

CANADA'S "BARBIE AND KEN" MURDER CASE: THE DEATH KNELL OF PUBLICATION BANS?

INTRODUCTION

It was a fairy tale wedding. Karla Homolka was resplendent in a flowing white gown, while husband-to-be, Paul Kenneth Bernardo, wore white tie and tails. The attractive young couple left the church near Niagara Falls in a horse-drawn carriage amidst a showering of well wishes from friends and family.

Approximately twenty miles away on that same day, June 29, 1991, the police were pulling seven blocks of concrete out of the waters of a favorite local fishing spot. Encased in the concrete were the dismembered body parts of Leslie Mahaffy, a shy fourteen-year-old with long blond hair who had disappeared from a nearby town two weeks earlier. Approximately a year and a half later, Canadian authorities arrested Karla Homolka and Paul Bernardo upon suspicion for this and other killings.

This paper will begin with a brief overview of the facts surrounding this case, and the ensuing publication ban of those facts. A discussion of the Canadian judiciary's authority for issuing publication bans will follow. This paper will conclude with a discussion of the ineffectiveness of publication bans and will offer alternative measures to ensure the fair trial rights of an accused.

A. *The Story Begins*

Karla Homolka was seventeen in 1987 when she met the man she would marry, Paul Bernardo. He was a university graduate trained in accounting, and Homolka worked as a veterinary assistant. When Homolka graduated from high school, the couple moved into a pink clapboard Cape Cod on the shores of Lake Ontario in a quiet suburban neighborhood. They appeared a typical happy and well-adjusted couple.

However, appearances can be deceiving.¹ The couple embarked upon a path of deviant behavior² which progressed to the abduction of fourteen-

1. It was not just that they were attractive, though the killings had quickly been dubbed the Barbie and Ken Murders. It was also their background. These were middle-class kids, achievers, straight out of the suburbs, with dreams and aspirations. Serial killers who choose to chop up a body and encase it in concrete are meant to come from broken homes. They aren't meant to be pretty and blonde and have perfect teeth. They aren't meant to live in icing-sugar pink clapboard houses down by the lake. But these ones, it seemed, did. Jay Rayner, *Karla Homolka Was A Sweet Young Girl*, MAIL ON SUNDAY, Apr. 13, 1995, at 39.

2. Around Christmas of 1990, prior to their marriage, Karla began helping Paul find young girls with whom he could have sex. According to accounts of the trial, some of these girls were friends of Karla's younger sister, Tammy. Tammy herself was to be Paul's Christmas present. On the evening of December 23, 1990, while at her parents' home, Karla

year-old Leslie Mahaffy in June 1991. Mahaffy was abducted near her home and taken to the Bernardo-Homolka residence in St. Catherine.³ She was sexually assaulted for two days and then strangled to death by Bernardo with an electric cord.⁴ The strangulation was videotaped by Homolka.⁵ Bernardo then used a circular saw to dismember the corpse and proceeded to encase the body parts in concrete.⁶ The concrete bricks were then heaved into Lake Gibson, where sinking tides later revealed the gruesome blocks.⁷

Ten months later, the couple, posing as lost tourists, abducted Kristen French in a church parking lot. French was kept alive in the Bernardo-Homolka home for two weeks. During this time she was subjected to varying sexual abuse at the hands of both Homolka and Bernardo.⁸ Eventually, she was strangled to death by Bernardo, and her body was dumped on a side road just feet from the grave of Leslie Mahaffy.

During the time these crimes were committed, relations between Bernardo and Homolka were deteriorating.⁹ Bernardo beat Homolka regularly. Following one particularly severe beating with a flashlight,¹⁰ Homolka retreated to her parents home, called the police, and revealed information which led to the subsequent arrest of Bernardo.

slipped a tranquilizer into Tammy's eggnog. While the young girl was unconscious, Karla and Paul took turns having sex with her. Each of them videotaped the other in the act, while Karla's parents sat in another room oblivious to what was happening.

Tammy then began to vomit. Karla and Paul called an ambulance but did not relate to police the drug she had ingested. Tammy died the next day, choking to death on her own vomit. The coroner ruled that her death was accidental. Anne Swardson, *Unspeakable Crimes This Story Can't Be Told in Canada. And So All Canada Is Talking About It . . .*, WASH. POST, Nov. 23, 1993, at b01.

3. The Paul Bernardo Teale/Karla Homolka Frequently Asked Questions List (FAQ), Version 4.0, Jan. 12, 1995, at 13 available in Internet, <http://www.cs.indiana.edu/canada/KarlaFAQv40> [hereinafter FAQ].

Various American universities provided the electronic home for this FAQ. It was compiled by several Canadian university students who were forbidden by school authorities to run a Bernardo page on their own school's Web site.

4. *Id.*

5. "Saying she [Leslie Mahaffy] wanted to see 'her little brother Ryan,' Paul strangled Mahaffy with an electrical cord." *Id.*

6. *Id.*

7. *Id.*

8. "After taking her back to their house, French was drugged with Halcion and kept alive in the root cellar in a semi-conscious state. However, when Bernardo tried to sexually assault her, French, a defiant young Roman Catholic, told Bernardo that there were 'some things worth dying for.'" Bernardo then used a videotape he had made of Mahaffy's strangulation to coerce French into fulfilling his sexual requests. *Id.*

9. Swardson, *supra* note 2, at b01.

10. *Id.*

On February 17, 1993, Bernardo was arrested in connection with several rapes which had occurred in the Scarborough area.¹¹ In May of that year, Bernardo and Homolka were charged with the deaths of Leslie Mahaffy and Kristen French.¹² Police spent the next six weeks searching the Bernardo-Homolka home, removing more than 900 pieces of evidence which were used in the subsequent trials.¹³

B. *The Publication Ban*

On July 5, 1993, Judge Francis Kovacs ordered a publication ban¹⁴ on information surrounding the trial of Karla Homolka.¹⁵ The ban was imposed to ensure a fair trial for Homolka's accused husband and accomplice, Bernardo, who was awaiting trial.¹⁶ The ban read as follows:

- (1) The Canadian media on proof of accreditation to the Court Services Manager will be admitted to the trial.
- (2) For reasons given, the public will be excluded from the court room except:
 - (a) The families of the victims,
 - (b) The families of the accused,
 - (c) Counsel for Paul Bernardo Teale who will not have standing,
 - (d) The Court's Law Clerk.
- (3) For reasons given the foreign press is excluded from the court room.

11. Nagging questions of police conduct remain unresolved in this area. Police in both Toronto and St. Catherine had several opportunities to arrest Bernardo prior to February 17, 1993. For example, in November 1990, Bernardo provided saliva, hair, and blood samples for DNA analysis after being questioned about the Scarborough assaults. However, Metro Toronto police inexplicably did not obtain the results until January 1993. This delay left a 26-month interval in which French, Mahaffy, and Tammy Homolka met their deaths. D'Arcy Jenish, *Heart Of Darkness*, MACLEAN'S, Sept. 11, 1995, at 18.

12. Bernardo was not charged with the murder of Tammy Homolka until May 1994, and Karla was never implicated in this killing. Rayner, *supra* note 1, at 39.

13. A troubling aspect of this extensive search is that police failed to find the damning videos that Bernardo had compiled. These videos revealed the horrors inflicted upon Mahaffy, French, and Tammy Homolka. Moving men later found the videos in a ceiling fixture and turned them over to Bernardo's first lawyer, Ken Murray. Murray withheld them from police for 16 months, forcing the Crown into a plea bargain with Homolka in exchange for her testimony against Bernardo. Jenish, *supra* note 11, at 18.

14. The term "publication ban" is used throughout this analysis to denote a ban on publishing in print or broadcasting on television, film, or radio.

15. *R. v. Bernardo* (1993), No. 2047 (Ont. C.J.) available in Internet <http://www.cs.indiana.edu/canada/MediaBan>.

16. "I believe that the considerations for a fair trial outweigh the right to freedom of the press in these exceptional circumstances." *Id.* para. 134.

(4) There will be no publication of the circumstances of the deaths of any victims referred to during the trial and they shall not be revealed directly or indirectly to a member of the foreign press.¹⁷

The court held that the media could publish whether a conviction was registered in Homolka's case but could not publish the plea.¹⁸ Further, the publication ban was temporary and would expire at the completion of Bernardo's trial.¹⁹

On July 6, 1993, Homolka was convicted of two counts of manslaughter and given a twelve year sentence for her involvement in the deaths of Leslie Mahaffy and Kristen French.²⁰ Canada's media establishment²¹ and the public²² vigorously challenged the publication ban in an effort to obtain details concerning this sensational murder case. The public was especially interested in why Homolka had received such a light sentence for her part in the crimes. Serious questions were raised concerning the court's authority to impose a publication ban on this information.

I. DERIVING AUTHORITY FOR JUDICIALLY IMPOSED PUBLICATION BANS

Sir Frederick Pollock once observed that through all the changes endured by the law over the ages, one concept remained steadfast: publicity of judicial proceedings.²³ From the "open-air meetings of the freemen"²⁴ to

17. *Id.* para. 137.

18. *Id.* para. 141(3).

19. *Id.* para. 143.

20. FAQ, *supra* note 3, at 3.

21. *Thompson Newspapers Ltd., Toronto Sun Publishing Corp., Toronto Star Newspapers Ltd., and the Canadian Broadcasting Corp.* appealed the decision of the court to issue a publication ban in the *Bernardo* case. *R. v. Bernardo*, para. 10 (1993), No. 2047 (Ont. C.J.), 10, available in Internet, <http://www.cs.indiana.edu/canada/MediaBan>.

22. On November 23, 1993, the *Washington Post* ran a story which detailed the murders of French and Mahaffy. See Swardson, *supra* note 2, at b01. Canadians rushed to the U.S. border to snatch up copies of this article which contained information banned for publication in Canada. "Over the weekend, the Niagara regional police seized 187 copies of the edition [*Washington Post*] at the frontier crossing. Sixty-one drivers were arrested or spoken to before being allowed to continue into Canada." Rupert Cornwell, *In Canada, Right To Fair Trial Wins Out Over Rights Of Press*, OREGONIAN, Dec. 2, 1993, available in Internet, <http://www.cs.indiana.edu/canada/independent>.

23. Jamie Cameron, *Comment: The Constitutional Domestication of our Courts—Openness and Publicity in Judicial Proceedings under the Charter*, in *THE MEDIA THE COURTS AND THE CHARTER* 331 n.1 (Phillip Anisman & Allen M. Linden eds., 1986) (citing F. POLLOCK, *THE EXPANSION OF THE COMMON LAW* 31-32 (1904)).

24. Early Anglo-Saxon criminal proceedings consisted of such meetings which the free men of the community were obligated to attend. Pollock analogized this Anglo-Saxon method

modern court proceedings, open trials have endured through the ages. This openness, or the "soul of justice,"²⁵ was deeply embedded in Anglo-American legal culture.²⁶

A tradition of openness does exist in Canada, but adherence to this tradition is mostly a formality.²⁷ There has been much talk of openness and the virtues that open legal proceedings protect, but much less commitment to their protection.²⁸ "When the judiciary perceives that the concept of public trial is in conflict with other interests, it typically concludes with surprising ease that openness should bow to those competing interests."²⁹

"The result is that judicial proceedings [in Canada] are neither fully open nor fully publicized. When placed in competition with other interests, the principle of an open trial has consistently been devalued."³⁰ The primary reason for the forfeiture of publicity has been to ensure that an individual accused of a crime receives a fair trial.³¹

A. *Statutory and Common Law Authority*

The statutory and common law history of Canada curtails the openness of criminal trials in a variety of ways.³² There are a number of statutory rules which permit judges to exclude the public from entire trials or certain phases of those trials. "Section 465(1)(j) of the Criminal Code permits a judge conducting a preliminary inquiry to exclude the public from the proceedings where it appears to him that the ends of justice will be best served by so doing."³³ Section 442(1) gives a trial judge discretion to close all or part of a trial if interests such as public morals, the maintenance of order, or the proper administration of justice would be threatened by a public trial.³⁴ Despite the existence of these provisions, Canadian judges have been

of trial to "an ill-managed public meeting." *Id.* at 331 n.2.

25. *Id.* at 331 n.3 (quoting *Gannett Co. v. De Pasquale*, 443 U.S. 368, 422 (1978)).

26. *Id.* at 331.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Other explanations for limiting the openness of judicial proceedings include, "concerns about the sensibilities of participants in the criminal process and solicitude for the integrity of the administration of justice." *Id.*

32. The adoption of the Charter of Rights and Freedoms in 1982 has altered the common law and statutory understanding of open criminal proceedings. However, it is beneficial to examine this history to obtain an understanding of the longstanding legal principles that shaped the Charter.

33. Cameron, *supra* note 23, at 332.

34. *Id.*

reluctant to entirely close trials in the absence of extreme circumstances.³⁵ However, the very presence of these codes is noteworthy in light of the broad discretion granted judges to simply close off proceedings, as well as the possibility that justice could be dispensed in a shroud of secrecy. Historical experience has proven that such secrecy in the administration of justice provides the proper climate for persecution at the hands of the state.³⁶

More common than closure orders are the wide variety of publication bans which can be administered by courts in order to curb the publication of information obtained throughout a criminal proceeding. The issuance of publication bans in pretrial proceedings is routine.³⁷ The Canadian Criminal Code requires judges to ban information obtained at bail, extradition, or preliminary inquiries upon the request of the accused or the prosecutor.³⁸ These bans are removed at the conclusion of trial or upon the dismissal of the accused.³⁹ The Code further maintains that it is an offense to publish evidence of an admission or confession obtained at a preliminary hearing.⁴⁰

Canadian statutory law provides for restraints on information learned during the course of a trial. For example, the Criminal Code instructs courts to safeguard the identity of complainants in cases concerning certain sexual offenses.⁴¹ This sort of ban is subject to the discretion of the judge or is mandatory upon request of either the accused or the prosecutor. Neither the accused nor the prosecutor is under any obligation to demonstrate possible prejudice as a result of publication.⁴² The Young Offenders Act absolutely

35. *Id.* at 333 n.13 (citing *R. v. Warwaruk* (1978), 42 C.C.C. (2d) 121 (Alta. C.A.) (allowing an appeal on the ground that the trial was improperly closed to the public); *Re Vaudrin and The Queen* (1982), 2 C.C.C. (3d) 214 (B.C.S.C.) (quashing a closure order under s. 442(1)); *F.P. Publications (Western) Ltd. v. Connor* (1980), 1 W.W.R. 504 (Man. C.A.) (quashing an order closing a portion of the trial to a named member of the press); *R. v. Quesnel and Quesnel* (1979), 51 C.C.C. (2d) 270 (Ont. C.A.) (setting aside a conviction for sexual offenses where grounds for exclusion were not present and the trial was improperly closed)).

36. *Id.* at 332 n.12 (citing Max Radin, *The Right To A Public Trial*, 6 TEMPLE L.Q. 381, 388-89 (1932)).

37. *Id.* at 333.

38. *Id.* at 333 n.17 (citing § 457.2(1) (relating to bail hearings) and § 467(1) (relating to preliminary inquiries)).

39. *Id.* at 333.

40. *Id.* at 333 n.18 ("Every one who publishes in any newspaper, or broadcasts, a report that any admission or confession was tendered in evidence at a preliminary inquiry. . . is guilty of an offence punishable on summary conviction." *Id.* (quoting § 470(2) of the Canadian Criminal Code)).

41. *Id.* at 333 n.20 ("The offences are incest, gross indecency, sexual assault with a weapon or with threats to a third party causing bodily harm and aggravated sexual assault." *Id.* (citing § 246.4 of the Canadian Criminal Code)).

42. *Id.* at 334 n.21 ("Where an accused is charged with [a § 246.4] offence . . . [the judge] may, or if application is made by the complainant or prosecutor, shall, make an order that the identity of the complainant . . . shall not be published." (quoting § 442(3))).

conceals the identity of juveniles charged with offenses as well as the identities of those who will serve as witnesses.⁴³ Further, judges have issued publication bans by relying on their inherent jurisdiction to control judicial proceedings.⁴⁴

The extent and scope of these bans provide a climate in which free expression is often severely restricted. Many of the bans are temporary, while others remain in place permanently.⁴⁵ Some of the bans are mandatory, while others rest within the discretion of the judge. However, in all cases the Criminal Code has categorically determined that the principle of openness must yield to other interests. As interpreted by one legal observer, "the Code thus institutes censorship by government of the work of one of its most vital branches, the judiciary."⁴⁶

The drafters and subsequent interpreters of the Criminal Code appreciated the interests that publication bans protect. When concealing the identity of complainants in sexual offense cases, the underlying purpose is to protect the victim's privacy and ensure their cooperation in the prosecution.⁴⁷ Protection of the identity of young offenders serves to avoid

The Canadian court recently held that § 442(3) did infringe upon freedom of expression as guaranteed in the Charter of Rights and Freedoms, but that the infringement was a reasonable limit on that freedom. *Canadian Newspaper Co., v. Canada* (1988), 43 C.C.C. (3d) 24.

43. *Cameron, supra* note 23, at 334 n.22. See also *R. v. S.* (1995), 98 C.C.C. (3d) 235. In this case, a newspaper reporter sought access to a tape recording of a trial which was held in youth court. On appeal, the trial judge's reasons not to grant access was dismissed as inconsistent with the principles of the Charter relating to free expression. However, under § 38 of the Young Offenders Act the name or any information tending to identify the juvenile could not be published. The court recognized the virtues of a free press and indicated these could be obtained without release of the offenders identity. The court stated: "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." *Id.* at 246 (quoting *Edmonton Journal v. Alberta* (1989), 64 D.L.R. (4th) 577, 610).

44. *R. v. Bernardo*, para. 63 (1993), No 2047 (Ont. C.J.) available in Internet, <http://www.cs.indiana.edu/canada/MediaBan>.

This Court has inherent jurisdiction to prohibit publication and broadcast in order to protect an accused's rights to a fair trial or to protect the fairness of a trial or to protect the fairness of a trial then conducted. The exercise of that jurisdiction does not contravene s. 2(b) of the Canadian Charter of Rights and Freedoms.

Id. (quoting *R. v. Barrow* (1988), 48 C.C.C. (3d) 305, 308 (N.S.C.A.)).

45. Publication bans of proceedings at bail, extradition, or preliminary hearings lift upon release of the accused or disposition of the facts at trial. Bans protecting the identities of complainants, other participants, or juveniles are permanent. *Cameron, supra* note 23, at 334 n.24.

46. *Id.* at 334.

47. *Id.* at 336.

stigmatization by their peers which would undermine their socialization.⁴⁸ The judiciary has consistently upheld these provisions by rationalizing that the identity of these individuals is irrelevant to any valid interest the media may maintain in publicizing criminal proceedings.⁴⁹

The common law also corrodes the idea of open publicity of criminal proceedings through the law of contempt.⁵⁰ The law of contempt contends that publishers can be fined or imprisoned for printing any information before or during a trial that may have a tendency to prejudice the accused's right to a fair hearing.⁵¹ The law of contempt does not make the creation of prejudice a prerequisite for punishment.⁵² This effort to prevent publication of any information that could interfere with the administration of justice places a heavy burden on the media.⁵³

The statutory and common law restrictions on media coverage of criminal proceedings creates an atmosphere in which the presumption of openness is compromised. This compromise is deeply rooted in the preservation of a fair trial for the accused. The adoption of the Charter of Rights and Freedoms⁵⁴ has modified the challenge,⁵⁵ but the restrictions on openness rooted in common law and legislative history continue to be espoused in post-Charter cases.⁵⁶ The philosophy of the court in 1955 that, "whether [the publicity] reacts favorably or unfavorably on the prisoner is

48. *Id.*

49. *Id.*

50. *Id.* at 334 n.26 (citing BORRIE AND LOWE'S LAW OF CONTEMPT (2d ed. 1983) for a general overview of the law of contempt).

51. *Id.* at 334 n.27 (citing *Re R. and Carocchia* (1972), 14 C.C.C. (2d) 354 (Que. Q.B.) (concluding that press releases would likely prejudice the community against the accused); *Re Murphy and Southam Press* (1972), 9 C.C.C. (2d) 330 (B.C. S.C.) (no contempt in absence of proof beyond a reasonable doubt that the publication might or was likely to interfere with a fair trial); and *Bellitti v. C.B.C.* (1983), 15 C.C.C. (2d) 300 (Ont. H.C.) (holding the prejudicial effect of a documentary on prospective jurors was largely speculative)).

52. *Id.* at 335 n.28 (citing BORRIE AND LOWE'S LAW OF CONTEMPT, *supra* note 50, at 61).

53. *Id.* at 335.

54. The Canadian Charter of Rights and Freedoms was adopted in April 1982 as a part of the newly revised Canadian constitution.

55. The Charter terminology propels the question of the right to attend and speak about criminal proceedings into the constitutional arena. Prior to the Charter enactment, it was a matter of ordinary law governed by legislative provisions and common law. The Canadian system is analogous to United States jurisprudence where challenges to freedom of expression are a constitutional question with legislative and common law dimensions. See DAVID LEPOFSKY, *OPEN JUSTICE* 179 (1985).

56. Cameron, *supra* note 23, at 335 n.30 (citing *R. v. Banville* (1983), 3 C.C.C. (3d) 312 (N.B. Q.B.) (dicta upholding mandatory publication bans of preliminary inquiry proceedings); *Re Global Communications Ltd. and A.G. Can.* (1983), 5 C.C.C. (3d) 346, *affirmed*, (1984) 44 O.R. (2d) 609 (Ont. C.A.) (upholding a publication ban on proceedings at an extradition hearing)).

not the test,"⁵⁷ continues to be affirmed in post-Charter cases.⁵⁸ The concern of publicity was expressed by this post-Charter court which stated that a fair trial is "quite capable of being shattered by the kind of publicity that can attend [an extradition] hearing and, once shattered, it may, like Humpty Dumpty, be quite impossible to put back together again."⁵⁹ Another opinion states that the writers of the Charter could not have intended that "the rights of an accused person should be whittled down in the name of a general concept of freedom of expression or freedom of the press."⁶⁰

An analysis of Canadian statutory and common law leads to the conclusion that the concept of openness and publicity are easily shattered when confronted with a fair trial challenge. Legal authorities have tended to take the position that publicity must cease when the interests of free expression potentially pervade upon the interest of the accused in a fair trial. This resolution of the free press-fair trial conflict is reflected in Canada's statutory and legislative history. However, the Charter of Rights and Freedoms specifically provides for the protection of free expression.⁶¹ Curtailing free expression in the post-Charter age requires disregarding the explicit language of a document analogous to the United States Bill of Rights. Any limitation of this freedom is worthy of close scrutiny.

B. *The Charter of Rights and Freedoms*

The Canadian Charter of Rights and Freedoms (Charter) was adopted as part of the Constitution Act of 1982. The Charter § 2(b) creates a new constitutional right for Canadians to "freedom of thought, belief, opinion and expression, including freedom of the press and other media communication."⁶² For the first time in Canada's history, the freedom of

57. *Id.* at 335 n.31 (quoting *Steiner v. Toronto Star Ltd.* (1955), 114 C.C.C. 117 (court held a newspaper in contempt for reporting the events surrounding a crime investigation)).

58. *Id.* at 335 n.32 (citing *Re Southam Inc. and The Queen* (1982), 70 C.C.C. (2d) 264 (Ont. H.C.); *Re Global Communications Ltd. and A.G. Can.* (1983), 5 C.C.C. (3d) 346).

59. *Id.* at 336 n.33 (quoting *Re Global Communications Ltd. and A.G. Can.* (1983), 5 C.C.C. (3d) 346).

60. *Id.* at 336 n.34 (quoting *Re Southam Inc. and The Queen* (1982), 70 C.C.C. (2d) 264, 269 (Ont. H.C.)).

61. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2.

62. Charter § 2, in its entirety provides:

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media communication;
(c) freedom of peaceful assembly; and
(d) freedom of association.

CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2.

speech and press is a constitutional right and fundamental freedom.⁶³ Although Canadians have always enjoyed a significant measure of expressive freedom, it is accurate to characterize the Charter's free expression and press rights as "new."⁶⁴ Prior to the Charter's enactment, Canadians did not enjoy an enforceable legal right to free speech.⁶⁵ One could not initiate proceedings in a Canadian court arguing that their constitutional right to free expression had been abridged. This sort of claim simply did not exist preceding the enactment of the Charter. The Charter has provided Canadians with legal standing to challenge infringements of their right to free expression on constitutional grounds.⁶⁶

It logically follows that speech about criminal proceedings is protected within the Charter's free expression guarantees. The essence of the free expression provision is "the right to think, say, write and broadcast to others, through any medium, ideas, information or beliefs they prefer to communicate, without public officials intervening with a heavy hand to put a stop to thoughts, statements, or publications deemed inappropriate."⁶⁷ Speech about criminal proceedings falls within this characterization of free expression. However, the right to free expression is not absolute and must be weighed against other competing interests. With regard to criminal proceedings, the limit is § 11(d) of the Charter which provides that: "Any person charged with an offense has the right . . . to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."⁶⁸ Existing limitations on openness must be considered in light of both constitutional guarantees, the freedom of expression and the right to a fair hearing before an impartial tribunal. Neither right is absolute,⁶⁹ and both are subject to reasonable limits if the exercise of one right oversteps the boundaries of the other. Curtailment is

63. Prior to the adoption of the Charter, individual rights (including freedom of expression) were not entrenched. Thus, the prior Canadian Constitution provided the courts with no legal basis to override otherwise valid governmental actions which interfered with individual rights. The enactment of the Charter changed this. The Charter, like the United States Constitution, provides textual protection for individual rights in the Canadian legal system. See Robert A. Sedler, *Constitutional Protection Of Individual Rights In Canada: The Impact Of The New Canadian Charter Of Rights And Freedoms*, 59 NOTRE DAME L. REV. 1191 (1984).

64. LEPOFSKY, *supra* note 55, at 215.

65. *Id.*

66. Sedler, *supra* note 63, at 1194.

67. LEPOFSKY, *supra* note 55, at 214-15.

68. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 11(d).

69. Neither freedom of expression nor the right of an accused to a fair trial are absolute rights. In considering freedom of expression, just as one does not have the freedom to shout "Fire!" in a crowded theater, one should not have the right to proclaim another's "guilt" in the arena of public opinion when this entails trampling on the fair trial rights of the accused.

valid only when it complies with § 1 of the Charter which “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁷⁰ In order to resolve the tension between free expression and the fair trial rights of the accused, it must be determined at what point the boundary between the two is crossed and what limit is reasonable.

II. TWO DIFFERING RESOLUTIONS OF THE FREE EXPRESSION VERSUS FAIR TRIAL RIGHTS CONFLICT

A. *The Bernardo Ban: Fair Trial Rights Are Paramount*

On July 5, 1993, the Ontario Court of Justice granted the Crown’s [prosecution] application for a time limited publication ban on the proceedings surrounding the trial of Karla Homolka until the discharge or completion of Paul Bernardo’s trial.⁷¹ Those opposing the ban in these proceedings included *The Toronto Star*, *Thompson Newspapers Co. Limited*, *The Canadian Broadcasting Corporation*, and *The Toronto Sun*.⁷² These media organizations contended that under the principles of the Charter, this limit on free expression was not reasonable. However, the Crown alleged that publication of information surrounding the trial of Karla Homolka would prejudice Paul Bernardo’s opportunity for a fair trial. The interests that each opposing party sought to protect are enumerated freedoms deserving of protection under the Charter of Rights and Freedoms.⁷³ However, the conclusions drawn as to when the infringement of one freedom upon the other becomes unreasonable are radically different.

The *Bernardo* court relied upon the inherent jurisdiction of the court to curtail freedom of expression when it conflicted with the fair trial rights of an accused.⁷⁴ This inherent jurisdiction is derived from common law and legislated discretionary authority. In *Attorney General of Nova Scotia v. McIntyre*, the court explains when this inherent jurisdiction can be used to curtail free expression.⁷⁵ In *McIntyre*, the court stated “curtailment of public accessibility can only be justified where there is present the need to protect

70. CAN CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1.

71. *R. v. Bernardo*, para. 143 (1993), No 2047 (Ont. C.J.) available in Internet, <http://www.cs.indiana.edu/cananda/MediaBan>.

72. *Id.* para. 10.

73. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2 and § 11(d).

74. *R. v. Bernardo*, paras. 63, 64 (1993), No 2047 (Ont. C.J.) available in Internet, <http://www/cs/indiana.edu/canada/MediaBan>.

75. *Id.* para. 77 (citing *Attorney Gen. of Nova Scotia v. McIntyre* (1982), 26 Ex. C.R. (3d) 193 (S.C.C.)).

social values of super ordinate importance. One of these is the protection of the innocent.”⁷⁶ The *Bernardo* court discerned that the integrity of the court’s process was a “social value of super ordinate importance.”⁷⁷ Maintaining this integrity required that only admissible evidence be tendered at the trial of Bernardo.⁷⁸ It was inevitable that facts would be disclosed at the trial of Homolka which were common to the charges against Bernardo. There was a possibility that the facts presented at the trial of Homolka would be inadmissible against Bernardo. Publicizing these facts before the trial of Bernardo would endanger the integrity of the court’s process.⁷⁹ In order to maintain the court’s integrity, it was necessary to maintain Bernardo’s presumption of innocence. Publicity of the facts disclosed at Homolka’s trial could destroy this presumption of innocence and possibly endanger the integrity of the court.⁸⁰

The *Bernardo* court considered the requirement of a fair trial a societal interest.⁸¹ This societal interest would be endangered if Bernardo was found guilty and subsequently moved for a mistrial due to publication that violated his right to a fair trial.⁸² In *Church of Scientology of Toronto v. The Queen*,⁸³ the court considered the right at common law to prohibit publication where several accused were charged arising from a common factual basis. The court stated that “[t]he authority [to ban publication pending trial of a co-accused] . . . is rooted in and a necessary incident of the Court’s authority, indeed obligation, to see that justice is done in proceedings within its judicial cognizance.”⁸⁴ The court further stated that “[w]hat the prophylactic order sought to achieve was the preservation of the rights of those co-accused later to be tried to a fair trial unpolluted or uncomplicated by any prejudicial references to their words or conduct which may emerge unchallenged from earlier proceedings.”⁸⁵ Regardless of whether Bernardo

76. *Attorney Gen. of Nova Scotia v. McIntyre* (1982), 26 Ex. C.R. (3d) 193, 213 (S.C.C.).

77. *R. v. Bernardo*, para. 80 (1993), No. 2047 (Ont. C.J.) available in Internet, <http://www.cs.indiana.edu/canada/MediaBan>.

78. *Id.*

79. *Id.* (“It would seem clear that the purpose of any order prohibiting publication, of whatever length and whatever terms, is to protect the integrity of the Court’s process not merely to minimize the embarrassment of those charged with or giving evidence of crime.” (quoting *Church of Scientology of Toronto v. The Queen* (no. 6) (1986), 27 C.C.C. (3d) 193)).

80. *Id.*

81. *Id.* para. 85.

82. *Id.* para. 86.

83. *Church of Scientology of Toronto v. The Queen* (no. 6)(1986), 27 C.C.C. (3d) 193.

84. *Id.* at 208.

85. *Id.*

opposed the publication of the trial of Homolka, the court has the "authority, indeed the obligation, to see that justice is done."⁸⁶

The *Bernardo* court considered several cases decided after the enactment of the Charter which held that the right to a fair and unprejudiced trial is superior to the right of free expression when the two conflict. In the case of *In re Canadian Newspapers Co. Ltd. and The Queen*, the court stated:

I have no difficulty in saying that one of these two rights, namely the right to a fair and unprejudiced trial, must have paramouncy over the right of freedom of expression. Great harm will occur if an accused is not assured of a fair trial and an unprejudiced hearing and for a temporary period of time there must be limitations on the freedom of expression.⁸⁷

The court expressed similar views in *In re Southam Inc. and The Queen*⁸⁸ and *R. v. Sophonow*.⁸⁹

However, the paramounce is not absolute, and there are instances when the court must engage in a balancing process between the two rights.⁹⁰ The *Church of Scientology* case suggests factors which should be considered in this balancing process:

factors such as the nature of the election of the remaining co-accused, the imminence or otherwise of future trial proceedings, the nature of the evidence to be disclosed upon the plea of guilty and the likelihood of its publication, the perceived adequacy or otherwise of the traditional procedural mechanisms, as for

86. *Id.*

87. *R. v. Bernardo*, para. 94 (1993), No. 2047 (Ont. C.J.) available in Internet, <http://www.cs.indiana.edu/canada/MediaBan> (quoting *In re Canadian Newspapers Co. Ltd. and The Queen* (1984), 16 C.C.C. (3d) 495, 500).

88. *Id.* para. 95 ("[W]hen the two interests, namely, the freedom of the press and the right of an accused person to have a fair and unprejudiced trial, competed one with the other, the second was invariably held to be paramount" *Id.* (quoting *In re Southam Inc. and The Queen* (1982), 70 C.C.C. (2d) 264, 267 (Ont. H.C.)).

89. *Id.* para. 97

Freedom of the press and the right of an accused to a fair trial so expressed, are not difficult to reconcile if it is recognized that freedom of the press is not conferred in absolute terms but carries with it a quality of restraint, that is to say, the freedom will be exercised reasonably with due regard to the right of an accused person to a fair trial as expressed in s. 11(d) of the Charter.

Id. (quoting *R. v. Sophonow* (No. 2)(1983), 34 C.R. Ex. (3d) 287, 291).

90. *Id.* para. 98.

example change of venue and challenge for cause, to ensure a fair trial, and the precise terms of the order sought.⁹¹

The *Bernardo* court considered each of these factors.

First, it was deemed reasonable to presume there would be a judge and jury in this case.⁹² Next, the likelihood that Bernardo's trial would be held well into the future would normally minimize the effect of press coverage concerning the first trial. However, courts have noted the media tendency to refresh the public of the facts surrounding a case just prior to an interesting or sensational trial.⁹³ The court determined that an order allowing publication up to a certain point prior to the trial (i.e. six months as in *R. v. Lazell*) would not work here due to the already extensive coverage by the media and the extremely sensational nature of this case.⁹⁴ It was inevitable that evidence would arise in Homolka's case containing numerous references to Bernardo. Such evidence would be highly prejudicial to Bernardo, especially if held to be inadmissible against him.⁹⁵ The likelihood of publication was inevitable⁹⁶ and change of venue was an unsatisfactory solution due to extensive coverage of the case throughout the province.⁹⁷

The effect of the United States media was considered due to the close proximity and ease with which information crosses the border. Further, there was adequate U.S. interest in the case to ensure publication.⁹⁸ A comparison of the two legal traditions in the case of *In Re Global Communications Ltd. and the Attorney General for Canada* notes the differences between the two countries respecting restraints on the media.

The approach taken by 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

91. *Id.* para. 102 (quoting *Church of Scientology of Toronto v. The Queen* (No. 6) (1986), 27 C.C.C. (3d) 193, 221).

92. *Id.* para. 104.

93. *Id.* para. 105 (citing *R. v. Lazell* (1988), 48 C.R.R. 258 (H.C.J.) and *Re Pilmaker and Law Society of Upper Canada*, (1989), 70 O.R. (2d) 126 (Ont. Div. Ct.)). In *R. v. Lazell*, the judge permitted publication until six months prior to the trial.

94. *Id.* para. 105

95. *Id.* para. 106.

96. *Id.* para. 107.

97. *Id.* para. 108.

98. On November 23, 1993, the *Washington Post* published a ban-breaking article. See Swardson, *supra* note 2, at b01. Also, the U.S. tabloid show "A Current Affair" covered the case in three episodes on October 26, 1993, November 9, 1993, and July 26, 1994. See FAQ, *supra* note 3, at 21.

. . . by an often searching examination into the attitudes, biases and even personal and financial affairs of potential jurors and . . . 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.⁹⁹

The court then compares this openness to the Canadian situation.

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.¹⁰⁰

If the public had access to the courtroom, there would be nothing to prevent the United States media from having a first hand source of information from which to publish. In view of the United States legal tradition of openness, there would be no restraints on what the media would publish.

The Canadian court has regularly paid due deference to the ability of juries to try the case on the facts presented at trial and to disassociate from their minds what they previously heard, saw, or read about the case in the media.¹⁰¹ Regardless, the Crown is entitled to assert the societal right to a fair trial where excessive publicity will possibly prejudice a jury. This restraint is accomplished through the exercise of the court's inherent jurisdiction to ban publicity. In *R. v. McGregor* the court stated:

99. *Id.*

100. *Id.*

101. *R. v. Bernardo*, para. 122 (1993), No. 2047 (Ont. C.J.) available in Internet, <http://www.cs.indiana.edu/canada/MediaBan>.

Today's jurors are intelligent people, well able to put from their minds something they heard elsewhere. While engaged in a tense jury trial they will not hark back to something heard elsewhere that they have been told to disregard. I have not heard it suggested that a trial judge who has heard about a case is not competent to decide it and I do not think that his capacity to reject what he heard before is unique. Jurors, too, are able to decide upon the evidence. (quoting *R. v. Hubbert* (1977), 29 C.C.C. 279, affirmed (1977) 2 S.C.R. 267 (S.C.C.), in which the Ontario Court of Appeal adopted what Seaton, J.A. said in *R. v. Makow* (1974), 28 C.R.N.S. 87, 94).

Id. para. 124 ("The Court should not be heard to call into question the capacity of juries to do the job assigned to them." *Id.* (quoting *R. v. Corbett* (1988), 41 C.C.C. (3d) 385, 401)).

He [referring to the expert] testified that while challenges for cause can certainly be of much assistance in ensuring a jury be impartial, there are certain particular difficulties in cases of massive pretrial publicity where emotions run high and where there is a perception of an apparent societal consensus as to the desired result.¹⁰²

This was certainly a danger in the *Bernardo* case due to the horrific nature of the crime. The court went on to say: "In such cases it is more difficult to identify those prospective jurors who lack the required impartiality through the challenge for cause process particularly under our Canadian system of law which does not permit an in depth probe into the prospective juror's beliefs and opinions."¹⁰³ In reaching the final decision to allow the ban, the court stated:

In considering the protection of the integrity of the trial process for the public I must keep in mind that if the accused is guilty of the multitude of serious charges he is facing it is essential he be tried and no fault be found in the court process. That, of course, applies as well if he is found innocent.¹⁰⁴

In light of these factors, the court granted the Crown's application for a publication ban.

This decision resulted in unprecedented disapproval among Canadians and those outside Canada. Many were not satisfied by the rationale offered in reaching this conclusion. The use of inherent jurisdiction by the court to control media coverage of criminal trials was considered to be in direct contradiction with the principles of free expression laid out in the Charter. Further, inherent jurisdiction was perceived by many as extremely dangerous because it rested upon common law or legislated discretionary authority rather than a ban required by statute. Discretion of this latitude is susceptible to abuse. Free expression advocates suffered a terrible blow as a result of the *Bernardo* publication ban. However, the *Dagenais* decision one year later suggested that their voices of dissent were taking hold of the judiciary.

B. *The Dagenais Decision: A Victory for Freedom of Expression*

In a landmark ruling handed down on December 8, 1994, the Supreme Court of Canada greatly limited situations in which a publication ban could

102. *Id.* para. 126.

103. *Id.*

104. *Id.* para. 131.

be issued.¹⁰⁵ In this ruling, the trial judge granted an injunction restraining the Canadian Broadcasting Corporation from airing a fictional broadcast entitled "The Boys of St. Vincent." This four hour mini-series portrayed the sexual and physical abuse of children by Catholic brothers who operated the orphanage in which the children lived. The fictional account closely paralleled the facts of an actual criminal trial which was in progress. The accused members of the religious order objected to the broadcast of the mini-series because they felt it was potentially prejudicial to their fair trial rights.¹⁰⁶

The Supreme Court of Canada overturned the decision of the lower courts and allowed the series to be aired. In a 6-3 decision the court ruled that the controversial film should not have been banned from broadcast on CBC stations.¹⁰⁷ In issuing this decision, the court commented on publication bans in general and issued new precedent. The court stated:

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 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).¹⁰⁸

Though freedom of expression was considered important in previous decisions, it was rarely characterized as having equal status to the fair trial rights of the accused.

While the *Bernardo* court spoke of "balancing," this was countered with a continued reliance on traditional principles that the fair trial rights of the accused always take precedent over freedom of expression. The court went on to say:

A hierarchal 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 in 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.¹⁰⁹

105. *Dagenais v. Canadian Broadcasting Corp.* (1994), 120 D.L.R. (4th) 12 (S.C.C.).

106. *Id.*

107. *Id.*

108. *Id.* at 21.

109. *Id.*

An exciting aspect of this decision was that it explicitly invalidated a hierarchal assessment of freedoms under the Charter.

The court continued by stating that the common-law rule governing the issuance of publication bans must be altered to reflect 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.¹¹⁰

The court acknowledged the serious curtailment on free expression that publication bans entail, and established very specific instances when such drastic measures should be taken.

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 effected by the ban.¹¹¹

The balancing which the court proposed is noteworthy because it weighed in favor of free expression. Whatever balancing took place in the *Bernardo* decision certainly weighed in favor of fair trial rights. The court noted further 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, [the Charter] does not require that all conceivable steps be taken to remove even the most speculative risks."¹¹²

The almost impossible task of enforcing publication bans in today's global village was recognized by the Court.

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 short wave radios.¹¹³

110. *Id.* at 22.

111. *Id.*

112. *Id.* at 23.

113. *Id.* at 27.

The practical problems regarding the implementation of publication bans was evident in the *Bernardo* decision. Eighty percent of the Canadian population lives within 200 miles of the United States.¹¹⁴ It would simply be impossible to deter United States media coverage from entering Canada. Cyberspace knows no boundaries. As the court stated: “[The efficacy of publication bans have] also been reduced by the advent of information exchanges available through computer networks. In this global electronic age, restricting the flow of information is becoming increasingly difficult. Therefore, the actual effect of bans on jury impartiality is substantially diminishing.”¹¹⁵

The court concluded by offering guidelines for future applications of publication bans:

- (a) At the motion for the ban, the judge should give the media standing . . . according to the rules of criminal procedure and the established common-law principles with regard to standing[;]
- (b) The judge should, wherever 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 [T]he 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[;]
- (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.¹¹⁶

The *Dagenais* decision tipped the balance in favor of free expression. The strictness of the *Dagenais* test is reminiscent of the *Nebraska Press* decision¹¹⁷ which laid out a three part test which United States courts had to satisfy before applying a prior restraint on the media. This test required the

114. *The Barbie-Ken Murders*, NEWSWEEK, Dec. 6, 1993, at 36.

115. *Dagenais v. Canadian Broadcasting Corp.* (1994), 120 D.L.R. (4th) 12, 27 (S.C.C.).

116. *Id.* at 29-30.

117. *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976).

court to consider: "(a) the nature and extent of pre-trial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pre-trial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger."¹¹⁸ The rigidity of this test caused one commentator to note that the *Nebraska Press* decision acts as a virtual bar to the use of prior restraints on the media as a method of resolving the free press-fair trial conflict.¹¹⁹

Freedom of expression was once viewed as fragile and easily destroyed in the interests of preventing possible prejudice to an accused. *Dagenais* suggests this freedom is no longer a fragile entity easily destroyed at the slightest hint of possible prejudice, but is a solid presumption which must be conclusively overcome by those who seek to curtail it.

Advocates of free expression hope that *Dagenais* has established a new precedent which will be adhered to in decisions to come. This may be true, but it is in no way a certainty. In reality, the Canadian history of limiting free expression is as recent as the *Bernardo* decision. Conflicting views remain as to how Charter principles should be interpreted in resolving the free expression-fair trial conflict.

III. A PROPOSED RESOLUTION

Publication bans do not properly resolve the conflict between free expression and fair trial rights. Publication bans are an unreasonable infringement upon a vital freedom, and for the following reasons should be effectively stricken from use by the Canadian judiciary.

A. *Publication Bans Undermine The Virtues Of Open Court Proceedings*

The merits of an open judicial process are recited in these words of Jeremy Bentham: "without publicity, all other checks are insufficient."¹²⁰ By its vigilant watch of the criminal justice system, publicity checks government action. Not only is publicity of trial proceedings vital to the legitimacy of the criminal justice system, it goes to the very root of self-governance. The openness of government proceedings is crucial to the existence of democracy. This openness cannot be compromised by

118. *Id.* at 562.

119. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 858-59 (2d ed. 1988). The court's "apparent confidence" that alternatives to prior restraints on the media would adequately deter any adverse impact of publicity in a particular trial suggests the *Nebraska Press* decision acts as "a virtual bar to prior restraints" on the press. *Id.*

120. Cameron, *supra* note 23, at 337 n.39 (citing *Richmond Newspaper Inc. v. Virginia*, 448 U.S. 555, 569 (1979)).

speculations of prejudice. Rather, such prejudice must be imminent and incurable before an open trial is compromised.

Historically, the openness of the trial was the only assurance an accused person had that it would be fair. In *Scott v. Scott*, the court stated:

It is needless to quote authority on this topic from legal, philosophical, or historical writers. 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 checks applicable to judicial injustice operate. Where there is no publicity there is no justice. It is the keenest spur to exertion and the surest of all guards against probity. It keeps the judge himself while trying under trial. The security of securities is publicity.¹²¹

Although an accused may now invoke a wide variety of procedural and substantive mechanisms in defense of a charge, one continues to have a fairness interest in the proceedings. Publicity surrounding the trial deters the state from engaging in unethical practices.¹²² It is difficult for the prosecutor to pursue measures which appear secretive without a resulting public outcry. In an open system subject to comment, the public can protest if it seems the state has victimized a particular individual or departed from the principles of due process. The judge is also restrained from acting unfairly when judicial actions are subject to scrutiny. It is unlikely that a judge will act with undue hostility to a defendant when those actions are in full view of an inquiring public eye. "Where proceedings go awry an ever-vigilant public, having had access to all phases of the proceedings through attendance and news reporting, can lend enormous strength to a claim that the accused was denied a fair trial."¹²³

The Canadian legislature and judiciary have closed off criminal proceedings to ensure a fair trial for the accused. However, in reality an open judicial process is essential to an accused's right to a fair trial. Representation by counsel is not a sufficient guarantee that the proceedings will be conducted fairly. Counsel is not present for every aspect of the process and is sometimes powerless to protect the accused from the forces of prejudice. The voice of the public can add sufficient strength to claims of unfairness and serve as an effective check against judicial trampling of the

121. *R. v. Bernardo*, para. 56 (1993), No. 2047 (Ont. C.J.) available in Internet, <http://www.cs.indiana.edu/canada/MediaBan> (quoting *Scott v. Scott* (1913), A.C. 417 (H. of L.)).

122. *Nebraska Press*, 427 U.S. at 587. Justice Brennan stated that the integrity of the criminal justice system is "of crucial import to citizens concerned with the administration of government." *Id.*

123. Cameron, *supra* note 23, at 338.

rights of an accused.¹²⁴ Empowered with “a duty to investigate and publicize all matters concerning the extension of abridgement of individual liberties, the press has been described as the ‘staunch guardian of the public interest.’”¹²⁵ In order to fulfill this duty, the press must be allowed to keep the public informed about the functioning of the judiciary, to act as a “watchdog,” and to report on prosecutorial excesses or any other infringement upon the rights of the accused.

This “watchdog” function was eliminated in the Bernardo case. Canadians were outraged when they learned of the light sentence Homolka received for her part in the horrid murders.¹²⁶ Justice was dispensed in secrecy, and there was no way for the public to adequately gauge if the punishment fit the crime. Secret judicial proceedings shake the foundations of democracy by fostering distrust and disillusionment among those who are governed.¹²⁷

124. *Id.*

125. Allen Linden, *Comment: Limitations on Media Coverage of Legal Proceedings: A Critique and Some Proposals for Reform*, in *THE MEDIA THE COURTS AND THE CHARTER* 302 n.13 (quoting W.B. Affleck, *Free Press - Fair Trial*, 8 CRIM. L.Q. 163, 164 (1965)).

126. The judge sentenced Homolka to two 12-year sentences to run concurrently. She is eligible for parole in four years. He said,

‘No sentence that I could impose could adequately reflect the revulsion of the community towards the accused.’ But she had, he said, given ‘significant and perhaps invaluable information to the police. There are serious unsolved crimes here and elsewhere. There can be no room for error in the prosecution of the offender, whoever that might be . . . This accused has committed the worst crimes. However, she is not the worst offender for whom the maximum sentence is designed.’

Rayner, *supra* note 1, at 3g. Few in the courtroom doubted that what the judge was implying was that Homolka was to be the star witness at her husband’s trial. However, the only part of this passed on to the public were these comments of the judge and the sentence. The public was left questioning whether justice had been obtained at Homolka’s trial. *Id.*

“The ban has nothing to do with a fair trial,” said Scott Brunside, a reporter with the *Toronto Sun* who covered the case from the beginning and attended Homolka’s trial. “The ban is to do with making a deal with Homolka.’ In other words, if you know too much about what went on, you would think she got off too lightly in exchange for turning evidence.” *Id.*

“We have somebody in prison (but) we don’t know why. We don’t see good triumph over evil, and that is primarily how we uphold the fairness and safety of our communities” (statement of John Cruickshank, managing editor of the *Globe and Mail*). Debby Waldman and Mary McIntosh, *Understanding Canadian Bans on Trial Coverage*, EDITOR AND PUBLISHER, May 7, 1994, at 18.

127. In November 1995, the Attorney General of Canada ordered a private judicial inquiry into whether it is possible to overturn the controversial plea bargain that led to Homolka’s 12-year sentence. Thus, amidst extreme pressure, the case will be re-examined in full view of the public. See A Statement To The Legislature By The Honorable Charles Harnick Attorney General Of Ontario, Nov. 14, 1995, available in Internet, <http://newswire.flexnet.com/month12/message/nov1995/c18237.htm>.

Society also has an interest in an openly publicized trial. At early common law an open trial was appreciated for its societal value rather than fairness to the accused.¹²⁸ Courts recognized long ago that open publicity protects societal interests that are only incidentally linked to the fair trial rights of the accused.¹²⁹ The public has a direct interest in the effectiveness of the trial process, especially as it relates to the prosecution of crime and the trial of alleged criminals. It is difficult to persuade society that the criminal justice system is running smoothly when it is denied access to that system.

The legitimacy that publicity brings to the criminal justice system is compromised by the ready issuance of publication bans. "The commission of crime and its prosecution engage the attention of the citizenry; if the public is to feel secure and confident in its system, no part of the process by which offenders are brought to justice should be shrouded in secrecy."¹³⁰ Justice which is "done in the corner or in any dark manner"¹³¹ is hard to reconcile as true justice because there is nothing to legitimize it.

This is especially true in highly celebrated or sensational cases. If the public is denied access, there is no assurance that true justice was rendered. Imagine the recent O.J. Simpson trial in the United States being conducted in secrecy. Whatever the outcome, criminal justice would appear arbitrary and biased. The eroding public confidence in the criminal justice system that this secrecy would cause is unimaginable.

Open trials train the citizenry in the art of effective self-government.¹³² When the public is able to critique the investigatory, prosecutorial, and

128. Cameron, *supra* note 23, at 339 n.45 ("[I]t is clear that Hale and Blackstone are scarcely thinking of the privileges of the accused, but of the effectiveness of the process at trial, which . . . means the expedition and frequency of conviction and not the facilitation of acquittal." *Id.* (quoting Radin, *supra* note 36, at 384)).

129. *Id.* at 339 n.46 (citing *Gannett Co. v. DePasquale* 443 U.S. 368, 442 (1978)). "[T]here is a party interest whose interest might, by means of the privacy in question, and a sort of conspiracy, more or less explicit, between the other persons concerned . . . be made a sacrifice." *Id.*

130. *Id.* at 340.

131. *Id.* at 340 n.47 (citing *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 570 (1980)).

132. There are those who hold an opposing view of an open court system. Max Radin, the American scholar, has argued that we indulge ourselves in the illusion that the public attends criminal trials to get:

valuable and salutary lessons from the proceedings. Rather, he states, our educational experience has taught us that neither men nor women nor children learn anything in which they are not interested, and there is not the slightest reason to suppose that the audience in a sensational trial leaves the courtroom with anything but the recollection of a thrill. In his view, the state is under no duty to provide a small selection of curious seekers for excitement with a theatrical performance. There is in the last analysis no more reason for the public trial as it is currently conceived than there is for a public execution.

Linden, *supra* note 125, at 302 n.14 (paraphrasing Radin, *supra* note 36, at 393-94).

judicial functions of the government, it is in a position to affect change in those areas. Proceedings must be open in order for the public to articulate dissatisfaction and proposals for reform.¹³³ Consider the open U.S. Senate hearings regarding the Supreme Court nomination of Clarence Thomas. Americans had first-hand exposure to the difficulties Anita Hill faced in challenging Thomas' nomination. This provided a forum for open debate and criticism of the Senate hearings and possible reform measures. If phases of these hearings had been closed or information censored, the public would no longer have the ability to judge the functioning of the system and call for effective change.

There are persuasive public interest arguments for allowing media coverage of judicial proceedings. Yet, a study of Canadian case law demonstrates that public interest has been of little importance in decisions restricting publicity of court proceedings. An understanding of the societal interests which publicity fosters suggests a resolution of the free expression-fair trial conflict. Societal interests tip the balance in favor of unrestrained publicity which ought not to be sacrificed unless there is an inescapable threat of prejudice which cannot be alleviated by other measures.

One exception to this concept of openness is pre-trial hearings. The evidence gained at pre-trial proceedings is often inflammatory, and dissemination of this information can prejudice potential jurors.¹³⁴ Testimony given at bail or change of venue proceedings may not be admissible at trial, yet prospective jurors may not be able to erase its damning effect from their minds.¹³⁵ Even the citizens of the United States, who staunchly and jealously guard their free expression rights, have no right to attend pre-trial hearings.¹³⁶

B. *Publication Bans Are Contradictory To The Principles Of The Charter*

Publication bans offend the Charter principle of free expression. Constitutionally, there should be a showing of incurable prejudice to the fairness of an accused's trial before a prior restraint is imposed. In the precedent setting wake of *Dagenais*, courts must consider alternative and less restrictive measures than a publication ban to resolve the problem of fairness

133. Cameron, *supra* note 23, at 340.

134. The United States, despite staunch protection of free expression, does not allow media reports regarding pre-trial proceedings. See *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

135. Cameron, *supra* note 23, at 339 n.42 (citing Terrence P. Goggin and George M. Hanover, *Fair Trial v. Free Press: The Psychological Effect of Pre-Trial Publicity on the Juror's Ability to be Impartial: A Plea for Reform*, 38 S. CAL. L. REV. 672 (1965)).

136. *Gannett Co. v. DePasquale*, 443 U.S. 368, 378-79 (1979).

to the accused.¹³⁷ These alternative measures can be extremely effective and are justified by Charter principles.

The *Bernardo* opinion suggests an inability on the part of the judiciary to understand sacrificing possible prejudice to the accused in favor of free expression. The *Bernardo* court relied upon common-law inherent jurisdiction of the court to impose publication bans. Three reasons were offered as rationales for invoking this inherent jurisdiction. First, the right of an accused is paramount to free expression. Second, the publication ban was a minimal infringement on free expression, and lastly, it was temporary to be lifted upon the commencement of Bernardo's trial. Each of these rationales can be eliminated in considering the proper balance of Charter principles.

The first argument is dismantled once one gains an understanding that Charter freedoms are not hierarchal.¹³⁸ Both the freedom of expression and the right to a fair trial serve important functions in a democratic society, but neither is paramount. Rather, they co-exist equally; a balance must be struck between the two when conflicts occur. The second argument seems to disregard the fact that the press has to function as "the surrogate for the public"¹³⁹ in evaluating the criminal justice system. The value of an open judiciary entails media coverage of the events as they occur. Publication bans are a form of censorship that completely disregard the value of openness. As Justice Brennan stated: "discussion of public affairs in a free society cannot depend on the preliminary grace of judicial censors Judges are not to abrogate the First Amendment rights of journalists [T]he decision of what, where and how to publish is for editors, not judges."¹⁴⁰ Because "a trial is a public event," what "transpires in the courtroom is public property" and "[t]hose who see and hear what transpired can report it with impunity."¹⁴¹ Censorship in the form of publication bans should invite suspicion.

The third argument does not take adequate account of the damage inflicted by publication bans. Timing is critical to the public's evaluation of criminal proceedings. Providing that at some future date the public will learn of what went on at trial does little to quell the public hostility or prevent potential abuses. Publication bans fall upon speech "with a brutality

137. *Dagenais v. Canadian Broadcasting Corp.* (1994), 120 D.L.R. (4th) 12 (S.C.C.).

138. *Id.* at 21.

139. Cameron, *supra* note 23, at 345 n.64 (quoting *Richmond Newspapers*, 448 U.S. at 573).

140. *Nebraska Press*, 427 U.S. at 573.

141. Cameron, *supra* note 23, at 346 n.66 (quoting *Craig v. Harney*, 331 U.S. 367, 371 (1947)).

and finality all their own Even if they are ultimately lifted they cause irremediable losses—a loss in the immediacy, the impact, of the speech.”¹⁴²

C. *Publication Bans Are Unenforceable*

Publication bans do not work. Whatever the merits of protecting an accused from prejudicial publicity, issuing a publication ban is not the way to achieve that end. There has been a media explosion in recent years. This explosion has been facilitated by increased use of information networks—computer and fax machines that do not recognize borders. Canadians, barred from passing pieces of paper to one another in the real world, shifted to the virtual world to learn information of the Homolka case. The police attempted in vain to shut down discussions of the case which were occurring on the Internet.¹⁴³ This proved impossible because Canadians served most of these discussions through computers in Finland or the United States.¹⁴⁴ A computer FAQ regarding the case read: “It’s working. The public is finding out, bit by bit, the real story of the Homolka trial Whenever this FAQ is faxed, e-mailed or printed up and passed around, it demonstrates the ineffectiveness of gag orders as well as futility of enforcement.”¹⁴⁵

D. *Publication Bans Sensationalize A Case Beyond Reasonable Proportions*

The ban proved to generate further interest in an already sensational case.¹⁴⁶ By halting discussion of the case, the courts fanned the flames of conjecture. The ban facilitated rumors and encouraged people to dredge up increasingly “bizarre scenarios from their own subconscious.”¹⁴⁷ Because it

142. Cameron, *supra* note 23, at 346 n.68 (quoting A. BICKEL, *THE MORALITY OF CONSENT* 75 (1975)).

143. FAQ, *supra* note 3, at 2.

144. Rayner, *supra* note 1, at 39.

145. FAQ, *supra* note 3, at 2.

146. The “Barbie and Ken” murders were turned into symbols of depravity seeping out of the Canadian suburbs. Examples include a gallery in Toronto which exhibited photographs, entitled “Karla’s Playpen,” of the house where the murders occurred. There were also the Killer Karla Comics, which were detailed graphic representations of the alleged events of the case, sewn through with a grim strain of humor. Further, a rock group called The Banned self-released a cassette entitled “Karla and Paul.” Rayner, *supra* note 1, at 39.

147. *Id.*

Together Homolka and Bernardo have become the murderous Barbie and Ken, freakish cartoon characters who carried out crimes that are the very stuff of suburban nightmare. By trying to halt discussion of the case, the courts only managed to fan the flames of conjecture, encouraging people to dredge ever more bizarre scenarios from their own subconscious. It was an orgy of speculation

was illegal to publish details surrounding the *Bernardo* trial, fact and rumor became inseparable. People will be holding on to the truths of false rumors long after the facts of this case are revealed.

E. *Other Procedural Mechanisms Effectively Protect Fair Trial Interests*

Procedural mechanisms that exist can be invoked to guard against unfairness to the accused. These procedures are not absolute insurance that fair trial rights will be protected but are preferred because they are less intrusive upon a fundamental right. The Canadian judiciary has argued that publication bans are necessary to ensure that the accused is not "convicted" of his or her crime by the media.

However, consider the following examples from the United States judiciary. The jurors who acquitted four Los Angeles policemen did so despite the repeated television airing of a tape showing the accused officers kicking and beating a defenseless Rodney King. The massive pre-trial publicity in the cases of Lorena and John Bobbit—he for marital rape, and she for malicious wounding—did not prevent juries from letting them go. Finally, the extensive damning publicity prior to the sequestration of the Simpson jurors did not prevent them from reaching an acquittal. Employing any or a combination of the following procedures served to mitigate prejudice in these examples. No procedural mechanism is an absolute guarantee against exposure of jurors to publicity, yet these individuals were acquitted despite rampant media coverage of the accused's alleged crimes.

Postponement of a highly sensational case, such as *Bernardo*, is not an adequate solution. This mechanism encroaches upon the accused's right "to be tried within a reasonable time."¹⁴⁸ Further, if the case is of great interest to the public, delay may actually increase the anticipation of the actual trial.¹⁴⁹ In theory, it is possible to carefully question and select jurors in such a way as to remove those who have been prejudiced by publicity. This practice can be effective, but is not necessarily beneficial to the judicial process. The "absence from the jury of individuals who read daily newspapers and keep abreast of newsworthy developments is simply not the best of all possible worlds."¹⁵⁰ The need for sophisticated jurors is particularly crucial in complex criminal trials which require understanding of technical evidence and expert testimony.¹⁵¹

148. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 11(b).

149. See *Sheppard v. Maxwell*, 384 U.S. 333, 354-55 (1966) (preliminary inquest ended in brawl; "bedlam reigned at the courthouse" three months later at trial).

150. *U.S. v. Simon*, 664 F.Supp. 780, 793 (S.D.N.Y. 1987).

151. See Ruth Marcus, *The Arduous Search for a Jury of North's Peers*, WASH. POST, Feb. 21, 1989, at A9, col. 1 (noting the difficulty in the complex Oliver North criminal trial

Conducting a voir dire on a large pool of potential jurors may be a solution in certain cases. Although, in a highly publicized criminal trial, this remedy will probably not be successful. In cases of intense public interest, a larger jury pool will result in a pool consisting of a larger number of people who have been exposed to prejudicial publicity.¹⁵² Jury sequestration, although effective, is a drastic remedy. Sequestration forces jurors to bear the burden of compensating for the highly publicized acts of the accused. Long periods of sequestration can lead to juror resentment of the accused; therefore, causing juror bias. However, this alternative is effective in long-running trials where the opportunity for potential bias is increased with each passing day. In a highly publicized criminal case, juror instructions can be effective but should not be relied upon as the sole deterrent of possible prejudice. When the nature of the crimes committed is especially horrific, instructions advising jurors to disregard those issues may actually serve to highlight those very issues.¹⁵³

A gag order on trial participants is an effective alternative to a publication ban on the media. This type of order would prevent trial participants from making statements to the news media which would endanger the fair trial rights of the accused. This type of order should be employed in highly sensationalized cases where there is a reasonable danger of prejudice. A gag order does not affect the free expression of the media, but it does affect the expressive rights of trial participants. Hence, it should be instituted with a degree of caution. However, this sort of order does not directly impact upon the media who are not restricted from covering courtroom events or matters of public record. Therefore, the infringement on free expression is less expansive. A gag order on trial participants would have been an effective alternative in the *Bernardo* case. The public would have been allowed access to the events of the trial through news reports based on public information. Under this sort of order, the public can rest assured that the proper balance has been struck between free expression and the right of an accused to a fair trial.

of finding a jury that would be unbiased but also able to render a verdict).

152. See Mary McGrory, *Barry, Beliefs, and Biases*, WASH. POST, June 7, 1990, at A2, col. 5 (observing the difficulty of finding a jury pool in the District of Columbia consisting of persons who had not been exposed to publicity concerning the mayor of the district).

153. One commentator has remarked that this problem is similar to asking a person not to think about elephants: inevitably elephants will come to mind. P. ROTHSTEIN, *EVIDENCE IN A NUTSHELL: STATE AND FEDERAL RULES 31* (1986). See also Don Colburn, *The Jury That Knew Too Much: Jurors Are Sometimes Asked to Disregard Things They Know—But Can They?* WASH. POST, Apr. 12, 1988, at Z7, col. 1.

IV. CONCLUSION

Freedom of expression is the cornerstone of individual liberty and of a free society. Publication bans restrict that freedom in a manner that is unreasonable. Neither freedom of expression nor the fair trial rights of an accused can take precedence over the other. A balance must be struck between the two when they conflict. Publication bans are not the way to create that balance. Publication bans are tantamount to censorship and should only be employed when there is a clear and present danger that a prejudicial effect on the trial is inevitable. Free expression regarding criminal trials is beneficial to the interests of society, government, and the accused. While the right of an accused to a fair trial should not be dismissed, there are other means to obtain this objective. Freedom of expression is the lifeblood of democracy, and publication bans effectively usurp that life-giving power.

*Ann Riehle**

* J.D. candidate, 1996, Indiana University School of Law - Indianapolis.

