

CALIBRATING THE SCALES OF JUSTICE: BALANCING FUNDAMENTAL FREEDOMS IN THE UNITED STATES AND CANADA

Rene Nuñez

"The proclamation of the Canadian Charter of Rights and Freedoms will cast a light into the dusty corners of many settled areas of the law, bringing about the need for re-evaluation, and perhaps a shifting of the balance."¹

I. INTRODUCTION

The adoption of the Canadian Charter of Rights and Freedoms (Charter) in 1982 was a revolutionary event in Canadian history with great implications for the future.² Much like the United States Bill of Rights, the Charter guarantees several civil liberties, most of which have obtained constitutional status for the first time.³

It was universally acknowledged that the Charter's constitutional protection of rights would redefine many settled areas of law.⁴ Some people, however, feared that adoption of the Charter was just another step in the Americanization of Canada.⁵ It has been predicted about the Charter that, "[a] country dedicated in the preamble of its constitution to 'peace, order, and good government' will give way

1. F. Randy Smith, Note, *Free Press-Fair Trial, A Question of Balance*, 19 U. BRIT. COLUM. L. REV. 73, 73 (1985).

2. R.I. CHEFFINS & P.A. JOHNSON, *THE REVISED CANADIAN CONSTITUTION* 130 (1986).

3. Cf. *id.* at 130-31. These rights include but are not limited to the freedom of conscience and religion, the freedom of thought and belief, freedom of the press, and the right to vote. *Id.*

4. Smith, *supra* note 1, at 73.

5. CHEFFINS & JOHNSON, *supra* note 2. Many Canadians are wary of their culture being supplanted by American culture. See Christopher P. Manfredi, *The Canadian Supreme Court and American Judicial Review: United States Constitutional Jurisprudence and the Canadian Charter of Rights and Freedoms*, 40 AM. J. COMP. L. 213, 213-15 (1992). Many Canadians see a gradual Americanization of Canadian culture, and they also see the adoption of the Charter as yet another step in this Americanization. *Id.* American law will "transform judicial review under the Charter into 'another branch-plant operation of an American head office.'" *Id.* A study of the social, political, and psychological sources and effects of Americanization is not within the scope of this Note. For purposes of this Note, it is sufficient that possible Americanization is a Charter issue that is a factor in Canada's historical reluctance to revisit the free press/fair trial issue and will be discussed in more detail in Parts III and IV *infra*.

to a Canadian society much more concerned with the American dream of 'life, liberty and the pursuit of happiness.'"⁶

One area of law where both implications are present is in the area of free press and fair trial. Tensions arise between the two rights during sensational trials because, "if a defendant is to have a fair trial, he is entitled to have his case heard by an unprejudiced jury . . . for the defendant in the exceptional case, these conditions can be difficult and perhaps impossible to meet."⁷

Both rights are protected by each nation's constitution.⁸ In addition, the tension between these rights has been addressed by both Canadian and American law, with, historically, both systems coming to different resolutions.⁹ Recently, in *Dagenais*, the Canadian Supreme Court issued a decision in this area which is undoubtedly a significant change in Canadian jurisprudence, and may be another step towards the Americanization of Canadian law.¹⁰

The study of this debate is interesting for two reasons. Prior to the Charter's adoption civil liberties in Canada were guaranteed in large part by the common law. Established practices and doctrines, like those present in the free press-fair trial issue, arose around these common law concepts. One such common law doctrine preferred the right to a fair trial over the freedom of the press. With the adoption of the Charter, however, many of these customs had to change.

Among other things, the Charter guarantees Canadians the rights of free press and fair trial equally. The prior common law preference for one over the other was therefore in conflict with the mandate of the new Charter. In light of the Charter's mandate the common law doctrine had to be changed. The Canadian Supreme Court articulated this change in *Dagenais*. A study of the free press-fair trial debate is also interesting because of the role American law has had in Canada. American law was the basis for many commentaries urging a change in Canadian jurisprudence in this area. Furthermore, it seems that the seminal American case in this area at least informed the Canadian Supreme Court's decision in *Dagenais*.

In one of the earliest and most important United States Supreme Court decisions, Chief Justice John Marshall articulated this effect:

The original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or

6. CHEFFINS & JOHNSON, *supra* note 2, at 130.

7. PETER KANE, MURDER, COURTS, AND THE PRESS 4 (2d ed. 1992). Sensationalism occurs particularly when the nature of the crime, the fame of the victim, or the notoriety of the accused excites public imagination. *Id.* at 3.

8. See CAN. CONST. (Constitution Act, 1982) pt. 1 (Canadian Charter of Rights and Freedoms), § 2(b); U.S. CONST. amend. I (freedom of press); see also CAN. CONST. (Constitution Act, 1982) pt. 1 (Canadian Charter of Rights and Freedoms), § 11(d); U.S. CONST. amend. VI (right to fair trial).

9. James E. Jefferson, *Loosening the Gag: Free Press and Fair Trial*, 43 U. TORONTO FAC. L. REV. 100, 101 (1985).

10. *Dagenais v. Canadian Broadcasting Corporation*, [1994] 120 D.L.R.4th 12.

establish certain limits not to be transcended by those departments. . . . Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature [or court] repugnant to the constitution must be void.¹¹

This Note will focus on the free press-fair trial debate to highlight the changes that the Charter has made in Canadian law, and to further address the issue whether Canadian law is being Americanized. Part II will address the issue in more depth, and recount the historical approaches Canadian and American jurisprudence has taken on this issue. Part III will analyze possible reasons why Canadian law has changed. Finally, Part IV will particularly discuss the issue of whether Canadian jurisprudence in this area is becoming more like that of the United States.

II. BACKGROUND: FREE PRESS AND FAIR TRIAL IN THE UNITED STATES AND CANADA

The tension between free press and fair trial encompasses many issues.¹² The issue that is the focus of this Note is whether, in the face of possible juror prejudice, a judge may issue an order prohibiting media reporting of a case in order to protect the accused's right to a fair trial.¹³ The following sections will discuss the nature of the issue in more depth, and will highlight the historical approaches of the United States and Canada in this area.

A. The Free Press-Fair Trial Debate

Both the United States and Canada constitutionally protect freedom of the press and a right to a fair trial.¹⁴ The basic problem which exists in the debate over the two rights is "how to respond when the exercise of one of these rights threatens to interfere with the other."¹⁵

This problem has been broken down further to highlight three specific fair trial issues concerning: 1) procedural fairness; 2) biased juries; and 3) integrity of

11. *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 176-77 (1803).

12. WAYNER. *LA FAVE & JEROL H. ISRAEL, CRIMINAL PROCEDURE* § 23.1, at 985 (2d ed. 1992). Among the issues covered by *La Fave* and *Israel* are cameras in the courtroom and the right of parties to communicate with the media. *Id.*

13. In the United States, such orders are called prior restraints, and in Canada they are often called publication bans. Both terms will be used interchangeably throughout this Note.

14. *See supra* Part I.

15. *Jefferson, supra* note 9, at 100.

the judicial system.¹⁶ The first concern is that news coverage may fan a public outcry which may lead a public official to act impartially or unfairly towards the accused.¹⁷

A classic example of this occurred during the trial of Dr. Samuel Sheppard in 1954.¹⁸ Sheppard, a noted surgeon, was accused of his wife's brutal murder.¹⁹ While there was evidence pointing to Sheppard's guilt, he was not arrested for a period of days.²⁰ This angered many people, and soon after the murder, newspapers ran headlines, such as *Why Isn't Sam Sheppard in Jail* and *Quit Stalling Bring Him In*.²¹ The intense media exposure continued throughout the trial, and the United States Supreme Court in reversing Sheppard's conviction held that the media coverage clearly caused the trial judge to neglect his duty of ensuring a fair trial for the accused.²² Sheppard was retried in a more controlled atmosphere and was acquitted.²³

The second concern existing in this debate is the fear that pre-trial news coverage may lead to the impaneling of a biased jury.²⁴ In Indiana, Leslie "Mad Dog" Irvin was arrested for a series of burglaries, and a few days later the police issued a press release stating that he had confessed to committing six recent murders in the area.²⁵ The press continued intensely reporting his story, and during voir dire, it was found that 370 out of 430 people examined believed him to be guilty.²⁶ In fact, it was later found that eight of the twelve impaneled jurors admitted that the media coverage convinced them of his guilt.²⁷ On this basis, the United States Supreme Court granted him a new trial in a new venue where he was again found guilty of the murders.²⁸

One final concern which does not deal with the accused's individual rights, is that inflammatory news coverage may bring the judicial system into disrepute in the public's mind.²⁹ It can be argued that this has occurred with the recent O.J. Simpson trial; however, such a broad topic is beyond the scope of this Note.

While the above examples show the damage sensational media publicity can inflict on a criminal trial, serious damage can also be done when attempts are

16. LA FAVE & ISRAEL, *supra* note 12, §§ 23.1-3.3, at 985-86.

17. *Id.*

18. Sheppard v. Maxwell, 384 U.S. 333 (1966); *see also* KANE, *supra* note 7, at 11.

19. Sheppard, 384 U.S. at 338.

20. *Id.* at 341

21. *Id.*

22. *Id.* at 363.

23. *Id.*

24. LA FAVE & ISRAEL, *supra* note 12, § 23.2, at 1000.

25. Irvin v. Dowd, 366 U.S. 717, 720 (1961); *see also* KANE, *supra* note 7, at 114.

26. Irvin, 366 U.S. at 727.

27. *Id.* at 729.

28. *Id.*

29. LA FAVE & ISREAL, *supra* note 12, § 23.1, at 985.

made to silence the media.³⁰ It is recognized in both the United States and Canada that a free press is essential to any democratic system because it spurs debate which is the life-blood of democracy.³¹ More specifically, it has been recognized that media scrutiny of judicial proceedings helps ensure fairness because it keeps the spotlight on the judicial system.³² A more dramatic interpretation of this rationale was made by one Canadian court. "In the darkness of secrecy, sinister interest, and evil in every shape have full swing . . . where there is no publicity there is no justice. Publicity is the very soul of justice. . . . [I]t keeps the judge himself while trying under trial."³³ In light of its recognized importance to the judicial system and democracy as a whole, it is no stretch of the imagination to see that whenever the government seeks to restrain the media, serious questions arise.

In the end, the preceding discussion has shown the problem that arises when one of the rights threatens or actually does interfere with the other. How to keep one right from interfering with the other, while still maintaining its integrity is a question which has presented itself in both the United States and Canada.

B. Free Press-Fair Trial in the United States

Prior to 1976, the United States Supreme Court had never directly confronted the issue of the use of publication bans to ensure fair trials.³⁴ Up until then, the Court dealt with the issue through criminal appeals when the defendant claimed that the media prejudiced their trial.³⁵ However, in that year, the Court issued the seminal decision in this area of American jurisprudence.³⁶

Nebraska Press arose when six members of a family were found murdered in their home in a small Nebraska farming community.³⁷ Extreme shock reverberated throughout the tiny village when word spread of the brutal crime, and of the suggestion that there had been sexual crimes inflicted on the victims.³⁸ The next day, Irwin Charles Simants was arrested for the murders and was arraigned two days later.³⁹ In light of the overwhelming publicity that the case had attracted, the defense and prosecution promptly asked the trial court for an order restraining the media from publishing anything about the trial.⁴⁰ The

30. *Id.*

31. Jefferson, *supra* note 9, at 102-03.

32. Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

33. MacIntyre v. Attorney General of Nova Scotia, [1982] D.L.R.3d 385, 396 (quoting Jeremy Bentham).

34. LAWRENCE H. TRIBE, CONSTITUTIONAL LAW § 12-11 (2d ed. 1988).

35. *Id.*

36. See *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539 (1976).

37. *Id.* at 542.

38. KANE, *supra* note 7, at 34.

39. *Id.*

40. *Id.*

motion presented before the court stated that there had been mass media coverage which was likely to continue, and it created a reasonable likelihood that the coverage would make it difficult, if not impossible, to impanel an impartial jury.⁴¹ Based on nothing other than the assertions in the motion, the trial court issued the media restriction.⁴²

Believing that the order violated the First Amendment, the media then petitioned the state district court to set aside the order.⁴³ Almost one week later, the district court did set aside the order, only to institute one of its own.⁴⁴ The court, reasoning that a clear and present danger to impaneling an impartial jury existed due to the pre-trial news coverage, issued an order prohibiting the media from reporting on the more sensitive issues until a jury had been impaneled.⁴⁵

The media then appealed the order to the Nebraska Supreme Court and to United States Supreme Court Justice Blackmun, as circuit judge for Nebraska.⁴⁶ Justice Blackmun declined the appeal, preferring that the Nebraska Supreme Court deal with the issue first.⁴⁷ The Nebraska Supreme Court affirmed the order.⁴⁸ Meanwhile, Simants' trial had begun, and he was convicted of the murders.⁴⁹

Although the trial had already ended, and thus the order as well, the United States Supreme Court still granted certiorari.⁵⁰ The Court held that the order violated the First Amendment.⁵¹ The holding was principally based on the Court's policy against prior restraints.⁵² In an earlier decision, the Court announced that "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity."⁵³

In this instance, the Court held that this presumption had not been overcome.⁵⁴ The Court explained the rationale behind the presumption by comparing prior restraints to sanctions in defamation cases: "A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protection. . . . A prior restraint, by contrast . . . has an immediate and irreversible sanction."⁵⁵ The Court went on to note that sanctions after publication "chill"

41. *Id.*

42. *State v. Simants*, 236 N.W.2d 794, 797 (1975).

43. *Id.*

44. *Id.*

45. *Id.* The prohibited issues included Simants' alleged confession and the alleged sexual crimes committed against some of the victims. *Id.*

46. *Id.*

47. *See Nebraska Press Ass'n. v. Stuart*, 423 U.S. 1319 (1976).

48. *Simants*, 236 N.W.2d at 802.

49. *Nebraska Press Ass'n.*, 427 U.S. at 546.

50. *Id.*

51. *Id.* at 570.

52. *Id.* For definition of prior restraint, see *supra* note 13 and accompanying text.

53. *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968).

54. *Nebraska Press*, 427 U.S. at 570.

55. *Id.* at 559

speech while a prior restraint "freezes" it, at least for a time.⁵⁶ It was this temporary "freezing" of speech which led the Court to say that prior restraints were the most intolerable and serious violations of the First Amendment.⁵⁷

This strong stance against prior restraints can be traced back to the belief that freedom of the press is essential to a democracy. It has been reasoned that, "[f]reedom of the press is essential to political liberty. Where freedom of expression exists, the beginnings of a free society and a means for every extension of liberty are already present."⁵⁸

However, noting that the framers of the Constitution did not assign a priority to rights, the Court refused to hold that the First Amendment took priority over the Sixth Amendment's fair trial guarantee.⁵⁹ As a result, the Court did not completely abandon the idea of press bans.⁶⁰ Instead, the Court held that before a press ban could be constitutionally permissible, the trial court must exhaust all plausible least restrictive options.⁶¹ In other words, the Court found that publication bans, while still an option, could never be the first option.

Since the *Nebraska Press* decision, the Court has revisited the area of free press-fair trial, but has not dealt specifically with the issues present in *Nebraska Press*. For example, the Court held that state bar sanctions against a defense attorney for violating the state code of professional responsibility's guidelines for communicating with the media violated his First Amendment rights.⁶² In another case, a plurality of the Court distinguished the *Nebraska Press* situation from the situation where the trial court banned the physical presence of the media in the courtroom.⁶³ Seven Justices agreed, but for different reasons, that while the First Amendment virtually prohibited prior restraints, it did not encompass the media's right to be present in the courtroom itself.⁶⁴

1. Practical Application of *Nebraska Press*

Nebraska Press did not entirely prohibit prior restraints, thus leaving the utilization of prior restraints as a possibility. One example of a successful prior restraint occurred during the trial of Manuel Noriega. After the Panamanian

56. *Id.*

57. *Id.*

58. Jefferson, *supra* note 9, at 102.

59. *Nebraska Press*, 427 U.S. at 561.

60. *Id.* at 572 (Brennan, J., concurring).

61. *Id.* at 564. Among the other options mentioned by the Court were: change of venue, postponement of trial, searching questions of the jury, and the use of emphatic jury instructions. *Id.*

62. See *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

63. See *Richmond Newspaper Ass'n. v. Virginia*, 448 U.S. 555 (1980).

64. See *id.*; see also *LA FAVE & ISRAEL*, *supra* note 12, § 23.1, at 985.

conflict, Noriega had been brought to the United States to stand trial on various charges.

While awaiting trial before a federal district court in Florida, the Cable News Network (CNN) attempted to broadcast audio tapes it claimed were telephone conversations between Noriega and his lawyers.⁶⁵ Noriega sought a temporary restraining order (TRO), claiming that the content of the tapes was privileged and that their broadcast would prejudice his right to a fair trial.⁶⁶ In seeking the TRO, Noriega did not seek to enjoin broadcast of the fact that the tapes existed, but merely the content of the tapes themselves.⁶⁷ The district court granted the TRO until the tapes could be examined *in camera* to determine whether a ban was merited.⁶⁸ CNN, however, refused to turn over the tapes, and instead sought a writ of mandamus from the Eleventh Circuit, seeking to set aside the TRO.⁶⁹

After accepting jurisdiction, the Eleventh Circuit went on to uphold the TRO.⁷⁰ The court noted that threats to an accused's guarantee of a fair trial need to be weighed against infringements on free press.⁷¹ The court stated, "a conclusory representation that publicity might hamper a defendant's right to a fair trial is insufficient to overcome the protection of the First Amendment."⁷² The court went on to reason that the district court's attempts to resolve the issue were being "shackled" by CNN's refusal to submit the tapes for judicial examination.⁷³ Thus, the court held, "No litigant should continue to violate a district court's order and attempt to have that district court's order reviewed at the same time."⁷⁴ On this basis, the court upheld the TRO.⁷⁵

An application to the United States Supreme Court for a stay of the order was denied, as was a petition for certiorari.⁷⁶ Justice Marshall issued a dissenting opinion with which Justice O'Connor joined.⁷⁷ Justice Marshall noted that the district court made no finding that the TRO was necessary to protect Noriega's right to a fair trial.⁷⁸ After reciting the Court's previous holdings warning against the use of prior restraints, Justice Marshall went on to say that the lower

65. United States v. Noriega, 917 F.2d 1543, 1546 (11th Cir. 1990).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 1547.

70. *Id.* at 1552.

71. *Id.* at 1549.

72. *Id.*

73. *Id.* at 1551.

74. *Id.* at 1552.

75. *Id.*

76. See Cable News Network v. Noriega, 498 U.S. 976 (1990) (memorandum decision).

77. See *id.* at 976 (Marshall, J., dissenting).

78. *Id.*

court's holdings could not be reconciled with those decisions.⁷⁹ Justice Marshall then argued that, "if the lower courts in this case are correct in their remarkable conclusion that publication can be automatically restrained pending application of the demanding test established by *Nebraska Press*, then I think it is imperative that we re-examine the premises and operation of *Nebraska Press* itself."⁸⁰ While a mere denial of certiorari is not dispositive of a case, Justice Marshall's dissent as well as the Eleventh Circuit's decision do provide insights on the practical application of *Nebraska Press*. These insights will be discussed in Part III.

C. Free Press-Fair Trial in Canada

This section will highlight the changes Canadian law has undergone on this subject. First, the rationales behind the historical Canadian approach to this area will be discussed. Then, the Charter's negligible impact in this area will be highlighted by discussion of a recent criminal trial. Finally, a recent Canadian Supreme Court decision which appears to make major changes in this area of Canadian jurisprudence will also be discussed.

1. The Historical Approach

Prior to 1994, the free press-fair trial issue was largely governed by the *sub judice* doctrine.⁸¹ *Sub judice* is a common law contempt of court doctrine which makes it a crime to interfere with judicial proceedings by their publication.⁸² The doctrine allows the trial judge to protect the integrity of the proceedings.⁸³

Thus, under the doctrine, it is a crime to publish information, which at the time of the publication, creates a substantial risk to a fair trial.⁸⁴ This was based on the assumption that fair trial took precedence over free press.⁸⁵ As the *Banville* court stated: "Freedom of the press, must, in my view, give way to the overriding obligation to ensure that an individual have a fair trial."⁸⁶ Violation of the doctrine is an absolute liability offense, as a result, editors can be held vicariously liable for articles that appear by mistake.⁸⁷

79. *Id.* (quoting *Nebraska Press v. Stuart*, 427 U.S. 539, 558 (1976), quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

80. *Id.* at 977.

81. John Pearson Allen & Thomas Allen, *Publication Restrictions and Criminal Proceedings*, 36 CRIM. L.Q. 168, 170 (1994).

82. *Id.* at 170.

83. Jefferson, *supra* note 9, at 116.

84. Allen & Allen, *supra* note 81, at 170.

85. *See R. v. Banville*, [1983] C.C.C.3d 312.

86. *Id.* at 316.

87. Allen & Allen, *supra* note 81, at 174.

A corollary to the *sub judice* doctrine is the practice of banning.⁸⁸ In order to ensure that offending information is not released, the trial court can impose publication bans.⁸⁹ In order for a ban to be issued, the moving party has to prove that there is a real and substantial risk to a fair trial.⁹⁰ This provides very minimal protection for free press in that, "it prevent[s] publication bans from being imposed for no reason."⁹¹ Therefore, this gives courts broad discretion in imposing bans.⁹²

Even after adoption of the Charter, the practice of banning and the preference for fair trial over free press continued.⁹³ As one court reasoned, "The reconciliation of these competing interests does not involve a disadvantage to either. The press will be free to publish the information when the individuals have been tried."⁹⁴

2. The Bernardo Trial and the Renewed Debate Over Press Bans

Recently, a ban imposed during one of the most sensational criminal cases in Canadian history created a firestorm of debate in both the United States and Canada.⁹⁵ In 1993 Karla Homolka implicated her husband, Paul Bernardo, in forty-three rapes, and soon after, both were charged with abducting, torturing, and murdering two teenage girls.⁹⁶ The two were tried separately, and prior to Homolka's trial the trial judge issued a Canada-wide ban that was to last until the conclusion of Bernardo's subsequent trial.⁹⁷ Further, he banned foreign media from the courtroom reasoning that the ban would not deter them from reporting on what transpired in the court.⁹⁸ The only information which was permitted to be reported were stories reporting the result of the trial, and the sentence.⁹⁹

As a result, foreign media were virtually powerless to report on the story since they were banned from the courtroom and there was no other way to obtain information.¹⁰⁰ Appeals of the ban were made, but it was upheld.¹⁰¹ Despite the

88. Jefferson, *supra* note 9, at 116.

89. Ken Englade, *Out of the Public Eye*, 23 *STUD. LAW.* 56, 58 (Jan. 1995).

90. Dagenais v. Canadian Broadcasting Corp., [1994] D.L.R.4th 12, 36.

91. *Id.*

92. See Allen & Allen, *supra* note 81.

93. Jefferson, *supra* note 9, at 116.

94. Manitoba (Attorney General) v. Groupe Quebecor Inc., [1987] D.L.R.4th 80, 96.

95. Englade, *supra* note 89, at 59.

96. *Id.*; see R v. Bernardo, [1994] D.L.R.4th 42.

97. See Bernardo, [1994] D.L.R.4th at 43.

98. *Id.* at 44.

99. *Id.*

100. Englade, *supra* note 89, at 57.

101. Bernardo, [1994] D.L.R.4th at 47.

ban, a reporter for the *Washington Post* somehow obtained the facts surrounding the case, and reported it in the United States.¹⁰²

The American media then picked-up on the story, and began wide-spread reporting of it.¹⁰³ This led to enforcement problems in Canada since many Canadians had access to the American media.¹⁰⁴ For example, portions of American television programs, such as *A Current Affair* and *Larry King Live* which discussed the trial, were blacked-out in Canada.¹⁰⁵ In another scene, Canadians who had crossed the border and purchased newspapers detailing the facts surrounding the trial, had them confiscated by customs agents.¹⁰⁶ In the end, the ban continued and was upheld by the court of appeals because as one judge stated, "What if a jury cannot be picked because of the publicity? . . . What happens then?"¹⁰⁷

3. The Rise of Free Press

In late 1994, the Supreme Court of Canada issued a major decision regarding publication bans.¹⁰⁸ *Dagenais* concerned the trial of a priest who was accused of molesting a number of children.¹⁰⁹ Prior to his trial, the Canadian Broadcasting Corporation (CBC) planned to air a made-for-TV movie which depicted a boy's molestation by a priest.¹¹⁰ The defendant claimed that the movie too closely resembled his case, and sought an order prohibiting the CBC from airing it.¹¹¹ The ban was granted by the trial court, and the case was appealed to the Canadian Supreme Court.¹¹²

102. Anne Swardson, *Unspeakable Crimes; This Story Can't Be Told in Canada.*, WASH. POST, Nov. 23, 1993, at B1.

103. See *A Current Affair* (Syndicated television broadcast, Nov. 9, 1993); *Larry King Live: Freedom of the Press in Canada* (CNN television broadcast, Nov. 29, 1993).

104. See *A Current Affair* (Syndicated television broadcast, Nov. 9, 1993); *Larry King Live: Freedom of the Press in Canada* (CNN television broadcast, Nov. 29, 1993).

105. See *A Current Affair* (Syndicated television broadcast, Nov. 9, 1993); *Larry King Live: Freedom of the Press in Canada* (CNN television broadcast, Nov. 29, 1993).

106. Mark Clayton, *Gag Order has Canadians Talking*, CHRISTIAN SCI. MONITOR, Dec. 28, 1993, at 12.

107. Engle, *supra* note 89, at 57.

108. See *Dagenais v. Canadian Broadcasting Corp.*, [1994] D.L.R.4th 12.

109. *Id.* at 19.

110. *Id.*

111. *Id.*

112. *Id.*

The court held that the ban violated the CBC's right to freedom of expression.¹¹³ Central to the court's holding was the rejection of the traditional belief that fair trial trumped free press.¹¹⁴ The court stated, "The pre-Charter common-law rule governing publication bans emphasized the right to a fair trial over the free expression interests of those affected by the ban. . . . [T]he balance this rule strikes is inconsistent with the principles of the Charter."¹¹⁵

In addition to abolishing the priority given to fair trial considerations, the court also announced a new test for courts to follow when faced with problems of prejudicial publicity: A publication ban should only be ordered when:

- (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
- (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.¹¹⁶

Soon after this decision, the Northwest Territories Supreme Court dealt with a publication ban in *Canadian Broadcasting Company v. Canada*.¹¹⁷ The court stated that "[t]he *Dagenais* case thus marks a clear departure from the pre-Charter common law rule in Canada. . . . [T]he proper interpretation and application of the Charter requires a judicious balance to be achieved which fully respects the various constitutional rights of all concerned."¹¹⁸ Therefore, the free press-fair trial debate has had historically different resolutions in the United States and Canada. However, significant changes have recently occurred in Canadian jurisprudence.

III. ANALYSIS

In comparing American and Canadian law in this area, two analyses are warranted. First, the historical difference between American and Canadian approaches to this area of law shows possibilities for the different resolutions. In addition, some possible reasons for the *Dagenais* decision will be put forth, while comparing it to its American counter-part *Nebraska Press*.

113. *Id.* at 48.

114. *Id.* at 37.

115. *Id.*

116. *Id.* at 38.

117. *Canadian Broadcasting Co. v. Canada*, [1995] C.C.C.3d 259.

118. *Id.*

A. Historically Different Approaches

In order to analyze the historical difference in Canadian and American law, the *Noriega* and *Homolka* decisions discussed in Part II will be compared. While it is true that both the *Noriega* and the *Homolka* decisions upheld the use of press bans, the rationales behind the decisions serve to highlight the differing approaches.

In his dissent, Justice Marshall claimed that *Noriega* was in direct opposition to *Nebraska Press*.¹¹⁹ However, upon closer inspection it appears that, in fact, *Noriega* was in harmony with *Nebraska Press*.

The *Nebraska Press* test specifically states that the gravity of the evil must be so great that it warrants the invasion of free press.¹²⁰ It takes into account the evidence before the trial judge in determining the nature and extent of the news coverage, whether other measures would be better suited to mitigating any damage, and how effective a ban would be in mitigating the damage.¹²¹ The precise terms of the order are also an important consideration.¹²²

With this in mind, it is not difficult to see that the TRO issued by the district court was a reasonable intrusion into CNN's right to publish the tapes. The tapes contained recordings of telephone conversations between a criminal defendant and his lawyer.¹²³ It is a well established principle that communications between lawyers and their clients are of utmost importance to the judicial system.¹²⁴ CNN is a national news station with millions of daily viewers. While it is true that the other two parts of the *Nebraska Press* test do not appear to be satisfied because of the speculative nature of the danger, this is mitigated by the fact that CNN never produced the tapes.

Implicit in *Nebraska Press* is that in balancing the two rights, evidence of possible damage must be examined.¹²⁵ In its opposition to the TRO, CNN appeared to claim that a prior restraint was never permissible.¹²⁶ This is a proposition which has been patently rejected by the Court.¹²⁷ The fact that the TRO would have ended upon production of the tapes also appears to be an important consideration.¹²⁸

It is apparent then, that *Noriega* is a case where a press ban was appropriately issued under *Nebraska Press*. At issue were specific tapes which contained

119. *Cable News Network v. Noriega*, 498 U.S. 976, 976 (1990) (Marshall, J., dissenting) (memorandum decision).

120. *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 562 (1976).

121. *Id.*

122. *Id.*

123. *United States v. Noriega*, 917 F.2d 1543, 1545 (1990).

124. *Id.* at 1548.

125. *Id.* at 1550.

126. *Id.* at 1552.

127. *See Nebraska Press Ass'n*, 427 U.S. at 570.

128. *Noriega*, 917 F.2d at 1552.

conversations between a criminal defendant and his lawyer. These potentially sensitive communications were subject to broadcast before millions of people over a national news network. The TRO was narrowly tailored to allow reporting of the fact that the tapes existed, and would have ended upon their production for an *in camera* examination. In light of the Court's explicit rejection of an absolute prior restraint prohibition, CNN's refusal to produce the tapes made the TRO reasonable under *Nebraska Press*.

In contrast, it is apparent that the *Homolka* ban was much broader and more speculative. *Homolka* was tried over a year before her husband, and during that year the only information that could be published was the outcome of the trial and her sentence.¹²⁹ The ban did not concern specific potential transgressors, but rather all media.¹³⁰ The ban also did not address any specific dangers.¹³¹ Instead, the only danger articulated was that a very gruesome murder case was the subject of great media interest.¹³² In conjunction, no finding was made about whether publication of the facts would endanger Bernardo's rights.¹³³ It seems more apparent that the ban was solely based on the concern enunciated by the court of appeal's justice, "What if a jury cannot be picked because of the publicity. . . . What happens then?"¹³⁴

In the end, *Noriega* and *Homolka* depict the historical differences between the American and Canadian approaches to this issue. In the United States, a very specific danger must be present.¹³⁵ Further, specific findings of fact must prove that this danger is grave enough to warrant curtailing the freedom of the press.¹³⁶ In *Noriega*, this second requirement was mitigated by the fact that the media affirmatively withheld the evidence from the court.¹³⁷ In Canada, on the other hand, bans were much broader and subject to speculative concerns.¹³⁸

Homolka shows that a broad-based ban could be issued on all media without any specific findings of fact.¹³⁹ Further, and even more disturbing, a ban could be issued on the mere speculation that a gruesome crime subject to great media interest would prejudice the population so that an impartial jury could not be impaneled. The ban seems to rest on the speculation of "what if" a jury cannot be impaneled rather than "is" this publicity prejudicial and "whether" there is no other way to get around it. This, however, appears to have changed dramatically with *Dagenais*.

129. Englade, *supra* note 89, at 59.

130. *R. v. Bernardo*, [1994] D.L.R.4th 42, 44.

131. *Id.*

132. *Id.*

133. *Id.*

134. Englade, *supra* note 89, at 55.

135. *TRIBE*, *supra* note 34.

136. *Id.*

137. *United States v. Noriega*, 917 F.2d 1543, 1550 (1990).

138. Englade, *supra* note 89, at 58.

139. *Id.*

B. Dagenais and Reasons for the Change in Law

Dagenais appears to have given the Canadian media greater freedom to report on criminal cases.¹⁴⁰ This section will attempt to explore some possible reasons behind this change in the law by utilizing American law as a point of comparison. There appears to be four major reasons for the change in the law. First, is the recognition that free press is equal to fair trial.¹⁴¹ Second, implicit in this recognition is that free press and fair trial are harmonious rights.¹⁴² Third, is the court's willingness to rely on other alternatives. Finally, is the rejection of the belief that temporary restraints on speech are acceptable first alternatives to the problem.¹⁴³

1. The Equalization of Rights

In the United States, the Supreme Court has held that a reading of the Constitution negates any belief that constitutional rights can be prioritized.¹⁴⁴ The Court reasoned that if the authors of the Bill of Rights, knowing the conflicts which can arise between rights, did not prioritize them, then it is not for the Court to undertake the task.¹⁴⁵

For quite some time, critics of the Canadian system have argued that entrenchment of free press in the Charter meant that it could no longer be treated as an inferior right.¹⁴⁶ As one critic stated, "[t]he judicial declarations that have been made to date about the primacy of the right to fair trial were uttered without . . . any analysis of the rationale behind entrenchment of press freedom."¹⁴⁷ This belief was recognized by the *Dagenais* court.¹⁴⁸

A recognition by the media that the old common law preference for fair trial over free press was inconsistent with the Charter, may also account for the increased litigation associated with publication bans. In 1982 eight challenges were brought against restrictive orders.¹⁴⁹ In just five years, the number jumped to thirty-three.¹⁵⁰ However, the statistics may be suspect because the association which tracks these numbers records only instances in which the banning order is

140. *Dagenais v. Canadian Broadcasting Corp.*, [1994] D.L.R.4th 12, 38.

141. *Id.* at 37.

142. *Id.* at 41.

143. *Id.* at 38.

144. *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 561 (1976).

145. *Id.* at 561.

146. See Jefferson, *supra* note 9, at 101.

147. *Id.* at 102.

148. *Dagenais*, [1994] D.L.R.4th 12, 37. "[A] hierarchical approach to rights, which places some over other, must be avoided." *Id.*

149. Engle, *supra* note 89, at 58.

150. *Id.*

challenged.¹⁵¹ In an untold number of cases, news organizations apparently accept the prohibitions limiting publication.¹⁵² In the end, it seems that one very important reason for the change was the recognition that constitutional rights are equal.

2. Rights in Harmony

Prior to *Dagenais*, many Canadian courts viewed free press and fair trial as two irreconcilable concepts.¹⁵³ One court stated, "the clash is between the freedom of the press to publish information relevant to a public issue and the right of an individual to have a fair trial."¹⁵⁴ If it is believed that one right is a threat to another right, then it stands to reason that the other right must be protected from the threat. As a result, the threatening right must be limited.

This clash model changed with *Dagenais*. As the court noted, "sometimes publicity serves important interests in the fair trial process."¹⁵⁵ This view has also been adopted by the United States Supreme Court. "The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial process to extensive public scrutiny and criticism."¹⁵⁶

Therefore, once it was recognized that a free press can be an essential element in guaranteeing a defendant a fair trial, the easier it was to reject the notion that one trumped the other because they were no longer in conflict. It is the recognition of the idea that free expression promotes and protects fair trials.¹⁵⁷

3. Accepting Other Alternatives

As stated earlier, past press ban decisions were based on much speculation.¹⁵⁸ As the judge said in the *Homolka* ban, "What if a jury cannot be picked?"¹⁵⁹ It has long been held by the United States Supreme Court that other measures would virtually always be sufficient alternatives to banning.¹⁶⁰ In *Nebraska*

151. *Id.*

152. *Id.*

153. *Dagenais*, [1994] D.L.R.4th at 40.

154. *Manitoba (Attorney General) v. Groupe Quebecor*, [1987] D.L.R.4th 80, 96.

155. *Dagenais*, [1994] D.L.R.4th at 41.

156. *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

157. *Jefferson*, *supra* note 9, at 102.

158. *See supra* Part III.A.

159. *Engle*, *supra* note 89, at 54.

160. *TRIBE*, *supra* note 34.

Press, the Court stated that such alternatives included change of venue, searching jury questions, sequestration, and the use of emphatic jury instructions.¹⁶¹

In contrast, Canadian courts have typically been skeptical about these alternative measures, and have relied on banning as a principle means for ensuring fair trials.¹⁶² *Dagenais* attempts to curb this reliance on banning by requiring the alternatives be exhausted before a ban can be considered.¹⁶³

4. Rejection of Temporary Freezes

One final reason for the change in Canadian law is found in the rejection of the belief that a temporary freezing of speech is an appropriate solution to curb the effects of prejudicial publicity. Prior to *Dagenais*, many Canadian courts saw banning as a temporary inconvenience and not a matter of constitutional concern.¹⁶⁴

In the United States, this view has never been embraced. The Supreme Court has, in fact, criticized this rationale. The Court expressed the belief that temporary restraints "freeze" speech and are an irreversible sanction.¹⁶⁵ The Court stated, "Delays imposed by governmental authority are a different matter. We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers."¹⁶⁶

In *Dagenais*, the Canadian high court also rejected the notion that publication bans were acceptable principle solutions to a prejudicial publicity threat.¹⁶⁷ The court noted that the very nature of publication bans was to curtail free expression rights, and held that alternative measures must be explored before this was to be considered.¹⁶⁸

The reasons outlined above are why the Canadian Supreme Court has rejected the common law banning practice. Many of these same justifications found in *Dagenais* are also found in American jurisprudence. However, this similarity does not necessarily mean that Canadian law is being Americanized. In the end, Canadian law changed because the court rejected many common law notions in light of the Charter's guarantees.

161. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563 (1976).

162. *Engle*, *supra* note 89, at 59.

163. *Dagenais v. Canadian Broadcasting Corp.*, [1994] D.L.R.4th 12, 38.

164. *Allen & Allen*, *supra* note 81, at 177.

165. *Nebraska Press Ass'n*, 427 U.S. at 559.

166. *Id.* at 560 (quoting *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 259 (1979) (White, J., concurring)).

167. *Dagenais*, [1994] D.L.R.4th at 38.

168. *Id.*

IV. IMPLICATIONS

One criticism of *Dagenais* is that it is a "further step in the Americanization of Canada. Our mass media will look a little more like the American media and Canadian trials will look a little more like American trials."¹⁶⁹ While it is true that *Dagenais* is similar in some respects to American law, the question is whether the American position will come to dominate Canadian law in this area. The answer to this question must be no. The fear that Canada will be thrown into, "the vortex of American Lockean liberalism"¹⁷⁰ will not come to pass for five reasons. These reasons are the differences in: 1) the histories of the rights; 2) the judicial systems in which they operate; 3) judicial attitudes; 4) population; and 5) constitutional provisions.

All five reasons have one common aspect. *Dagenais* plainly states that all reasonable alternatives must be exhausted before a press ban would be acceptable.¹⁷¹ In other words, this means that a press ban must be the most reasonable alternative. These five reasons go to the reasonableness of selecting a press ban as an alternative.

A. Different Histories

The first and clearest reason why Canadian law will never be Americanized is the disparate length of time each nation has had to consider this issue. In the United States, the right to free press and fair trial have been constitutionally guaranteed for over two hundred years. The Charter of Rights and Freedoms, on the other hand, has guaranteed these rights for only fourteen years.

Undoubtedly, this will have an impact on how the Charter and the Bill of Rights are interpreted in each country. For example, in *Nebraska Press*, the Court primarily based its decision on its strong presumption against prior restraints.¹⁷² The Court highlighted that this presumption was built-upon over seventy years of case law.¹⁷³ *Dagenais*, on the other hand, is the first Canadian case to really admonish against the use of prior restraints.¹⁷⁴

To say that this solitary holding in *Dagenais* means that Canadian law is now just like American law is just sheer speculation. *Nebraska Press* is the culmination of years of criminal appeals and press decisions. *Dagenais* is just the starting point. What kind of publicity is prejudicial? What alternative measures are reasonable? How much does a judge have to investigate? These and other

169. Robert Martin, *Judicial Proceedings: Media Bans: C.B.C. v. Dagenais*, 74 CAN. B. REV. 500, 512 (1995).

170. CHEFFINS & JOHNSON, *supra* note 2, at 130.

171. *Dagenais*, [1994] D.L.R.4th at 38.

172. *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 570 (1976).

173. *Id.* at 557.

174. *Dagenais*, [1994] D.L.R.4th at 38.

questions are still left for Canadian courts to answer, and how they answer them might be quite different from how American courts have answered them.

B. Different Judicial Systems

One assertion that can be made from the study of the historical approaches Canada and the United States have taken toward the free press-fair trial issue is that both judicial systems are different. If they were not, then there would have been no historically different approaches in the first place.

The most fundamental difference is the historical place of the judiciary in both governmental systems. It is noted that prior to the Charter, for example, civil liberties were guaranteed in Canada by statute.¹⁷⁵ Thus, the judiciary interpreted civil liberties questions as statutory questions, thereby making the intent of the legislature very important.¹⁷⁶ It also meant that if the legislature did not like a particular decision, they could change the statute to circumvent it.

However, with the adoption of the Charter, those enshrined civil liberties went from legislative grants to constitutional guarantees.¹⁷⁷ The role of the courts, especially the Canadian Supreme Court, has changed and will undoubtedly continue to change. The courts will go from interpreting whether certain acts comport with the statute, to having the "last word" as to whether those acts have constitutional validity.¹⁷⁸

In the United States, the Supreme Court's role as final arbiter of constitutional questions was established nearly two hundred years ago.¹⁷⁹ Since that time, judicial practices and standards of review have become entrenched. It is too early to say, however, how the Canadian Supreme Court will accept its new role. This, like much of Canadian constitutional law, is still in flux. It is too soon to predict whether the Canadian Supreme Court will follow the United States Supreme Court's model.

While the relative status of both court systems is the major difference between the two judicial systems, there are some more practical differences as well. One such difference can be found in the way each system selects juries.¹⁸⁰ Two examples of the differences in the jury selection process are voir dire and sequestration.¹⁸¹

It has been stated that the voir dire system is radically different in Canada.¹⁸² In the United States, lawyers and judges conduct the juror questioning, and decide

175. CHEFFINS & JOHNSON, *supra* note 2, at 132.

176. *Id.*

177. See CAN. CONST. (Constitution Act, 1982) pt. VII.

178. CHEFFINS & JOHNSON, *supra* note 2, at 130.

179. *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 160 (1803).

180. See Neil Vidmar, *Pretrial Prejudice in Canada: A Comparative Perspective on the Criminal Jury*, 79 JUDICATURE 249 (1996).

181. *Id.* at 253.

182. *Id.*

whether to dismiss or accept a particular member of the jury venire.¹⁸³ If an American juror states that they have heard of the case, then it is up to the judge to decide whether the juror stays or goes.¹⁸⁴

In Canada, once potential jurors state that they have knowledge of a case, two "triers" are selected from the remaining potential jurors or the members already picked to serve on the jury.¹⁸⁵ It is those two "triers" who decide whether the potential juror should be dismissed, the judge has no part in the decision.¹⁸⁶ It is said that this process results in, "Canadian lawyers run[ning] through a lot more potential jurors, and there are many more veniremen dismissed for cause."¹⁸⁷ Thus, if this is the case, then a ban may be more reasonable because it is harder to impanel an impartial jury.¹⁸⁸

Another alternative measure which is treated differently in Canada is sequestration. Sequestering juries to insulate them from adverse publicity about a case is common in the United States.¹⁸⁹ It is said that sequestering Canadian juries is highly unusual.¹⁹⁰ It is impossible to imagine, for example, the O.J. Simpson trial without the sequestration of the jury. While, concededly, an O.J. Simpson trial in Canada might warrant the unusual practice of sequestration a less sensational trial might not.

Yet it is conceivable that a less sensational case would still warrant enough media attention that it might impact potential jurors. It is entirely possible that judges who take Martin's view that, "to sequester a juror is, in effect, to imprison a juror . . . to deprive the citizen . . . of his freedom is rightly regarded in our system as something to be avoided," might find a ban reasonable if sequestering is the only alternative available.¹⁹¹

As a result, differences in their respective judicial systems will keep Canadian and American jurisprudence on the issue of free press and fair trial from mirroring each other any time soon. This fact should alleviate the fears of Canadian critics who are apprehensive about the Charter Americanizing Canadian law.

C. Different Attitudes

Soon after the Charter's adoption, a Canadian judge studying the effects the Charter would have on judicial analysis stated: "If we pursued the publication ban issue, we would inevitably move to the question why *we* treasure free speech, and what sacrifices we would place on its altar. That raises difficult questions about

183. Engle, *supra* note 89, at 61.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. Martin, *supra* note 169, at 508.

190. *Id.* at 507.

191. *Id.* at 508.

the ranking of societal goods. . . . That is the office of political philosophy. And so, philosophy counts.¹⁹² The attitude Canadian judges have when considering a publication ban issue in Canada will go a long way to determining whether bans are considered reasonable.

In the United States, judges have a long history of declaring that prior restraints are presumptively unreasonable. Canadian judges, on the other hand, have a long history of using them as a primary tool in ensuring fair trials. To claim that one case will automatically change this historical attitude is a bit naive. While maybe not consciously using this rationale in their decisions, it could well be the case that this favorable historical predisposition towards press bans might weigh in a judge's determination of a ban's reasonableness.

D. Population Differences

The United States is a nation of about 260 million people.¹⁹³ In contrast, Canada is a nation of about thirty million people.¹⁹⁴ This makes it about as populous as the state of California.¹⁹⁵ It is quite possible that these vast population differences might have some affect on a ban's reasonableness.

For example, in *Nebraska Press*, the crime was committed in a very small town of about 800 people.¹⁹⁶ It is claimed that, proportionally, the six people murdered in that small town would be equivalent to 21,000 people being murdered in Chicago.¹⁹⁷ Whether this is accurate or not, it does show that the six murders in that tiny community may have been more shocking and well known than six murders in New York City. In *Nebraska Press*, the Court ruled that the publication ban was unreasonable because the trial court did not explore other alternatives.

It is conceivable that a smaller population may make the imposition of a publication ban more reasonable in Canada. For example, Prince Edward Island is a province of roughly 130,000 people.¹⁹⁸ The news of a particularly sensational crime in that province may be heard by proportionally more people there, than the same crime being committed in the states of California or New York. It is arguable that once the trial court explores the alternatives, it could conclude that a

192. Roger P. Kearns, *The Future of Section One of the Charter*, 23 U. BRIT. COLUM. L. REV. 567, 574 (1989).

193. THE WORLD ALMANAC AND BOOK OF FACTS 377 (Robert Famighetti ed., 1995) [hereinafter WORLD ALMANAC].

194. *Id.* at 753.

195. *Id.* at 379.

196. KANE, *supra* note 7, at 7.

197. *Id.*

198. WORLD ALMANAC, *supra* note 193, at 753.

publication ban is the only reasonable means to secure a fair trial because of the small pool from which to choose the jury.¹⁹⁹

E. Different Constitutional Provisions

A final reason why Canadian law will most likely not be Americanized is the existence of Section One of the Charter. It reads, "*The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."²⁰⁰ This section is the subject of much debate in Canada, and of many Notes and Commentaries. Suffice it to say, an in-depth study of this provision is beyond the scope of this Note.

However, it is important to point out that the American Bill of Rights does not have a similar provision. How judges and scholars interpret its function in the free press-fair trial debate, may substantially differentiate Canadian law from American law.

Real and possibly substantial differences exist between American and Canadian law and society. These difference may well make it impossible for Canadian law to be Americanized. This is not to say that they are not or ever will be similar. It is just to point out that Canada and the United States are different. These differences, in turn will probably negate any possibility that Canadian law will come to be dominated by American judicial concepts.

V. CONCLUSION

In conclusion, while it is doubtful that Canadian law in this area will be Americanized, it is apparent that it has changed. The preceding discussion regarding the free press-fair trial issue is significant in two respects. First, it shows the impact the Charter has had on Canadian law and society. Second, the debate illustrates the impact nations can have on each others law.

This Note focused on the free press-fair trial debate to highlight the changes that the Charter has made in Canadian law. Common law doctrines which prefer one right over another are repugnant to the idea of constitutional enshrinement. In light of the recently adopted Charter, these Canadian common law preferences had to change, and the Canadian Supreme Court in *Dagenais* did just that. What other ancient doctrines and practices will be changed in light of the Charter's

199. This problem would seem to manifest itself, if at all, in the smaller Canadian provinces. Provinces like Ontario and Quebec and cities like Vancouver and Calgary are sufficiently populated that population may not be an issue when it comes to prejudicial publicity.

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

mandates is unclear. However, if *Dagenais* is any indication, there will be more changed.

In addition, the fear that *Dagenais* has somehow Americanized Canadian law is unfounded. The United States and Canada are two different nations. Among other things, we each have different histories, different attitudes, and different populations. These differences are such that Canadian law will never be fully Americanized. With recent American judicial controversies over such sensational trials as the O.J. Simpson and Mendendez murder trials, maybe we can take a cue from our northern neighbors. Maybe our law needs to be looked at once again, and maybe Canadian law will provide useful insights.



