

**HORRIFIC VIDEO TAPES AS EVIDENCE:  
BALANCING OPEN COURT AND VICTIMS' PRIVACY**

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***Title Page Footnotes***

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### ***Defining the Issues***

The jury is rivetted to the video monitor. The courtroom is packed with spectators, and a throng of media anxiously await the playing of *the* videotape. Finally, after some legal wrangling, the Crown's main piece of evidence is openly played for the jury and the public. It is a parent's worst nightmare.

The video shows, in a very graphic way, the violent vaginal and anal rape of two young school girls abducted by the accused. The sexual degradation continues with forced fellatio, cunnilingus, anilingus, masturbation, the urination and attempted defecation by the accused on one girl, the forcing of a wine bottle into the vagina and anus of the same girl, and forced sex between young women and between two women and a man. Throughout the video there are beatings, and throughout there are cries of anguish and cries for help from the victims. The girls are ordered to smile, given scripted lines to repeat and are required to say they are enjoying their ordeal. Although not shown on the videotapes, each is finally murdered and the body of one is dismembered -- acts which a Crown expert described as the "ultimate sexual experience" for the accused.

A Hollywood production, or reality? Incredibly, this video formed the very heart of the Crown's evidence in the recent Canadian case of the *Queen v. Bernardo*.<sup>1</sup> The videotape depicts pornography of the worst kind. For reasons that go well beyond the scope of this paper, those who engage in sadistic sexual torture, and who have access to video equipment, often record the event for future

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<sup>1</sup> *R. v. Bernardo* (unrep., Sept. 1, 1995, Ont. Ct. of J.), discussed in *French Estate v. Ontario (Attorney General)* (1996), 106 C.C.C. (3d) 193 (Ont. Ct. (Gen. Div.)), esp. at p. 206; appeal quashed 122 C.C.C. (3d) 449 (Ont. C.A.). For a further history of this case, see footnote 63, *infra*.

enjoyment.<sup>2</sup> As a consequence, in our high-tech world, the prosecution increasingly finds itself relying upon evidence of this sort to demonstrate culpability.<sup>3</sup>

Cases of this nature pose an immense challenge to our criminal justice system: Are victims of this type of crime, and their families, entitled to an element of privacy in the trial of the accused and, if they are, how does one balance that right against the centuries-old common law and statutory principle of openness in court proceedings? In this paper, we intend to explore this broad issue and, in the process, will consider a number of questions: To what extent can the public, including the media, access and duplicate the evidence for later broadcast? To what extent, and under what circumstances, can the media or the victim's family intervene in the trial for the purpose of asserting a

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<sup>2</sup> During the investigation, Special Agent G. O. McCrary of the Federal Bureau of Investigation (FBI) gave information to the investigators that turned out to be highly accurate. He advised that a sexual sadist is likely to videotape his sexual activities and keep the video for future enjoyment. This, together with information from Karla Homolka, caused the police to examine the Bernardo residence in search of this type of evidence for considerably longer than would otherwise have been the case. Special Agent McCrary was a criminal investigative analyst with the National Center for the Analysis of Violent Crimes (NCAVC) in Quantico, Virginia, U. S. A. Since 1981, the organization has acted as a support to law enforcement agencies investigating complex and bizarre crimes, especially serial murders and severe sexual offences. See "Galligan", *infra*, footnote 39 at pp. 12 and 45. Other recent cases support this view. Charles Ng, recently extradited from Canada to the United States in connection with 13 serial sex-torture murders, videotaped two of his victims before they were killed. The tapes form the heart of the case for the prosecution. His case is still pending before the courts in California: See *Reference re: Ng Extradition (Can.)* (1991), 67 C.C.C. (3d) 61 (S.C.C.), recently discussed, quite accurately, in: "Why is Charles Ng Still Alive?", by Rick Mofina, *Penthouse Magazine* (New York, N.Y., U.S.A.: August 1997), at p. 46 *et seq.* The case is, as well, discussed on the Internet: [HTTP://www.TMIweb.com/Bigfree/Teafree/Killer/killer.html](http://www.TMIweb.com/Bigfree/Teafree/Killer/killer.html). Finally, a New Zealand man who raped his stepdaughter and videotaped the incidents was recently sentenced to eight years imprisonment. In *R. v. [Name Suppressed]* (unrep., September 29, 1997, N.Z.D.C.), the accused systematically drugged and raped a thirteen-year-old girl over a period of five years. The videotape made by the accused showed that throughout the assaults the girl was heavily sedated. The man would shake or slap her to ensure that the drugs were working, then would proceed to rape her [*The Dominion*, Wellington, New Zealand, September 30, 1997, at p. 10].

<sup>3</sup> For example, see the cases of *Reference re: Ng Extradition (Can.)* and *R. v. [Name Suppressed]*, *ibid.*

right? How should the Court ensure that the accused's right to a fair trial is not impaired in the context of competing victim and media interventions? Should the videotape be played in the usual way for all to see, or is there another way in which this evidence can be tendered and relied upon which is more sensitive to victim concerns and notions of public morality? Finally, who owns the tape, and what should be done with it once all legal proceedings are completed?

Before dealing with any of these issues, however, we will describe the broader legal context within which these specific points ought to be considered. First, we will examine the fundamental common law principles in this area of the law. Next, recent developments in Canada will be analyzed, following which the law in a number of countries which have a common law base to their criminal justice system will be reviewed. Finally, we will advance a few thoughts on future directions that could be pursued in order to strike the right balance between the principle of openness and the privacy rights of victims.

### ***Fundamental Common Law Principles Concerning Openness***

The freedom of the individual to discuss information about the institutions of the state, and their policies and practices, is pivotal to any notion of democratic rule. The liberty to criticize and express contrary views has long been thought to be a safeguard against government tyranny and corruption. James Mill put it this way almost 175 years ago:<sup>4</sup>

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<sup>4</sup> “Liberty of the Press”, in *Essays on Government, Jurisprudence, Liberty of the Press, and Law of Nations*, by James Mill (1825) (New York: Augustus M. Kelly, reprint edition 1967), at p. 18.

“So true it is, however, that the discontent of the people is the only means of removing the defects of vicious governments, that the freedom of the press, the main instrument of creating discontent, is, in all civilized countries, among all but the advocates of misgovernment, regarded as an indispensable security, and the greatest safeguard of the interests of mankind.”

It is clear that the courts, especially the criminal courts, play a pivotal role in any democracy. It is only through the courts that the individual can challenge government and obtain a decision binding on the state.

The courts, too, must therefore be open to public scrutiny and public criticism of their operations. This point was made powerfully by Jeremy Bentham in a passage subsequently adopted with approval by the House of Lords, the Supreme Court of Canada and appellate courts in Australia:<sup>5</sup>

“In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.” Publicity is the very

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*Scott v. Scott*, [1913] A.C. 417 (H.L.); *Attorney-General v. Leveller Magazine Ltd.*, [1979] A.C. 440 (H.L.); *Attorney-General of Nova Scotia et al. v. MacIntyre* (1982), 65 C.C.C. (2d) 129 (S.C.C.), at p. 144; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)* (1996), 110 C.C.C. (3d) 193 (S.C.C.), at pp. 202-3 on behalf of the unanimous nine-person court. Also, at the trial level, see *Canadian Broadcasting Corp. v. Canada (Attorney-General)* (1995), 97 C.C.C. (3d) 259 (N.W.T.S.C.) at p. 271. Australian, New Zealand and American courts have also embraced this principle: see *Russell v. Russell* (1976), 134 C.L.R. 495 (H.C.), at p. 520; *R. v. Tait* (1979), 24 A.L.J.R. 473 (Fed. Ct. Of A.); *Broadcasting Corporation of New Zealand v. Attorney General*, [1982] 1 N.Z.L.R. 120 (C.A.); *Police v. O'Connor*, [1992] 1 N.Z.L.R. 87 (H.C.); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 566 (1980), 100 S. Ct. 2814 (1980), at p. 2822; *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 606 (1982).

soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.”

The principle of open courts is deeply embedded in the common law tradition. In the seminal case, *Scott v. Scott*,<sup>6</sup> Lord Shaw of Dunfermline clearly articulated the fundamental basis for the openness principle:<sup>7</sup>

“The security of securities is publicity”. But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: “Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise.”

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<sup>6</sup> [1913] A.C. 417 (H.L.).

<sup>7</sup> *Ibid.*, at p. 477.

Later, in *McPherson v. McPherson*,<sup>8</sup> Lord Blanesburgh, delivering the judgment of the Privy Council, referred to publicity as the “authentic hall-mark of judicial as distinct from administrative procedure.”

In more recent times, the Supreme Court of Canada and other Commonwealth courts have observed that the principle of open courts is anchored on at least three main grounds. First, and primarily, public accessibility to our court system is an important ingredient of judicial accountability.<sup>9</sup> It fosters public confidence in the integrity of the court system as well as the public’s understanding of the administration of justice.<sup>10</sup> As well, the open court principle, as the very soul of justice, acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law.<sup>11</sup>

The second broad rationale supporting the openness principle concerns the deterrence and public denunciation functions of the sentencing process: “Public scrutiny of criminal sentencing advances both these functions by subjecting the process to the public gaze and its attendant condemnation ... In

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<sup>8</sup> [1936] A.C. 177 (H.L.), at p. 200.

<sup>9</sup> *Attorney-General of Nova Scotia et al. v. MacIntyre* (1982), 65 C.C.C. (2d) 129 (S.C.C.), at pp. 144-145; *Vickery v. Nova Scotia Supreme Court (Prothonotary)* (1991), 64 C.C.C. (3d) 65 (S.C.C.), at p. 91c, per Stevenson, J. on behalf of the majority, and at pp. 79 - 81, per Cory, J. on behalf of the minority; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)* (1996), 110 C.C.C. (3d) 193 (S.C.C.), at pp. 202 - 203, per La Forest, J. on behalf of all nine members of the court; *SRD v. Australian Securities Commission*, 123 A.J.C. 730 (Fed. Ct. of A.); *R. v. Tait*, *supra*, at p. 488; *Police v. O’Connor*, *supra*, at p. 95.

<sup>10</sup> *Attorney-General of Nova Scotia et al. v. MacIntyre*, *supra*, at pp. 145-6; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at p. 203d; *Globe Newspaper Co. v. Superior Court*, *supra*, at p. 606; *Police v. O’Connor*, *supra*, at pp. 103 - 104; *Television New Zealand Ltd. v. R.*, [1996] 3 N.Z.L.R. 393 (C.A.), per Keith, J. on behalf of a unanimous five-person bench. In Australia, see *Russell v. Russell*, *supra*, at p. 520, and *R. v. Tait*, *supra*, at pp. 487 - 8.

<sup>11</sup> *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at p. 203d; and see *Morris v. The Crown Office*, [1970] 1 All E.R. 1079 (C.A.), at p. 1081.

any criminal case, the sentencing process serves the critically important social function of permitting the public to determine what punishment fits a given crime, and whether sentences reflect consistency and proportionality.”<sup>12</sup>

The third rationale concerns the ability of the openness principle to support other democratic values such as the right of free expression. The reasoning is this: The right of the public to information concerning court proceedings depends upon the ability of the media to transmit this information to the public. Debate in the public domain is therefore predicated on an informed public, which in turn is reliant upon a free and vigorous media. Essential to the freedom of the media to provide information to the public is their ability to have access to the courts and their process.<sup>13</sup>

### ***Openness of the Courts: Two Facets***

The open court principle has two separate and distinct facets. The first is the right of the public and the media to attend trials and court proceedings and to report on all that transpires. The second concerns the right of the public to criticize and scrutinize the judicial process, including court

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<sup>12</sup> *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at p. 222.

<sup>13</sup> *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at p. 204; *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, *supra*, at 86h; and see: *Public and Media Access to the Criminal Process*, published by the Law Reform Commission of Canada (Ottawa, Canada: 1987), at pp. 9 - 17 [hereinafter referred to as the “Law Reform Commission of Canada Report”]; this rationale has also been accepted in New Zealand: *Police v. O’Connor*, *supra*, at pp. 103 - 104; *Television New Zealand Ltd. v. R.*, *supra*.

exhibits and “judicial records”.<sup>14</sup> It is the latter, and more particularly the exceptions that have developed in this area, upon which we now propose to focus.

### ***Competing Values: Exceptions to the Openness Rule***

In Anglo-based systems of criminal justice, openness is clearly the rule, with secrecy the exception.<sup>15</sup>

Whether and to what extent the general rule of openness applies in a particular case depends on whether there exists a competing social value of superordinate importance.<sup>16</sup>

Once again, the seminal case is *Scott v. Scott, supra*. Several members of the House of Lords considered the issue in that case. Viscount Haldane, L.C., said:<sup>17</sup>

“ . . . the power of an ordinary Court of justice to hear in private cannot rest merely on the discretion of the judge or on his individual view that it is desirable for the sake of

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<sup>14</sup> *Attorney-General of Nova Scotia et al. v. MacIntyre, supra*, at pp. 133 - 134; *Vickery v. Nova Scotia Supreme Court, supra*, at pp. 71 and 86, per Cory, J. (L’Heureux-Dubé and McLachlin, JJ. concurring) on behalf of the minority; *Ex Parte Drawbaugh*, 2 App D.C. 404 (1894), at p. 407; *United States v. Edwards*, 672 F. 2d 1289 (1982), at p. 1294.

<sup>15</sup> *Attorney-General of Nova Scotia et al. v. MacIntyre, supra*, at pp. 145 - 147; *French Estate vs Ontario (Att. Gen.)* (1998), 122 C.C.C. (3d) 449 (Ont. C.A.), at p. 462; *Scott v. Scott, supra*; *R. v. Foreman, supra*; *Attorney-General v. Leveller Magazine Ltd.*, [1979] A.C. 440 (H.L.), at p. 450; *Police v. O’Connor, supra*, at p. 96; *R. v. Liddell*, (1995) 1 N.Z.L.R. 538 (C.A.); *Russell v. Russell, supra*, at p. 520; *R. v. Tait, supra*.

<sup>16</sup> *Attorney-General of Nova Scotia et al. v. MacIntyre, supra*, at p. 147; *Vickery v. Nova Scotia Supreme Court (Prothonotary), supra*, at p. 81d; *Law Reform Commission of Canada Report, supra*, at pp. 17-21; and, generally, see *Scott v. Scott, supra*, at p. 435 (“overriding principle”). A similar approach has been adopted in the United States: *Richmond Newspapers v. Virginia, supra*, at p. 581 [“overriding interests”]. In New Zealand, the test is whether access would “frustrate the interests or administration of justice”: *Police v. O’Connor, supra*, at p. 96, or whether there are “compelling reasons to the contrary”: *Television New Zealand Ltd. v. R., supra*. Australian courts have adopted a similar approach: “would justice be defeated if the proceedings were held in public”: *R. v. Tait, supra*, at p. 489.

<sup>17</sup> *Scott v. Scott, supra*, at p. 435.

public decency or morality that the hearing should take place in private. If there is any exception to the broad principle which requires the administration of justice to take place in open Court, that exception must be based on the application of some other and overriding principle which defines the field of exception and does not leave its limits to the individual discretion of the judge.”

On the same point, Lord Atkinson said:<sup>18</sup>

“It is not necessary in the present case to determine whether the broad proposition laid down by Sir Francis Jeune (as he then was) in *D. v. D.* is well founded. The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.”

Earlier authorities therefore tended to emphasize that while the decision was a discretionary one, the discretion ought to be exercised cautiously and only when circumstances demand.<sup>19</sup>

Earl Loreburn, in *Scott v. Scott*, cast the “exceptional circumstances” in somewhat narrower terms, in a way that subsequently has been followed by courts in other Commonwealth countries:<sup>20</sup>

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<sup>18</sup> *Scott v. Scott, supra*, at p. 463.

<sup>19</sup> *R. v. Warawuk* (1978), 42 C.C.C. (2d) 121 (Alta. C.A.), at p. 125, interpreting *Scott v. Scott, supra*.

“Again, the Court may be closed or cleared if such a precaution is necessary for the administration of justice. Tumult or disorder, or the just apprehension of it, would certainly justify the exclusion of all from whom such interruption is expected, and, if discrimination is impracticable, the exclusion of the public in general. Or witnesses may be ordered to withdraw, lest they trim their evidence by hearing the evidence of others.”

This describes the main exception to the rule of openness -- an exception which, as we shall discuss shortly, has spawned several further refinements. In the case law, this exception is one which has variously been described as “necessary for the administration of justice”,<sup>21</sup> or one which is “in furtherance of the proper administration of justice”<sup>22</sup> or is necessary where the openness principle “would render the proper administration of justice unworkable or impracticable.”<sup>23</sup>

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<sup>20</sup> *Scott v. Scott, supra*, at pp. 445 - 446; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General), supra*, at p. 206; *Australian Broadcasting Commission v. Parish* (1980), 29 A.L.R. 228 (Fed. Ct. Of A.); *South Australian Telecasters Limited v. Director of Public Prosecutions* (1995), 64 S.A.S.R. 123, per Cox, J. on behalf of the unanimous court; and see *Richmond Newspapers v. Virginia, supra*, at pp. 564 - 574; *Police v. O'Connor, supra*, at p. 96. And, for an analysis of the various judgements in *Scott*, see: *R. v. Tait, supra*.

<sup>21</sup> *Scott v. Scott, supra*, at pp. 445-446.

<sup>22</sup> *Canadian Broadcasting Corp. v. New Brunswick (Attorney General), supra*, at p. 206f.

<sup>23</sup> *Canadian Broadcasting Corp. v. New Brunswick (Attorney General), supra*, at p. 206b and *Attorney General of Nova Scotia et al. v. MacIntyre, supra*, at p. 148. And, generally, see the cases referred to in footnote 14.

During the past decade or so, the Courts have described some of the variants to the exception framed by Earl Loreburn. They can be summarized in the following way (roughly in order of importance or frequency in practice).<sup>24</sup>

- a) The need for courts of criminal jurisdiction to control their own process in furtherance of the rule of law.<sup>25</sup>
- b) The need to protect innocent persons.<sup>26</sup>
- c) The need to protect the privacy of parties, witnesses and victims.<sup>27</sup>
- d) Where evidence tendered during the trial was ruled inadmissible, particularly where the evidence was inculpatory and an acquittal resulted.<sup>28</sup>

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<sup>24</sup> This list is certainly not intended to be exhaustive. At least some of the American cases suggest that the right to a fair trial is the *only* countervailing interest which could overcome the strong presumption in favour of access. In this respect, see the helpful review of American case law in *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, *supra*, at pp. 72 - 78, per Cory, J.

<sup>25</sup> *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at p. 208c; *Morris v. The Crown Office* [1970] 1 All E.R. 1079 (C.A.), at p. 1081; *Attorney-General of Nova Scotia et al. v. MacIntyre*, *supra*, at pp. 147 - 148, per Dickson, J. on behalf of the majority; *R. v. Foreman* (unrep., July 4, 1996, Sup. Ct. S.A.), at paragraph 17.

<sup>26</sup> For instance, this exception may be triggered where, on particular facts, a search warrant was executed but nothing was found, and no charges were laid, or where evidence sought by the media was ruled inadmissible at trial and an acquittal resulted. There is, therefore, a clear linkage between this exception and the privacy and inadmissibility points discussed below. See *Attorney-General of Nova Scotia et al. v. MacIntyre*, *supra*, at p. 147; *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, *supra*, at p. 95; *Law Reform Commission of Canada Report*, *supra*, footnote 13 at pp. 18-19; *R. v. Liddell*, *supra*, (anguish of innocent family of the offender).

<sup>27</sup> As discussed later, the social interest in protecting privacy has only recently emerged as a value of superordinate importance. Earlier cases emphasized that embarrassment or discomfort was not sufficient to dislodge the openness principle. In practice, the privacy exception probably arises most commonly in relation to sexual assault cases. See *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at pp. 209 - 210; *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, *supra*, at pp. 79 and 90; *Attorney-General of Nova Scotia et al. v. MacIntyre*, *supra*, at pp. 144 - 146; *Law Reform Commission of Canada Report* at p. 18; *Dietrich v. The Queen* (1992), 67 A.L.J.R. 1 at p. 35, per Toohey, J., at p. 12 per Brennan, J.; “The Role of the Victim During Criminal Court Proceedings”, by Sam Garkawe, 17 *U.N.S.W. Law Journal* 595 (1994), at p. 603; *W. v. Police*, [1997] 2 N.Z.L.R. 17 (H.C.); in the United States, see *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), and the cases discussed, *infra*; and in New Zealand: *Television New Zealand Ltd. v. R.*, *supra*.

<sup>28</sup> See the discussion of this point in *Vickery v. Nova Scotia Supreme/ Court (Prothonotary)*, *supra*, at pp. 76 - 82. There is an obvious linkage between this point and (b), concerning innocent persons.

- e) Where the Court concludes that it is necessary to limit or prohibit publicity surrounding the trial, whether by virtue of statute or under a common law power. This is especially the case where the Court concludes that it is necessary to protect the identity and background of a witness or a victim.<sup>29</sup>
- f) The need to ensure that an accused will be able to have a fair trial.<sup>30</sup>
- g) At least one appellate court has suggested that “exclusion (of the public) may be ordered from that part of the proceedings where *the most lurid or violent details of the offence* are recounted.”<sup>31</sup> This point will be discussed in greater detail later on in this article.

In summary, therefore, the public should, in general, have access to court proceedings and to the judicial record.<sup>32</sup> In an individual case, however, an overriding principle may lead to the conclusion

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<sup>29</sup> For a discussion of this point, see *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*; most commonly, this issue will arise in conjunction with the “innocence” or “privacy” points discussed above. The Supreme Court of Canada, however, has noted that mere sensitivities are not enough: “It must be remembered that a criminal trial often involves the production of highly offensive evidence, whether salacious, violent or grotesque. Its aim is to uncover the truth, not to provide a sanitized account of facts that will be palatable to even the most sensitive of human spirits. The criminal court is an innately tough arena.”, *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at p. 209d. To the same effect, see *Attorney General of Nova Scotia et al. v. MacIntyre*, *supra*, at p. 146, adopting *R. v. Wright*, 8 T.L.R. 293; *R. v. Horsham Justices*, [1982] 2 W.L.R. 430, per Lord Denning; *Police v. O’Connor*, *supra*, at p. 97, and *Television New Zealand Ltd. v. R.*, *supra*, at p. 396. The Bernardo case is perhaps a good example of the type of situation where an order on this basis may be appropriate. One of the victim’s identities was suppressed; she was known only as “Jane Doe” where it was established that she had repeatedly been raped by Bernardo while unconscious, and only learned of the crimes when shown a videotape by police.

<sup>30</sup> More commonly, this will arise where evidence is broadcast as distinct from evidence which is withheld from public scrutiny. The issue could, however, arise where some of the evidence is broadcast, while other portions are not, thus losing context. U.S. authorities have said that where there is a clash between the common law right of access and a defendant’s constitutional right to a fair trial, the court can only deny access on the basis of *articulable facts* known to the court. Generally, see *United States v. Edwards*, 672 F. 2d 1289 (1982); *Law Reform Commission of Canada Report*, *supra*, at p. 19. It should also be observed that the Supreme Court of Canada has held that where the right to a fair trial collides with another interest protected at common law, a hierarchical approach to rights, which places some over others, must be avoided. Where they come into conflict, it becomes necessary to develop a balance that fully respects the importance of both sets of rights: *Dagenais v. Canadian Broadcasting Corp.* (1994), 94 C.C.C. (3d) 289 (S.C.C.), at pp. 316 - 317. The fair trial exception may have special importance in New Zealand and Canada where, respectively, the *Bill of Rights* and the *Charter of Rights and Freedoms* guarantee an accused the right to a fair hearing. Concerning New Zealand, see *Police v. O’Connor*, *supra*, at pp. 96 - 98, and *Proctor v. R.*, [1997] 1 N.Z.L.R. 295 (C.A.).

<sup>31</sup> *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at p. 216f. (Emphasis added). On the same point, see also: *Television New Zealand Ltd. v. R.*, *supra* and *French Estate v Ontario (Att. Gen)*, *supra*, at p. 474.

<sup>32</sup> *Scott v. Scott*, *supra*; *Cox Broadcasting Corp. v. Cohn*, *supra*, at pp. 491 and 495; *Vickery v. Nova*

that access should be denied.<sup>33</sup> Overriding principles sufficient to dislodge the openness principle should, in general, be such that they advance the proper administration of justice in the circumstances of the case.<sup>34</sup> The burden of displacing the general rule of openness lies on the party making the application, usually the Crown.<sup>35</sup> As well, there must be a sufficient evidentiary basis from which the trial judge may assess the application and upon which he or she may exercise the Court's judicial discretion.<sup>36</sup> Finally, there is a need for the Court to engage in a "contextual balancing" in deciding whether to grant access in individual cases.<sup>37</sup> This will usually involve the balancing of the broad policy considerations discussed above.<sup>38</sup>

### ***Recent Developments in Canada: The Case of Paul Kenneth Bernardo***

Paul Kenneth Bernardo is a psychopathic sexual sadist who lived in Scarborough, Ontario.<sup>39</sup> From 1987 until 1991, he raped at least twelve young women, most of whom were teenagers ranging in age

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*Scotia Supreme Court (Prothonotary)*, *supra*, at pp. 70 - 71; *Attorney-General of Nova Scotia et al. v. MacIntyre*, *supra*, at pp. 133 - 134; and see the cases referred to in footnotes 15 and 16, *supra*.

<sup>33</sup> *Scott v. Scott*, *supra*; *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, *supra*, at p. 81d; and see the cases in footnote 16, *supra*.

<sup>34</sup> *Scott v. Scott*, *supra*; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at p. 206.

<sup>35</sup> *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at p. 218a; *Police v. O'Connor*, *supra*, at p. 96.

<sup>36</sup> *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at p. 218c; *United States v. Edwards*, 672 F. 2d 1289 (1982), at p. 1294: The exercise of this judicial discretion must, of course, proceed on a principled basis.

<sup>37</sup> *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, *supra*, at p. 78h.

<sup>38</sup> *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, *supra*, at pp. 78-79; *Attorney-General of Nova Scotia et al. v. MacIntyre*, *supra*, at p. 144; *Australian Broadcasting Commission v. Parish*, *supra*.

<sup>39</sup> The facts of this case have been drawn from several sources going well beyond the transcript of the trial. We have drawn heavily from a report on the case prepared by The Honourable Patrick T. Galligan, Q.C., formerly a judge in the Ontario Court of Appeal, entitled "*Report to the Attorney General of Ontario on Certain Matters Relating to Karla Homolka*" [ "Galligan" ] (unrep., March 15, 1996), as well as the reported decision in *French Estate v. Ontario (Attorney General)* (1996), 106 C.C.C. (3d) 193 (Ont. Ct. (Gen. Div.)) appeal quashed 122 C.C.C. (3d) 449 (Ont. C.A.); *Bernardo Investigation Review: Report of Mr. Justice Archie Campbell* (unrep, June 1996); the transcript of the proceedings at trial and at sentencing, and the various rulings made by the trial

from fourteen to nineteen. Some evidence suggests that the number of offences may actually be higher than that. Three of these women were murdered by Bernardo.<sup>40</sup>

In order to fully appreciate the legal issue arising in the Bernardo case which forms the subject of this paper, we feel it is necessary to describe, unfortunately in some detail, the facts concerning Bernardo's crimes. An understanding of the circumstances places the legal issue into its proper perspective; it also explains the media and public's initial thirst for the evidence, and the public's later disgust for what emerged in Court. It may also help to understand the role that some of the victims played in subsequent court proceedings and why they were allowed to assume that role.

The facts of the case are dreadful, to say the least. One judge said that they involved "unspeakable atrocities",<sup>41</sup> while another judge described the evidence as "graphic, searing, emotional and disturbing".<sup>42</sup> When the facts and evidence of the case were wrapped in secrecy, the case intrigued a nation; later, as the facts emerged, many members of the public were revolted and did not wish to hear anything further.<sup>43</sup>

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judge during the course of the proceedings. On this particular point, see "Galligan" at p. 15.

<sup>40</sup> Bernardo was convicted on two counts of first degree murder. The circumstances surrounding the third death, being the accidental or unintentional killing of Tammy Homolka, were read into the record in accordance with the principles laid down in *R. v. Garcia*, [1970] 3 C.C.C. 124 (Ont. C.A.); see also *R. v. Ness* (1987), 77 A.R. 319 (Alta. C.A.); *R. v. Getty* (1990), 104 A.R. 180 (Alta. C.A.).

<sup>41</sup> "Galligan", *supra*, footnote 39, at p. 17.

<sup>42</sup> *R. v. Bernardo* (unrep., May 29, 1995, LeSage, A.C.J.O.C., Court No. 274/94) [Hereinafter referred to as the "Videotape Ruling"]. An appellate court subsequently said that videotapes "constitute one of the worst forms of coerced child pornography imaginable." *French Estate v Ontario*, *supra*, at p. 456.

<sup>43</sup> There was extensive media coverage of this trial in Canada and abroad. An unprecedented warning was placed at the beginning of most articles published in Canada. It said: "This report

*A. The Facts*

Paul Bernardo was born in 1964. Until 1990, he lived in Scarborough, Ontario, a major suburb of Toronto. He developed a habit of night prowling in order to observe single women go through their evening routines at home. It was not long before his habit of prowling escalated to rape.

The rapes that he subsequently acknowledged in court bear many similar hallmarks. Most occurred in quiet, residential areas. The victim was usually young, petite and in her teens. Bernardo would generally grab the girl as she walked along the sidewalk, put a knife to her throat and drag her to a secluded area behind a nearby hedge or building. He would rape her vaginally from the rear, and anally, and force her to perform fellatio upon him. He would threaten her and sometimes cut her with his knife. He would beat her and force her to call herself degrading names. Often he would tie up the victim and steal her personal effects, including her identification, as a “trophy”. On occasion, he would insert foreign objects into the victim’s vagina or anus. He broke the arm of one victim. In each case, the medical evidence showed significant injuries as a result of the violence he had inflicted. In one instance, in relation to the injuries sustained by a victim, the judge subsequently observed that “the damage which this hour of torture has done to every aspect of her life is unimaginable and indescribable”.<sup>44</sup>

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contains graphic details that some readers may find offensive. Parents may want to review the story before allowing children to read it.”

<sup>44</sup> “Galligan”, *supra*, footnote 39, at p. 31.

One case will be sufficient to demonstrate the enormity of Bernardo's crimes. During the summer of 1989, a woman that Bernardo had previously stalked was walking home from a bus stop. Bernardo hid in some bushes near the sidewalk, jumped out, grabbed the young victim and covered her mouth and nose. She screamed and struggled. He put a knife to her throat and said he would kill her if she continued to make noise. He then dragged her to the side of a house, threw her to the ground and called her a "bitch". He then announced that he was the "Scarborough rapist" -- a term then used by the media to describe the rapist who had been terrorizing the area for several years.

He held her by the hair and pulled off her vest. He stuffed the vest into her mouth to keep her from screaming. He removed her shorts and underpants and lifted her top and brassiere. He ran his knife over her face and said that it would be a shame if her "pretty face" were to be scarred. He then forced vaginal intercourse upon her from behind. He followed that by forcing anal intercourse upon her. When she screamed in pain, he again stuffed her vest into her mouth and struck her on the head with his knife, threatening to kill her if she screamed again. When she stopped crying out, he demanded that she tell him about her intimate relations with her boyfriend.

He then grabbed her by the hair and forced her to perform fellatio upon him. Whenever she attempted to slow down or stop he would hit her and threaten to kill her. He accused her of performing poorly and again threatened to kill her. He removed a ring given to her by her boyfriend and threw it away, saying that her boyfriend was "cheap". He then ran the blade of his knife along her body, pushed her to the ground, and again forced vaginal intercourse upon her from behind.

During the course of the continuing assault, Bernardo told his victim that she must call herself a “bitch” and a “slut” and thank him for being so nice to her. He stole her purse containing her identification and some money. He threatened her family. He tied her hands together in front of her, and tied them to her neck. Her legs were bound together. He then left.

Shortly afterwards, however, he returned. He put his knife to her neck and said “Now we are going to have some fun”. He thrust his fingers into her vagina and then tried to insert a small branch from a tree. Finally he stopped and left for good. The ordeal lasted two hours.

A judge subsequently reviewing the case described the impact that this assault had upon the victim, in these terms:<sup>45</sup>

“The horror which this victim endured is described in vivid detail in her written victim impact statement which was filed on the dangerous offender proceedings taken against Paul Bernardo after the completion of his trial for murder. Since that night, now many years ago, this woman has lived with terror, fear of being alone, and the inability to love, to trust or to lead a normal life. She has swayed between living and not living. She is exhausted both physically, by an inability to sleep, and emotionally. A normal, healthy, productive and happy person has been indelibly scarred for the rest of her life. She was not the first of Paul Bernardo’s victims, nor would she be the last. Three of his later victims lost their lives.”

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<sup>45</sup> “Galligan”, *supra*, footnote 39, at pp. 10 - 11.

Unable to apprehend the so-called “Scarborough rapist”, police sought the assistance of the United States Federal Bureau of Investigation (FBI) to develop a psychological profile of the offender. Their research suggested that the offender was a sexual sadist whose criminal activities would continue to expand, and whose violence would likely escalate as time went on. The FBI also advised that a lifestyle change, such as a change in the offender’s residence, could lead to the abduction of the next victim, which, if it occurred, would “virtually guarantee that murder will result”.<sup>46</sup>

Bernardo had already committed two of his acknowledged rapes when in 1987 he met a seventeen year old high school student named Karla Homolka. Although their relationship was normal in the beginning, bit by bit over the next several years Homolka was drawn into the sinister side of Bernardo’s life. Near the end, Karla Homolka was a full participant in several of Bernardo’s most serious offences.<sup>47</sup> In the midst of Bernardo’s sexual rampage, the two, incredibly, became married and lived together until Bernardo’s proclivity towards sexual violence, and violence generally, finally turned towards his wife.<sup>48</sup>

By May, 1990, Bernardo had committed his tenth acknowledged rape.<sup>49</sup> Homolka did not, at that stage, know that her boyfriend was the “Scarborough rapist”. He was, however, making bizarre

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<sup>46</sup> “Galligan”, *supra*, footnote 39, at pp. 13 - 14.

<sup>47</sup> The extent to which Homolka voluntarily participated in the crimes, or was coerced, was a central *Family Physician*, entitled “Compliant Victims of the Sexual Sadist”, 22 *Australian Family Physician* 474 (1993).

<sup>48</sup> *Ibid.*

<sup>49</sup> Evidence led during the dangerous offender proceedings disclosed twelve rapes, two further sexual assaults and a further rape involving Jane Doe which was not known until the videotapes were

suggestions to her. He wanted to bring young girls to their house, and turn them into sex slaves. In December of that year, at Bernardo's insistence, according to Homolka, Bernardo and Homolka drugged Homolka's fifteen year old sister, Tammy, while the Homolka family slept upstairs, and both sexually assaulted her as she lay unconscious. Shortly after Bernardo stopped raping her, Tammy vomited and died of asphyxiation on her own vomit. Much of the assault was videotaped by them.

According to Homolka, in 1991 Bernardo ordered Homolka to bring young girls to their house so that he could have sex with them. She invited two girls, one of whom was a fifteen year old, later known publicly only as "Jane Doe". Doe was befriended by the couple and the three socialized quite regularly. On two occasions, Doe was drugged, anaesthetized, and raped by Bernardo and Homolka.

One rape was videotaped and kept by Bernardo for future enjoyment. Doe was unaware that she had been raped until police later discovered the videotape and showed it to her.

In June, 1991, Bernardo abducted fourteen year old Leslie Mahaffy, blindfolded her and took her to his house. There, he repeatedly raped her and forced the young girl to perform a number of other sexual acts with him and Homolka. Portions of these activities were videotaped by them. The next day, Leslie was drugged and Bernardo strangled her to death. He then dismembered her body and encased its parts in concrete. Bernardo and Homolka carried the body parts to a nearby lake and threw them into the water.<sup>50</sup>

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discovered. There is some basis to believe that there were additional sexual assaults for which there was insufficient evidence to indict Bernardo.

Two weeks later, on June 29, 1991, Bernardo and Homolka were married. On their wedding night, Bernardo confessed to Homolka that he was the Scarborough rapist. The couple then left for their honeymoon in Hawaii. The day they left, however, body parts of Leslie Mahaffy were found in the lake into which they had been thrown.

In April, 1992, Bernardo and Homolka abducted Kristen French, a fifteen year old girl who was in grade ten. She was taken to their residence where she was repeatedly and violently sexually assaulted and beaten. Once again, the events were videotaped. Bernardo subsequently strangled her, and her body was dumped on a rural road near Burlington, Ontario.

In the ensuing months, Bernardo began to direct his violence towards Homolka. She left him in mid 1992, but returned when he threatened to expose her role in the crimes. She became trapped in the relationship.<sup>51</sup>

In December, 1992, she was beaten badly by Bernardo. An attending physician described it as the worst case of spousal assault he had seen in his experience as an emergency room physician. Homolka decided to leave Bernardo. Before moving out, however, she looked for the videotapes showing the rapes of her sister, Leslie Mahaffy and Kristen French. She could not find them.

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<sup>50</sup> “Galligan”, *supra*, footnote 39, at p. 38.

<sup>51</sup> At the trial of Bernardo, and during the sentencing hearing involving Homolka, an issue was raised with respect to the extent to which she voluntarily participated in the crimes, or had been trapped in the relationship. See footnote 47, *supra*, and the accompanying text. Also, see the various theories developed in the books written on the case which are referred to in footnote 63, *infra*.

We can describe the rest of this dreadful saga quite briefly. In February, 1993, a DNA analysis linked Bernardo to one of the Scarborough rapes. Shortly afterward, Homolka was approached by the authorities and after extensive negotiations she agreed to co-operate with police in reconstructing the events of the preceding six years. Bernardo was arrested on February 17, 1993, for the rapes and the murders, but was only charged with the sexual offences. He was later charged with the murders of Kristen French and Leslie Mahaffy in May, 1993, when Homolka implicated him in her interviews with the police. He has remained in custody ever since.

Police combed through the Bernardo residence over a period of 71 days in search of evidence, particularly any videotapes that may exist. None could be found. Within days of the termination of the search warrant, the lawyer representing Bernardo at the time entered the house, and, apparently acting on Bernardo's instruction, located and removed the videotapes. For sixteen months, police remained unaware of their existence until new counsel was retained and became counsel of record.<sup>52</sup>

In exchange for her testimony and cooperation with the police, Homolka pleaded guilty to two counts of manslaughter and on the 6th of July, 1993, was sentenced to two concurrent terms of twelve years imprisonment. Bernardo was found guilty, after a lengthy trial, on two counts of first degree murder in relation to Kristen French and Leslie Mahaffy, plus several related offences, and was sentenced to life imprisonment with no parole for a minimum of twenty-five years. He subsequently pleaded guilty to the Scarborough rapes. A motion brought by the Crown to have him declared a "dangerous

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Bernardo's first lawyer has since been charged with obstructing justice under the *Criminal Code*, and is the subject of disciplinary proceedings before the Law Society. At the time of writing, both issues are pending.

offender” under the *Criminal Code* was successful, and, on November 3, 1995, he was sentenced to be detained for an indefinite period of time. The saga was thus complete.<sup>53</sup>

We propose now to discuss two aspects of this case. The first concerns the handling of the tapes during the trial. The second concerns the attempts by the media to access the tapes once the trial had been completed.

***B. The Bernardo Tapes During the Trial***

The Crown’s case against Bernardo relied heavily on the testimony of the convicted accomplice Homolka, as well as the videotapes made by Bernardo and Homolka. Homolka’s integrity and credibility were challenged vigorously on the stand, and in that sense this part of the Crown’s case was vulnerable if not weak. The videotapes therefore played a pivotal role in the proceedings.

At the commencement of the trial, Crown Counsel moved to limit public and media access to the tapes during the trial. That position was supported by three intervenors -- the French and Mahaffy families, and Jane Doe -- all of whom were granted standing to argue the point. The motion was opposed by counsel for the accused, and intervening media interests who likewise were granted standing to present submissions.

It is important to understand the nature and parameters of the order sought by the Crown. Prosecuting counsel did not seek a ban on publication, an order which was clearly available under the

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<sup>53</sup> Homolka brought no appeals, and is presently serving her sentence. Bernardo has commenced an

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*Criminal Code*. Nor did the Crown seek to exclude the public from the court. The Crown’s motion was designed to strike a balance between the openness principle, on the one hand, and the emotional and psychological harm that would be suffered by the victims’ families and Jane Doe. The trial judge described the order sought by the Crown in this way:<sup>54</sup>

“In essence, the Crown and Intervenors are requesting that during portions of the videotape evidence, which depict Kristen French, Leslie Mahaffy, Jane Doe and Tammy Homolka, the monitor screens facing the public not be activated and that the audio be accessed through headphones only. The result would be that only the jurors, the judge, the accused and his counsel, Crown counsel, the instructing officers and the court reporters will be permitted to hear and view those portions of videotape evidence.”

The trial judge concluded that the remedy was not being sought by virtue of any provision of the *Criminal Code*; rather it was sought on the basis of the common law and the Court’s inherent jurisdiction to “see that justice is done”.<sup>55</sup> The arguments of counsel can be summarized as follows.

First, the Crown submitted that the openness principle can be fulfilled by means other than public exposure of the images on the videotapes. Since Homolka would be required to explain the acts that occur on the tapes, the contents will be disseminated to the public. Additionally, counsel argued,

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<sup>54</sup> “Videotape Ruling”, *supra*, footnote 42, at p. 4.

<sup>55</sup> *Ibid.*, at p. 5; see also *French Estate v. Ontario (Attorney General)*, *supra*, at p. 202d.

opening and closing addresses to the jury will (and did) describe the contents of the videotapes in detail. The Crown also asked the Court to take into account the victims, including the surviving family members. The families' concerns, he said, were not merely private interests but were public ones which, if affected adversely, could affect the perception of whether justice was being administered fairly.

The victim intervenors, particularly Jane Doe, took a much more aggressive position. They sought exclusion of the public from viewing and audio access to portions of the videotapes, as well as an order excluding the public when those portions of the evidence were discussed by counsel. It was conceded by all, and found by the Court, that the tapes portrayed child pornography.<sup>56</sup> Public display of the tapes, the families argued, would extend the harm that had already been caused when the tapes were first created. Additionally, counsel for Jane Doe argued that every time the videotapes were played, her client, who was unconscious during the filming of the assault, was further violated. She submitted that public viewing of the tapes was an unreasonable invasion of her privacy, dignity and autonomy, and would have a profound and lasting effect on her life. Jane Doe also sought a complete ban on the publication of the videotapes which exposed her sexual assault, including vaginal and anal rape, and a ban on publication of any information which tended to identify her. Finally, she sought an *in camera* hearing if she were called to testify, as well as the exclusion of the public during the screening of the videotapes and all associated testimony, and a permanent sealing of the videotape exhibits.

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<sup>56</sup> "Pornographic" in the sense that the girls depicted in the videotape were well under the age of 18, the sex was forced, degrading and violent. The judge in *French Estate v. Ontario (Attorney General)*, *supra*, described it at p. 206a as "pornography of the worst kind".

Counsel for the accused took the position that exclusion of the public and media from seeing and hearing the tapes violated s. 486 of the *Criminal Code*. Counsel for the accused also took the position that any limitation on the defendant's use of court exhibits would constitute an infringement of the accused's right to make full answer and defence. He continued by saying that if the public were to be excluded whenever the tape was being referred to, as sought by some of the applicants, the frequent interruptions that would be necessary during examination and cross-examination of the witnesses would interfere with the ability to make full answer and defence and could affect the very fairness of the trial.

The final submissions were presented by counsel for the media intervenors. They argued that the applicants' proposal would effectively deny the ability of the media to disseminate the trial proceedings. They contended that the public would not be able to understand the factual and evidentiary basis upon which the trial proceeded, effectively amounting to an exclusion of the public from the trial. Limitation of the public's access, they said, should only be ordered where the ends of justice will be subverted by disclosure or where the information will be used for an improper purpose. At the conclusion of submissions, the trial judge, Associate Chief Justice LeSage, (now Chief Justice of the Ontario Court (General Division)), reserved judgement and subsequently delivered a forty page ruling on May 29, 1995.<sup>57</sup> Accepting the Crown's general approach as one which struck an appropriate balance between the various competing interests, the Court started the ruling by noting that:<sup>58</sup>

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<sup>57</sup> "Videotape Ruling", *supra*, footnote 42.

<sup>58</sup> *Ibid.*, p. 34.

“The media play a very important role in our society. They are responsible for disseminating news to the public. Part of the responsibility entails a duty to follow and report on (criminal) trials to ensure that the public are well informed about the justice system.”

He outlined the rationale for limiting the public’s access in these terms:<sup>59</sup>

“On all of the evidence before me on this application, I am satisfied that the harm that flows from the public display of this videotape evidence far exceeds any benefit that will flow from the public exposure of sexual assault and child pornography. When I refer to harm, I am not suggesting that individual members of the public need to be protected from any harm that may flow from viewing these videotapes. The videotapes, although graphic, searing, emotional and disturbing are unlikely to cause any lasting harm to any persons who voluntarily choose to view them. By harm, I am referring to the injury that most likely will be occasioned upon the surviving family members of these three young deceased girls if the videos are played in open Court. The families will suffer tremendous psychological, emotional and mental injury if the evidence, as the Crown has described it in the opening statement, that is rape; anal and vaginal, the forced fellatio, cunnilingus, anilingus, forcing of the neck of a wine bottle in both the vagina and anus of one of these young women, is publicly displayed.

I concur with the Applicants’ position that it is not necessary that the graphic pictorial images be displayed to the public gallery in order for there to be ‘open justice’. For there to be an open trial, it is not necessary that the public gallery be shown the graphic display of one of the victims lying in a bathtub whilst the accused attempts to defecate and actually urinates on her head and face. ‘Open justice’, is a concept, a principle, that can be more than adequately achieved without pictorially displaying the indignities suffered by these young victims.

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<sup>59</sup> *Ibid.*, pp. 35 - 37.

The public pictorial display of these videos has virtually no redeeming societal value. Public display of this evidence will seriously affect the families, friends and I suspect a large number of citizens. A public trial, a fair trial, an open trial, does not require more than the procedure suggested by the Crown as far as the videos are concerned. Although the audio portions will be very upsetting to many, particularly the families, I am satisfied, that on the balance, the public should not be excluded from that portion. I so conclude, partly because the *viva voce* examination and cross examination of witnesses particularly Homolka will occur in open Court. Verbal descriptions of, I suspect, all the details of the videotapes during which she was present (the substantial majority) will be adduced.”

The precise parameters of the limitations ordered by the Court were cast as follows:<sup>60</sup>

“The jurors, counsel, the accused, myself and any necessary Court staff may view the videotapes as they are played in Court. There will be no restriction on the audio of this evidence, nor on the examination or cross-examination relating to his video evidence.

This ruling relates not only to the videos of the three deceased young women but *a fortiori* to the videos of Jane Doe who would personally and directly suffer as described in the affidavits.”

Finally, the Court ordered a publication ban on any information that could disclose the identity of Jane Doe and ruled that neither the public nor the media could have access to the videotapes until the

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<sup>60</sup> *Ibid.*, p. 39.

conclusion of the trial, and then only if the Court so ordered.<sup>61</sup> Conveniently, that point takes us to the next and last phase of this disturbing legal saga.

### ***C. The Bernardo Tapes After the Trial***

Bernardo's conviction and sentence to a lifetime in prison left unresolved a series of questions concerning the future of the videotapes. Where should they be kept, and how should they be stored and preserved against unauthorized use? Does either the Crown or the victims' families have any sort of proprietary right or interest in the videotapes? Can the Courts now declare that no future hearing will result in public or media access to them?

With a view to resolving these issues, the parents of Leslie and Kristen brought an action in the Ontario Court (General Division), naming the Attorney General as respondent. After having heard submissions, Justice Gravely delivered the decision of the Court on April 2, 1996.<sup>62</sup>

Concerning the first issue, the Court adopted a plan that had been jointly agreed upon and recommended by counsel for the parties. Essentially, it provided that the videotape and other specified exhibits would be held by the Court pending other related litigation;<sup>63</sup> when no longer

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<sup>61</sup> *Ibid.*, pp. 39 - 40. While the media have continued to litigate the access issue, their counsel, somewhat bizzarely, advised the court on appeal that "they do not intend to seek access to the videotapes in future proceedings": *French Estate v Ontario (Attorney General)* (1998), 122 C.C.C. (3d) 449 (Ont. C.A.), at par. 81.

<sup>62</sup> *French Estate v. Ontario (Attorney General)* (1996), 106 C.C.C. (3d) 193 (Ont. Ct. (Gen. Div.)).

<sup>63</sup> Primarily, a civil action commenced by the families against Homolka and Bernardo; the appeal taken by Bernardo against his conviction and sentence; a new trial in the event that Bernardo is successful in his appeal; and the parole hearings for Bernardo and Homolka. Several other

required “for the due administration of justice”, they would be returned to the Attorney General for destruction.

With respect to the proprietary rights issue, the Court concluded, based on decisions from the House of Lords and the Supreme Court of Canada, that as there was no respondent to the action who may have an ownership interest in the property, it would be inappropriate to make a declaratory order. Noting that the applicant families had already commenced a civil action against Bernardo and Homolka for damages, this part of the application was dismissed without prejudice to their right to raise the issue in other proceedings.

On the final point, the Court agreed that future use of the tapes should be confined to the “due administration of justice”. He also observed that on the basis of the *audi alteram partem* principle, as interpreted in a recent decision of the Supreme Court of Canada,<sup>64</sup> the victims’ families would be

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proceedings, both criminal and civil, are pending before the courts at the time of writing. First, Kenneth Murray, Bernardo’s former counsel, is charged with obstruction of justice. A preliminary inquiry into that charge has bogged down on the issue of solicitor-client privilege respecting conversations between Murray and Bernardo. Second, the parents of Kristen French and Leslie Mahaffy are seeking an order from the Ontario Court of Appeal prohibiting further playing of the videotapes in open court. Third, Bernardo’s former friend and best man at his wedding, Van Smirnis, has sued a newspaper for denying him the \$100,000 reward it offered for information leading to the apprehension of Kristen French’s killer. Parenthetically, the Bernardo/Homolka affair has spawned at least 5 books: *Karla’s Web* by Frank Davey, (Toronto: Penguin Books Canada Ltd, 1994); *Deadly Innocence* by Scott Burnside & Alan Cairns (New York: Warner Books, 1995); *Invisible Darkness: The Horrifying Case of Paul Bernardo and Karla Homolka* by Stephen Williams (Toronto: Little, Brown & Company [Canada] Limited, 1996); *Paul’s Case: The Kingston Letters* by Lynn Crosbie (Toronto: Insomniac Press, 1997); and *Deadlier Than The Male* by Terry Manners, (London: Pan Books, 1995), chapter nine respecting Karla Homolka.

<sup>64</sup> *R. v. Beharriell* (1995), 103 C.C.C. (3d) 92 (S.C.C.).

entitled to intervene in future hearings, present submissions concerning the potential use of the videotape, and take part in any appeal that may flow from those proceedings.<sup>65</sup>

The Court also made a series of interesting observations concerning the role of the victims' families at the trial of Bernardo. "Barring public access to the videotapes of their daughters", the judge observed, "always has been of overriding importance to the applicant".<sup>66</sup> At the same time, however, the families felt tremendous pressure *not* to advance their position fully and forcefully. Defence counsel had accused them of interfering with Bernardo's right to a fair trial. They were afraid that if they pressed their position, a motion for a mistrial would result. Bernardo's counsel discussed with them the possibility of a plea of guilty to a lesser offence and said that this was the only way to guarantee the videotapes would not be played in open court. When they refused the offer, counsel for the accused opposed their intervention in the case and their motion to prohibit public access to the videotapes.

To minimize what they felt was unfair pressure from the defence, the families submitted that victims should, in general, be entitled to intervene in the case as a right. The Court rejected this contention saying:<sup>67</sup>

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<sup>65</sup> *French Estate v. Ontario (Attorney General)*, *supra*, at p. 205 b.

<sup>66</sup> *Ibid.*, at p. 203.

<sup>67</sup> *Ibid.*, at p. 204. Timothy S. B. Danson, counsel for the French and Mahaffy families, made the point during a speech he presented at the International Bar Association Conference in Berlin, Germany in October 1996: "The most disturbing aspect of the litigation with the media and the accused in their quest to gain media and public access to the videotapes was the overwhelming coercive burden that was imposed upon the victims. The accused, through his counsel, used the videotapes as a bargaining chip to extract a plea to second degree murder . . . . The defence argued

“Criminal trials have become more and more lengthy and technically complex. To the extent third parties become involved, the more complex the trial becomes and the greater the risk that a guilty person may go free. That was one of the sources of pressure on the applicants here at trial.

It is essential that a judge be able to manage the trial in the context of the competing interests present. In my opinion, giving automatic status to all victims to participate in the trial is unrealistic.”

The French and Mahaffy families, and Jane Doe, appealed this decision to the Ontario Court of Appeal. At issue was whether section 486 (1) of the *Criminal Code*, which facially enables a trial judge to permit public access to trial exhibits that contain child or coerced pornography, is unconstitutional. Dismissing the appeal, Moldaver, J.A., for a three-person panel, held that as one of the governing principles makes it clear that the burden of displacing the general rule of openness lies with the proponent, it follows that there is no room to attack the section on the basis that it treats openness as the rule and exclusion as the exception.

The applicant also sought an order that the public be denied access to the videotapes in all future proceedings. While the court dismissed this motion on the basis that the order requested would amount to an impermissible fettering of judicial discretion, Moldaver, J.A. added the following

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that the only way I could protect my clients and prevent public access to the tapes, was to accept a guilty plea. The deal they wanted to extract from us was a plea to second degree murder, with parole eligibility set at one day less than 15 years, so that Bernardo’s parole eligibility would be considered by the Parole Board rather than a civilian jury. The defence was correct in believing that Bernardo’s parole possibilities were better with the Parole Board.”

observations on the propriety of allowing access in the future:<sup>68</sup>

“First, the public has already had access to the audio content of the videotapes in the Bernardo criminal proceedings. To that extent, the public’s “right” to know about the intimate and gruesome details of Leslie’s and Kristen’s final moments has been satisfied and it is doubtful that any useful purpose would be served by permitting the public to revisit their tragic ordeals.”

“Second, in the context of the Bernardo criminal trial, the videotapes played a central, if not crucial role, in bringing Bernardo to justice. The tapes formed some of the most cogent and damning evidence against Bernardo and their value in his successful prosecution cannot be overstated. In contrast to this, when one considers the nature of the future proceedings, apart from a possible retrial on the criminal charges, the cogency of the videotapes will undoubtedly be far less significant, thereby diminishing the importance of public access to them.”

“Finally, the nature of the expression sought to be restricted by the families lies far from the core values enshrined in the s. 2(b) of the *Charter*. As I have already observed, the videotapes constitute one of the worst examples of coerced child pornography imaginable. To quote from La Forest J. at p. 514 in *C.B.C. v. New Brunswick*, “...exclusion may be ordered from that part of the proceedings where the most lurid or violent details of the offence are recounted, such that the restricted expression would be far from the core of s. 2(b)”.”

***The Situation in New Zealand, the United States, Australia and the United Kingdom***

***New Zealand***

New Zealand courts have fully embraced the principle of open justice articulated in *Scott v. Scott*. In *Broadcasting Corporation v. Attorney-General*<sup>69</sup>, Woodhouse P. described the reasons and purposes

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<sup>68</sup> *French Estate v Ontario (Attorney General)*, *supra*, at page 474: paragraphs 89, 90 & 91.

<sup>69</sup> [1982] 1 N.Z.L.R. 120 (C.A.).

underlying the principle of public justice in a passage which has been re-affirmed by the Court of Appeal as recently as 1996.<sup>70</sup>

“The Judges speak and act on behalf of the community. They necessarily exercise great powers in order to discharge heavy responsibilities. The fact that they do it under the eyes of their fellow citizens means that they must provide daily and public assurance that so far as they can manage it what they do is done efficiently if possible, with human understanding it may be hoped, but certainly by a fair and balanced application of the law to facts as they really appear to be. Nor is it simply a matter of providing just answers for individual cases, important though that always will be. It is a matter as well of maintaining a system of justice which requires that the judiciary will be seen day by day attempting to grapple in the same even fashion with the whole generality of cases. To the extent that public confidence is then given in return so may the process be regarded as fulfilling its purposes.” (*Broadcasting Corporation of New Zealand v. Attorney-General* [1982] 1 N.Z.L.R. 120, 122 - 123; see also Cooke, J. at pp. 127 - 128, and Richardson, J. at p. 132.).

Still, New Zealand courts have recognized the existence of certain circumstances which merit limits being placed on this principle. These exceptions derive from legislation or from the inherent jurisdiction of the court to take steps to ensure that justice is done: “If an open hearing would prevent the due administration of justice in that wide and general sense then on rare occasions it has been accepted that the quite exceptional step could be taken of closing the Court”.<sup>71</sup> A balancing test is applied: “the precautions that might seem necessary must depend upon the circumstances of the particular case and then be balanced against the paramount importance of maintaining an open system of justice.”<sup>72</sup>

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<sup>70</sup> *Television New Zealand Ltd. v. R.*, *supra*, at p. 396.

<sup>71</sup> *Ibid.*, p. 123.

<sup>72</sup> *Ibid.*, p. 126; and see pp. 133 - 134, per Richardson, J. For a more recent example, see *Television New Zealand Ltd. v. R.*, [1996] 3 N.Z.L.R. 393 (C.A.), where the court sought to balance openness and freedom of expression with victim privacy rights.

New Zealand courts have addressed the issue of the pivotal importance of ‘maintaining an open system of justice’, with restrictions to this principle, in several important Court decisions.

*Taylor v. Attorney-General*<sup>73</sup> involved an appeal of a contempt of court charge following publication of a witness’ name. This publication was in defiance of an order<sup>74</sup> made by the trial judge suppressing the names of New Zealand Security Intelligence Service witnesses involved in the trial of a public official under the *Official Secrets Act 1951*. The Court of Appeal, in dismissing the appeal, held that the order was made within the ‘inherent jurisdiction’ of the court, and determined that this inherent jurisdiction covered restrictive orders such as the one contemplated in *Taylor*, so long as the inherent jurisdiction did not contravene any statutory provision.<sup>75</sup>

*65 Broadcasting Corporation of New Zealand v. Attorney-General* addressed similar issues concerning the court’s inherent jurisdiction to limit access to the courtroom. At issue was the sentencing of an accused after a plea of guilty to a drug offence, in which the Judge directed that the

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<sup>73</sup> [1975] 2 N.Z.L.R. 675 (C.A.).

<sup>74</sup> *Ibid.*, p. 676. The trial Judge pronounced two orders: “1. By consent I make an order prohibiting the taking of photographs or making of sketches within the precincts of the Court and the taking of notes is also forbidden unless prior permission has been obtained from the Court Office. 2. By consent I make an order prohibiting the publication of anything that may lead to the identification of officers of the New Zealand Security Service. They will be described by a letter or symbol in each case.”

<sup>75</sup> *Ibid.*, p. 680. Wild, C.J. however, distinguished between the concepts of “open court” and “open justice”: “...it is important to recognize the limited extent of the orders made. The Court did not close its doors. No one was shut out. The witnesses were there to be seen and heard by everyone present. It was only their names that were not given and the publication of material leading to their identification as witnesses at the trial that was prohibited.”

hearing be held *in camera*, and that there be a publication ban on any details of the court hearing, apart from the fact that a man had been sentenced. The Court of Appeal considered the importance of the principles articulated in *Scott v. Scott*, and determined that the Judge, in using the court's inherent jurisdiction to restrict access, had exceeded the limitations necessary to achieve the desired protection of the offender in light of the relevant legislation then in force.<sup>76</sup>

In 1992, the High Court provided a valuable description of the rationale underlying the openness principle:<sup>77</sup>

“The ability to scrutinise the workings of the Courts is the public's entitlement. In advanced societies people cannot perform the judicial function themselves. So they have delegated it to the Judges, and with that delegation they have vested the Judges with the authority and considerable powers to properly perform that function. But the Judges have not been given a free rein; they speak and act on behalf of the community they serve. In a real sense, the fact that the Courts are open to the public, and that proceedings may be freely reported in the media, is the method by which Judges remain answerable to the public.

Consequently, the maintenance of a system of justice, not just as a system which provides just results in individual cases, but as a system which both claims and vindicates public confidence in the judicial function itself, and its capacity to operate efficiently and justly, is of primary importance. The public must at all times be assured that the Courts perform their judicial function with integrity and fairness as an

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<sup>76</sup> *Ibid.*, pp. 124 - 125. The *Criminal Justice Act 1954*, s. 46, provided authority for suppression of names, and the *Crimes Act 1961*, s. 375, gave the court the power to clear the public from the courtroom, with certain exceptions.

<sup>77</sup> *R. v. O'Connor*, [1992] 1 N.Z.L.R. 87 (H.C.), at p. 95.

integral part of a free and democratic society. For this reason the scrutiny and supervision of the operation of the Courts cannot be lightly inhibited.”

In recent years, the open justice issue has most commonly been considered by New Zealand courts within the context of a series of “name suppression applications”.<sup>78</sup>

The leading case in this line of authority is *R. v. Liddell*.<sup>79</sup> There, the Court of Appeal sat a full five-person bench, led by Cooke, P.; the Deputy Solicitor General appeared personally on behalf of the Crown. At issue was the granting of a suppression order by the trial court. For the Court, Cooke, P. laid down the following principles:<sup>80</sup>

“Secondly, there is the general question of the principles which should govern the making or refusal of name suppression orders. Understandably parliament has refrained from attempting any statement of principles in s 140 of the Criminal Justice Act, leaving this difficult area to the Courts.

In considering whether the powers given by s 140 should be exercised, *the starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as ‘surrogates of the public’*. These principles have been stressed by this Court in a line of cases extending from *Broadcasting Corporation of New Zealand v. Attorney-General* [1982] 1 NZLR 120 to *Auckland Area Health Board v. Television New Zealand Ltd.* [1992] 3 NZLR 406 where a number of the intermediate decisions are cited. The basic value of freedom to receive and impart information has been re-emphasised by s 14 of the New Zealand Bill of Rights Act 1990. And the principles

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<sup>78</sup> *Police v. O’Connor*, [1992] 1 N.Z.L.R. 87 (H.C.); *R. v. Liddell*, [1995] 1 N.Z.L.R. 538 (C.A.); *R. v. H.*, [1996] 2 N.Z.L.R. 487 (H.C.); *Proctor v. R.*, [1997] 1 N.Z.L.R. 295 (C.A.); *W. v. Police*, [1997] 2 N.Z.L.R. 17 (H.C.).

<sup>79</sup> [1995] 1 N.Z.L.R. 538 (C.A.).

<sup>80</sup> *Ibid.*, pp. 546 - 547.

just mentioned may be seen in vigorous -- and, to some, even startling-- operation in the Supreme Court of Canada in *Edmonton Journal v. Alberta (Attorney-General)* (1989) 64 DLR (4th) 577 and the High Court of Australia in *Nationwide News Pty Ltd. v. Wills* (1993) 177 CLR 1; *Australian Capital Television Pty Ltd. v. Commonwealth of Australia* (1993) 177 CLR 106; and *Theophanous v. Herald & Weekly Times Ltd.* (1994) 124 ALR 1.

The room that the legislature has left for judicial discretion in this field means that it would be inappropriate for this Court to lay down any fettering code. What has to be stressed is that the prima facie presumption as to reporting is always in favour of openness. Name restrictions as to victims of sexual crimes are automatic (subject to the possibility in a range of cases of orders to the contrary), and they are permissible for accused or convicted persons. But they are never to be imposed lightly, and in cases of conviction for serious crime the jurisdiction has to be exercised with the utmost caution.” (Emphasis added.)

Two years later, in 1997, the Court of Appeal, differently constituted, reaffirmed the approach taken in *Liddell* and added two further factors that militate in favour of openness and publication. First, on learning of the case and the conviction through the media, the public can assess for themselves whether the accused poses a continuing threat to the community. Second, further victims of the offender may decide to come forward as a result of the publicity surrounding the trial.<sup>81</sup>

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<sup>81</sup> *Proctor v. R.*, [1997] 1 N.Z.L.R. 295 (C.A.).

The Court of Appeal has also had a recent opportunity to consider the openness issue in quite a different context: balancing open justice and freedom of expression with the right of privacy and the dignity of victims of offences.

The case was *Television New Zealand Ltd. v. R.*,<sup>82</sup> and the facts were quite appalling. The defendant, David Cullen Bain, had killed his two parents, two sisters and his brother. During the trial, the court prohibited the publication of the name of a proposed defence witness and the substance of the intended evidence. In the view of the Court of Appeal, the evidence would almost certainly have been inadmissible, and was dealt with on that basis.

At issue were the privacy concerns of the offender's family. The court concluded that family members were, in fact and in law, "victims" of the crime. Keith, J. said for the unanimous court:<sup>83</sup>

"We were referred to a helpful elaboration of the concept of privacy prepared by the Broadcasting Standards Authority for the purposes of the operation of its jurisdiction under the Broadcasting Act 1989 and upheld in that particular context in *TV3 Network Services Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720. The first of its principles is that the protection of privacy includes legal protection against the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities.

There can be no doubt that the alleged facts in issue in the present application do fall within the last part of that statement. But the criminal justice system itself requires that some highly offensive facts, once private, do become public. That happens, as in

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<sup>82</sup> [1996] 3 N.Z.L.R. 393.

<sup>83</sup> *Ibid.*, at p. 396.

this case, in accordance with the tenets of public justice and the fair hearing of the cases presented by the prosecution and the defence.”

In the result, the Court concluded that the need for open and public justice outweighed the privacy concerns of the Bain family. However, just how much of this conclusion is anchored, directly or indirectly, on the fact that the privacy interest sought to be protected was connected with the *defendant killer* is, on the facts of this case, quite unclear.

### ***United States***

Not surprisingly, there is an abundance of American judicial decisions in this area of the law. We first propose to outline the broad principles established by the United States Supreme Court; after that, we will examine the variants addressed by both State and Federal Courts of Appeal.

Consistent with High Court decisions in the Commonwealth, the Supreme Court of the United States has adopted the Anglo-based presumption of access to “judicial records”.<sup>84</sup> In the now famous “Watergate” case, *Nixon v. Warner Communications, Inc.*, the Supreme Court stated that: “courts in this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.”<sup>85</sup> The Supreme Court in *Nixon* acknowledged that there was a common law “presumption” in favour of access to judicial records, but refused to grant the media a

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<sup>84</sup> *Ex Parte Drawbaugh*, 2 App. D.C. 404, 407-8, (1894), is the landmark case recognizing the right of access and extending it to judicial records: “[any attempt to maintain secrecy, as to the records of this court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access.” The United States Supreme Court further confirmed this extension in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).

<sup>85</sup> *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) at 597, 98 S. Ct. 1306 (1978), at p.

right of access to the “Watergate” tapes for copying for subsequent broadcast on statutory grounds<sup>86</sup>.

The Court in *Nixon* also indicated that the common law right of access is not absolute, and that there may be circumstances where the motive behind the request for access or the sensitive nature of the recorded material requires that access be denied.

Since then, the Supreme Court has articulated several policy reasons for adopting the openness principle: public access enhances the quality and safeguards the integrity of fact finding; it enhances the appearance of fairness and therefore promotes public respect for the justice system and public confidence in its fairness; it ensures that uniform procedures are used in all cases; it can function as a substitute for the jury in trials by judge alone; it provides a community outlet for rage; and it functions as a check on state abuses of power.<sup>87</sup>

The Supreme Court in *Richmond Newspapers v. Virginia*<sup>88</sup>, established for the first time that the media and the general public have a First Amendment right of access to criminal trials, seemingly raising the “presumption” of access from *Nixon* to a constitutional right. The plurality stated that

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<sup>86</sup> *Ibid.*, at p. 613. The Supreme Court held that the *Presidential Recordings and Materials Preservation Act*, 44 U.S.C., ss 2107 (1970), governed access to the Watergate tapes. The tapes consisted of approximately twenty-two hours of taped conversations recorded in the White House Oval Office and in former President Nixon’s private office.

<sup>87</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), 100 S. Ct. 2814 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

<sup>88</sup> *Richmond Newspapers, Inc. v. Virginia*, *supra*. This case contains an excellent analysis of the early history of open trials in England, Quebec and the United States, and the relationship of those practices to modern principles of “openness” and public access. (per Burger, C.J. for the Court)

“the right to attend criminal trials is implicit in the guarantees of the First Amendment”<sup>89</sup>. Consistent with other common-law countries, however, the Court also noted that First Amendment rights are not absolute:

“Just as a legislature may impose reasonable time, place, and manner restrictions upon the exercise of First Amendment freedoms, so may a trial judge impose reasonable limitations upon the unrestricted occupation of a courtroom by representatives of the press and members of the public”.<sup>90</sup>

Reaffirming the First Amendment guarantee of the right of public access to criminal trials first articulated in *Richmond Newspapers*, the Supreme Court in *Globe Newspaper Co. v. Superior Court*<sup>91</sup> invalidated a Massachusetts statute prohibiting the public from being present at any sex offense trial during the testimony of a minor victim. The Court developed a two-pronged test for determining when the right of access may be limited: first, whether the public’s right of access attaches to a particular proceeding or piece of information; second, if it does, whether the government has asserted a reason sufficient to restrict that right.<sup>92</sup> The Court stated that the right of access to a criminal trial is “of constitutional stature”, but is “not absolute”<sup>93</sup>, and held that denial of public

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<sup>89</sup> *Ibid.*, p. 580.

<sup>90</sup> *Ibid.*, p. 600.

<sup>91</sup> *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.* p. 606.

access to a criminal proceeding to which the right applies must be shown to be necessitated by a compelling governmental

interest, and narrowly tailored to serve that interest.<sup>94</sup> If access is to be denied, “the State’s justification in denying access must be a weighty one”.<sup>95</sup>

The Supreme Court has also endeavoured to balance the openness principle with the freedom of the press and the constitutionally-protected right of a victim to an element of privacy.<sup>96</sup> There have been a number of important Supreme Court decisions addressing attempts to restrict public and media access to courts or to judicial records, often in the interests of protecting a victim’s privacy, which have affirmed the spirit of “openness”.

If a state seeks to limit the First Amendment privilege, it must show that it has a compelling reason for doing so and that the chosen means are narrowly tailored to achieving an interest of the highest order. Two leading Supreme Court decisions addressing the conflict between the First Amendment guarantees of freedom of the press and freedom of speech, and the individual right of privacy, are *Cox Broadcasting Corp. v. Cohn*<sup>97</sup> and *Florida Star v. B.J.F.*<sup>98</sup> Both cases concerned the right of a

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<sup>94</sup> *Ibid.*, p. 607. The “tailoring” principle has also been adopted in the United Kingdom, New Zealand and Canada: *Attorney General v. Leveiler Magazine Ltd.*, *supra*, at p. 450; *Police v. O’Connor*, *supra*, at pp. 96 and 104; and *Edmonton Journal v. Alta (A.G.)*, [1989] 2 S.C.R. 1326, per Cory, J. for the majority. And see *R. v. Bernardo*, *supra*, (“Videotape Ruling”), *supra*, at pp. 34 - 35. A somewhat similar sentiment has been expressed by the Federal Court of Australia in *R. v. Tait* (1979), 24 A.L.R. 473 (Fed. Ct. Of A.), at p. 490.

<sup>95</sup> *Ibid.*, p. 620.

<sup>96</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965). The Court found that the constitutional right to privacy was derived from specific guarantees of the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments.

<sup>97</sup> *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), 95 S. Ct. 1029 (1975).

rape victim to privacy, in respect of the publication of her identity. Both also discussed how best to achieve the necessary balance between the privacy rights of the victim and the media's right of access to judicial records -- in these instances, records which revealed the victim's identities.<sup>99</sup>

In *Cox*, the father of a deceased rape victim brought an action against a television station after the station revealed his daughter's name. The Supreme Court ruled in favour of the media by refusing to hold the media liable for broadcasting her identity, as the information had been obtained from court records available to the public.

*Florida Star v. B.J.F.* concerned a lawsuit filed by a rape victim, B.J.F., following publication by The Florida Star of her full name in a newspaper article about the offence, in contravention of a Florida statute protecting the identity of sexual assault victims. Her name had been obtained from a police report. In the result, the Court held for the media, stating: "We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case."<sup>100</sup> The Court invoked a balancing test: first, whether the newspaper lawfully obtained

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<sup>98</sup> *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), 109 S. Ct. 2603 (1989).

<sup>99</sup> *Ibid.*, p. 537. The majority in *Florida Star* qualified its holding by stating that "We accordingly do not rule out the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim might be so overwhelmingly necessary" that to do so would not violate the First Amendment.

<sup>100</sup> *Florida Star v. B.J.F.*, *supra*, p. 533.

truthful information about a matter of public significance; second, whether imposing liability on the media pursuant to a state regulation serves a need to further a state interest of the highest order.<sup>101</sup>

State and Federal appellate courts have endeavoured to deal with several important issues not yet considered by the Supreme Court of the United States. *In re National Broadcasting Co. (Myers)*<sup>102</sup>, the United States Court of Appeals for the Second Circuit allowed three major television stations to copy and televise videotapes depicting corrupt dealings between public officials and undercover FBI agents conducting a sting operation. The Court stated that there existed a “strong” presumption in favour of access and that only the most “compelling circumstances” justified denial<sup>103</sup>. Some appellate courts have followed this approach; others have not. It is important to note, however, that these decisions have generally dealt with the issue of audio or videotaped evidence of public officials involved in bribery or public scandal, and not with horrific evidence of the sort illustrated by the *Bernardo* case.

In the second case of this nature, *United States v. Criden*,<sup>104</sup> the Court of Appeals permitted media access to audio tape of public officials involved in bribery, and acknowledged a legitimate public interest in knowing what occurs in a courtroom, an interest which is understandably heightened when a public official is involved. Of significance, the Court distinguished the facts before it from

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<sup>101</sup> *Ibid.*

<sup>102</sup> 635 F. 2d 945 (2d Cir. 1980).

<sup>103</sup> *Ibid.*, p. 952.

<sup>104</sup> 648 F. 2d 814 (3d Cir. 1981).

situations in which broadcast would inflict additional pain on the victim in a criminal case or on other innocent third parties.<sup>105</sup>

In *United States v. Edwards*<sup>106</sup>, the United States Court of Appeals for the Seventh Circuit denied media access to broadcast audio tape of a scandal involving the bribery of a State senator. Though recognizing the presumption in favour of access, the Court denied access based on the defendant's Sixth Amendment right to a fair trial. More importantly, the Court in *Edwards*, referring to *Myers*, indicated that it was "unwilling to go so far as the Second Circuit's statement that only exceptional circumstances will justify non-access."<sup>107</sup>

The case of *In re Application of KSTP Television*<sup>108</sup> is an important one, as the facts are markedly similar to the *Bernardo* case. In this case, a media outlet applied for the release of videotape recordings made by the accused which showed him repeatedly raping a woman, and which further depicted considerable "anticipatory" conduct and conversation. The recording of the sexual assaults was not shown in court, and the videotape sought by the station was that of the preliminary behaviour of the accused and not of the repeated rapes. The District Court for Minnesota recognized the importance of public access to judicial records, but distinguished the case at hand from cases involving public officials by noting that releasing the tapes would not serve the public interest.

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<sup>105</sup> *Ibid.*, p. 825.

<sup>106</sup> 672 F. 2d 1289 (7th Cir. 1982).

<sup>107</sup> *Ibid.*, p. 1294.

<sup>108</sup> 504 F. Supp. 360 (D. Minn. 1980).

Furthermore, the public and the media had not been excluded from the courtroom during the playing of these particular tapes. Upon considering the privacy rights of the victim<sup>109</sup>, the Court refused the release of the tapes for copying and stated that: "... release of the video tapes either to the public or to the electronic media for dissemination would not be for a proper purpose. All of the information in the tapes has already been made available to the public and to the media in the course of an unrestricted public trial. The First Amendment requires no more."<sup>110</sup>

In the United States, therefore, this much is clear: the principle of openness is well-established, as are the Constitutional guarantees of freedom of the press and the right of an accused to a fair trial. What remains to be determined is whether and under what circumstances American courts will be prepared to protect victims by balancing their rights with centuries-old constitutional rights of the media and of the accused.

### *Australia*

Not surprisingly, the principles in *Scott v. Scott* are securely rooted in the Australian states.<sup>111</sup> Two recent Australian cases -- both from South Australia -- illustrate the point. In the first, *South Australian Telecasters Limited v. Director of Public Prosecutions and Miho Christian Alavija*<sup>112</sup>, the

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<sup>109</sup> *Ibid.*, p. 363. The Court stated: "The scant value to the public of any additional information inherent in the video tape form is clearly outweighed by the interest of Mrs. Stauffer and of the public in maintaining the dignity of the private person."

<sup>110</sup> *Ibid.*, p. 364.

<sup>111</sup> See *Russell v. Russell* (1976), 134 C.L.R. 495 (H.C. of A.), per Gibbs, J. at p. 520; *R. v. Tait* (1979), 24 A.L.R. 473 (Fed. Ct. of A.), at pp. 487 - 8; *Australian Broadcasting Commission v. Parish* (1980), 29 A.L.R. 228 (Fed. Ct. of A.).

<sup>112</sup> *South Australian Telecasters Limited v. Director of Public Prosecutions and Miho Christian Alavija* (1995), 64 S.A.S.R. 123.

Court considered an application by a television station for the release of the video of the accused's police interrogation. In the result, the Court refused release of the video to the media, primarily on the basis that the videotaping of police interviews was a relatively recent and significant development in the criminal justice system in Australia, and the widespread dissemination of this type of evidence by the media might result in reticence by an accused to participate in a video interview.<sup>113</sup> It seems clear that the decision in *South Australian Telecasters Limited* was essentially one of policy, anchored on notions of what was in the best interests of the administration of justice in the State of South Australia.

One year later, in *R. v. Kingsley John Foreman*<sup>114</sup>, the Supreme Court of South Australia considered a mid-trial request by the media to access and broadcast videotape evidence relied upon by the prosecution. Acknowledging that *Scott v. Scott* had been received into Australian jurisprudence, subject to various restrictive state legislation, Lander, J. concluded that the media applicants should be permitted access subject to two considerations: first, would access interfere with the proper administration of justice, including the right to a fair trial; second, would access interfere in any way with the integrity of the exhibits. Not satisfied on the first point, as the jury might be exposed to the evidence outside the courtroom, Lander, J. dismissed the application on the basis that it was

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<sup>113</sup> *Ibid.* At this point, it should be noted that the court made reference to s. 131 of the *Supreme Court Act*, which deals specifically with public access to judicial records. Section 131 provides that the court must make available for inspection by an applicant, amongst other items, documentary material admitted into evidence, subject to limited exceptions. The Court also referred to s. 69a of the *Evidence Act* which provides that a court may make an order suppressing publication of evidentiary material if the court is "satisfied that an order ought to be made only to prevent prejudice to the proper administration of justice or to prevent undue hardship to a victim or crime to a witness who is not a party to the proceedings."

<sup>114</sup> *R. v. Foreman* (unrep., July 4, 1996, Sup. Ct. of S.A.).

premature. He stated however, that he would be prepared to reconsider the point once a verdict had been delivered by the jury.

It would seem, therefore, that while the openness principle has been incorporated into Australian law, the courts are sharply focussed on legislative exceptions and, perhaps more importantly, on the proper and effective functioning of the criminal justice system. That leads, then, to the question of what role victims can play in such a system; and whether their privacy concerns address the ‘proper administration of justice’ point in Australia.

Sam Garkawe, in a recent Australian article entitled “The Role of the Victim During Criminal Court Proceedings”<sup>115</sup>, addresses seven specific interests of victims in criminal court proceedings.<sup>116</sup> One concerns their privacy:

“The sixth interest of the victim is the protection of their *privacy*. Many victims will not want to reveal their name and address during proceedings, and will not want the media intruding into their affairs. They may thus desire the court to exercise their discretion to close the court to the public, at least during their testimony.”

Garkawe argues that given the many and varied interests of the victim in a criminal proceeding, victims should be included in the ‘balancing process’ undertaken by the courts to ensure fairness in Australia’s legal system.

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<sup>115</sup> “The Role of the Victim During Criminal Court Proceedings”, by Sam Garkawe, 17 *U.N.S.W. Law Journal* 595 (1994).

<sup>116</sup> *Ibid.* The specific interests of victims are: (1) in reviewing information concerning the case; (2) in recovering their property and receiving compensation for the harm done to them; (3) in the verdict of the Court; (4) in receiving protection from the threat of further victimisation or retaliation; (5) in an adequate sentence being passed by the Court; and (6) in the protection of their privacy.

The High Court of Australia has acknowledged the importance of victim's concerns to the criminal process. In *Russell v. Russell*,<sup>117</sup> Gibbs, J. made the following comment in a non-criminal context: "The need to maintain secrecy or confidentiality, or the interests of privacy or delicacy, may in some cases be thought to render it desirable for a matter, or part of it, to be held in closed court." In *Dietrich v. R.*<sup>118</sup>, Toohey, J. indicated that it is not only the interests of the accused that are relevant: "The situation of witnesses, particularly the victim, may need to be considered".<sup>119</sup>

Courts in Australia have also made several other important points. First, a balancing of broad public interest considerations is important.<sup>120</sup> And, quite apart from statutory requirements, the courts have an obligation to ensure that "justice is done".<sup>121</sup> At the same time, there is a strong presumption in favour of openness, and attempts to derogate from this rule must fall within the "strictly defined exceptions" set out in *Scott v. Scott*.<sup>122</sup> It seems evident, then, that Australian law is largely consistent with other jurisdictions in recognizing the need for an increased role and substantive rights for victims, and in wrestling with appropriate limitations on the principles of open justice to accommodate these interests.

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<sup>117</sup> *Russell v. Russell*, *supra*, at p. 520; considered at some length in *R. v. Tait* (1979), 24 A.L.R. 473 (Fed. Ct. of A.).

<sup>118</sup> (1992) 67 A.L.J.R. 1 (H.C.).

<sup>119</sup> *Ibid.*

<sup>120</sup> *Australian Broadcasting Commission v. Parish*, *supra*, at p. 242.

<sup>121</sup> *Ibid.*, p. 224.

<sup>122</sup> *R. v. Tait* (1979), 24 A.L.R. 473 (Fed. Ct. of A.), at p. 487.

### ***The United Kingdom***

In the post-*Scott* era, there have been a number of important decisions in the United Kingdom affirming the *Scott* principles. In *Attorney General v. Leveller Magazine Ltd.*<sup>123</sup>, the House of Lords emphasized the fundamental principle of open justice, with the attendant exceptions to the rule. Lord Diplock stated:<sup>124</sup>

“... since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule. Apart from statutory exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice.”

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<sup>123</sup> [1979] 1 All E.R. 745, [1979] A.C. 440.

<sup>124</sup> *Ibid.*, p. 450.

“The Leveller”, a magazine, was charged with contempt of court following publication of the name of an anonymous witness whose true identity was deduced from the evidence he provided in open court. The House of Lords allowed The Leveller’s appeal, and held that the effect which the court had intended to bring about by referring to the witness by letter rather than name within the courtroom, was frustrated by the witness’ own statements in evidence (which, notably, were not the subject of protest by the Crown or the court). Perhaps more importantly, however, the concealment of the witness’ name was determined by the court to be an acceptable restriction on the openness principle:<sup>125</sup> “If a court is satisfied that for the protection of the administration of justice from interference it is necessary to order that evidence either be heard in private or be written down and not given in open court, it may so order.”

More recently, in *Re Crook*<sup>126</sup>, a freelance journalist appealed to the Court of Appeal (Criminal Division) following denial of public access to the court in two separate cases. The court accepted the statements of Lord Diplock in *Leveller* and stated:<sup>127</sup> “From the cases it is clear that the public can be excluded only when and to the extent that is strictly necessary, and also that each application must be considered on its own merits. It is not sufficient that a public hearing will cause embarrassment for some or all of those concerned.” The reasons for the respective judges’ decisions to hold the hearings *in camera* were unremarkable: one concerned the discharge of a juror and the other the request by the Crown to hear an application in chambers. Nevertheless, the Court dismissed the

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<sup>125</sup> *Ibid.*, p. 473.

<sup>126</sup> [1992] 2 All E.R. 687 (C.A. (Crim. Div.)).

<sup>127</sup> *Ibid.*, p. 692h.

appeal and stated that the exclusion of the public was acceptable given that the issues were procedural and not evidentiary in nature, and that.<sup>128</sup>

“A judge sometimes needs an opportunity to receive information in chambers so that he can decide the preliminary question of whether privacy is required in the interests of justice and, if so, to what extent. A judge should not adjourn into chambers as a matter of course, but only if he believes that something may be said which makes the determination of that preliminary question in chambers appropriate. If he does sit in chambers, he should be alert to the importance of adjourning into open court if, and as soon as, it emerges that the need to exclude the public is not plainly necessary.”

There are a number of other decisions which discuss the broad principles in *Scott*. In *R. v. Waterfield*<sup>129</sup>, the Court of Appeal upheld a trial judge’s decision to close the court during the showing of pornographic films to the jury. The Court acknowledged that:<sup>130</sup> “Trials must be held in open court save in a few exceptional cases. The fact that a trial is concerned with what are alleged to be indecent matters is not one of them.” It nonetheless allowed the closure, stating:<sup>131</sup> “We appreciate that some judges may be of the opinion that the showing of what are alleged to be indecent films in a crowded court is undesirable. The fact that persons with a taste for the nasty may come into court to see the display is of no importance. What does matter is the danger that the presence of such people

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<sup>128</sup> *Ibid.*, p. 693j.

<sup>129</sup> [1975] 2 All E.R. 40 (C.A., (Crim. Div.)).

<sup>130</sup> *Ibid.*, p. 42j.

<sup>131</sup> *Ibid.*, p. 44a.

may create an atmosphere of tension and result in gasps, giggling, and comments which may make the jury's task more difficult." The Court did, however, acknowledge the importance of the public being made aware of what transpired in the courtroom and made an exception to permit media attendance.

*R. v. Beck and others, ex parte Daily Telegraph plc and others*,<sup>132</sup> dealt with the issue of a prohibition order made by the Court in respect to the reporting of a trial involving serious sexual and physical abuse of children in the care of social workers. The Court applied a two-pronged test: first, whether it was necessary to the administration of justice to postpone publication of the facts, and second, whether a balance could be achieved between the right of "a fair trial by an unprejudiced jury on the one hand and the requirement of open justice and a legitimate public interest and concern in those matters on the other."<sup>133</sup>

The Court of Appeal in *Ex parte Telegraph plc and other appeals*<sup>134</sup> adopted a similar test following the trial judge's postponement of publication of any material that would identify the defendants:<sup>135</sup> "the court had to balance the competing interests of ensuring a fair trial and open justice and was accordingly required to determine first that there would be 'a substantial risk of prejudice to the

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<sup>132</sup> [1993] 2 All E.R. 177 (C.A. (Crim. Div.)).

<sup>133</sup> *Ibid.*

<sup>134</sup> [1993] 2 All E.R. 971 (C.A. (Crim. Div.)).

<sup>135</sup> *Ibid.*

administration of justice' and then that postponement of publication appeared to be necessary to avoid that risk.”

### *Emerging Victims' Rights*

Thus far, we have discussed at some length the common law and statutory support for the openness of our judicial system. Traditional common law thinking also sees the criminal trial as a contest between two parties -- the Crown and the accused -- with everyone else sitting on the sidelines as mere spectators.<sup>136</sup> The victim, for instance, was seen only as someone who could provide material evidence in the case; beyond that, however, he or she played virtually no role in the proceedings.<sup>137</sup>

In recent years, the balance has shifted somewhat in countries that have an Anglo-based criminal justice system. The reforms commenced with the establishment of victim's compensation schemes in the 1970's, and have since expanded to include victim-witness programs, social service referral

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<sup>136</sup> In the past, it has been believed that the substantive and evidentiary laws involve a delicate balance between the Crown and the accused, and that intervention by third parties could tip that balance. Canada has clearly moved in the direction of allowing third party interventions: See “Public Interest Intervention in the Courts”, by Philip L. Bryden (1987), 66 *Can. Bar Rev.* 490. At least one Australian commentator argues against granting victims substantive rights, preferring an enhanced victim/prosecutor relationship; “The Role of the Victim During Criminal Court Proceedings,” by Sam Garkawe, 17 *U.N.S.W. Law Journal* 595 (1994).

<sup>137</sup> *Ibid.* See also: “Two Scales of Justice: A Reply”, by Allan N. Young, 35 *Cr. L.Q.* 355 (1993); and see Sam Garkawe, *supra*, at p. 597. At the beginning of the victim's movement, N. Christie wrote an article entitled, “Conflicts as Property”, (1977) 12 *British J. Crim.* 1, and said: “So, in a modern criminal trial, two important things have happened. First, the parties are being represented. Secondly, the one party that is represented by the state, namely the victim, is so thoroughly represented that she or he for most of the proceedings is pushed completely out of the arena, reduced to the triggerer-off of the whole thing. She or he is a sort of double loser; first, vis-à-vis the offender, but secondly and often in a more crippling manner by being denied rights of full participation in what might have been one of the most important ritual encounters in life. The victim has lost the case to the state.”

programs, crisis intervention programs, victim advocacy programs and victim-offender mediation programs, including family group conferencing.<sup>138</sup>

Two reforms deserve special comment. During the 1980's, a number of common law countries enacted legislation providing for the admission of victim impact statements into their criminal procedure.<sup>139</sup> Criticized by some as being an unnecessary and unprincipled adjunct to the traditional adversarial criminal trial,<sup>140</sup> and capable of triggering the “hydraulic pressure” of public opinion,<sup>141</sup> victim impact statements have largely been accepted, reluctantly in some instances, in Canada, the United States, Australia, the United Kingdom and New Zealand.

The second reform concerns the development of Bills of Rights for victims (variously called a Victims’ Charter, Victims’ Bill of Rights, Declaration of Victims’ Rights, etc.).<sup>142</sup> While some of

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<sup>138</sup> Allan N. Young, *ibid*, and Sam Garkawe, *ibid*. Sometimes called, perhaps more accurately, “Community conferencing”.

<sup>139</sup> *Ibid*. In Canada, victim impact statements were introduced in 1988 through an act to amend the authorization for the use of victim impact statements: Allan N. Young, *supra*, at p. 359. In New Zealand, they were introduced by the *Victims of Offences Act 1987*: see “Victim Impact Statements: Sentencing on Thin Ice?” by Geoff Hall, 15 *New Zealand Universities Law Review* 143 (1992); and in the United Kingdom, the following has been said: “The Victim Statement scheme resulted from a working group led by the D.P.P... The scheme applies to some serious categories of cases” [*Crown Prosecution Service Annual Report 1996-7*] (ordered by the House of Commons to be printed 15 July, 1997. London: The Stationery Office, 1997), at p. 17.

<sup>140</sup> For instance, see: “Two Scales of Justice: The Victim as Adversary”, by Steven Skurka, 35 *Cr. L.Q.* 334 (1993).

<sup>141</sup> *Payne v. Tennessee*, 501 U.S. 808 (1991), at p. 868, quoting Oliver Wendell Holmes’ famous statement in a dissenting judgment in *Northern Securities Co. v. U.S.*, 193 U.S. 197 (1904), at pp. 400-1.

<sup>142</sup> See the useful cross-country survey conducted by Allan N. Young, *supra*.

these Bills have been placed on a statutory footing,<sup>143</sup> many have simply been declared part of Government or prosecution policy.<sup>144</sup>

The trial judge who presided at the Bernardo trial commented on these developments at the conclusion of his ruling on the videotapes. He said:<sup>145</sup>

“... I wish to comment briefly on the general subject of victims rights. The law and the development of the law is a fluid process. Historically, there was a period when all crimes were personal to the victim. Over the years, the criminal law evolved toward a recognition that crimes are transgressions of societal order and values. This evolution continued until we reached a point where the state interest appeared to be total and the individual victim was given little recognition. The **only** recognized interest, at that point, was the broader interest of the state. During recent years, there has been a gradual shift, or evolution, depending upon how you perceived it, to a recognition of the concerns, interests and involvement of the individual who has suffered as a result of crime. I perceive that as a healthy evolution. Victims should have a participation in the criminal law process that is greater than was recognized twenty or thirty years ago. As desirable as that participation and that involvement is, it can never interfere with or be seen to interfere with the accused’s rights to a fair

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<sup>143</sup> For instance, in New Zealand, the *Victims of Offences Act 1987*; and in Canada, the province of Ontario p

<sup>144</sup> Most notably, the Home Office in the United Kingdom issued a “*Victim’s Charter: A Statement of the Rights of Victims of Crime*”, in 1990, which was re-issued in 1996.

<sup>145</sup> “Videotape Ruling”, *supra*, at pp. 38 - 39.

trial, the orderly process of the Court's business and the Crown's overriding historical obligation to represent the whole of society individuals." (emp. in original)

In Canada, there has been considerable discussion about the privacy rights of victims and the interrelationship of those rights with other competing values, especially the accused's right to a fair trial. Other countries have struggled with this issue as well. In *R. v. Beharriell*<sup>146</sup>, L'Heureux-Dubé, J. with whom LaForest and Gonthier, JJ. concurred, noted that the Supreme Court of Canada has, on several occasions, recognized privacy as an interest protected by both the common law as well as the *Canadian Charter of Rights and Freedoms*.<sup>147</sup> The Supreme Court of the United States, likewise, has conferred constitutional status on certain aspects of privacy: *Roe v. Wade*<sup>148</sup> and, as outlined earlier, U.S. courts at the federal trial level have been prepared to hold that the privacy right of a degraded and videotaped victim is *capable* of overriding the principle that the judicial system ought to be fully open.<sup>149</sup> In New Zealand, the High Court recently has reached a similar conclusion.<sup>150</sup>

But is it necessary to adopt a hierarchical approach to rights -- one which says that some rights are more important than others? The Supreme Court of Canada has clearly said no, and the House of Lords, the High Court of Australia and the High Court in New Zealand have said that victim's rights

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<sup>146</sup> (1995), 103 C.C.C. (3d) 92 (S.C.C.).

<sup>147</sup> *Ibid.*, pp. 124 - 125.

<sup>148</sup> 410 U.S. 113 (1973).

<sup>149</sup> *In re Application of KSTP Television*, 504 F. Supp. 360 (D. Minn. 1980).

<sup>150</sup> *Police v. O'Connor*, [1992] 1 N.Z.L.R. 87 (H.C.), at p. 98.

are part of the equation that need to be taken into account when assessing interests such as the right to a fair trial.<sup>151</sup> On the other hand, American courts have traditionally given primacy to freedom of the press, and the right to a fair trial.<sup>152</sup>

### ***Conclusions: The Search for a Principled Approach***

In this article, we have examined the approach that the courts in a number of countries have taken to the balance that needs to be struck between the openness of the judicial process, and other competing social values, such as the right to privacy. Some common themes emerge in the various judicial decisions, but there are some differences as well. The following are the principles which we believe will assist in the development of an appropriate judicial response in a case raising these issues.

We start with the obvious: openness in the administration of justice has long been regarded as a cornerstone of a society founded on democratic principles. The “open court” principle has two separate facets. The first is the right of the public, including the media, to attend trials and court proceedings and to report on all that transpires. The second concerns the right of the public to criticize and scrutinize the judicial process, including the “judicial record”.

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<sup>151</sup> *Dagenais v. Canadian Broadcasting Corp.* (1994), 94 C.C.C. (3d) 289 (S.C.C.), most recently applied in *French Estate v. Ontario (Attorney General)* (1998), 122 C.C.C. (3d) 449 (Ont. C.A.), at p. 459; *Dietrich v. R.* (1992), 67 A.L.J.R. 1(H.C.) at pp. 12 and 35; *Attorney General v. Times Newspapers Ltd.*, [1973] 3 All E.R. 54 (H.L.), at p. 60, per Lord Reid; “The Role of the Victim During Criminal Court Proceedings”, by Sam Garkawe, 17 *U.N.S.W. Law Journal* 595 (1994); *Attorney General v. British Broadcasting Corp.*, [1980] 3 W.L.R. 109 (H.L.); *Police v. O’Connor*, [1992] 1 N.Z.L.R. 87 (H.C.), at p. 98.

<sup>152</sup> See the cases outlined in footnotes 85 and 87, *supra* .

Openness is not, however, an absolute value that has no boundaries or limits. Curtailment of public access may be justified where there is present the need to protect a social value of superordinate importance.<sup>153</sup>

There is, nonetheless, a strong presumption in favour of the openness principle. The burden to displace that presumption rests with the proponent, and must be based on articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture. Those facts, if they are to be successful, must establish that a denial of access is necessary for the proper administration of justice on the facts of the case.

A request to deny access may engage a number of competing individual rights, such as the right to a fair trial, the media's right to report the proceedings to the public, and the victim or complainant's right to privacy. A hierarchical approach to rights, which places some over others, should be avoided. When the rights of two individuals come into conflict, as inevitably occurs in these types of cases, the court should strive to achieve a contextual balance that fully respects the importance of both sets of rights. And where a decision is taken to limit a right (to report in the media, for instance), the court's order should be tailored in such a way as to minimize impairment of the right as much as possible, and still be able to serve the interest sought to be protected.

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<sup>153</sup> We recognize that some of the cases have applied a test of "overriding principle". We feel, however, that a somewhat higher threshold test is necessary -- hence, our preference for the phrase "superordinate importance".

In the case of horrific videotapes and other similar types of evidence, a number of specific factors may need to be reviewed and weighed when considering a post-trial motion to limit or deny access to the public. They include, but are not necessarily confined to, the following:<sup>154</sup>

- a) The nature and content of the videotape and, in particular, whether it depicts violent or degrading non-consensual sexual activity involving an identifiable victim.
- b) The use to which the video will be put: will it advance a public interest, or is it intended primarily to satisfy prurient curiosity?
- c) Are innocent victims shown who could be re-victimized through a public dissemination of the tape?
- d) Would public dissemination amount to a significant violation of a victim's personal privacy, or will it simply result in embarrassment or discomfort?
- e) Is there a reasonable basis to believe that possession of the videotape by a member of the public, including the media, could constitute a criminal offence such as possession (or publication) of child pornography?

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In this article, we have not attempted to deal with the troublesome question of the obligation on the prosecution to disclose even pornographic videotape evidence to the accused and his or her counsel once charges have been laid. That issue, in itself, raises difficult questions concerning the scope and nature of the disclosure obligation, as well as the potential need to impose conditions that may be necessary to prevent further disclosure to unconnected but "interested" third parties. We would, however, point out that Watt, J. in *R. v. Blencowe* (1997), 118 C.C.C. (3d) 529 (Ont. Ct. (Gen. Div.)) endeavoured to strike a balance between the accused's right to a fair trial, including disclosure, and the privacy rights of child victims depicted in videotapes. We also note the attempt by the British Parliament to regulate access by the defendant and others to "protected material" in relation to proceedings for a sexual offence. "Protected material" includes the victim's statement, a photograph of the victim, and the medical report pertaining to the victim: Sexual Offences (Protected Material) Act 1997.

- f) Were the tapes played and shown fully in court, or were there limitations imposed by the trial judge?
- g) Is there a reasonable basis to believe, on the evidence, that the victim or the victim's remaining family members will suffer long-term psychological or emotional injury if the videotape is made public?
- h) Was the videotape ruled inadmissible at the trial and, if it was, did its exclusion result in or contribute to an acquittal?
- i) Could a denial of access in any way prejudice the accused's right to a fair trial in any future proceedings?

In the context of a specific case, some of these factors may be quite inapplicable; in other cases, certain factors, or a group of them, may well be dispositive of the issue before the court.

Balancing the rights of competing interests is the right thing to do for a number of reasons. It allows fundamental rights to be respected, even in the face of opposing and seemingly contradictory rights. It recognizes that the liberty of the accused is very much at stake in the proceedings. More to the point, however, it ensures that the victim of the crime -- who more often than not was drawn into the offence unwillingly and was hurt in the process -- can have a measure of comfort in the knowledge that his or her views and experiences will be taken into account by the court. The public's confidence in the justice system is rarely strong, and in recent years certainly has been eroding significantly<sup>155</sup>; but small steps such as a balancing exercise in the case of horrific videotapes can go

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Alan N. Young has observed that: "Public discontent appears to be an inevitable and constant response to institutionalized justice". In 1906, Roscoe Pound noted that "dissatisfaction with the administration of justice is as old as our own legal system" and that "discontent has an ancient and unbroken pedigree". [ "Two Scales of Justice: A Reply", by Alan N. Young, 35 *Cr. L.Q.* 355 (1993).] Recent surveys tend to confirm this view, at least in Canada. In 1991, a national survey concluded that while one half of Canadians provided a positive assessment of the work of the police, only sixteen percent said that the courts were doing a good job in helping victims of crime. [ "Public Perceptions of Crime and the Criminal Justice System", Juristat, Statistics Canada,

a long way towards showing that as a society we care about the victims of crime just as much as we do about the accused's right to a fair trial. Perhaps equally important, consideration of a victim's rights is both a modest and an appropriate approach which in the larger context might serve to further enhance public confidence in the fair administration of criminal justice.

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Canadian Centre for Justice Statistics, January, 1991]. In May, 1997, a national survey concluded that forty-seven percent of Canadians lacked confidence in the Courts (thirty percent were "not very confident"; seventeen percent were "not at all confident") [National Angus Reid/CTV Poll on "Crime and the Justice System", conducted by the Angus Reid Group, Inc., released on the 27th of July, 1997].