Publication Bans: An Examination of Some General Principles

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The present view of Canadian courts towards publications bans intended to protect the fair trial interests of an accused person was succinctly summarized by Chief Justice Dubin in justifying the ban on the broadcast of "The Boys of St. Vincent" in *Re Dagenais and the Canadian Broadcasting Corporation:*

> *Freedom of expression, including freedom of speech, and the right to a fair trial, have now been given constitutional status by having been entrenched in the* Canadian Charter of Rights and Freedoms. *However, where there is a conflict between these two values, or indeed a conflict between any of the values enunciated in the Charter, the court is again called upon to balance them, and as was the case before the Charter, if there is a conflict between freedom of expression and a fair trial, then the right to a fair trial is held to be paramount.*[1]

Since that opinion was written, the spectacle in the United States surrounding the O.J. Simpson trial appears to have confirmed all of the worst fears of the Canadian judiciary about the potential effects of an uncontrolled media on the administration of justice.

The acceptance of publication bans as an important, if not routine, tool in the judicial arsenal appears to rest on four propositions:

1. When freedom of expression comes into conflict with the rights of a fair trial, the right to a fair trial is paramount.

2. In most cases a ban is not really a ban but a "publication deferral order" and delay is an acceptable price to pay for a fair trial.

3. Doubts about the factual impact of pre-trial publicity or jurors should be resolved in favour of the accused.

4. The collision between fair trial interests and freedom of expression must be determined within section 1 of the Charter. On this analysis, publication bans meet all of the tests of legitimate objective, rationality, minimal impairment and proportionality.

Before addressing the sample situations proposed by Mr. Justice Martin for today's discussion, it might be useful to examine these issues.

I. COULD THE O.J. SIMPSON SPECTACLE HAPPEN IN CANADA?

The ongoing carnival in Los Angeles provides a good *in terrorem* argument for those who favour publication bans. The unarticulated premise of this argument is that the O.J. Simpson spectacle is the fault of the First Amendment. On this view, the media create a carnival-like atmosphere in which lawyers and prosecutors are compelled to participate or risk losing the case in the court of public opinion, from which at some point the jury pool will be selected.

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1. *Dagenais* v. *Canadian Broadcasting Corp.* (1992), 99 D.L.R. (4th) 326 at 332 (Ont. C.A.).

With this judicial nightmare is contrasted the situation in Canada, where discipline is either exercised in the newsroom or failing that, applied by the bench. There is a story, perhaps apocryphal, that media coverage of the famous Evelyn Dick murder case (which first brought J.J. Robinette, Q.C. to star status in the media) began with a somewhat cautious headline in the Hamilton Spectator that read: "Dismembered Torso found on Hamilton Mountain: Foul Play Suspected".

I suggest that the spectacle in Los Angeles has more to do with legal ethics than it does with journalistic standards.

The media blitz seems largely to be fed by the legal profession. Judge Lance Ito has berated both prosecutors and defence lawyers, as well as the police, for leaking sensational pieces of information, some of it highly prejudicial, to the press.

The problem of media manipulation by trial participants is not unknown to Canada. Paul Bernardo's lawyer opposed the publication ban in the Karla Homolka/Paul Bernardo case on the basis that the Niagara Regional Police had selectively leaked damaging information about his client to the media for a period of years to create the impression of Bernardo's guilt, while at the same time building up Karla Homolka as a Bernardo victim rather than a Bernardo-collaborator for the purpose of enhancing her credibility as a prosecution witness against Bernardo.

Shortly after he was retained, O.J. Simpson's chief defence attorney, Robert Shapiro, set out the defence media strategy in the *New Yorker* Magazine. It was open to Judge Ito at the outset of the case to instruct everyone involved in the court proceedings, including the lawyers, police and court attendants, to refrain from discussing any aspect of the case with the media. Had he done so, most of the information that is now said to threaten a fair trial would never have reached the media in the first place.

It is difficult to imagine Canadian lawyers escaping sharp and immediate court sanctions, not to mention discipline proceedings by their respective Law Societies, were they to attempt to emulate their Los Angeles counterparts in the O.J. Simpson case.

If Canadian lawyers and the police were held to what Canadian courts regard as appropriate professional standards, the media would be left to make what it can of fringe information such as Paul and Karla Bernardo's wedding pictures. While this sort of marginal stuff may not say much about the intellectual content of the media coverage, the fact of the matter is that no publication ban would ever extend to such marginal trivia in any event.

II. IF THERE IS A CONFLICT BETWEEN FREEDOM OF EXPRESSION AND A FAIR TRIAL, IS THE RIGHT TO A FAIR TRIAL NECESSARILY PARAMOUNT?

It is evident that in any balancing of fair trial interests and freedom of expression there will be numerous instances where fair trial interests should be held paramount. Few Canadian lawyers would contend that a report of a confession should be published in newspapers just prior to a jury trial where the admissibility of that confession is contested (although the United States Supreme Court held to the contrary in *Nebraska Press Association* v. *Stewart)*.[2] However, the orthodox judicial wisdom in Canada that fair trial rights should in all cases be paramount is, I think, too broad.

This is not to say that the courts can or would tolerate an unfair trial. It simply means that in some circumstances it is more important that the public understand the facts of what happened in relation to particular events than it is to allocate guilt or innocence to particular individuals. The result would be that if, at the time the jury is selected, it appears that an impartial jury cannot be empanelled, the prosecution would have to be stayed.

Section 2(b) of the Charter has as much to do with the public's right to know as it does with the media's right to publish what it likes.[3]

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2. *Nebraska Press Association* v. *Stuart* 427 U.S. 539 (1976). The principle established by *Nebraska Press* is described by L.H. Tribe, *American Constitutional Law,* 2d ed. (Mineola, N.Y.: Foundation Press, 1988) at 858:

   The trial judge was wholly justified in concluding that intense and pervasive pretrial publicity would continue, and that without restraining the press it would be difficult to impanel a jury which had not been exposed to the prejudicial information. Nonetheless the Supreme Court unanimously — and rightly — struck down the order. The opinion of the Chief Justice, joined by four other members of the Court, found that the trial court's conclusion about the impact of the expected publicity on prospective jurors "was of necessity speculative, dealing ... with factors unknown and unknowable." While the trial judge could reasonably predict that a very large number of veniremen would be exposed to the publicity, he could only speculate as to what he could not legally presume — namely, that jurors exposed to such information would be unable to render an impartial verdict.

3. *Edmonton Journal* v. *Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1339, Cory J. The potential conflict between prior restraint on publication in a civil case and the requirement of a fair and impartial trial was resolved *against* prior restraint by the European Court of Human Rights in the landmark case of *The Sunday Times* v. *United Kingdom* (1979), 2 E.H.R.R. 245. That Court observed at 280:

   There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.

   See also *Sunday Times* v. *The United Kingdom (No. 2)* (1991), 14 E.H.R.R. 229 (the "Spycatcher" injunction case).

The press in Italy is said to be as unrestrained as its counterpart in the United States.[4] For the past few years, the Italian press has been awash in sensational revelation about corruption at the highest corporate and political levels, including the Prime Minister.

Some of these disclosures are undoubtedly highly prejudicial to the ultimate fair trial of particular politicians and businessmen swept up in the scandal. In comparable circumstances, a court in Canada might nevertheless justifiably refuse to issue a "gag order" at the instance of one of the accused on the ground that it is more important to cleanse the body politic than to bring a particular miscreant to trial. If indeed a fair trial is no longer possible given the pre-trial publicity, then a stay would have to be entered.

Another example of free press over fair trial might be the ongoing uproar in the British legal system arising out of the controversial series of trials of suspected IRA bombers in the 1970's. Particularly relevant is the case of three policemen who were charged with fabricating confessions put before the court in the trial of the Birmingham Six. Eventually, on October 15, 1993, a stay was entered in those prosecutions on the basis that pre-trial publicity had rendered impossible an impartial trial.[5] This case was heavily relied upon by the Attorney General of Ontario in seeking to uphold the publication ban on the trial proceedings of Karla Homolka. Looking at the broader picture, however, the British court might well have refused publication bans in matters concerning the IRA bombers (had any such bans been applied for) on the basis that it was more important to get out the facts about police conduct and potential interference in the administration of justice than to bring particular individuals to trial. After all, the publication of that information shook the British judiciary to its foundation, produced a Royal Commission which made sweeping recommendations in relation to the administration of criminal justice, and precipitated important police reforms.

Reasonable people could conclude that it was more important to reform the justice system in a timely way that to single out particular police officers for punishment.

Closer to home, there is certainly an argument to be made that it is in the greater public interest to know the facts of the Westray mining disaster in Nova Scotia than it is to hold a particular mine manager or his colleagues to account in a criminal prosecution. If the provincial inquiry is allowed to proceed at all, there will no doubt be an application for publication bans of particular portions of evidence to protect fair trial concerns. Such applications could legitimately be resisted on the basis of the public's right to know what happened. Once again, a balancing of fair trial interests and freedom of expression should not necessarily come down in favour of a publication ban. Whether or not criminal proceedings against the particular individuals involved in the Westray disaster would have to be stayed is a different question, and one that can only be answered at the time the prosecutions are called for trial, as stated by La Forest J. of the Supreme Court of Canada in *R.* v. *Vermette*:

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4. See the attached clipping from The Guardian Weekly, "Life for `Monster' Tried by Italy's Unfettered Media".

5. *R.* v. *Reade, Morris and Woodwiss* (15 October 1993) (Old Bailey, London) [unreported].

> *It is only at the stage when the jury is to be selected that it will be possible to determine whether the respondent can be tried by an impartial jury*.[6]

The case of the broadcast ban of "The Boys of St. Vincent", now pending before the Supreme Court of Canada,[7] shows that the values of fair trial and free speech are not necessarily in conflict. That case involved a fictional depiction of child abuse in the setting of a religious teaching institution. Child abuse is a matter of public interest and concern. An award-winning film[8] that helped the viewer understand the issue emotionally as well as intellectually, fullfilled an important public function.[9] In other "free and democratic societies", greater importance seems to be attached to the value of public debate in matters of real importance than is the case in this country, even where such discussion has some potential collateral impact (as was alleged by the case with "The Boys of St. Vincent") on pending prosecutions.[10]

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6. *R.* v. *Vermette,* [1988] 1 S.C.R. 985 at 992, La Forest J.

7. I should disclose the bias that I argued the case for the CBC against the ban in the Supreme Court of Canada. The appeal is under reserve.

8. "Best film" prize at the *Festival International des Productions Audio-Visuelles* at Cannes, France, as well as at the *Banff International Film Festival*, Canada.

9. The Canadian Conference of Catholic Bishops, in its recent publication, *Breach of Trust, Breach of Faith — Child Sexual Abuse in the Church and Society,* cites and endorses a recent federal government report on child sexual abuse, including the recommendation that:

   The CBC and other public broadcasters should regularly broadcast appropriate documentaries and dramas dealing with domestic violence and child abuse.

10. In England, since passage of the 1981 Act, the courts have been willing to acknowledge the importance of noninterference in the discussion of matters of general public interest, per Lord Diplock in *Attorney General* v. *English*, [1983] 1 A.C. 116 at 144 (H.L.):

    Such gagging of bona fide public discussion in the press of controversial matters of general public interest, merely because there are in existence contemporaneous legal proceedings in which some particular instance of those controversial matters may be in issue, is what section 5 of the Contempt of Court Act 1981 *was in my view intended to prevent.*

    The Australian Courts have long recognized that the media may legitimately engage in discussion of public affairs or matters of public interest even where, because of a pending criminal proceeding dealing with the same issues, the discussion may incidentally affect the outcome of civil or criminal litigation. *Re Truth and Sportsman Ltd. Ex parte Bread Manufacturers Ltd.* (1937), 37 S.R.N.S.W. 242 at 249 Jordan C.J.:

    It is of extreme public interest that no conduct should be permitted which is likely to prevent a litigant in a court of justice from having his case tried free from all matter of prejudice. But the administration of justice, important though it undoubtedly is, is not the only matter in which the public is vitally interested; and if in the course of the ventilation of a question of public concern matter is published which may prejudice a party in the conduct of a lawsuit, it does not follow that a contempt has been committed. The case may be one in which as between competing matters of public interest the possibility of prejudice to a litigant may be required to yield to other and superior considerations. The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion or the denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant.

III. IS PUBLICATION DEFERRED PUBLICATION DENIED?

Canadian courts have latched onto the notion that publication deferral is not really a publication ban and that any breach of freedom of expression should therefore be regarded as a trivial Charter infringement of short duration. There are, of course, many situations in which this would be true. The duration of the proposed ban is clearly a factor to be weighed in the balance.

However, as the examples of the Italian corruption investigation and the IRA police abuse cases show, publication deferred may on occasion effectively be publication denied. The Westray mining disaster involves all manner of allegations of political interference at a federal and provincial level to approve and fund a mining scheme over the objection (apparently) of many technical experts. Governments have changed. It is of little utility to point a finger at Ministers long gone from office. When the Iran-Contra inquiry wound up in the United States with the conclusion that in fact President Bush and President Reagan both knew a great deal more about the exchange of arms for hostages than they had asserted, both were out of office and President Reagan lightly dismissed the whole affair as "old news".

Accordingly, in answer to the question "Must the news be new news?", the answer depends upon the context. Timeliness is always a factor, and calling a publication ban a "publication deferral order" is no more than terminological camouflage.

It is not entirely clear why courts seem more ready to attribute a time value to justice ("Justice delayed is justice denied") than to other pursuits such as journalism.

IV. SHOULD DOUBTS ABOUT THE IMPACT OF PRE-TRIAL PUBLICITY ON JURORS BE RESOLVED AGAINST THE MEDIA AND IN FAVOUR OF THE ACCUSED?

Of this dictum it was said by Lord Reid in *Attorney General* v. *Times Newspaper Ltd.*, [1974] A.C. 273 at 296, "I know of no better statement of the law [...]".

The antipodean belief in public debate seems to extend to situations where the debate is directly related to the facts of the prosecution. In *R.* v. *Harawira,* [1989] 2 N.Z.L.R. 714 (C.A.), the accused appealed her conviction on the ground that pre-trial publicity prejudiced her right to a fair trial, resulting in a miscarriage of justice. The Court said the complaint of the accused must be considered in the context of the trial Judge's direction to the jury to ignore everything previously heard and to decide the case on the basis of the evidence presented. In rejecting the accused's appeal, the Court stated at 729:

Our system of justice operates in an open society where public issues are freely exposed and debated. Experience shows that juries are quite capable of understanding and carrying out their role in this environment, notwithstanding that an accused may have been the subject of widespread debate and criticism.

The problem with this proposition is that it presupposes a hierarchy of constitutional values in which fair trial interests always trump free speech interests, even where there is legitimate doubt whether the two are in fact in conflict. The Charter, of course, contemplates no such hierarchy ordering our rights and freedoms.[11]

The courts seem at times too quick in ban cases to assume that jurors are less capable than judges and lawyers to concentrate on the job at hand. This lack of faith contrasts curiously with expressions of confidence in the jury system in other types of cases. In *R.* v. *Corbett*,[12] the Supreme Court of Canada reviewed a large number of studies of jury behaviour and simulated jury behaviour and found them inconclusive, but held, per Dickson, C.J.:

> *The jury is, of course, bound to follow the law as it is explained by the trial judge. Jury directions are often long and difficult, but the experience of trial judges is that juries do perform their duty according to the law.*

Law Reform Commission of Canada studies have also confirmed the independence and impartiality of jurors despite the existence of pre-trial publicity[13] and this conclusion is consistent with judicial opinion in other "free and democratic societies".[14]

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11. The framers of the Constitution must have assumed *prima facie* that these values can live together, as the Ontario Court of Appeal emphasized in *R.* v. *Hubbert* (1975), 29 C.C.C. (2d) 279 at 291 (Ont. C.A.):

    In this era of rapid dissemination of news by the various media, it would be naive to think that in the case of the crime involving considerable notoriety, it would be possible to select 12 jurors who had not heard anything about the case. Prior information about a case, and even the holding of a tentative opinion about it, does not make partial a juror sworn to render a true verdict according to the evidence.

12. *R.* v. *Corbett*, [1988] 1 S.C.R. 670 at 692, Dickson C.J.

13. See Law Reform Commission of Canada, Working Paper No. 56.

14. In the recent case of *Ex Parte The Telegraph Plc.*, [1993] 1 W.L.R. 980 at 987, the Lord Chief Justice of England stated:

    In determining whether publication of matter would cause a substantial risk of prejudice to a future trial, a court should credit the jury with the will and ability to abide by the judge's direction to decide the case only on the evidence before them. The court should also bear in mind that the staying power and detail of publicity, even in cases of notoriety, are limited and that the nature of a trial is to focus the jury's minds on the evidence put before them rather than on matters outside the courtroom.

    To the same effect is the comment of Sir John Donaldson in *Attorney General* v. *News Group Newspaper Ltd.*, [1987] A.C. 1 at 16 (H.L.):

    [...] *the fact is that for one reason or another a trial, by its very nature, seems to cause all concerned to become progressively more inward looking, studying the evidence given and submissions made to the exclusion of other sources of enlightenment. This is a well-known phenomenon. As Lawton J. put it on the basis of vast experience of jury trials, both at the Bar and on the Bench: `the drama, if I may use that term, of a trial almost always has the effect of excluding from recollection that which went before'.* Reg. *v.* Kray *(1969), 53 C.A.R. 412 at 415.*

Certainly one can think of many examples of celebrated cases where juries acquitted the accused after widespread and highly damaging pre-trial publicity. A jury acquitted the Los Angeles police officers who were accused of beating Rodney King despite the widely shown video of the police beating. John DeLorean was acquitted despite a video of the transaction that arguably constituted the offence. Mayor Marion Barry of Washington was acquitted of all but a minor charge despite being filmed in a hotel room *in flagrante delicto*. One can, of course, dismiss these acquittals as due to perverse factors even more powerful than the pre-trial publicity. Such a theory, however, presupposes a level of jury irrationality or bias that suggests far bigger doubts about the whole jury process than is capable of being remedied by publication bans.

A few days after affirming its faith in the jury system in *Corbett*,[15] the Supreme Court of Canada released its decision in *R.* v. *Vermette*,[16] in which it maintained that a stay is not available in respect of pre-trial publicity unless there is a likelihood that a fair trial has become impossible, per La Forest, J.:

> [T]*here is no evidence indicating that it will be impossible to select an impartial jury in a reasonable time. This is rather a matter of speculation.*
>
> *In deciding the question, one must not, in my view, rely on speculation. As the Court of Appeal of Ontario observed in* R. *v.* Hubert *(1975), 29 C.C.C. (2d) 279, at p. 289 (affirmed by this Court: [1977] 2 S.C.R. 267), "There is an initial presumption that a juror ... will perform his duties in accordance with his oath", and the fact that he may have read about the case through the media is by and large unimportant;* [...] *I am far from thinking that it must necessarily be assumed that a person subjected to such publicity will necessarily be biased* [...].

It is difficult to reconcile these affirmations of faith in the jury system with the growing phenomenon of publication bans.

V. MUST THE COLLISION BETWEEN FAIR TRIAL INTERESTS

In *R.* v. *Kray* (1969), 53 C.A.R. 412, Lawton J. had stated at 414:

[t]*he mere fact that a newspaper has reported a trial and a verdict which was adverse to a person subsequently accused ought not in the ordinary way to produce a case of probable bias among jurors empanelled in a later case. I have enough confidence in my fellow-countrymen to think that they have got newspapers sized up* [...] *and they are capable in normal circumstances of looking at a matter fairly and without prejudice even though they have to disregard what they may have read in the newspaper.*

The same sentiment was expressed by Lord Denning, M.R. in *R.* v. *Horsham Justices Ex parte Farguharson*, [1982] Q.B. 762 at 794 (C.A.), and by the New Zealand Court of Appeal in *R.* v. *Harawira, supra*note 10 at 729.

15. *Supra* note 12.

16. *Supra* note 6 at 992; See also *R.* v. *Sherratt* (1991), 3 C.R. (4th) 129 (S.C.C.).

AND FREEDOM OF EXPRESSION BE DETERMINED WITHIN SECTION 1 OF THE CHARTER?

Courts confronted with application for publication bans have generally resorted to section 1 of the Charter to determine whether such a ban in the circumstances of a particular case meets the tests of legitimate objective, rationality, minimal impairment and proportionality.

The problem with a section 1 approach, obviously, is that it produces a race to the courthouse. If the media get there first seeking a declaration of their section 2(b) Charter right, the section 1 onus is thrown onto the proponents of the ban. If those seeking to uphold fair trial rights under section 11(d) Charter get there first, the onus is reversed. When there is a tie, as in the Karla Homolka/Paul Bernardo case, the court is faced with an impossible conceptual conflict.

The fact of the matter is that section 1 does not provide a relevant mechanism to reconcile free speech and fair trial rights as both of these interests are constitutional values of equal weight. There is no logical reason for treating fair trial interests as a "reasonable limitation" on freedom of expression or vice versa. In this respect, the Charter poses a problem comparable to that faced by American courts in interpreting their Bill of Rights. Constitutional rights have to be limited within the Charter by reference to each other before the section 1 process is even reached.

CONCLUSION

It seems to me, for the reasons mentioned above, that the legal difficulties presented by publication bans go deeper than the orthodox solutions presently adopted by our courts. We have moved far enough along the information highway to know that publication bans are no match for modern technology. At times they create rather than prevent injustice, as was argued on behalf of Paul Bernardo in opposing the ban of the proceedings of the Karla Homolka trial. The point, I think, is that ultimately the problems of securing a fair and impartial trial will have to be solved in the courtroom rather than by publication bans directed to the larger community outside it.