Publication Bans 1996

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Criminal Section Documents - Publication Bans

I. BACKGROUND

At the 1994 Conference Saskatchewan presented a resolution which was passed by the Section as follows:

- "That the Criminal Law Section form a committee to study publication bans and exclusion orders and provide the 1995 meeting with recommendations on changes in the law in this area."

Saskatchewan offered to Chair the Committee which included members from British Columbia, Alberta, Manitoba, Quebec and the federal Department of Justice.

At the 1995 Conference the Publication Bans Committee presented a paper outlining the legal background and framework of publication bans, the constitutional issues arising in this area and a discussion of the recent Dagenais and T.S. decisions of the Supreme Court of Canada. That paper raised some outstanding issues in the post-Dagenais era.

In addition, the Publication Bans Committee sought the approval of the Section to continue its efforts with some variations on the original mandate. Noting that there had been a number of significant developments in the law in this area and that there were cases pending in the Supreme Court of Canada, the Committee requested further time to consider the issues and to also address third party interests.

The Committee sought approval to proceed with respect to three areas and this approval was given. Accordingly, this paper reflects the work done in the approved areas over the last year. As there was no funding available for this project, different parts of the Paper were prepared by individual members. It was not possible to meet to debate each proposal and time constraints prevented even the circulation of a final draft to all members. Accordingly, it should not be thought that each member of the Committee endorses each proposal. The proposals are simply put forth to stimulate discussion and any further action the Section considers appropriate.

The first section of the paper presents the legal background and framework concerning publication bans. Following that is a presentation of the substantive and legal issues addressed by the Committee including general proposals for the reform of some but not all of the present substantive and procedural law. Next, the penalty provisions relating to these offences are examined. Finally, proposals are made for reform of the substantive and procedural law in a separate Part of the Criminal Code. A summary of the proposals is attached to this paper.

Appendix I to the paper outlines the present provisions in the Criminal Code which relate to these issues as well as proposed legislation on these issues. Appendix II provides the actual provisions referred to in Appendix I.

II. PUBLICATION BANS: THE LEGAL BACKGROUND AND FRAMEWORK

A judicial ban upon publication of details about a criminal proceeding engages a variety of interests, some of which are constitutionally protected. There is the right of an accused person to receive a fair trial. This significant interest is enshrined in the common law and enjoys protection in the Canadian Charter of Rights and Freedoms.[1] As well, there is the interest of the state and the public in seeing that criminality is prosecuted and, if proven, punished. This interest is also articulated in both the common law and the Charter.[2] Finally, there are the interests of various third parties to the prosecution. One of the more significant third party interests is that of the media to publish and to broadcast information about criminal proceedings. This interest is subsumed within the fundamental freedom of the press now guaranteed by section 2(b) of the Charter. There are also the interests of other third parties such as witnesses or victims of the crimes being prosecuted and their families. Traditionally, the interests of those individuals have only been indirectly acknowledged in our law. Indeed, any constitutional recognition of these interests is only inferential, most notably a privacy interest which resides, perhaps, in the penumbra of section 7. [3]

A. The Rights Delineated

This part of the paper will address the two most significant constitutional protections engaged
by a publication ban, namely the right to a fair trial and the fundamental freedom of the press.

1. Right to a Fair Trial

The right of an accused person to a fair trial is the principal objective of the criminal justice system. Most rules which govern the investigation and prosecution of crime are intended to serve that end. Though many of these rules are now constitutionally enshrined, this is only the culmination of their evolution and development at common law. [4] For example, the principle against self-incrimination applied most recently by the Supreme Court of Canada in R. v. S. (R.J.)[5] is one example of a legal principle informed by both the common law and the constitution. Its aim, ultimately, is to ensure a fair trial of an accused person without his or her involuntary participation.

An important attribute of a fair trial is "openness", a concept which emerged following the

worst excesses of the Court of Star Chamber. Dickson J. (as he then was) enunciated the policy rationale underlying the concept of open justice in Attorney General of Nova Scotia v. McIntyre[6] as follows:

The rationale [for a strong public policy in favour of "openness" in respect of judicial acts] has been eloquently expressed by Jeremy Bentham in these terms:

- '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'. [7]

So integral is this concept to the fairness of a criminal proceeding, that fairness and openness are enshrined conjunctively in the constitutional text. Section 11(d) guarantees to every accused person the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal". The clear inference to be drawn from this juxtaposition is that openness is the norm. Publicity which is distinct from openness is often equated with it. That concept will be discussed in the next section.

2. Freedom of the Press

Like an accused's right to a fair trial, freedom of the press has long been recognized and protected at common law. Dubin C.J.O. made this point in Dagenais when he observed that "long before the [Charter], it was the common law courts that held freedom of expression, including freedom of the press, to be a fundamental freedom, defended it, and gave it almost a constitutional status".[8] Freedom of the press was expressly identified in section 1(f) of the Canadian Bill of Rights[9] as a right that has "existed and shall continue to exist" in Canada.

This fundamental freedom was constitutionally enshrined in section 2(b) of the Charter. That paragraph guarantees to all Canadians "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". The Supreme Court of Canada has consistently given the concepts of freedom of expression and freedom of the press a most ample reading. For example, when scrutinizing the constitutional propriety of former section 442 of the Criminal Code in Canadian Newspapers Co. v. Canada (Attorney General),[10] Lamer J. (as he then was) stated:

- 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.[11]

Amongst the current members of the Court, the most enthusiastic advocate of an unfettered press is Cory J. His judgment for the plurality in Edmonton Journal v. Alberta (Attorney General)[12] best illustrates this. There the constitutional validity of a provision of the Judicature Act (Alta.),[13] which prohibited the publication of information respecting divorce proceedings, was impugned. Cory J. who found this prohibition to be unconstitutional began by expressing the view that "free and uninhibited speech permeates all truly democratic

societies and institutions" and, as a consequence, its "vital importance. . . cannot be over-emphasized".[14]

Referring to freedom of the press, Cory J. asserted that it was essential to the rule of law that "the press . . . be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny".[15] He elaborated upon the critical function of the media in enhancing the rule of law as follows:

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. [16]

Cory J. reiterated his unabashed support for a free press most recently in Nova Scotia Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)[17]. That case involved a challenge to a rule of the Nova Scotia Legislative Assembly which prohibited television in the Legislative Chamber. Although his was a dissenting view, he again advanced an absolutist interpretation of freedom of the press. He opined that: "It is obvious that prohibition on television cameras is by definition a restriction on freedom of the press . . . if the legislative assembly prohibits any media access to the public debates or excludes one form of the media (television) from the public debates, there has been an infringement of the Charter right to freedom of expression".[18]

It is true the majority in Nova Scotia Broadcasting Co. found no violation of the Charter for the simple reason that a privilege of the Nova Scotia House of Assembly was not susceptible to constitutional review. However, these cases are not enumerated for the purpose of amassing the win/loss record for media institutions before the Supreme Court. Rather, they demonstrate that media claims of unconstitutionality, when unsuccessful, have been defeated on the section 1 analysis and not because the media has failed to establish a prima facie violation of section 2(b).

Although it is beyond the scope of this Part, it is useful to pause and identify certain of the assumptions which underlie the claims advanced by media organizations under the rubric of freedom of the press. First, those claims are strongly libertarian. It is the position of the media that subject to justification under section 1 of the Charter, no law can purport to regulate or affect how the media gathers news; how they decide what to report and how, whether and when it is disseminated. For the most part, this approach has been endorsed by the Supreme Court. The only point of disagreement between the claimants and the Courts has been the type of limitation that satisfies the reasonableness criteria under section 1.

Second, the Supreme Court has accepted uncritically the assumption that the contemporary

media functions as the surrogate for the general public. This agency argument, articulated and applied by Cory J. in Edmonton Journal holds that as most members of the public are unable to attend judicial proceedings, it is essential that the press attend on our behalf and report back to us what transpires in the court room. The questionable basis for this assumption was highlighted very recently by Taylor J.A. in Blackman v. British Columbia Review Board[19] as follows:

[T]he media are not required to act responsibly, nor to serve what others may regard as the best interest either of individuals or the public . . . While the media serve an important role in informing the public, they do not "represent" the public, in the sense of having any responsibility to the public, nor have they any obligation properly to inform the public on any particular matter; such public duties or responsibilities would be quite inconsistent with the concept of a "free" press.[20]

There are, of course, additional problems with this notion which to date the Supreme Court has failed to address, not the least of which is accountability. Indeed, were any mechanism put in place to oversee the press or to make it more accountable to the public, it would be viewed, at least by the media, as an anathema.

The last assumption found in the jurisprudence to be highlighted here is the claim that only when the press is permitted to report on what occurs in a courtroom, will it be possible for society to be satisfied that justice is done. It is premised on the well-known maxim that "not only must justice be done, it must be seen to be done". However, as a retired justice of the Supreme Court of Ontario recently observed: "The maxim is not directly relevant. It does not deal, other than by implication, with the concept of an open court".[21] Moreover, the logical extension of this argument reveals its fatal flaw. Most criminal trials which take place in Canada every day are conducted without a representative of the press in attendance. Does this mean that those accused persons did not obtain a fair trial? The claim is an extravagant one, to be sure. Yet it flows logically from the assertion that publication is an essential ingredient of a fair trial.

B. Dagenais and T.S. -- The Constitutionality of Publication Bans

The starting point for any discussion respecting the constitutionality of publication bans must be Dagenais v. Canadian Broadcasting Corporation [22] and its companion appeal, R. v. T.S. [23] Dagenais is the principal authority and came to the Supreme Court with leave from the Ontario Court of Appeal. It concerned an injunction granted by Gotlib J. of the Ontario Court of Justice (General Division) which enjoined C.B.C. from broadcasting the award winning docu-drama, "The Boys of St. Vincent", anywhere in Canada pending completion of the trials for certain Christian Brothers on charges of sexual assault. On appeal, the Ontario Court of Appeal amended Gotlib J.'s order only in one respect. The Court narrowed its geographical ambit, confining its application to Ontario and to a French language television

station which broadcast into Ontario from Montreal.[24] On further appeal, the Supreme Court (La Forest, L'Heureux-Dubé and Gonthier JJ. dissenting) quashed the order of Gotlib J. as amended by the Ontario Court of Appeal.

T.S. concerned a publication ban imposed by a Youth Court Judge at the outset of a trial on a number of sexual assaults which allegedly took place in Martensville, Saskatchewan. As certain other individuals faced similar allegations of criminality, the Youth Court Judge ordered that no details of the young offender proceedings, except for the verdicts, be published until the related trials were over. The Saskatchewan Court of Appeal dismissed C.B.C.'s appeal from this order for want of jurisdiction. [25] The Supreme Court granted leave to C.B.C. to appeal[26] Ultimately, however, the Court dismissed this appeal for lack of jurisdiction.

1. The Ruling in Dagenais

Five separate opinions were rendered in Dagenais. Lamer C.J. wrote for the majority. McLachlin J. filed a separate, concurring opinion and like the Chief Justice found the injunction at issue to violate section 2(b) of the Charter in a way which was not reasonable for the purposes of section 1. La Forest J. dissented on jurisdictional issues. However, in obiter dicta, he expressed the view that he was "in agreement with the Chief Justice that the common law rule did not give sufficient protection to freedom of expression. [27] L'Heureux-Dubé J.'s dissent was confined to the lack of jurisdiction to entertain the appeal from the Ontario Court of Appeal. On the substantive issue, she concurred with the reasons of Gonthier J. For his part, Gonthier J. held that while the common law rule impugned by the Appellant offended section 2(b), it was justifiable under section 1. For purposes of this Part, however, only the analysis of Lamer C.J. will be reviewed and assessed.

On this aspect of the appeal, Lamer C.J. began by noting that since the advent of the Charter, publication bans engaged two interests, both of which are constitutionally protected, namely the right of an accused to a fair trial and freedom of expression, including freedom of the press. In view of the explicit recognition of these values in the Charter, Lamer C.J. asserted that it would be wrong to view publication bans "as a clash between two titans".[28] The approach advocated by the Chief Justice entails a balancing of these two interests. He stipulated:

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. [29]

When Lamer C.J. applied this balancing approach to the common law rule under attack in Dagenais, he concluded it was weighted too much in favour of suppressing publication. As a

consequence, it was in need of amendment for it failed to give sufficient recognition to freedom of expression. The new constitutional common law rules provide 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 of the free expression of those affected by the ban. [30]

As formulated by Lamer C.J. this new rule demands that all balancing be undertaken and accomplished under section 1. This is not a surprise. The Supreme Court had earlier held in Canadian Newspapers Co.[31] that any prohibition upon publication amounts to a prima facie infringement of section 2(b). [32] Therefore, since the analysis takes place within section 1, the onus to demonstrate that a proposed publication ban is warranted rests upon "the party seeking to limit freedom of expression".[33] The Chief Justice indicated further that the party must prove on a balance of probabilities that: (1) the ban "relates to an important objective that cannot be achieved by a reasonably available and effective alternative measure"; (2) "[it] is as limited (in scope, time, content, etc.) as possible"; and (3) "there is a proportionality between the salutary and deleterious effects of the ban". [34]

Lamer C.J. directed that before lower courts may impose a publication ban the judge must first consider "all other options" to suppressing publication in order to satisfy himself or herself that the ban is the most "reasonable and effective alternative available". [35] Understandably, the Chief Justice was pragmatic about the efficacy of contemporary publication bans, particularly in light of the breathtaking advances in contemporary computerized technology. [36] He observed that: "In this global electronic age, meaningfully restricting the flow of information is becoming increasingly difficult [and] the actual effect of bans on jury impartiality is substantially diminishing". [37] This fact directly affects the important questions of whether or not a ban can ever be effective and, as a consequence, the most reasonable alternative available. It did not figure prominently in Dagenais; however, the Supreme Court must address this issue in the future, having avoided it in R. v. Thomson Newspapers Ltd. [38]

Unfortunately, Lamer C.J. did not engage in an extensive consideration or assessment of the kind of alternatives to a publication ban which might be more appropriate. He did, however, offer this brief litany of options:

- Possibilities that readily come to mind . . . 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.[39]

It is interesting to observe that at least one of the options identified by Lamer C.J. as a viable alternative, namely adjourning the trial to permit publication engages yet another Charter protection. Section 11(b) guarantees to every accused person the right to a trial

within a reasonable time. By suggesting that adjournment is possible, the Chief Justice injected a third constitutional value to be weighed and balanced when assessing the appropriateness of a publication ban.

Once it is ascertained that a publication ban is the appropriate mechanism, the judge must then assess the best way to limit the ban and restrict it "as much as possible".[40] Restrictions of this kind would include time limited bans. For example, it has long been established, at common law, that a ban, imposed by a trial court to preserve the fairness of proceedings before it, may include the subsequent trial of a co-accused on related charges. [41] It was just such time limited publication bans which were at issue in both T.S.[42] and Thomson Newspapers Ltd.[43] Unfortunately, in light of the disposition of the appeal in T.S. solely on jurisdictional grounds, the constitutional propriety of an order of this kind has yet to be determined definitively.S[4]

Another common restriction would be to make the ban geographically specific. Typically, such a stipulation would limit the ambit of the ban to the area surrounding where the trial is to occur and from where potential jurors are to be drawn. Dagenais concerned a restriction of this sort. Lamer C.J. ruled that the original ban imposed by Gotlib J. at first instance "was far too broad", since it "prohibited broadcast throughout Canada and even banned reporting on the ban itself".[45] Any court which elects to impose a publication ban must carefully craft the geographical limitation to be imposed.

The issue of geographic limitations upon a publication highlights the circularity of the analysis and raises serious questions as to whether an order postponing publication will ever be appropriate. On the one hand, Lamer C.J. states that a publication ban must be resorted to only as a last resort, after a court has reviewed and considered the other available alternatives. At the same time, the Chief Justice has clearly directed that when ordered the ban must be drawn only to affect the area surrounding where the trial itself is to occur. However, in this age when it is extremely difficult to cabin the dissemination of information this way, it may be virtually impossible to ensure that a ban will ever be effective. Simply put, limiting a publication ban geographically may defeat its efficacy.

In Dagenais, only the common law jurisdiction of a judge to order a publication ban on a criminal proceeding was implicated. However, the extensive analysis undertaken by the Court cannot be confined to that context. Lamer C.J. set down the fundamental principles and values which must be balanced whenever limitations may be placed upon the publication of information about what occurs in a criminal courtroom or even access to that courtroom.

III. SUBSTANTIVE AND PROCEDURAL ISSUES

In this Part, certain provisions of the Criminal Code will be assessed in the wake of

Dagenais. A discussion of significant procedural issues will follow.

A. Selected Provisions

The constitutionality of a number of provisions of the Criminal Code relating to publication bans has already been challenged under section 2(b) of the Charter. Some of these provisions have been sustained at least in part. Others, however, have managed to escape constitutional scrutiny. The more important of these provisions are discussed in this section.

1. Sections 486(3) and (4)

Superior courts of criminal jurisdiction have long had the power to protect the rights of third parties, including witnesses, in criminal proceedings. For example, protecting witnesses by the manner in which courtrooms are configured had been within the inherent power of courts prior to Parliament enacting provisions relating to screens and sequestration.[46] As well, the inherent power of superior courts to preserve access to the courts themselves and the proceedings which take place there has been acknowledged on numerous occasions.[47]

The power of a superior court to impose limitations upon publication is another illustration of this authority to protect the interests of a third party, oftentimes a complainant or victim of crime. While it is an open question whether the discretionary power to order publication bans is inextricably included within the fundamental powers of a superior court of criminal jurisdiction, Parliament has enhanced the discretionary power to ban publication under sections 486(1) and (2) of the Criminal Code, which are discussed below, by clothing all courts of criminal jurisdiction with this power. Parliament has supplemented this authority by providing for a mandatory publication ban pursuant to sections 486(3) and (4), which is limited only to the identity of the complainant.[48]

These latter two provisions have survived constitutional attack. For example, the precursor of the current section 486(4) was upheld in Canadian Newspapers Co. [49] In that case, Lamer J. (as he then was) wrote for the Court and sustained the former section 486(4) as a reasonable limitation upon freedom of expression. He expressly left open the question of whether section 486(4) offended the right of an accused person to a fair trial.[50] Since this pronouncement of the Supreme Court, this particular provision has been amended to include witnesses under the age of 18 years as well as complainants in sexual matters. However, in light of the limited application of this provision which the Court held to be necessary to ensure that the legislative objective was not frustrated, it is difficult to perceive how trial fairness is abridged by these sections.

On balance, it is likely that the constitutional propriety of this provision will not be revisited post-Dagenais. It is true that sections 486(3) and (4) do not provide for the generous balancing approach advocated by Lamer C.J. in Dagenais. However, the limitation placed upon freedom of the press by this section is very narrow and it is arguable that it indirectly

received the blessing of the Supreme Court in R. v. O'Connor.[51] This provision is not in need of re-drafting.

Proposal: That sections 486(3) and 486(4) of the Criminal Code be retained in their current form.

2. Section 486(1)

Currently, section 486 (1) permits a trial judge to close the court to "all members of the public" provided he or she "is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice" to do so. Very recently, the Supreme Court of Canada unanimously upheld the constitutionality of the "proper administration of justice" arm of this provision in Canadian Broadcasting Corporation v. New Brunswick (Attorney General) et. al.[52] The Court announced that it was sustaining the constitutionality of that portion of the impugned section with "reasons to follow".[53] The New Brunswick Court of Appeal had earlier found section 486 (1) was a reasonable limitation upon freedom of expression. [54]

The other bases enumerated in section 486 (1) upon which a presiding judge may close a courtroom, namely "in the interest of public morals [and] the maintenance of order" are not obviously unconstitutional. The section makes it clear that any order made pursuant to it is discretionary. However, this fact does not render it constitutionally suspect. Discretion abounds in the criminal law. The Supreme Court has already held that discretion reposed in state agents does not offend the Constitution.[55] Curial deference, even more so, is not invalid on this basis. On the contrary, it is a key element of a court's ability to carry out not only the various duties assigned to it, but to act as a guardian of the Constitution itself. [56] Indeed, as Tallis J.A., speaking for the Saskatchewan Court of Appeal in Saskatchewan (Attorney General) v. McConachie[57] , remarked this discretion is "to be exercised on a case by case basis in light of the relevant facts and circumstances with due regard for the presumption of openness enshrined in s. 486 of the Criminal Code and the common law."[58] To this mix must be added the balancing of constitutional values identified by Lamer C.J. in Dagenais.

Another recent case in which the constitutionality of section 486(1) was impugned is The Estate of Kirsten French et. al. v. Attorney General of Ontario.[59] The relief sought on that particular application was whether explicit video-tapes which had been introduced during Paul Bernardo's first degree murder trial should be destroyed. As well, the Applicants sought a declaration that section 486 (1) of the Criminal Code, was unconstitutional, principally because the "public morals" aspect of the provision was vague and did not adequately protect victims of sexually related offenses. In the course of the hearing before Gravely J. of the Ontario Court of Justice (General Division), counsel for the Applicants presented a proposed amendment to the current section 486(1) as follows:

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 the maintenance of order, the proper administration of justice or to prevent serious harm or injustice to any person shall order the exclusion of all or any members of the public from the court room, or make such other order that is less intrusive provided it achieves the same objective.[60]

The proposal also provided in a separate subparagraph that "serious harm" shall include child pornography and obscenity as defined by this Act. [61] The plain objective sought to be advanced by this proposal is to afford protection to victims of certain sexually related crimes. Nevertheless, that objective can already be achieved under the terms of the current section. That, at least, was the view of Gravely J. He concluded:

- While s. 486(1) does not use the word "harm", in my opinion, that is implicit in the language used, namely "public morals, the maintenance of order or the proper administration of justice." While it is easy to define harm and morality as distinctly different concepts, in practical terms it is not useful to do so. Moral imperatives do not exist in a vacuum. They must be viewed in the context of the harm they are designed to prevent.
- In my opinion, a court when approaching the public morality issue in a s. 486(1) enquiry cannot ignore harm to members of the public, in this case the applicants.[62]

The phrase "public morals" appears arcane to some extent but removal of the phrase may also remove an element of "harm" which should continue to be included in the section. Accordingly, if the section were to be amended to remove the reference to "public morals", consideration would have to be given to adding a reference to "harm" since it may not be covered by the phrase "the proper administration of justice".

Proposal: That section 486(1) be retained in its current form.

3. Section 487.2

Section 487.2 prohibits, in the absence of a criminal charge, the publication of details surrounding the execution of a search warrant "without the consent of every person" referred to in the warrant. This provision has been found to contravene section 2 of the Charter by the superior courts of two provinces.[63] The Saskatchewan Court of Appeal recently assumed this provision to be constitutionally valid without deciding the question.[64]

It is clear that section 487.2 of the Criminal Code is prima facie unconstitutional in that it violates freedom of the press as set out in section 2(b) of the Charter. Nevertheless, in spite of the prevailing view expressed in the current jurisprudence, there are legitimate public values which must be taken into account in the context of a section 1 analysis. These would include privacy concerns of individuals who, as yet, have not been charged with any criminal offence as well as legitimate law enforcement objectives. While it cannot be denied that in its current form section 487.2 is constitutionally suspect as it imposes a mandatory and complete ban on publication, until there is a ruling that it is unconstitutional after a s.1 analysis has occurred, there should be no amendment of the provision.

Proposal: That section 487.2 be retained in its current form.

4. Sections 517 and 539

These two provisions authorize the imposition of publication bans in the context of certain pre-trial proceedings. Section 517 relates to a ban upon the publication of evidence which is presented at a bail hearing held in accordance with section 515. If such an order is requested by the Crown, it is necessary for the prosecutor to demonstrate why a publication ban is warranted. However, if it is the accused who asks for the order, the order is mandatory as the court is obliged to grant it.[65] Any order made pursuant to section 517 remains in effect until the accused is either discharged following a preliminary inquiry or convicted or acquitted of the crime against him or her.[66] Section 539 which relates to evidence tendered at a preliminary inquiry is in almost identical terms to section 517.

To date, the constitutionality of these provisions has been sustained. In Re Global Communications Ltd. and A.G. CanS[67], the Ontario Court of Appeal upheld the constitutional propriety of section 517 on the basis that it was a reasonable limitation upon freedom of the press. The New Brunswick Court of Queen's Bench in R. v. BanvilleS [68] measured section 539 against the requirements of section 2(b) of the Charter and found it to be constitutionally sufficient.

The results achieved in those cases must be revisited, however, in light of Dagenais. Applying the reasoning advanced there, it is apparent that these two provisions are seriously flawed in one significant aspect. The court possesses no discretion when the request for a publication ban upon the evidence is advanced by the accused. In that particular circumstance, the presiding judge must impose a ban. As a consequence, no balancing is permitted whereby the effect a publication ban may have upon freedom of the press may be assessed. In the post-Dagenais era, this inquiry is essential. It would appear that both section 517 and section 539 are premised on the belief that the right to a fair trial is exclusively the prerogative of an accused person, otherwise, the order would not be automatic at the behest of the defence. However, it is now beyond dispute that there is also an important societal value achieved by ensuring the fair trial of an individual charged with a criminal offence. [69] In view of this obvious flaw, sections 517 and 539 need repair.

Proposal: That sections 517 and 539 be amended to remove the requirement of a mandatory publication ban order at the request of the accused.

B. Procedural Issues

Dagenais and, to a lesser extent, T.S. also addressed certain procedural issues related to a publication ban. Dagenais concerned an application for an order suppressing publication which was brought in a provincial superior court before a judge other than the trial judge. T.S. involved a similar order sought in the provincial court. Lamer C.J. chose Dagenais as

the case in which to pronounce upon the various procedural issues raised in these appeals. His discussion is logically divided into two parts, one relating to applications brought either at the commencement of trial or during its course and the other relating to appeals initiated following the issuance of an order suppressing publication. The analysis and commentary which follows will also be organized in this way.

1. Pre-trial and Trial Applications

In the course of his discussion of issues relating to applications seeking a publication ban brought either before or at trial, Lamer C.J. touched upon three procedural issues, namely, (a) forum, (b) notice and (c) standing of third parties. These issues will be canvassed below in turn.

(a) **Forum**

Lamer C.J. began by asserting that an application for a publication ban should be brought as soon as possible in the proceedings. It "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)". He stipulated further that in the event it was not possible to ascertain the level of court which ultimately would try the accused, "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)." [71]

The approach of the Chief Justice to the question of forum is sensible. He emphasizes that the preferred adjudicator is the trial judge. However, he also acknowledges that practicality may dictate that an application be commenced prior to when a trial court is ascertainable or a trial judge designated. A similar approach to the selection of the appropriate forum has been adopted by certain provincial appellate courts in relation to applications alleging prosecutorial non-disclosure. [72] Accordingly, it is recommended it should be codified.

Proposal:

That the Criminal Code be amended to provide for an application to seek a publication ban prior to trial. The section should require that the trial judge hear such an application and only if he or she is not identified can the application be heard by a judge of the provincial superior court.

(b) Notice

Respecting the question of notice, Lamer C.J. enumerated only the most obvious issues raised by a notice requirement, namely "[w]hich media are to be given notice, and how is such notice to be given?" [73] Unfortunately, he did little more than identify the problems and

offer the view that perhaps these questions should best be resolved on a case by case basis relying upon "provincial rules of criminal procedure and the relevant case law".[74]

From his brief analysis of this topic, it would seem that the Chief Justice is of the opinion the onus to alert the media of an application asking for suppression of publication rests upon the party seeking such an order. This would only stand to reason. However, in the event questions arise respecting "who is to be given notice and how notice is to be given", Lamer C.J. suggests that directions may be obtained from the designated judge.[75] This is an obvious area of difficulty especially in large metropolitan centres in this country which have a large number of media organizations, both print and electronic. Presumably, it would be useful for applicants to have a set procedure to obtain directions for notice included in the Criminal Code. This provision would enable the applicant to obtain directions for notice to be given, for example, to the leading media organizations in a particular centre. In most centres this would include the C.B.C.

Proposal:

That the Criminal Code be amended to include a provision enabling the party seeking a publication ban on criminal proceedings to apply for an ex parte order for direction as to which, if any, media organizations in the judicial centre should be given notice. The provision could also state that if this is done, the notice requirement has been satisfied and other media who wish to be heard ought to appear before the presiding judge and seek leave.

(c) Standing

Lamer C.J. dealt with the serious question of standing very briefly. He observed that as in most matters, the manner in which the hearing of an application is conducted is left to the discretion of the presiding judge. He did elaborate by observing that the media which wish to participate in this hearing should be given standing in accordance with "the rules of criminal procedure and the established common law principles."See footnote 76 The only clear direction the Court gave to lower courts was that "in a jury trial, a motion for a publication ban must be heard in the absence of the jury."[77]

The Chief Justice's discussion of standing is sensible. The rules surrounding which third party may be granted standing are well developed and especially if a notice requirement is crafted, those rules may be applied without being clouded by concerns about interested parties not receiving notice.

Proposal:

That no special rules be crafted respecting standing to third parties in applications for a publication ban. If a party not directly notified of such an application appears at the hearing,

its ability to participate and the extent of that participation, if any, may be assessed in accordance with the developed law relating to third party standing.

2. Appeals

The procedural issue central to both Dagenais and T.S. was the appropriate mechanism for obtaining appellate review of a publication ban. Since the rulings in those appeals, the Court has revisited and refined the principles set out there. [78] Essentially, the nature and availability of an appellate mechanism in respect of an order made against a third party is determined by the forum in which the original order is made. T.S. and Primeau are examples of third party appeals from orders made by a provincial court judge. Dagenais is an example of an appeal taken from an order made in a provincial superior court.

In Primeau, Sopinka and Iacobucci JJ. attempted to explain the rationale for this approach as follows:

- In Dagenais, the Court traces two separate paths to follow for challenges to orders made in a criminal proceeding: one for the parties to the proceeding, another for third parties. Both the accused and the Crown must apply for relief to the trial judge, or to the level of court having jurisdiction to hear the trial, if known, or otherwise to a superior court judge. An appeal of such a decision must await the end of the trial.
- The procedure for third parties differs for two reasons. First, a third party, being outside the actual proceedings, cannot apply to the trial judge for relief. Second, an order deciding an issue with respect to a third party is a final order. Such a characterization is important in order to comply with the general rule barring interlocutory appeals in criminal matters.[79]

(a) Orders made in Provincial Courts

Orders made by a provincial court judge in respect of constitutional issues are to be reviewed by way of a prerogative writ in accordance with Part XXVI of the Criminal Code. Lamer C.J. summarized the appeal route in Dagenais this way:

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 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.

Sopinka and Iacobucci JJ. endorsed this approach and observed the "advantages of this route lie in its use of established procedures and its consistency with recent decisions of the

Court."[80]

When this approach was applied to C.B.C. 's appeal in T.S., it was dismissed because the appellant had by-passed the provincial superior court and, instead, gone directly to the Court of Appeal. In dismissing the appeal, Lamer C.J. stated that were the Supreme Court to assume jurisdiction, it would be tantamount to endorsing a "direct appeal avenue to the Supreme Court from an order banning publication made by a provincial court judge." [81]

(b) Orders made in Superior Courts

It is possible to appeal an order suppressing publication made by a provincial superior court judge. However, such an appeal lies only to the Supreme Court of Canada with leave pursuant to section 40 of the Supreme Court Act. Lamer C.J. asserted that this particular avenue was available since 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 a particular case."[82]

Lamer C.J. acknowledged there were problems associated with this rather cumbersome appellate mechanism, most notably expense and expedition. Nevertheless, he offered the view that these concerns may be more apparent than real. He stated:

[A] direct appeal to the Supreme Court of Canada can be faster than 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. [83]

In the end, he recognized that neither of these mechanisms were entirely satisfactory and that in crafting these particular appellate routes, the Court had been "forced to choose the least unsatisfactory of a set of unsatisfactory options."[84] He urged "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."[85]

(c) Commentary

The Court has expressly invited Parliament to enact legislation providing for appeals from orders prohibiting publication and the immediate question is should this invitation now be taken up? To answer this question it is necessary to weigh both the salutary effects of codifying a third party's right to appeal and the deleterious effects of not doing so.

If amendments are not made to the Criminal Code then the appeal mechanisms set out by the Court and outlined above will operate. This will disadvantage the Crown or an accused's challenge to an interlocutory order such as a publication ban, since those parties must follow the traditional avenues of appeal set out in the Code. While it is true that any party

affected by the appeal, including the Crown, would have standing to appear in a third party's appeal [86], generally speaking, the Crown or the accused must await the final verdict and pursue an appeal of an interlocutory appeal if appropriate grounds exist. To counterbalance this concern, the mechanisms established by Dagenais do not encourage appeals as it is not user friendly.

Furthermore, maintaining the status quo will result in inconvenience and increased expense to the parties, especially those having to appeal directly to Ottawa. An accused's right to a trial within a reasonable time guaranteed under section 11(b) of the Charter may also be impaired in those cases where the trial is adjourned pending the third party appeal. However, this disadvantage may exist in any third party appeal. The Supreme Court itself may be inconvenienced with the burden of considering leave applications in respect of a wide range of third party appeals which ordinarily likely would never reach that Court.

On balance, however, Lamer C.J.'s challenge to Parliament should be embraced, at least with respect to orders limiting publication. However, despite his comments respecting the efficiency of appealing directly to the Supreme Court, it is suggested there should be an appeal to the provincial court of appeal from orders of this kind, regardless of the forum which issues it. A provincial court of appeal is far more likely to be aware of, and sensitive to, local concerns current in the region, than a distant court in Ottawa. In addition, the physical proximity of the Court of Appeal to the litigants may reduce costs.

The procedure established in Dagenais and refined in subsequent cases has already been endorsed in respect of other appeals brought by third parties to a prosecution.[87] Therefore, any appeal mechanism for publication bans will be an exception to this general appellate regime for third parties. One important issue is whether the appeal structure for publication bans should parallel the current regime for summary conviction and indictable matters. There is a certain logic to that approach. On the other side, there may be wisdom in having all appeals from orders of this kind heard with leave by the provincial court of appeal. [88] As there will not be many of these kinds of appeals, having them go to the provincial court of appeal may ensure consistency.

Proposal: T

That the Criminal Code be amended to provide for an appeal from an order prohibiting publication to the provincial court of appeal with leave regardless of whether it was issued in a summary conviction or indictable matter.

IV. LIABILITY AND PENALTY SCHEMES

Before discussing the liability and penalty schemes that should govern non-publication orders under the Criminal Code, the disparities in wording between the existing non-publication provisions should be mentioned.

The non-publication orders and publication bans provided for in the Criminal Code are intended to prevent certain information from being made public in writing or orally.

In the case of bans on passing information on in writing, subsection 486(5) of the Criminal Code prevents every one from publishing the information in any document, while other provisions are more limited, banning only the publication of the information in a newspaper, as defined in section 297 of the Criminal Code (ss. 276.3(1), 487.2(1), 517(1), 539(1), 542(2) and 648(1) of the Criminal Code). Where bans on passing information on orally are concerned, subsection 486(5) of the Criminal Code prohibits broadcasting it in any way, while other provisions prohibit broadcasting or diffusing without further clarification (s. 487.2), although limitations are placed on the mode of diffusion in the French versions of some of these provisions. Thus s. 276.3(1) uses the phrase "à la radio ou à la télévision", subsections 517(1) and 542(1) use the verb "radiodiffuser", section 648(1) uses the phrase "ni révélée dans une émission radiodiffusée" and subsection 539(1) uses the phrase "ni être révélée dans aucune émission".

Parliament's intention is to prevent certain information from being made public, and for this it is not necessary to cover situations in which the information is passed on privately, unless a person who does so aids, within the meaning of subsection 21(2), another person to make the information public. However, to afford adequate protection to information covered by a non-publication order, it is necessary to prohibit every one from making the information public by any means whatsoever. The existing provisions do not, for example, prohibit publishing the information by putting up posters in places accessible to the public or circulating it on the Internet. These omissions must accordingly be rectified.

Proposal:

That the existing provisions be amended to prohibit every one from making information covered by a non-publication order available to the public by any means.

The availability of defences is another important aspect in respect of which the existing provisions diverge. There are provisions that permit an accused to raise a lawful excuse, the proof of which lies on the accused (ss. 517(2), 520(9) and 521(10)), and others that do not (ss. 276.3(2), 486(5), 487.2, 539, 542(2) and 648(1)).

In view of the importance of protecting information covered by a non-publication order, the fact that the courts make such orders after weighing the interests involved and the fact that interested parties can apply to the higher courts to review them, it should not be open to a

person to rely a posteriori on any lawful excuse whatsoever for contravening a non-publication order. Even the fact that information has already to a certain extent entered the public domain should not serve as a justification for spreading it further.

Proposal:

That a person charged with contravening a non-publication order not be permitted to raise a lawful excuse.

1. Liability Scheme

Although it is not expressly stated in the provisions authorizing non-publication orders, the penalty for contravening such an order is based on a scheme of liability founded on knowledge and general intent.

The person who publishes the information must know that the publication thereof is prohibited by order and must publish it wilfully. The onus is therefore on the prosecution to prove beyond a reasonable doubt that the person knew about the order, and the accused need only raise a bona fide lack of knowledge to raise a reasonable doubt.

Since the person to whom non-publication orders most often apply are media companies or persons working for such companies, and in view of the difficulty of proving beyond a reasonable doubt that the order was brought to their attention, they should be subject to a penalty for publishing information not only where they knew such publication to be banned, but also where they ought to have known it to be banned. It does not seem excessive to require such companies to take any reasonable action necessary to make sure that information related to criminal proceedings is not subject to a ban before publishing it.

Proposal:

That every media or telecommunications company be prohibited from publishing information that it knows or ought to have known to be subject to a non-publication order.

2. Penalty Scheme

A person who contravenes a non-publication order made under the Criminal Code is guilty of an offence punishable on summary conviction. Thus, under subsection 787(1) of the Criminal Code, he or she is liable only to a fine of not more than two thousand dollars or to imprisonment for six months or to both, and a corporation is liable to a fine not exceeding twenty-five thousand dollars under paragraph 719(b) of the Criminal Code. Furthermore, if the person in question contravenes a non-publication order made under the authority of the common law, such as a ban on publishing information even after the termination of the proceedings, he or she is guilty of an indictable offence and is subject to a penalty at the court's discretion (cf. Quebec (A.G.) v. Publications Photo-Police Inc.[89] In addition, a person

who contravenes an order authorized by any Act is under subsection 127(1) of the Criminal Code liable to imprisonment for a term not exceeding two years where no penalty is provided.

Thus, there is a disparity in penalties for which no justification can be found. Moreover, to punish the contravention of a non-publication order only as a summary offence neither sufficiently reflects the objective seriousness of the offence nor is a sufficient deterrent. However, it must be acknowledged that the contravention of such an order is not always, in view of all the circumstances, an indictable offence.

As a result, we consider it necessary to review the penalty scheme for non-publication orders and make the contravention of such orders punishable by indictment or on summary conviction. In doing so, we have two options: to make it a hybrid offence punishable by (1) imprisonment for two years less a day in the case of an indictable offence and six months on summary conviction, or (2) imprisonment for five years in the case of an indictable offence and eighteen months on summary conviction. We favour the first option in view of the power to award costs against the accused, which we will discuss in the next recommendation.

Proposal:

That a person who contravenes a non-publication order made on the basis of a power conferred under the Criminal Code or the common law be guilty of an offence punishable by imprisonment for two years less a day in the case of an indictable offence and six months on summary conviction.

That the fine that can be imposed on corporations be raised.

3. Power to Award Costs

The contravention of non-publication orders generally has serious consequences not only for the conduct of the criminal proceedings but also for the costs the parties must incur. As a result, a court that convicts a person who contravenes such an order should have the power, after the parties have had the opportunity to make representations, to require him or her to reimburse their costs related to the conduct of the criminal proceedings that were incurred due to the publication of information covered by the order. This power is in particular necessary with regard to section 648 of the Criminal Code, since the contravention of such an order may result not only in the failure of the proceedings and the empanelling of a new jury, but also in a change of venue, with all the related costs.

Proposal:

That a court that convicts a person of contravening a non-publication order have the power to require him or her to reimburse the parties' costs related to the criminal proceedings that

were incurred due to the contravention, and that the court permit the parties to make any necessary representations in this respect.

V. SEPARATE PART FOR PUBLICATION BAN ORDERS

As the appendix to this paper demonstrates, the provisions authorizing an order for a publication ban are distributed throughout the Criminal Code. The question arises as to whether these provisions, as well as any new Sections, including those relating to procedure and appellate jurisdiction, should be collected and housed within a discreet part of the Code.

There is an advantage to having publication ban provisions located within the Sections concerning which a publication ban may be obtained in that it draws the attention of counsel to the fact a publication ban may be sought. However, in the event that there is a wholesale rationalization of these orders, it would seem sensible to locate all of the Sections, (old, amended and new) in a discreet new part of the Criminal Code.

While several organizational formats could be used in creating such a discreet part of the Criminal Code, it would seem most appropriate to draft such a part under the following subject headings to facilitate ease of reference, to encourage clarity and to avoid repetition. The section could contain a definition section, distinguish mandatory from discretionary publication bans, deal with penalties and could set out procedures with respect to such issues as notification.

1. Definitions

This section would apply specifically to the distinct part of the Criminal Code relating to publication bans and would thus have the benefit of not inadvertently affecting other definitions throughout the Code. Such a section, would present an opportunity to include modern definitions for such terms as "publication".

While repeated reference has been made by the courts to the "media", advances in electronic communication suggest that attention might be given to other individuals or entities which may have an interest in disseminating information and therefore might properly be subject to a publication ban. An example of this might be an interest group or individual with a particular interest in disseminating information via a web site. Current Criminal Code ban provisions require close scrutiny to ensure that they respond to the realities of modern day electronic information dissemination. It could be argued that sections such as 517 which make specific reference to "published in any newspaper" are quickly losing relevance.

2. Mandatory Publication Bans

This section would enumerate all current, amended, and new sections within the Code where there is no judicial discretion with respect to ordering a publication ban, (such as a ban of publication of the complainant's name in a sexual assault case). These bans would be mandatory, and, to the extent that they have already survived constitutional attack, no additional procedures would be required in order to deal with such matters as forum or notice. Unlike those publication bans for which a balancing of interests is required between the right of the accused to a fair trial and freedom of the press, these sections would deal with issues outside that paradigm.

As a practical matter, in drafting this section all mandatory publication bans throughout the Criminal Code would be transferred to this general part, with specific section amendments as required.

3. Discretionary Publication Bans

This section would include specific reference to each of the current sections currently sprinkled throughout the Code dealing with discretionary bans on publication. In addition, unique sections such as 486(1) which grant the court discretion to limit public access to courtrooms would also be included in this section.

For clarity, it would also be preferable to add any new provisions which can be presently identified where it would be appropriate to expand the court's exercise of discretion in imposing bans. This would include such situations as that which might arise when the Crown does not wish to publicize the fact that an arrest warrant has been issued thereby alerting the accused.

It could be argued that with respect to enumerated heads of discretionary power where Parliament decides it is appropriate for judges to exercise discretion and which concern primarily the parties to the case, notice would not be required prior to the ban being imposed. It would be clear that when such an order was made a simplified appeal process would be available to any interested third party.

In addition, this section would allow for the expansion of the authority of the court to consider applications for bans on publication where the situation is not enumerated as above but, where, in consideration of the interests of justice, it might be appropriate for the court to impose such a ban. In part, this would be a codification of the common law and would set out specific requirements with respect to notification, forum and procedure for all parties.

It would provide the court with an ability to make an order in a situation that is currently unanticipated but where the public interest would make such an order appropriate.

A codified but non-exhaustive list of factors that might be considered in making such a ban "where is it necessary for the proper and orderly administration of justice" might include the following:

- (i) the proper maintenance of order and the administration of justice;
- (ii) the protection of informants/witnesses;
- (iii) ensuring the integrity of ongoing criminal investigations;
- (iv) the protection of the accused's right to a fair trial;
- (v) the encouragement of witnesses to come forward and testify; and
- (vi) the right of the public to access material before the courts, subject to any of the enumerated considerations.

With respect to all discretionary orders,

- i) A court of competent criminal jurisdiction would be given the authority to exercise its discretion to impose a ban on publication of any materials required for the proper maintenance of order and the administration of justice.

In determining whether a publication ban is appropriate in given circumstances, the court would be obliged to consider whether:

(a) such a ban is necessary in order to prevent a real and substantial risk of fairness of the trial, because reasonably available alternative measures will not prevent the risk; and

(b) the salutary affects of the publication ban outweigh the deleterious affects of the free expression of those affected by the ban.

- ii) The onus for establishing that such a ban is necessary would be on the party requesting such a ban.
- iii) Insofar as the applications under the suggested general publication ban authority are concerned, prior to the imposition of such a ban, the court would be required to consider whether notice should be given to any potential third parties and if so, to give directions as to the form of such notice including time frames. There would be no specific reference to standing and the current law would prevail.
- iv) An application for a ban on publication would be made to the trial court, where it has already been designated, or before the court at the level the case will be heard, if the level of the court can be established definitively by reference to the statutory provisions; and, where it is not possible to ascertain the level of court which ultimately would try the accused, and the application should be made before a Superior Court judge being the highest court that could hear the case.

Liability and Penalty

This section would deal with the liability that would be incurred for a violation of a non-publication order. Either within this section, or by means of the definition section mentioned earlier, the existing provisions would be amended to prohibit anyone from making information covered by a non-publication order available to the public by any means. A person or entity found to have published in contravention of a ban would have to demonstrate that reasonable efforts were taken to determine whether a publication ban was in existence, bearing in mind the nature of the case, in order to escape liability.

Currently, there is a disparity in the penalties which may be imposed for violation of non-publication orders. The creation of an offence of general application for which the Crown could elect to proceed either indictably or summarily would appear to be justifiable. In order to ensure that corporations would not be tempted to incur a financial penalty as a "cost of doing business", the maximum penalty for breach of a non-publication order could be increased. Similarly, for this reason and, in order to help defray the very considerable cost that might be incurred by the justice system as a consequence of a breach of a non-publication order, the court could have the ability to order costs.

Appeals

This section would apply only to discretionary publication ban orders and would provide for an appeal from an order relating to publication bans to the Provincial Court of Appeal with leave regardless of whether it was issued in a summary conviction or indictable matter.

Proposal:
The Criminal Code be amended to include a specific part relating exclusively to orders for publication bans. These provisions would be a collection of all current as well as new provisions of the Code relating to publication bans and would be in a format similar to that set out above. It would include provisions relating to mandatory bans, enumerated discretionary bans, and a general discretionary ban authority, as well as to procedures and appeals relating to publication bans.

SUMMARY OF PROPOSALS

1. That sections 486(3) and 486(4) of the Criminal Code be retained in their current form.

2. That section 486(1) be retained in its current form.

3. That section 487.2 be retained in its current form.

4. That sections 517 and 539 be amended to remove the requirement of a mandatory publication ban order at the request of the accused.

5. That the Criminal Code be amended to provide for an application to seek a publication ban prior to trial. The section should require that the trial judge hear such an application and only if he or she is not identified can the application be heard by a judge of the provincial superior court.

6. That the Criminal Code be amended to include a provision enabling the party seeking a publication ban on criminal proceedings to apply for an ex parte order for direction as to which, if any, media organizations in the judicial centre should be given notice. The

provision could also state that if this is done, the notice requirement has been satisfied and other media who wish to be heard ought to appear before the presiding judge and seek leave.

7. That no special rules be crafted respecting standing to third parties in applications for a publication ban. If a party not directly notified of such an application appears at the hearing, its ability to participate and the extent of that participation, if any, may be assessed in accordance with the developed law relating to third party standing.

8. That the Criminal Code be amended to provide for an appeal from an order prohibiting publication to the provincial Court of Appeal with leave regardless of whether it was issued in a summary conviction or indictable matter.

9. That the existing provisions be amended to prohibit every one from making information covered by a non-publication order available to the public by any means.

10. That a person charged with contravening a non-publication order not be permitted to raise a lawful excuse.

11. That every media or telecommunications company be prohibited from publishing information that it knows or ought to have known to be subject to a non-publication order.

12. That a person who contravenes a non-publication order made on the basis of a power conferred under the Criminal Code or the common law be guilty of an offence punishable by imprisonment for two years less a day in the case of an indictable offence and six months on summary conviction.

That the fine that can be imposed on corporations be raised.

13. That a court that convicts a person of contravening a non-publication order have the power to require him or her to reimburse the parties' costs related to the criminal proceedings that were incurred due to the contravention, and that the court permit the parties to make any necessary representations in this respect.

14. That the Criminal Code be amended to include a part relating exclusively to orders for a publication ban.

LIST OF AUTHORITIES

1. Attorney General of Nova Scotia v. McIntyre, [1982] 1 S.C.R. 175

2. B.C.G.E.U. v. British Columbia (Attorney General), [1988] 2 S.C.R. 214

3. Blackman v. British Columbia Review Board , [1995] B.C.J. No. 95 (C.A.) January 24, 1995, Vancouver Registry No. CA017480

4. C.B.C. v. Dagenais (1993), 12 O.R. (3d) 239 (C.A.)

5. Canadian Broadcasting Corporation v. New Brunswick (Attorney General) et. al. S.C.C. March 29, 1996, No. 24305, Supreme Court of Canada, 1996 Bulletin of Proceedings, at p. 583

6. Canadian Broadcasting Corporation v. New Brunswick (Attorney General) et. al. (1994), 32 C.R. (4th) 334 (N.A.C.A.)

7. Canadian Newspapers Co. Ltd. v. Attorney General of Canada (1986), 28 C.C.C. (3d) 379 (Man. Q.B.)

8. Canadian Newspapers Co. Ltd. v. Attorney General of Canada and two other actions (1986), 29 C.C.C. (3d) 203 (Ont. H.C.J.)

9. Canadian Newspapers Co. Ltd. v. Canada (Attorney General), [1988], 2 S.C.R. 122

10. Dagenais v. C.B.C., [1994] 3 S.C.R. 835

11. Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326

12. L.L.A. v. A.B. (1995), 44 C.R. (4th) 91 (S.C.C.)

13. MacMillan Bloedel Ltd. v. Simpson (1995), 44 C.R. (4th) 277 (S.C.C.)

14. Nova Scotia Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319

15. Quebec (AG) v. Publication Photo Police Inc., [1990] 1 S.C.R. 851

16. Re Church of Scientology of Toronto and the Queen (No. 6) (1986), 27 C.C.C. (3d) 193 (Ont. H.C.)

17. Re Global Communication Ltd. and A.G. Can. (1984), 10 C.C.C. (3d) 97 (Ont. C.A.)

18. R. v. Adams, [1995] 4 S.C.R. 707

19. R. v. Banville (1983), 3 C.C.C. (3d) 312 (N.B.Q.B.)

20. R. v. Beare, R. v. Higgins, [1988] 2 S.C.R. 387

21. R. v. Corbett, [1988] 1 S.C.R. 670

22. R. v. Clement (1821), 106 E.R. 918

23. R. v. Faid, [1983] 1 S.C.R. 265

24. R. v. Keegstra, [1995] 2 S.C.R. 381

25. R. v. Laba, [1994] 3 S.C.R. 965

26. R. v. Laporte (1993), 84 C.C.C. (3d) 343 (Sask.C.A.)

27. R. v. L. (D.O.), [1993] 4 S.C.R. 419

28. R. v. O'Connor (1995), 103 C.C.C. (3d), (S.C.C.)

29. R. v. Primeau, [1995] 2 S.C.R. 60

30. R. v. Rodrigue (1995), 91 C.C.C. (3d) 129 (Y.T.C.A.)

31. R. v. Ryan (1991), 69 C.C.C. (3d) 226 (N.S.C.A.)

32. R. v. Schafer, et. al., [1994] 7 W.W.R. 670 (Sask.C.A.);
leave to appeal denied [1994] 3 S.C.R. xi

33. R. v. Seaboyer, [1991] 2 S.C.R. 577

34. R. v. S.(R.J.), (1995), 36 C.R. (4th) 1 (S.C.C.)

35. R. v. Thomson Newspapers Ltd. et. al. (sub. nom. R. v. Homolka), Ont. C.A.,
Dec. 22, 1994; leave to appeal denied S.C.C. No. 24579, May 4, 1995,
S.C.C. Bulletin at p.773

36. R. v. T.S. (1993), 109 Sask. R. 96, 82 C.C.C. (3d) 352 (C.A.)

37. R. v. T.S., [1994] 3 S.C.R. 952

38. R. v. Warren, [1995] 3 W.W.R. 379 (N.W.T.S.C.)

39. Saskatchewan (Attorney General) v. McConachie (1993), 109 Sask. R. 161 (C.A.)

40. Scott v. Scott, [1913] A.C. 417 (H.L.)

41. The Estate of Kirsten French et. al. v. Attorney General of Ontario, [1996] O.J. No. 1300
(Gen. Div.) also referred to as R. v. Bernardo re: French Estate v. Ontario (A.G.)

Footnotes

Footnote: 1 Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 1 1 (hereinafter the "Charter"), sections 7 and 11(d).

Footnote: 2 For example, section 11(d) of the Charter provides that all accused persons must receive a
"fair and public hearing by an independent and impartial tribunal".

Footnote: 3 For a discussion of privacy as a right subsumed within section 7, see: R. v. Beare, R. v. Higgins, [1988] 2 S.C.R. 387, at pp. 412-413 per La Forest J. Section 486(4) of the Criminal Code of Canada expressly recognizes the interests of certain witnesses, such as complainants in sexual assault matters and witnesses under 18 years of age.

Footnote: 4 In Canadian Broadcasting Corporation v. Dagenais (1993), 12 O.R. (3d) 239 (C.A.), Dubin C.J.0. observed at page 245 that "it was the common law courts that first recognized, as a fundamental legal right, the right of an accused to a fair trial ... in the absence of any legislation by Parliament or the Legislative Assemblies".

Footnote: 5 (1995), 36 C.R. (4th) 1 (S.C.C.).

Footnote: 6 [1982] 1 S.C.R. 175.

Footnote: 7 Id. at p. 183.

Footnote: 8 Supra. n. 4, at p. 244.

Footnote: 9 S.C. 1960, c. 44. This statute has been characterized as a "quasi-constitutional instrument', see: Hogan v. The Queen, [1975] 2 S.C.R. 574, Laskin J. (as he then was) stated that "[t]he Canadian Bill of Rights is a half-way house between a purely common law regime and a constitutional one; it may aptly be described as a quasi-constitutional document": Hogan, supra. at p. 579. By virtue of section 5(2), the Bill of Rights applies only to federal laws and institutions: see Hogg, Constitutional Law of Canada (3rd. ed, loose-leaf), Volume II, at p. 32-3.

Footnote: 10 [1988] 2 S.C.R. 122.

Footnote: 11 Id. at p. 129

Footnote: 12 [1989] 2 S.C.R. 1326.

Footnote: 13 R.S.A. 1980, c. J-1, s. 30.

Footnote: 14 Id. at p. 1336

Footnote: 15 Id. at p. 1339

Footnote: 16 Id. at p. 1340.

Footnote: 17 [1993] 1 S.C.R. 319.

Footnote: 18 Id. at p. 406.

Footnote: 19 [1995] B.C.J. No. 95 (C.A.), January 24, 1995, Vancouver Registry No. CA017480.

Footnote: 20 Id. at paragraph 38.

Footnote: 21 Anderson, "The Open Court and a Free Press: A View from the Bench" (1994), 24 L.S.U.C. Gazette 64, at p. 66.

Footnote: 22 [1994] 3 S.C.R. 835.

Footnote: 23 [1994] 3 S.C.R. 952

Footnote: 24 Supra. n. 4.

Footnote: 25 See: R. v. T.S. (1993), 109 Sask. R. 96, 82 C.C.C. (3d) 352 (C.A.).

Footnote: 26 [1993] 3 S.C.R. v.

Footnote: 27 Supra. n. 22 at p. 894.

Footnote: 28 Id. at p. 881.

Footnote: 29 Id. at p. 877.

Footnote: 30 Id. at p. 878.

Footnote: 31 Supra. n. 10.

Footnote: 32 Supra. n. 11.

Footnote: 33 Supra. n. 22, at p. 891.

Footnote: 34 Id.

Footnote: 35 Id. at p. 891.

Footnote: 36 Id. at pp. 884-887.

Footnote: 37 Id. at p.886. Unique problems arise with trans-border publications and individual trial judges craft their own solutions. For example, it is interesting to note that LeSage A.C.J. O.C. (as he then was), the trial judge in the trial of R. v. Paul Bernardo "warned the U.S. news media that they would be barred from the courtroom for the duration of the trial" if they chose to publish details of matters dealt with in the absence of the jury: The Globe and Mail, "Phone call followed missed curfew, trial told", May 24, 1995 at p. A-3.

Footnote: 38 R. v. Thomson Newspapers Ltd. et. al. (sub. nom. R. v. Homolka), Ont. C.A., December 22, 1994; leave to appeal denied, S.C.C. No. 24579. May 4, 1995: S.C.C. Bulletin at p. 773. In that ruling the Court of Appeal quashed the media's appeal from Kovac J.'s order limiting publication of the proceedings in R. v. Homolka until the murder trial of her co-accused husband, Paul Bernardo was completed.

Footnote: 39 Id. at p. 881. A subsequent commentator offered yet another option, a stay of proceedings. W. Ian C. Binnie, Q.C., counsel for C.B.C. in Dagenais suggested that in certain exceptional circumstances "it may be more important to get out the news than to have a trial". He explained that "in a situation where there are widespread media reports about alleged government corruption, bribery and payoffs, the court might elect to stay the trial of a particular individual involved and give preference to having the public informed": "S.C.C. lays down law on publication bans", The Lawyers Weekly, January 6, 1995, at p. 16. Quare whether such a circumstance would advance the public interest in any meaningful way.

Footnote: 40 Supra. n. 22 at p. 891.

Footnote: 41 See especially: R. v. Clement (1821), 106 E.R. 918; Scott v. Scott, [1913] A.C. 417 (H.L.) and Re Church of Scientology of Toronto and the Queen (No. 6) (1986), 27 C.C.C. (3d) 193 (Ont. H.C.), at pp. 206-208.

Footnote: 42 Supra. n. 23.

Footnote: 43 Supra. n. 38.

Footnote: 44 At least one trial court has made an order of this kind post-Dagenais. In R.

v. Warren, [1995] 3 W.W.R. 379 (N.W.T.S.C.), de Weerdt C.J. imposed certain conditions on the publication of exhibits introduced at the murder trial of Roger Warren until all proceedings against the accused, and any appeal, were finally ended.

Footnote: 45 Supra. n. 22 at p. 891.

Footnote: 46 See for example: R. v. Faid, [1983] 1 S.C.R. 265 and R. v. L.(D.O.), [1993] 4 S.C.R. 419.

Footnote: 47 See for example: B.C.G.E.U. v. British Columbia (Attorney General), [1988] 2 S.C.R. 214 and MacMillan Bloedel Ltd. v. Simpson. (1995), 44 C.R. (4th) 277 (S.C.C.)

Footnote: 48 In R. v. Adams,[1995] 4 S.C.R. 707 the Court held that a ban ordered pursuant to section 486(4) could not be revoked without the consent of the Crown and the complainant: Id. at pp. 723-724. The Court opined that a revocable ban would not provide the certainty necessary to encourage victims of sexual offences to report them to the police, which was Parliament's goal in enacting the section.

Footnote: 49 Supra. n. 10

Footnote: 50 Id. at p. 134

Footnote: 51 (1995), 103 C.C.C.(3d) 1 (S.C.C.) at p. 24 per Lamer C.J. and Sopinka J. referring with approval to R.v. Ryan (1991), 69 C.C.C.(3d) 226 (N.S.C.A.) at p. 230.

Footnote: 52 S.C.C., March 29, 1996, No. 24305, Supreme Court of Canada, 1996 Bulletin of Proceedings at p. 583

Footnote: 53 Id. at p. 584

Footnote: 54 Canadian Broadcasting Corporation v. New Brunswick (Attorney General) et. al. (1994), 32 C.R. (4th) 334 (N.B.C.A.), at p. 338 per Hoyt C.J.N.B. (Turnbull J.A. concurring) approving (1993), 143 N.B.R. (2d) 174 (Q.B.) per Landry J. The third appellate judge, Anger J.A., also sustained the constitutionality of section 486(1) on the basis that it manifested no violation of section 2(b) whatsoever. In his view it was not necessary to embark upon an inquiry under section 1 of the Charter.

Footnote: 55 Beare, supra. n. 3.

Footnote: 56 See for example: Beauregard v. Canada, [1986] 2 S.C.R. 56 and P.(J.), supra.

Footnote: 57 (1993), 109 Sask. R. 161 (C.A.)

Footnote: 58 Id. at p. 163.

Footnote: 59 [1996] O.J. No. 1300 (Gen. Div.) also referred to as R. v. Bernardo re: French Estate v. Ontario (A.G.).

Footnote: 60 Id. at Appendix B, Schedule 2.

Footnote: 61 Id.

Footnote: 62 Id. at para. 42 and para. 46.

Footnote: 63 See: Canadian Newspapers Co. Ltd. v. Attorney General of Canada (1986), 28 C.C.C.(3d) 379 (Man. Q.B.) and Canadian Newspapers Co. Ltd. v. Attorney General of Canada and two other actions (1986), 29 C.C.C.(3d) 203 (Ont. H.C.J.)

Footnote: 64 R. v. Schafer, et. al., [1994] 7 W.W.R. 670 (Sask. C.A.); leave to appeal denied [1994] 3 S.C.R. xi.

Footnote: 65 See: section 517(1) of the Criminal Code

Footnote: 66 Section 517(1)(a) and (b).

Footnote: 67 (1984), 10 C.C.C.(3d) 97 (Ont. C.A.)

Footnote: 68 (1983), 3 C.C.C.(3d) 312 (N.B.Q.B.)

Footnote: 69 See especially: R. v. Seaboyer, [1991] 2 S.C.R. 577, at p. 603 and R. v. Corbett, [1988] 1 S.C.R. 670, at p. 745 per La Forest J. dissenting in the result.

Footnote: 70 Supra. n. 22 at p. 870.

Footnote: 71 Id. This was also the approach to selecting the appropriate forum advocated by the Saskatchewan Court of Appeal in McConachie, supra. n. 57 at p. 163 per Tallis J.A.

Footnote: 72 See e.g.: R. v. Laporte (1993), 84 C.C.C.(3d) 343 (Sask. C.A.) and R. v. Rodrigue (1995), 91 C.C.C. (3d) 129 (Y.T.C.A.)

Footnote: 73 Supra. n. 22 at p. 868.

Footnote: 74 Id. at p. 869.

Footnote: 75 Id. at p. 869.

Footnote: 76 Id. at p. 872.

Footnote: 77 Id. at p. 868.

Footnote: 78 See especially: R. v. Primeau, [1995] 2 S.C.R. 60; R. v. Laba, [1994] 3 S.C.R. 965; R. v. Keegstra, [1995] 2 S.C.R. 381; Adams, supra. n. 48 and L.L.A. v. A.B. (1995), 44 C.R.(4th) 91 (S.C.C.).

Footnote: 79 Primeau, id. at p. 68.

Footnote: 80 Id. at p. 69.

Footnote: 81 T.S., supra. n. 23 at p. 961.

Footnote: 82 Supra. n. 22 at p. 861.

Footnote: 83 Id. at p. 861.

Footnote: 84 Id. at p. 858.

Footnote: 85 Id. McLachlin J. in her separate, concurring opinion echoed the Chief Justice's call for legislative reform at pp. 947-948:

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.

Footnote: 86 L.L.A. v. A.B., supra. n. 78 at pp. 105-106 per L'Heureux-Dubé J.

Footnote: 87 See e.g.: L.L.A, id., at p. 97 per Lamer C.J. and Sopinka J. and, at pp. 104-106 per L'Heureux-Dubé J.

Footnote: 88 This is clearly the option preferred by LaForest J. in Dagenais, supra. n. 22 at p. 894. By way of comparison in England, section 4(2) of the Contempt of Court Act, 1981 (U.K.), c. 49, provides the authority for a court to issue a publication ban "where it appeals to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent..." An immediate appeal to the Court of Appeal with leave from such an order is provided for by section 159(1)(a) of the Criminal Justice Act 1988, 1988 (U.K.), c. 33. The section provides further that the decision of the Court of Appeal is final.

Footnote: 89 [1990] 1 S.C.R. 851, affirming Chouinard J.A., dissenting in the Court of Appeal (1988), 42 C.C.C. (3d) 220.