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What Happens at a Bail Hearing Anyway? The Supreme Court's Troubling Retreat from the Openness Principle in *Toronto Star v. Canada*

Paul Schabas*

I. INTRODUCTION

In 2005, in *Toronto Star Newspapers Ltd. v. Ontario*,[1] a unanimous Supreme Court struck down a temporary sealing order on an Information to obtain a search warrant. Speaking through Fish J. the Court began its judgment with these blunt words: "In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy."[2] The Court's decision followed "more than two decades of unwavering decisions" that have affirmed the openness principle — from the seminal pre-Charter decision of Dickson J. in *Nova Scotia (Attorney General) v. MacIntyre*,[3] to the recognition that openness is a component of freedom of expression in section 2(b) of the *Canadian Charter of Rights and Freedoms*[4] in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*[5] and in *Edmonton Journal*, where Cory J. emphasized the need for courts to operate in "the penetrating

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1 [2005] S.C.J. No. 41, [2005] 2 S.C.R. 188 (S.C.C.) [hereinafter "*Toronto Star v. Ontario*"].

2 *Id*., at para. 1.

3 [1982] S.C.J. No. 1, [1982] 1 S.C.R. 175 (S.C.C.) [hereinafter "*MacIntyre*"].

4 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

5 [1996] S.C.J. No. 38, [1996] 3 S.C.R. 480 (S.C.C.) [hereinafter "*CBC v. New Brunswick*"].

light of public scrutiny",[6] to *Dagenais v. Canadian Broadcasting Corp.*[7] and *R. v. Mentuck*,[8] which established a high test for any *discretionary* limit on the public's right to know what happens in courts.

In light of this long line of decisions, and 15 years of repeatedly confirming and strengthening the principles established in *Dagenais*, it might have been expected that the Supreme Court would have difficulty upholding statutory *mandatory* bans, such as that found in section 517 of the *Criminal Code*.[9] It provides that when an accused requests a publication ban at a bail hearing, it *must* be ordered and the public is automatically denied the right to know virtually everything about the hearing — "… the evidence taken, the information given or the representations made and the reasons, if any, given …".[10] Only whether the accused has been released and, if so, on what terms, can be reported, regardless of whether the ban is necessary to protect fair trial interests, or for any other reason. Although a ban is discretionary if requested by the Crown, the effect of section 517 has meant that, in practice, the public knows little, if anything, about what happens at a bail hearing.

However, when the validity of section 517 came before the Court recently, eight of the nine judges had little difficulty upholding the provision.[11] In what must be seen as a retreat from its holdings on the importance of openness, the Court gave little weight to its previously stated requirements that the public's right to know should only be limited where it is "*necessary*", based on concerns that are "well grounded" in evidence, and that such limits cannot be justified on the basis of "remote" or "speculative" concerns.[12]

This paper reviews the history of the openness principle, including the "more than two decades of unwavering decisions" of the Supreme Court favouring openness.[13] It then discusses the recent decision uphold-

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[6] *Edmonton Journal v. Alberta (Attorney General)*, [1989] S.C.J. No. 124, [1989] 2 S.C.R. 1326, at para. 9 (S.C.C.) [hereinafter "*Edmonton Journal*"].

[7] [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835 (S.C.C.) [hereinafter "*Dagenais*"].

[8] [2001] S.C.J. No. 73, [2001] 3 S.C.R. 442 (S.C.C.) [hereinafter "*Mentuck*"].

[9] R.S.C. 1985, c. C-46.

[10] *Id*., s. 517.

[11] *Toronto Star Newspapers Ltd. v. Canada*, [2010] S.C.J. No. 21, [2010] 1 S.C.R. 721 (S.C.C.) [hereinafter "*Toronto Star v. Canada* – SCC"].

[12] *Dagenais*, *supra*, note 7, at 880; *Mentuck*, *supr*a, note 8, at paras. 32, 34.

[13] *Toronto Star v. Ontario*, *supra*, note 1, at para. 30.

ing section 517 in *Toronto Star v. Canada* – SCC,[14] and the difficulty in reconciling it with the Court's other decisions in this area. Although the case may, arguably, be limited to the context of statutory, mandatory bans, the Court's approach is a troubling departure from its previous decisions that looked skeptically at assertions of trial unfairness and other claims of prejudice to parties arising from openness.

II. THE HISTORY OF THE OPEN COURT PRINCIPLE

The openness principle is at least as old as the common law. It was a critical element of the development of the English justice system, as judges travelled to towns in England to conduct public trials *before the community*. In the 17th century, Charles I's use of the Star Chamber, which operated in private, was a source of complaint in the years leading to the English Civil War. Openness, however, was not seen merely as a way of scrutinizing the judges, but was also regarded as a key component of finding the truth: "Blackstone stressed that the open examination of witnesses 'in the presence of all mankind' was more conducive to ascertaining the truth than secret examinations."[15] Wigmore too recognized the role of openness in improving "the quality of testimony".[16] Equally important, is that an open trial ensures that the parties, including the judge and jury, conduct themselves properly. It serves a valuable educational function by informing the public of what goes on in courts and fostering public confidence in them. Bentham put it eloquently in his well-known "darkness of secrecy" passage: "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."[17]

The openness principle has been repeatedly confirmed in the case law. Lord Shaw, in *Scott v. Scott*,[18] referred to Bentham's famous passage in holding that family court matters must be public. Lord Halsbury stated

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[14] *Supra*, note 11.

[15] See *Edmonton Journal*, *supra*, note 6, at para. 55, *per* Wilson J., citing Blackstone's *Commentaries on the Laws of England*, vol. 3 (1768), c. 23, at 373. For a detailed review of the history of openness, dating even back to Roman times, see *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

[16] *Edmonton Journal*, *id.*, at para. 55.

[17] Cited by Dickson J. in *MacIntyre*, *supra*, note 3, at 183.

[18] [1913] A.C. 417, at 477 (H.L.).

bluntly that "every court of justice is open to every subject of the King".[19] And Lord Blanesburgh stated subsequently, in *McPherson v. McPherson*, that "publicity is the authentic hall-mark of judicial as distinct from administrative procedure ...".[20]

In his seminal pre-Charter decision on openness, Dickson J. in *MacIntyre* held that Informations to obtain search warrants must be subject to public scrutiny once the warrant has been executed, observing that "covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered".[21]

Justice Dickson went on to state that "[a]s a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings," noting that "[a]t every stage the rule should be one of public accessibility and concomitant judicial accountability."[22]

Post-Charter, the openness principle has been recognized as a component of freedom of expression protected by section 2(b) of the Charter. In *Edmonton Journal*,[23] the Court declared invalid legislation that restricted the ability of the press to report on details of matrimonial proceedings. Following *MacIntyre*, Cory J. (who wrote the principal judgment concurred in by Dickson C.J.C. and Lamer J.), emphasized that

> [t]he more complex society becomes, the more important becomes the function of the courts. As a result of their significance, the courts must be open to public scrutiny and to public criticism of their operation by the public ... The press 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.[24]

Edmonton Journal[25] elaborated on the holding of the Supreme Court in *Ford v. Quebec (Attorney General)*,[26] that freedom of expression

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19 *Id.*, at 440.

20 [1936] A.C. 177, at 200-202 (P.C.).

21 *MacIntyre*, *supra*, note 3, at 185.

22 *MacIntyre*, *id*., at 185-86. It is interesting to note that Dickson J. referred with approval to a much earlier decision of the Court of Duff J. (as he then was) in *Gazette Printing Co. v. Shallow*, [1909] S.C.J. No. 7, 41 S.C.R. 339, at 359 (S.C.C.), in which the Court upheld the openness principle over a century ago.

23 *Supra*, note 6.

24 *Edmonton Journal*, *supra*, note 6, at paras. 5, 9.

25 *Id*., at para. 10.

"protects listeners as well as speakers", noting that "[t]hose who cannot attend rely in large measure upon the press to inform them about court proceedings — the nature of the evidence that was called, the arguments presented, the comments made by the trial judge — in order to know not only what rights they may have, but how their problems might be dealt with in court." As Cory J. continued:

> It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.[27]

Following *Edmonton Journal*, in *CBC v. New Brunswick*, a unanimous Court recognized the constitutional aspect of openness. There, La Forest J. stated:

> That the right of the public to information relating to court proceedings, and the corollary right to put forward opinions pertaining to the courts, depend on the freedom of the press to transmit this information is fundamental to an understanding of the importance of that freedom. *The full and fair discussion of public institutions, which is vital to any democracy, is the raison d'être of the s. 2(b) guarantees. Debate in the public domain is predicated on an informed public, which is in turn reliant upon a free and vigorous press. The public's entitlement to be informed imposes on the media the responsibility to inform fairly and accurately. This responsibility is especially grave given that the freedom of the press is, and must be, largely unfettered*.[28]

In *CBC v. New Brunswick*, the public broadcaster challenged section 486 of the *Criminal Code*, which makes openness subject to a number of exceptions, including the need to exclude the public where necessary for the "proper administration of justice". Here, the Court found that a trial judge had not been justified in excluding the public from a sentencing hearing in a sexual assault matter, but nevertheless upheld section 486

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[26] [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712, at 767 (S.C.C.).

[27] *Edmonton Journal*, *supra*, note 6, at para. 10.

[28] *CBC v. New Brunswick*, *supra*, note 5, at para. 23 (emphasis added).

because it contained a valid objective and could be narrowly applied through proper exercise of judicial discretion. The Court relied on the principles enunciated in *Dagenais*,[29] directing trial judges to consider alternatives to closing the courts in order to ensure that any restriction on public access is "limited as much as possible", by balancing the competing interests.[30]

III. DISCRETIONARY BANS: THE DEVELOPMENT OF THE *DAGENAIS/MENTUCK* TEST

Dagenais is perhaps the most important Charter case on the openness principle. It arose from a ban imposed by courts in Ontario on the broadcast of a docudrama, *The Boys of St. Vincent*, dealing with abuse of boys by priests based loosely on the events disclosed in the Mount Cashel Inquiry,[31] because trials of priests on sexual abuse charges dealing with similar facts were ongoing or imminent in Ontario. The Supreme Court overturned the bans, and in doing so discarded what it described as "[t]he pre-*Charter* common law rule governing publication bans [which] emphasized the right to a fair trial over the free expression interests of those affected by the ban." Chief Justice Lamer held, for the majority, as follows:

> In my view, the balance this rule strikes is inconsistent with the principles of the *Charter*, and in particular, the equal status given by the *Charter* to ss. 2(b) and 11(d). It would be inappropriate for the courts to continue to apply a common law rule that automatically favoured the rights protected by s. 11(d) over those protected by s. 2(b). *A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the* Charter *and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans,* Charter *principles require a balance to be achieved that fully respects the importance of both sets of rights.*[32]

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[29] *Dagenais*, *supra*, note 7.

[30] See *CBC v. New Brunswick*, *supra*, note 5, at para. 61.

[31] See, *e.g.*, *R. v. Kenny*, [1991] N.J. No. 253, 68 C.C.C. (3d) 36 (Nfld. T.D.) [hereinafter "*Kenny*"].

[32] *Dagenais*, *supra*, note 7, at para. 72 (emphasis added).

Chief Justice Lamer went on to formulate the rule for when publication bans should be ordered, as follows:

> A publication ban should only be ordered when:
>
> (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.[33]

In *Dagenais*, Lamer C.J.C. emphasized that bans should only be ordered to "prevent *real and substantial risks* of trial unfairness — publication bans are not available as protection against remote and speculative dangers".[34] He emphasized the strength of the jury system, and noted that alternative measures to bans "readily came to mind", including "adjourning trials, changing venues, sequestering jurors, allowing challenges for cause and *voir dires* during jury selection, and providing strong judicial direction to the jury".[35]

Dagenais dealt with the balancing of the openness principle against risk to fair trial interests. However, the Court has taken *Dagenais* further. In *Mentuck*,[36] the Court modified the *Dagenais* test to apply to other discretionary bans, such as protecting the proper administration of justice. There, the Crown had sought a ban on specific undercover police techniques — including the now well-known "crime boss" scenario. In rejecting the ban, Iacobucci J. modified the *Dagenais* test as follows:

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

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33 *Id*., at para. 73 (emphasis in original).
34 *Id*., at para. 76 (emphasis in original).
35 *Id*., at para. 79.
36 *Mentuck*, *supra*, note 8.

> accused to a fair and public trial, and the efficacy of the administration of justice.[37]

In addition, the Court gave further guidance and strength to what has now become known as the "*Dagenais/Mentuck* test", emphasizing that for the "real and substantial" risk test to be met: "it must be a risk the reality of which is well-grounded in the evidence". Justice Iacobucci continued: "It must also be a risk that poses a *serious threat* to the proper administration of justice. In other words, it is a *serious danger* sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained."[38]

Indeed, Iacobucci J. made even clearer the importance of openness and the heavy burden on a party seeking to justify a ban in the following passage:

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

The *Dagenais/Mentuck* principles are not just reserved to criminal law. In *Sierra Club of Canada v. Canada (Minister of Finance)*,[40] the Supreme Court modified the *Dagenais/Mentuck* test to also apply to place the same heavy burden on parties seeking to limit public access to, and reporting of, civil litigation where commercial interests might otherwise prefer confidentiality. In *Sierra Club*, the Court articulated the test as follows:

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[37] *Id.*, at para. 32.

[38] *Id.*, at para. 34 (emphasis added). Subsequently, in *Toronto Star Newspapers Ltd. v. Ontario*, [2003] O.J. No. 4006, 67 O.R. (3d) 577, at para. 27 (Ont. C.A.), Doherty J.A. put this principle more bluntly: "Fundamental freedoms, like the freedom of expression and freedom of the press, cannot, however, be sacrificed to give the police a 'leg up' on an investigation."

[39] *Mentuck*, *supra*, note 8, at para. 39.

[40] [2002] S.C.J. No. 42, [2002] 2 S.C.R. 522 (S.C.C.).

> A confidentiality order under Rule 151 [of the *Federal Court Rules, 1998*] should only be granted when:
>
> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.[41]

The Court emphasized that a "commercial interest" sufficient to meet the test must be one which can be expressed in terms of a public interest in protecting the commercial interest. Thus, the commercial interest that is sought to be protected must transcend the parties.[42]

The *Dagenais/Mentuck* test has been repeatedly applied over the past 15 years. It is regarded as a "flexible and contextual test" that applies to all exercises of judicial discretion that have the effect of limiting freedom of expression and the public's right to know what happens in courts.[43] In 2005, in *Toronto Star v. Ontario*, the Supreme Court strongly confirmed the *Dagenais/Mentuck* test in striking down a temporary sealing order on search warrant materials. As Fish J. stated in response to the Crown's argument that the test should not apply: "This argument is doomed to failure by more than two decades of unwavering decisions in this Court: the *Dagenais/Mentuck* test has repeatedly and consistently been applied to all discretionary judicial orders limiting the openness of judicial proceedings."[44]

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41 *Id.*, at para. 53.

42 *Id.*, at para. 55, where Iacobucci J. endorsed the words of Binnie J. in *Re N. (F.)*, [2000] S.C.J. No. 34, [2000] 1 S.C.R. 880, at para. 10 (S.C.C.): "the open court rule only yields 'where the *public* interest in confidentiality outweighs the public interest in openness'" (emphasis added).

43 *Supra*, note 1, at para. 31.

44 *Id.*, at para. 30.

IV. STATUTORY BANS

The *Dagenais/Mentuck/Sierra Club* test applies to discretionary bans. However, it is a direct application of the openness principle protected by section 2(b) of the Charter. Further, the Court recognized in *Mentuck* that the *Dagenais* test "incorporates the essence of section 1 of the *Charter* and the *Oakes* test".[45] Indeed, in *CBC v. New Brunswick*, in upholding the validity of section 486(1) of the *Criminal Code* (which permits limits on public access in the interests of "the proper administration of justice"), the Court found section 1 applied by considering the same factors found in *Dagenais* and *Mentuck*. Because the section granted the judge discretion, which must be exercised by considering whether the limitation was necessary, having regard to the availability of "reasonable and effective alternatives", "whether the order is limited as much as possible", and to "weigh the importance of the ... particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate", the provision was found to be valid.[46]

In light of these "unwavering decisions", the validity of mandatory bans to protect fair trial interests has been in doubt at least since *Dagenais*.[47] Two such bans are regularly ordered in criminal proceedings: bans on bail hearings and bans on preliminary inquiries, provided in sections 517 and 539, respectively, of the *Criminal Code*. The provisions are similar in their terms, directing that a ban *shall* be ordered if requested by the accused, but only *may* be ordered if requested by the Crown. While the ban at a preliminary inquiry only applies to "the evidence taken at the inquiry", the ban at a bail hearing is broader, applying to "the evidence taken, the information given or the representations made and the reasons, if any, given or to be given by the justice". Both bans, once imposed, continue until the accused is either discharged or the trial is concluded. Both sections make it a criminal offence to breach the ban.[48]

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45 *Mentuck*, *supra*, note 8, at para. 27.

46 *Id*., at para. 25; *CBC v. New Brunswick*, *supra*, note 5, at para. 69.

47 *Supra*, note 7.

48 The terms of *Criminal Code*, R.S.C. 1985, c. C-46, s. 517(1) are as follows:

(1) If the prosecutor or the accused intends to show cause under section 515, he or she shall so state to the justice and the justice may, and shall on application by the

These provisions effectively give an accused the right to override the public's right to know, regardless of what evidence or submissions may be made at the bail hearing or preliminary inquiry, and regardless of whether a jury trial is likely, or even possible. In practice, the sections are routinely invoked and, as a result, the public knows little of, and rarely hears about, what occurs at a bail hearing or preliminary inquiry.

V. HISTORY OF THE STATUTORY BANS

Statutory publication bans on bail hearings were first introduced as part of the *Bail Reform Act* of 1972, which strengthened protections for those charged with criminal offences, such as shifting the burden to the State to justify detention, on limited and specific grounds.[49] What is now section 517 originally only permitted discretionary bans, however, and seems to have passed without discussion or attention in Parliament. In 1976, the provision was amended to make bans mandatory when requested by the accused. Again, there was no substantive discussion of this section in Parliament.[50]

There was no historical justification for the mandatory ban when it was introduced. Professor Friedland, whose book *Detention Before Trial* led to the *Bail Reform Act*, did not address the issue.[51] Until 1972, all bail

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accused, before or at any time during the course of the proceedings under that section, make an order directing that the evidence taken, the information given or the representations made and the reasons, if any, given or to be given by the justice shall not be published in any document, or broadcast or transmitted in any way before such time as

(a) if a preliminary inquiry is held, the accused in respect of whom the proceedings are held is discharged; or

(b) if the accused in respect of whom the proceedings are held is tried or ordered to stand trial, the trial is ended.

[49] Prior to 1972, bail was determined under *An Act Respecting the Duties of the Justice of the Peace, Out of Sessions in Relation to Respondents Charged with Indictable Offences*, S.C. 1869, c. 30; *R. v. Rae*, [1914] O.J. No. 113, 23 C.C.C. 266 (Ont. H.C.).

[50] An explanatory footnote to the original bill states only that the amendment is "in part" consequential to other amendments, these include shifting the onus to the accused to justify release for certain offences and broadening the scope of the secondary ground. See Explanatory Notes to Bill C-71, *Criminal Law Amendment Act, 1975*, 1st Sess., 20th Parl., 1975, cls. 47-48; *Bail Reform Act*, S.C. 1970-71-72, c. 37, s. 5, at para. 457.2; *Criminal Law Amendment Act, 1975*, S.C. 1974-75-76, c. 93, s. 48; Gary T. Trotter, *The Law of Bail in Canada*, 2d ed. (Toronto: Carswell, 1999), at 2-13.

[51] Friedland, *Detention Before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts* (Toronto: University of Toronto Press, 1965) [hereinafter "Friedland"].

hearings and preliminary inquiries were open to the public and to publicity, other than reporting confessions or admissions.[52]

Interestingly, in 1987, the Law Reform Commission of Canada recommended that the provisions requiring mandatory bans be abolished, but there was no response from Parliament.[53]

In the early days of the Charter, section 517 was the subject of a constitutional challenge in *Global Communications Ltd. v. Canada (Attorney General)*.[54] In a decision rendered before the *Oakes* test was developed, and long before the pre-Charter common law rule was reformulated in *Dagenais*, the Ontario Court of Appeal had little difficulty in upholding section 517 on the basis of protection of fair trial interests by preventing supposed prejudice to potential jurors. Section 539, dealing with the ban

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[52] Hon. J.C. McRuer, *Ontario Royal Commission Inquiry into Civil Rights, Report No. 1*, vol. 2 (Toronto: Queen's Printer, 1968), c. 49, "Publication of Proceedings Before Trial", at 755-69, especially 763 [hereinafter "McRuer Report"] (emphasis added). As the *McRuer Report* observed in 1968, in comments equally applicable to bail hearings:

> The risk is that wide publication of the evidence given at a preliminary inquiry may so influence the minds of prospective jurors that they will approach their duties with conscious or unconscious bias against the accused, or that the public mind in the community will be so aroused that members of a trial jury will be intimidated by the force of public opinion. *We have grave doubts that this is a real risk. In the first place, at the time of a preliminary inquiry no one, including the jurors, knows who the jurors at the trial will be. In metropolitan areas the public memory is very short and individuals are largely anonymous. Few members of the public can remember what they have read or heard about a particular case for many days, let alone months. In less populous areas gossip and rumour spread more easily, but gossip and rumour thrive on secrecy. It is much more likely that vicious and inaccurate gossip will be spread throughout a community by individuals who claim to have knowledge than by fair and accurate report by news media*.

[53] Law Reform Commission of Canada, *Working Paper 56: Public and Media Access to the Criminal Process* (Ottawa, 1987), at 76-77 (footnotes omitted, emphasis added):

> *These provisions, in our view, are overly restrictive of freedom of expression, notwithstanding that they have both been found to be constitutionally valid. The mandatory nature of the prohibitions and their breadth constitute an unjustifiable intrusion on the principle of maximum openness. Other similar mandatory orders have, in fact, been found to offend the Charter. Our approach here is consistent with our earlier Recommendation 3 that no automatic bans should remain in the Criminal Code. ...*
>
> We would replace the present limitations with our Recommendation ... that an order should only be made when necessary to satisfy a substantial competing interest. ... It would require that a justice presiding at a bail hearing or preliminary inquiry consider whether other means of guaranteeing a fair trial would be effective before deciding to impose a publication ban. ...
>
> ... We would remove the accused's entitlement to an automatic publication ban on all evidence tendered at bail hearings and preliminary inquiries ... [I]f either the defence or the prosecution seeks a limit on the presumption of openness, it must discharge the corresponding onus of proof.

[54] [1984] O.J. No. 3066, 44 O.R. (2d) 609 (Ont. C.A.) [hereinafter "*Global Communications*"].

on preliminary inquiries, was upheld on a similar basis in another early Charter decision in New Brunswick.[55]

In light of the development of the *Oakes* test, the *Dagenais/Mentuck/Sierra Club* test, and the other decisions of the Supreme Court favouring openness under the Charter, sections 517 and 539 became ripe for challenge.

VI. *TORONTO STAR V. CANADA*: THE ARRESTS OF THE "TORONTO 18"

In 2006, 14 adults and four young persons were charged in Brampton, Ontario with various terrorism-related offences under the *Criminal Code*. The arrests raised widespread concerns about national security and the threat of terrorism, and were the subject of intense media scrutiny, locally, nationally and internationally. The police held press conferences announcing the arrests. Between June 3 and June 12, 2006, there were at least 4,710 articles reporting on the arrests by news organizations around the world, including virtually all local and national media as well as international media, such as CNN, BBC News, *The Los Angeles Times*, Al-Jazeera, *The Bangkok Post*, *The Sydney Morning Herald*, *The New York Times* and *The Wall Street Journal*.[56]

Significant details about the alleged terrorist plots and the accused were disclosed by the police and reported, including the following:

- The accused plotted to bomb the Toronto Stock Exchange, the CSIS Toronto Office, the CN Tower, the CBC, the Parliament buildings and/or the Peace Tower, and to storm the Parliament buildings, take political leaders hostage and behead the Prime Minister.
- The accused were equipped with three tons of ammonium nitrate, other bomb-making materials, handguns, a Rambo-style assault knife, camouflage uniforms and walkie-talkies.
- The accused set up and attended a terrorist training camp in Washago, Ontario and tested explosives in Matheson, Ontario.

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[55] *R. v. Banville*, [1983] N.B.J. No. 110, 3 C.C.C. (3d) 312 (N.B.Q.B.).

[56] See *Toronto Star Newspapers Ltd v. Canada*, [2009] O.J. No. 288, 2009 ONCA 59, at para. 4 (Ont. C.A.) [hereinafter "*Toronto Star v. Canada* – CA"]. Additional facts may be found in the court Record.

- The accused were motivated by ideology supportive of militant Islamic causes, and were inspired by al-Qaeda. Some of the accused had links with Islamic militants and suspected terrorists in the United States and Europe. Certain of the accused allegedly had prior convictions for weapons offences and theft.

Many of the allegations about the plans, preparations and motivations came from the police press conference following the arrests, at which they displayed purported bomb-making materials including a red cell phone wired to an explosive detonator. Statements from official sources included the following:

> This group posed a real and serious threat. It had the capacity and intent to carry out these attacks ... our investigation and arrests prevented the assembly of any bombs and the attacks from being carried out ... it was at the point when we felt we could no longer let them continue in their actions without a threat to the public. [Michael McDonell, Assistant Commissioner, RCMP]
>
> The suspects appeared to have become adherents of a violent ideology inspired by al-Qaeda. [Luc Portelance, Assistant Director of Operations, CSIS][57]

At a court appearance a few days after this firestorm of publicity, a justice of the peace imposed a publication ban under section 517 for the show cause hearings of all the adult accused, even though some of the accused had opposed the ban.[58] A media coalition led by the New York-based Associated Press moved to quash the publication ban on the basis that it should not apply to all accused when not all had requested a ban. Justice Durno of the Ontario Superior Court denied the media application, finding (among other things) that "when persons are charged in the same information, and one seeks a mandatory order under s. 517, the order applies to all accused. Any other interpretation makes no practical

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[57] See Jonathan Jenkins, "Cell Targeted CSIS and Police; 'They Were Going After Institutional Targets', Sources Says" *The Toronto Sun* (June 4, 2006), at 2; Michelle Shephard & Isabel Teotonio, "Bomb-making material delivered in police sting" *The Toronto Star* (June 4, 2006), at A3; Doug Struck, "Canada Holds 17 in Alleged Bomb Plot; Strikes on Ontario Sites Said Imminent" *The Washington Post* (June 4, 2006), at A1; Beth Duff-Brown, "Canada foils terrorist attack with arrest of 17 al-Qaida-inspired Suspects" *The Associated Press* (June 3, 2006); Beth Duff-Brown, "Canadian Police Reportedly Moved in on Terrorist Suspects After Delivery of Bomb Materials" *The Associated Press* (June 4, 2006).

[58] *Toronto Star v. Canada* – CA, *supra*, note 56, at para. 5.

sense."[59] The appellants then challenged the constitutionality of section 517 of the *Criminal Code*, supported by two of the accused. Justice Durno then held that he was bound by the 1984 decision of the Ontario Court of Appeal in *Global Communications* that upheld section 517.[60]

Despite the extraordinary allegations and sensational public nature of the arrests, a number of the accused were released on bail — some even on consent. And while the challenge to the ban continued, the Crown stayed charges against at least three accused persons, while proceedings continued against others. No explanation was, or could be, given for these events due to the publication ban.

The media appealed Durno J.'s decisions to the Ontario Court of Appeal. A five-judge panel was unanimous that the decision in *Global Communications* should be overruled. Justice Feldman, speaking for the majority (Laskin and Simmons JJ.A. concurring), accepted the Crown's assertion that the purpose of the mandatory ban was to provide the accused with an effective and expeditious means to prevent jurors from being exposed to prejudicial information that might be disclosed at their bail hearing.[61] However, she found that section 517 was overbroad. Specifically, it did not meet the rational connection and minimal impairment tests under *R. v. Oakes*[62] to the extent that it imposed a mandatory ban even when there was no prospect of a jury trial. As she put it, "[f]air trial rights cannot be said to be at risk where a judge, sitting alone, is exposed to prejudicial information which should not be admitted at trial."[63] As a remedy, Feldman J.A. purported to cure the breach by adding to section 517 the words "where and for so long as the charge(s) may be tried by a jury" after "shall on application by the accused".[64]

Justice Rosenberg (Juriansz J.A. concurring) dissented. He would have struck down the section 517 ban entirely, on the basis that its deleterious effects outweighed its salutary effects.[65] Justice Rosenberg described section 517 as a "dramatic curb on freedom of expression",

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[59] *Toronto Star Newspapers Ltd. v. Canada*, [2006] O.J. No. 5781, 211 C.C.C. (3d) 234, at para. 101 (Ont. S.C.J.).

[60] *Toronto Star Newspapers Ltd. v. Canada*, [2007] O.J. No. 5729, 84 O.R. (3d) 766, at para. 48 (Ont. S.C.J.); *Global Communications*, *supra*, note 54.

[61] *Toronto Star v. Canada* – CA, *supra*, note 56, at para. 239.

[62] [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

[63] *Toronto Star v. Canada* – CA, *supra*, note 56, at para. 185.

[64] *Id.*, at paras. 185, 250, 255.

[65] *Id.*, at paras. 70-108.

and observed that the mandatory ban is "all-embracing; it prohibits publication of 'the evidence taken, the information given or the representations made and the reasons, if any, given or to be given by the justice.' Thus, even the reasons for releasing or detaining the accused, which may be of considerable interest to the public, cannot be published at the time the decision is made."[66] He also noted that although section 517 "does not prevent anyone from attending court to witness the operation of the bail system first hand, the section effectively prevents access to the courts for most of the population".[67] He observed that in the overwhelming majority of cases in which a publication ban is imposed, the ban does not serve the objective protecting the accused from a jury tainted by pretrial publicity since less than 2 per cent of all criminal cases are tried by a jury.[68] To remedy the unconstitutionality of section 517, Rosenberg J.A. would have declared the words "and shall on application by the accused" to be of no force and effect.[69]

The media appealed to the Supreme Court, asking that the dissenting view of Rosenberg J.A. be adopted. Among other things, the media appellants submitted that the majority's remedy of "reading down" the application of section 517 to situations where a jury trial was not, or was no longer, possible, had little practical effect as most cases at least have the possibility of going to a jury at the early stages, and that the *Dagenais/Mentuck* test, properly applied, could rarely justify bans on the publication of bail hearings.

VII. THE ALBERTA CASE: *R. V. WHITE*[70]

A challenge to section 517 was also brought in Alberta, although in a case raising quite different facts. It involved a high-profile murder, in which the accused was charged with killing his wife. White was granted bail, but his release was subsequently revoked by a decision of the Court

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[66] *Id.*, at paras. 31-32.

[67] *Id.*, at para. 33.

[68] *Id.*, at para. 80. Statistics from the Attorney General of Ontario filed in the case suggest that the number is much lower, perhaps 0.1 per cent — about 500 out of 500,000 charges in Ontario per year.

[69] *Id.*, at para. 3. Justice Rosenberg would have also suspended the declaration of invalidity for one year to allow Parliament to consider alternative legislation.

[70] [2005] A.J. No. 1727, 2005 ABCA 435 (Alta. C.A.) [hereinafter "*White*"]; [2007] A.J. No. 608, 2007 ABQB 359 (Alta. Q.B.).

of Appeal. As the ban under section 517 does not apply to appellate proceedings, and as neither party sought to justify a common law discretionary restriction on publication, there was no publication ban on the bail proceedings before the Court of Appeal. However, the original section 517 ban on the proceedings before the Judge who had granted bail remained in place. The media moved, in these circumstances, to have section 517 of the *Criminal Code* declared unconstitutional in order to have the ban on the original bail hearing lifted. Justice Brooker, who had originally granted bail, agreed with the media that section 517 was aimed at preventing jury contamination and could not be justified. He noted that the Crown had not presented any evidence to support a rational connection between the restriction on publication and the accused's right to a fair trial by a jury, that the section does not minimally impair Charter rights as it applies even to non-jury trials, and that the salutary effects of the legislation were not proportionate to its deleterious effects.

The Alberta Court of Appeal overturned Brooker J.'s decision, concluding that a section 517 ban "merely defers publication and that the values of protecting fair access to bail and the right to a fair trial were benefits that outweighed the deleterious effects of the restrictions".[71]

VIII. THE SUPREME COURT'S DECISION UPHOLDING SECTION 517

Justice Deschamps, writing for eight of the nine justices on the Supreme Court (Abella J. dissented), upheld the constitutionality of section 517 in its entirety, even overturning the relatively limited reading down of the section by the majority in the Ontario Court of Appeal. In contrast to *Toronto Star v. Ontario*, which focused on the infringement of section 2(b) ("the administration of justice thrives on exposure to light — and withers under a cloud of secrecy"),[72] the majority in *Toronto Star v. Canada* focused on the rights of the accused, opening with the following statement: "[U]pholding the rights of Canadian citizens by fostering trial fairness and safeguarding liberty interests is central to the criminal

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[71] *R. v. White*, [2008] A.J. No. 956, 2008 ABCA 294 (Alta. C.A.), as summarized by Deschamps J.A. in *Toronto Star v. Canada* – SCC, *supra*, note 11, at para. 5.

[72] *Toronto Star v. Ontario*, *supra*, note 1, at para. 1.

justice process."[73] This criminal context drove the Court's analysis which led to a favouring of fair trial interests over openness. And while the Court said, again, that "the test developed in *Dagenais/Mentuck* incorporates the essence of the balancing exercise mandated by the *Oakes* test",[74] it is difficult to rationalize the Court's decision with its earlier "unwavering decisions" favouring openness.

How did the Court reach this result? First, the majority concluded that that there were two "pressing and substantial" objectives underlying section 517: (i) to safeguard the right to a fair trial; and (ii) to ensure expeditious bail hearings.[75] This finding was broader than the finding of both the majority and the dissent at the Ontario Court of Appeal, both of which expressed the view that the primary objective of section 517 was to foster *trial* fairness. In response to the argument that the second objective was a new or impermissible "shifting purpose" not evident in any of the legislative debates or raised by the Crown 25 years earlier in *Global Communications*, Deschamps J. stated that the two objectives are "inextricably linked, as the latter embraces the former". The acceptance of this new, second purpose, was derived from the "particular emphasis placed in the Ouimet Report on ensuring expeditious bail hearings".[76] However, that objective is met through other provisions (such as section 503(1)(a) of the *Criminal Code*, which requires that an accused be brought before a justice "without unreasonable delay") and was never linked to section 517. But by stating the objective this broadly, the majority was able to find that the other elements of the *Oakes* test were met.

Second, Deschamps J. concluded that a "rational connection can clearly be found" between the adopted means and Parliament's objectives in enacting section 517. She noted that the bail hearing process is informal, must be brought expeditiously and often includes evidence or information that "would not necessarily be relevant or admissible at trial", such as confessions or bad character evidence.[77] The ban, therefore, "prevents the dissemination of evidence which, for the sake of

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[73] *Supra*, note 11, at para. 1.

[74] *Id.*, at para. 18.

[75] *Id.*, at para. 19.

[76] *Id.*, at para. 23; Roger Ouimet, Report of the Canadian Committee on Corrections: *Toward Unity: Criminal Justice and Corrections* (Ottawa: Queen's Printer, 1969).

[77] *Toronto Star v. Canada* – SCC, *supra*, note 11, at para. 30.

ensuring an expeditious hearing, is untested".[78] But the link to an expeditious hearing is not explained. Rather, as Deschamps J. notes, the provision was proposed by the Ouimet Report "to prevent prejudicing the accused at his trial by the dissemination of prejudicial matter which would not be relevant or admissible at his trial".[79] Yet this concern for fair trial interests, in light of *Dagenais*, makes the section difficult to defend, as discussed below.

Turning to minimal impairment, Deschamps J. emphasized that the initial stage of a criminal proceeding is "crucial" to the accused, and that "if the justice were to hold a publication ban hearing, the accused would have to prepare for that hearing in addition to preparing a rebuttal to the grounds the prosecution might raise to justify detaining him or her".[80] After noting that "the hurdles the accused would face in such a hearing are real", she concluded that "[i]n light of the delay and the resources a publication ban hearing would entail, and of the prejudice that could result if untested evidence were made public, it would be difficult to imagine a measure capable of achieving Parliament's objectives that would involve a more limited impairment of freedom of expression."[81] Justice Deschamps rejected various discretionary alternatives to complete mandatory bans that the media argued would trench less on freedom of expression.[82] In view of the timing of any potential publication ban hearing, and of how little the accused would know about the information the prosecutor would be conveying, she held that it would be difficult for the accused to discharge the burden of showing that a ban would be necessary under the *Dagenais/Mentuck* test.[83]

Surprisingly, especially in light of the "unwavering decisions" of the previous decades, Deschamps J. seemed to find the ban was not particularly harsh because media are still permitted to publish "the identity of

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[78] *Id.*, at para. 33.

[79] *Id.*, at para. 30.

[80] *Id.*, at para. 35.

[81] *Id.*, at para. 37.

[82] These alternatives included: (i) procedures to address jury bias, such as challenge for cause, change of venue and jury sequestration; (ii) time-limited publication bans ordered summarily, subject to a follow-up hearing to determine if the ban should continue; (iii) "sunset clauses" that would allow publication at the time of the bail hearing but ban publication closer to trial; (iv) limited discretionary bans on specific prejudicial information and (v) a limited mandatory ban on specific types of evidence, such as confessions.

[83] *Toronto Star v. Canada* – SCC, *supra*, note 11, at paras. 44, 46.

the accused, comment on the facts and the offence that the accused has been charged with, and that an application for bail has been made, as well as report on the outcome of the application".[84] She stated that "the temporary nature of the ban is another important factor", suggesting that "the information it covers can eventually be made public once more complete information produced in accordance with the standards applicable to criminal trials is available".[85] As Deschamps J. put it:

> In summary, although information revealed at the bail hearing may no longer be newsworthy by the time the media can release it, the ban cannot be said to impair freedom of expression more than is necessary. The ban is limited to a preliminary stage of the criminal justice process and is not absolute, and the information the media are prevented from publishing is untested, and is often one-sided and largely irrelevant to the search for truth. The ban may make journalists' work more difficult, but it does not prevent them from conveying and commenting on basic, relevant information.[86]

The Court at this stage also took issue with the majority decision in the Ontario Court of Appeal that would have limited the ban to circumstances where a jury trial was and remained a possibility. Picking up on Rosenberg J.A.'s comment that "the practical impact of the majority's conclusion is limited, since at the time of the bail hearing, the accused has usually not yet made an election and not yet ruled out the possibility of being tried by a jury", Deschamps J. noted:

> Because the bail hearing is held at the beginning of the process, even if the provision is read down as the majority have done, the ban would still apply in the vast majority of cases. Thus, this alternative cannot be accepted. Not only does it fail to respond to the appellants' concerns, but it fails to settle the timing and resource issues that arise in respect of the proposed publication ban hearing.[87]

Finally, Deschamps J. concluded that mandatory publication bans had salutary benefits that outweighed their deleterious effects. Although such bans were "not a perfect outcome", she concluded that the mandatory ban "represents a reasonable compromise", as the limits on the

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[84] *Id.*, at para. 38.
[85] *Id.*, at para. 39.
[86] *Id.*, at para. 40.
[87] *Id.*, at para. 47.

publication of information were "outweighed by the need to ensure certainty and timeliness, to conserve resources, and to avert the disclosure of untested prejudicial information; in other words, to guarantee as much as possible trial fairness and fair access to bail".[88]

Justice Abella, in dissent, agreed with Rosenberg J.A. that the mandatory ban in section 517 should be struck down. Unlike Deschamps J., Abella J. emphasized the importance of openness:

> This Court has a long pedigree in protecting the public's right to be aware of what takes place in the country's courtrooms. It is based on the premise that to maintain public trust in the justice system, the public must be able to see the judicial process at work. The public's ability to engage in meaningful discussion about *what* a judge decides, depends primarily on knowing *why* the particular decision is made. The jurisprudence has, as a result, consistently attempted to enhance both the visibility of the system and the confidence of the public.[89]

She characterized the effect of section 517 as "a profound interference" with the open courts principle because it had the effect, "for all but the handful of people who are present in the courtroom, of denying access to information surrounding a key aspect of the criminal justice system — the decision whether or not to release an accused back in to the community pending his or her trial".[90]

IX. THE SUPREME COURT'S RETREAT FROM *DAGENAIS*

Toronto Star v. Canada represents a retreat by the Supreme Court from its long history of upholding the open courts principle and freedom of the press, and its skepticism that pre-trial publicity impairs fair trial rights. The effect of Deschamps J.'s judgment, as Abella J. noted, is that bail hearings can continue to operate — to paraphrase Bentham — in the darkness of secrecy. This harms public confidence in the bail process, the public's right to scrutinize judicial processes, and fair trial interests, as Berger J.A. of the Alberta Court of Appeal pointed out in the first *White* decision.[91]

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88 *Id.*, at para. 60.

89 *Id.*, at para. 65 (emphasis in original).

90 *Id.*, at para. 67.

91 *White*, *supra*, note 70, at para. 16, *per* Berger J.A. in chambers:

As noted above, Deschamps J. grounded her analysis of section 517 on the dual premises that mandatory publication bans requested by the accused at bail hearings (i) safeguard fair trial rights; and (ii) ensure expeditious bail hearings. Each of these rationales may be criticized.

1. Safeguarding Fair Trial Rights Does Not Require Mandatory Publication Bans

Section 517 bluntly creates a sweeping ban on all information at bail hearings, regardless of the evidence or information presented, and regardless of how unlikely it may be — if it is even possible — that the case will result in a jury trial. This is because section 517 applies to *all* criminal cases, many of which, such as summary conviction offences, cannot *possibly* be tried by a jury. As Rosenberg J.A. pointed out, "in the overwhelming majority of cases in which a publication ban is imposed and freedom of expression infringed, the ban does not serve the objective of protecting the accused from a jury tainted by pre-trial publicity".[92] Although Rosenberg J.A. observed that "less than 2 percent of all criminal cases are tried by jury",[93] in fact the statistics presented suggested that the number may be as low as 0.1 per cent. This point was also made in the McRuer Report in recommending *against* publication bans.[94]

More significantly, however, there is no basis to conclude that publicity at a bail hearing will jeopardize the fairness of a jury trial. There has *never* been a case in Canada in which an impartial jury has not been found, regardless of the level of pre-trial publicity, including publicity from prior trials where re-trials have been necessary,[95] and where trials

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I ask rhetorically: 'How is public confidence enhanced by a "cone of silence" descending over the careful and considered analysis of the adjudicator?' Keeping the public in the dark, in my opinion, can be a recipe for uninformed speculation fuelling widely publicized concern in the community — a far greater risk to the fair trial rights of the accused and the Crown.

92 *Toronto Star v. Canada* – CA, *supra*, note 56, at para. 80.

93 *Id*.

94 McRuer Report, *supra*, note 52, at 755-69, especially at 763.

95 As Rosenberg J.A. noted, "commentary from judges in Canada and other common-law jurisdictions is virtually uniform that the impact of pre-trial publicity is *speculative* and that other measures short of a contemporaneous ban on publication of the entire proceeding will protect the accused's fair trial rights". See *Toronto Star v. Canada* – CA, *supra*, note 56, at para. 93 (emphasis added).

have followed highly publicized public inquiries, such as Mount Cashel[96] and Westray.[97] Indeed, the Supreme Court itself has addressed this issue in several cases. Echoing the McRuer Report, Cory J. stated in *Phillips*:

> In my view, the Westray Inquiry hearings would not present an unacceptable risk to the s. 11(d) fair trial rights of the respondent managers. *Often the publicity pertaining to the evidence given at the Inquiry will have little effect on potential jurors. The impact may be fleeting and quickly fade away. How very quickly the details of a news story can be forgotten. The passage of a very few days may suffice to dim if not obliterate the memory of the reporting of Inquiry evidence. The likelihood of a prejudicial effect upon fair trial rights may be small indeed, a minor item washed away in the flood of information generated daily by the media.*[98]

The Supreme Court has also repeatedly emphasized its confidence in the ability of jurors to disabuse themselves of information that it is not entitled to consider.[99] Addressing the jury's ability to ignore prejudicial pre-trial publicity, Lamer C.J.C., in *Dagenais*, expressed "doubt that jurors are always adversely influenced by publications" and his belief "that jurors are capable of following instructions from trial judges and

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[96] *Kenny*, *supra*, note 31.

[97] *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] S.C.J. No. 36, [1995] 2 S.C.R. 97 (S.C.C.) [hereinafter "*Phillips*"].

[98] *Id.*, at para. 161 (emphasis added). To similar effect, five judges of the Ontario Court of Appeal, in *R. v. Hubbert*, quoted the following with approval (emphasis added):

> This does, in my judgment, lead to a *prima facie* presumption that anybody who may have read that kind of information might find it difficult to reach a verdict in a fair-minded way. *It is, however, a matter of human experience, and certainly a matter of the experience of those who practice in the criminal courts, first, that the public's recollection is short, and, secondly, that the drama, if I may use that term, of a trial almost always has the effect of excluding from recollection that which went before*.

See *R. v. Hubbert*, [1975] O.J. No. 2595, 29 C.C.C. (2d) 279, at para. 30 (Ont. C.A.) [hereinafter "*Hubbert*"], quoting Lawton J. in *R. v. Kray* (1969), 53 Cr. App. R. 412, at 415. See also *R. v. Murrin*, [1997] B.C.J. No. 3182 (B.C.S.C.) [hereinafter "*Murrin*"], where Oppal J. remarked at para. 20 that "[c]ommon sense tells us that public knowledge is at times fleeting in matters of this nature"; *White*, *supra*, note 70, at para. 17, where Berger J.A. stated, "I very much doubt that prospective jurors would retain and recall the details of a 30 second news clip or a seven inch column summarizing submissions made by counsel, or reasons for decision pronounced by a bail judge"; *R. v. Steele*, 2007 CarswellOnt 3045 (Ont. S.C.J.).

[99] See, *e.g.*, *R. v. Vermette*, [1988] S.C.J. No. 47, [1988] 1 S.C.R. 985, at 992-94 (S.C.C.); *R. v. Sherratt*, [1991] S.C.J. No. 21, [1991] 1 S.C.R. 509, at 525 (S.C.C.) [hereinafter "*Sherratt*"].

ignoring information not presented to them in the course of criminal proceedings".[100]

The Supreme Court accepts that jurors are capable of ignoring highly prejudicial information (such as prior convictions) when so directed, and can consider prejudicial information for certain purposes (such as credibility) and not for others (guilt or innocence). This reflects a high degree of confidence in the ability of jurors to do their job. This faith in juries is central to the criminal justice system. As Dickson C.J.C. stated:

> … *the Court should not be heard to call into question the capacity of jurors to do the job assigned to them*. The ramifications of any such statement could be enormous. Moreover, the fundamental *right* to a jury trial has recently been underscored by s. 11(*f*) of the *Charter*. *If that right is important, it is logically incoherent to hold that juries are incapable of following the explicit instructions of the judge.*[101]

In *Phillips v. Nova Scotia*, in refusing an application to stay a public inquiry on the basis that pre-trial publicity would prejudice the right to a fair trial, Cory J. stated:

> I am of the view that this objective [a fair trial] is readily attainable in the vast majority of criminal trials even in the face of a great deal of publicity. The jury system is a cornerstone of our democratic society. The presence of a jury has for centuries been the hallmark of a fair trial. I cannot accept the contention that increasing mass media attention to a particular case has made this vital institution either obsolete or unworkable. There is no doubt that extensive publicity can prompt discussion, speculation, and the formation of preliminary opinions in the minds of potential jurors. However, the strength of the jury has always been the faith accorded to the good will and good sense of the individual jurors in any given case.[102]

Many lower court judgments make similar statements, some in the face of very prejudicial and "sustained" pre-trial information.[103] In *Kenny*, for example, a stay of proceeding was denied where the accused

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[100] *Dagenais*, *supra*, note 7, at para. 87. In *Dagenais*, Lamer C.J.C. allowed that there could be a *possible* exception in a case of *sustained* pre-trial publicity, but that is not what would result from the publication of show cause hearings.

[101] *R. v. Corbett*, [1988] S.C.J. No. 40, [1988] 1 S.C.R. 670, at 691-94, especially 693 (S.C.C.) (emphasis added).

[102] *Phillips*, *supra*, note 97, at para. 133.

[103] *Sherratt*, *supra*, note 99, at 525.

was charged *after* the "Mount Cashel" Inquiry, at which there had been intense media coverage, including testimony (provided under relaxed rules of evidence) from seven of the 10 sexual assault complainants.[104]

In *White*, Berger J.A. commented:

> The Applicant has been charged with second-degree murder. His preliminary hearing will not take place until the new year. If committed to stand trial, jury selection would begin months later. *I very much doubt that prospective jurors would retain and recall the details of a 30 second news clip or a seven inch column summarizing submissions made by counsel, or reasons for decision pronounced by a bail judge. Even if some did, the usual admonitions to the array, challenges for cause, and jury instructions themselves, are, in my opinion, sufficient safeguards to ensure that an impartial jury, true to their oaths, will be empanelled.* While the underlying fear is that issues will be pre-judged or that there will be "trial by media" without the benefit of safeguards inherent in legal proceedings, I am convinced that the average citizen understands full well what Voltaire meant when he said in 1760: "When we hear news we should always wait for the sacrament of confirmation."[105]

Justice Berger's opinion is consistent with Lamer C.J.C.'s comments in *Dagenais* about the availability of alternative measures:

> Possibilities that readily come to mind, however, include adjourning trials, changing venues, sequestering jurors, allowing challenges for cause and *voir dires* during jury selection, and providing strong judicial direction to the jury. Sequestration and judicial direction were available

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[104] *Kenny*, *supra*, note 31, at 14-15:

I accept that people are biased by pre-trial publicity in the sense that they develop pre-conceived ideas. However, I accept that they are capable of responding to the instructions of the Trial Judge and of obeying their oath, notwithstanding any previously formed opinions. See *Hubbert* and *Keegstra*. The notion that people are unable to assess how much they have been biased by publicity is one which attacks the very heart of the jury system. If this is true, prospective jurors will not be able to reveal their biases when questioned by triers. They will not be able to obey their oaths or follow the judge's instructions because they will not recognize their own biases ... I am not persuaded, however, that there is anything so significantly new and startling in these [studies], in comparison to what was previously available to Parliament and the Supreme Court of Canada, as to require me to strike down the jury system which dates back to the Magna Carta of 1215.

[105] *White*, *supra*, note 70, at para. 17 (emphasis added).

> for the Dagenais jury. Apart from sequestration, all of the other effective alternatives to bans were available for the other three accused.[106]

In *Hubbert*, the Ontario Court of Appeal noted that "[p]rior information about a case, and even the holding of a tentative opinion about it, does not make partial a juror sworn to render a true verdict according to the evidence."[107] Put another way, an accused is entitled to an impartial jury, not an ignorant one.

Similar faith in the ability of jurors to do their job impartially is found in other common law jurisdictions. In England, in *Montgomery v. HM Advocate and another*,[108] the accused were brought to trial after a firestorm of adverse publicity, including comments from a judge about the culpability of the accused that were widely reported. The defendants' motion for a stay on the basis that they could not have a fair trial in light of the adverse pre-trial publicity was dismissed. In the House of Lords, Lord Hope of Craighead noted that "the entire system of trial by jury is based upon the assumption that the jury will follow the instructions which they receive from the trial judge and that they will return a true verdict in accordance with the evidence."[109]

In *R. v. B.*, the English Court of Appeal recently addressed the ability of jurors to follow instructions despite pre-trial publicity in a case involving charges of terrorist activity that had attracted much interest, noting that "[j]uries follow the directions which the judge will give them

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[106] *Dagenais*, *supra*, note 7, at para. 79. For examples of courts employing the alternative measure of sunset clauses, see *R. v. Brown*, [1998] O.J. No. 482, 126 C.C.C. (3d) 187, at 15-18 (Ont. Gen. Div.) [hereinafter "*Brown*"]; *R. v. Lake*, [1997] O.J. No. 5446, at paras. 24-27 (Ont. Gen. Div.) [hereinafter "*Lake*"]; *Murrin*, *supra*, note 98, at paras. 16-21.

[107] *Hubbert*, *supra*, note 98, at para. 29. See also *Brown*, *id.*, at para. 13: "Under our law the courts have consistently expressed confidence in the dynamics of the jury system as a means of ensuring juries render fair and impartial verdicts. Prior information about an accused or the trial does not in itself disqualify a potential juror — nor does the holding of a tentative opinion about the case."; *R. v. Bryant*, [1980] O.J. No. 3914, 54 C.C.C. (2d) 54, at para. 23 (Ont. H.C.J.) (quoting the McRuer Report: "[t]he requirement that the verdict of a jury must be unanimous constitutes a real safeguard against bias or prejudice. There may be some risk that one or two jurors may allow their preconceived notions to deflect them from the requirements of their oaths as jurymen, but that twelve jurors will all be derelict to the sanctity of their oaths is very remote"); *R. v. Keegstra*, [1991] A.J. No. 232, [1991] 63 C.C.C. (3d) 110 at para. 10 (Alta. C.A.); *Lake*, *id.*; *Edmonton (City) v. Kara*, [1995] A.J. No. 5, [1995] 4 W.W.R. 99, at para. 10 (Alta. Q.B.); *Murrin*, *id.*, at paras. 17-21; *Kenny*, *supra*, note 31, at 8-18.

[108] [2003] 1 AC 641 (P.C.) [hereinafter "*Montgomery*"].

[109] *Id.*, at 674.

to focus exclusively on the evidence and to ignore anything they may have heard or read out of court."[110]

Similar positions have, not surprisingly, been stated by the highest courts in Australia,[111] Ireland[112] and the United States.[113]

Nor does the social science evidence support the concern that jurors will be prejudiced. In the Ontario Court of Appeal, Feldman J.A. noted that there is "no definitive evidence of the extent to which juries' verdicts may be affected by … information they glean outside the trial".[114] Justice Rosenberg's review of the social science literature concluded that "it is difficult to draw firm conclusions from this material".[115]

It is striking, therefore, that Deschamps J. grounded her judgment in *Toronto Star v. Canada* to such an extent on the *possibility* of jury tainting in light of this long line of jurisprudence that addresses this concern. Indeed, it might be said that here too there have been "unwavering decisions" of the Court that pre-trial publicity will not prejudice fair trial rights, and that ample safeguards exist to address the issue when the concern may exist — as in *Dagenais*. Yet none of this jurisprudence was referred to by the majority. As Abella J., dissenting, stated:

> Concerns over pre-trial publicity were addressed by this Court when it considered the question of discretionary bans in *Dagenais* and *Mentuck*. The new threshold articulated in those cases was a high one, and bans were only to be imposed where they are "necessary" to protect against "real and substantial" risks to an accused's fair trial rights (*Dagenais*, at p. 878), or "serious" risks to the administration of justice (*Mentuck*, at para. 32). Section 517, in granting an automatic ban at the request of an accused regardless of whether he or she can demonstrate such a degree of risk, completely collapses the constitutional framework in *Dagenais*/*Mentuck*, leaving out of the

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[110] *R. v. B.*, [2006] EWCA Crim 2692, at para. 31 (C.A.) [hereinafter "*R. v. B.*"]. See also *Montgomery*, *supra*, note 108, at 673-74; *Ex parte Telegraph Plc.*, [1993] 2 All E.R. 971, at 978 (C.A.); *R. v. Abu Hamza*, [2006] EWCA Crim 2918, [2007] QB 659 (C.A.). More recently, in *Sinclair v. HM Advocate*, the English Court of Appeal noted that "the whole jury system depends on there being trust between judge and jury, including an understanding that jurors will not deliberately disobey the instructions on law or procedure which they are given by the trial judge". See *Sinclair v. HM Advocate*, [2007] HCJAC 27, at para. 16 (C.A.).

[111] *R. v. Glennon* (1992), 173 C.L.R. 592, 106 A.L.R. 177 (H.C.A.).

[112] *Z. v. Director of Public Prosecutions*, [1994] 2 I.R. 476, at 508 (I.S.C.).

[113] *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, at 568-70 (S.C., 1976).

[114] *Toronto Star v. Canada* – CA, *supra*, note 56, at para. 167.

[115] *Id.*, at para. 87.

> balance entirely the public's presumptive right to know what goes on in a courtroom.
>
> Even if one is disinclined to accept what is to me the cogent evidence in the reasons of Rosenberg J.A. demonstrating how speculative the concerns over pre-trial publicity are, there remains the possibility of remedies such as a partial ban, challenges for cause, or a change of venue if there is a sufficient risk of prejudice. We should also be able to rely on the ability of a properly instructed jury to disregard irrelevant evidence, a reliance that is at the foundation of our belief in juries in criminal trials (*Dagenais*, at pp. 884-85; see also *R. v. Corbett*, [1988] 1 S.C.R. 670, at pp. 692-93; *R. v. Vermette*, [1988] 1 S.C.R. 985, at pp. 992-93).
>
> .....
>
> In any event, s. 517 only protects an accused from disclosure of pre-trial information from a bail hearing. There is no legislative protection from potentially prejudicial pre-trial information that emanates from sources other than the bail hearing. In the absence of such a generalized ban, the benefit of a ban only on bail hearing information seems to me to be too porous to justify the seriousness of the infringement.[116]

2. Section 517 Is Not Necessary to Ensure Expeditious Bail Hearings

Justice Deschamps's decision largely focused on what she had found was the other purpose of the legislation — to ensure expeditious bail hearings. Without the mandatory ban, she said, "an additional burden would be placed on the accused at a time when he or she is extremely vulnerable", perhaps "overwhelmed by the criminal process", without counsel or the "opportunity to learn what evidence the prosecution intends to adduce".[117] As Deschamps J. put it: "They should be devoting their resources and energy to obtaining their release, not to deciding whether to compromise on liberty in order to avoid having evidence aired outside the courtroom."[118] She continued:

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116 *Toronto Star v. Canada* – SCC, *supra*, note 11, at paras. 71-73.
117 *Id*., at para. 36.
118 *Id*.

> In light of the delay and the resources a publication ban hearing would entail, and of the prejudice that could result if untested evidence were made public, it would be difficult to imagine a measure capable of achieving Parliament's objectives that would involve a more limited impairment of freedom of expression. If issues unrelated to the release of the accused were added to the bail hearing, this would require the consideration of matters extraneous to the bail process and could have a domino effect on other bail hearings in the same forum, thereby delaying the administration of justice.[119]

Justice Deschamps referred repeatedly to the burden on the accused and the delay that would be caused if publication bans had to be justified at bail hearings. While she recognized that bans are discretionary when sought by the prosecutor, "[u]nlike the accused, the prosecutor knows exactly what allegations are to be made against the accused and also knows what evidence will likely be introduced at trial."[120] While one might have thought that this knowledge could — and should — be used *by the Crown* to also protect fair trial interests in appropriate cases, such as, for example, where evidence of a confession will be presented at a bail hearing and so *that fact* might be the subject of a ban, this was not considered by the court.

The appellant's argument, based on the *Dagenais* test, was dismissed in the following statement:

> The appellants argue that bail hearings would almost never be delayed if the ban were discretionary because the *Dagenais* test would rarely be met, since jury bias is purely speculative. As a result, counsel would seldom bring motions for bans. This proposition is based on the assumption that accused would renounce their interest in trial fairness to ensure an expeditious hearing. This is exactly the kind of compromise the mandatory ban is intended to avoid. The appellants' argument is in fact based on the incorrect view that the ban has nothing to do with the rights of the accused to a fair trial and to fair access to bail. It is simply wrong to assume that neither the bail hearing itself nor the disclosure of information, evidence or the reasons for the justice's order would have any effect on the accused's interests.[121]

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[119] *Id.*, at para. 37.
[120] *Id.*, at para. 46.
[121] *Id.*, at para. 57.

This reasoning, however, is based on the presumption that "trial fairness" *will* be compromised by a ban. It fails to consider that in the very small number of appropriate cases where a limited ban *might* be justified (such as where a confession is adduced) the issuance and tailoring of a ban can be effected promptly and without delay. As Rosenberg J.A. observed in the Ontario Court of Appeal:

> Even granting the possibility that pre-trial publicity can influence jury behaviour, this would only be the case in the most unusual instances, being cases where a single powerful piece of inadmissible evidence comes to the attention of the jury pool at a time proximate enough to the trial to have an impact.[122]

Notice to the media is not required, and should not result in adjournments, as Abella J. pointed out in dissent.[123]

The *Dagenais* test, properly applied, would rarely, if ever, justify bans on publication of bail hearings, and may only, in very limited circumstances, justify even a partial ban. In those limited circumstances, which may be identified by the Crown or the defence (*e.g.*, evidence of a confession, or inculpatory wiretap evidence, perhaps), a ban may be sought and justified under the flexible *Dagenais* test. In other circumstances — the vast majority of cases — it would be irrational for accused persons to bring futile motions that might delay their own release.

In any event, publication bans, if sought, can and should usually be decided summarily, just as bail hearings proceed in an expeditious

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[122] *Toronto Star v. Canada* – CA, *supra*, note 56, at para. 90.

[123] *Id.*, at para. 74. The Supreme Court has never said that notice — while desirable — is mandatory. As Fish J. stated in *Toronto Star v. Ontario*, *supra*, note 1, at para. 31:

> It hardly follows, however, that the *Dagenais/Mentuck* test should be applied mechanistically. Regard must always be had to the circumstances in which a sealing order is sought by the Crown, or by others with a real and demonstrated interest in delaying public disclosure. The test, though applicable at *all* stages, is a flexible and contextual one. Courts have thus tailored it to fit a variety of discretionary actions, such as confidentiality orders, judicial investigative hearings, and Crown-initiated applications for publication bans.

And as Rosenberg J.A. noted in *Toronto Star v. Canada* – CA, *supra*, note 56, at para. 97:

> … as to notice, the justice has a discretion whether to give notice and the form of notice: *Dagenais*, at 869. Given the need for an expedited bail hearing to avoid the unwarranted detention of the accused, it would seem to me that in most cases the justice need not give notice to the media. Such an approach appears to be authorized by *Named Person v. Vancouver Sun*, [2007] S.C.J. No. 43, [2007] 3 S.C.R. 253 (S.C.C.), where the Court held, at paras. 53-54, that notice need not be given every time an *in camera* proceeding is to take place …

manner, with judges receiving all evidence that is "credible or trustworthy", often simply allegations from the police or Crown counsel.[124] As Rosenberg J.A. stated:

> As to the issue of the accused needing time to gather "evidence" of the risk to trial fairness or the administration of *justice*, this issue must be put in context. As already noted, the strict rules of evidence do not apply at bail hearings. In my view, in considering whether to impose a publication ban, the justice of the peace is entitled to act upon the kind of information that can be received on a bail hearing, being evidence that is considered credible and trustworthy. It is not unusual for evidence to be presented through statements of facts read out by Crown counsel. It would seem to me that the justice of the peace would be entitled to act upon submissions of counsel in deciding whether or not to impose a publication ban. It is not practicable to expect the party seeking the order to adduce the kind of evidence that might be admissible at a trial, in accordance with the normal rules of evidence.[125]

X. WHAT OF OPENNESS? SALUTARY AND DELETERIOUS EFFECTS

Justice Deschamps did note that section 517 has the deleterious effect of banning the media "from informing the population on matters of interest which could otherwise be subject more widely to public debate".[126] However, she concluded that "on balance ... the deleterious effects of the limits on the publication of information are outweighed by the need to ensure certainty and timeliness, to conserve resources, and to avert the disclosure of untested prejudicial information".[127] As noted earlier, Deschamps J. minimized some of the effects of the ban, noting that it "is not an absolute ban on access to the courts or on publication" and that it is "temporary", that it "applies only with respect to the bail process, and the information it covers can eventually be made public

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[124] *Criminal Code*, R.S.C. 1985, c. C-46, s. 518(1)(e). See also *R. v. John*, [2001] O.J. No. 3396, at para. 56 (Ont. S.C.J.), *per* Hill J.: "A bail hearing is not a trial. Nor should this summary proceeding assume the complications of a trial."

[125] *Toronto Star v. Canada* – CA, *supra*, note 56, at para. 99.

[126] *Toronto Star v. Canada* – SCC, *supra*, note 11, at para. 58.

[127] *Id.*, at para. 60.

once more complete information produced in accordance with the standards applicable to criminal trials is available".[128]

These rationales for overriding section 2(b) are troubling, and inconsistent with prior decisions of the Court. While Deschamps J. may be correct that section 517 does not create an "absolute ban", it prevents reporting of any meaningful information that would allow the public to know why an accused is detained or released. This "cone of silence"[129] prevents an understanding by the public of the bail process generally — a critical aspect of criminal justice. The decision whether to grant bail can have a more significant impact on the accused than any other decision in a criminal case, and may lead to the only term in custody he or she will serve. Professor Friedland noted many years ago that

> [t]he period before trial is too important to be left to guess-work and caprice. ... but also may have a substantial impact on the result of the trial itself. The law should abhor any unnecessary deprivation of liberty and positive steps should be taken to ensure that detention before trial is kept to a minimum.[130]

Imprisonment prior to conviction, no matter how brief, is an exercise of the utmost power of the state to limit an individual's freedom, at a time when the individual is presumed to be innocent.

There is a very significant public interest in judicial decisions about bail. In *R. v. Hall*, the Supreme Court upheld the provision that allows a judge to deny bail when necessary to maintain confidence in the administration of justice. The existence of this section, and this Court's decision that it is a valid ground on which to deny bail, underlines the importance of judicial interim release decisions. As McLachlin C.J.C. stated: "Without public confidence, the bail system and the justice system generally stand compromised."[131]

Yet, as Rosenberg J.A. noted in the Ontario Court of Appeal, section 517 "stifles informed public participation in one of the crucial aspects of the criminal justice system".[132] He continued:

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[128] *Id.*, at para. 39.

[129] Justice Berger in *White*, *supra*, note 70, at para. 16.

[130] Friedland, *supra*, note 51, at 172.

[131] [2002] S.C.J. No. 65, [2002] 3 S.C.R. 309, at para. 31 (S.C.C.) (see also para. 27) [hereinafter "*Hall*"]. See also *White*, *supra*, note 70.

[132] Reasons of Rosenberg J.A., *Toronto Star v. Canada* – CA, *supra*, note 56, at para. 83.

> *Section 517, however, prevents the dissemination of information necessary to promote public confidence in the bail system.* This is the case both at the time the initial decision is made, and later where subsequent events may raise questions as to the wisdom of that decision, as when the accused who is on bail commits further offences. The fact that an accused was on bail when he or she committed a further serious offence often receives wide coverage in the media. However, the public is left to speculate as to why the accused was initially released, because of the s. 517 order.[133]

Such concerns — deleterious effects — are given short shift by the majority in the Supreme Court — mentioned only briefly and dismissed with the paternalistic suggestion that a bail hearing "may not be fully understood by the public" and that "the media would be better equipped to explain the judicial process to the public if the information they could convey were not restricted".[134] One might have thought these concerns favoured openness! Indeed, as the cloak of secrecy applies to bail decisions as well as the hearings themselves, section 517 likely inhibits academic scrutiny of the process.

Nor does the majority ever contend with its "unwavering" line of cases that the openness principle applies at *every* stage of the criminal process. While the Court refers, for example, to *Re Vancouver Sun*,[135] for the proposition that all discretionary bans are subject to the *Dagenais/Mentuck* test, it makes no attempt to reconcile that decision which effectively turned *ex parte* — and necessarily *in camera* — investigative hearings into hearings in which *Dagenais/Mentuck* applies.

The fact that a ban is "temporary" is not a justification, but should only be considered once it is determined that a ban is *necessary* at all. This was the approach of the Court in *Toronto Star v. Ontario* where a delay of 90 days in access to search warrant materials was not a justification for the ban. In any event, these bans may be long-lasting and are often in place for years. Yet, as Rosenberg J.A. stated in the Court of Appeal, "the public is most interested in the information disclosed at the bail hearing … when the bail decision is made. That is the point in the

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[133] *Id*., at para. 78 (emphasis added). Similar points were made by Abella J., dissenting in the Supreme Court, *supra*, note 11, at para. 68.

[134] *Toronto Star v. Canada* – SCC, *supra*, note 11, at para. 59.

[135] [2004] S.C.J. No. 41, [2004] 2 S.C.R. 332, at para. 18 (S.C.C.), referred to by Deschamps J.

proceedings when the public is entitled to scrutinize and hold the criminal justice system to account." [136]

Courts have repeatedly emphasized the importance of timeliness in news reporting.[137] As Doherty J.A. put it: "The values promoted by s. 2(b) are not served by publication when the speaker has lost his audience and the message to be conveyed has lost its purpose."[138] Justice Nordheimer recently commented that "... transgression of fundamental freedoms ought not to be readily justified on the basis that any such infringements will be transient or short-lived".[139] Delayed scrutiny may, in fact, cause harm, as Berger J.A. noted in *White*:

> News is a perishable commodity ... [and] unjustified delay in permitting full public access will have a deleterious effect on the ability of the media to report, and, in the result, for the public to be informed. Contemporaneous access to court documents and processes allows the media to fulfill their legitimate role as the eyes and ears of the public.[140]

A further concern expressed by Deschamps J. also merits comment — her reference to delaying publication until "more complete information produced in accordance with the standards applicable to criminal trials is available".[141] This too seems inconsistent with *Toronto Star v. Ontario*, where Fish J. confirmed the long line of jurisprudence that the openness principle applies to *all* stages of the criminal process.[142] An Information to obtain a search warrant may be very one-sided, and will be reported and regarded that way. So too an investigative hearing. If all that occurs at a bail hearing is the reading of allegations by the Crown, or the presentation of untested hearsay, then at least the public will learn of

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[136] *Toronto Star v. Canada* – CA, *supra*, note 56, at para. 82.

[137] *Dagenais*, *supra*, note 7, at para. 183: "*Unlike news*, immediacy is not the essence of docudramas." (emphasis added), *per* Gonthier J., in dissent; *Brown*, *supra*, note 106, at para. 23, *per* Trafford J., citing David Lepofsky, *Open Justice: The Constitutional Right to Attend and Speak About Criminal Proceedings* (Toronto: Butterworths, 1985): "Immediacy is of fundamental importance to the constellation of principles of s. 2(b) of the *Charter*."; *Triple Five Corp v. United Western Communications Ltd.*, [1994] A.J. No. 278, at para. 6 (Alta. C.A.), *per* Kerans J.A.: "News, as the word implies, invokes something new — something fresh. As a result time for [the media] is always of the essence."

[138] *R. v. Domm*, [1996] O.J. No. 4300, 31 O.R. (3d) 540, at para. 40 (Ont. C.A.).

[139] *R. v. Toronto Star Newspapers Ltd.*, [2005] O.J. No. 5533, 204 C.C.C. (3d) 397, at para. 33 (Ont. S.C.J.).

[140] *White*, *supra*, note 70, at para. 6.

[141] *Toronto Star v. Canada* – SCC, *supra*, note 11, at para. 39.

[142] *Toronto Star v. Ontario*, *supra*, note 1, at para. 31.

— and perhaps criticize — the process. But to suggest that reporting of judicial acts must be dependent on evidence admissible at trials, when those judicial acts are not so dependent, is inconsistent with *MacIntyre* and *Toronto Star v. Ontario*, and is troubling indeed.

It should also be borne in mind that it is now simply not possible for courts to control the spread of information — prejudicial or not, true or false — over the Internet.[143] Rumour and speculation can emanate from — or be fuelled by — official sources. Law enforcement officials often make public statements about accused persons and the allegations against them at the time of arrest. It is irrational that police sources should be able to make public statements — as occurred in *Toronto Star v. Canada*, namely, that the accused were "adherents of a violent ideology inspired by al-Qaeda" and that the arrests "prevented the assembly of any bombs and the attacks from being carried out" — yet the public is then prevented from hearing these same allegations when they are raised (or not), and potentially tested (or not), in a court of law. As Rosenberg J.A. noted, the ban imposed by section 517 "has no effect on other pre-trial publicity, some of which may be more inflammatory than the general factual information presented at the bail hearing".[144]

Unlike police sources and individuals posting information on the Internet, news organizations have a duty to report fairly and accurately on court proceedings.[145] They are also subject to contempt charges if they endanger fair trial interests. Newspapers and broadcasters act responsibly. There are no instances in Canada in which pre-trial publicity has been found to have prejudiced a fair trial, or prevented the selection of an impartial jury. As the English Court of Appeal recently pointed out,

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[143] Parliament appears to have sought to curtail the possibility of non-media sources publishing what transpires at bail hearings by extending the reach of s. 517 to publication in "any document" instead of only applying to a newspaper or broadcast. This is presumably to address the concern identified in the McRuer Report of members of the public disseminating information from bail hearings. See *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32, s. 17. This amendment does nothing, of course, to prevent rumour and speculation about criminal proceedings.

[144] *Toronto Star v. Canada* – CA, *supra*, note 56, at para. 95. And on the facts of the case before him he pointed out, at para. 81, that "there is no indication that what would be disclosed at the bail hearing would be any more prejudicial than information disclosed by the authorities at the time of the arrest".

[145] *Libel and Slander Act*, R.S.O. 1990, c. L.12, s. 4(1); *Young v. Toronto Star Newspapers Ltd.*, [2005] O.J. No. 4216, 77 O.R. (3d) 680, at paras. 92-98 (Ont. C.A.).

> the responsibility for avoiding the publication of material which may prejudice the outcome of a trial rests fairly and squarely on those responsible for the publication. *In our view, broadcasting authorities and newspaper editors should be trusted to fulfil their responsibilities accurately to inform the public of court proceedings, and to exercise sensible judgment about the publication of comment which may interfere with the administration of justice.*[146]

Thus, there is no basis to conclude that the public will form a fixed view of a matter as a result of a fair and accurate report on a bail hearing, any more so than it does from hearing the police assert at press conferences that accused were planning a "terrorist attack". Fair and accurate reports on court proceedings are an antidote to rumour and innuendo. They provide the public with legitimate information about judicial proceedings.

XI. CONCLUSION

Public confidence and public scrutiny go hand in hand. As McLachlin C.J.C. wrote in *Hall*, "[w]ithout public confidence, the bail system and the justice system generally stand compromised."[147] Yet, in light of *Toronto Star v. Canada*, section 517 prevents public understanding and scrutiny of what happens at bail hearings and how the grounds on which people are detained or released are applied by judges. It is difficult to have confidence in a process that is subject to such limited scrutiny. Whether the Supreme Court's departure from its "unwavering decisions" on openness is an anomaly driven by concerns over fairness to an accused, or a harbinger of the things to come remains to be seen.

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[146] *R. v. B.*, *supra*, note 110, at para. 25 (emphasis added). See also *R. v. Bhatti*, [2006] All E.R. (Digest) 348 (C.A.).

[147] *Hall*, *supra*, note 131, at para. 31.