Victim Privacy and the Open Court Principle

Jamie Cameron, Professor of Law
Osgoode Hall Law School

Policy Centre for Victims Issues

Research and Statistics Division

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Executive Summary

This Report analyzes the tension between victim privacy and the open court principle, and especially in the context of sexual assault proceedings. It explains that the open court principle is one of the most highly prized values in the Anglo-Canadian common law tradition. Not only has the jurisprudence under the *Charter of Rights and Freedoms* reinforced this value, it has set more onerous requirements for exceptions to the open court principle to meet. The Report provides an analysis of open court's transition from common law to constitutional principle.

Historically, the victims of crime have not played a central role in a trial process that is conceptualized as a bipolar contest between the state and the accused. Even before the *Charter of Rights and Freedoms* was adopted in 1982, however, the status of victims had begun to improve. The law relating to sexual offences was one area in which reforms were most forcefully sought, and most frequently secured as a result. Though statutory measures had taken some steps in this direction, protecting the privacy of victims was not recognized, at common law, as one of the permissible exceptions to open court's twin elements of access and publicity.

Almost exclusively in the context of sexual assault proceedings, the status of crime victims changed radically under the *Charter*. Albeit in the context of conflict between the rights of the accused and the complainant, the Supreme Court of Canada recognized a right of victim privacy under s.7 of the *Charter*, and placed it on an equal plane with the defendant's right of full answer and defence. The Report views this as a critical development because of the importance of linking the privacy concerns which arise at different times and for different reasons in sexual assault proceedings. The open court jurisprudence weighs the salutary benefits of protecting victim privacy against the deleterious consequences of derogating from open court. The invasion of privacy elsewhere in the process, and the steps that have been taken to address it, may influence the judiciary's perception of proportionality in contests between victim privacy and open court.

The Report adds perspectives from other jurisdictions and provides a discussion of the values which are at stake when victim privacy is set against open court. In doing so, it raises but does not answer the question whether victim privacy, and the need for anonymity in particular, is justified by the nature of the offence, or should instead be regarded as a remedial measure to address the chronic under reporting of sexual offences and encourage victims to trust the system. In essence, the question is whether these offences are different and should, from a privacy perspective, always be treated differently. An alternative approach would treat sexual assault victims differently, but only for the time being, and because the unfair treatment they have suffered in the past has not yet been eliminated.

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Chapter One

Introduction

Privacy may be an ancient concept that is linked in fundamental ways to the dignity and integrity of individuals, but it is a relative newcomer to the law just the same. Though aspects of property and defamation law, as well as some rules of evidence, are related to it, privacy, until recently, lacked status as an independent right or concept. At least in the North American tradition, the development of a legal entitlement began with a watershed article, written in 1890, by Samuel D. Warren and Louis D. Brandeis. Their perception of excesses by the American press prompted Warren and Brandeis to demand that privacy be recognized and protected by the law. In one of their more colourful passages the authors of "The Right to Privacy" described the pathology of what they saw, as follows:

> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.[1]

Warren and Brandeis argued that the "intensity and complexity of life" rendered "some retreat from the world" necessary at the same time that "modern enterprise and invention" created new ways and means of invading privacy. The result, they concluded, was that individuals could be subjected to mental pain and distress "far greater than could be inflicted by mere bodily injury".[2]

The inventions Warren and Brandeis had in mind included typewriters, which were introduced to newsrooms in 1876, telephones which dated to the early 1880s, and news photography which arrived in 1897.[3] More than one hundred years later, privacy as a legal concept has evolved in a number of directions, especially in the United States, where it is a viable cause of action in the law of tort. Today, modern enterprise and invention have developed sophisticated broadcast and electronic technologies which dramatically accelerate the possibilities for the invasion of privacy. Not only that, the media promotes a culture of publicity which thrives on the details of private lives, whether the object of attention is a celebrity, a public figure, or an unlucky individual whose life has taken a turn which can be sensationalized for profit. There can be no doubt that the victims of crime are among those who are unwillingly thrown onto the public stage. While leaving larger questions about the privacy from unwanted media attention to another time and place, this study focuses on the privacy of crime victims, and of complainants in sexual assault proceedings, in particular.

"The history of criminal justice is almost synonymous with the decline of the victim's influence."[4] Historically, the common law treated the victims of crimes as witnesses, not as parties to criminal proceedings. Though the victim initiated proceedings as the prosecutor in the

earliest days, the foundations of modern criminal justice were laid when the state undertook that responsibility in the name of the victim and the community at large. From then on, the central elements of the criminal trial, which was conceived as a contest between those accused of offences and the state, began to evolve. Over time, substantive principles, rules of evidence, and procedures which protected the defendant's right to a fair trial would offset the considerable powers, advantages and resources the state enjoyed in prosecuting those accused of crime.

How the frequently competing interests in law enforcement and due process should be calibrated is an issue of ongoing adjustment and debate. Thus, it could be expected that those accused of criminal offences would be key beneficiaries when constitutional rights arrived in Canada, some twenty years ago. Today, the process of adjusting the balance between law enforcement and fairness to the accused is channelled, for the most part, through the *Charter of Rights and Freedoms*.[5]

Meantime, the victims and witnesses who were participants in criminal trials were not only visible to the public but were often the objects of sympathy as well. Still, as third parties, they lacked status or standing in the system, in their own right. As LeSage A.C.J.O explained, in *The Queen v. Bernardo*:

> Historically, there was a period when all crimes were personal to the victim. Over the years, the criminal law evolved toward a recognition that crimes are transgressions of societal order and values. This evolution continued until we reached a point where the state interest appeared to be total and the individual victim was given little recognition. The **only** recognized interest, at that point, was the broader interest of the state.[6]

The Crown could not secure convictions without the assistance of the victims and witnesses of crime. Yet the interests of the victim and the Crown often diverged and, in any case, prosecutors lacked the authority to promise victims that their interests, including privacy concerns, would be protected. Nor were the courts willing, or able, institutionally, to reform the criminal justice system in ways that responded to the concerns of victims. For that to happen, legislative intervention was necessary.

For many years now, victims' rights groups have been active and effective participants in the political and legal processes of government. As a result of their efforts, the status of crime victims has changed in many ways. Victims' charters have been enacted in, for example, the province of Ontario. The 1995 *Victims' Bill of Rights* declares that "[t]he people of Ontario believe that victims of crime, who have suffered harm and whose rights and security have been violated by crime, should be treated with compassion and fairness."[7] In addition, the Preamble states that "[t]he people of Ontario further believe that the justice system should operate in a manner that does not increase the suffering of victims of crime and that does not discourage victims of crime from participating in the justice system."[8] The *Bill* establishes principles, which include a declaration that victims should have access to information on a variety of points about the criminal justice system and the proceedings in which they are involved.[9] As well, s.2(1)1 announces that "[v]ictims should be treated with courtesy, compassion and respect for their

personal dignity and privacy by justice system officials."[10] Meanwhile, victim impact statements are now admissible at sentence hearings [11] and steps have been taken to address victims' needs for compensation and restitution.[12]

Following his statement above, regarding the traditional role of the victim, LeSage A.C.J.O.C. observed, "[d]uring recent years, there has been a gradual shift, or evolution ... to a recognition of the concerns, interests and involvement of the individual who has suffered as a result of crime."[13] Describing this as a "healthy evolution", he stated that "[v]ictims should have a participation in the criminal law process that is greater than was recognized twenty or thirty years ago."[14] The proviso he added is that their participation and involvement "can never interfere with or be seen to interfere with the accused's right to a fair trial."[15] That, of course, is when the criminal justice system confronts conflicts between the rights of defendants and their accusers. There, the question is whether the victims of crime can claim entitlements and rights of participation in the criminal process, or will remain as third parties, whose recognition in the system is limited to the "soft", or unenforceable, declarations set out in charters and bills of rights.

Conflicts between the rights of the accused and their victims have been brought to the forefront by women's organizations, which have directed their energies over the years to the problems of sexual assault and domestic violence. In Canada and elsewhere, organizations have lobbied effectively for legislative reforms and have participated in high profile court cases. At home, the law has been modified in important ways as a result. For example, the *Criminal Code*'s offence of rape was repealed in 1982 and replaced by sexual assault, which is a broader and more encompassing offence.[16] In addition, the Supreme Court of Canada recognized battered wife syndrome as a valid aspect of self-defence in answer to a murder charge.[17] Moreover, through a combination of judge-made law and *Criminal Code* revisions, it is more difficult now for the accused to claim that he mistakenly thought a complainant consented to a sexual assault, when she in fact did not.[18] As well, and in response to a controversial decision by the Supreme Court, Parliament has removed intoxication as an available defence to offences which interfere with a person's bodily integrity, including sexual assault.[19]

Historically, sexual assault victims were treated poorly in criminal proceedings. For instance, it was once commonplace for defence counsel to question a complainant about her previous sexual history, not only with the accused, but with other partners too.[20] It was presumed that this evidence was relevant to the question of consent: a complainant with a history of sexual activity was deemed more likely to have consented or, alternatively, to have led the accused to believe, mistakenly, that she had given permission. Debate about the permissibility of this line of inquiry, as well as on access to other sources of information about the complainant, initially centred less on a right of victim privacy than on the question whether the evidence was relevant to the defence. While counsel for the accused maintained that such evidence was relevant to the credibility of the complainant and her story, others challenged that view on the ground that information, which was extraneous to the offence itself, was irrelevant. Moreover, they argued that assumptions about the relevance of such evidence were based on stereotypical views about who gets raped, by whom, for what reason, and in what circumstances.

Through its constitutionalization of the presumption of innocence and other elements of procedural fairness, the *Charter of Rights and Freedoms* guaranteed defence access to evidence which advanced the accused's right of full answer and defence. In the circumstances, conflicts between the criminal defendant's new found constitutional rights and the countervailing demands that sexual assault complainants be treated fairly were inevitable. The victims of sexual offences reacted by asserting their own constitutional entitlements in the criminal process. As a result, the focus gradually shifted away from the question whether private information was relevant, and turned toward the establishment of privacy and equality rights for the victims of sexual offences. In due course, the Supreme Court of Canada and *Criminal Code* set evidentiary boundaries around the defendant's access to personal information about the complainant.[21]

The recognition of victims' rights generally, and the establishment of privacy and equality rights for sexual assault complainants are not unrelated to the more specific purpose of this study, which is to consider the relationship between victim privacy and the open court principle. Despite the common law's reluctance to recognize privacy as a permissible exception to the presumptions of access and publicity, the Supreme Court of Canada has explicitly weighed victim privacy in balancing the interests for and against open court. Thus, in *C.B.C. v. New Brunswick (Re: R. v. Carson)*, the Supreme Court of Canada was asked to close a courtroom during part of a sentence hearing for a sexual offence the defendant had committed against two young women.[22] La Forest J. acknowledged that "[w]hile the social interest in protecting privacy is long standing, its importance has only recently been recognized by Canadian courts."[23] He noted that privacy "does not appear to have been a significant factor in the earlier cases which established the strong presumption in favour of open courts."[24] Though that approach had generally continued and may be inherent to the nature of a criminal trial, he stated that the right of privacy "is beginning to be seen as more significant."[25] Ultimately, the Court concluded that the public can be excluded from the court room, as a way of controlling publicity to protect the innocent and safeguard privacy interests.[26]

In *C.B.C. (Re: R. v. Carson)* and other decisions, privacy has received new and increased recognition in relation to the open court principle. At the same time, the Supreme Court of Canada has given that principle strong endorsement. In a series of decisions, the Court has made it clear that access to the courts and their proceedings enables public criticism of the justice system and encourages public participation in one of Canada's democratic institutions. Excluding the public from court proceedings or banning the publication of information about the trial process undercuts one of the "core" values that is protected by s.2(b) of the *Charter*'s guarantee of expressive freedom.

The presumption in favour of open court is strong but not absolute, and exceptions are permissible. The rationale, which traditionally was most frequently invoked to support a publication ban, was the accused's right to a fair trial. Proceedings could also be closed, in some instances, to protect the proper administration of justice. Under the *Charter*, the Supreme Court of Canada has articulated doctrines which place significant restrictions on derogations from the open court principle. In other words, exceptions remain available, but must satisfy the Court's multi-criteria standards of justifiability. Even so, the open court *Charter* doctrines are flexible

enough to accommodate exceptions which are necessary, in particular circumstances, to protect fair trial, privacy, or other compelling interests.[27]

With a doctrinal framework for open court in place, it remains somewhat unclear how it will be applied as the jurisprudence evolves. Whether the Supreme Court enforces a presumption in favour of access and publicity, or is generous in its interpretation of exceptions will vary on a case-to-case basis. It is difficult to predict the direction conflicts between open court and victim privacy will take under a methodology that is so contextual in nature. In that regard it should be noted, however, that the Supreme Court's recognition of a right of victim privacy under s.7 of the *Charter* is certain to affect its appreciation of the balance between privacy and open court under s.2(b).

With these introductory remarks as background, the plan for the study can now be outlined. Chapter Two introduces the constitutionalized concept of open court and traces its evolution in four of the Supreme Court of Canada's important decisions on these issues: *Canadian Newspapers Co. v. Canada (A.G.)*[28]; *Edmonton Journal v. Alberta (A.G.)*[29]; *Dagenais v. C.B.C.*[30]; and *C.B.C. v. New Brunswick (Re: R. v. Carson)*[31]. Two of the four raise privacy questions, and two others pose open court issues in the context of sexual assault proceedings. Next is Chapter Three, and though it does not address the open court principle, it is a vital part of this study. The objective of that Chapter is to link the invasion of privacy that sexual assault victims experience, *throughout the process*, from the initial complaint to the final appeal, and to demonstrate how privacy concerns which are pervasive in sexual prosecutions key back to the open court principle. Chapter Three explains how a right of victim privacy emerged in the court of three Supreme Court of Canada decisions of the 1990s; they are *R. v. Seaboyer*[32]; *R. v. O'Connor*[33]; and *R. v. Mills*[34].

Chapter Four ranges beyond Canada's borders to see how victim privacy is treated in other jurisdictions. Limited information was available on civilian and other non-common law systems. As well, the Commonwealth countries, which lack a constitutional framework for conflicts between these competing interests, contributed little in the way of new insight. More provocative in this Chapter, then, is the analysis of victim privacy and the First Amendment of the U.S. Constitution, which guarantees freedom of speech and of the press. If the American jurisprudence fails to supply answers, it at least does not shy from asking the difficult questions.

Simply enough, Chapter Five is titled "Perspectives." Its purpose is to step away from an emphasis on statutory provisions and case law, and to try and flush out what is at stake in pitting open court against victim privacy. While it does not claim to provide answers, the discussion identifies the rationales which are strongly advanced on each side of the ledger. It also attempts to articulate the difficult choices which lie ahead in deciding which of two cherished values should be preferred, both generally and in particular circumstances. In doing so, it draws on a substantial secondary literature to discuss the merits of victim anonymity, as well as the arguments in favour of identifying the victims of crime. That analysis is followed by a comment on the Homolka-Bernardo proceedings and the conflicting values those proceedings generated.

Chapter Six is relatively brief. At the conclusion of a lengthy Report, its purpose is to summarize and highlight the key elements of the study. Thus it crystallizes the findings and conclusions reached, as well as points up unanswered questions and issues for the future. It is followed by Chapter Seven, which provides a Bibliography of constitutional, statutory and case law materials, as well as a list of the secondary literature that was consulted in the preparation of this Report.

Chapter Two

The open court principle and the Charter

Introduction

Open court is a venerated ideal of justice in common law systems, and a principle that is regarded as indispensable. Generally, the principle requires that court proceedings be open to the public, and that publicity as to those proceedings be uninhibited. No less than the legitimacy of criminal justices depends on it; the fairness of criminal process and public confidence in the system are at stake. Of signal importance as well, a free flow of information encourages feedback and debate among members of the public, thereby promoting the accountability of institutions which exercise coercive powers against individuals.

Yet the rule is one matter and its exceptions, another. Despite the rhetoric, the common law's commitment to open court has yielded a variety of exceptions from the rule. As fundamental as its underlying values are, securing the fair trial of the accused at times requires a ban on the publication of information which could prejudice his right to be presumed innocent. In Canada, many such exceptions are found in the *Criminal Code*, which was enacted for the first time in 1892.[1] For instance, publication bans today prevent the disclosure of information revealed in pre-trial proceedings, such as bail hearings[2] and preliminary inquiries.[3] Such information can impair fair trial rights by revealing evidence that is inadmissible or by undermining the presumption that an accused is innocent until proven guilty. In default of a *Code* provision, the judge can order a publication ban at trial, as an aspect of his or her common law jurisdiction to prevent bias against the accused.[4] Bans safeguard the integrity of the process in other ways as well; for example, the identity of a juror or jurors is protected,[5] as is the confidentiality of jury proceedings.[6]

In s.794, the 1892 *Code* endorsed the common law principle that every court "shall be an open public court", and added, in s.848, that the hearing "shall be deemed an open and public court, to which the public may generally have access so far as the same [room] can conveniently contain them".[7] Even so, the *Code* has, since its earliest days, authorized judges to exclude the public from the courtroom in specified circumstances.[8] Up until 1953's revision, the *Code* preserved the judge's common law power to exclude the public in any case where such exclusion was deemed "necessary or expedient".[9] That year saw the introduction of s.428, which is substantially the same as the present s.486(1), the latter which reads as follows:

> 486(1). *Exclusion of public in certain cases* - Any proceedings against an accused shall be held in open court, but where the presiding judge, provincial court judge or justice, as the case may be, is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice to exclude all or any members of the public from the courtroom for all or part of the proceedings, he may do so. [10]

This provision codifies the general rule and then sets out the grounds on which the public can be excluded by way of exception.[11]

Today, the *Code* encompasses hundreds of provisions which prescribe the substantive and procedural details of Canada's criminal law. Though it is the primary source, the *Code* is not the only source of criminal law, and is supplemented in its coverage by drug and firearms legislation, as well as by the former *Young Offenders Act,* and now the *Youth Criminal Justice Act*.[12] Further exceptions to the principle of openness are found in these and other statutes. Yet the *Criminal Code* and criminal law legislation do not completely oust the common law. To the extent statute law is silent, the judiciary retains a discretion at common law to consider and determine limits on the open court principle.[13]

Exceptions to the principle of open court are *prima facie* vulnerable under the *Charter of Rights and Freedoms*[14]. Given that such exceptions from principle had been accepted in the past, it was difficult to predict what difference the *Charter* would make. From one perspective, the status quo represented a fair balance between the rule and its exceptions. From another, it appeared that the *Charter* had re-calibrated that balance in favour of expressive freedom, and had the potential, therefore, to defeat existing limits on openness. In this regard it should also be noted that Canada's system of constitutional rights permits exceptions or limits which are considered "reasonable" from the perspective of a "free and democratic society".[15]

Today, more than twenty years later, the Supreme Court of Canada has had the opportunity to consider whether and in what ways the open court principle has been altered by the *Charter*. This Chapter highlights four of the Court's decisions on this issue: *Canadian Newspapers Co. v. Canada (A.G.)*;[16] *Edmonton Journal v. Alberta (A.G.)*;[17] *Dagenais v. Canadian Broadcasting Corp.*;[18] and *Canadian Broadcasting Corp. v. New Brunswick (A.G.) (Re: R. v. Carson)*.[19] While three affect privacy concerns, a fourth - which is *Dagenais* - discusses the accused's right to a fair trial; meanwhile, three of the four consider the permissibility of a publication ban and a fourth, *C.B.C. (Re: R. v. Carson)* invalidates an order excluding the public from a court room. Once again, three are set in the criminal justice system and a fourth, *Edmonton Journal*, arises in a civil context. Finally, *Canadian Newspapers* and *C.B.C. (Re: R. v. Carson)* place open court in conflict with the interests of a complainant in sexual assault proceedings. First, it is worthwhile noting, in a general way, the pre-*Charter* status of open court and privacy.

The open court principle at common law

Until recently, and with the exception of young offender legislation, the statute law did not protect the privacy of crime victims. Nor did the common law, as the two key pre-*Charter* decisions reveal.

Scott v. Scott was a precedent-setting decision of the House of Lords, which held that open court does not defer to the privacy concerns of individuals who are participants in judicial proceedings.[20] There, the issue arose, in a civil context, from an annulment hearing which was held *in camera*. After the court granted the petitioner an order annulling her marriage, on grounds of her spouse's impotence, she obtained transcripts of the hearing and circulated them to

his father, his sister, and a third party. Thereafter, he sought an order that she be held in contempt of court for publicizing information that had been revealed in a closed hearing. The annulment proceedings raised inherently private matters at a time when sensitive problems, like male impotence, were not widely discussed. Even so, the House of Lords quickly rejected the suggestion that litigants should be spared the humiliation, pain or embarrassment of having private matters publicly disclosed.

As Earl Loreburn explained, "[t]he inveterate rule is that justice shall be administered in open court";[21] the traditional law, "that English justice must be administered openly in the face of all men", he described as "an almost priceless inheritance."[22] For his part, Lord Atkinson acknowledged that the hearing of a case in public may be "painful, humiliating, or deterrent both to parties and witnesses", and that in many cases, especially those of a criminal nature, "the details may be so indecent as to tend to injure public morals".[23] He concluded, nonetheless, that "all this is tolerated and endured", because a public trial is "the best security for the pure, impartial, and efficient administration of justice, the best means of winning for it public confidence and respect".[24]

Lord Shaw added to the rhetoric of openness, in passages which have been cited with frequency over the years. In doing so, he invoked and relied on the well-known words of Jeremy Bentham, among others. As Lord Shaw declared:

> 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 of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." "The security of securities is publicity." But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: "Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise."[25]

Leaving aside the criminal process, which is subject to the requirement of a fair trial, the House of Lords could only identify three exceptions to the Earl of Loreburn's "inveterate rule": litigation affecting wards, lunacy proceedings, and disputes over trade secrets. Specifically, Lord Shaw rejected the suggestion that openness should be diluted to preserve access to justice. After inquiring whether the fear of giving evidence in public would deter witnesses of delicate feeling from giving testimony, and provide a sound reason for administering justice in such cases behind

closed doors, he replied that "this ground is very dangerous ground".[26] He agreed that the reluctance to intrude one's private affairs upon public notice induces many citizens to forgo their just claims, and acknowledged that many such cases might have been brought before tribunals which met in secret. Yet he concluded that "the concession to these feelings would, in my opinion, tend to bring about those very dangers to liberty in general, and to society at large, against which publicity tends to keep us secure...."[27] On its face an uneventful matrimonial case, *Scott v. Scott* provided an exegesis on the open court principle.

Some years before *Scott v. Scott*, Duff J., of Canada's Supreme Court, had written that "[t]he general advantage to the country in having [] proceedings open more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings."[28] And in the wake of *Scott v. Scott*, Lord Blaneburgh confirmed in *McPherson v. McPherson*, which was likewise a matrimonial case, that publicity is the "authentic hall-mark of judicial as distinct from administrative procedure."[29] If openness prevailed over privacy in a hearing of private interest to the spouses in a failed marriage, it was difficult to imagine how privacy could prevail in a criminal case of the highest public interest.

Many years later, the Supreme Court of Canada addressed the clash between the private and public in *Nova Scotia v. MacIntyre*.[30] Decided in 1982, the year of the *Charter*'s arrival, *MacIntyre* fell for resolution under common law. Though not a *Charter* decision, Dickson J.'s opinion nonetheless anticipated the competing interests which would arise under a regime of constitutional rights. There, the contest was between the *ex parte* and *in camera* status of a search warrant hearing, and the public's access to information about the investigative process. MacIntyre was a journalist who raised the question whether search warrants are documents which he was entitled to examine, as a member of the public.

Mr. Justice Dickson, who wrote the Court's majority opinion, accommodated them by forging a compromise between the interests at stake. Thus he denied the journalist access to the warrants at the time of their issue, but held that the documents became public upon being executed. When a warrant is issued, protecting a potentially innocent subject and safeguarding an investigative process which could be compromised by disclosure are the priorities. Once an investigation is undertaken, however, he concluded that the public was entitled to know the details, in the interests of accountability. Through that approach, Dickson J. protected the search warrant process without sacrificing public access to information about the system.

His discussion of the underlying values in *MacIntyre* also provided guidance for the future. Citing Bentham, he endorsed a "strong public policy in favour of 'openness' in respect of judicial acts".[31] On the question of warrants, Dickson J. held that "[t]he concern for accountability is not diminished by the fact that the search warrants might be issued by a justice *in camera*".[32] To the contrary, he went on, "this fact increases the policy argument in favour of accessibility", because "[i]nitial secrecy surrounding the issuance of warrants may lead to abuse, and publicity is a strong deterrent to malversation".[33] Though he spoke in favour of "maximum accountability and accessibility", he found that those values could not be pursued at the expense of harming the innocent or of impairing the efficiency of the search warrant" as a weapon in law enforcement.[34]

Mr. Justice Dickson's analysis did not ignore privacy concerns. After recognizing that such interests are unavoidably compromised by court proceedings, he declared that "[i]t is now well established, however, that covertness is the exception and openness the rule". [35] He noted that the public's confidence in the integrity of the court system and its understanding of the administration of justice are fostered by a rule in favour of openness. When pitted against the very integrity of the justice system, the privacy concerns of individuals do not weigh heavily in the scales. Accordingly, Dickson J. stated that the "sensibilities of the individuals involved are *no basis* for exclusion of the public from judicial proceedings". [36] At the same time, though, he introduced a qualification which would later be cited to support a right of victim privacy under the *Charter*. Significantly, he announced that public accessibility could be curtailed to protect "social values of superordinate importance". [37] In the circumstances, he left the task of determining which social values are of that magnitude to future judicial consideration.

To summarize, *MacIntyre* is not a *Charter* decision and has little to say directly on the question of *victim* privacy. In the circumstances of a journalist seeking information about search warrants, Dickson J. was concerned about individuals who might be publicly exposed to suspicion in the course of an investigation but vindicated, in at least some cases, upon its conclusion. Yet his conception of the openness rule and its exceptions would have broader applications. By combining the principle that "covertness is the exception and openness the rule" with the prospect of exceptions to protect "social values of superordinate importance", he introduced a methodology which was flexible enough to accommodate competing values in a range of settings and circumstances.

The open court, principles, and the Charter

With the enactment of the *Charter of Rights and Freedoms* in 1982, restrictions on openness were challenged under s.2(b), which guarantees freedom of expression and of the media.[38] Publication bans directly infringe the right to communicate information that is disclosed in the course of criminal proceedings. Meanwhile, orders which exclude the public from courtrooms deny access to information about the justice system and, in the case of the press, interfere in the newsgathering function.

At the least, the *Charter* has changed the way open court issues are analyzed. Before turning to the decisions, it may be helpful to review some key points of *Charter* analysis. Whether and to whom the *Charter* applies is a central issue that need only be noted here. According to s.32, the *Charter* applies to the federal, provincial, and territorial governments; as most of the issues in this study arise under the *Criminal Code* and other criminal law statutes, the *Charter* applies without argument.[39] Even so, it should be noted that although the *Charter* does not apply *per se* to the common law, the rules of criminal law and process which remain grounded in the common law must comply with the *Charter*.

In any discussion of open court and privacy, the key *Charter* provisions are ss. 2(b), 8, 7 and 1. As noted above, s. 2(b)'s guarantee of expressive and press freedom is the source of challenges to restrictions on open court. By comparison and, in the absence of an explicit textual guarantee, the *Charter*'s protection of privacy is less straightforward. Section 8, which

guarantees individuals the right to be secure against unreasonable search and seizure, is related to privacy but is concerned, directly, with the rights of the accused in the investigative process. [40] As Chapter Three explains, the Supreme Court drew on s.8 to incorporate protection for privacy into s.7 of the *Charter*, which prohibits the state from denying an individual's life, liberty, or security of the person in any way that violates the principles of fundamental justice.[41] Section 7, in combination with s.15's guarantee of equality, provided the basis for the Supreme Court's protection of victim privacy in sexual assault proceedings. As the discussion in this Chapter shows, the privacy rights of complainants played a less significant role in the open court cases decided under s.2(b) of the *Charter*.

Of central importance to the *Charter* is s.1, which allows the government to "save" legislation which violates a constitutional guarantee, by demonstrating that the infringement is reasonable by reference to democratic values. It is axiomatic that the *Charter* does not guarantee rights absolutely, but sets up an equation; on one side of the equation are the rights and freedoms that are guaranteed and, on the other, is s.1 and its concept of reasonable limits. Specifically, s.1 states that the *Charter*'s rights are subject only to "such reasonable limits as can be demonstrably justified in a free and democratic society". The equation achieves balance by weighing the rights and freedoms in question against the limits placed on them by government. In simple terms, a limit is justifiable under s.1 when the government establishes that it is reasonable to infringe an individual's constitutional rights. The result there is that democratic limits prevail over individual rights. If the government cannot demonstrate that its limit is justifiable, the right will prevail and the violation will be declared unconstitutional.

The Supreme Court encased the question of reasonable limits under s.1 in a doctrinal framework which was introduced in *R. v. Oakes*.[42] The *Oakes* test proposed a complex and structured series of requirements for the government to meet in satisfying its burden that a limit on *Charter* rights was demonstrably justified. Though it has generated variations in application over the years, the standard's fundamentals have remained constant. The test is cumulative, and if the government's measure fails any part, the infringement is unconstitutional. The first part of *Oakes* seeks evidence of a government objective that is pressing and substantial enough to warrant the infringement of a constitutional right.

Once that hurdle has been cleared, the second part, which is divided into three elements that are known collectively as the proportionality test, must be applied. The object of proportionality analysis is to ensure that the statutory provision is drafted with sufficient precision to avoid the needless or gratuitous violation of rights. In summary, the *Oakes* proportionality test demands that the limit be carefully drawn, be no broader than necessary, and maintain proportionality between the measure's salutary benefits and its deleterious consequences. At the time *Oakes* was decided, the Supreme Court intended to set up a strict and rigorous standard of justification under s.1. Applied literally, and especially under the terms of proportionality, the test proved rigid and inflexible. As a result, its components have been adjusted over time to fit the circumstances of particular facts and issues.

This brief overview of *Charter* analysis serves as an introduction to the Supreme Court's four key decisions on the open court principle. The discussion below presents them chronologically, in order of decision.

Canadian Newspapers Co. v. Canada (AG)[43]

The Supreme Court of Canada addressed the principle of open court for the first time under the *Charter* in *Canadian Newspapers Co. v. Canada (A.G.)*. The issue there was whether s.442(3) of the *Criminal Code* (now s.486(3)) violated s.2(b) of the *Charter*. That provision allowed a trial judge to impose a ban on the publication of the victim's identity, as well as on information which might identify the victim in sexual assault proceedings; in addition, s.442(3) made a publication ban mandatory at the request either of the complainant or the prosecutor.[44] In the Ontario Court of Appeal, Chief Justice Howland held under s.1 of the *Charter* that s.442(3)'s imperative element was unnecessary. The government's interest in protecting the complainant's identity could be served, he thought, by making a ban available on an as needed, case-by-case basis.[45]

There was no dispute that s.442(3) violated s.2(b) of the *Charter*. The only question was whether the violation was reasonable under s.1. In answering that question, Howland C.J.O. acknowledged the connection between freedom of the press and the principle of open court, in these terms:

> The freedom of the press to report what transpires in our courtrooms is one of the fundamental safeguards of our democratic society. Justice is not a cloistered virtue and judicial proceedings must be subjected to careful scrutiny in order to ensure that every person is given a fair trial.... Openness of the courts is essential for the maintenance of public confidence in the administration of justice and to further a proper understanding of the judicial system.... It gives the public an opportunity to see that justice is done. There is necessarily implicit in the concept of an open court the concept of publicity; the right of the media to report what they have heard in the courtroom so that the public can be informed about court proceedings, and public criticism, if necessary, engendered should any impropriety occur.[46]

At the same time, he also recognized and endorsed the objective of s.442(3). Relying on *MacIntyre*, which permitted exceptions to openness when social values of superordinate importance were at stake, Howland C.J.O. came to this conclusion:

> ... it has been clearly established that the social value to be protected, namely, the bringing of those who commit such sexual offences to justice, is of superordinate importance and can merit a prohibition against publication of the victims' identity or of any information that could disclose it. It is a reasonable limitation on the freedom of the press.[47]

Section 442(3)'s social value was established through evidence from the co-ordinator of a Sexual Assault Crisis Centre, whose trial testimony was excerpted in the Court's reasons, as follows:

> Q. All right, what questions do they ask you about whether to report it or not?
>
> A. Victims are very hesitant. I think the bottom line is they don't want people to know what happened. They check us out to see if we are connected with the police or hospitals. They are concerned about privacy, because rape to them, or sexual assault, is embarrassing. They feel ashamed and they are very hesitant to report -
>
> Q. - hesitant to report, all right. What apparent degree of importance is attached by them to the issue of publicity of their identity?
>
> A. They are concerned that if they do report, who is it going to be reported to. Will it be printed in the paper? They are very hesitant to come to court because that is part and parcel of their concern that other people will find out that [they] have been rape victims and there are a number of factors that influence that. They don't feel they will be believed. They feel that they will be blamed for what happened and they are very frightened about going to court - very frightened about other people finding out in the papers and fearful of retribution by the accused ....
>
> Q. ... where on the concerns raised with you would the concern over publicity rank, from the concerns they disclose to you?
>
> A. From the information I obtain from them, I would say very high on their list of concerns, very high.
>
> Q. In light of your experience ... what effect do you feel it would have on the rate at which they report the offence to the authorities, should section 442(3) be struck down?
>
> A. The rate of reporting would drop even lower than it is now .... [48]

Despite that evidence the Ontario Court of Appeal concluded that s.442(3)'s valid interest in the prosecution of sexual assaults would be adequately served by the availability of a ban on victim identity, at the discretion of the judge. In doing so, the Court acknowledged its concern that in some instances the complainant might have made false allegations, or might have previously accused other persons without justification. In such cases, publishing her name might bring forth other witnesses to testify on behalf of the accused.[49] Given that prospect, and the fact that the trial judge retained discretion on this issue in other countries, Howland C.J.O. found for the Court that the government failed to show the need for a mandatory prohibition. The Supreme Court of Canada disagreed with that conclusion and upheld the provision in its entirety.

The Court's decision was written by Lamer J., who would later become the Chief Justice of Canada. After noting the infringement of freedom of the press, he indicated that "the main issue before us is whether the impugned provision can be salvaged under s.1."[50] In terms of s.442(3)'s objective, he found that the measure "purports to foster complaints by victims of sexual assault by protecting them from the trauma of widespread publication resulting in embarrassment and humiliation."[51] In such circumstances, Lamer J. did not hesitate to conclude that "[e]ncouraging victims to come forward and complain facilitates the prosecution and conviction of those guilty" and satisfies the requirement of a pressing and substantial government objective.[52]

The second part of the s.1 analysis, which consists of the *Oakes* test's three part proportionality test, focussed on the question whether a mandatory ban was necessary when a discretionary ban would also protect the complainant's identity, with less intrusive consequences for freedom of the press. Lamer J. also rejected that argument, for the following reasons. As he noted, "fear of treatment by police or prosecutors, fear of trial procedures *and fear of publicity or embarrassment*" are the main reasons sexual assault is underreported.[53] In the circumstances, a guarantee of anonymity could play a vital role in influencing a complainant's decision whether to report the offence: at the critical moment, the complainant may require a promise that her identity will not be disclosed. A discretionary ban, which might or might not subsequently be granted at trial, would be less intrusive of s.2(b), but more unpredictable from the complainant's perspective. Morever, he found that the limits imposed by s.442(3) on the media's rights were minimal.[54]

The Supreme Court's decision in *Canadian Newspapers* was not a foregone conclusion. Reasons, which were framed in the language of law enforcement, protected victim anonymity. The Court may have emphasized that rationale because, as seen above, the judiciary had not previously been sympathetic to the privacy concerns of participants in the justice system.[55] By upholding s.442(3)'s mandatory ban, then, *Canadian Newspapers* to some extent represented a break with the past. Moreover, as the s. 2(b) jurisprudence evolved, it would become clear that blanket prohibitions on expressive freedom, such as the one at stake in *Canadian Newspapers*, are difficult to justify.[56] Less intrusive means, such as discretionary bans, are normally more desirable because they enable courts to balance interests, rather than choose, absolutely, between them. *Canadian Newspapers* concluded that an automatic ban was necessary, essentially on the strength of one witness's testimony,[57] and failed to consider the underlying rationales of openness, including the Ontario Court of Appeal's suggestion that publicity might encourage undiscovered witnesses to come forward. Though its reasoning, arguably, was flawed, the Supreme Court invoked a law enforcement rationale to uphold s.442(3) and thereby protect the privacy of complainants.

Edmonton Journal v. Alberta (AG)[58]

Not long after the decision in *Canadian Newspapers*, the Supreme Court issued a landmark in the s.2(b) jurisprudence. In *Edmonton Journal v. Alberta (A.G.)*, a majority of four judges concluded that a statutory provision banning the publication of certain information about matrimonial proceedings was unconstitutional. Citing a countervailing interest in privacy, three other members of the Court disagreed and would have upheld the provision.[59]

Writing in support of the majority result, Cory J. strongly advocated values of openness, accessibility, and accountability. Thus, he wrote that "a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions".[60] In his view, the vital importance of free and uninhibited speech could not be over-emphasized. Given that the *Charter* framed s.2(b) in "absolute terms", the rights enshrined in the guarantee could "only be restricted in the clearest of circumstances".[61] Mr. Justice Cory spoke of the connection between freedom of expression, democracy, and open courts. For instance, he emphasized that "the courts must be open to public scrutiny and to public criticism of their operation by the public".[62] In one of the well known passages from his opinion, he stated that "freedom of expression is of fundamental importance to a democratic society", and continued that "[i]t is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly."[63] Turning to the press, Cory J. added that those who bring the news to the public "must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny."[64]

At the same time, Cory J. was not unsympathetic to the privacy of individuals. He noted that society has cherished and given protection to privacy, and indicated that the Court had on a number of occasions "underlined the importance of the privacy interest in Canadian law."[65] The problem, though, was that the courts must function openly and the public's need to know cannot be denied. He concluded that in contrast to the ban at issue in *Canadian Newspapers*, Alberta's restrictive ban on publication significantly reduced the openness of courts and was more sweeping than necessary to protect the privacy of witnesses and children.[66] For those reasons, it could not be justified under s.1.

Meanwhile, Wilson J. came to the same conclusion by a different route. In what she referred to as a contextual approach, she juxtaposed the two values at stake. Like Cory J., she strongly advocated the open court principle, and concluded that "there would have to be very powerful considerations in order to justify inroads into the open court process."[67] Though Wilson J. gave some attention to the privacy interest, she characterized the concern at issue as being the "personal anguish and loss of dignity that may result from having embarrassing details of one's life printed in the newspapers."[68] She turned to *Scott v. Scott* for "a stern reminder of the importance of not allowing one's compassion ... to undermine a principle which is fundamentally sound in its application."[69] In her view, there was little in matrimonial disputes to warrant a special immunity from publicity in court proceedings.

She concluded that the two values - the right of the press to publish, and the right of litigants to the protection of their privacy in matrimonial disputes - could not both be fully respected. In the circumstances she found it unnecessary for the statute to ban the publication of information in all matrimonial cases, to protect the privacy of litigants in the small number of cases which might cause trauma or humiliation.[70]

LaForest J.'s dissent would have upheld the statute's privacy provision. Prior to the *Charter,* there was no constitutional basis on which to challenge a publication ban which nonetheless was contrary to *Scott*'s open court principle. Nor, as noted above, does the *Charter*

explicitly guarantee privacy rights. Despite the absence of a textual guarantee, La Forest J. stated that personal privacy has "been recognized by this court as having constitutional significance".[71] Though the Court's protection of privacy was limited to s.8's concept of reasonable search and seizure, he suggested that privacy might also be an aspect of s.7's liberty or security of the person. "However that may be", he went on, "there can be no doubt that in this modern age, it ranks high in the hierarchy of values meriting protection in a free and democratic society".[72] Against the weight of *Scott* and *MacPherson*, both of which dealt with a closed hearing rather than a publication ban, La Forest J. voted to uphold the statutory provision. In doing so, he concluded that privacy prevailed because of the "very limited character of the restriction as compared with the serious deleterious effects on the important values sought to be protected by the legislation."[73]

Mr. Justice La Forest also cited *Canadian Newspapers* in support of his conclusion. A mandatory ban was acceptable to members of the Court in that setting, however, because victim anonymity served law enforcement objectives and not because privacy prevailed over the open court principle. By contrast, the statutory ban in *Edmonton Journal* could not invoke an objective apart from the protection of privacy. Though La Forest J. saw *Canadian Newspapers* and *Edmonton Journal* as analogous, the majority on that panel did not.

Unlike *Canadian Newspapers*, *Edmonton Journal* discussed and emphasized the open court principle and its relationship to s.2(b) of the *Charter*. Moreover, *Edmonton Journal* confronted the conflict between open court and privacy, which *Canadian Newspapers* did not mention. Finally, the Court recognized in *Edmonton Journal* that the challenge was one of balancing the two values. According to the majority, the statute's protection of privacy failed the requirement of proportionality that the infringement be no greater than necessary in the circumstances. Despite that conclusion, *Edmonton Journal* is significant because seven members of the Court accepted that privacy has constitutional implications. As well, and against the weight of a common law tradition that valued open court above privacy, three members of the Court treated the privacy of litigants as a justifiable limit on s.2(b)'s guarantee of expressive freedom.

The discussion of *Edmonton Journal* concludes by mentioning *Vickery v. N.S.S.C. (Prothonotary)*, in which a majority of the Court denied a television producer access to a videotape confession which had been submitted as evidence in a murder case.[74] The confession was inadmissible, the accused was acquitted, and in response to a request for a copy of the confession, the Court held that the defendant's privacy interests "as a person acquitted of a crime outweigh the public right of access to exhibits judicially determined to be inadmissible against him."[75] *Vickery* was not decided under the *Charter*, and nor did it concern a publication ban, as was the case in *Edmonton Journal*.

It is worth noting, nonetheless, for Cory J.'s dissenting opinion, which was joined by Justices L'Heureux Dubé and McLachlin JJ. Though he expressed respect for the accused's right to privacy and weighed it in the balance, Mr. Justice Cory's adherence to the open court principle was passionate and unbending. Quoted below are a few of the passages which

demonstrate that, for him, the principle was almost unconditional. Thus, he expressed the value of openness in these terms:

> [C]ourts must, *in every phase and facet of their processes*, be open to all to ensure that so far as is humanly possible, justice is done and seen by all to be done. If court proceedings, and particularly the criminal process, are to be accepted *they must be completely open* so as to enable members f the public to assess both the procedure followed and the final result obtained. *Without public acceptance, the criminal law is itself at risk*.[76]

After discussing American experience at some length, Cory J. stated that "[a]s a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings."[77]

Under the heading "some general policy considerations", Mr, Justice Cory declared that an open trial process demonstrates "*to all*, whether the family of the victim, the family of the accused, or the members of the community in general, that *the entire criminal process* has been conducted fairly and that those accused of crimes have been dealt with justly."[78] And, though he emphasized the role of the media, as the public's representative in court proceedings, it is the value Cory J. attached to openness that is striking. On that he claimed the following:

> There can be no confidence in the criminal law process unless the public is satisfied with all court proceedings from the beginning of the process to the end of the final appeal. *Of the three levels of government, it is the courts above all which must operate openly*. While what is done in secret is forever suspect, what is done openly, whether susceptible to praise or condemnation, is more likely to meet with acceptance. *There cannot be reasonable comment or criticism unless all aspects of the proceedings are known to the public*.[79]

In the end he cautioned against a "priestly cult of the law whereby lawyers and judges exclusively determine" what can be seen and heard by members of the public; in his view, "anything that prevents light being shed" on the subject of a trial "can only lead to a dark suspicion of the process."[80]

Mr. Justice Cory's comments on open court appeared in a dissenting opinion but are significant nonetheless. Through the combination of *Edmonton Journal*, the *Vickery* dissent, and the majority opinion in *C.B.C. v. New Brunswick (Re: R. v. Carson)*, a strong endorsement of the *value* of the open court principle emerged in the Supreme Court jurisprudence.

Dagenais v. C.B.C.

Dagenais v. C.B.C. is also a landmark, not only for s.2(b) and the open court principle, but for the rights of third parties in the criminal process too.[81] There, conflict arose between the fair trial rights of priests accused of sexual offences, and the C.B.C.'s right, under s.2(b), to broadcast a controversial docudrama on that subject. Four members of a religious order, who were accused of physical and sexual abuse in Catholic training schools, obtained a publication

ban which prevented the C.B.C. from broadcasting *The Boys of St. Vincent*. Speaking through Chief Justice Lamer, the Supreme Court found that the order was unconstitutional; the evidence did not disclose any threat to fair trial rights which could only be averted by banning the docudrama.

Among the numerous *Code* provisions which permit publication bans and closed proceedings, there is none which addresses the threat to fairness that publicity can pose during the trial itself. In default of a statutory rule, the issue reverted to the common law. As noted above, common law rules which apply in criminal proceedings generally must co mply with the *Charter*. Under those rules, publication bans were traditionally granted to prevent a real and substantial risk that publicity might interfere with the right to a fair trial. [82] Although the common law standard accorded freedom of expression some deference, the Chief Justice questioned whether the rule provided "sufficient protection" for s.2(b)'s guarantee of expressive freedom.[83] In his view, a pre-*Charter* rule that favoured fair trial over free expression was inconsistent with the principles of the *Charter*.[84] Accordingly, Lamer C.J. concluded that it would be "inappropriate" to "continue to apply a common law rule that automatically favoured the rights protected by s.11(d) over those protected by s.2(b)."[85]

He indicated that the power to grant a publication ban may be discretionary, but its exercise "cannot be open-ended" and must observe "the boundaries set by the principles of the *Charter*."[86] To direct the exercise of discretion Chief Justice Lamer constitutionalized the common law rule. In doing so, he modified the *Oakes* test and proposed a standard which would limit the availability of a ban to circumstances in which:

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

b) the salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by them. [87]

The *Dagenais* framework has since served as a model for determi ning the reasonableness of other restrictions on open court.[88] On the central question of fair trial versus freedom of the press, *Dagenais* represented an important vindication of openness. Though it failed to discuss and reinforce the underlying values of open court, the majority opinion established a concrete standard which rejected the assumption that virtually any risk to fair trial was sufficient to warrant restrictions on publicity.

It is also significant, in terms of this study, that *Dagenais* advanced the rights of crime victims in two ways. One, which is procedural, altered the status of third parties in criminal proceedings. In an adversarial contest between the state and the accused, third parties, such as victims, witnesses and the C.B.C., had little or no status. Not surprisingly, the *Criminal Code* did not grant such parties a statutory right of appeal from orders affecting their rights under the *Charter*. In *Dagenais*, this meant that unless the Supreme Court addressed its claim, the C.B.C. would forfeit its rights under s.2(b) of the *Charter*. To avoid that prospect, Chief Justice Lamer

found that the Supreme Court had jurisdiction, under its own statutory powers, to hear C.B.C.'s appeal.[89] As this avenue of appeal is not exclusive to the press, *Dagenais* effectively granted third parties unprecedented access to justice at the Supreme Court of Canada.

Second, *Dagenais* introduced a principle of *Charter* interpretation which inadvertently provided the impetus for the recognition of victim privacy under s.7 of the *Charter*. Discussing the competing interests at stake, the Chief Justice observed in *Dagenais* that the *Charter* draws no distinction between ss.2(b), which guarantees expressive and press freedom, and 11(d), which guarantees a fair trial. This led him to conclude that it was inappropriate for the common law to privilege one constitutional right at the expense of another, when the two have "equal status".[90] More generally, Lamer C.J. stated that "[a] hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when interpreting the common law".[91] In cases of conflict between two rights, he indicated, *Charter* principles require "a balance to be achieved that fully respects the importance of both sets of rights".[92] If it was unclear how conflicting rights could both be fully respected, the key point is that *Dagenais* endorsed a non-hierarchical approach to *Charter* rights. How *Dagenais* contributed to the evolution of victim privacy through its rejection of a hierarchy of values is traced, in detail, in Chapter Three.

C.B.C. v. New Brunswick (Re: R. v. Carson)[93]

C.B.C. v. New Brunswick (Re: R. v. Carson) combined *Edmonton Journal*'s strong endorsement of openness values with a doctrinal standard that built on the methodology of *Dagenais*. In doing so, the Court emphasized the importance of the newsgathering function and its relationship to an informed public and democratic values. Unlike previous cases, *C.B.C. (Re: R. v. Carson)* raised the question of access to the courtroom. Under s.486(1) of the *Criminal Code*, which permits proceedings to be closed to protect the proper administration of justice, the trial judge had excluded the public from a portion of the sentence hearing which disclosed the acts of sexual assault and interference the accused had committed against two young females. Though LaForest J., for the majority, found the order unconstitutional in the circumstances, he upheld s.486(1). In doing so, he accepted that privacy is a valid exception to the rule in favour of openness.

Section 486(1) declares that proceedings shall be held in open court, except when the judge concludes that it is "in the interest of public morals, the maintenance of order or the proper administration of justice to exclude all or any members of the public from the court room for all or part of the proceedings."[94] Rather than invalidate the provision, LaForest J. stated that in applying its exclusionary criteria, a court must exercise its discretion "in conformity with the *Charter*."[95] In his view, s.486(1) armed the judiciary with a useful and flexible interpretive tool to preserve the openness principle, subject to whatever exceptions or limits the proper of administration of justice might require. The fact that the discretion must be exercised within constitutional parameters would ensure that the terms of a particular exclusionary order would accomplish what was necessary to achieve s.486(1)'s goals, and no more. When an exercise of discretion did not conform with the *Charter*, it would be appropriate for the Court to quash the order.

To provide guidance in determining the validity of an exclusionary order, LaForest J. drew on the *Dagenais* standard. Stating that the "same directives" are equally useful in determining when a court room may be closed under s.486(1), he held that an exclusion order can only be issued once the following steps have been taken:

a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
b) the judge must consider whether the order is limited as much as possible; and
c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.[96]

In addition, he indicated that the burden of displacing the rule of openness rests on the party making the application, and stressed, repeatedly, the need for a sufficient evidentiary basis for the order.[97]

In the result, the trial judge's order was inconsistent with s.2(b) of the *Charter*, not only because embarrassment alone is not a sufficient reason to protect witnesses from a public presence in the courtroom but also, because there was no evidence that the two victims would suffer "undue hardship" were the public permitted to attend a twenty-minute segment of the hearing on sentence. The victim impact statements did not indicate any basis for such hardship and nor did they disclose the circumstances of the offences. Most sexual offences involve evidence that is "very delicate", La Forest J. observed, and there was nothing to indicate that this case should be "elevated" above other sexual assaults.[98] The mere fact that the victims were young females was not sufficient in itself, and there were other effective means to protect them.[99] Excluding the public was unnecessary because the victims' identities were protected by a non-publication order, they were not witnesses at the hearing, and there was no evidence that their privacy required more protection.[100]

Though reluctant to criticize, LaForest J. was not impressed that the trial judge made the exclusionary order without first confirming that all the facts had been placed before the court.[101] He agreed that the criminal justice system must be "ever vigilant in protecting victims of sexual assault from further victimization", but cautioned that the importance of a sufficient factual foundation for s.486(1)'s exercise could not be overstated.[102] In this instance, the trial judge's reasons for excluding were no better than "scant".[103]

The Court's concern with a factual foundation and sufficient evidentiary basis arise from its perception of the s.2(b) values at stake. In that regard, *C.B.C. (Re: R. v. Carson)* is noteworthy for its insights on and endorsement of the open court principle. First, LaForest J. recognized that access to the courts is "integrally linked to the concept of representative democracy and the corresponding importance of public scrutiny of the criminal courts."[104] In addition, he acknowledged that through the gathering and dissemination of information, the media plays an "integral role" in informing the public about the courts. As he explained, "the democratic function of public criticism of the courts" would not be possible without a public informed by the press, and the press could not discharge its responsibility to the public without access to the

courts.[105] In his own words, "[d]ebate in the public domain is predicated on an informed public, which is in turn reliant on a free and vigorous press."[106] Though the Court upheld s.486(1), including its discretion to exclude the public from the court room, La Forest J. regarded openness, access to information, and the newsgathering function as essential aspects of Canadian democracy.

At the same time, LaForest J. had dissented earlier in *Edmonton Journal*, and was sympathetic to the protection of privacy. Though openness prevailed in the circumstances of *C.B.C. (Re: R. v. Carson)*, he did not ignore the privacy concerns of crime victims. Noting that earlier case law had established a strong presumption in favour of open courts, he added that the importance of privacy "has only recently been recognized by Canadian courts."[107] Citing *MacIntyre*, *Edmonton Journal*, and *R. v. O'Connor*,[108] LaForest J. stated that "the right to privacy is beginning to be seen as more significant."[109] And though openness "appears inherent to the nature of a criminal trial,"[110] he added that "the court's power to regulate the publicity of its own proceedings serves ... to protect privacy interests, especially those of witnesses and victims."[111] His majority opinion concluded that excluding the public under s.486(1) is permissible to protect the innocent and safeguard privacy interests, and "thereby provide a remedy to the under reporting of sexual offences."[112]

C.B.C. (Re: R. v. Carson) gave the principle of open court strong vindication under the *Charter*. At the same time, LaForest J. accepted that privacy interests could justify an exclusion order, providing that a sufficient factual foundation was established. Though the public should not have been excluded in the circumstances of that sentence hearing, exclusion orders are constitutionally available under *C.B.C. (Re: R. v. Carson)* when supported by a "sufficient evidentiary basis". Despite the common law's reluctance in this regard, the Court showed its willingness, under the *Charter*, to recognize privacy as a valid exception to the open court principle.

Conclusion

Prior to the *Charter*, open court was a principle that was highly prized but subject to exceptions nonetheless. Though the privacy of participants in the justice system was not an exception the common law recognized, the legislatures were free to modify that position and protect privacy by statutory measures. With the *Charter*'s arrival the relationship between the principle and its exceptions remained constant in some ways, and was altered in others.

Open court has been given especially strong recognition in the s.2(b) jurisprudence. Traditionally, the principle has been linked to the fairness of proceedings, as well as to the legitimacy of criminal justice and the public's confidence in the system. What the *Charter* has added are a recognition of the link between open court and democratic accountability, and the distinctive role the press plays in providing the public the information it requires to scrutinize and debate the operations of the justice system. These values received strong endorsement under the *Charter* in *Edmonton Journal* and *C.B.C. (Re: R. v. Carson)*.

As to results, the open court claims succeeded in three of the four decisions reviewed in this Chapter, and others could be added to the list.[113] In that regard, it is important to note that the evidentiary threshold for a limit or an exception to the principle has changed dramatically.

The common law treated open court and fair trial as important values, but assumed that open court should yield to fair trial whenever that value might be threatened. Statutory provisions created blanket or mandatory exceptions, or granted judges almost unfettered discretion to place limits on access or publicity. Under the doctrinal framework introduced in *Dagenais*, and developed in the subsequent case law, that would change. Limits on the principle remain permissible, but must now satisfy particular and more onerous requirements under the *Charter*. *Dagenais*, *C.B.C. (Re: R. v. Carson)*, and the more recent *Mentuck/O.N.E.* cases demonstrate that it has become difficult to justify limits on the open court principle. [114] Looking back at *Canadian Newspapers* today, one wonders whether the result would have been the same, had the case been decided under the standards established by the subsequent jurisprudence.

While enhancing the status of open court, the *Charter* jurisprudence also granted privacy concerns important protection. As seen above, *Canadian Newspapers* employed a law enforcement rationale under s.1 of the *Charter* to protect the identity of sexual assault complainants. Subsequently, however, and though it did not prevail, the privacy interest was considered and weighed by the judges in the majority in *Edmonton Journal*, and was the deciding factor for those who dissented. Finally, *C.B.C. (Re: R. v. Carson)* discussed privacy in some detail and treated it as a reasonable limit on open court which failed because it was not established, as a matter of evidence, in the circumstances of that case. Without serving as the determining factor or changing the result in any of these cases, privacy nonetheless travelled a considerable distance from *Scott* and *MacIntyre*, and in a relatively short time, under the *Charter*.

Chapter Three

Victim privacy, sexual assault, and the Charter

Introduction

Privacy was a theme in Chapter Two's analysis of the open court principle. Though it was an indirect or unspoken factor in *Canadian Newspapers v. Canada (A.G.)*, and an express consideration in *Edmonton Journal v. Edmonton (A.G.)* and *C.B.C. v. New Brunswick (Re: R. v. Carson)*, the Supreme Court did not in these cases treat privacy as an entitlement in its own right.[1] The purpose of this Chapter, then, is to explain how it was recognized as a *Charter* right in sexual assault proceedings. That development occurred in the context of setting evidentiary boundaries around the complainant's privacy in her past sexual history and in securing the confidentiality of her counselling and therapeutic records.[2]

The discussion begins by acknowledging the significance of privacy in sexual assault proceedings. *Canadian Newspapers* acknowledged that anonymity is an element in a victim's decision whether to report the commission of an offence and to proceed with charges. Privacy concerns do not stop there, however, but continue through the investigative and trial processes. At every stage, the complainant's credibility is open to question. In addition to the unavoidably private nature of a sexual offence, which can only be revealed by the complainant, the victim has in the past been subject to inquiries into the history of other sexual activities. More recently, complainants' privacy has been threatened by defence claims for access to counselling and therapeutic records which are in the possession either of the Crown or private third parties.

Rules of evidence which regulated the defendant's access to these sources of information provoked contests under the *Charter*, between the accused's right to full answer and defence, and the privacy and equality rights of complainants. This Chapter focuses on a trilogy of decisions which together led to the recognition of victim privacy under s.7 of the *Charter*. In order of decision and also of discussion below, those cases are: *R. v. Seaboyer*,[3] *R. v. O'Connor*,[4] and *R. v. Mills*.[5] Before continuing, it is important to explain why this development is significant. First, sexual assault's implications for privacy are complex and multi-dimensional; it would be a mistake, therefore, to treat conflicts between open court and victim privacy as an isolated phenomenon. Second, as a result of that connection, the entitlement which emerged in *Mills* may influence the way open court and privacy values will be balanced under s.2(b) of *The Charter*.

There is one further preliminary to a discussion of the three key decisions. Before explaining how the Supreme Court resolved conflicts between the defendant's right to full answer and defence, and the complainant's assertion of privacy and equality rights, it is worthwhile to review the *Charter* status of privacy prior to the *Seaboyer-O'Connor-Mills* trilogy.

The privacy rights of the accused

Nowhere does the *Charter* explicitly protect privacy, and nor does it mention the rights of crime victims. Rather, its legal rights, which are found in ss.7 to 14, grant those accused of

offences a number of procedural and substantive rights. Perhaps for that reason, the primary beneficiaries of the Supreme Court of Canada's early *Charter* jurisprudence were criminal defendants. One of the Court's first decisions concerned s.8, which provides that "[e]veryone has the right to be secure against unreasonable search or seizure."[6] In commenting on the guarantee's interpretation in *Hunter v. Southam*, Dickson J. announced that the *Charter* provides for the "unremitting protection of individual rights and liberties".[7] As for s.8, he rejected the suggestion that common law rules rooted in concerns about property and the law of trespas s should determine its scope. Instead, he stated that the *Charter*'s provisions must be "capable of growth and development over time to meet new social, political and historical realities."[8] Once having acknowledged the need for a "broad perspective in app roaching constitutional documents",[9] Dickson J. signalled his wariness of "foreclosing the possibility that the right to be secure against unreasonable search and seizure might protect interests *beyond the right of privacy*", and indicated that "its protect ion goes at least that far."[10] The question, he held, is whether "the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy."[11]

That determination depends, from one case to t he next, on whether the individual is entitled in the circumstances, to "a reasonable expectation of privacy against governmental encroachments".[12] In *R. v. Dyment*, Mr. Justice La Forest reinforced the relationship *Hunter v. Southam* had forged between s.8's guarantee and the concept of privacy. He endorsed the view that "privacy is at the heart of liberty in a modern state", and added that, in being "grounded in many's physical and moral autonomy", it is "essential for the well -being of the individual."[13] Worthy of constitutional protection for that reason alone, he declared that privacy has profound significance for the public order because restraints on the government's power to pry into the lives of citizens "go to the essence of a democratic state."[14]

La Forest J. also agreed with Dickson J.'s suggestion that *Charter* rights should be interpreted in a broad and liberal manner. In terms of s.8, that meant "[i]ts spirit must not be constrained by narrow legalistic classifications based on notions of pr operty and the like which served to protect this fundamental human value in earlier times."[15] Quoting from the Task Force on *Privacy and Computers*, he agreed that privacy transcends the physical and engages the dignity of the human person.[16] His comments about informational privacy are of particular interest in the context of this Chapter:

> In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such info rmation, but situations abound where the reasonable expectation of the individual that the information shall remain confidential to the person to whom, and restricted to the purposes for which it is divulged, must be respected.[17]

Hunter v. Southam and *R. v. Dyment* established a strong foundation for privacy but were limited as precedent to s.8 and its application to investigative processes. Any right of privacy outside that context would have to be located elsewhere in the *Charter*. Over time, s.7, which guarantees entitlements that are more general and abstract, filled that gap in the *Charter*'s text. The provision protects three entitlements - the right to "life, liberty and security of the person" -

and then adds an important proviso: a deprivation of those rights which is consistent with principles of fundamental justice does not violate the *Charter*.[18]

As s.7's abstract text is amenable to broad and narrow interpretations, it is not surprising that the Supreme Court has shifted in both directions. On the one hand, the Court has been reluctant to freeze or stultify the content of this *Charter* right; on the other, the judges realize that concepts such as liberty or security of the person, as well as fundamental justice, are malleable. In the case of privacy, then, the genesis of a right under s.7 is found in *dicta* discussing the meaning of "security of the person." In an early decision, Lamer J. claimed that the meaning of liberty and security of the person should not be confined to elements of physical integrity, but should include violations of an individual's psychological integrity as well.[19] Despite its influence on the s.7 jurisprudence, *R. v. Mills* was decided under s.11(b), which entitles the accused to trial within a reasonable time.[20] There, Mr. Justice Lamer effictively incorporated s.7's guarantees of liberty and security of the person into his interpretation of s.11(b).[21] In his view, the reasonable time guarantee was designed to protect the rights set forth in s.7, albeit "in a specific manner and setting."[22] Having linked the general contours of s.7 and the particulars of s.11(b), he held that under the latter, "the security of the person is to be safeguarded as jealously as the liberty of the person."[23] Mr. Justice Lamer then expounded on the meaning of security of the person, in these terms:

> Security of the person is not restricted to physical integrity; rather, it encompasses protection against overlong subjection to the vexations and vicissitudes of a pending criminal accusation ... These include stigmatization of the accused, *loss of privacy*, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life, and work, legal costs, uncertainty as to the outcome and sanction.

Surprisingly, *dicta* which appeared in a dissenting opinion that addressed the scope of s.7 in a s.11(b) case dealing with the rights of the *accused*, and in which privacy was but one in a list of security interests, helped provide the foundation for a right of *victim* privacy.

The Court picked up on the proposition that s.7 protects an individual's psychological integrity in other decisions as well. For instance, in *R. v. Morgentaler*, Dickson C.J. stated that "[s]ecurity of the person must be given content in a manner sensitive to its constitutional position."[24] After citing the above passage from *Mills*, he held that "[i]f state-imposed psychological trauma infringes security of the person in the rather circumscribed case of s.11(b), it should be relevant to the general case of s.7 where the right is expressed in broader terms."[25] Even so, he held that criminal restrictions on a woman's right to seek an abortion were in the circumstances unconstitutional, but concluded that "[i]t is not necessary ... to determine whether the right extends further, to protect either interests central to personal autonomy, such as a *right to privacy* or interests unrelated to criminal justice."[26] Meanwhile, Madam Justice Wilson's concurring opinion citing the same passage from *Mills*, found that "the right to security of the person entitled a person to be protected against psychological trauma", and agreed that the entitlement extended to an individual's physical and psychological integrity.[27] She alone held that s.7 guarantees the substantive right to seek an abortion which, in her view, was grounded in

s.7's liberty entitlement and its guarantee "to every individual a degree of personal autonomy over important decisions intimately affecting their *private lives*."[28]

As seen above in Chapter Two, the Supreme Court accepted that s.2(b)'s principle of open court could be limited, under the s.1 analysis, to protect privacy interests. As an entitlement, however, the concept of privacy was confined to s.8 and those accused of crimes. Meantime, both before and after the *Charter*'s enactment, the women's movement achieved important reforms in many areas of the criminal law. Early in the 1980s, Parliament repealed the *Criminal Code*'s rape provision and created the offence of sexual assault in its place.[29] That step was one of several which, together, comprised a package of reforms. Even before those reforms, Parliament introduced legislation which placed strict limits on an accused's right to cross-examine the complainant on her past sexual history.[30] Measures which protected a victim's identity, which were discussed in Chapter Two, are another part of the initiatives that were introduced in this period.[31] Subsequently, *Criminal Code* provisions also narrowed or removed certain defences in sexual assault proceedings. The two most controversial defences were the accused's claim of a mistaken belief that the activity was consensual,[32] and the excuse that he was too intoxicated to be held criminally responsible for his actions.[33]

These changes were afoot at the time the *Charter* was enacted in 1982. In the years that followed, the Supreme Court's aggressive protection of the accused's rights prompted complainants to assert *Charter* entitlements of their own. In the course of the *Seaboyer-O'Connor-Mills* trilogy, the Court extended the concept of privacy that had protected criminal defendants from search and seizure under s.8, to the victims of crime, under s.7 of the *Charter*.

The privacy rights of victims

As seen above in Chapter Two, *Canadian Newspapers v. Canada (A.G.)* employed a law enforcement rationale to protect victim anonymity in sexual assault proceedings. Yet privacy concerns are not limited to the question of identity, but run through the process. An issue which may surface for the first time when a complainant is deciding whether to report an offence can be magnified at trial, when she is required to testify about the assault in open court, and then to submit to cross-examination by the lawyer for the accused. That part of the process has been especially contentious in recent years. On the one hand, the accused is entitled, under the *Charter*, to various aspects of a fair trial, one of which is his right to make "full answer and defence." This entitlement, which is protected under ss.7 and 11(d), guarantees access to whatever evidence is necessary for him to make his defence, including private information about the complainant.[34]

Before the reforms just mentioned, this evidence in sexual assault proceedings included the right to cross-examine the complainant on her past sexual experience. Common law rules of evidence allowed that line of questioning on the assumption that such information was relevant to the question of consent. When the common law was modified by *Criminal Code* provisions restricting access to such evidence, those limits were challenged under the *Charter*, as violations of the defendant's fair trial right and his right to make full answer and defence.

Meanwhile, the perception that complainants were being re-victimized by a process which was dominated by myths and stereotypes drew attention to their rights in the criminal trial process. In this way, the privacy and equality claims of sexual assault victims were set up against the rights of the accused. This contest gave rise to two major developments in the *Charter* jurisprudence: first, the Supreme Court of Canada recognized a right of victim privacy under s.7; and second, in doing so, the Court held that the victims of such crimes are not subordinate, but equal in their rights, to the accused. Before turning to the trilogy of cases, it should be mentioned that this Chapter does not comment on the concept of relevance, as its purpose instead is to trace the evolution of a *Charter* right of privacy.

R. v. Seaboyer[35]

R. v. Seaboyer was a decision which highlighted the divisive issues which arise in sexual assault cases. There, a Supreme Court majority opinion invalidated s.276 of the *Criminal Code*, which made cross-examination on a complainant's previous sexual history effectively unavailable to the accused in prosecutions for sexual assault.[36] According to then Madam Justice McLachlin, who wrote the Court's opinion, the *Code*'s so-called "rape-shield" provision impermissibly infringed the accused's rights under the *Charter*. In restricting access to a line of questioning that could result in an acquittal, s.276 denied him the opportunity to answer the charge against him. Though her decision to strike s.276 effectively restored the common law, McLachlin J. articulated a number of guidelines to prevent a return to past patterns of cross-examination.[37]

Meanwhile, L'Heureux Dubé J. wrote a stinging dissent which extensively reviewed the myths and stereotypes of rape law, before concluding that s.276 did not offend s.7 and was, in any case, easily justified under s.1 of the *Charter*. As far as she was concerned, the exclusion of "largely irrelevant and highly prejudicial sexual history evidence does not significantly entrench [sic] upon an accused's right to a fair trial or an accused's right to make full answer and defence."[38] Not only did *Seaboyer* expose sharp disagreement between the Supreme Court's two women judges, the dissent aggressively supported a feminist interpretation of sexual assault. Yet by majority vote, the rights of the accused prevailed over those of his victims, as they had so consistently in the past. For these and other reasons, *Seaboyer* marked a defining moment in the rising conflict between the rights of those accused of sexual offences and their accusers.

McLachlin J.'s majority opinion described s. 276 as imposing a "blanket exclusion" on evidence of a complainant's prior sexual history, subject only to three exceptions.[39] In the circumstances, her difficulty was that the provision denied the accused access to evidence, in some instances, that he was constitutionally entitled to, as a matter of fair trial under s.11(d) and fundamental justice under s.7 of the *Charter*. After describing a number of situations in which such evidence might be relevant, she held that s.276 was constitutionally flawed because an absolute exclusion provided no means for evidence to be evaluated.[40] From her perspective, such an approach was "inherently incapable of permitting the Court sufficient latitude to properly determine relevance in the individual case."[41]

Supporters of s.276 maintained that its key purpose was to abolish common law rules which permitted evidence of the complainant's sexual conduct that was of little probative value and was calculated to mislead the jury. In addition, they submitted that the provision advanced the truth-seeking objective of criminal justice, and that eliminating this evidence would preserve the integrity of the trial process, encourage the reporting of crime, and protect the witness's privacy.[42] Responding, in particular, to the privacy issue, McLachlin J. stated that such a claim could not justify s.276's rigid exclusionary rule. "Important as it is to take all measures possible to ease the plight of the witness", she held that "the constitutional right to a fair trial must take precedence in case of conflict."[43] As for the notion that complainants could claim entitlements of their own under ss.7 and 15 of the *Charter*, she noted that s.7 includes a variety of societal interests but stated that a measure which denied the accused's right to full answer and defence would violate s.7 in any event.[44] For her, the problem was that s.276's "pigeon-hole approach" was incapable of addressing the evidentiary question whether the evidence was relevant or not in any particular case.[45]

Despite invalidating s.276, Madam Justice McLachlin did not favour a return to the common law's "outmoded sexist-based use of sexual conduct evidence."[46] She described as "totally discredited" the idea that a complainant's integrity might be affected by whether she has had other sexual experiences, and went on to state that "[t]here is no logical or practical link between a woman's sexual reputation and whether she is a truthful person."[47] A provision that excluded evidence which was sought for illegitimate purposes was unquestionably permissible; the difficulty for her was that the existing provision also had unconstitutional effects. Her solution formulated guidelines which were designed to "reduce and even eliminate the concerns" which had prompted the enactment of s.276, and at the same time to preserve the right of an accused to a fair trial.[48]

Meantime, L'Heureux Dubé J. was adamant that the provision did not violate the *Charter* and should be upheld. She described McLachlin J.'s optimism that judicial guidelines could address Parliament's objectives and avoid the infirmities of the common law as "badly misplaced."[49] In her view, the guidelines were "entirely too broad and support the very stereotypes and myths that they are meant to eradicate."[50] But if the tone of her dissenting opinion magnified divisions between the two, it is worth noting that victim privacy was not a central consideration in either opinion.

Madam Justice L'Heureux Dubé declared more than once that sexual assault is "not like any other crime."[51] Nor was her dissenting opinion limited in scope to the constitutionality of s.276; *Seaboyer* presented the opportunity to write an indictment of the law of sexual assault, and so she did. Accordingly, her lengthy reasons detailed and catalogued the myths and stereotypes that infuse the system,[52] and serve as a filtering process which "select[s] out the cases not worthy of further attention."[53] As a result, when a woman's victimization does not "fit the myths", she declared it unlikely that an arrest would be made or a conviction obtained.[54] Myths, which she unmistakeably viewed as insidious, affect "perceptions of the culpability of the aggressor and the moral "character" and, hence, the credibility of the complainant".[55] In summarizing the flaws of the system, she found that "from the making of the initial complaint down to the determination

of the issue at trial", discriminatory beliefs are at work, thereby lowering the number of reported cases, influencing police decisions to decrease the rate of arrest, and distorting the issues at trial, with implications for the outcome.[56] L'Heureux Dubé J.'s reasons left little doubt that she regarded these beliefs as an endemic and destructive force.

Not surprisingly, she also found that the common law uncritically "enshrined" these discriminatory beliefs in its rules of evidence. Because the law viewed victims of sexual assault with "suspicion and distrust", unique evidentiary rules were developed, and the complainant in a sexual assault trial was treated "unlike any other."[57] In enacting s.276 and a host of other reforms, Parliament took important steps to address and remedy discriminatory beliefs that were deeply entrenched in the common law. Under a view that condemned the common law and applauded the statutory initiatives, the constitutional analysis of s.276 became a foregone conclusion. There, L'Heureux Dubé J. held that s.7 is not confined to the "narrow interests of the accused", and rejected the "recognition of an unfettered right in the accused to adduce all relevant evidence."[58] Under s.1, she made these observations about the justifiability of the provision:

> It is obvious that in respect of the provision at issue in this case, the goal of Parliament was to eliminate sexual discrimination in the trial of sexual offences through the elimination of irrelevant and/or prejudicial sexual history evidence. A further legislative goal, intimately linked to the first, is to encourage women to report their victimization. My discussion of sexual assault at the outset makes it clear that a factor that loomed large in the failure of women to report, and police to classify complaints as "founded" and in the high rate of acquittal was the admission of prior sexual history into the trials of sexual offences.[59]

Additionally, it is noteworthy, considering her subsequent opinion in *R. v. O'Connor*, that she introduced s.15 and equality values in her discussion under s.1. Finally, citing *Canadian Newspapers* and its conclusion that "*an absolute ban on publication is the only means to reach the desired objective*", she stated that "much the same can be said" of s.276: in order to "effectively combat sex discrimination and increase reporting", Parliament had attempted to eliminate the application of discriminatory beliefs at trials of sexual offences."[60]

Seaboyer represents a point of departure in the evolution of a privacy right for sexual assault complainants. The analysis and debate between the Court's two women judges focussed on shifting conceptions of relevance and the right of full answer and defence. Somewhat like *Canadian Newspapers*, then, *Seaboyer* addressed concerns about victim privacy without suggesting or accepting that it might be protected by the *Charter*. The Court had not reached the point of balancing the rights at stake; privacy had not yet emerged as an entitlement, much less been granted equal status with fair trial and full answer and defence.

By the time *R. v. O'Connor* was decided, the dynamics had changed. While Madam Justice L'Heureux-Dubé's *Seaboyer* dissent was praised, McLachlin J.'s majority opinion was scorned. In due course, Parliament enacted a new "rape-shield law" along the lines the dissent had suggested.[61] Meantime, substantial restrictions on an accused's free rein to explore a

complainant's past sexual history shifted the right of full answer and defence to another source of evidence - counselling or therapeutic records which could provide information about a complainant that might assist an accused in defending a charge of sexual assault.

R. v. O'Connor[62]

Like *Seaboyer*, the Court's decision in *R. v. O'Connor* took a critical step in the direction of establishing a right of victim privacy under the *Charter*. Once again, innovative reasoning appeared in the dissenting opinion of Madam Justice L'Heureux Dubé. This time she linked the myths and stereotypes reviewed in *Seaboyer* to the privacy and equality rights of complainants in sexual assault proceedings. Not only did L'Heureux Dubé J. set those rights up against the accused's right of full answer and defence, she maintained that their rights were equal, and should not be subordinated to those which belong to criminal defendants. For those reasons, the *O'Connor* dissent may be one of L'Heureux Dubé J.'s most powerful opinions. In responding to the Court's decision, which applied the *Charter* in a non-statutory setting, Parliament enacted Bill C-46,[63] and legislation that rejected the majority opinion in favour of the dissent in *O'Connor* was subsequently upheld in *R. v. Mills*.[64] Through the trajectory of *O'Connor*, Bill C-46, and *R. v. Mills*, the Supreme Court entrenched a right of victim privacy under s.7.

Meantime, in the period between *Seaboyer* and *O'Connor*, the Supreme Court dismissed full answer and defence challenges to *Code* provisions which protected witnesses who were young and vulnerable. Thus Chief Justice Lamer wrote for a majority in *R. v. L.(D.O.)*,[65] which agreed that s. 715.1 did not impermissibly violate the accused's *Charter* rights.[66] Under its terms, young complainants who have been the victims of sexual offences are permitted to give their evidence by videotape. L'Heureux Dubé J.'s concurrence spoke of the "innate power imbalance between the numerous young women and girls who are the victims of sexual abuse at the hands of almost exclusively male perpetrators."[67] In light of that, she held that the Court could not disregard the "propensity of victims of sexual abuse to fail to report the abuse in order to conceal their plight from institutions within the criminal justice system which hold stereotypical and biased views about the victimization of women."[68] Referring, as well, to privacy concerns, she added that the subject matter of the crime "requires that the child provide intimate and embarrassing details about the events that occurred - the unwanted interference with the child's body."[69]

Then in *Levogiannis v. the Queen*, s.486(2.1), which permits a young complainant to testify behind a screen, was also upheld.[70] Under that provision, the screen blocked the complainant's view of the accused, which might threaten or intimidate the witness, but not the accused's view of the complainant. There, too, the interest in creating conditions for the complainant's testimony, which would facilitate the prosecution of sexual abuse, prevailed.

Significantly, *Dagenais v. C.B.C.* was also decided in the interim between *Seaboyer* and *O'Connor*. As noted above in Chapter Two, Chief Justice Lamer indicated that the Court should adopt a non-hierarchical approach to the interpretation of *Charter* rights.[71] He stated that principle in the context of a contest between fair trial and a free press, both of which are guaranteed by the *Charter*'s text. In *O'Connor*, however, that part of *Dagenais* provided support for the proposition that the rights of the accused should not prevail over those of their victims.

Specifically, Madam Justice L'Heureux Dubé J.'s dissent stated that, "a balance must be struck", which places the *Charter* rights of complainants "*on an equal footing* with those of accused persons."[72]

For purposes of this Chapter, the key question in *R. v. O'Connor* was whether an accused charged with sexual offences could require third parties to produce counselling and therapeutic records which pertained to the complainant.[73] A brief digression is necessary to explain how the accused claimed the right, under the *Charter*, to review records which were held by private, non-governmental parties. Once again, the entitlement at stake was full answer and defence, and the argument was that the accused required access to such records in order to defend the charges against him. The milestone precedent was *R. v. Stinchcombe*, which imposes a constitutional duty on the Crown to disclose all information in its possession to the accused.[74] Parenthetically, it is noteworthy that *Stinchcombe* and *Seaboyer* were decided the same year; ironically, while *Stinchcombe* expanded the accused's access to defence evidence, the majority in *Seaboyer* agreed with Parliament that a complainant's past sexual history was irrelevant in most cases and, excepting in specified circumstances, unavailable to the accused. Thus, effectively denied access to areas of cross-examination which had previously been open, criminal defendants began seeking another source of evidence - the complainant's records. *O'Connor* raised the question whether the Crown's *Stinchcombe* duty should extend to records held by third parties, as an aspect of the accused's right of full answer and defence.[75]

In the absence of *Criminal Code* provisions on this issue, the Supreme Court proposed an approach that granted the accused access to such records, but not as a matter of course, and not without establishing a procedure to safeguard victim privacy. Even so, there was a sharp split in the way the majority and minority opinions balanced the competing interests. Without rehearsing the differences between the procedures adopted by the two, it is fair to say that Chief Justice Lamer and Sopinka J. accepted that victim privacy should be protected, but accorded full answer and defence a higher priority; as a result, the joint opinion set a lower threshold for access to the evidence.[76] Unlike the dissent, their joint opinion did not mention the equality rights of complainants, and rejected its suggestion that there should be a presumption in favour of privacy.

Meanwhile, though Madam Justice L'Heureux Dubé's dissent also balanced those interests, her solution was based on the *Dagenais* principle of equality between rights. She invoked the Chief Justice's warning in *Dagenais*, that "the court must exercise its discretion in a manner that is respectful of *Charter* values, "[77] and stated that any production order in favour of the accused must balance *Charter* rights to ensure that any adverse effects on one right are proportionate to the salutary benefits for the other.[78] At that point, she had not yet established that victim privacy *is* protected by the *Charter*. Before addressing that question, L'Heureux Dubé J. commented on the scope of full answer and defence. From her perspective, the right could not be considered "in the abstract"; moreover, fairness must be considered, not only from the accused's point of view, but that of the complainant and the community as well.[79] In the specific terms of the case, she indicated that the rights of the defendant could not be "so broad as to grant the defence a fishing licence into the personal and private lives of others."[80]

Full answer and defence might not be absolute, but that still did not explain or address the *Charter* status of the complainant's records. To articulate a right based on privacy, it became necessary for L'Heureux Dubé J. to piece together the Supreme Court's scattered comments on the subject. Thus she explained that, at the level of generality, the Court had "on many occasions recognized the great value of privacy in our society", and had "expressed sympathy for the proposition that s.7 of the *Charter* includes a right of privacy".[81] For instance, Wilson J.'s concurring opinion in *R. v. Morgentaler* stated the view that s.7 guarantees "a degree of personal autonomy over important decisions intimately affecting their private lives."[82] Moreover, as noted earlier in this Chapter, Lamer J.'s dissent in *R. v. Mills* included privacy in s.7 of the *Charter*, via s.11(b). There, he commented on the "stigmatization, loss of privacy, stress and anxiety" an accused might suffer, along with disruption of family, social life and work, costs and uncertainty when his trial was unreasonably delayed.[83] In L'Heureux Dubé J.'s view, substituting the word "complainant" for the word "accused" resulted in "an excellent description of the psychological traumas potentially faced by sexual assault complainants."[84]

Drawing that analogy between the complainant and the accused enabled her to incorporate s.8's reasonable expectation of privacy into s.7's entitlements of liberty and security of the person. Her reasoning was that having to produce counselling and therapeutic records is compelled production and a form of search; yet respect for privacy is "an essential component of what it means to be free", and the infringement of that right undeniably "impinges upon an individual's liberty."[85] When private records are revealed, "it is an invasion of the dignity and self-worth of the individual, *who enjoys the right to privacy as an essential aspect of his or her liberty in a free and democratic society*."[86] In her view, it followed that the reasonable expectation of privacy that is guaranteed by s.8 is worthy of protection under s.7.[87]

That, briefly, is how Madam Justice L'Heureux Dubé established a right of victim privacy for complainants. Perhaps to strengthen the textual connection, she included a discussion of s.15's guarantee of equality. Thus she concluded, not only that "a privacy analysis *creates a presumption against ordering production of private records*, but also that ample and meaningful consideration must be given to complainants' equality rights."[88] In this way she made the link between the myths and stereotypes discussed in *Seaboyer* and victim rights explicit. As embodied in evidentiary rules both at common law and under the *Code*, assumptions that were discriminatory played a "pernicious role" in the system.[89] Bluntly put, "uninhibited disclosure of complainants' private lives indulges the discriminatory suspicion that women and children's reports of sexual victimization are uniquely likely to be fabricated."[90] L'Heureux Dubé J.'s dissent in *O'Connor* admonished that the Court should be careful not to permit such practices to reappear under the guise of "extensive and unwarranted inquiries into the past histories and *private lives* of complainants of sexual assault."[91] Applied to the facts of the case, it meant that the accused should not have ready access to third party records; that would create indirect access to the same evidence to which direct access had been prohibited by the rape-shield provision and other reforms which sought to erase the discriminatory assumptions of the past. In her view, it would be a mistake to "close one discriminatory door only to open another."[92]

Returning again to *Dagenais,* L'Heureux Dubé J. stated that "[a]s important as the right to full answer and defence may be, it must co -exist with other constitutional rights, rather than trample them."[93] Without mincing words, she declared that "[p]rivacy and equality must not be sacrificed willy-nilly on the altar of trial fairness".[94] Instead, the *Charter* required a balance "that places the *Charter* rights of complainants on an equal footing with those of accused persons".[95]

O'Connor was decided by a five to four majority at a time when *Charter* protection for the rights of the accused was strong. The majority opinion balanced the competing interests but concluded, ultimately, that victim privacy must defer to the accused's rights. Following the decision in *O'Connor*, Parliament enacted Bill C-46, a mini-code of procedure that regulates defence access to this evidence and which, in doing so, substantially endorsed the dissenting opinion in *O'Connor*. In such circumstances, it was inevitable that the accused would challenge Bill C-46's breach of his rights under the *Charter*. Less inevitable was the outcome in *R. v. Mills*. There, the Supreme Court of Canada effectively abandoned *O'Connor* to avoid invalidating parts of the mini code which were inconsistent with its majority opinion in that case.

R. v. Mills[96]

The Supreme Court's decision in *R. v. Mills* is significant for several reasons, many of which are not of immediate concern here. There, the Supreme Court concluded that the *Charter* protects the privacy and equality rights of sexual assault victims, and upheld Bill C-46. Prior to *Mills*, the complainants' rights had been promoted, mainly, in dissenting opinions by Madam Justice L'Heureux Dubé J. In addition to *O'Connor*, she explained in *(L.L.) v. (B.(A.)* why balancing the rights of the accused and the complainants under the *Charter* was a "better approach" than a case-by-case privilege for the private records of sexual assault complainants.[97] Citing the *Dagenais* principle that fair trial should not have pre-eminence over "other constitutionally protected rights", she re-iterated her commitment to a procedure that placed "the *Charter* rights of complainants on an equal footing with those of accused persons."[98] Subsequently, a majority held in *R. v. Carosella* that a sexual assault crisis centre's destruction of records and non-disclosure to the accused resulted in a breach of his right of full answer and defence.[99] Once again in dissent, L'Heureux Dubé J. strenuously resisted the suggestion that the crisis centre had any obligation to preserve evidence, which she regarded as private in nature, for the benefit of the accused's defence.

Though *L.(L) v. B.(A.)* and *Carosella* were decided by contentious five to four margins, it should not be forgotten that, in *C.B.C. v. New Brunswick (Re: R. v. Carson)*, the Supreme Court recognized that victim privacy could justify an exception to the open court principle.[100] Another decision, in *M (A.) v. Ryan*, should also be noted.[101] *Ryan* concerned the disclosure of counselling records in a civil suit arising from a psychiatrist's sexual misconduct with a young woman. In concluding that a privilege could attach to the plaintiff's psychiatric records, McLachlin J. referred to "the law's increasing concern with the wrongs perpetrated by sexual abuse and the serious effect such abuse has on the health and productivity of the many members of our society it victimizes."[102] Significantly, she stated that *Charter* values, including s.8's

interest in privacy and s.15's guarantee of equality, were relevant to the question of privilege. In doing so, she explained why sexual assault has distinctive implications for privacy and equality:

> The intimate nature of sexual assault heightens the privacy concerns of the victim and may increase, if automatic disclosure is the rule, the difficulty of obtaining redress for the wrong. The victim of a sexual assault is thus placed in a disadvantaged position as compared with the victim of a different wrong. The result may be that the victim of sexual assault does not obtain the equal benefit of the law to which s.15 of the *Charter* entitles her. She is doubly victimized, initially by the sexual assault and later by the price she must pay to claim redress - redress which in some cases may be part of her program of therapy. [103]

As to Bill C-46, it is clear that Parliament's mini-code was designed to override the majority opinion in *O'Connor* and thereby enhance protection for victim privacy. Not only was the legislation inconsistent in many respects with the decision in *O'Connor*, its preamble explicitly endorsed the *Charter* rights of victims, their rights to security of the person, privacy, and the equal benefit of the law, and expressed concerns about the problems associated with the reporting and prosecution of sexual offences. All told, Bill C-46 left little doubt of the impact of L'Heureux Dubé J.'s dissenting opinions in *Seaboyer* and *O'Connor*. Its detailed provisions followed the lead of the *O'Connor* dissent in prescribing rules and procedures to limit defence access to private records in sexual assault proceedings.

How the Court rationalized its decision in *Mills* to uphold legislation, which effectively reversed its interpretation of the *Charter* in *O'Connor,* is one matter, and what the majority opinion said about the privacy and equality rights of complainants is another. By adopting the *O'Connor* dissent's privacy and equality analysis, the joint opinion authored by Justices McLachlin and Iacobucci converted it to binding precedent.

As noted above, the *O'Connor* dissent applied the *Dagenais* presumption against hierarchies between rights to establish victim privacy and then endow it with the same *Charter* status as the rights of the accused. Likewise, the joint opinion in *Mills* endorsed the principle of co-equal rights. At the outset, Justices McLachlin and Iacobucci cited *Dagenais* for its rejection of a "hierarchical approach" to the question of competing interests: "[o]n the one hand stands the accused's right to make full answer and defence"; on the other hand "stands the complainant's and the witness's right to privacy."[104] In such circumstances, they held that "[n]either right may be defined in such a way as to negate the other" and both sets of rights "are informed by the equality rights at play in this context."[105] Signalling the Court's willingness to retreat, the joint opinion further stated that, "it is important to keep in mind that the decision in *O'Connor* is not necessarily the last word on the subject."[106] To emphasize the status of complainants, the judges re-iterated a second time that under s.7, "the rights of full answer and defence, and privacy, must be defined in light of each other" and "both must be defined in light of the equality provisions of s.15."[107]

As they prepared to address the rights at stake, the judges admonished, once more, that "[n]o single principle is absolute and capable of trumping the other."[108] As for full answer and

defence, *Mills* explained that s.7 does not guarantee the most favourable procedures imaginable, because fundamental justice "embraces more than the rights of the accused."[109] Specifically, McLachlin and Iacobucci JJ. indicated that the ability to make full answer and de fence is subject to "other principles of fundamental justice which may embrace interests and perspectives beyond those of the accused."[110] In their opinion, the accused's rights are not "automatically breached" when he is deprived of relevant information.[111]

Following the pattern of the *O'Connor* dissent, the joint opinion in *Mills* strongly endorsed the privacy and equality rights of complainants in sexual assault proceedings. Absent any textual guarantee of privacy, the judges found that an order for the pr oduction of records under the *Code* fell within the ambit of s.8's protection against unreasonable search and seizure. After emphasizing the importance of informational privacy and the confidentiality of the therapeutic relationship, McLachlin and Iacobucci JJ. linked those concerns to s. 7's guarantee of security of the person, in these terms:

> Counselling helps an individual to recover from his or her trauma. Even the possibility that this confidentiality may be breached affects the therapeutic relationship. Furthermore, it can reduce the complainant's willingness to report crime or deter him or her from counselling altogether. In our view, such concerns indicate that the protection of the therapeutic relationship protects the mental integrity of complainants and witnesses. ... Therefore, in cases where a therapeutic relationship is threatened by the disclosure of private records, security of the person and not just privacy is implicated.[112]

The relationship between ss.8 and 7 that emerged in *Mills* is this. Section 8 protects a person's privacy and, in doing so, it addresses a particular application of the principles of fundamental justice. Under that reasoning, a search or seizure can only be consistent with the principles of fundamental justice when it is reasonable, and it will only be reasonable when it "accommodates both the accused's right to make full answer and defence and the complainant's privacy right."[113]

As they had in the *O'Connor* dissent, equality rights provided an added dimension to the balancing of interests in *Mills*. There, the joint opinion made it clear that "an appreciation of the myths and stereotypes in the context of sexual violence" is essential in defining the scope of full answer and defence.[114]

> As has frequently been noted, speculative myths, stereotypes, and generalized assumptions about sexual assault victims and classes of records have too often in the past hindered the search for truth and imposed harsh and irrelevant burdens on complainants in prosecutions of sexual offences.... The myths that a woman's testimony is unreliable unless she made a complaint shortly after the event (recent complaint), or if she has had previous sexual relations, are but two of the more notorious examples of the speculation that in the past has passed for truth in this difficult area of human behaviour and the law. The notion that consultation with a psychiatrist is, by itself, an indication of untrustworthiness is a more recent, but equally invidious, example of such a myth. The purpose [of this mini code] is to

> prevent these and other myths from forming the entire basis of an otherwise unsubstantiated order for production of private records.[115]

The Court also stated that the accused would not be permitted to "'whack the complainant' through the use of sexual stereotypes regarding the victims of sexual assault."[116] To that end, the task of balancing privacy and full answer and defence could not be undertaken "in a manner that fully respects the privacy interests of complainants," without an "appreciation of the equality dimensions of records production."[117] In summary of the Court's reasoning, the non-disclosure of third party records with a high privacy interest that might contain relevant evidence will not compromise trial fairness where such non-disclosure would not prejudice the accused's right to full answer and defence.[118]

Mills upheld legislation that contradicted one of the Court's majority opinions interpreting the *Charter*. In doing so, *Mills* gave constitutional sanction to *Criminal Code* provisions that unquestionably promoted the rights of complainants in sexual assault proceedings. As a matter of principle, the most significant aspect of the decision is the Court's adoption of victim privacy as a s.7 entitlement equal to the accused's right of full answer and defence. Subsequent decisions, including *R. v. Darrach*,[119] *R. v. Ewanchuk*, [120] and *R. v. Regan*[121] should be noted too, as each confirms the Court's vigilance in rectifying the unfairnesses that are perceived to this day as persisting in the law of sexual offences. In *R. v. Darrach*, for instance, the Court unanimously upheld s.276 of the *Criminal Code*, which essentially codified the *Seaboyer* guidelines restricting the accused's scope of cross-examination of complainants in sexual assault cases. Though neither addressed victim privacy, *R. v. Ewanchuk* and *R. v. Regan* confirm the Court's ongoing concern about the "disadvantage that women victims have suffered as a result of stereotypes in society and the justice system." [122]

Conclusion

Chapter Two's discussion of the open court principle provides one example of the way the criminal justice system has accommodated the privacy interests of crime victims in recent years. Yet as developments in the law relating to sexual assault de monstrate, it may not be the most prominent example. Though this study is focused on the relationship between open court and victim privacy, it would be a mistake to neglect the emergence of victim privacy in the context of the accused's right to a full answer and defence. One reason is that although rates of reporting and conviction for several offences are low, the precise causes of that problem have not been isolated. For a variety of reasons, including but not limited to anonymity, victims of these crimes have not been confident that their complaints would be fairly treated. From that perspective, tracing the evolution of a right of victim privacy beyond the issues at stake under the open court principle forms an important part of this study.

This Chapter has shown that, especially in sexual assault proceedings, privacy is an issue for complainants at various stages of the process. It is not limited to the exposure of identity or of the details of a sexual encounter that are threatened by the open court principle. Complainant privacy has been asserted in answer to rules of evidence which permitted counsel for the defence to probe a victim's past sexual history or gain access to third party therapeutic and counselling

records. These strategies are an aspect of full answer and defence which are aimed at uncovering information that may be unrelated to the charge but relevant in some way to the complainant's credibility. The Supreme Court of Canada has now concluded that these rules and practices are a breach of privacy whose prohibition does not impermissibly violate the accused's right to make full answer and defence.

Purely as an exercise in the evolution of law, the transformation of the concept of privacy that was traced in this Chapter is noteworthy. From its foundation in s.8, the investigative process, and the rights of the accused, privacy became an entitlement belonging to the victims of sexual offences. Although the *Charter* does not explicitly protect privacy, this development occurred when unfairness in the rules of evidence was linked to the privacy of complainants, and to the *Charter*'s guarantee of equality. From the dissents in *Seaboyer* and *O'Connor* to the majority opinion in *Mills*, it did not take long for a right of privacy to emerge.

In terms of the focus of this study, the relationship between the privacy rights discussed in Chapters Two and Three is this. Under reporting has been a chronic problem in the law of sexual offences for many years, and it is unquestionably linked to perceptions that the system will re-victimize those who make a complaint. Privacy is consistently mentioned as a concern, and as one of the reasons, complainants give for not reporting an offence or pressing a charge. It is not only the defendant's right to cross-examine the complainant, but the fact that the criminal process ordinarily takes place in open court; the combination of the two compounded the invasion of privacy in the past. At present, though, the jurisprudence does not consider how these elements of privacy interact; in particular, there is no indication whether anonymity and open proceedings would raise the same concerns about privacy in a system that removed the discriminatory beliefs and stigma which attached to sexual offences in the past. More will be said about this in Chapter Five. For now, the point is that if the precise cause of low rates of reporting, prosecution and conviction cannot be pinpointed, at the least it is known that privacy is one of the factors that discourages complainants from coming forward.

As well, the emergence of a privacy right in Chapter Three's trilogy of cases provides a jurisprudential context and analogy for privacy in the open court context. At the time, *Canadian Newspapers v. Canada (A.G.)* was decided, the Supreme Court did not base its decision on victim privacy. By granting victim privacy *Charter* status, the *O'Connor* dissent and *Mills* decision may affect the balancing of interests the next time privacy and open court are in conflict. At the same time, some words of qualification should be added. Privacy emerged as an entitlement in Chapter Three's trilogy, in response to a history of discriminatory practices. Sexual offences were different, and were subject to rules of evidence that were based on myths and stereotypes which discriminated against complainants and violated their privacy. As a result, *Seaboyer*, *O'Connor* and *Mills* are part of a judicial and legislative process which is aimed at rectifying this blot on the criminal justice system. To summarize, the privacy of several assault victims was uniquely violated and now must be restored.

The above analysis is not as compelling in the open court setting. To the extent their identity and privacy are protected by *Criminal Code* provisions, sexual assault complainants are granted preferential or special treatment by the system. Whatever the consequences for their

privacy, the victims of other crimes are not entitled to a publication ban protecting their identity, and persuading a judge to close the courtroom in the interest of privacy would be even more difficult. That raises the question whether sexual offences are by their nature different, and therefore subject to distinctive rules for the benefit of victim privacy. Another way of putting the question is to ask whether victim privacy in this area is a short -term remedy for the myths and stereotypes of the past, or whether these offences warrant permanent exceptions to the open court principle. Before pursuing that question in Chapter Five, the next Chapter explores comparative, transnational and international perspectives on these issues.

Chapter Four

Comparative, transnational and international perspectives

Introduction

This Chapter on comparative, transnational and international perspectives is necessarily impressionistic. Generally, the movement to establish rights for the victims of crime in Canada is reflected in developments around the world. Many countries have endorsed bills of rights, charters, and declarations which are aimed at improving the status of victims. As well, statutory measures have addressed their many grievances, granted them rights of participation in the criminal justice system, and provided access to compensation or restitution. Internationally, the rights of victims have been recognized by the United Nations, and are reflected in the procedures adopted by the International War Crimes Tribunal.

Though privacy is an issue for the victims of crime, it is not a dominant concern. Parallels to the issues and developments canvassed in Chapters Two and Three above can be found, however, in the law relating to sexual offences. Even so, the non-domestic materials on victim privacy and open court are uneven and asymmetrical. Jurisdictions, which differ fundamentally in their conception of criminal justice, approach these issues from distinctive perspectives. For that reason, and also due to gaps in the information, the discussion in this Chapter can only offer a bare survey on the status of victims in legal systems which are either civilian or inquisitorial in nature.

From a comparative perspective, Canada stands between the common law tradition of Britain and other commonwealth countries like Australia and New Zealand, and the constitutional tradition of the United States. Developments in commonwealth jurisdictions which lack a regime of constitutional rights are statutory in nature. To the extent privacy was not recognized, traditionally, as a valid basis for derogating from openness, that position has been altered by legislation. As a result, changes to Canada's *Criminal Code*, which deal with victim anonymity as well as with privacy and confidentiality in sexual assault proceedings, can be found elsewhere, albeit with local variations.

Meanwhile, by empowering the courts to invalidate statutory provisions and court orders inconsistent with the open court principle, the *Charter of Rights and Freedoms* changed the way those issues are analyzed. Canada's constitutionalization of that principle renders the American experience instructive; while there are points of difference between the two countries, there are similarities, too. For instance, parallels to *Charter* guarantees are found in the First Amendment to the U.S. Constitution, which guarantees freedom of the press, and the Sixth Amendment, which protects a public trial. [1] Much like the *Charter*, the American Bill of Rights fails to include any right of privacy. At the same time, privacy interests have been granted constitutional

protection. Even so, and in deference to the First Amendment and the principle of accountability, the U.S. jurisprudence has struck a different balance, one which is reluctant to permit exceptions to the open court that would protect the privacy of victims. The question the American jurisprudence raises is whether the *Charter*'s interpretation will evolve in that direction and adopt an uncompromising commitment to open court; otherwise, the Supreme Court of Canada might continue to treat victim privacy as the co-equal of other *Charter* rights, including s.2(b) and its protection of open court.

The discussion begins by outlining key points of comparison between common law and non-common law systems of criminal justice. It is followed by an account which identifies the general elements of statutory protection for victim privacy in the United Kingdom, Australia, and New Zealand. The Third part of the Chapter explores the relationship between the open court principle and victim privacy under the U.S. Constitution.

1. Non common law jurisdictions

The rise of victims' rights movements in the United States prompted interest in comparative analysis. For these and perhaps other reasons, there is a secondary literature in the English language which describes, reviews and analyzes developments in other legal systems. Yet this literature is more scattershot than systematic, and the information that is drawn from it does not provide a complete picture. Moreover, articles discussing the role of victims in European and socialist systems are only tangentially concerned with privacy issues. As well, it should be noted that civilian and inquisitorial models of criminal justice rest on assumptions and procedures which differ, fundamentally, from those that describe common law jurisdictions.

At least historically, an adversarial conception of the criminal trial treated victims and witnesses, essentially, as outsiders rather than as participants. Vindicating their interests was not the central objective of the trial, and their stake in the outcome was secondary to that of the state and the notional community at large. By contrast, legal systems, which do not subscribe to a bipolar model of criminal justice, are not required, by their underlying assumptions, to minimize the victim's role or exclude that person from the process. In Russia, for example, the victim not only has rights, but actively participates in the criminal trial. This includes the right to question witnesses and the accused. One author reports witnessing trials "where the role of the victim was to frequently interrupt with shouted accusations that had no role in a 'fair' criminal trial." [2]

At least in Europe, one of three models for victim participation will generally be found. In some jurisdictions, the victim has the right to prosecute the crime or participate, to some degree, in the prosecution.[3] One form of participation, which is examined further below, enables the victim to serve as a subsidiary or supporting prosecutor. Otherwise, in countries which include France, the victim may present a *civil* claim in the course of a *criminal* proceeding. Such a claim is termed a *partie civille* or, in jurisdictions with a German legal tradition, may be designated as "adhesive" in nature. [4] Finally, some countries treat the victim, effectively, as a witness and no more.[5] Though it strays from the subject of victim privacy and open court, a brief discussion of Germany's *Nebenklage* process follows, for it demonstrates a conception of the victim that is quite foreign to common law systems. It is of particular interest that the *Nebenklagerin*, or subsidiary prosecutor, can invoke the process when the crime which has been committed is a sexual offence.

Roughly, *Nebenklagerin* means "secondary accuser" or subsidiary prosecutor. [6] The procedure known as *Nebenklage* permits victims to participate through counsel at trial on nearly equal footing with lawyers for the state and the defense. Note, parenthetically, how unprecedented it was, in Chapter Three, for the Supreme Court of Canada to agree that the privacy rights of complainants are on a par with the rights of the accused. The question there arose in the limited context of rules of evidence and the defendant's access to information about the complainant. From that perspective, it is clear that *Nebenklage* contemplates a more innovative process, in which the victim is an active participant throughout the criminal process, including the investigative stages of proceedings. In this it is interesting that the Federal Constitutional Court rejected a challenge to the institution of the victim-plaintiff, which was raised on the ground that the procedure interfered with the rights of criminal defendants. This result reinforces the point that civilian systems can treat the victim as a party to the proceedings without upsetting the contest mentality that defines criminal justice in common law systems.

The *Nebenklagerin* is entitled to participate at the investigative stage. Not only is the victim and his or her lawyer granted access to the investigatory files of the police and the prosecutor, the victim's interest in participating in pre-trial proceedings is recognized in other ways. The victim-plaintiff is entitled to be present throughout the trial, and may ask questions at trial through a lawyer. Counsel for the victim is also permitted to make a closing statement, but in doing so generally does not address the question of sentence.

Although *Nebenklage* has been a part of German criminal procedure since 1877, major reforms expanded the category of crimes in which the victim was entitled to participate as a secondary accuser. As they might not otherwise be prosecuted, *Nebenklage* was originally aimed at and reserved for more minor offences. Then in 1986 the *Victim Protection Law* extended the victim's direct participation to crimes considered particularly serious, and victim-plaintiff status is "now seen as an opportunity for injured parties thought to be particularly worthy of protection to pursue justice on their own behalf". [7] Significantly, the 1986 legislation added sexual assault to the list of crimes that are eligible for *Nebenklage*.

Though the procedure is invoked by victims in a relatively small number of cases, the exception to this is sexual offences, where there has been a considerable increase in the percentage of victims who participate as secondary accusers. These victims may seek their own legal representation "due to the highly personal and demeaning nature of the crime, as well as the nature of such trials, where it is not unusual for the character or reputation of the victim to come under attack". [8] In the circumstances, the decision to include sexual assault in the reform statute of 1986 was an important recognition of the special problems these victims face in court.

Victim-plaintiffs who invoke this status are visible participants in the trial of the defendant. Though it is their choice to be active in the process, doing so does not mean that their privacy must be sacrificed. Whether as victim or as victim-plaintiff, the complainant in a sexual assault case may apply to exclude the public during her testimony. The request will normally be granted unless the public's interest in hearing the testimony outweighs the interest of the victim. [9]

This brief discussion does not offer an evaluation of *Nebenklage* or other variations on the role and status of the victim in jurisdictions which are not based on the common law assumption of a two party contest between the state and the accused. It does illustrate, however, that victims *are* granted rights of participation, in varying degrees, in other legal systems. In the common law world, extending rights and powers to the victims of crimes would undoubtedly be resisted on the ground that such changes would upset the balance of the criminal justice system and disadvantage or even create unfairness for the accused. Such concerns are a familiar theme in the American literature. The comparative point here is that the Supreme Court of Canada's recognition of victim privacy in Chapter Three is, alongside Germany's *Nebenklage*, a modest development. Though the rights of victims have gained a foothold in common law systems, those who are the victims of crime are still regarded as third parties. Changing that status and granting victims a stronger role in the proceedings would require a re-conceptualization of the criminal trial at common law.

Great Britain, Australia, and New Zealand

The overview of common law jurisdictions which follows is more focused on privacy and, in particular, the anonymity of sexual assault victims. Albeit with local variations, protecting the identity of these victims can be described as a widely accepted statutory exception to the open court principle in Great Britain, Australia, and New Zealand. In none of these countries is there a system of constitutional rights analogous to that either of Canada or the United States. For that reason there is little jurisprudence on the question of open court versus victim privacy. The statutory provisions state the law, and although questions of application may arise, the law itself cannot be challenged in court.

As noted in Chapter Two, the open court principle is a common law concept which finds its roots in a long-standing tradition of British justice. Though exceptions to publicity and open courts were recognized at common law, victim privacy was not among them. [10] Thus in Britain, "where the tabloid newspapers give huge coverage to sexual offences", any woman "could count on the whole country knowing who she was and what had been done to her". [11] In due course, this was "too nauseating for even English public taste" [12] and in 1976 Parliament passed a law which made it an offence to disclose a rape victim's identity. [13]

Gaps in the law quickly became apparent, however. The statutory ban did not apply until a person had been accused, which meant that the victim could be identified up until her attacker became known. In one case, a newspaper ran a photo of a clergyman's daughter attending church, not long after she had been raped in her father's vicarage by burglars. [14] She could be identified under the then existing provision because the gang of burglars was still at large. The law was soon amended to protect the victim's identity from the time the commission of an offence is reported.[15] Second, the ban initially applied only to those who are victims of rape, and has now been amended to include the victims of other offences, such as buggery, indecent assault, and incest.[16]

In addition to the distinctive statutory measures that protect victims of sexual offences, legislation permits the court to prohibit the identification of a child. [17] The victims of other offences are occasionally protected by a judge's discretionary power to forbid the publication of

an individual's identity. At common law, the court has a general power to order that a name be withheld; this kind of order is often considered appropriate, for example, in a blackmail case. [18]

More generally, it appears that the advent of victims' rights is relatively recent in Britain. The *Victim's Charter*, released in 1990, confers no rights or privileges but merely lists the ways in which the criminal justice system "ought" to be sensitive to the victim's position. [19] Though there has been "an enormous growth of new policies and provision for victims and witnesses in the U.K.", progress is slow. [20] For example, fear of aggressive, humiliating and irrelevant questioning in court has been cited as the largest single factor in prompting women to withdraw complaints of sexual offences. [21] As of 1997, the conviction rate for rape was in decline, despite s.2 of the *Sexual Offences (Amendment) Act*, which introduced a rape-shield provision broadly akin to the measure considered by the Supreme Court of Canada in *R. v. Seaboyer*.[22]

One of the reasons the British law is perceived to be a failure is that cross-examination on a complainant's sexual history is within the discretion of the judge. In the circumstances, witnesses can never be sure, in advance of trial, whether they will face humiliating and intimate questions about their personal lives. A similar issue was discussed in Chapter Two's analysis of the *Criminal Code*'s mandatory ban on victim identification. There, Canada's Supreme Court held that a discretionary ban was inadequate to provide victims the protection they sought in deciding whether to report an offence. Likewise, Canada has adopted statutory provisions which severely limit the accused's freedom to question complainants about their past sexual history.

Meanwhile, as occurred elsewhere, concern for the victims of crime rose in Australia too, and inquiries were commissioned to report on their status in the criminal justice process during the 1980s. As a result, all state governments issued declarations or charters of victims' rights. [23] Parenthetically, it should be noted that, like Canada and the United States, Australia is a federation. Though the federal government has jurisdiction over the criminal law in Canada, it is the reverse both in Australia and the United States, where the states have that authority. Instead of one system of criminal law that is national in scope, these countries have a number of systems which function independently of each other. In any case, without creating entitlements for victims or enforceable duties on others, these "charters" provide guidelines for the treatment of victims. Typically, these instruments state that victims should be treated with courtesy and compassion and with respect for their dignity; that victims should be kept informed, at various stages and about various elements of the process; and that the privacy of victims should be protected.[24] For instance, the *Victims Rights Act* of New South Wales provides, as do others, that a victim's residential address and telephone number should not be disclosed unless a court otherwise directs.[25]

In addition, there are statutes which address the problems of law enforcement of sexual offences. Like Canada, Australia has broadened the scope of sexual assault and debated the question of consent. As well, all states have adopted special rules to limit the cross-examination of victims on their prior sexual history. [26] For instance, Queensland's *Criminal Law (Sexual Offences) Act* not only prohibits evidence of the complainant's reputation and prior sexual history,[27] it requires the public to be excluded from the courtroom during the complainant's

testimony.[28] Likewise, the statute places a mandatory ban on the publication of any information which might identify the complainant, unle ss the court, "for good and sufficient reasons shown", orders to the contrary.[29] Interestingly, s.7 of the Act also prohibits the publication of information which would identify the defendant prematurely.[30]

New Zealand's response is consistent with develo pments in Britain and Australia. There, too, statutory measures prohibit the publication of names in specified sexual offences, and permits a ban on the publication of names in certain other circumstances. Otherwise, there is some case law in New Zealand on the question whether and when name suppression is appropriate for an accused. In *R. v. Liddell*, which is a leading case, the court held that the privacy interests of the offender's family rarely justify an order suppressing disclosure of his identity.[31] In considering the statutory powers to prohibit the publication of names, the court said that, "the starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the lat ter fairly".[32] Citing *Edmonton Journal v. Alberta*, the court also noted that those principles may be seen in "vigorous - and, to some, even startling - operation in the Supreme Court of Canada...."[33] In the circumstances, the New Zealand appellate court wa s reluctant to concede too much to the privacy interests of the offender's wife and two children. As the court observed:

> But anguish to the innocent family of an offender is an inevitable result of many convictions for serious crime. Only in an extraord inary case could it outweigh, in relation to the reporting of the name of a person convicted of a serious crime, the general principle of open justice and the open reporting of justice.[34]

To summarize, each of Britain, Australia and New Zealand has taken steps, by statutory enactment, to protect the identity of sexual assault victims. In addition, other systemic law enforcement problems in this area have been addressed through modification to the definition of the offence, as well as to the rules of evid ence which govern the cross -examination of complainants. In the absence of any constitutional guarantee of expressive or press freedom, the protection of victim identity has been relatively uncontroversial in these countries. By contrast, publication ban s are virtually unavailable in the United States, and access to the courts is likewise given strong protection by the U.S. Constitution.

The United States of America
Introduction

As in post-*Charter* Canada, the resolution of these issues in the United Sta tes is governed by constitutional considerations. By way of introduction, a few points of information about U.S. constitutionalism may help to set the discussion in perspective. It is useful to know, for example, that different rules of federalism apply to the systems of criminal justice in Canada and the United States. By virtue of s.91(27), the *Constitution Act, 1867* grants Canada's federal government authority over the criminal law and criminal procedure.[35] As a result, the *Criminal Code* and other cri minal law statutes enacted by the federal government apply in all parts of the country.

By contrast, the American Constitution does not grant the U.S. government a similar criminal law power. Under their model of federalism, all powers not expressly de legated to the national government by the Constitution are reserved to the states. The states' plenary authority over all else that is not granted to the national government is referred to, in the American constitutional tradition, as the "police power." To compare, there is one system of criminal justice in Canada, but fifty - plus one - in the United States: one for each of the states, as well as one that is federal in nature. That feature of U.S. federalism makes it cumbersome to review statutory prov isions on open court which govern in fifty jurisdictions. Some uniformity on questions of open court and victim privacy is achieved, however, through constitutional interpretation, as state laws which violate the Bill of Rights, including the First Amendm ent's guarantees of free speech and a free press, are unconstitutional.

Like s.2(b) of Canada's *Charter*, the First Amendment of the U.S. Constitution guarantees freedom of speech and freedom of the press. [36] Unlike the *Charter*, though, the American Bill of Rights has no provision like s.1, which permits limits on rights to accommodate democratic values. Though rights are not absolute and are subject to judge-made limits, the First Amendment has been granted strong protection by the U.S. Supreme Court. A n example, which affects the open court principle, is the presumption against publication bans, which is deeply entrenched in the American jurisprudence. A ban on the publication of information is a form of prior restraint and, as such, is regarded as a particularly insidious form of censorship. Banning publication halts expressive activity in advance, before it is known whether it will have harmful effects or consequences. Meantime, the *Charter* case law has not yet adopted a similar presumption against such bans: while some have been invalidated under the *Charter*, others have been upheld.[37] The discussion below demonstrates how difficult it is to sustain a publication ban under the First Amendment.

In addition, the balancing of values that takes place under the *Charter* does not occur in the same way under the First Amendment. That is, in part, because the U.S. text has no limitations clause and, in part, because the First Amendment itself is framed in the language of an absolute guarantee. Culturally and historically, it has been considered the first freedom or the "matrix, the indispensable condition of nearly every other form of [freedom]." [38] As important a value as it may be, privacy does not have the same status as freedom of speech or the press. Though it, like its Canadian counterpart, has been granted a measure of recognition in the jurisprudence, it is not explicitly protected by the constitutional text. [39] Ironically, a civil right of action for the invasion of privacy exists in all U.S. stat es, and has generated a considerable tort jurisprudence. In Canada, where the Supreme Court has been sympathetic to victim privacy in criminal proceedings, it is more difficult to bring a civil action for the invasion of privacy. [40] Under the *Charter*, however, our Court has protected the privacy of crime victims and placed the privacy of complainants in sexual assault proceedings on the same plane as the rights of the accused. By contrast, in the United States, the First Amendment has consistently prevaile d over privacy on open court issues.

Publicity versus anonymity

In contrast to Canada, where the Supreme Court upheld a mandatory ban on victim identity in *Canadian Newspapers v. Canada (A.G.)*, the U.S. Supreme Court has favoured the right to publish over an individual's freedom from unwanted publicity. In each of four cases considered below, the American Court held that the press could not be held criminally or civilly responsible for disclosing an individual's identity. Two of the four cases, *Oklahoma Publishing Co. v. Oklahoma County District Court*,[41] and *Smith v. Daily Mail Publishing Co.*[42], concerned the identity of juveniles who were accused of criminal offences; each arose in the context of statutory provisions which regulated the disclosure of a youth's identity. Two others, *Cox Broadcasting Corp. v. Cohn*,[43] and *The Florida Star v. B.J.F.*,[44] raised the question whether the press could be held civilly liable for disclosing the identity of a rape victim.

Certain principles emerge from this group of cases. First and foremost, the First Amendment protects the press from being punished for publishing truthful information on a question of interest to the public. Under that principle, and assuming that a victim or juvenile offender is correctly identified, the only debating point is whether the information is of interest to the public. Moreover, the press cannot be faulted for publishing information it obtained from the state. If the press cannot be held accountable for disclosing information the s tate made available, it follows that protecting a victim's privacy is the state's responsibility, and not that of the press. Finally, the state has control of the information and has the power to protect a victim or a juvenile's identity: information is o nly publicized when the state fails to protect the individual's anonymity. In such circumstances, the victim's remedy should be against the state, and not the press.

The first of the four, *Cox Broadcasting v. Cohn*, is an influential decision. [45] There, the U.S. Supreme Court held that a television station could not be held civilly liable for broadcasting the name of a rape victim, which the reporter had obtained from the indictments against the accused. The documents were public records and had been ma de available for inspection in the courtroom. In addressing the competing interests, White J. observed that "the century has experienced a strong tide running in favor of the so -called right of privacy", [46] but also that the privacy claim confronted the co nstitutional freedoms of speech and the press. Framed by those considerations, the question was whether the state could impose sanctions for the accurate publication of the name of a rape victim, obtained from records which were made open to public inspection.

Many years before LaForest J. would make similar comments in *C.B.C. v. New Brunswick (Re: R. v. Carson)*, White J. acknowledged that "[g]reat responsibility is [] placed upon the news media to report fully and accurately the proceedings of governmen t, and official records and documents open to the public are the basic data of governmental operations." [47] As well, he indicated that, "even the prevailing law of invasion of privacy recognizes that the interests in privacy fade when the information involv ed already appears on the public record." [48] Mr. Justice White went on to surmise that the state must have concluded that the public interest was being served by placing the information in the public domain on official court records. Such records "by thei r very nature are of interest to those concerned with the administration of government, and a public benefit is conferred by the reporting of the true contents of the records

by the media."[49] Not only was the press discharging its constitutional function, he concluded, in doing so it conferred a benefit on the public. To encourage a rule that made public records generally available and then forbade their publication would under this analysis make it difficult for the media to inform citizens about the public business. The result would be to invite "timidity and self-censorship"[50] on the part of the press.

Mr. Justice White's opinion in *Cox Broadcasting* made it clear that, in the American jurisprudence, the conflict is between the press and the state, not the press and the victim. He explained that dynamic in the following terms:

> If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish. Once true information is disclosed in public court documents open to public inspection, the press *cannot* be sanctioned for publishing it. In this instance as in other reliance must rest upon the judgment of those who decide what to publish or to broadcast.[51]

The next two decisions arose when members of the press published a juvenile offender's identity, contrary to statutory provisions which prohibited disclosure. Although neither addresses the issue of victim privacy, both entrenched the principles that were introduced by *Cox Broadcasting*. In the first, *Oklahoma Publishing Co. v. Oklahoma District Court*, the U.S. Supreme Court struck down an order enjoining the press from publishing the name or picture of the defendant.[52] There, a juvenile's name, which was disclosed during a detention hearing, was published by newspapers, as well as by radio and television stations. Subsequently, at the accused's arraignment hearing, the judge enjoined publication of his name and picture. Although state legislation authorized the order, the U.S. Supreme Court declared it an unconstitutional prior restraint.

In reaching that conclusion, the Court relied on *Nebraska Press Assn v. Stuart*, which, one year earlier, placed strict limits on the availability of pre-trial publication bans.[53] The principle from *Nebraska*, that information disclosed in a public hearing cannot be the subject of a prior restraint, was directly applicable in *Oklahoma Publishing*. *Cox Broadcasting* also applied because the juvenile's name and picture were publicly revealed at the detention hearing, with the full knowledge of the presiding judge, the prosecutor, and the defence counsel. Despite the state's legislation, which required juvenile hearings to be held in private and permitted restrictions on access to records, the U.S. Supreme Court held that "*Cox* and *Nebraska* are controlling nonetheless."[54] It was a simple matter of applying the rule from *Nebraska Press*, that once a hearing is public the information disclosed cannot be subject to a prior restraint, and the principle of *Cox Broadcasting*, that the press cannot be punished for publishing truthful information that is lawfully obtained.

Oklahoma Publishing was followed, within two years, by *Smith v. Daily Mail Publishing Co*.[55] On facts which were not entirely dissimilar, the Supreme Court arrived at the same

conclusion. Once again, newspapers and radio stations had published the name of a juvenile who was arrested in connection with a shooting. West Virginia legislation prohibited the publication of any juvenile offender's name without the prior approval of the juvenile court. The difference was that in *Daily Mail*, indictments were returned against members of the press which had violated the prohibition.

The Court found it unnecessary to decide whether the statutory provision was in itself a prior restraint, for "state action to punish the publication of truthful information seldom can satisfy constitutional standards." [56] Neither *Cox Broadcasting* nor *Oklahoma Publishing* was directly controlling, as in each case the government provided or made possible press access to the information. In *Daily Mail*, the juvenile's identity was obtained through routine newspaper reporting techniques. Though it recognized the connection between confidentiality and rehabilitation, the U.S. Supreme Court held that the interest was not strong enough to support the imposition of a criminal penalty. [57]

Rehnquist J. disagreed with the Court's analysis. In his view, a state's interest in preserving the anonymity of its juvenile offenders far outweighed any minimal interference with freedom of the press that a ban on publication of youths' names entailed. In discussing the right to publish a juvenile's name, he made the following remarks:

> The press is free to describe the details of the offense and inform the community of the proceedings against the juvenile. *It is difficult to understand how publication of the youth's name is in any way necessary to performance of the press' "watchdog" role*. In those rare instances where the press believes it is necessary to publish the juvenile's name [the law] permits the juvenile court judge to allow publication. [That judge], unlike the press, is capable of determining whether publishing the name of the particular young person will have a deleterious effect on his chances for rehabilitation and adjustment to society's norms. [58]

A question that is deferred for the moment to Chapter Five, is whether the *name* of an individual is a relevant piece of information for purposes of the accountability principle, which is so central to the concept of open court. Though he supported anonymity, Mr. Justice Rehnquist agreed in the result because the legislation, in applying only to newspapers and not to the electronic media, was incapable of accomplishing its objective and was therefore constitutionally flawed.

Though the outcome was more controversial than in *Cox Broadcasting* , the Court held a second time, in *The Florida Star v. B.J.F.*, that the press could not be held responsible, civilly, for publishing the name of a rape victim. [59] Unlike the victim in *Cox Broadcasting*, the plaintiff in *The Florida Star* was not killed, and suffered some harassment following the publication of her identity. Her name was published in violation of a Florida statute, in contravention of signs posted in the pressroom which made it clear that the names of rape victims are not matters of public record, and in violation of the newspaper's own internal policy. Notwithstanding those damaging facts, the key consideration for a majority of the Court was that the reporter obtained the victim's name from a police report which was placed in the Police Department's press room.

While a majority held, in the circumstances, that the paper's right to publish fell within the principle of *Cox Broadcasting*, three members of the Court dissented on the ground that the earlier decision was "wholly distinguishable" and did not apply.

The question was whether the earlier trilogy of decisions - *Cox*, *Oklahoma Publishing*, and the *Daily Mail* - were inapplicable, both because the information in the other cases had appeared on a "public record", and because the privacy interests there were less profound than in *The Florida Star*. Given that "press freedom and privacy rights are both 'plainly rooted in the traditions and significant concerns of our society'", and the "sensitivity and significance of the interests" presented in clashes between the two, the majority opinion by Marshall J. emphasized the decision to rely on limited principles that would sweep no more broadly than the case at hand.[60]

In doing so, the Court synthesized three principles from the trilogy: first, that the government retained ample other means of safeguarding significant interests which might be compromised by publicity, including a rape victim's identity; second, that once the government has made information publicly available, it is not only anomalous to sanction persons other than the source, it is unlikely that a meaningful public interest is served by restricting its further release; and third, that to threaten repercussions against those who relied on "the government's implied representation of the lawfulness of dissemination" would foster "timidity and self-censorship" on the part of an uncertain press. [61] Applied to B.J.F.'s circumstances, and despite the "tragic reality of rape", the First Amendment protected the publication of truthful information which was lawfully obtained. To mute the force of the dissent, however, the majority opinion stressed the narrow and limited nature of its ruling:

> We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense. We hold only that where a newspaper publishes truthful information which is has lawfully obtained, punishment may be lawfully imposed, if at all, only when narrowly tailored to a state interest of the highest order....[62]

The dissenting opinion of White J. began with a powerful reminder that "[s]hort of homicide, rape is the 'ultimate violation of self'". [63] In his view, the trilogy cases were "wholly distinguishable"; while the victim's identity in *Cox Broadcasting* was found by consulting public, judicial records, according to the statute, as well as police and press practice, the information in *The Florida Star* was private rather than public. As for *Oklahoma Publishing* and *Daily Mail*, White J. remarked that "[s]urely the right of those accused of crimes and those who are their victims must differ with respect to privacy concerns."[64]

In disagreeing with the way the majority opinion struck the balance between competing values, he found "a place to draw the line higher on the hillside", a spot which, in his view, was "high enough to protect B.J.F.'s desire for privacy and peace-of-mind in the wake of a horrible personal tragedy." [65] In stating that "there is *no public interest in publishing the names,*

addresses, and phone numbers of persons who are the victims of crime", he agreed with the views expressed by Rehnquist J. in *Daily Mail*.[66] Likewise, White J. could not understand what public interest would be served in immunizing the press from liability in the rare cases where a state's efforts to protect a victim's privacy had failed.[67]

The principle that the government cannot punish the publication of truthful information that is lawfully obtained is strongly entrenched in the American jurisprudence. In each of these cases, the U.S. Supreme Court faulted the state for allowing the information to become public, and then estopped the state from punishing members of the press, either by criminal or civil means, for then publicizing it. In this, there is a significant difference between the Canadian and American responses to the question of victim privacy in sexual assault proceedings. As Chapter Two demonstrated, publication bans which protect the identity of victims are not only permissible but mandatory under the *Criminal Code*. In addition, there are different perceptions of what is at stake in the Canadian and American constitutional systems. In the American tradition, publication bans are seen as a conflict between the state and the press, and less emphasis is placed on the relationship between the victim and the press. By contrast, the question in Canada is whether the state can mediate the competing interests of the press and the victims of crime. Not only that, it is not unusual in Canada for information to be made available at trial, on condition that it not be disclosed or published. For instance, it is routine to ban the publication of evidence that is disclosed at the preliminary inquiry. The First Amendment assumes differently, though, that once the state reveals information it cannot subsequently ban its disclosure. Finally, it should be noted that the rationale which the Court adopted in *Canadian Newspaper v. Canada (A.G.)*, that anonymity was necessary to encourage complainants to come forward, was not before the Court in *Cox Broadcasting* or *The Florida Star*. In the two American cases that discussed a rape victim's anonymity, the issue arose through a civil action for invasion of privacy, and not in the course of a criminal trial.

At the same time, two qualifications to the apparent rigidity of the First Amendment's position should be noted. First, the U.S. Supreme Court emphasized that its rulings in these decisions were narrow and did not foreclose limits on publicity to protect the anonymity of victims. The Court inferred that privacy can be protected, providing that the measures taken interfere, to the least extent possible, with the First Amendment. Second, there is an important divergence between principle and practice in the United States. Though the press is free, under governing Supreme Court authority, to publish accurate information which is lawfully obtained, in practice, the press voluntarily declines to publish the names of rape victims in most cases.

Access to the courts

On access to the courtroom, the landmark U.S. decision is *Richmond Newspapers v. Virginia*.[68] The issue for decision there was whether a criminal trial could be closed to the public, at the defendant's request, and without any evidence of a threat to his right to a fair trial, or of some other overriding consideration. Citing an "unbroken, uncontradicted history", which is supported by reasons "as valid today as in centuries past", Chief Justice Burger held that, " a presumption of openness inheres in the very nature of a criminal trial."[69] Not only does openness provide assurance that the proceedings are conducted fairly, it discourages perjury, the misconduct of participants, and decisions based on secret bias or partiality.[70] In addition, the

U.S. Chief Justice maintained that public trials have "significant community therapeutic value".[71] That is to say, the open processes of justice serve the important prophylactic purpose of providing "an outlet for community concern, hostility, and emotion"; public trials also vindicate "the fundamental, natural yearning to see justice done", as well as "the urge for retribution".[72]

The Court's lengthy discussion of openness led to the principle that "[a]bsent an overriding interest articulated in findings", criminal trials must be open to the public.[73] The problem in *Richmond Newspapers* was that the trial judge made no findings of fact to support the closure order, and failed to consider whether alternative measures would have met the need to ensure fairness. As a result, the two prerequisites for an order excluding the public are the presence of an *overriding* interest, and the absence of *any viable alternative means* to protect that interest, short of closure. The *Richmond Newspapers* standard is more demanding, but at the same time is not unlike the criteria La Forest J. proposed under s.486(1) of the *Criminal Code* in *C.B.C. v. New Brunswick (Re: R. v. Carson)*.[74]

Conflict between the privacy of sexual assault victims and the open court principle arose shortly thereafter in *Globe Newspaper Co. v. Superior Court*.[75] The question in *Globe Newspaper* was whether the First Amendment prohibited the mandatory closure of trials, for certain sexual offences, during the testimony of victims under age 18. After reviewing the underlying values of openness, Brennan J. indicated that to deny access to inhibit the disclosure of sensitive information, the state must show that the denial is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest".[76] In other words, an order to close a courtroom is subject, in American constitutional terminology, to strict scrutiny. Practically speaking, it would be very difficult, if not impossible, for a closure order to survive once strict scrutiny is applied. The statutory provision at issue in *Globe Newspaper* failed because Brennan J. concluded for a majority that mandatory closure was not necessary; a trial court could instead determine whether closure would protect the welfare of a minor on a case to case basis. Note, parenthetically, that this is what occurs in Canada through the combination of s.486(1) of the *Criminal Code* and the *C.B.C. (Re: R. v. Carson)* criteria.

Significantly, Brennan J. rejected the suggestion that mandatory closure was permissible because it would encourage victims of sex crimes to come forward and provide accurate testimony. In doing so, he noted that the state provided no empirical support for its claim that automatic closure would lead to an increase in the number of minor victims coming forward and cooperating with state authorities. Not only did he view the proposition as speculative, he stated that it is "also open to serious question as a matter of logic and common sense," because the press was not denied access to the transcript or other sources of information about the victim's testimony.[77] As well, Brennan J. was reluctant to recognize any exception which would run contrary to the right of access recognized in *Richmond Newspapers*. In any case, he noted that even if mandatory closure encouraged these victims to come forward, the same could be said of other crime victims.

> Surely it cannot be suggested that minor victims of sex crimes are the *only* crime victims who, because of publicity attendant to criminal trials, are reluctant to come forward and testify. The State's argument based on this interest therefore

> proves too much, and runs contrary to the very foundation of the right of access recognized in *Richmond Newspapers*....[78]

In comparing sex crime victims to the victims of other crimes, Brennan J. at least implicitly rejected the proposition tha t the victims of these offences are vulnerable in ways that set them apart. Meanwhile, in dissent Rehnquist J. complained of the majority opinion's "wooden application" of a "rigid standard". [79] Given that the press and public would have access to the victim's testimony through transcripts, he claimed that "[t]heir additional interest in actually being present during the testimony is minimal". [80] As far as he was concerned, the law had a minimal impact on First Amendment rights. Moreover, he characterized t he Court's dismissal of the under reporting rationale as an instance of "cavalier disregard for the reality of human experience".[81]

Albeit on a question of closure, *Globe Newspaper* is reminiscent of the debate that took place in *Canadian Newspapers v. Canada*, between the Ontario Court of Appeal and the Supreme Court of Canada, on the question of a mandatory versus a discretionary publication ban.[82] In *Globe Newspaper*, Rehnquist J. was unwilling to "leave the closure determination to the idiosyncrasies of individual judges".[83] Like Lamer J. in *Canadian Newspapers*, he referred to the uncertainties in the victim's mind prior to the trial, and noted that "[t]he mere possibility of public testimony may cause parents and children not to report these heinous cri mes".[84] Though in dissent, Rehnquist J. concluded that it was within the state's power to provide for mandatory closure to alleviate understandable fears and encourage the reporting of such crimes. In *Canadian Newspapers*, however, Mr. Justice Lamer wrote the Supreme Court of Canada's majority opinion.

Both the United States and Canada contemplate that proceedings can be closed in some circumstances. Under the American jurisprudence, however, the case for closure must be close to invincible; the state i nterest must be compelling, it must be supported by empirical evidence, and the Court must be satisfied that the interest cannot be satisfied in any other way but closure. Though *C.B.C. v. New Brunswick (Re: R. v. Carson)* also set a high threshold, it is not as strict as the doctrine that has emerged under the First Amendment. The American jurisprudence also endorses a broader conception of what the public interest is and how it is protected by the First Amendment. Whether the public has a sufficient int erest in being physically present in the courtroom or in knowing a victim's identity raise policy questions that are pursued in Chapter Five.

Conclusion

Comparative and transnational perspectives are of some assistance in understanding the choices that are presented when the principle of open court conflicts with the demands of victim privacy. In that regard, differences in practice from one system to another can be as revealing as similarities. For instance, even a limited review of civilian and other models of criminal justice demonstrates that victims are not, by unavoidable definition, third parties in the trial process. They can be and are treated as participants in some jurisdictions; under Germany's institution of *Nebenklage*, the victim-plaintiff can play a role as secondary or subsidiary prosecutor.

According the victims of crime such status would, however, be inconsistent with the governing assumptions of criminal justice in common law jurisdictions.

On first impression, the British and Commonwealth systems might be expected to provide the closest analogy for Canada. And it is true that many of the *Criminal Code*'s reforms, which enhance the status of victims and complainants in sexual assault proceedings, will also be found in British, Australian and New Zealand law. Yet the same debate between victim privacy and other values, such as open court and the accused's right of full answer and defence, has not taken place in that jurisprudence. Unlike Canada, these countries lack a system of constitutional rights. Yet as Chapters Two and Three explained, conflicts between victim privacy and competing values intensified and assumed new form, analytically, under Canada's *Charter of Rights and Freedoms*. For that reason, the resolution of those conflicts in common law systems without constitutional rights is less relevant than it would have been in Canada's pre-*Charter* era.

By the same token, the American jurisprudence also fails to provide a precise analogue. Though the issues are addressed under a regime of constitutional rights, the assumptions of American constitutionalism may not apply, or may apply with less force in Canada. A good example, which was mentioned above, is the presumption against publication bans, which is deeply rooted in First Amendment doctrine. Meanwhile, the Supreme Court of Canada has not yet held that the element of prior restraint in such bans raises particular issues of concern under s.2(b) of the *Charter*. As well, the First Amendment jurisprudence can be militant when confronted by measures, whether criminal or civil in nature, which interfere with the watchdog role of the press. In contests between the press and the state, the press tends to win. Meanwhile, provisions which are aimed at protecting the privacy of victims are more likely to be seen in Canada as a reasonable compromise or balance between competing values.

Despite assuming a harder line on the principle of open court, the American jurisprudence and literature offers a vigorous debate of the policies on both sides. That debate is taken up in Chapter Five.

Chapter Five

Perspectives

Introduction

Debate about sexual offences has, in recent years, been focused on the myths and stereotypes surrounding the crime of rape. It is a debate which, to some extent, has been polarized between those who dispute the existence or persistence of such perceptions and beliefs, on one side, and those who claim that the criminal justice system is tainted by them, on the other. As Chapter Three explained, the Supreme Court of Canada has concluded that these perceptions are part of the dynamics which have defined sexual assault proceedings in the past. Those dynamics can result in an ugly contest between the complainant and accused which re-victimizes those against whom crimes have been committed. In passing, it can be noted that rape myths extend in many directions, as the sorry history of race discrimination attests. Not so long ago and perhaps to this day, discriminatory beliefs about the sexual appetites of black men and their lust for white women resulted in lynchings, wrongful convictions, and many other injustices in the United States.[1]

It is not difficult to see how myths and stereotypes that promote prejudicial beliefs at the expense of truth can undermine criminal justice. The system is not functioning when offences are not reported or, if reported, are not prosecuted as a result of such beliefs. Unpunished crimes, in turn, compromise the community's interest in law enforcement, and victims pay a personal price when their bodily integrity is violated with impunity. Society's need of retribution and denunciation is denied, and the victim's right to vindicate and restore her sexual integrity is sacrificed.

But nor does the process function smoothly when complaints are prosecuted; a conviction cannot be secured without the victim's decision to testify and thereby forego her privacy as well, in many cases, as her dignity. Latterly, procedures and rules of evidence too often enabled the accused to savage a victim's character and expose her past sexual activity to excuse a non-consensual contact. Rules of evidence, which permitted what are now recognized as irrelevant questions, were experienced by victims as humiliating and insulting. The consequences for complainant privacy and dignity were discussed in the context of the *Charter* jurisprudence, in Chapter Three above.

Not only did such questions in and of themselves constitute an invasion of privacy, they rebounded back to the open court principle and the problem that sexual offences are chronically under reported. For complainants, the travails of submitting to cross-examination were surely compounded by an open court principle which treated sexual assault victims the same way as other victims of crime. Newspapers and broadcasters were free to publish the private and intimate details of a named complainant's sexual encounter with the accused. And, before restrictions were placed on this evidence, details of the victim's sex life with others could also be

freely reported because it was disclosed in open court. In the circumstances, it is understandable that the victims of these crimes were reluctant to trust the criminal justice system.

The reforms of recent years have done much to ameliorate the status of complainants in sexual assault proceedings. Initiatives in judicial and legislative forums have been aimed at rectifying the perceptions and beliefs that disadvantaged this class of crime victims. As a result, debate about the relative rights of complainants and the accused is, in Canada, quiet for the time being. Though proponents of the accused's rights resist the suggestion that the defendant and his victim are "equal" under the *Charter*, statute law and judicial precedent have made it clear that there is no "hierarchy of entitlement" between the accused and his victim. Yet competing interests remain strong; the Supreme Court of Canada has indicated, at the same time, that victim privacy cannot be promoted, absolutely or disproportionately, at the expense of the accused's right of full answer and defence.[2] By the same token, nor does victim privacy stand above the open court principle. Thus, the Supreme Court accepts that victim privacy can be protected, and also places access and accountability at the core of s.2(b)'s underlying values.[3]

Another element of the myths and stereotypes which surround the crime of rape concerns the way sexual offences are reported by the media and how the public, in turn, perceives the complainant[4]. As explained by Helen Benedict, "[s]ex crimes have a unique ability to touch upon the public's deep-seated beliefs about sex roles,"[5] and the press plays a role in "establishing or reinforcing those attitudes."[6] In her 1992 book, *Virgin or Vamp: How the Press Covers Sex Crimes*, the author identifies a number of rape myths which in her view are "still alive and well."[7] She maintains that these myths condition the way the press reports sexual offences, and the way the public responds to a complainant's allegation of rape. Benedict suggests that sex crime victims are squeezed into one of two images: "she is either pure and innocent, a true victim attacked by monsters - [a virgin] or she is a wanton female who provoked the assailant with her sexuality - [a vamp]."[8] In light of how "deeply terrible a crime sexual assault is", this kind of stereotyping is particularly unfair. Benedict describes her understanding of rape in these terms:

> I learned how it destroys the fundamental sense of autonomy and privacy of the victim - one's body is used as an object, one's humanity degraded; how it introduces trauma and distrust between the victim and those close to her, often destroying marriages and families; and how little the police, the press and the public at large understand or even sympathize with these troubles. I learned how rape victims become trapped in a cycle of injustice: having fallen victim to a violent crime through no fault of their own, they are blamed for it, sometimes mocked for it by neighbors, friends, family, and the law. I also learned that, even after two decades of feminist attempts to educate the public about rape, women are still screamed at or run out of town for it, and are still commonly portrayed as promiscuous liars by the press and public....[9]

With reforms now in place, it is difficult to know whether sexual offences are traumatic because the attack is sexual in nature, because the myths and stereotypes aggravate and worsen the victim's trauma, or because the attack and its mythology have not yet and perhaps cannot be disentangled. Benedict predicts that "[a]s long as people have any sense of privacy about sexual

acts and the human body, rape will [] carry a stigma", and this is "not necessarily a stigma that blames the victim for what happened to her", but a stigma "that links her name irrevocably with an act of intimate humiliation."[10]

For purposes of this study, it is important to identify the rationales which support victim privacy in cases of sexual assault. Specifically, in relation to the open court principle, the question is whether exceptions to access and publicity are necessary to overcome the mythology and negative history of law enforcement in this area, or whether sexual offences always have been, and always will be different. The first view would regard exceptions to open court as a temporary measure to protect the privacy of complainants who are caught in a criminal justice system and media culture which has not yet eliminated prejudicial attitudes about sexual offences. The other perspective would treat victim privacy as a permanent exception to the open court principle in sexual assault proceedings. That view is grounded in the belief that a sexual offence should be treated differently because the crime necessarily commits a violation of its victim that is distinctive.

In addressing those points of view, it is important to contextualize the problem of myths and stereotypes and the open court principle. Chapter Three explained how discriminatory beliefs entered and pervaded the proceedings, from the investigation through to the rules of evidence which applied at trial, and in doing so treated sexual assault complainants unfairly. Despite having been addressed by reforms, these patterns of unfairness are systemic and will be slow to disappear. By contrast, the open court principle neither endorses nor incorporates the myths and stereotypes which infused other aspects of sexual assault proceedings in the past. The presumption in favour of access and publicity does not treat sexual assault victims differently or unfairly; rather, it assumes that the same principles which apply to other victims of crime should also apply to those who suffer a sexual assault.

Yet there is a qualification to that; victim anonymity is protected by s.486(3) of the *Criminal Code*, as an exception to openness which is justifiable because of the link between victim identification and under reporting. As well, but only in circumstances where the evidence supports the order, s.486(1) permits a judge to close part or all of a proceeding. Moreover, even if the open court principle is not based on any myths or stereotypes, according to Benedict, media reports continue to trade on a variety of prejudices about sexual offences. From that perspective, exceptions to open court place a check on the media's tendency to reinforce or even establish myths and stereotypes about the victims of sexual offences. On that view, sexual assault prosecutions should be regarded as seamless, in the sense that the privacy implications of the open court principle cannot be separated from the privacy implications of the confrontation between the victim and the accused.

It is beyond the scope of this Chapter, and the study, to resolve the complex dynamics that are identified above. Instead, this Chapter provides a discussion of the rationales which enter into the equation when open court and privacy are in conflict. It is divided into two parts which correspond to the two major open court issues analyzed in Chapter Two: publicity versus publication bans on victim identity; and access to proceedings versus orders excluding the public

from the court room or the evidence. Accordingly, the first section below explores victim anonymity and, in doing so, draws on the extensive American literature on this issue.

The second part of the Chapter examines the open court questions that arose in the Homolka-Bernardo proceedings, with two objectives in mind. One is to consider when and for what reasons it may be permissible to exclude the public from the courtroom, or deny it access to critical elements of the evidence. A second is to explore the concept of a victim. It is trite that the commission of a single offence can create many victims, and it is well established that the victims of crime have not been well treated by the criminal justice system in the past. In such circumstances, granting the victims of crime new opportunities to participate in the criminal process unavoidably challenges the traditional concept of a single victim. The question is whether "secondary" victims should also be recognized and, if so, in what ways or for which purposes. Though the *Charter* has conferred some status on third parties, such initiatives are controversial because they alter the concept of a criminal trial as an adversarial contest between two parties: the state and the accused.

The discussion of these difficult issues is followed by a brief conclusion.

Victim anonymity

Unlike the evidence cases on defence access to private information, victim anonymity in sexual proceedings has generated little discussion in Canada. The Supreme Court of Canada's decision to uphold the *Criminal Code*'s mandatory publication ban on victim identity was not particularly controversial, and the complainant's right to remain anonymous has not since been challenged. At the same time, Chapter Two noted Howland C.J.O.'s reasons for concluding that identity should not automatically be protected. In his view, disclosure in at least some cases might bring fresh evidence or witnesses to the fore. That Chapter also traced the evolution of litigant privacy in the justice system, from a low point in *Scott v. Scott*, to the present, including the discretion under s.486(1) to close all or part of the proceedings to protect victim privacy.

Reforms to protect victim privacy, along with more sweeping modifications to the law of sexual offences, have been in place for many years now. At this point in time, it might be helpful to know whether these changes have favourably influenced rates of reporting, prosecution, and conviction for sexual offences. In the absence of data, the debate on anonymity takes the form of principled arguments on each side of the question.

An initial point, and an important one, which was flagged in discussion of the American jurisprudence, is whether the open court principle is compromised when a victim's identity is withheld from the public. On that point, it is not obvious that access to information, or the transparency and accountability of the criminal justice system, require the victims of crime to be publicly identified. Presumably, what matters is the offence that has been committed, and the guilt or innocence of the accused that is at stake, and not the name or particulars of the victim. To the extent such particulars are relevant to the fairness or credibility of the trial, those details remain available through the public's access to the courtroom and to reports of the proceedings in the print and broadcast press. To put it another way, it is reasonably arguable that excising the victim's identity constitutes a minimal trivial derogation from the requirement of openness.

Thus Rehnquist J., who has been the Chief Justice of the United States for many years, claimed in *Smith v. Daily Publishing Co.* that publishing a juvenile's name was unrelated to the watchdog role the press plays in monitoring the criminal justice system. [11] Given its freedom to describe the details of the offence and inform the community of the proceedings against the juvenile, the prohibition on identity was, in his view, "a minimal interference with freedom of the press."[12] Rehnquist J.'s position on anonymity was based on his concerns for a young offender's rehabilitation, as well as on the existence of a judicial discretion to permit publication.

Likewise, White J. dissented in *The Florida Star v. B.J.F.*, on the ground that there is "no public interest in publishing the names, addresses, and phone numbers of persons who are the victims of crime."[13] In his view, it was "not too much to ask the press, in instances such as this, to respect simple standards of decency and refrain from publishing a victim's name, address, and/or phone number."[14] As far as he was concerned, if the First Amendment prohibited a private person from recovering for publication of the fact that she was raped, there might not be any facts which were too private for publication. [15] The majority opinion provided two answers to Mr. Justice White's concerns. First, Marshall J. claimed that the article *generally*, as opposed to the *specific identity* contained within it, involved a matter of paramount public interest.[16] Second, his opinion did not rule out the possibility that civil sanctions for publication might be necessary to serve the interests at stake. In the circumstances, he concluded that imposing liability on the Florida Star was "too precipitous" a means to protect a victim's safety and privacy, or encourage other victims to come forward without fear of exposure. [17]

If the majority's answers are not entirely persuasive, the question whether the name or identity of a person is important remains unanswered. It is not self evident that withholding victim identity would undercut the press function as watchdog, or that the name of a crime victim matters to the public. In addressing that question, NBC News President Michael Gartner explained, that "we are in the business of disseminating news", and that "[n]ames and facts are news" which "add credibility to stories and give viewers or readers information they need to understand issues."[18] On its face, that assertion is difficult to prove or disprove; though undoubtedly true in some cases, it hardly supports an absolute right to name victims. A more realistic view is that of Howland C.J.O., who found in *Canadian Newspapers* that identity might make a difference in some cases, when disclosure of a victim's name prompts others to come forward.

On a different point, if the public does not need to know the identity of a sexual assault victim, it is questionable whether it is essential to know the identities of any victims of any crimes. This recalls the observation Brennan J. made in *Globe Newspaper*, in explaining why it was inappropriate to close the court room for the young victims of sexual offences, and not for other victims. There, he commented that the victims of sex crimes are not the only ones who would be more likely to come forward when guaranteed a closed hearing. The dilemma in drawing distinctions between victims is that none are voluntary participants in the criminal justice system; they are part of the process through force of circumstance rather than choice. Those who suffer a sexual assault are not alone in this, and if victim privacy is taken seriously, an anonymity order should be available to any victim who seeks it. That approach is

unacceptable, however, because it would transform an exception from the open court principle into a rule of anonymity. Such an expanded concept of victim privacy, which is still a newcomer in the criminal justice system, would raise the concerns voiced by Lord Shaw in *Scott v. Scott* and echoed, as well, by Wilson J. in *Edmonton Journal v. Alberta (AG)*.[19]

A further point, which is often raised in the American literature, concerns fairness to the accused. Some claim that protecting the identity of the complainant infers that the unnamed person was indeed a victim and undercuts the presumption that the defendant is innocent. For instance, American criminal defence lawyer Alan Dershowitz expressed that view in these terms:

> People who have gone to the police and publicly invoked the criminal process and accused somebody of a serious crime such as rape must be identified.... In this country there is no such thing and there should not be such a thing as anonymous accusation. If your name is in court it is a logical extension that it should be printed in the media. How can you publish the name of the presumptively innocent accused but not the name of the accuser?[20]

Michael Gartner, President of NBC News during the William Kennedy Smith and Central Park jogger incidents, agreed that fairness as between the suspect and the accuser is an issue, yet his view was that the decision whether to name victims is an editorial question and should be made on a case to case basis.[21] It is sometimes argued that the identity of the defendant should also be protected, at least until trial proceedings are concluded. Doing so would effectively create an anonymous trial process, though, and that would be anathema to the values of transparency and accountability that have been jealously guarded over the years by the open court principle.

The main issue between those who support the naming of victims and those who support anonymity is stigma, and how it can or should be addressed in the context of sexual assault. One view is that sexual offences should be normalized, and from that perspective, special protocols simply perpetuate the stigma and shame of being a rape victim. Nadine Strossen maintains, for instance, that, "if we are ever to get beyond the situation where rape is seen as stigmatizing, where the victim is seen as 'damaged goods', then we have to stop mythologizing it and treating it as some special kind of crime."[22] She and others contend that mandatory anonymity implies and encourages the view that rape is disgraceful. Likewise, a former President of the National Organization of Women stated that prohibiting publication "merely establishes the victim as an outcast"; she urged others to "*pull off the veil of shame. Print the name*."[23] Though it may be less credible, given that its source has an interest in identifying victims, Michael Gartner of the NBC News argues that, "by not naming rape victims, we are participating in a conspiracy of silence which does a disservice to the public by reinforcing the idea that there is something despicable about rape."[24] He added that "[r]ape is a despicable crime of violence, and rapists are deplorable people", but rape victims, on the other hand, are "blameless."[25] His view of the press role is "to inform the public, and one way of informing the public is to destroy incorrect impressions and stereotypes."[26]

Meanwhile, the arguments in favour of anonymity are as forcefully advanced. One such argument is that it is not the victim's burden to educate the public and de-stigmatize the offence

of rape by exposing her personal circumstances. A person who has already suffered the ordeal of rape should not bear responsibility for changing prejudicial views about rape and its victims:

> [W]hy must the victim, who has already suffered from the ordeal of rape, be forced to bear the responsibility of educating society and changing its prejudicial view toward rape and its victims" These negative views have been developed and reinforced by many segments of our society - parents, teachers, newspaper and television reporters, film-makers, politicians, sports heroes, and other role models. The seeds of change must come from these same individuals if society is to make any meaningful progress in changing its attitude about rape victims.[27]

Benedict echoes this view in the assertion that to expose a victim to the humiliation of being identified without her consent is "nothing short of punitive."[28] She considers that the media covers rape "too irresponsibly" to be able to de-stigmatize the crime merely by naming victims, and adds that until rape coverage is reformed as a whole, "naming victims will only further humiliate, expose, and endanger them."[29]

In any case, it is noted that revealing the victim's identity focuses attention on the victim, and not on those who may have prejudicial views. The stigma surrounding these offences renders its victims especially vulnerable and creates distinctive challenges for them in the healing process. The public disclosure of a victim's identity could disrupt her healing process, and although commentators argue that stigma is removed by routinely revealing the names of all victims, those who are caught in the transition period would be unduly harmed while the stigma still exists.[30]

This section closes with two observations about the question of victim anonymity in the American literature. As the discussion has shown, the debate tends to be conducted on an all or nothing basis. For instance, Michael Gartner explained that, "producers, editors, and news directors should make editorial decisions, rather than lawyers or legislatures."[31] To that he added, "I oppose preventing news organizations from disclosing the names of rape victims who prefer to remain anonymous."[32] And, on a point of equality, he added that, "we do not give newsmakers in any other category of news the option of being named or not being named."[33] From his perspective, the state cannot dictate newsroom decisions about what is or is not newsworthy. On the other side, women's organizations and those who seek to reform the law of rape insist that the victim's identity should never be disclosed without her consent.

The first observation, then, is that the polarization between sides that characterizes debate at the level of constitutional principle is not reflected in current practice. Whether or not a state law prohibits publication of a rape victim's name, the American practice is for the media not to reveal her identity. Though a statutory ban has not yet been upheld under the First Amendment, the media has voluntarily adopted the principle of anonymity. In doing so, it is unclear whether the press has conceded that victim identity is either irrelevant or marginally relevant to the accountability rationale, or has concluded that the privacy of the victim outweighs the public's need to know her identity.

Second, those who are opposed to disclosure are offended that the victim's name is revealed without her permission. Put another way, whether to be known to the public as a victim of rape should be a matter of choice. In that regard, Nancy Ziegenmeyer is an example. Ziegenmeyer is an American woman who chose to come forward and reveal the explicit details of her rape. She has been praised for her courage in doing so, and the story of her violation earned its author a Pulitzer Prize. Ziegenmeyer maintains, however, that any decision to speak out should be made by the victim and only when she has healed enough. Her own experience led her to offer the following advice:

> I would encourage any rape victim to come forward who has gone through enough counselling and has a support system and she thinks it is right for her. No one should dictate to crime victims that they should speak out. It must be their choice.[34]

To conclude, reference should be made to *R. v. Adams*, a decision of the Supreme Court of Canada on the question whether, when and at whose instance a sexual assault publication ban can be lifted.[35] In that case, the ban was imposed at trial upon the request of the Crown, and not the complainant. When the trial ended in an acquittal of charges against the accused, the judge revoked the publication order, citing his findings that the complainant "was a prostitute and a liar."[36] In restoring the order, Mr. Justice Sopinka of the Supreme Court found that the language of s.486(4) did not expressly authorize the revocation of such orders. Nor was he prepared to imply such a power in the statutory provision, given the purpose of the ban, which is to provide the complainant a permanent guarantee of anonymity. In his view, a revocable ban, like the discretionary ban at issue in *Canadian Newspapers v. Canada (AG)*, "would fail to provide the certainty that is necessary to encourage victims to come forward."[37]

Nor did the trial judge have an inherent power to revoke the order, because it was mandatory at the request of the Crown, and the Crown had neither withdrawn its application nor consented to the revocation of the order. In any case, Sopinka J. held that even if the Crown consented, the judge still would have no power to revoke the order if the complainant did not. Such an order can only be lifted when both the Crown and complainant consent.

In Canada, then, the complainant in sexual assault proceedings controls the disclosure of her identity, during the process and following its completion as well. Though the victims of these crimes are free to identify themselves to the public and speak to their experiences, few, if any, have chosen to do so thus far.

Access to proceedings

Despite its entrenchment in the s.2(b) jurisprudence, the open court principle remains vulnerable. The shock value of violent crime ensures that exceptions to the rule will be sought whenever the circumstances are frightening enough to threaten competing values such as fair trial and victim privacy. At present, decisions will be made on a case-to-case basis, under the analytical frameworks established in *Dagenais v. C.B.C*, *C.B.C. v. New Brunswick (Re: R. v. Carson)*, and *R. v. Mentuck* and *R. v. O.N.E.*[38] Generally speaking, exclusion orders constitute a more serious infringement of the open court principle than publication bans; perhaps for that

reason *C.B.C. (Re: R. v. Carson)* emphasized the need for a sufficient evidentiary foundation to justify closing all or part of a hearing. In addition, closure orders unavoidably deny access to the information which is imparted during proceedings and that is problematic because once access is denied that part of the hearing is effectively lost to the public.

Under s.486(1) of the *Criminal Code*, the public can be excluded, to protect the privacy of victims or witnesses, for part or all of a proceeding. That question arose with particular poignancy in the course of the Homolka-Bernardo trials. There, the survivors of the French and Mahaffy victims fought to keep graphic videotapes of sex torture out of the public domain. Though not to sympathize with their cause might seem heartless, on a point of principle the Homolka-Bernardo crimes raised as yet unanswered concerns about the accountability of the criminal justice system. To this day, the public is sceptical of the deal the Crown "cut" with Ms Homolka, and doubts whether she received just punishment for the crimes she committed. At the same time, the privacy and dignity interests of the victims and their survivors could scarcely have been more compelling. That is why the open court issues at stake in the Homolka and Bernardo trials are so pertinent here; in each, the competing concerns under discussion in this Report were at an apex.

The open court principle was challenged three times in the course of separate trials for the defendants Homolka and Bernardo. First of all, at the hearing to consider Ms Homolka's plea bargain and sentence, Kovacs J. excluded the public and foreign press from the courtroom, and imposed a wide-ranging publication ban on the domestic press.[39] Second, as the date for Mr. Bernardo's trial neared, the families of the French and Mahaffy victims applied for orders excluding the public during those parts of the proceedings in which the videotapes would be shown or discussed.[40] Third and finally, after the Bernardo trial and appeals were concluded, the families applied again for orders to destroy the videotape evidence, and that task was carried out late in 2001.[41]

The elemental facts are well known and require little attention.[42] Karla Homolka and Paul Bernardo were lovers who then married and carried out a series of sexual offences which they committed, together, against at least four victims. Two of the four, Leslie Mahaffy and Kristen French, were murdered and a third, Ms Homolka's sister Tammy, died accidentally following sexual assaults that occurred while she was unconscious. For some time the police did not regard Tammy Homolka's death as suspicious, were unaware of Jane Doe, the surviving victim, and were without leads in the French and Mahaffy murders. The investigation broke when Karla Homolka presented herself to the police as a victim of spousal assault in January, 1993. Once she implicated her spouse, Bernardo was arrested. Charges of manslaughter in the deaths of French and Mahaffy were brought against Ms Homolka on May 18, 1993, and the next day murder charges, among others, were laid against Mr. Bernardo.

At the time of the Homolka trial, three features of the case worried and concerned the public. First, little was known about the sexual captivity and offences the victims endured before being murdered, except that their treatment was rumoured to be sadistic, horrific, and unimaginable. Second, little was likewise known about the respective roles Homolka and Bernardo played in committing those offences and then killing their victims. Third, by the

spring of 1993, it was apparent that the Crown's case against Bernardo depended on his spouse's evidence against him. In simple terms, to secure a conviction against him, her story had to be believed. Yet on no view of the facts then known could she be exculpated; by casting her as a victim of his predatory behaviour, her responsibility for the crimes that were committed could be diminished and her credibility as a witness preserved.

Karla Homolka's trial took place on June 28, 1993, some two years before Bernardo's, amid intense public interest. Whether or not they were unprecedented, the trial judge's orders on the open court issues were at least extraordinary. Not only did Kovacs J. impose a near-blanket publication ban on the proceedings, he excluded the public and foreign media from the courtroom.[43] As a result, the only details from her trial and sentence hearing that could be reported were the contents of the indictment, whether there was a joint submission as to sentence, whether a conviction was registered but not the plea, the sentence imposed, and a few other unrevealing aspects of the Court's reasons.[44] In addition, the non-publication order applied to the transcript of the trial proceedings.[45] As to access, beyond the families of the accused and the victims and court personnel, only the Canadian press were allowed into the courtroom; the public at large and the foreign press were specifically excluded by order under s.486(1) of the *Criminal Code*.[46] Moreover, it was a condition of access, to those admitted to the proceedings, that there be "no publication of the circumstances of the deaths of any persons referred to during the trial."[47]

By his own admission, the sensibilities of the victims' families and the community at large played no role in the judge's decision to impose a publication ban and exclude the public from his courtroom. Thus Kovacs J. apologized that he could not act on his "real concern for the psychological well being of the innocent victims."[48] He did not consider it permissible, under the existing case law, to create an exception to open court in deference to the privacy or dignity of the families. For the same reason, he did not take the trauma which might be experienced by the community of St. Catherine's into account, should the proceedings be publicized.[49]

Oddly, given the circumstances, the publication ban and exclusion order were granted to protect Bernardo's right to a fair trial at some later date. On the strength of *Nova Scotia v. MacIntyre*, Kovacs J. found that protecting an accused who is presumed innocent and securing the integrity of the court's process were values of superordinate importance, sufficient to warrant an exception to the open court principle.[50] Yet Bernardo opposed the publication ban and indicated that he was prepared to waive his right to complain that the publicity surrounding the Homolka proceedings would deny him a fair trial. The trial judge refused to treat his insistence that the open court principle be followed as determinative. In his view, permitting Bernardo to waive the fair trial claim would be tragic, if his own trial led, as a result of pre-trial prejudice, to the conviction of an innocent man. And if he was guilty, the harm to society would be "inestimable" if his conviction was flawed because a fair trial had been impossible due to the irreparable publicity surrounding the Homolka trial.[51]

After listing some of the extraordinary features of the case, Mr. Justice Kovacs held that the considerations for a fair trial outweighed the right to freedom of the press.[52] The order excluding the public and foreign press was linked to his concerns about publicity. In the

circumstances, a publication ban which could not be enforced against the American media would be inadequate to protect the integrity of the process. There remained the risk, should the public be granted entry, that the U.S. press would succeed in gaining access to information about the proceedings and then publish it.

From an open court perspective, the trial judge's reasons are not strong. Kovacs J. did not attach significant value to freedom of the press or to the public's access to information about the trial, including the opportunity to debate the justness of Homolka's sentence. Moreover, in assuming that publicity would jeopardize the fairness of Bernardo's trial, he failed to consider whether alterative measures, such as a change of venue, could obviate the need for an exception to open court. Finally, it should be noted that his publication ban and exclusion order predated the Supreme Court's decisions in *C.B.C. v. Dagenais* and *C.B.C. v. New Bruswick (Re: R. v. Carson)*, both of which set onerous standards under the *Charter* to justify exceptions to the open court principle.[53]

At the time, the ban and closed hearing were enormously controversial. As Frank Davey explained, the judge's order was "perhaps, from the point of view of public knowledge, the most unfortunate moment in Ontario history for the imposition of such a ban."[54] The dynamics at play, including the media's role, led to a public perception of the case as "an enormous collection of deceits and concealments."[55] For instance, the victims' families were perceived as being concerned with "unjustly protecting their privacy"; it looked as though the police were determined to keep the media and the public "from finding out about even inconsequential information"; it appeared that the police and Crown were making deals "against the public's back"; and it was widely held that Homolka received an "unjustly light sentence."[56] Yet Davey is most critical of the media, which he characterized as behaving in a self-serving manner throughout:

> Arguably, it was not the ban itself that might cause disrespect of the court system, but the reception of the ban in the media. The media have a large role in controlling what issues the public is encouraged to see as important.... In the debate over the publicity ban, the media were the only public institutions to publicize and criticize the judge's order.... Without the media's repeated writing about their own indignation about the order ... that is, without the media making themselves the story-much of the debate of the ban would not have occurred.[57]

Nor did subsequent events restore confidence in Homolka's sentence or the judicial orders that shielded details about the offences and her participation in them from public scrutiny. Some time after her sentence had been imposed, videotapes documenting the crimes committed against Mahaffy and French were surrendered to the Crown by defence counsel for Bernardo. The discovery of this evidence altered the entire complexion of the case. First, the video footage uncovered a surviving but previously unknown victim, Jane Doe, and revealed the events leading up to Tammy Homolka's death. Second, tapes that proved Bernardo's sexual offences rendered the Crown's case less dependent on Homolka's direct evidence against him. Moreover, footage which recorded her willing participation in the commission of those offences undercut any claim that Homolka had been an unwilling participant and helpless victim of spousal abuse. Not

surprisingly, these revelations rendered the sentence which was imposed at her hearing even more suspect, and not the least because it did not include punishment for the offences she committed against Jane Doe and her own sister.

Third, the discovery of the videotapes subjected the victims' families to untold agony, and brought them into the proceedings which led up to and followed the Bernardo trial. The order by Kovacs J. had the effect, though not the purpose, of protecting the privacy and dignity of the victims' families. Yet the publication ban was temporary and would expire at the conclusion of Bernardo's trial.[58] In the ordinary course, however, the tapes would be entered as evidence and played in open court at those proceedings. Faced with that prospect, the families pressed the courts to protect them and their deceased daughters from the public violation of their privacy and dignity.

Prior to the Bernardo trial, the Crown brought an application under s.486(1) of the *Criminal Code* to exclude the public from the courtroom during its presentation of the videotape evidence. While members of the media opposed it, the families of the deceased victims supported the Crown's application. First, it was necessary for them to secure status as intervenors in the process. Ordinarily, third parties are not permitted to participate in criminal proceedings, and though the status of third parties, including victims, has changed under the *Charter*, the criminal trial remains a contest between the accused and the Crown.[59]

Through their counsel, the families maintained that their constitutional rights would be violated if the tapes were shown to the public. The difficulty was that if the victims' families were granted standing in Bernardo's case, it might be difficult to refuse other crime victims similar status.[60] LeSage A.C.J.O.C., who would later preside over the jury trial, noted that, "in general victims and parents of victims do not have a right to intervenor status in a criminal trial."[61] Even so, he granted the Mahaffy and French families' requests, "as an indulgence", and on the strength of the "unique and different perspective" they would have to offer.[62] Emphasizing that it was rare for the Court to grant third parties such status, he did so because the circumstances of the case were "so strikingly unusual".[63]

On its merits, the Crown's s.486 application posed a difficult question. The case for access to the proceedings, including the video evidence, could hardly have been more compelling. That evidence documented the relationship between Homolka and Bernardo, and proved their respective roles in the commission of multiple sexual offences. And, if the purpose of the evidence was to establish Bernardo's guilt, the degree of Homolka's complicity in the offences, including murder, and the legitimacy of the Crown's "bargain" with her, remained contentious. From that perspective, the adage that, "pictures don't lie," seemed to offer some hope of getting at the truth of what happened. In this instance, however, the fair trial rationale could not provide a cover for victim privacy, as it had at the Homolka proceedings. Parenthetically, it should be noted that questions surrounding the videotape were decided *before* the Supreme Court's decision in *C.B.C. (Re: R. v. Carson)*, which identified the protection of privacy as a permissible reason for excluding the public from the courtroom.

Playing the tapes in open court could only be experienced by the Mahaffy and French families as a cruel and even a barbaric act. Thus, the Crown submitted that the failure to recognize the distress of the victims, including the families, would adversely affect the perception of the administration of justice, which is referred to in s.486(1) as one of the permissible exceptions to openness. Without accepting that the deceased victims or their families could assert *Charter* claims, LeSage A.C.J.O.C. forged a compromise between the demands of open justice and victim privacy. Specifically, he decided that the audio portions of the videotapes would be played in open court, but that their visual images would be shown only to the jurors, lawyers, the accused, the judge, and any Court staff whose presence at the proceedings was required. In doing so, his analysis was based more on the harm their publication would cause than on the privacy of the families. Specifically, he stated:

> ... I am satisfied that the *harm* that flows from the public display of this videotape far exceeds any benefit that will flow from the exposure of sexual assault and child pornography. When I refer to *harm*, I am not suggesting that individual members of the public need to be protected from the *harm* that may flow from viewing these videotapes.... By *harm*, I am referring to the injury that most likely will be occasioned upon the surviving members of these three young girls if the videos are played in open Court. *The families will suffer tremendous psychological, emotional and mental injury if the evidence, as the Crown described it ... is publicly displayed*.[64]

Unsatisfied with that result, the families sought and were denied leave to appeal that decision to the Supreme Court of Canada.[65] They did succeed, however, in obtaining an order, in subsequent proceedings, that the videotapes be returned to the Attorney General for destruction, when no longer required for the due administration of justice. [66] On further appeal, the Ontario Court of Appeal rejected their submission that s.486(1) is unconstitutional and held t here was "no room" to attack its validity on the basis that it treats openness as the rule and exclusion as the exception.[67] As Moldauer J.A. noted, there is a difference between a person's right to engage in certain conduct, such as child pornography, and the public's right of access to observe conduct captured on videotape and tendered as an exhibit in court proceedings. [68] In any case, the appellate court did not disturb the trial judge's destruction order. Accordingly, the final stage in the videotape saga occurred when the families of the victims witnessed the incineration of the videotapes late in December 2001.[69]

One way of assessing the way competing demands were resolved in the Homolka - Bernardo proceedings is to ask, in hindsight, how the deleterio us consequences for open court and the salutary benefits for victim privacy compare. [70] That question of final proportionality between the reason for the exception and the harm to open court is a key consideration in the Supreme Court's *Dagenais*, *C.B.C. (Re: R. v. Carson)*, and *Mentuck* doctrines. The benefits which accrued from the exceptions to open court throughout the proceedings are relatively straightforward; the Homolka exclusion order and publication ban, the Bernardo videotape order, and the order which led to the destruction of the tapes provided the families of the victims who were videotaped a degree of privacy within the criminal justice system which they ordinarily

would not have received. At the same time, their interests were not absolutely protected. The Homolka publication ban was lifted once the Bernardo trial ended. Moreover, the families sought not only to deny the public access to the audio and visual portions of the tapes but also, to exclude the public from the courtroom when witness testimony disclosed any statements made by the victims on tape. As seen above, LeSage A.C.J.O.C. was not prepared to go that far.

The deleterious consequences for the open court principle are more difficult to assess. It can be argued that the Kovacs order had limited consequences because the ban on information was temporary. From that perspective, the public's access to information about the justice system was merely delayed. At the same time, there can be little doubt that the publication ban and exclusion order had a negative impact on the public's confidence in the integrity and legitimacy of the police investigation, the Crown's plea bargain, and the Homolka trial itself. That gap in confidence widened once the tapes were discovered, and to this day, the wisdom of such extensive limits on information about the Homolka proceedings remains open to serious question. Meanwhile, the salutary benefits of these orders, which were aimed at protecting Bernardo's right to a fair trial, could well have been achieved by alternative measures including a change of venue, jury screening, and instructions to the jury. Kovacs J. did not seriously entertain any of those measures. Absent the video evidence, which would not appear until later, it is questionable whether the privacy and dignity of the victims and their families were compelling enough to warrant exceptions to open court on the scale of the Kovacs publication ban and exclusion orders. Under the existing doctrine, Kovacs J. was right in concluding that the answer was no; and, even under the subsequent criteria of *C.B.C. v. New Brunswick (Re: R. v. Carson)*, the issue is debatable.

The deleterious consequences of derogating from the open court principle to protect victim privacy, in the case of the videotape order, may seem modest. As LeSage A.C.J.O.C. stressed, "it is not necessary", for there to be an open trial, that "the public gallery be shown the graphic display of one of the victims lying in the bathtub whilst the accused attempts to defecate and actually urinates on her head and face."[71] Given that members of the press and public could hear the evidence, he concluded that it was not essential for anyone but the principals, including members of the jury, to view the tape. Yet LeSage A.C.J.O.C. did concede that, "it is difficult to rationalize why the verbal, but not the pictorial, images may be publicly displayed."[72] The answer he gave was that "traditionally we do not display, for public viewing, photographs of dead bodies, close-up photographs of wounds, photographs of autopsies, photographs of exhumations, and similar type evidence".[73] The analogies he relied on are not perfect, though, because the examples he listed simply documented the consequences of violent crime. Unlike the Bernardo videos, photos of wounds and autopsies do not constitute proof of a crime's commission. In any case, the question before LeSage A.C.J.O.C. was not whether access to the tapes fell within traditional practices, but whether a different answer was required by the *Charter*'s constitutionalization of open court.

Sparing the families further and undue suffering was compassionate in the circumstances. The video order also spared public suffering, and avoided implicating the criminal justice system in the unwilling distribution of child pornography. Still it left broader and important questions of principle unanswered. Primary among is the definition of a victim, and whether the secondary

victims of a crime can advance rights in their own name. If there is no doubt that the commission of a single crime can create several victims, the problem is one of deciding which ones and how many should be granted standing in the criminal justice system. In that, it quickly and unavoidably becomes subjective to draw comparisons between victims and the relative degrees of harm they suffer. The Bernardo video order is defended as an exception to open court which, by virtue of its circumstances, was unprecedented. Once created, however, precedent seeks the company of analogous circumstances, and rarely remains a solitary and isolated decision. In any case, to limit the video order to a once in a lifetime case privileges the victims of the Mahaffy and French tragedies, and excludes other victims whose privacy and dignity interests might be as profoundly harmed. Then again, should the Bernardo video order be see as a precedent for the protection of victims, including the secondary victims of crime, the consequences for the open court principle would be quite troubling. This is the dilemma that arises when compassion for the victims of crime is in conflict with the demands of principle.

Conclusion

Open court and victim privacy unavoidably come into conflict, and choosing between the two is not easy. To some, it may seem that the derogations from openness which are required to protect victim privacy are minimal, and are readily outweighed by the equities which run in favour of those unfortunate enough to be a crime victim, and especially a victim of sexual assault. From that perspective, demanding the right to publish a victim's name or to see the Bernardo videotapes suggest an attachment to the open court principle that is needlessly scrupulous. As these pages have shown, however, there are compelling reasons why the pre- and post-*Charter* tradition in Canada claims strong adherence to that principle.

At the same time, victim privacy imposes costs on the system. By singling sexual assault complainants out for distinctive treatment (among a few others), such rules raise fairness and equality concerns. Moreover, secrecy in any aspect of criminal justice can erode confidence in the legitimacy of the system. Protecting the privacy of some victims also leaves unanswered the status of others, as well as of secondary victims who may also have suffered horribly. At present, the statute law and jurisprudence have not established a clear rationale or set of guidelines to address the issue of victim privacy. In the case of sexual assault, it is assumed that anonymity is linked to law enforcement. Yet the Court relied on chronic under reporting in *Canadian Newspapers* and *Adams* without addressing privacy as an entitlement in its own right. How anonymity has affected reporting, and whether sexual assaults raise distinctive privacy issues, regardless of law enforcement concerns or the persistence of past prejudices, are questions which should be asked and answered.

By way of postscript, two developments which arose since the Chapter was written should be mentioned. First, on the issue of victim anonymity, it is noteworthy that Simon and Shuster has scheduled the publication of the book, *I Am the Central Park Jogger,* in April. The identity of the jogger who was brutally assaulted and left for dead has never been disclosed, but now the victim, whose name is Pimsleur, has come forward. Second, the publication of Stephen Williams', *Karla: A Pact with the Devil,* in English Canada has revived the contest between the French and Mahaffy families, and those who are of the opinion that the accountability issues in the Homolka plea bargain remain inadequately canvassed.[74] The victims' families complained,

in particular, about two photographs, one of which showed the cement blocks that encase Leslie Mahaffy's body, and the other, which showed Jane Doe with Homolka, albeit with a black bar across her eyes. In this instance, their point may have moral force, but it is without legal foundation.

Chapter Six

Conclusions

At least in common law systems, the sensibilities of crime victims have historically not been granted consideration in the trial process. Though their participation was vital to the outcome, victims and witnesses were third parties who lacked independent standing or status in what was a two-way contest between the state and the accused. In many ways, which include an increasing recognition of their privacy concerns, that conception of the victim has been changing. Today, the victims of crime, and of sexual assaults in particular, are more visible in the criminal justice system than ever before.

The commission of a crime not only robs an individual of his or her integrity, its investigation and prosecution may unavoidably entail an invasion of that person's privacy. In a system that focused attention on the commission of an offence against the community, the individual who suffered the violation was an object of sympathy in most cases; even so, vindicating his or her personal suffering was secondary to the objective of the system. That view of criminal justice, and the importance of vindicating the offence against the community, supported a particular conception of open court. Granting access to courtrooms and permitting the evidence and outcomes of proceedings to be widely publicized was an essential part of maintaining the public's confidence in the legitimacy, justness and fairness of the system.

Chapter Two of this Report explained the relationship between three sources of law that have defined Canada's conception of the open court principle over the years. Those sources are the common law, statute law, and - since 1982 - the *Charter of Rights and Freedoms*. The common law principle of open court protected the twin concepts of access to proceedings and publicity. Exceptions to the principle were also recognized mainly, but not exclusively, to preserve the fairness of a criminal trial. For a variety of reasons, the common law was relatively unresponsive to the privacy concerns of victims or witnesses in the criminal trial process.

The common law is subject to modification by the legislature, and exceptions to the open court principle increased in number as the *Criminal Code* and other criminal law measures were amended. Though many measures were introduced to protect the fairness of the trial and thereby preserve the presumption of innocence, some addressed the status of victims and witnesses.

As Chapter Two explained, the *Charter* created uncertainty about the status of common law and statutory exceptions to the open court principle. Yet the Supreme Court of Canada has, in its s.2(b) jurisprudence, strongly endorsed that principle. In doing so, the Court has linked open court to the fundamental values it supports: public confidence in the justice system; the legitimacy of criminal justice; and the accountability of courts and judges. What the *Charter* has added to the common law conception of openness is a deeper awareness of the connection between an open process, and the legitimacy of the justice system *as one of the central institutions of Canadian democracy*.

Chapter Two also traced the evolution of doctrine under s.2(b) of the *Charter*, which guarantees freedom of expression and the press. To summarize briefly, the three most important features of that jurisprudence are: first, the establishment of constitutional "tests" in *Dagenais v. C.B.C.* and the subsequent case law; second, the requirement that exceptions to the principle rest on a sound evidentiary basis; and third, the recognition that open court should in some cases be limited to protect victim privacy.

With that foundation in place, Chapter Three took a closer looked at the status of victim privacy in sexual assault proceedings. In that context, privacy concerns were raised in answer to rules of evidence, which in the past permitted an accused to probe the details of a complainant's private life or allowed the defence, more recently, to gain access to confidential medical and counselling records. Chapter Three explained how the Supreme Court of Canada responded by introducing a right of victim privacy under s.7 of the *Charter*, and placing it on an equal plane with the rights of the accused. For purposes of this Report, the point of Chapter Three was to demonstrate that for complainants, the privacy issues at stake are not limited to the open court issues of anonymity and closure or the definition of "relevant" evidence; the privacy concerns which arise in sexual assault proceedings are instead linked throughout the process of investigation and trial.

In other words, victim privacy has multiple dimensions. The incursion begins when the complainant makes a decision to report the offence, and continues during the process of investigation, when authorities consider whether the allegation is credible enough to warrant charges and prosecution. The loss of privacy can then only be magnified during the trial process, when the victim must testify and then submit to cross-examination. Traditionally, the proceedings took place in public, under rules of evidence, which were based on a concept of relevance that permitted counsel for the accused to probe the details of a complainant's sexual history, or to demand access to private records created in the course of a confidential relationship. The loss of privacy that is inherent in the open court principle could only be aggravated by investigatory practices and evidentiary rules which exposed the victims of sexual assault to scrutiny and doubt that is not experienced, generally, by other victims of crime.

Chapters Four and Five added further dimensions to the Report by offering comparative perspectives from other countries and systems of law, as well as by providing reflections on the deeper issues at stake. For instance, the importance of victim anonymity will depend on the degree to which those who suffer a sexual assault are considered the same as, or different than, other victims of crime. That issue in turn raises other questions which remain unanswered at present. Specifically, it is unclear whether anonymity is granted as a remedial response to the under reporting of sexual offences, as the Supreme Court claimed in *Canadian Newspapers v. Canada (AG)*. On that view, anonymity is necessary to promote enforcement of the law but not, in particular, because there are privacy interests at stake. It follows from that position that sexual assault victims are in principle no different from other victims of crime, with this qualification: the history of myths and stereotypes which accompanies the law of sexual offences has made it imperative to rectify the invasions of privacy that occurred in the past. Once the myths and stereotypes have been eliminated, the remedy will no longer be needed. Determining when past

patterns have been eliminated and the victims of these offences are "normalized", vis-a-vis other victims of crime, is an exercise that does not lend itself to precision.

Under another view, sexual assault victims are fundamentally different because the nature of the offence that has been committed against them is unique. The underlying assumption there is that special measures to protect the privacy of these victims are justifiable on an ongoing and permanent basis. As the discussion in Chapter Five revealed, however, opinions vary on the question whether the stigma that is associated with these offences is increased or decreased by an anonymity rule. While some maintain that protective measures perpetuate that stigma, others argue that it is unfair to place the burden of de-stigmatizing this offence on individual victims.

It is one of the Report's themes that the relationship between the practices and beliefs, which were rejected by the Supreme Court, and the open court principle, is important. As long as prejudicial beliefs about sexual assault persist and are reflected, not only in the rules and protocols of the justice system but in the media coverage of sexual offences as well, the vulnerability of its victims may require or justify exceptions to the open court principle. As noted above, however, access and publicity do not reflect any bias against or discriminatory beliefs about the victims of sexual assaults. The problem, instead, is that the system around these offences, and the cultural attitudes which are attached to sex, have resulted in measures which protect the anonymity of victims and allow proceedings to be closed, though only on a discretionary basis which is fettered by standards that must comply with the *Charter*.

In the past, the victims of sexual assault did not readily place their trust in the criminal justice system. Against the need to secure their confidence that complaints will be treated fairly, and that any proceedings undertaken will be reported with some objectivity, the exceptions to open court that are in place at present appear modest. Perhaps for that reason and in recognition, as well, of the ways sexual offences have been mismanaged, the derogations have not been particularly controversial. The guarantee of anonymity is linked to the complainant's decision to report, but the decision to report is also linked to fears about the other invasions of privacy that will necessarily occur during the processes of investigation and prosecution. Eliminating or minimizing these unpleasant elements of the process will take time, and whether steps taken in that direction have been successful will in any event be a matter of perception.

In principle, and with an exception for young victims, those who suffer sexual assaults should be treated the same way as other victims of crime. Assuming that discriminatory beliefs about the "looseness" or "availability" of women who have been assaulted can be overcome, the remaining argument for a special rule of anonymity is that these offences are uniquely private in nature. For that reason, it can be argued that the identity of those who are its victims should be protected. The difficulty in responding to that claim is that it remains almost impossible to separate the nature of the offence from societal attitudes about sexual offences, which have been systemically expressed and entrenched both in the justice system and in the press. Yet it is unclear why anonymity should attach to the victim of an offence that causes shame because it is *private* or intimate, and not to the victim of an offence who suffers deep pain arising from an offence that is *violent* or *disfiguring*.

Another issue which might be reconsidered is the guarantee or promise of anonymity, no matter what the circumstances. Under the current *Criminal Code* provision and judicial interpretation, sexual assault can be committed in a number of ways which are not all that intimate or private, and which fall short of the violation that was required to establish the predecessor offence of rape. In other words, the invasion of privacy that is inherent in sexual assault varies significantly with the facts and circumstances of the case. From that perspective, the necessity of an absolute promise of anonymity is less compelling than in the past. It is also less justifiable under the evolving s.2(b) jurisprudence, and its disapproval of absolute prohibitions, than it was in 1988, when *Canadian Newspapers v. Canada (AG)* was decided.

As to closed proceedings, the Supreme Court of Canada's standard in *C.B.C. v. New Brunswick (Re: R. v. Carson)* reflects a healthy suspicion of decisions to exclude the public from the courtroom. There, Mr. Justice La Forest made it clear that it is in the nature of criminal process that the victim's circumstances must be exposed, and that exclusion orders will not be justifiable unless a sufficient evidentiary basis is present to demonstrate why an exception to openness is permissible in the circumstances of a particular case. Though trial judges have the discretion to make that decision, the Supreme Court has indicated that the exercise of that discretion must comply with the *Charter*.

Access to evidence raises problematic issues. If LeSage A.C.J.O.C.'s Bernardo video order felt right in the circumstances, it is more difficult to defend as a matter of principle. The troubling question there was whether the public was entitled to know what was on those tapes, and who, to the contrary, could be considered a victim for purposes of defending the privacy and dignity interests which were at stake. Though his was a dissenting opinion, it is doubtful that LeSage A.C.J.O.C.'s compromise between the audio and video components of the tapes was consistent with Cory J.'s comments on access to evidence in *Vickery v. N.S.S.C. (Prothonotary)*. For the time being though, the Bernardo video order can be viewed as a decision which was based on its exceptional facts. But the questions it raised, on points of principle, will surface again.

Open court and victim privacy have received strong endorsement in the *Charter* jurisprudence. Yet only one of the two can be protected in any given case. As Wilson J. noted in *Edmonton Journal v. Alberta (AG)*, the open court principle and privacy cannot both prevail at the same time; a choice must be made when the two are in conflict. The Supreme Court of Canada has put doctrines in place which are designed to reinforce the open court principle, and accommodate exceptions at the same time. Whether the Court holds more strictly to the principle in the future, or instead grants exceptions generously, to protect the privacy of victims, remains to be seen.

Chapter Seven

Selected Bibliography

Canada:

The Charter of Rights and Freedoms
Schedule B of the Canada Act, 1982, (U.K.) 1982, c. 11

s.1 (guarantee of rights and freedoms subject only to reasonable limits)

s.2(b) (fundamental freedoms: freedom of expression, including freedom of the press and other media of communication)

s.7 (legal rights: life, liberty and security of the person, and principles of fundamental justice)

s.8 (legal rights: the right to be secure against unreasonable search or seizure)

s.15 (equality rights: equality before and under law and equal protection and benefit of law)

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

s. 276 Complainant privacy in several assault proceedings: evidence of complainant's sexual activity inadmissible ("rape shield" provisions)

s. 276.2(1) Jury and public excluded from hearings to determine the admissibility of evidence under s.276 (2) (upon application as per s.276.1)

s. 276.3 Ban on publication of information in s.276.1 hearing

s. 278.1-9 Production of record to accused

s. 486 (1) Exclusion of public from the courtroom in certain cases

s. 486 (1.1) Protection of child witnesses

s. 486 (2.1) Complainant or witness under the age of 18 or who has mental or physical disability may testify outside the courtroom (behind a screen/closed-circuit TV)

s. 486 (2.2) Condition of exclusion (re: testimony given under s.486 (2.2))

s. 486 (2.3) Accused not to personally cross-examine child witness

s. 486 (4.1) Victim/witness anonymity in proceedings not covered by s.486(3)

s. 517 Publication ban on "show cause" hearing at bail proceedings (mandatory on application by the accused)

s. 539 Ban on publication of evidence taken at preliminary inquiry (mandatory on application by the accused)

s. 542 (2) Ban on publication of admission or confessions tendered in evidence at the preliminary inquiry

s. 648 (1) Ban on publication of information at trial which was not presented to jury

s. 649 Ban on the disclosure of jury proceedings

s. 715.1 Videotape evidence of young complainant or witness in sexual assault proceedings is admissible

Young Offenders Act
R.S. 1985, c. Y-1

s. 17 (1) Order restricting publication of information presented at transfer hearing (upon application)

s. 38 (1) Identity not to be published (applies to accused, victim, witnesses)

s. 39 (1) Exclusion of any or all unnecessary persons from hearing

Youth Criminal Justice Act
R.S. 2002, c.1

s. 110(1) Identity of offender not to be published

s.111(1) Identity of victim or witness not to be published

s.118(1) No access to records unless authorized

s.132(1) Exclusion from hearing

Related Provincial Legislation

Child & Family Services Act
R.S.O. 1990, c. C-11

s. 45 (4) Hearings private unless court orders otherwise

s. 45 (7) Order excluding media representatives or prohibiting publication (where the court is of the opinion that the presence of the media or the publication of the report would cause emotional harm to a child involved in the proceedings)

s. 45 (8) Prohibition: identifying child
(applies to witness, participant, subject in proceedings, or child's parents or member of child's family)

Courts of Justice Act
R.S.O. 1990, c. C-43

s. 135 (2) Exclusion of public where there is the possibility of serious harm or injustice to any person

s. 135 (3) Disclosure of information of hearing under s.135 (2) (not contempt of court unless disclosure is expressly prohibited)

s. 136 (1) Prohibition against photography, etc., at court hearing

Fatality Inquiries Act
R.A.S. 2000, c. F-9

s. 41 Private hearings (proceedings can be closed if they involve disclosure of matters of public security, or intimate or personal matters)

Provincial Offences Act
R.S.O. 1990, c. P-33

s. 52 (2) Excluding public from hearing (for specific purpose)

s. 52 (3) Prohibition of publication of evidence or identity (to protect the reputation of a minor)

Victims Rights
Victims Bill of Rights, 1995
S.O. 1999, c.6

The Victims' Rights Act
S.M. 1998, c.44

Case Law

Pre-Charter:
Scott v. Scott, [1913] A.C. 417
(endorsing the open court principles and rejecting privacy as grounds for an *in camera* hearing)

Nova Scotia v. MacIntyre, [1982] 1 S.C.R. 175
(balancing the open court principles against law enforcement objectives and the privacy of the innocent in a search warrant context)

Vickery v. N.S.S.C. (Prothonotary), [1991] 1 S.C.R. 671
(denying a journalist access to videotape evidence of an accused's confession which was illegally obtained)

Post-*Charter*
Aubry v. Les Editions Vice Versa Inc., [1998] 1 S.C.R. 591
(concluding that s.5 of the *Quebec Charter of Rights and Freedoms* protects the right to one's image, as part of a right to privacy)

A. (L.L.) v. B. (A.), [1995] 4 S.C.R. 536
(holding that the *O'Connor* procedure for determining defence access to a complainant's counselling and therapeutic records, in sexual assault proceedings, applies to records held by third party counselling institutions)

Blencoe v. B.C. (Human Rights Commission), [2000] 2 S.C.R. 307
(discussing the scope of "security of the person" under s.7 of the *Charter*, in the context of a claim that delay in the processing of a human rights complaint of sexual harassment denied the accused his constitutional rights)

Canadian Newspapers Co. v. Canada (A.G.), [1988] 2 S.C.R. 122
(upholding a mandatory ban on the publication of the identity of sexual assault victims and reversing the Ontario Court of Appeal decision to invalidate the mandatory ban and uphold a discretionary ban); rev'd. (1985), 49 O.R. (2d) 557 (O.C.A.)

*CBC v. New Brunswick (A.G. (*Re: *R. v. Carson))*, [1996] 3 S.C.R. 480
(upholding s.486(1) of the *Code*, which permits exclusion orders, and invalidating the order in this case)

Dagenais v. C.B.C., [1994] 3 S.C.R. 835
(invalidating a common law publication ban imposed to protect the fair trial of the accused)

Edmonton Journal v. Alberta (A.-G.), [1989] 2 S.C.R. 1326
(invalidating a statutory publication ban on information disclosed in matrimonial proceedings)

Hunter v. Southam, [1984] 2 S.C.R. 145
(linking s.8's guarantee against unreasonable search and seizure to the right of privacy)

M. (A.) v. Ryan, [1997] 1 S.C.R. 158
(holding, in a civil action against a therapist for sexual misconduct, that a partial privilege attaches to psychiatric counselling records, to protect a compelling privacy interest)

R. v. Adams, [1995] 4 S.C.R. 707
(holding that a ban on victim identity under s.486(3) cannot be revoked without the complainant's consent)

R. v. Carosella, [1997] 1 S.C.R. 80 (concluding that the accused has a constitutional entitlement to the production of documents, including counselling records, from either the Crown or third parties)

R. v. Darrach, [2000] 2 S.C.R. 443
(upholding the *Criminal Code*'s post-*Seaboyer* rape shield provisions)

R. v. Ewanchuk, [1999] 1 S.C.R. 330 (confirming that mistake of fact is only available as a defence in sexual assault proceedings where the accused honestly believed the complainant had communicated consent)

R. v. L. (D.O.), [1993] 4 S.C.R. 419
(upholding s. 486 (2.1) of the *Criminal Code* permitting young complainants for certain offences to testify behind screens)

R. v. Levogiannis, [1993] 4 S.C.R. 475
(upholding s. 715.1 of the *Criminal Code* and videotape evidence for young witnesses in sexual assault cases)

R. v. Mentuck, [2001] 205 D.L.R. (4^{th}) 512 (S.C.C.)
(articulating a publication ban doctrine to govern conflict between the open court principles and undercover police operations)

R. v. Mills, [1986] 1 S.C.R. 863
(discussing the accused's right to trial within a reasonable time under s.11(b))

R. v. Mills, [1999] 3 S.C.R. 668
(upholding *Criminal Code* provisions enacted after the decision in *R. v. O'Connor* and restricting an accused's access to a victim's private records)

R. v. Morgentaler, [1988] 1 S.C.R. 30
(invalidating the *Criminal Code*'s abortion provision and discussing security of the person under s.7)

R. v. O'Connor, [1995] 4 S.C.R. 411
(establishing a test to balance the accused's right of full answer and defence, and the victim's privacy right in counselling and therapeutic records)

R. v. O.N.E., [2001] 205 D.L.R. (4^{th}) 542(S.C.C.)
*(*Companion case to *Mentuck*, above)

R. v. Osolin, [1993] 4 S.C.R. 595
(upholding the accused's right to cross-examine the complainant on her medical record in sexual assault proceedings)

R. v. Regan, 2002 S.C.C. 12
(denying a stay of proceedings in sexual assault proceedings on the ground that the importance of prosecuting sexual offences outweighed abuses of authority on the Crown's part)

R. v. Seaboyer, [1991] 2 S.C.R. 577
(invalidating the *Criminal Code*'s rape shield provisions)

Secondary Literature

D. Alderson, "*R. v. O'Connor* and Bill C-46: Two Wrongs Do Not Make A Right" (1996-1997), 39 *Crim. L.Q.* 181-226.

W. J. Anderson, "The Open Court and a Free Press: A View From the Bench", (1994), 23 *L. Soc. Gaz.* 64-67.

N. Bala and H. McCormack, "Accommodating the Criminal Process to Child Witnesses: *L. (D.O.)* and *Levogiannis*" (1994), 25 C.R. (4th) 341-349.

E. Bennett, "Disclosure of Complainant's Medical and Therapeutic Records" (1996), 1 *Can. Crim. L. Rev.* 17-30.

K. Busby, "Discriminatory Uses of Personal Records in Sexual Violence Cases" (1997), 9 *Canadian J. of Women's Law* 148-177.

J. Cameron, "Dialogue and Hierarchy in *Charter* Interpretation: A Comment on *R. v. Mills* (2001), 38 *Alta. L. Rev*. 1051-1968.

_____, "Tradition and Change Under the *Charter*: The Adversary System, Third Party Interests and the Legitimacy of Criminal Justice in Canada", in J. Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Toronto: Thomson Canada Ltd., 1996) 217-238.

_____, "Toward a Theory of Responsible Justice", in *Open Justice* (Montreal: Les Editions Themis, 1994) 138-151.

_____, "The Constitutional Domestication of our Courts: Openness and Publicity in Judicial Proceedings Under the *Charter*", in P. Anisman and A. Linden, *The Media, the Courts, and the Charter* (Toronto: Carswell Co., 1986). 331-353.

_____, "The Rationales for Openness in Judicial Proceedings and the Rationales for Placing Limits on the Principle of Openness" (September 1985), unpublished paper for the Law Reform Commission of Canada.

S. Coughlan, "Complainants' Records After *Mills*: Same As It Ever Was" (2000), 33 C.R. (5th) 300-310.

F. Davey, "Karla's Web: A Cultural Investigation of the Mahaffy-French Murders" (Toronto: Penguin Books, 1994).

J. Dawson, "Compelled Production of Medical Records" (1998), 43 *McGill L.J.* 25-65.

R. Delisle, "Adoption, Sub-silentio, of the Paciocco Solution to Rape Shield Laws" (2001), 36 C.R. (5th) 254-257.

F. Falzon, "Hardly a 'Natural Born' *Charter* Right: Why Section 2(b) of the *Charter* Should Not Include a Right to Attend Hearings" (1994-1995), 5 *N.J.C.L.* 321-362.

M. Fuerst, "When Societal Rights Outweigh A Right to Confrontation: *Charter* Protection for Child Witnesses", in J. Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Toronto: Thomson Canada Ltd., 1996) 161-179.

E. Grace, "Case Comment: *R. v. Mills* - Production of Health Records in Criminal Sexual Abuse Cases" (1999-2000), *J. of Women's Health and Law* 279-292.

E. Grace, "Compelled Production from Third Parties of Health Records in Sexual Abuse Cases: Legal Principles and Procedures and Guidelines for Health Care Providers" (1999-2000) *J. of Women's Health and Law* 59-91.

E. Grace and S. Vella, *Civil Liability for Sexual Abuse and Violence in Canada* (Toronto: Butterworths, 2000)

J. Gilmour, "Counselling Records: Disclosure in Sexual Assault Cases", in J. Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Toronto: Thomson Canada Ltd., 1996) 239-269.

H. Holmes, "An Analysis of Bill C-46, Production of Records in Sexual Offence Proceedings" (1997), 2 *Can. Crim. L. Rev.* 71-110.

K. Kelly, "You must be crazy if you think you were raped": Reflections on the Use of Complainants' Personal and Therapy Records in Sexual Assault Trials" (1997), 9 *Can. J. of Women & the Law* 178-195.

Law Reform Commission of Canada, *Public and Media Access to the Criminal Process*, Working Paper 56 (1987)

D. Layton, "Third Party Production, Legal-Professional Privilege and Full Answer and Defence" (2000), 5 *Can. Crim. L. Rev*. 277-316.

M.D. Lepofsky, *Open Justice: The Constitutional Right to Attend and Speak About Criminal Proceedings* (Toronto: Butterworths, 1985).

_____, "Open Justice in 1990: The Constitutional Right to Attend and Report on Proceedings", in D. Schneiderman, *Freedom of Expression and the Charter* (Toronto: Carswell Co., 1991) 3-84.

A. Linden, "Limitations on Media Coverage of Legal Proceedings: A Critique and Some Proposals for Reform", in P. Anisman and A. Linden, eds., *The Media, the Courts and the Charter*, (Toronto, Carswell Co., 1986). 301-330.

B. MacFarlane & H. Keating, "Horrific Video Tapes as Evidence: Balancing Open Court and Victims' Privacy" (1999), 41 *Crim. L.Q.* 413.

D. MacIntosh, "Protecting Children: The Constitutionality of Sections 715.1 and 486(2.1) of the *Criminal Code*" (1993-1994), 4 *N.J.C.L.* 234-247.

D. Martin, "Rising Expectations: Slippery Slope or New Horizon? The Constitutionalization of Criminal Trials in Canada", in J. Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Toronto: Thomson Canada Ltd., 1996) 87-121.

D. Paciocco, "Techniques for Eviscerating the Concept of Relevance: A Reply and Rejoinder to "Sex with the Accused on Other Occasions: The Evisceration of Rape Shield Protection" (1995), 33 C.R. (4th) 365-380.

K. Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999)

P. Sankoff, "Crown Disclosure after *Mills*: Have the Ground Rules Suddenly Changed?" (2000), 28 C.R. (5th) 285-294.

H. Stewart, "*R. v. Darrach*: A Step Forward in the Constitutionalization of Fault?"(1999), 4 *Can. Crim. L. Rev.* 9-23

D. Stuart, "*Mills*: Dialogue with Parliament and Equality by Assertion at What Cost? (2000), 28 C.R. (5th) 275-284.

A. Young, *The Victims of Crime Research Series*, "The Role of the Victim in the Criminal Process: A Literature Review - 1989 to 1999.

U.K. and the Commonwealth

A. Ashworth, "Victims' Rights, Defendants' Rights and Criminal Procedure" in A. Crawford and J. Goodey eds., *Integrating a Victim Perspective within Criminal Justice: International Debates*, (Aldershot: Dartmouth Publishing Co. Ltd., 2000) 185-204.

R.A. Caldwell and J.M.E. Garrow, "Garrow and Caldwell's Criminal Law in New Zealand, 6th ed." (Wellington: Butterworths of New Zealand Ltd., 1981) 360-361, 397.

B. Cook, F. David and A. Grant, "Victim's Needs, Victim's Rights: Policies and Programs for Victims of Crime in Australia" (1999), Canberra: Australian Institute of Criminology, 122-153.

M. Findlay, S. Odgers and S. Yeo, *Australian Criminal Justice* (Victoria: Oxford University Press, 1999) 333-355.

S. Garkawe, "The Role of the Victim During Criminal Court Proceedings" (1994), 17 *UNSW L. J.* 595-616.

Great Britain Central Office of Information (1990), *Victim's Charter: A Statement of the Rights of Victims of Crime*, prepared for the Home Office by the Central Office of Information, London: H.M.S.O.

R.I. Mawby, "Victims' needs or victims' rights: alternative approaches to policy-making" in M. Maguire and J. Pointing eds., *Victims of Crime: a new deal?* (Milton Keynes: Open University Press, 1988) 127-137.

D. Miers, "The Responsibilities and the Rights of Victims of Crime" (1992), 55 *Modern L. Rev.* 402-505.

H. Reeves and K. Mulley, "The New Status of Victims in the UK: Opportunities and Threats" in A. Crawford and J. Goodey, eds., *Integrating a Victim Perspective within Criminal Justice: International DebatesI* (Aldershot: Dartmouth Publishing Co. Ltd., 2000) 125-145.

J. Shapland, "Victims and Justice: Needs, Rights and Services", in J. van Dijk et al. eds., *Criminal Law in Action: An Overview of Current Issues in Western Societies* (Deventer: Kluwer Law and Taxation Publishers, 1986) 393-404.

J.R. Spencer, "Improving the Position of the Victim in English Criminal Procedure" (1997), 31 *Israel L. Rev.* 286-299.

The United States

The United States Constitution
The First Amendment
(guarantees the freedom of speech and the freedom of the press)

Sixth Amendment
(guarantees the accused in criminal prosecutions a speedy and public trial)

Case law
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)
(holding that a civil damages award for broadcasting the name of a rape-murder victim, obtained from courthouse records, was unconstitutional)

Florida Star v. B.J.F., 491 U.S. 524 (1989)
(concluding that the First Amendment precludes damages against a newspaper for publishing the name of a rape victim which was obtained from a publicly released police report)

Gannett Co. v. DePasquale, 443 U.S. 368 (1979)
(holding that neither the press nor the public has the constitutional right to attend *pre*-trial criminal proceedings)

Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982)
(holding that the mandatory closure of trials, for certain sexual offences, during the testimony of victims under age 18, violated the First Amendment)

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978)
(holding unconstitutional a state law punishing media disclosure of confidential investigations into judicial misconduct)

Nebraska Press Assn v. Stuart, 427 U.S. 539 (1976)
(concluding that once a public hearing is held, what transpires cannot be subject to prior restraint)

Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977)
(striking a state court injunction prohibiting the news media from publishing the name or photograph of a defendant in juvenile court)

Press-Enterprise Co. v. Superior Court of Calif., 464 U.S. 501 (1984)
(concluding that the guarantee of open public proceedings in criminal trials invcludes *voir dire* examination of jurors)
Richmond Newspapers v. Virginia, 448 U.S. 555 (1980)
(upholding a constitutionally protected right of access to courtrooms)

Ross v. Midwest Communications, 870 F.2d 271 (5th Cir. 1989)
(holding that the use of a rape victim's first name and picture of her residence was not actionable as an invasion of privacy, because such details were newsworthy in the circumstances of that documentary)

Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979)
(holding that newspapers cannot be charged for publishing the name of a juvenile offender)

State v. Globe Communications Corp., 648 So. (2d) 110 (1994)
(finding Florida's provision protecting the identity of sex offense victims invalid on its face, in criminal proceedings against one of the newspapers that published the name of the victim in William Kennedy Smith's rape trial)

Secondary Literature

P.A. Albrecht, "The Functionalization of the Victim in the Criminal Justice System" (1999), 3 *Buff. Crim. L. Rev.* 91.

M. Ash, "On Witnesses: A Radical Critique of Criminal Court Procedures" in P. Rock, ed., *Victimology* (Aldershot: Dartmouth Publishing Co. Ltd., 1994) 159-198.

H. Benedict, "Commentaries" (1993), 61 *Fordham L. Rev.* 1141-1145).

H. Benedict, *Virgin or Vamp: How the Press Covers Sex Crimes* (USA: Oxford University Press, 1992).

B.J. Berlin, "Revealing the Constitutional Infirmities of the '*Crime Victims Protection Act*': Florida's New Privacy Statute for Sexual Assault Victims" (1995), 23 *Fla. St. U. L. Rev.* 513-560.

K. Chopra, "Peeping Press vs. Private Persecution: A Resolution of the Conflict between Freedom of the Press and Freedom From the Press" (1999), 19 *Loy. L.A. Ent. L.J.* 253-277.

S. Cohn, "Protecting Child Rape Victims From the Public and Press After *Globe Newspaper* and *Cox Broadcasting*" (1983), 51 *Geo. Wash. L. Rev.* 269-289.

Comment,"An Accommodation of Privacy Interests and First Amendment Rights in Public Disclosure Cases"(1976), 124 *U. Pa. L. Rev.* 1385-1417.

D.W. Denno, "Perspectives on the Disclosing Rape Victims' Names" (1993), 61 *Fordham L. Rev.* 1113-1131, and "Commentaries", at 1133-45.

L. Fairstein, "Commentaries"(1993), 61 *Fordham L. Rev.*1137-1140.

G. M. Fenner & J.L. Koley, "Access to Judicial Proceedings: To *Richmond Newspapers* and Beyond"(1981),16 *Harv. C.R.-C.L. L. Rev.* 415-459.

A. Frumkin, "The First Amendment and Mandatory Courtroom Closure in *Globe Newspaper Co. v. Superior Court*: The Press' Right, The Child Rape Victim's Plight"(1984), 11 *Hastings Const. L. Q.* 637-664.

M. Gartner, "Commentaries"(1993), 61 *Fordham L. Rev.* 1133-1135.

G. Giampetruzzi, "Raped Once but Violated Twice: Constitutional Protection of a Rape Victim's Privacy"(1992), 66 *St. John's L. Rev.* 151-177

A. Goy, "The Victim-Plaintiff in Criminal Trials and Civil Law Responses to Sexual Violence"(1996), 3 *Cardozo Women's L.J.* 335-348.

P. Grobman, "The Constitutionality of Statutorily Restricting Access to Judicial Proceedings: The Case of the Rape Shield Mandatory Closure Provision"(1986), 66 *B.U. L. Rev.* 271-310.

C. Haughwout, "Prohibiting Rape Victim Identification in the Media: Is it Constitutional?"(1992), 23 *U. Tol. L. Rev*. 735-750.

J. Hearn, "*Globe Newspaper*: Sounding the Death Knell for Closure in Courtroom Proceedings?"(1983), 3 *Pace L. Rev.* 395-414.

Lynne Henderson, Criminal Law Symposium Commentary: "The Federal Victims' Rights Amendment" (1998), 10 *St. Thomas L. Rev.* 579.

S. H. Hutt, "In Praise of Public Access: Why the Government Should Disclose the Identities of Alleged Crime Victims"(1991), 41 *Duke L.J.* 368-414.

A. Koskela, "Victims' Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System" (1997), 34 *Idaho L. Rev.* 157.

S. M. Leone, "Protecting Rape Victims' Identities: Balance Between the Right to Privacy and the First Amendment"(1993), 27 *New Eng. L. Rev.* 883-913.

P. Marcus and T. McMahon, "Limiting Disclosure of Rape Victims' Identities"(1991), 64 *Cal. L. Rev.* 1019-1055.

R. Mostseller, "Victims Rights and the Constitution: Moving from Guaranteeing Participatory Rights to Benefiting the Prosecution" (1998), 29 *St. Mary's L.J.* 1053.

J. Nowaczewski, "The First Amendment Right of Access to Civil Trial After *Globe Newspaper Co. v. Superior Court*"(1984), 51 *U. Chi. L. Rev.* 286-314.

K. O'Brien, "South Carolina: Last Haven for Rape Victim Privacy?"(1999), 50 *S.C.L. Rev*. 873-885 .

L. Perry, "When Identities are 'Wrongfully Disclosed': How *The Florida Star v. B.J.F.* Has Changed Privacy Protection"(1990), 3 *U. Fla. J. L. & Pub. Pol'y* 101-135.

W.T. Pizzi and W. Perron, "Crime Victims in German Courtrooms: A Comparative Perspective on American Problems"(1996), 32 *Stanford J. of Int'l. L*. 37-64.

K. Rhodes, "Open Court Proceedings and Privacy Law: Re-Examining the Bases for the Privilege"(1996), 74 *Tex. L. Rev.* 881-912.

K. Sanchez, "Barring the Media From the Courtroom in Child Abuse Cases: Who Should Prevail?"(1998), 46 *Buff. L. Rev.* 217-256.

L. Sebba, "Will the "Victim Revolution" Trigger A Reorientation of the Criminal Justice System?"(1997), 31 *Israel L. Rev*. 379-428.

M. Stanton, "*Florida Star v. B.J.F.*: The Wrongful Obliteration of the Tort of Invasion of Privacy Through the Publication of Private Facts"(1991), 18 *Hastings Const. L.Q.* 391-416.

Samuel D. Warren & Louis D. D.Brandeis, "The Right to Privacy"(1890), 4 *Harv. L. Rev.* 193-220 .

L. Weakland, "Confusion in the Courthouse: The Legacy of the *Gannett* and *Richmond Newspapers* Public Right of Access Cases"(1986), 59 *S. Cal. L. Rev.* 603-639.

S. Wiegand, "Sports Heroes, Sexual Assault and the Unnamed Victim" (2001), 12 *Marq. Sports L. Rev.* 501-514.

C. Work, "Whose Privacy?"(2001), 55 *Montana L. Rev.* 209 (1994).

R.D. Workman, "Balancing the Right to Privacy and the First Amendment"(1992), 29 *Hous. L. Rev.* 1059-1089.

Civilian and Other Jurisdictions

S. Boylan, "Coffee from a Samovar: The Role of the Victim in the Criminal Procedure of Russia and the Proposed Victims Rights Amendment to the United States Constitution" (1998), 4 *U.C. Davis J. of Int'l. L & Pol'y* 103-118.

D. Krapac, "The Victim's Procedural Role in the Yugoslav Criminal Processes" (1985), 11 *Rev. Of Socialist L*. 369-386.

M. Joutsen, "Changing Victim Policy: International Dimensions", in G. Kaiser, H. Kury, and J. Albrecht, eds., *Victims and Criminal Justice* Vol. 3, part 2 (Freiburg: Max Planck Institute, 1991) 765-797.

M. Joutsen, "Listening to the Victim: The Victim's Role in European Criminal Justice Systems" (1987), 34 *Wayne L. Rev.* 95-124.

M. Kaiser, "The Status of the Victim in the Criminal Justice System According to the *Victim Protection Act*", in G. Kaiser, H. Kuey, and J. Albrecht, eds., *Victims and Criminal Justice* Vol. 2 (Freiburg: Max Planck Institute, 1991) 543-578.

H. Kury and G. Kaiser, "The Victim's Position Within the Criminal Proceedings - An Empirical Study", in G. Kaiser, H. Kuey, and J. Albrecht, eds., *Victims and Criminal Justice* Vol. 2 (Freiburg: Max Planck Institute, 1991) 579-628.

I. Melup, "United Nations: Victims of Crime; Implementation of the Conclusions and Recommendations of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders; Measures Taken to Implement the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power" (1991), 2 *Int'l. Rev. Victimology* 29-59.

E. Muller-Rappard, "Perspectives on the Council of Europe's Approach to the Issue of Basic Principles of Justice for Victims of Crime" (1990), 12 *Human Rights Quarterly* 281-245.

J.F. Nijboer, "Protection of Victims in Rape and Sexual Abuse Cases in the Netherlands" (1997), 31 *Israel L. Rev.* 300-336.

K. Stefanowicz, "The Victim of Crime in Polish Criminal Law" (1992), 21 *Capital U. L. Rev.* 83-94.

J.J.M. van Dijk, "Victim Rights: A Right to Better Services or a Right to Active Participation?", in J. van Dijk et al. eds., *Criminal Law in Action: An Overview of Current Issues in Western Societies* (Deventer: Kluwer Law and Taxation Publishers, 1986) 351-375.

United Nations

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power
A/Res/40/34, 29 November 1985, 96th plenary meeting

Para. 6(d) (providing that the responsiveness of judicial and administrative processes to the needs of victims should be facilitated by ... taking measures to minimize inconvenience to victims, *protect their privacy*, when necessary, and ensure their safety)

International War Crimes Tribunal Act

Art. 22 (stating that the International Tribunal shall provide in its rules and procedures for the protection of victims and witnesses, and that such measures shall include the conduct of *in camera* proceedings and the protection of the victim's identity)

I. Melup "United Nations: Victims of Crime: Implementation of the Conclusions and Recommendations of the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders; Measures Taken to Implement the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1991), 2 *Int'l Rev. of Victimology* 29-59

CHAPTER 1

[1] (1890) 4 *Harv. L. Rev.* 193, at 196.

[2] *Id.*

[3] C. Work, "Whose Privacy?" (1994), 55 *Montana L. Rev.* 209, at 221.

[4] K. Kury and M. Kaiser, "The Victim's Position within the Criminal Proceedings - An Empirical Study", in G. Kaiser, H. Kury and H.-J. Albrecht, *Victims and Criminal Justice*, Vol. 51 Criminological Research Reports 581 (Freiburg: Max Planck Institute for Foreign and International Penal Law, 1991).

[5] *Charter of Rights and Freedoms*, being Part 1 of the *Constitution Act, 1982*, enacted by the *Canada Act 1982* (U.K.) c.11.

[6] *The Queen v. Bernardo*, unreported decision of LeSage A.C.J.O.C., May 29, 1995, at 38 (emphasis in original).

[7] Preamble, *The Victims' Bill of Rights,* S.O.1995, c.6.

[8] *Id*.

[9] *Id*. at s.2(1)2.

[10] *Id*. (emphasis added).

[11] See s.722 of the *Criminal Code* (providing that the court shall, for purposes of sentencing, consider any statement prepared by a victim of the crime describing the harm done or loss arising from the commission of the offence); S.C. 1995, c.22, s.6.

[12] See, e.g., s.738 and following in the *Criminal Code* (providing for orders that the offender make restitution to the victim or victims or his or her crime); S.C. 1995, c.22, s.6.

[13] *Bernardo*, *supra* note 6, at 38.

[14] *Id*.

[15] *Id*.

[16] Section 271, *Criminal Code* 1980-81-82, c.125, s.19.

[17] *R. v. Lavallee*, (1990), 76 C.R. (3d) 329.

[18] See s.273.2, 1992, c.38, s.1 (indicating when belief in consent is not a defence); see also *R. v. Ewanchuck* (1999), 22 C.R. (5th) 1 (elaborating on the requirements of the statutory provision, and confirming that the accused must how an honest and mistaken belief that the complainant had communicated consent).

[19] See s.33.1, 1995, c.32, s.1 (defining the circumstances, which include interfering with the bodily integrity of another person, when a defence of self-induced intoxication is not available; see also *R. v. Daviault*, (1994), 33 C.R. (4th) 165 (S.C.C.) (recognizing intoxication as a defence to a charge of sexual assault).

[20] It is understood that the complainant in sexual assault proceedings may either be a male or a female. The history of sexual assault, and the privacy and equality concerns of complainants is not gender-neutral. Recognizing, then, that males can also be victims but that the privacy issues have been discussed in gender-specific terms, the Report in most cases describes the complainant as female.

[21] See Chapter Three, titled "Victim privacy, sexual assault, and the *Charter*".

[22] [1996] 3 S.C.R. 480.

[23] *Id*. at 504.

[24] *Id*.
[25] *Id*.
[26] *Id*. at 505.
[27] See Chapter Two, titled "The open court principle and *the Charter*".
[28] [1988] 2 S.C.R. 122.
[29] [1989] 2 S.C.R. 1326.
[30] [1994] 3. S.C.R. 835.
[31] *Supra*, note 22.
[32] [1991] 2. S.C.R. 577.
[33] [1995] 4 S.C.R. 411.
[34] [1999] 3 S.C.R. 668.

CHAPTER 2

[1] *Criminal Code*, 1892, c.29.
[2] See s.517 (providing for an order of non-publication of information disclosed in a show cause hearing, which is mandatory on application by the accused, where either the accused or the prosecutor intends to show cause under s.515).
[3] See s.539 (1) (providing for a non-publication order of evidence taken at a preliminary inquiry, which is discretionary at the request of the prosecutor and mandatory at the request of the accused).; see also s.542 (2) (prohibiting the disclosure of any admission or confession tendered in evidence at a preliminary inquiry).
[4] See *Dagenais v. C.B.C.*, [1994] 3 S.C.R. 835.
[5] See s.631(6) (protecting the identity of jurors).
[6] See s.649 (prohibiting the disclosure of jury proceedings).
[7] *Criminal Code*, 1892, c.29, ss.794, 849.
[8] *Criminal Code*, R.S.C. 1906, c. 146, s.645.
[9] *Id*., s.645 (3).
[10] As enacted in 1953-53, s.428 provided as follows:

> The trial of an accused that is a corporation or who is or appears t be sixteen years of age or more shall be held in open court, but where the court, judge, justice or magistrate, as the case may be, is of opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice to exclude all or any members of the public from the court room, he may do so. *Criminal Code*, 1953-54, c.51, s.428.

[11] See *C.B.C. v. New Brunswick (Re: R. v. Carson)*, [1996] 3 S.C.R. 480.
[12] *Supra*, note 8; see also the *Controlled Drugs and Substances Act*; and the *Firearms Act*, S.C. 1995, c.39. See *Young Offenders Act*, R.S.C. 1985, c.Y-1, ss. 38 (prohibiting the publication of the names of young persons involved in the commission or prosecution of offences); 39 (granting a court or justice the power to exclude a person or the public from the proceedings); and 17 (providing for the non-publication of information disclosed at an application for transfer to ordinary court). The *Youth Criminal Justice Act,* R.S.C. 2002, c.1, came into effect April 1, 2003, ss. 110 and 111 (identity of offender, victims and witnesses not to be published); 132

(granting a court or justice the power to exclude a person or the public from the proceedings); 118 (prohibiting access to records unless authorized).

[13] See *Dagenais v. C.B.C.* [1994] 3 S.C.R. 835; *R. v. Mentuck* (2001), 205 D.L.R. (4th) 512 (S.C.C.); and *R. v. O.N.E.* (2001), 205 D.L.R. (4th) 542 (S.C.C.).

[14] *Charter of Rights and Freedoms*, being Part 1 of the *Constitution Act, 1982*, enacted by the *Canada Act 1982* (U.K.) c.11.

[15] Section 1 of the *Charter id*., states:

> The *Canadian Charter of Rights and Freedoms* 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.

[16] [1988] 2 S.C.R. 122.

[17] [1989] 2 S.C.R. 1326.

[18] [1994] 3 S.C.R. 835.

[19] [1996] 3 S.C.R. 480.

[20] [1913] A.C. 417.

[21] *Id*., at 445.

[22] *Id*. at 447.

[23] *Id.* at 463.

[24] *Id*.

[25] *Id.* at 477.

[26] *Id.* at 485.

[27] *Id*.

[28] *Gazette Printing Co. v. Shallow* (1909), 41 S.C.R. 339, at 359.

[29] [1936] A.C. 177, at 200 (J.C.P.C.).

[30] [1982] 1 S.C.R. 175.

[31] *Id*. at 183.

[32] *Id*.

[33] *Id*. at 183-4.

[34] *Id*.

[35] *Id*. at 185.

[36] *Id*. (emphasis added)

[37] *Id*. at 186-7.

[38] Section 2 states that "Everyone has the following fundamental freedoms: ... (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication"; the *Charter*, *supra* note 14.

[39] Section 32, *id*., specifies that the *Charter* applies to the Parliament and government of Canada, including matters relating to the Territories, and to the legislature and government of each province; the *Charter*, *supra* note 14.

[40] Section 8, *id*., provides: "Everyone has the right to be secure against unreasonable search or seizure"; *Id.*

[41] Section 7, *id*., provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice"; *Id.*

[42] [1986] 1 S.C.R. 103.

[43] [1988] 2 S.C.R. 122.
[44] When first enacted, s.442(3) provided that the order could only be made if the prosecut or applied for it, but then it was mandatory for the trial judge to grant it. S.C. 1974 -75-76, c.93. It was amended to enable the judge to make the order at his or her initiative, and to make the order mandatory once either the prosecutor or complainant applied for it. S.C. 1980-81-82, c.125.
[45] (1985), 49 O.R. (2d) 557 (O.C.A.).
[46] *Id*. at 574-75.
[47] *Id*. at 577.
[48] *Id*. at 564.
[49] It is understood that the complainant in sexual assault proceedings may either be a male or a female. The history of sexual assault , and the privacy and equality concerns of complainants is not gender-neutral. Recognizing, then, that males can also be victims but that the privacy issues have been discussed in gender-specific terms, the Report in most cases describes the complainant as female.
[50] [1988] 2 S.C.R. 122, at 129.
[51] *Id*. at 130.
[52] *Id*.
[53] *Id*. at 131-32 (emphasis added).
[54] *Id*. at 133. For instance, the section applies only to sexual offences, it restricts publication of facts related to identity and does not provide for a general ban, and is limited to instances where the prosecutor or complainant requests the ban.
[55] See, *e.g.*, *R. v. Several Unnamed Persons* (1983), 44 O.R. (20) 84 (Ont. H.C.) (dismissing applications by several *accused* charged with gross indecency for orders banning the disclosure of their identities).
[56] See, *e.g. Peterborough City v. Ramsden*, [1993] 2 S.C.R. 1084.
[57] Note, though, that her testimony was based on interview information with more than 100 victims. *Supra* note 45, at 563-64.
[58] (1989), 64 D.L.R. (4th) 577 (S.C.C.).
[59] Justice Cory wrote for himself, as well as for Chief Justice Dickson and Lamer J.; together with Wilson J., who concurred, the four judges formed a majority. La Forest J.'s dissent was joined by L'Heureux-Dubé J. and Sopinka J.
[60] *Id*. at 607.
[61] *Id*.
[62] *Id*. at 608.
[63] *Id*. at 610.
[64] *Id*.
[65] *Id*. at 614.
[66] *Id*. at 615.
[67] *Id*. at 589.
[68] *Id*. at 590.
[69] *Id*. at 592.
[70] *Id*. at 593.
[71] *Id*. at 600.
[72] *Id*.

[73] *Id*. at 603.
[74] [1991] 1 S.C.R. 671.
[75] *Id*. at 679.
[76] *Id*. at 687 (emphasis added).
[77] *Id*. at 702 (emphasis added).
[78] *Id*. (emphasis added).
[79] *Id*. at 714 (emphasis added).
[80] *Id*.
[81] [1994] 3 S.C.R. 835.
[82] *Id*.
[83] *Id*. at 876 (emphasis in original).
[84] *Id*. at 877.
[85] *Id*.
[86] *Id*. at 875.
[87] *Id*. at 878 (emphasis in original).
[88] In addition to *C.B.C. (Re: R. v. Carson)*, see *R. v. Mentuck* (2001), 205 D.L.R. (4 th) 512; and *R. v. O.N.E.*, (2001), 205 D.L.R. (4th) 542.
[89] *Dagenais*, at 857 -67 (explaining the convoluted grounds for finding jurisdiction to hear the appeal).
[90] *Id*. at 877.
[91] *Id*.
[92] *Id*.
[93] [1996] 3 S.C.R. 480.
[94] R.S.C. 1985, c.C-46.
[95] *New Brunswick*, at 508.
[96] *Id*. at 515-6.
[97] *Id*. at 516 and f.
[98] *Id*. at 521.
[99] *Id*.
[100] *Id*.
[101] "Indeed", La Forest J. remarked, "Rice Prov. Ct. J. expressly stated that he did not have all the facts before him in making the order"; *id*. at 520.
[102] *Id*. at 521.
[103] *Id*. at 522.
[104] *Id*. at 493.
[105] *Id*.
[106] *Id*. at 497.
[107] *Id*. at 504.
[108] [1995] 4 S.C.R. 411, see Chapter Three.
[109] *Id*.
[110] *Id*.
[111] *Id*. at 503.
[112] *Id*. at 505.
[113] See *R. v. Mentuck* (2001), 205 D.L.R. (4th) 512; and *R. v. O.N.E.* (2001), 205 D.L.R. (4th) 542.

[114] In *Mentuck*, Iacobucci J. re-framed the *Dagenais* test to allow explicitly for other crucial aspects of the administration of justice. There, the issue was whether a publication ban on the details of an undercover operation violated s.2(b) of the *Charter*. After agreeing with the *Dagenais* requirement that the ban be necessary and proportional, he stated the proper analytical approach this way: In his view, a ban should only be ordered when:

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

CHAPTER THREE

[1] See Chapter Two.
[2] It is understood that the complainant in sexual assault proceedings may either be a male or a female. The history of sexual assault, and the privacy and equality concerns of complainants is not gender-neutral. Recognizing, then, that males can also be victims but that the privacy issues have been discussed in gender-specific terms, the Report in most cases describes the complainant as female.
[3] [1991] 2 S.C.R. 577.
[4] [1995] 4 S.C.R. 411.
[5] [1999] 3 S.C.R. 668.
[6] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.
[7] *Hunter v. Southam*, [1984] 2 S.C.R. 145, at 155.
[8] *Id*. at 155.
[9] *Id*.
[10] *Id*. at 159 (emphasis added).
[11] *Id*.
[12] *R. v. Dyment*, [1988] 2 S.C.R. 417, at 428.
[13] *Id*. at 427.
[14] *Id*. at 428.
[15] *Id*. at 426.
[16] *Id*. at 429.
[17] *Id*.
[18] Section 7 states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." *Charter*, *supra* note 6.
[19] *R. v. Mills*, [1986] 1 S.C.R. 863.
[20] Section 11 states that "Any person charged with an offence has the right ... (b) to be tried within a reasonable time." *Charter*, *supra* note 6.
[21] *Supra* note 19, at 918 (stating that the fundamental purpose of s.11(b) is to secure, within a specific framework, the more extensive right to liberty and security of the person of which no

one may be deprived except in accordance with the principles of fundamental justice.)
[22] *Id*.
[23] *Id*.
[24] [1988] 1 S.C.R. 30, at 54.
[25] *Id*.
[26] *Id*. at 56.
[27] *Id*. at 171.
[28] *Id*. at 175 (emphasis added).
[29] 1980-81-82-83, c. 125, s.19.
[30] R.S.C. 1985, c.C-46.
[31] *Id*.
[32] Section 273.2 (where belief in consent is not a defence); 1992, c.38, s.1.
[33] Section 33.1 (when defence of self-induced intoxication is not available); 1995., s.32, s.1.
[34] As noted above , the complainant, in this study, is described in gender -specific terms. By the same token, the accused is referred to as "he". Although there are exceptions to the gender -specific terminology used here, the debate about victims privacy in sexual assault proceedings presupposes that the accused and the victim are gender-specific individuals.
[35] [1991] 2 S.C.R. 577.
[36] *Criminal Code*, R.S.C. 1985, c. C-46 (formerly s.246.6 and 246.7 of the *Criminal Code*, R.S.C. 1970, c. C-34).
[37] *Seaboyer*, at 634-36.
[38] *Id*. at 711.
[39] *Id*. at 613. Those exceptions were rebuttal evidence, evidence going to identity, and evidence relating to consent to sexual activity on the same occasion as the trial incident.
[40] *Id*. at 620.
[41] *Id*. at 619.
[42] *Id*. at 605-6.
[43] *Id*. at 617.
[44] *Id*. at 603-4.
[45] *Id*. at 619.
[46] *Id*. at 598.
[47] *Id*. at 612.
[48] *Id*. at 634-36.
[49] *Id*. at 712.
[50] *Id*.
[51] *Id*. at 648.
[52] The most common myths and stereotypes are listed in her reasons, *id*., at 651-53.
[53] *Id*. at 655.
[54] *Id*. at 650.
[55] *Id*. at 665.
[56] *Id*. at 664.
[57] *Id*. at 665.
[58] *Id*. at 700.
[59] *Id*. at 702-3.

[60] *Id*. at 709-10 (emphasis in original).
[61] S.C. 1992, c.38.
[62] [1995] 4 S.C.R. 411.
[63] S.C. 1997, c. 30.
[64] [1999] 3 S.C.R. 668.
[65] [1993] 4 S.C.R. 419.
[66] See Section 715.1, R.S.C., 1985, c.C-46.
[67] *L.(D.O.)*, at 441.
[68] *Id*. at 441-42.
[69] *Id*. at 465.
[70] See s.486(2.1), R.S.C. 1985, c. 19.
[71] See Chapter Two.
[72] *O'Connor*, at 503 (emphasis added).
[73] The other central issue in *O'Connor*, which is not discussed here, is whether the accused was entitled to a stay of proceedings in the circumstances.
[74] [1991] 3 S.C.R. 326.
[75] Note that whereas *Stinchombe* addressed the duties of Crown officers, who are unquestionably bound by the *Charter*, third parties in possession of records pertaining to a complainant are not.
[76] Thus the joint opinion stated that in cas es involving the production of third party records, "we are concerned with the competing claims of a *constitutional right to privacy* in the information, on the one hand, and the right to full answer and defence on the other." *O'Connor*, at 433 -34 (emphasis added).
[77] *O'Connor*, at 479.
[78] *Id.*, at 479-80.
[79] *Id*. at 480.
[80] *Id*.
[81] *Id*. at 483.
[82] *Id*. at 482.
[83] *Id*. at 483.
[84] *Id*.
[85] *Id*. at 484.
[86] *Id*. at 487 (emphasis added).
[87] *Id*. at 486.
[88] *Id*. at 490 (emphasis added).
[89] *Id*. at 488.
[90] *Id*.
[91] *Id*.
[92] *Id*.
[93] *Id*. at 491.
[94] *Id*. at 492.
[95] *Id*. at 503.
[96] [1999] 3 S.C.R. 668.
[97] [1995] 4 S.C.R. 536, at 581.
[98] *Id*. at 581-82.

[99] [1997] 1 S.C.R. 80.
[100] See Chapter Two.
[101] [1997] 1 S.C.R. 157.
[102] Id., at 171.
[103] *Id*. at 175.
[104] *Mills*, at 688.
[105] *Id*.
[106] *Id*. at 689.
[107] *Id*.
[108] *Id*. at 713.
[109] *Id*. at 718.
[110] *Id*. at 719.
[111] *Id*. at 719-20.
[112] *Id*. at 724.
[113] *Id*. at 726.
[114] *Id*. at 727.
[115] *Id*. at 741.
[116] *Id*. at 727.
[117] *Id*.
[118] *Id*. at 747.
[119] [2000] 2 S.C.R. 443.
[120] [1999] 1 S.C.R. 330.
[121] [2002] S.C.C. 12.
[122] *Id*. at para. 115.

CHAPTER FOUR

[1] The First Amendment states that "Congress shall make no law ... abridging the freedom of speech or of the press", and the prohibition also applies to the fifty states through the Fourteenth Amendment. The Sixth Amendment which also binds the states as well as the federal government, states that in all criminal prosecutions, the accused "shall enjoy the right of a speedy and public trial". *The United States Constitution*.
[2] S. Boylan, "Coffee From A Samovar: The Role of the Victim in the Criminal Procedure of Russia and the Proposed Victim Rights Amendment to the United States Constitution" (1998), 4 *U.C. Davis J. of Int'l L. & Pol'y* 103, at 105.
[3] See generally M. Joutsen, "Listening to the Victim: The Victim's Role in European Criminal Justice Systems", (1987) 34 *Wayne L. Rev.* 95-124.
[4] *Id*. at 115.
[5] Though common law systems generally permit private prosecutions, criminal proceedings are rarely initiated by private citizens, and the victims of crimes, otherwise, have been viewed as witnesses with no independent status in the process.
[6] See A. Goy, "The Victim-Plaintiff in Criminal Trials and Civil Law Responses to Sexual Violence", (1996) 3 *Cardozo Women's L.J.* 335-348; and W. T. Pizzi and W. Perron, "Crime Victims in German Courtroons: A Comparative Perspective on American Problems", (1996) 32

Stanford J. of Int'l L. 37-64.
[7] Goy, *id*., at 336.
[8] Pizzi and Perron, *supra* note 6, at 59.
[9] Goy, *supra* note 6, at 340-41, and Pizzi and Perron, *id.*, at 60-61. Further information about the kind of public interest that will outweigh victim privacy was not provided.
[10] See Chapter Two.
[11] J.R. Spencer, "Improving the Position of the Victim in English Criminal Procedure", (1997), *Israel L. Rev.* 286, at 290.
[12] *Id*.
[13] *Sexual Offences (Amendment) Act 1976*, s.4.
[14] Spencer, *supra* note 11, at 291.
[15] *Id*.
[16] See *Sexual Offences (Amendment) Act*, 1992, c.34.
[17] Spencer, *supra* note 11, at 291 (explaining the *Children and Young Persons Act* 1933, s.39).
[18] *Id*.
[19] *Id*., at 286-87.
[20] H. Reeves and K. Mulley, "The New Status of Victims in the UK: Opportunities and Th reats", in A. Crawford and J. Goodey, eds. *Integrating a Victim Perspective Within Criminal Justice: International Debates* (Aldershot: Dartmouth Publishing Co. Ltd., 2000), at 125.
[21] *Id*. at 134.
[22] See Chapter Three.
[23] S. Garkawe, "The Role of the Victim Du ring Criminal Court Proceedings" (1994), 17 U.N.S.W.L.J. 595, at 598.
[24] M. Findlay, S. Odgers and S. Yeo, *Australian Criminal Justice* (Victoria: Oxford University Press, 2nd ed. 1999), at 344.
[25] *Victims Rights Act*, 1996 No. 114 (N.S.W.).
[26] Garkawe, *supra* note 23, at 602.
[27] *Criminal Law (Sexual Offences) Act*, s. 4(1) & (2).
[28] *Id*., s. 5.
[29] *Id*., s.6.
[30] *Id*.
[31] [1995] 1 N.Z.L.R. 539.
[32] *Id*. at 546.
[33] *Id*. at 546.
[34] *Id*. at 544.
[35] *The Constitution Act, 1867*, U.K. 30 & 31, c.3.
[36] The First Amendment states, in part, that "Congress shall make no law ... abridging the freedom speech, or of the press...." *The United States Constitution*.
[37] See, *e.g., Canadian Newspapers v. Canada (A.G.)*, [1988] 2 S.C.R. 122 (upholding the ban on publication of a sex crime victim's identi ty); and *Edmonton Journal v. Alberta (A.G.)*, [1989] 2 S.C.R. 1326 (invalidating a publication ban on information revealed in matrimonial proceedings); see Chapter Two.
[38] *Palko v. Connecticut*, 302 U.S. 319 (1937).
[39] Note that the Fourth Amendment, which gua rantees the "right of the people to be secure ...

against unreasonable searches and seizures", is akin to s.8 of the *Charter*. Note also *Griswold v. Connecticut*, 381 U.S. 479 (1965) (discovering a constitutional right of privacy in the "penumbras" emanating from the specific guarantees, as well as in other extra-textual sources of authority).

[40] But see *Aubry v. Vice-Versa*, [1998] 1 S.C.R. 591 (upholding liability, under Quebec's *Civil Code*, for the unauthorized publication of a photograph).

[41] 430 U.S. 829 (1977).

[42] 443 U.S. 97 (1979).

[43] 420 U.S. 469 (1975).

[44] 491 U.S. 524 (1989).

[45] 420 U.S. 469 (1975).

[46] *Cohn*, at 487.

[47] *Id*. at 491-92.

[48] *Id*. at 494-95.

[49] *Id*. at 495.

[50] *Id*. at 496.

[51] *Id*. at 496 (emphasis added).

[52] 430 U.S. 308 (1977).

[53] 427 U.S. 539 (1976).

[54] *Oklahoma Publishing*, at 311.

[55] 443 U.S. 97 (1979).

[56] *Id*. at 103.

[57] Given that there were other ways to protect the confidentiality of juvenile proceedings, criminal penalties were in the Court's view unnecessary. *Id*. at 105.

[58] *Id*. at 109-10 (emphasis added).

[59] 491 U.S. 524 (1989).

[60] *Id*. at 533.

[61] *Id*. at 536.

[62] *Id*. at 541.

[63] *Id*. at 542 (citing *Coker v. Georgia*).

[64] *Id*. at 545.

[65] *Id*. at 553.

[66] *Id*. (emphasis added).

[67] *Id*.

[68] 448 U.S. 555 (1980).

[69] *Id*. at 573.

[70] *Id*. at 569.

[71] *Id*. at 570.

[72] *Id*. at 571.

[73] *Id*. at 581.

[74] See Chapter Two.

[75] 457 U.S. 596 (1982).

[76] *Id*. at 607.

[77] *Id*. at 609-10.

[78] *Id*. at 610 (emphasis in original).
[79] *Id*. at 615.
[80] *Id*. at 616.
[81] *Id*. at 617.
[82] See *Canadian Newspapers v. Canada*, Chapter Two.
[83] *Id*. at 618.
[84] *Id*. at 619.

CHAPTER FIVE

[1] See H. Benedict, *Virgin or Vamp: How the Press Covers Sex Crimes* (U.S.A.: Oxford University Press, 1992).
[2] See Chapter Three.
[3] See Chapter Two.
[4] Much, if not most, of the the discussion in the American literature is specific to the crime of rape. As noted in Chapter Three, Canada has abandoned that offence and replaced it with a series of offences which relate to sexual assault. The text in this part of the Chapter refers to rape, sexual assault, and sexual offences without interrupting the discussio n to refine the terminology on an ongoing basis.
[5] Benedict, *supra* note 1, at 3.
[6] *Id*.
[7] *Id*. at 14-18. The myths she lists and describes in the pages cited are: rape is sex; the assailant is motivated by lust; the assailant is perverted or crazy; the assa ilant is usually black or lower class; women provoke rape; women deserve rape; only "loose" women are victimized; sexual attack sullies the victim; rape is a punishment for past deeds; and women cry rape for revenge.
[8] *Id*. at 18.
[9] *Id*. at *Preface*.
[10] *Id*. at 254.
[11] See Chapter Four.
[12] *Smith v. Daily Publishing Co.*, 443 U.S. 97, at 108 (1979).
[13] *The Florida Star v. B.J.F.*, 491 U.S. 524, at 553 (1989).
[14] *Id*. at 547.
[15] *Id*.
[16] *Id*. at 537.
[17] *Id*.
[18] M. Gartner, "Panel Discussion", in Symposium: The Privacy Rights of Rape Victims in the Media and the Law (1993), 61 *Fordham L. Rev.* 1133.
[19] See Chapter Two.
[20] D. Denno, "Perspectives on Disclosing Rape Victims' Names", in Symposium, *supra* note 18, at 1129 (quoting Dershowitz).
[21] Gartner, *supra* note 18.
[22] S. Hutt, "In Praise of Public Access: Why the Government Should Disclose the Identities of Alleged Crime Victims" (1991), 41 *Duke L.J.* 368, at 398 (quoting Nadine Strossen).
[23] K. O'Brien, "South Carolina: Last Haven for Rape Victim Privacy?" (1999), 30 *S.C.L. Rev.*

873, at 880.
[24] Gartner, *supra* note 18, at 1133.
[25] *Id*.
[26] *Id*.
[27] P. Marcus and T. McMahon, "Limiting Disclosure of Rape Victims' Identities" (1991), 64 *Cal. L. Rev.* 1019, at 1033.
[28] H. Benedict, "Panel Discussion" in Symposium, *supra* note 18, at 1145.
[29] *Id*.
[30] S. Leone, "Protecting Rape Victims' Identities: Balance Between the Right to Privacy and the First Amendment" (1993), 27 *New Eng; L. Rev.* 883, at 911.
[31] Gartner, *supra* note18, at 1133.
[32] *Id*.
[33] *Id*.
[34] Marcus and McMahon, *supra* note 27, at 1034, n. 73 (quoting Ziegenmeyer).
[35] [1995] 4 S.C.R. 707.
[36] *Id*. at 712.
[37] *Id*. at 721.
[38] See Chapter Two.
[39] *R. v. Bernardo*, [1993] O.J. No. 2047.
[40] *The Queen v. Bernardo*, unreported decision of LeSage A.C.J.O.C., May 29, 1995.
[41] *Re Estate of French et al. v. Ontario (Attorney General)*, (1996) 134 D.L.R. (4th) 587 (On. Gen. Div.); *aff'd* (1998), 122 C.C.C. (3d) 449 (O.C.A.).
[42] See generally, B. MacFarlane and H. Keating, "Horrific Video Tape as Evidence: Balancing Open Court and Victim's Privacy" (1999), 41 *Crim. L. Q.* 413.
[43] *R. v. Bernardo*, [1993] O.J. No. 2047.
[44] *Id*. at para. 141.
[45] *Id*. at para. 142.
[46] *Id*. at para.137.
[47] *Id*. at para. 140.
[48] *Id*. at para. 75.
[49] *Id*. at para. 76.
[50] *Id*. at pare. 83.
[51] *Id*. at para. 86.
[52] *Id*. at paras. 134-35.
[53] See Chapter Two.
[54] K. Davey, *Karla's Web* (Toronto: Penguin Books Canada, 1994) at 40.
[55] *Id*.
[56] *Id*. at 40-41.
[57] *Id*. at 94-95.
[58] The Ontario Court of Appeal quashed an appeal from the order of Kovacs J., on the ground that there was no right of appeal to the appellate court from the trial judge's decision. (1994), 95 C.C.C.(3d) 437 (O.C.A.).
[59] See Chapter Two.
[60] As John Rosen, who was acting for Bernardo, explained, the parents of the two deceased girls

are no different from the parents of other victims of murder. *R. v. Bernardo*, (1995) 38 C.R. (4th) 229, at 234 (Ont. Gen. Div.).
[61] *Id*. at 236.
[62] *Id*. at 237.
[63] *Id*.
[64] *The Queen v. Bernardo*, unreported decision of LeSage A.C.J.O.C., May 29, 1995, at 35-36 (emphasis added).
[65] The application for leave to appeal was filed on June 2, 1995 and dismissed, w ithout reasons, on June 13, 1995.
[66] *Re Estate of French et al. v. Ontario (Attorney General)* (1996), 134 D.L.R. (4th) 587 (Ont. Gen. Div.); *aff'd* (1998), 122 C.C.C. (3d) 449 (O.C.A.).
[67] (1999), 38 O.R. (30) 347 (O.C.A.).
[68] *Id*., at 357-58.
[69] See C. Blatchford, "Destroying evidence sets an eerie precedent", *National Post*, December 22, 2001.
[70] This is the question posed by the third step of the *Oakes* proportionality test. There, the question is only asked after a *Charter* violation has survived the other parts of the analysis. Here, the question is asked in a more abstract or reflective way.
[71] *Bernardo*, *supra* note 39, at 36.
[72] *Id*. at 37.
[73] *Id*.
[74] *Karla: A Pact With the Devil* (Canada: Cantos International, 2003).