a commission of inquiry lends even greater weight to that presumption when applied to this forum. The party seeking the ban must provide a convincing evidentiary basis to overcome the principle of openness in the courts which "is so strong and so highly valued in our society."[50]

The *Dagenais* case involved balancing freedom of expression against the right to a fair trial. In *Mentuck*, the ban was sought to protect the safety of police officers and the mode of certain undercover police oper-

47 Ontario, s. 4; British Columbia, s. 15(1); Newfoundland and Labrador, s. 6(2).

48 *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 [*Dagenais*].

49 *R. v. Mentuck*, [2001] 3 S.C.R. 442 [*Mentuck*].

50 *Ibid.* at para. 39, Iacobucci J. delivering the judgment of the Court.

ations. As a result, the *Dagenais* test was reconfigured more broadly to encompass other aspects of the administration of justice, as follows:

> A publication ban should only be ordered when:
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.[51]

The test for ordering *in camera* proceedings is essentially the same.[52] In applying this test, it must be kept in mind that:

> the relevant rights and interests will be aligned differently in different cases, and the purposes and effects invoked by the parties must be taken into account in a case-specific manner.[53]

In *Toronto Star*,[54] the Court also emphasized the need to apply the *Dagenais/Mentuck* test in a "flexible and contextual manner." Justice Morris Fish gave the example of granting a sealing order for a search-warrant application at an early investigative stage but only for a brief period. As a general principle, bans should be removed immediately when their purpose has passed.

In the same case, the Ontario Court of Appeal had ruled that the judge below had exceeded her jurisdiction by denying a brief adjournment to allow counsel for the media to attend and make submissions. Justice Fish did not address this issue but referred to the "guidelines on notice to the media and media standing."[55] The implications of these for a commission of inquiry are that notice should be given to the media of

51 *Ibid.* at para. 32.

52 *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 [*New Brunswick*], La Forest J. delivering the judgment of the Court, discussed in *Mentuck*, above note 49 at paras. 24–27, 36, and 38.

53 *Mentuck*, *ibid.* at para. 37.

54 *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188 at para. 8, Fish, J. delivering the judgment of the Court [*Toronto Star*].

55 *Ibid.* at para. 13, referring to *Dagenais*.

motions for publication bans. It is in the discretion of the commissioner to whom and how notice should be given. The media-relations officer will know what journalists, publications, or stations have been covering the proceedings and may suggest others as well. The granting and extent of their standing on the motion is also discretionary but could include some or all of these opportunities: to cross-examine witnesses, call *viva voce* evidence, file affidavit evidence, and present other written evidence. A publication ban should be placed on the hearing of the motion itself but restricted or removed if the motion is (partially) denied.

The decision in *Episcopal*[56] provides a good illustration of the application of the *Dagenais/Mentuck* test. The commissioner denied a publication ban to a witness in the Cornwall Inquiry. The witness had been acquitted of sexual-abuse charges over fifteen years previously but the complainant was also to be called as witness at the inquiry to testify about the same allegations. The applicant sought to protect his privacy and reputational interests but the commissioner held that the allegations already had received widespread publicity. The public would be reminded of the acquittal and the mandate "to clear the air" would override any interest of the applicant that would be protected by the ban.

The Court agreed that protection of the reputation of innocent persons was a highly significant factor to be weighed against openness and freedom of expression. But the commissioner had weighed several factors that mitigated the risk to reputation. The commission could not "retry" the allegations of sexual abuse. As well, counsel for the applicant could be expected to ensure that evidence of the acquittal was made clear. The Court was also able to take into account the complainant's evidence that actually was taken at the hearings. A publication ban was placed on the details of the alleged sexual abuse. It was emphasized that the witness was testifying about allegations and not the truth of those allegations. The acquittal was introduced by commission counsel. When the complainant testified that the acquittal was due to a reasonable doubt, the commissioner intervened to point out that the trial judge had given reasons stating he believed the accused's denial. The Court

56 *Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry*, 2007 ONCA 20, Sharpe J.A. delivering the reasons of himself, MacPherson, and Blair JJ.A. [*Episcopal*].

concluded that the commissioner had acted reasonably in protecting the applicant's innocence.

The applicant also argued that the requested ban would not affect the commission in fulfilling its mandate. But the Court pointed to the purpose of the inquiry as a response to allegations of a pedophile ring, conspiracy, collusion, and cover-up. It had to examine whether the allegations of this complainant and others were properly investigated. In this context, the commissioner also acted reasonably in concluding that the applicant's name was relevant to the interrelationship of the persons involved. The applicant's prosecution and acquittal were widely reported and his identity was germane to clearing the air in the community. It was an important element of the broad objective of this commission of inquiry to inform, educate, and "heal" members of the public.

Taking all these facts into account, the Court upheld the commissioner's decision. He had applied the correct test and acted reasonably in concluding that the applicant had not satisfied its burden.

The Goudge Inquiry also faced motions to restrict publication of the names of some individuals. Notice was given to the parties and media and published on the inquiry's website. Redactions were required for the names of those who had been investigated and prosecuted under the *Youth Criminal Justice Act* but the actual physical redactions would have taken "many months." Instead, access to the unredacted documents was restricted to counsel for the parties and to the media, who were expected to comply with the non-publication order with respect to the names.

The order also required that certain persons be identified by first name only in some circumstances and, when required by this Act, by initials only. This allowed them to be referred to at the hearings without their names being revealed. On the "rare occasion" where a name was mentioned inadvertently, the time delay in the webcast allowed it to be removed. The transcript also was corrected.

The issue of a publication ban often arises where a witness is facing criminal investigation or already has been charged. In Walkerton, a key witness was the subject of an ongoing criminal investigation. Commission counsel took the initiative to inform the witness's counsel that a publication ban might be appropriate, but none was requested.

In *Phillips*, Justice Cory expressed the view that findings of misconduct in a commissioner's final report would be a much greater risk to a fair trial than merely testifying at the hearings:

> the potential for lasting impartiality is much less when what is published are the carefully reasoned conclusions of a judge who has heard all of the testimony and examined all of the evidence relevant to the inquiry mandate. The publication of these findings of facts and conclusions will create a much greater risk of prejudice to fair trial rights.[57]

In his view, the publication of such a report should be delayed until those facing trial have an opportunity to review it and consider an application for a publication ban until the disposal of the criminal charges.[58] The publication of the Mount Cashel Inquiry's Report was delayed until the completion of the trials of all the former brothers of the institution who had been charged.

A publication ban was sought for the testimony of three witnesses who were subpoenaed and scheduled to testify before the Gomery Inquiry in April 2005. They were also scheduled to be tried before courts composed of a judge and jury commencing on 2 May 2005, and the trials were expected to last from four to six weeks. The charges involved multiple counts of fraud and conspiracy under the *Criminal Code*. The witnesses sought the ban not only for their own testimony but also for the testimony of other witnesses that related to the criminal charges they were facing.

One of the applicants requested, as an alternative remedy, that his testimony before the commission be postponed until after the completion of his criminal trial. This was rejected since a publication ban would provide equivalent relief. Also, to postpone his testimony would "disrupt the orderly presentation of the evidence and unduly delay" the completion of the hearings and the report, which was urgently required.[59]

The commissioner pointed out that commission counsel had undertaken not to adduce evidence or to question the applicants on any of the matters underlying the criminal charges they were facing. He also noted that the primary responsibility for ensuring a fair trial rested with the trial judge, through means such as jury selection and instructions. However, he also took judicial notice of the great public interest in his hearings, as "evidenced by extensive media and broadcast coverage and commentary." This coverage had intensified in recent months and the

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57 Above note 4 at para. 124.

58 *Ibid.* at para. 163.

59 Gomery Inquiry, Ruling (29 March 2005).

commissioner was aware of media reports of "a high degree of public indignation" in response to "recent revelations" at the hearings. The problem was exacerbated by the timing of the testimony at the hearings, which would be only a few weeks or days before the start of the criminal trials.

He also took into account the difficulty an applicant has in satisfying the *Dagenais/Mentuck* test when the consequences of future testimony have to be assessed: "I cannot imagine how one is to assess the effect that revelations will have upon the public consciousness, particularly when one does not know what the revelations will be, the extent to which they will be reported by the media and in what terms." The prejudicial effect of future testimony "can only be guessed." He concluded that a publication ban was required "as a precaution" to prevent a serious risk to the proper administration of justice. It was not certain that alternative measures could prevent that risk.

In order to restrict only minimally the freedom of expression of the press, a publication ban should be limited in "duration, content and scope." In the case of the Gomery Inquiry, it was imposed "only until the moment at the end of the criminal trial of the applicant concerned when jurors are sequestered to deliberate." In addition, the commissioner invited representations from the media at the end of the testimony of each of the applicants as to whether some or all of it should be released from the publication ban. As a result, further rulings were made following the testimony of each of the applicants, on 7 April, 27 April, and 4 May, respectively. The publication bans were lifted for all three applicants with the exception of specifically identified portions of the testimony of each.

In another ruling, Commissioner Gomery referred to "a kind of no-publication order"[60] that was requested for certain documents. These related to the financial statements for a trust and corporations of the applicant. He sought an order that the documents be kept confidential and not disclosed to anyone unless a confidentiality agreement was signed. The commissioner had no doubt that disclosure of this financial information would have a negative effect on the applicant's business interests and would constitute an invasion of his privacy. But he applied

60 *Ibid.*, Ruling (13 April 2005).

Justice Iacobucci's test for granting such an order in civil litigation. According to this test, it should be granted when:

- such an order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.[61]

Justice Iacobucci elaborated that the risk must be solidly substantiated by evidence and pose a "serious threat to the commercial interest" in question. Commissioner Gomery ruled that the strictly commercial private interest here had to give way to freedom of expression. Unless all of the details were disclosed, Canadians would be denied important information about where the sponsorship money "went."

Inquiries are increasingly addressing non-publicity issues in their rules of procedure or in separate "protocols." See, for example the "Media Protocol for Confidentiality Issues" of the Cornwall Inquiry, which refers to "*In Camera* Hearings, Non-Identifying Initials and Non-Publication."

2) National Security Confidentiality

Reference was made to the problem faced by the Air India Inquiry when the government claimed National Security Confidentiality (NSC) over large portions of the documents before the commissioner. The terms of reference required him to prevent disclosure of information that could be injurious to international relations, national defence, or national security. A process was established whereby the commissioner would receive *in camera* any such information so identified by the government. The commissioner would then make a ruling and give notice to the government. The difficulty was that the government could then institute a court challenge, as it had done in the previous Arar Inquiry.

61 *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 at para. 53 delivering the judgment of the Court.