

# OPEN JUSTICE AND SUPPRESSING EVIDENCE OF POLICE METHODS: THE POSITIONS IN CANADA AND AUSTRALIA

## PART ONE

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*[In recent years, courts in Canada and Australia have been asked to make orders suppressing publication in the mass media of both evidence given in open court concerning the particular police methods used to solve cold cases and the identities of undercover police officers involved. This article identifies the source of the courts' power to make non-publication orders and compares the tests that are used in determining whether such orders should be made. It then outlines how these tests have been applied. Finally, this article discusses the impact of these tests and decisions on the principle of open justice.]*

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## I INTRODUCTION

The principle of open justice is fundamental to the Australian legal system. It ensures that courts are open to the public and that those who exercise their right to be present in the courtroom are free to report to the world what they see and

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hear. For obvious reasons, most members of the public do not exercise their right to attend judicial proceedings. Instead, most people rely on the media to give them reports of what has taken place in the courtroom. Consequently, in modern times it is the media that gives real substance to the principle of open justice. The surrogate reporting role of the media is now routinely regarded by courts as an essential attribute of open justice and of equal importance as the right of members of the public to observe judicial proceedings first hand.<sup>1</sup>

Much has been written about the purpose and value of open justice.<sup>2</sup> Of prime importance is the belief that open justice enhances the integrity, accountability and performance of those who are involved in the administration of justice. For example, it is supposed that openness makes judges more accountable for the manner in which they exercise the judicial power that is vested in them; secret courts are regarded as having a propensity to spawn corruption.<sup>3</sup> Witnesses are thought to be more likely to tell the truth if they have to testify orally in open court.<sup>4</sup> For their part, the public, having observed responsible and truthful behaviour on the part of the judges and witnesses, will have increased confidence in the operation of the courts and a greater understanding of society's laws and legal system. Any perceived shortcomings in the behaviour of particular individuals or in the substance of the law or its application in a particular case can be publicly scrutinised and, perhaps, corrected. In jurisdictions that have a charter of rights which contains an express guarantee of freedom of expression, such as Canada, open justice is also regarded as a manifestation of, and as giving

<sup>1</sup> See, eg, *R v Denbigh Justices; Ex parte Williams* [1974] 1 QB 759, 765 (Widgery CJ); *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 55 (Kirby P); *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 476–7 (McHugh JA); *R v Felixstowe Justices; Ex parte Leigh* [1987] 1 QB 582, 591–2 (Watkins LJ); *Edmonton Journal v A-G (Alberta)* [1989] 2 SCR 1326, 1339–40 (Cory J for Dickson CJ, Lamer and Cory JJ); *A-G (UK) v Guardian Newspapers Ltd [No 2]* [1990] 1 AC 109, 183 (Donaldson MR); *Herald & Weekly Times Ltd v Medical Practitioners Board of Victoria* [1999] 1 VR 267, 278–9 (Hedigan J); *Chase v News Group Newspapers Ltd* [2002] EWHC 1101 (Unreported, Eady J, 29 May 2002) [48]; *Re Applications by Chief Commissioner of Police (Vic) for Leave to Appeal* (2004) 9 VR 275, 286 (Winneke P, Ormiston and Vincent JJA) ('*Re Applications 2004*').

<sup>2</sup> The author has considered the purpose and benefits of open justice in more detail in two previous articles: Sharon Rodrick, 'Defamation, the Media and Reporting Documents on the Court Record' (2005) 10 *Media and Arts Law Review* 171; Sharon Rodrick, 'Open Justice, the Media and Avenues of Access to Documents on the Court Record' (2006) 29 *University of New South Wales Law Journal* 90. See also Garth Nettheim, 'The Principle of Open Justice' (1984) 8 *University of Tasmania Law Review* 25; Garth Nettheim, 'Open Justice Versus Justice' (1985) 9 *Adelaide Law Review* 487; Chief Justice J J Spigelman, 'Seen to be Done: The Principle of Open Justice — Part 1' (2000) 74 *Australian Law Journal* 290; Peter Wright, 'The Open Court: The Hallmark of Judicial Proceedings' (1947) 25 *Canadian Bar Review* 721.

<sup>3</sup> See Jeremy Bentham, *Judicial Evidence* (1825) 69–72; Stuart Wilder, 'All Courts Shall Be Open: The Public's Right to View Judicial Proceedings and Records' (1979) 52 *Temple Law Quarterly* 311, 313–15; Chief Justice Murray Gleeson, 'Judicial Accountability' (1995) 2 *Judicial Review* 117, 123–4. See also *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J); *A-G (UK) v Leveller Magazine Ltd* [1979] AC 440, 450 (Lord Diplock); *Richmond Newspapers Inc v Virginia*, 448 US 554, 592, 596 (Brennan and Marshall JJ) (1980); *R v Davis* (1995) 57 FCR 512, 514 (Wilcox, Burchett and Hill JJ); *Television New Zealand Ltd v The Queen* [2000] NZCA 354 (Unreported, Keith, Tipping and McGrath JJ, 28 November 2000) [18] (Keith, Tipping and McGrath JJ).

<sup>4</sup> Sir William Blackstone, *Commentaries on the Laws of England* (3<sup>rd</sup> ed, 1768) vol 3, 373; Bentham, above n 3, 67–8; *Edmonton Journal v A-G (Alberta)* [1989] 2 SCR 1326, 1338 (Cory J for Dickson CJ, Lamer and Cory JJ).

vitality to, freedom of speech and the press.<sup>5</sup> By contrast, Australian courts, which administer justice in a jurisdiction that lacks such a guarantee, have tended to eschew this wider role for the principle of open justice.<sup>6</sup>

The principle of open justice has never been absolute. While in the vast majority of cases it is believed to enhance the administration of justice, there are certain circumstances in which open justice is regarded as operating to its detriment. It is in these situations that superior courts have claimed an inherent common law power — and inferior courts an implied power<sup>7</sup> — to close their doors to the public and the media, or to conceal some of the evidence from those present in the courtroom.<sup>8</sup> What remains unclear is whether Australian courts have inherent or implied power to restrict or prohibit publication outside the courtroom of what has transpired in open court and, if such power does exist, the circumstances in which it can be legitimately exercised. Although the position at common law is unsettled, there are numerous instances in which Parliaments have legislated to confer power on courts to make non-publication orders,<sup>9</sup> thereby making it unnecessary for courts to rely on these dubious common law powers. Orders which restrict the ability of the media to publish information about judicial proceedings held in open court are likely to be regarded by the media as an unacceptable abridgement of the principle of open justice, and challenged on the basis that the public has a right to be informed about the workings of the courts.<sup>10</sup>

<sup>5</sup> *Toronto Star Newspapers v Ontario* [2005] 2 SCR 188, 191 (McLachlin CJ, Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ). In New Zealand, the right of journalists to report court proceedings is regarded as an aspect of the right of freedom of expression enshrined in the *Bill of Rights Act 1990* (NZ) s 14; John Burrows and Ursula Cheer, *Media Law in New Zealand* (5<sup>th</sup> ed, 2005) 326. See also New Zealand Law Commission, *Access to Court Records*, Report No 93 (2006) 47–8. The right to report is also regarded as an aspect of the First Amendment to the *United States Constitution*: see *Richmond Newspapers Inc v Virginia*, 448 US 555, 556 (Burger CJ joined by White and Stevens JJ) (1980).

<sup>6</sup> See, eg, *Herald & Weekly Times Ltd v Magistrates' Court of Victoria* [1999] 3 VR 231, 248 (Mandie J), citing *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, 303 (Lord Diplock); *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 526 (Spigelman CJ).

<sup>7</sup> For an explanation of the difference between the inherent powers possessed by superior courts and the implied powers possessed by inferior courts: see *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 471–4 (Mahoney JA), 476–7 (McHugh JA).

<sup>8</sup> The circumstances in which courts can sit in camera or conceal information from those who are present in the courtroom are well established: see Thomson Lawbook Company, *Media and Internet: Law and Practice*, vol 1 (at 38) ¶15.150; Des Butler and Sharon Rodrick, *Australian Media Law* (2<sup>nd</sup> ed, 2003) 173–80. Each circumstance is regarded as an instance of the application of an overriding principle, namely, that a court can make such orders only where they are necessary in the interests of the administration of justice in the case or, perhaps, in the interests of the administration of justice as a continuing process. At least two judges have claimed that the circumstances in which a court can exercise its common law powers to sit in camera are exhaustive: see *John Fairfax Publications Pty Ltd v A-G (NSW)* (2000) 181 ALR 694, 707 (Spigelman CJ), 723 (Meagher JA). However, it is always open to Parliament to legislate to confer power on the courts to sit in camera in a wider range of circumstances: *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).

<sup>9</sup> See, eg, *Federal Court of Australia Act 1976* (Cth) s 50; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 91–2; *Evidence Act 1929* (SA) s 69A; *Supreme Court Act 1986* (Vic) s 18.

<sup>10</sup> See, eg, *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465; *Independent Publishing Co Ltd v A-G (Trinidad and Tobago)* [2005] 1 AC 90.

Recently, police in Canada and Australia (particularly Victoria) have applied to the courts for orders suppressing the publication of evidence given in open court concerning particular police methods used to solve cold cases and the identities of undercover police who employ them. It is understood that *Re Applications 2004* was the first time an order of this kind has been sought in an Australian court.<sup>11</sup> The purpose of this article is to examine these applications and resultant decisions from the perspective of open justice.

The article is divided into two parts. Part One will outline the nature of the police methods that were sought to be suppressed. It will then identify the source of the Canadian and Australian courts' powers to make non-publication orders and compare the tests that are used to determine whether such orders should be made. Finally, Part One will identify some of the practical, procedural and technical issues posed by non-publication orders that were highlighted in these cases, as well as some unresolved issues of statutory interpretation, and consider how these issues encroached upon open justice. Part Two will deal with the substance of the courts' decisions and will evaluate them from the perspective of open justice. It will also consider whether there is any scope for the application of the evidentiary doctrine of public interest immunity to police methods and identities. Canada was chosen as the comparator jurisdiction because it is the country where the police method in question was first developed and has primarily been employed. Not surprisingly, therefore, it is in Canada that the method has been subjected to the most judicial scrutiny, both in terms of the admissibility of the confessional evidence elicited as a result of the method, and in relation to whether details of the method should be the subject of publication bans.

## II THE POLICE METHOD IN QUESTION

The police method in question was developed by the Royal Canadian Mounted Police ('RCMP') in Vancouver, Canada in the early 1990s.<sup>12</sup> It has been used in Canada in hundreds of cases.<sup>13</sup> Basically, the method is designed to elicit a confession from a suspect in circumstances where, without such an admission, the case would probably never be solved. It proceeds on the basis that guilty persons are likely to incriminate themselves if they consider it to be in their interests and safe to do so.<sup>14</sup>

While the method is not applied with precise uniformity, it follows a commonly employed pattern.<sup>15</sup> Undercover police operatives, employing an appro-

<sup>11</sup> In the case in question — *Re Applications 2004* (2004) 9 VR 275, 288 (Winneke P, Ormiston and Vincent JJA) — the Victorian Court of Appeal declared itself to be unaware of any situation in which an order of this kind had been sought or granted.

<sup>12</sup> In Canada, the method is colloquially referred to as a 'Mr Big' operation: see, eg, *R v Osmar* (2007) 217 CCC (3d) 174, 177 (Rosenberg JA).

<sup>13</sup> It has reportedly been used in British Columbia approximately 180 times since 1997, with an 80 per cent success rate, meaning that it has either led to a confession or has eliminated the suspect from suspicion: Brian Hutchinson, 'RCMP Turns to "Mr Big" to Nab Criminals: Shootings, Assaults Staged in Elaborate Stings', *National Post* (Ontario, Canada), 18 December 2004, RB1.

<sup>14</sup> *Re Applications 2004* (2004) 9 VR 275, 277–8 (Winneke P, Ormiston and Vincent JJA).

<sup>15</sup> The ensuing description is drawn from *ibid.*

priate pretext, make contact with the suspect. After a degree of confidence has been established, the suspect is introduced to a fictitious criminal gang that supposedly operates under the direction of a powerful crime boss. Suggestions are made that if the suspect is accepted into the gang, they will be able to share in its carefully organised and highly profitable activities. The boss is held out to the suspect as a person who is able to monitor and influence the conduct of police investigations. The suspect is given certain tasks to undertake which increase in importance over time. These might include counting large sums of money, delivering parcels, driving vehicles or standing guard during gang meetings. In due course, the suspect is given to understand that there has been a resurgence of police interest in the investigation of his or her own matter. The suggestion is made that the police may have come into possession of further information. The purpose of this suggestion is to create in the suspect a measure of anxiety and an eagerness to ascertain the current state of police knowledge. The object of the exercise is to carefully manipulate these influences in such a way as to induce the suspect to make full disclosure to the crime boss, who will insist that nothing be withheld if the suspect is to secure the acceptance and protection available to gang members.<sup>16</sup> The ensuing conversations and admissions of the suspect are recorded on video or audiotape. The suspect is then charged with the crime and prosecuted in the courts.

The RCMP trained Australian police in the use of the method.<sup>17</sup> In Victoria, the method began to be used after the creation of the Covert Investigation Unit within the Homicide Squad.<sup>18</sup> It was recognised that many cold murder cases would never be solved without a confession from those suspected of having committed them. It has been reported that the method has been used to investigate 20 suspects in Victoria since 1999, and has been credited with obtaining several murder convictions, including the convictions of: Malcolm Clarke for the murder of Bonnie Clarke in 1982; Lorenzo Favata for the murder of Samuel Macumber in 1999; Alipapa Tofilau for the murder of Belinda Romeo in 1999; and Shane John Hill for the murder of Craig Reynolds in 2002.<sup>19</sup> The method has also been used to extract confessions in cases of armed robbery<sup>20</sup> and arson.<sup>21</sup> Police in other Australian states have also employed this procedure.<sup>22</sup> The method is not suitable for use in jurisdictions where confessions extracted through such tactics are inadmissible.<sup>23</sup>

<sup>16</sup> For example, in *R v ONE* [2001] 3 SCR 478 ('ONE'), the suspect was told that the boss could arrange for someone with a terminal illness to confess to her crime, provided she supplied the boss with sufficient details to make the confession credible: at 482 (Iacobucci J for Iacobucci J for L'Heureux-Dubé, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ).

<sup>17</sup> Ian Munro, 'Covert Police Methods Revealed', *The Age* (Melbourne), 8 September 2004, 1.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *DPP (Vic) v Ghiller* (2003) 151 A Crim R 148. See also Munro, above n 17.

<sup>21</sup> *DPP (Vic) v Bennett* [2004] VSC 207 (Unreported, Cummins J, 4 June 2004). See also Munro, above n 17.

<sup>22</sup> Munro, above n 17, where it was reported that the crime gang method has been used in New South Wales, Tasmania, South Australia and Western Australia. See also *Re Applications 2004* (2004) 9 VR 275, 278 (Winneke P, Ormiston and Vincent JJA).

<sup>23</sup> The strategy is not used in the US or Great Britain: *R v Osmar* (2007) 217 CCC (3d) 174, 193 (Rosenberg JA).

Serious concerns have been expressed about the use of this method. First, it is possible that the method might be employed by police without first attempting to solve the crime using traditional methods of investigation. However, it is likely that the personnel, time and expense required to implement a crime boss scenario will ensure that the method is reserved for use as a last resort in serious cases where conventional policing methods have failed to solve the crime.<sup>24</sup> Secondly, while it might seem counter-intuitive that a person would confess to a crime that they did not commit, there is a growing body of research on the phenomenon of false confessions that casts doubt on the veracity of confessions obtained as a result of inducements.<sup>25</sup> The Victorian Court of Appeal alluded to this when it postulated that the prospect of financial and other rewards might lure suspects into making false confessions.<sup>26</sup> In Canada, there are indications that this has actually occurred in cases where the crime boss scenario has been employed.<sup>27</sup> Thus, it appears that while the method has been successful in securing confessions, it has not necessarily been as successful in eliciting the truth.

Finally, the former President of the Law Institute of Victoria, Christopher Dale, has claimed that the technique undermines a number of fundamental legal principles including the right to remain silent, the right to a lawyer and the right to receive formal warnings during interviews with police.<sup>28</sup> However, his calls for legislative guidelines clarifying acceptable investigative methods were not heeded by the Victorian government.<sup>29</sup> The Victorian Attorney-General expressed his confidence that Victorian judges can be trusted to exclude evidence that has been unfairly obtained, and that the matter should be left to them.<sup>30</sup> In this respect, it is worthy to note that there are many Victorian cases in which confessions obtained as a result of the technique have survived a legal challenge and been ruled admissible, both by trial judges in the Supreme Court of Victo-

<sup>24</sup> Andrew Palmer, 'Applying *Swaffield* Part II: Fake Gangs and Induced Confessions' (2005) 29 *Criminal Law Journal* 111, 111.

<sup>25</sup> Many organisations and academics have made a substantial contribution to an understanding of the phenomenon of false confessions and wrongful convictions. Two high profile US examples include the Association in Defence of the Wrongly Convicted, and the Northwestern University School of Law Center on Wrongful Convictions. See also Richard Leo and Richard Ofshe, 'The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation' (1998) 88 *Journal of Criminal Law and Criminology* 429; R J Ofshe and R A Leo, 'The Decision to Confess Falsely: Rational Choice and Irrational Action' (1997) 74 *Denver University Law Review* 979; Welsh White, 'False Confessions and the Constitution: Safeguards against Untrustworthy Confessions' (1997) 32 *Harvard Civil Rights and Civil Liberties Law Review* 105; *R v Oickle* [2000] 2 SCR 3, 26–7 (Iacobucci J for L'Heureux-Dubé, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ).

<sup>26</sup> *Re Applications 2004* (2004) 9 VR 275, 289 (Winneke P, Ormiston and Vincent JJA).

<sup>27</sup> A prime example is the case of Kyle Unger, who served 14 years of a sentence for murder before being released on bail by the Court of Queen's Bench of Manitoba in November 2005, pending a decision on his application for ministerial review of his conviction. This occurred because two pieces of evidence used to convict Unger were discredited, leaving the confession elicited as a result of the crime boss scenario as the main evidence against him. The judge described the confession as 'fraught with serious weaknesses': *R v Unger* [2005] MBQB 238 (Unreported, Beard J, 4 November 2005) [48].

<sup>28</sup> Ian Munro, 'Lawyers Warn against Police Stings', *The Age* (Melbourne), 9 September 2004, 3.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

ria<sup>31</sup> and, on appeal, by the Victorian Court of Appeal.<sup>32</sup> In Canada, the Supreme Court and several appellate courts have also held on many occasions that confessions obtained as a result of the crime boss technique are admissible at common law.<sup>33</sup> Moreover, Canadian courts have held that, since the suspect in a crime boss operation is not detained when making the confessional statements, the right to silence guaranteed by s 7 of the *Canadian Charter of Rights and Freedoms* ('*Canadian Charter*') is not violated.<sup>34</sup>

The primary concern of this article is not with the propriety of the method, or whether it has a propensity to elicit unreliable confessions, or whether it violates the legal rights of the suspects upon whom it is employed.<sup>35</sup> As explained earlier, the focus of this article is on whether the courts in Canada and Australia should have acceded to applications by the police or the Crown for orders suppressing, for an indefinite period, the publication of the particulars of the scenarios and the identities of the undercover police officers who took part in them. However, the two issues are not entirely disparate: the greater the concerns about the legality and reliability of the method, the more weighty is the claim that it should be exposed to the public gaze.

### III OPEN JUSTICE AND THE POWER TO MAKE NON-PUBLICATION ORDERS

In two Canadian cases involving the use of the aforementioned technique — *R v Mentuck* ('*Mentuck*')<sup>36</sup> and *ONE*<sup>37</sup> — the RCMP (or, in the case of *Mentuck*, the Crown) sought a court order banning the publication in the media of the names and identities of the undercover officers involved in the investigation of the respective accused persons, and of the specific methods used during the operation. Both cases were ultimately decided by the Supreme Court of Canada.

<sup>31</sup> See, eg, *R v Tofilau* (2003) 13 VR 1; *DPP (Vic) v Ghiller* (2003) 151 A Crim R 148; *R v Favata* [2004] VSC 7 (Unreported, Teague J, 23 January 2004); *R v Clarke* [2004] VSC 11 (Unreported, Kellam J, 19 January 2004); *R v Marks* (2004) 150 A Crim R 212. In each case the respective judges held that the confessions in question were voluntarily made, reliable and should not be excluded in the exercise of the court's discretion.

<sup>32</sup> In early 2006, the Court of Appeal upheld the convictions of four out of five persons for murder upon whom the scenario had been used: *R v Clarke* [2006] VSCA 43 (Unreported, Callaway, Buchanan and Vincent JJA, 21 April 2006); *R v Hill* [2006] VSCA 41 (Unreported, Callaway, Buchanan and Vincent JJA, 21 April 2006); *R v Marks* [2006] VSCA 42 (Unreported, Callaway, Buchanan and Vincent JJA, 21 April 2006); *R v Tofilau* (2006) 13 VR 28. The exception was *R v Favata* [2006] VSCA 44 (Unreported, Callaway, Buchanan and Vincent JJA, 21 April 2006), where the appeal was upheld and a new trial ordered, but not on grounds relating to the use of the crime boss technique.

<sup>33</sup> See, eg, *R v McIntyre* [1994] 2 SCR 480; *R v Grandinetti* [2005] 1 SCR 27; *R v Terrico* [2005] BCCA 361 (Unreported, Newbury, Huddart, Lowry JJ, 30 June 2005).

<sup>34</sup> See, eg, *R v Hebert* [1990] 2 SCR 151; *R v McIntyre* [1994] 2 SCR 480; *R v Osmar* 217 CCC (3d) 174 (2007).

<sup>35</sup> For a discussion of these matters in the Australian context: see Andrew Palmer, 'Police Deception, the Right to Silence and the Discretionary Exclusion of Confessions' (1998) 22 *Criminal Law Journal* 325; Andrew Palmer, 'Applying *Swaffield*: Covertly Obtained Statements and the Public Policy Discretion' (2004) 28 *Criminal Law Journal* 217; Andrew Palmer, 'Applying *Swaffield* Part II', above n 24.

<sup>36</sup> [2001] 3 SCR 442.

<sup>37</sup> [2001] 3 SCR 478.

Orders of a similar nature were sought by the Chief Commissioner of Victoria Police during the course of two murder trials in the Supreme Court of Victoria in which the techniques had been used to procure confessions from the respective accused. Before discussing these cases, it is necessary to identify the source of the courts' power to make such orders, and to compare the general tests used by the Canadian and Australian courts to determine whether a publication ban is appropriate.

#### A *The Position in Canada*

Unlike the position in Australia, there is little doubt that Canadian courts regard themselves as possessing a common law power to impose publication bans in respect of judicial proceedings. Broad and unqualified statements to this effect were made by the Supreme Court of Canada in the seminal cases of *Dagenais v Canadian Broadcasting Corporation* ('*Dagenais*')<sup>38</sup> and *Mentuck*.<sup>39</sup> The exercise of common law powers is subject to the *Canadian Charter*. Canadian courts are obliged to develop the common law consistently with *Canadian Charter* values and, where possible, must reformulate pre-*Canadian Charter* common law rules that are inconsistent, or insufficiently consistent, with those values.<sup>40</sup> Legislation that is inconsistent with *Canadian Charter* rights can also be struck down.<sup>41</sup> However, the *Canadian Charter* itself contemplates that these constitutionally guaranteed rights and freedoms are not absolute, but can be subjected to 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'<sup>42</sup> The preoccupation of the Canadian courts has not been with whether they have power to make non-publication

<sup>38</sup> [1994] 3 SCR 835, 864 (Lamer CJ for Lamer CJ, Sopinka, Cory, Iacobucci and Major JJ), 916–17 (L'Heureux-Dubé J). See also Kent Roach and David Schneiderman, 'Freedom of Expression in Canada' in Gérald-A Beaudoin and Errol Mendes (eds), *Canadian Charter of Rights and Freedoms* (4<sup>th</sup> ed, 2005) 259, 297–302.

<sup>39</sup> [2001] 3 SCR 442, 457, 460 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ). It should be noted that the Privy Council has expressed the view that *Dagenais* does not stand for the proposition that judges possess an inherent power to make non-publication orders in respect of evidence adduced in open court: *Independent Publishing Co Ltd v A-G (Trinidad and Tobago)* [2005] 1 AC 190, 214 (Lord Brown). Rather, the Privy Council stated that *Dagenais* was concerned with the power of the court to grant an injunction to restrain a particular media organisation from broadcasting a particular programme which the judge thought would prejudice the trial of certain accused persons: *Independent Publishing Co Ltd v A-G (Trinidad and Tobago)* [2005] 1 AC 190, 214 (Lord Brown). However, in *Mentuck*, which did not involve an injunction against a particular person, the Supreme Court proceeded on the assumption that it had common law power to issue publication bans: [2001] 3 SCR 442, 457, 460 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

<sup>40</sup> *Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd* [1986] 2 SCR 573, 603 (McIntyre J for Dickson CJ, Estey, McIntyre, Chouinard and Le Dain JJ); *R v Salituro* [1991] 3 SCR 654, 675 (Iacobucci J for Lamer CJ, Gonthier, Cory, McLachlin and Iacobucci JJ); *Dagenais* [1994] 3 SCR 835, 893 (La Forest J), 911–12, 914 (L'Heureux-Dubé J).

<sup>41</sup> The override clause in s 33 of the *Canadian Charter* is an important qualification to this proposition: see below nn 64–6 and accompanying text.

<sup>42</sup> *Canadian Charter* s 1. The judicial interpretation of this provision was settled in *R v Oakes* [1986] 1 SCR 103. For a discussion of this provision: see Robert J Sharpe and Kent Roach, *The Charter of Rights and Freedoms* (3<sup>rd</sup> ed, 2005) ch 4.



orders, but with delineating the circumstances in which such orders will be consistent with *Canadian Charter* values.

The *Canadian Charter* value most likely to conflict with a non-publication order is contained in s 2(b), which states that everyone has the fundamental freedom of ‘thought, belief, opinion and expression, including freedom of the press and other media of communication.’<sup>43</sup> Indeed, it is in the very nature of a non-publication order that it will tread upon the freedom of expression of the media and the general public.

Another *Canadian Charter* value that may be compromised by a non-publication order is the right of any person charged with an offence ‘to be presumed innocent until proven guilty according to law in a fair and *public* hearing by an independent and impartial tribunal’.<sup>44</sup> In a literal sense, a non-publication order does not detract from the public nature of a hearing — the doors of the court do not close. However, as explained in Part I above, courts do not restrict the concept of a public hearing to an open courtroom, but regard the principle of open justice as encompassing the right of the public to media reports of the proceeding.

The *Canadian Charter* right to a public hearing exists for the benefit of a person who has been charged with an offence.<sup>44</sup> It operates to the advantage of an accused person in two main ways.<sup>45</sup> First, it helps to ensure that the judiciary conduct fair trials with fair procedures, not trials that abuse the right of an accused person to be presumed innocent, or in which a conviction is a foregone conclusion. Secondly, a public hearing can vindicate an accused person who has been acquitted, particularly when the acquittal is surprising to the public, which may be the case if the accused is known to have made an admission. However, it is possible that an accused person will not perceive a public hearing as being in their best interests. Thus, unlike the media, whose interests will inevitably lie in favour of challenging a publication ban on the basis that it is an unacceptable interference with freedom of expression, an accused person may either seek a publication ban or join with the media in resisting it. If a publication ban is sought by an accused, it will almost certainly be because the accused perceives that their right to a fair trial will be compromised by the publication of certain information.<sup>46</sup> In such a case, the accused will argue that their right to a fair trial should be given precedence over others’ rights of free expression, and even over his or her own *Canadian Charter* right to a public hearing.

A situation of this kind arose in *Dagenais*,<sup>47</sup> the seminal post-*Canadian Charter* case on non-publication orders. The Supreme Court had to formulate the test

<sup>43</sup> *Canadian Charter* s 11(d) (emphasis added).

<sup>44</sup> The general public also has an interest in accused persons being convicted or acquitted through trials that are both fair and have the appearance of fairness: *R v Généreux* [1992] 1 SCR 259, 282–3 (Lamer CJ for Sopinka, Gonthier, Cory and Iacobucci JJ); *Dagenais* [1994] 3 SCR 835, 879 (Lamer CJ for Lamer CJ, Sopinka, Cory, Iacobucci and Major JJ), 916–17 (L’Heureux-Dubé J).

<sup>45</sup> *Mentuck* [2001] 3 SCR 442, 473–4 (Iacobucci J for McLachlin CJ, L’Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

<sup>46</sup> The accused is usually concerned that the publication of certain information will affect the impartiality of the jury.

<sup>47</sup> [1994] 3 SCR 835.

to be applied in relation to publication bans. The majority began by considering how the courts had exercised their common law power to order publication bans prior to the enactment of the *Canadian Charter*. They found that judges had deliberately preferred the right of the accused to a fair trial over the right to freedom of expression of those affected by the ban.<sup>48</sup> At that time, courts were entitled to allow the right to a fair trial to trump that of freedom of expression, since neither right was expressly guaranteed by the *Canadian Constitution*.<sup>49</sup> However, the advent of the *Canadian Charter* in 1982 rendered this approach inappropriate, as the *Canadian Charter* requires a balance to be achieved that respects both freedom of expression and the right to a fair trial. Accordingly, the common law had to be reformulated to accommodate both rights. In light of this requirement, the Supreme Court developed a two-limb test for determining when a publication ban can be imposed.<sup>50</sup>

Under the first limb of the test, a court must be satisfied that a publication ban is necessary in order to prevent a real and substantial risk to the fairness of the trial. The availability of alternative measures that would meet the same objective without detracting from freedom of expression is relevant to the determination of whether a ban is necessary. If the court is satisfied that the implementation of alternative measures would prevent the risk, a ban will not be ordered. These alternative measures might include: questioning prospective jurors about their exposure to pre-trial publicity and their ability to disregard it; adjourning a trial; changing the trial venue; sequestering juries; allowing challenges for cause; and making strong judicial directions to the jury not to rely on pre-trial publicity.

Under the second limb, the court must consider the proportionality of the ban to its effect on the *Canadian Charter* value of free expression. The test contemplates that even if a non-publication order is necessary to secure a fair trial because no alternative measures are available, it might still come at too great a cost to freedom of expression. Accordingly, the court must be satisfied that the salutary effects of the ban outweigh the deleterious effects on the freedom of expression of those whom it affects.<sup>51</sup> In undertaking this analysis, a court must not compare the costs and benefits in the abstract, but must ascertain how adequately the publication ban would *actually* protect the objective of securing a fair trial.<sup>52</sup> In this context, the Supreme Court acknowledged that emerging technologies are making it more difficult to restrict the flow of information; thus the practical efficacy of publication bans is diminishing.<sup>53</sup>

The problem with the two-limb *Dagenais* test is that it was designed to equip a court with an appropriate means of balancing the *Canadian Charter* right to freedom of expression with the *Canadian Charter* right of an accused person to a fair trial in circumstances where the two rights are in conflict. It does not take into account the fact that a publication ban may be sought for reasons other than

<sup>48</sup> Ibid 877 (Lamer CJ for Lamer CJ, Sopinka, Cory, Iacobucci and Major JJ).

<sup>49</sup> Sharpe and Roach, above n 42, 159.

<sup>50</sup> *Dagenais* [1994] 3 SCR 835, 878 (Lamer CJ for Lamer CJ, Sopinka, Cory, Iacobucci and Major JJ).

<sup>51</sup> Ibid.

<sup>52</sup> Roach and Schneiderman, above n 38, 298.

<sup>53</sup> [1994] 3 SCR 835, 886 (Lamer CJ for Lamer CJ, Sopinka, Cory, Iacobucci and Major JJ).

to guard an accused person's interest in a fair trial. This shortcoming became apparent in the context of the orders that were in issue in *Mentuck* and *ONE*. In these cases, the publication bans were sought primarily to protect the safety of police officers in the field and to preserve the efficacy of undercover police operations in the present and for the future. From the perspective of the accused persons, there may have been a fair trial aspect to the case, but it lay in opposing the ban.<sup>54</sup> Thus, the interests of the accused in a fair trial and the interests of the media in free expression were both aligned on the side of publication.

In *Mentuck*, the Supreme Court concluded that the two-limb *Dagenais* test did not properly account for the fact that non-publication orders might be sought in the interests of the administration of justice, but for purposes other than to protect an accused person's fair trial rights, or to protect interests other than the administration of justice, which may or may not be *Canadian Charter* rights.<sup>55</sup> Accordingly, the relevant test had to be reconfigured to account for the different purposes for which a non-publication order might be sought.<sup>56</sup> The Court held that a publication ban should be ordered only when:

- (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.<sup>57</sup>

The Court went on to elaborate on the issues that must be addressed when making a finding as to the 'necessity' of a public ban pursuant to the first limb of this test. First, it is necessary to determine what is encompassed by the phrase 'proper administration of justice'. While not wishing to restrict the kinds of danger that may make a publication ban necessary, the Court urged judges to be 'cautious in deciding what can be regarded as part of the administration of justice.'<sup>58</sup>

Secondly, the Court explained that the focus must be on whether there is a serious danger to the administration of justice that a non-publication order seeks to avoid, not on whether there is a substantial benefit to the administration of justice that is sought to be obtained.<sup>59</sup>

<sup>54</sup> In *Mentuck* [2001] 3 SCR 442, the accused regarded the publication of the details of his confession, arrest and trial as essential to the fulfilment of his fair trial interest, particularly as he had been tried and acquitted of the crime: at 460 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ). This explains why he joined with two newspapers in opposing the ban.

<sup>55</sup> [2001] 3 SCR 442, 461–2 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

<sup>56</sup> Ibid 460–1 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

<sup>57</sup> Ibid 462 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

<sup>58</sup> Ibid 463 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

<sup>59</sup> Ibid.

Thirdly, the ‘real and substantial risk’ or ‘serious threat’ to the proper administration of justice must be ‘well-grounded in the evidence’.<sup>60</sup> The burden is on the party seeking a publication ban to lay an evidentiary foundation for its necessity.

Fourthly, it is incumbent on judges to consider what alternatives to a publication ban are available, since they must be satisfied that less drastic alternatives will not prevent the risk to the administration of justice.

Finally, any non-publication orders that are made must be restricted as far as possible without sacrificing the prevention of the risk.<sup>61</sup>

As established in *Dagenais*, the second limb of the test requires the party seeking a publication ban to prove that the benefits outweigh the deleterious effects. Before this can be done, the judge must first identify the rights that are in conflict. In *Dagenais*, the countervailing interest that militated against the order was freedom of expression. In *Mentuck*, the second limb was widened to require courts to consider the deleterious effects of a non-publication order on rights and values other than freedom of expression. The Court acknowledged that ‘the relevant rights and interests will be aligned differently in different cases, and the purposes and effects invoked by the parties must be taken into account in a case-specific manner.’<sup>62</sup> The Court explained that ‘the test exists to ground the exercise of the discretion in a constitutionally sound manner, not to command the same result in every case.’<sup>63</sup>

This discussion shows that the elevation of freedom of expression to a constitutional guarantee has mandated a change in the approach of Canadian courts to publication bans. Whereas courts had previously been entitled to give priority to a fair trial over freedom of expression, they must now engage in a cost-benefit analysis in which freedom of expression, of which the principle of open justice is a manifestation, plays a more prominent role.

There is an important qualification to the proposition that legislation cannot override *Canadian Charter* rights. Section 33 of the *Canadian Charter* permits the Canadian Parliament and provincial legislatures to provide by express declaration that an Act, or a particular provision of it, shall operate notwithstanding the infringement of certain fundamental rights protected in the *Canadian Charter*, including freedom of expression and the right to a fair and public hearing. The effect of this legislative override is to exclude judicial review of such legislation, thus giving Canadian legislatures, not Canadian judges, the last say in determining the rights and freedoms of Canadians.<sup>64</sup> It means that a legislature could enact mandatory publication bans on police methods and

<sup>60</sup> Ibid.

<sup>61</sup> Ibid 464 (Iacobucci J for McLachlin CJ, L’Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> An important qualification is built into this override clause — an express declaration ceases to have effect five years after it is made. Parliament can re-enact the express declaration, but any re-enactment is subject to the same limitation period. The five-year period was chosen because it corresponds to the life of a Parliament: Sharpe and Roach, above n 42, 79. This effectively ensures that any re-enactment would have to be made by a new Parliament, thus forcing the matter to be debated again.

identities, contrary to the tests laid down in *Dagenais* and *Mentuck*, provided an express declaration to that effect is inserted. However, with the exception of Quebec,<sup>65</sup> the override clause has been used sparingly.<sup>66</sup> Accordingly, it seems unlikely that it would be employed to override decisions such as *Dagenais* and *Mentuck*.

### B *The Position in Australia*

Unlike Canada, Australia lacks a bill of rights that imbues coveted values such as freedom of speech and the right to a fair and public trial with constitutional status.<sup>67</sup> The omission was deliberate and reflected the view of the framers of the *Australian Constitution* that individual rights could be safely left to the protection of the common law and the federal Parliament.<sup>68</sup> As a result, Australian courts that are called upon to make non-publication orders are not constitutionally obliged to conduct a balancing process along the lines of that which must be conducted by the Canadian courts. The absence of a bill of rights means that an Australian Parliament could invest judges with a discretion to authorise the non-publication of sensitive police methods, or perhaps even mandate the non-disclosure of such methods.<sup>69</sup> By contrast, Canadian Parliaments must expressly invoke the override clause in order to do so.<sup>70</sup>

When faced with a request for a non-publication order, Australian courts have been preoccupied with two main questions: (1) the existence and source of their power to make such orders; and (2) the circumstances in which non-publication orders can be made, assuming the power to make them exists. Unfortunately, the

<sup>65</sup> Following the enactment of the *Canadian Charter*, the Quebec Parliament enacted legislation which purported to repeal all Quebec statutes and re-enact them with the inclusion of an override clause: *An Act Respecting the Constitution Act*, SQ 1982, c 21. In addition, all statutes enacted by the Quebec National Assembly over the next three years contained an override clause. The effect was to exempt all Quebec statutes from judicial review under the *Canadian Charter*: Sharpe and Roach, above n 42, 87. These override measures were endorsed by the Supreme Court of Canada, subject to one proviso, namely, that an override clause can only operate prospectively and cannot give retrospective effect to the override procedure: *Ford v A-G (Quebec)* [1988] 2 SCR 712, 740–5 (Dickson CJ, Beetz, McIntyre, Lamer and Wilson JJ). These omnibus overrides expired after five years and were not renewed. The practice of exempting all Quebec laws from the *Canadian Charter* has now ceased. Since this practice ceased, the Quebec National Assembly has used the override clause to reverse a decision of the Supreme Court of Canada that the prohibition on the use of the English language on commercial signs in a law known as ‘Bill 101’ was contrary to freedom of expression: *Ford v A-G (Quebec)* [1988] 2 SCR 712. See also *Devine v A-G (Quebec)* [1988] 2 SCR 790. The legislation was eventually amended and the override clause was removed.

<sup>66</sup> Sharpe and Roach, above n 42, 88.

<sup>67</sup> Many human rights and freedoms are enshrined in the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘*ICCPR*’), which was ratified by Australia in 1980. However, the *ICCPR* has not been incorporated into Australia’s federal domestic law. The exceptions are the Australian Capital Territory and Victoria, which have respectively enacted the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Both Acts confer a right to freedom of expression and a right to have criminal charges and civil suits determined in a fair and public hearing.

<sup>68</sup> *Kruger v Commonwealth* (1997) 190 CLR 1, 61 (Dawson J).

<sup>69</sup> This proposition is subject to any implied constitutional rights: see below nn 82–4 and accompanying text.

<sup>70</sup> *Canadian Charter* s 33.

judgments ‘do not speak with one voice’ on these issues.<sup>71</sup> Some of the confusion that pervades this area of the law is attributable to the fact that courts often do not clearly separate these questions, nor do they always differentiate between the powers of superior and inferior courts.<sup>72</sup> Moreover, when appealing to authority, courts often fail to distinguish between cases that involve an order that certain information be concealed from those present in the courtroom and cases that involve an order forbidding the publication of what has taken place in open court.<sup>73</sup> Yet these scenarios are different, although they may seek to achieve the same result. In the former situation, the court order does not directly inhibit the publication of evidence; rather, it is directed at how a case is to be conducted inside the courtroom. Conversely, in the latter situation, the order operates to directly suppress the publication of evidence; it therefore purports to have effect outside the courtroom. It is with the latter type of order that this article is concerned.

In relation to the existence of judicial power to make non-publication orders, it is clear that superior courts possess inherent powers that are derived from their position as superior courts of unlimited jurisdiction with responsibility for the administration of justice.<sup>74</sup> These powers enable superior courts to protect and secure their own curial processes.<sup>75</sup> However, these powers are not at large,<sup>76</sup> and there is some doubt as to whether they can support an order forbidding the publication of information disclosed in open court.<sup>77</sup> There is considerable authority both in favour of,<sup>78</sup> and against,<sup>79</sup> the existence of such a power. As explained in Part III(A) below, no such hesitancy is evident amongst the Canadian judiciary.

<sup>71</sup> *Herald & Weekly Times Ltd v Medical Practitioners Board of Victoria* [1999] 1 VR 267, 278 (Hedigan J).

<sup>72</sup> It has been observed that the inherent powers of superior courts are frequently confused with the implied powers of inferior courts: *John Fairfax Group Pty Ltd (receivers and managers apptd) v Local Court of New South Wales* (1992) 26 NSWLR 131, 147 (Kirby P). See also *Grassby v The Queen* (1989) 168 CLR 1, 16–17 (Dawson J).

<sup>73</sup> Sometimes a judge will make both types of order in the one case: see, eg, *Rockett v Smith; Ex parte Smith* [1992] 1 Qd R 660.

<sup>74</sup> *Grassby v The Queen* (1989) 168 CLR 1, 16–17 (Dawson J); *Herald & Weekly Times Ltd v Medical Practitioners Board of Victoria* [1999] 1 VR 267, 280 (Hedigan J); *R v Williams; Re an Application by ‘The Age’* [2004] VSC 413 (Unreported, Kellam J, 22 October 2004) [12].

<sup>75</sup> *DPP (Vic) v Williams* [2004] VSC 209 (Unreported, Cummins J, 1 June 2004) [1], [14], [18].

<sup>76</sup> *Reid v Howard* (1995) 184 CLR 1, 16 (Toohey, Gaudron, McHugh and Gummow JJ); *SG v DPP (NSW)* [2003] NSWSC 413 (Unreported, Michael Grove J, 16 May 2003) [12].

<sup>77</sup> *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 55 (Kirby P).

<sup>78</sup> *Ex parte The Queensland Law Society Inc* [1984] 1 Qd R 166, 169–70 (McPherson J); *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 472 (Mahoney JA); *Herald & Weekly Times Ltd v Medical Practitioners Board of Victoria* [1999] 1 VR 267, 278–9 (Hedigan J); *John Fairfax Publications Pty Ltd v District Court of New South Wales* (2004) 61 NSWLR 344, 354 (Spigelman J); *R v Williams; Re an Application by ‘The Age’* [2004] VSC 413 (Unreported, Kellam J, 22 October 2004) [12]; *Brennan v New South Wales* [2006] NSWSC 167 (Unreported, Hall J, 22 March 2006) [28]. The New Zealand courts regard the New Zealand High Court as possessing an inherent power to make non-publication orders that bind the public and the media: *Taylor v A-G (NZ)* [1975] 2 NZLR 675, 678–9 (Wild CJ), 684 (Richmond J); *Muir v Commissioner for Inland Revenue* [2004] NZCA 277 (Unreported, McGrath, Hammond J and William Young JJ, 3 December 2004) [32] (William Young J).

<sup>79</sup> *A-G (UK) v Leveiler Magazine Ltd* [1979] AC 440, 455–6 (Viscount Dilhorne), 463–4 (Lord Edmund-Davies); *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323, 334 (Samuels AP); *Independent Publishing Co Ltd v A-G (Trinidad and Tobago)* [2005] 1 AC 90.

Australian courts that deny that the inherent powers of superior courts extend to the making of non-publication orders take the view that an order of this nature is not an exercise of judicial power.<sup>80</sup> Judicial power is concerned with the determination of disputes and the making of orders concerning the existing rights, duties and liabilities of persons involved in proceedings before the courts.<sup>81</sup> By contrast, a non-publication order that purports to operate as a common rule binding the world at large is an exercise of legislative or administrative power that therefore requires legislative sanction.

The position in relation to inferior courts and statutory tribunals is even more uncertain. Inferior courts and statutory tribunals do not have inherent powers. They possess only those powers that are conferred on them by statute and such additional powers as must be necessarily implied from the statute to enable them to effectively exercise their express statutory powers.<sup>82</sup> These ‘implied powers’ are more limited than the inherent powers of superior courts,<sup>83</sup> and probably do not extend to the making of non-publication orders.<sup>84</sup> The fact that Australian courts are still grappling with whether they have inherent or implied power to make non-publication orders in respect of evidence that has been adduced in open court is somewhat surprising, especially in jurisdictions such as NSW where courts have historically lacked broad statutory powers to make non-publication orders.

Even if a common law power to make non-publication orders exists, courts have taken the view that the principle of open justice is so fundamental that it can be curtailed only when necessary in the interests of the administration of justice in the particular proceeding. Most judges take a strict approach to the concept of necessity, and equate it with what is ‘essential’, not with what is merely ‘desirable’.<sup>85</sup> On this approach, a non-publication order will be necessary only if a court is satisfied that if the order is not made, the object of the proceed-

<sup>80</sup> *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 477 (McHugh JA); *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323, 333 (Samuels AP). The Victorian Court of Appeal recently attributed this judicial hesitancy about the existence of common law powers to make such orders to the crucial significance that is ascribed to the maintenance of an open system of justice: *Re Applications 2004* (2004) 9 VR 275, 288 (Winneke P, Ormiston and Vincent JJA).

<sup>81</sup> See, eg, *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 268–9 (Deane, Dawson, Gaudron and McHugh JJ); *Luton v Lessels* (2002) 210 CLR 333, 360 (Gaudron and Hayne JJ), 387–8 (Callinan J); *Huddart, Parker & Co v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ); Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (4<sup>th</sup> ed, 2006) 663–73.

<sup>82</sup> *John Fairfax Publications Pty Ltd v District Court of New South Wales* (2004) 61 NSWLR 344, 353 (Spigelman J).

<sup>83</sup> *Grassby v The Queen* (1989) 168 CLR 1, 16–17 (Dawson J).

<sup>84</sup> *A-G (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342, 358 (McHugh JA); *Rockett v Smith; Ex parte Smith* [1992] 1 Qd R 660, 664–5 (McPherson SPJ); *John Fairfax Group Pty Ltd (receivers and managers apptd) v Local Court of New South Wales* (1992) 26 NSWLR 131, 142 (Kirby P); *Herald & Weekly Times* [1999] 1 VR 267. But there are contrary opinions: see, eg, *A-G (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342, 345–7 (Mahoney JA); *Re Bromfield, Stipendiary Magistrate; Ex parte West Australian Newspapers Ltd* (1991) 6 WAR 153, 167 (Malcolm J), 181 (Rowland J).

<sup>85</sup> See, eg, *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 476–7 (McHugh JA); *John Fairfax Publications Pty Ltd v District Court of New South Wales* (2004) 61 NSWLR 344, 358 (Spigelman CJ); *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 522 (Spigelman CJ).

ing would be defeated, the proceeding could not effectively continue (or would be prejudiced or frustrated in some real and tangible way), or the decision of the court would be deprived of practical utility.<sup>86</sup> A few judges have exhibited a willingness to treat ‘necessity’ as a more malleable concept. For example, non-publication orders have sometimes been made in the interests of the administration of justice as a continuing process rather than to protect the administration of justice in the proceeding at hand.<sup>87</sup> An even more generous approach was taken in one case by Mahoney JA, who was prepared to regard an order as necessary whenever it can be properly assumed that unacceptable consequences will follow if it is not made.<sup>88</sup> Not many judges have been prepared to go this far.<sup>89</sup>

The position is quite different where a power to make non-publication orders is conferred by legislation. Such orders are capable of operating as a common rule, and binding the world at large.<sup>90</sup> Criminal sanctions generally apply if they are breached.<sup>91</sup> In terms of the circumstances in which a non-publication order can be made, Parliaments are not restricted to permitting derogations from open justice only when this is necessary in the interests of the administration of justice in the subject case. Subject to any constitutional constraints, a Parliament can direct or authorise a court to make non-publication orders in whatever circumstances it thinks fit, although courts have made it clear that any statutory provisions authorising non-publication will be ‘strictly construed and utilised only when clearly necessary.’<sup>92</sup> A legislative provision might simply reproduce the common law test — that a non-publication order must be necessary to secure the administration of justice — or there might be some other public interest consideration for whose protection Parliament has seen fit to modify the open justice principle.<sup>93</sup> These could conceivably include national security;<sup>94</sup> securing the fairness of another concurrent or future trial; ensuring that persons are not exposed to physical danger; protecting privacy; or preventing embarrassment or damage to reputation.

<sup>86</sup> *J v L & A Services Pty Ltd [No 2]* [1995] 2 Qd R 10, 44–5 (Fitzgerald P and Lee J).

<sup>87</sup> *John Fairfax Group Pty Ltd (receivers and managers apptd) v Local Court of New South Wales* (1991) 26 NSWLR 131, 141 (Kirby P). But see *Re Applications 2004* (2004) 9 VR 275, 288, 293–4 (Winneke P, Ormiston and Vincent JJA).

<sup>88</sup> *John Fairfax Group Pty Ltd (receivers and managers apptd) v Local Court of New South Wales* (1991) 26 NSWLR 131, 161.

<sup>89</sup> Cf *J v L & A Services Pty Ltd [No 2]* [1995] 2 Qd R 10, 49 (Pincus J was prepared to follow the lead of Mahoney JA).

<sup>90</sup> *A-G (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342, 355 (McHugh JA); *Registrar of the Supreme Court v Herald & Weekly Times Ltd* [2004] SASC 129 (Unreported, Gray J, 28 May 2004) [28].

<sup>91</sup> A breach may also be treated as a contempt of court: *Solicitor-General v Smith* [2004] 2 NZLR 540, 554–5 (Wild and MacKenzie JJ).

<sup>92</sup> *Re Applications 2004* (2004) 9 VR 275, 288 (Winneke P, Ormiston and Vincent JJA). See also *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 55 (Kirby P); *Herald & Weekly Times Ltd v Magistrates’ Court of Victoria* [1999] 2 VR 672, 247–8 (Mandie J); *R v Pomeroy* [2002] VSC 178 (Unreported, Teague J, 20 May 2002) [9].

<sup>93</sup> *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1985) 5 NSWLR 465, 476 (McHugh JA).

<sup>94</sup> See Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report No 98 (2004) chs 7–11.



Most statutory provisions that confer power on a court to make non-publication orders invest the court with a discretion as to whether or not to do so.<sup>95</sup> In deciding whether to exercise this discretion, courts must have due regard to the impact of an order on open justice and the right to report.<sup>96</sup> It seems that where a court is invested with statutory power to make a non-publication order to avoid prejudice to the administration of justice, it will generally be prepared to make the order once it is satisfied on the evidence that prejudice would be occasioned by publicity. This is because open justice, which is primarily valued for its contribution to the administration of justice, must yield to the need to secure the administration of justice in the unusual event that publicity would be to its detriment.<sup>97</sup>

However, the courts are more cautious about exercising a discretionary power to restrict or preclude publication that is not founded on a need to avoid prejudice to the administration of justice. The Victorian Court of Appeal has sounded a warning that where a statutory power is not founded on such a need, a court must look cautiously to the power and be ‘particularly careful not to deny the general principle of an open trial.’<sup>98</sup> Indeed, the Court went so far as to state that the exercise of the power ‘must not derogate from the desirability of the open administration of justice.’<sup>99</sup> With respect, it is difficult to see how such a power could ever be exercised without derogating from open justice, as this is the inexorable result of a non-publication order. However, the point is that courts are very cautious when an order is being sought for reasons that are not grounded in what is necessary for the administration of justice. This probably reflects the traditional emphasis by Australian courts on open justice as an aid to the administration of justice, rather than as a manifestation of free speech.<sup>100</sup>

The fact that Australia lacks an express constitutional bill of rights has not deterred the High Court from implying rights into the *Australian Constitution*.<sup>101</sup> The most well-known instance occurred in 1992, when the High Court first discerned, from those provisions in the *Australian Constitution* that enshrine a system of representative government, an implied constitutional freedom of communication in relation to government and political matters.<sup>102</sup> There is considerable doubt as to whether this implied freedom extends to communications concerning the judiciary, where these communications do not implicate the

<sup>95</sup> See, eg, *Supreme Court Act* 1986 (Vic) ss 18–19. This is not always the case. Some legislative provisions impose mandatory prohibitions on the publication of certain information about a proceeding. In this situation, the statute itself operates as an order not to publish, and the decision is taken out of the court’s hands. This article is concerned with provisions that confer discretionary power on a court to make such orders.

<sup>96</sup> *Re Application by Chief Commissioner of Police (Vic)* (2005) 214 ALR 422, 449 (Kirby J) (*‘Re Application 2005’*).

<sup>97</sup> *Scott v Scott* [1913] AC 417, 437–8 (Viscount Haldane LC).

<sup>98</sup> *Re Applications 2004* (2004) 9 VR 275, 288 (Winneke P, Ormiston and Vincent JJA).

<sup>99</sup> *Ibid* 294.

<sup>100</sup> See above n 6 and accompanying text.

<sup>101</sup> For a more detailed exploration of whether open justice has constitutional implications: see Rodrick, ‘Open Justice’, above n 2.

<sup>102</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106. See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1.

legislative or executive branches of government.<sup>103</sup> More importantly in the present context, some members of the High Court have stated that Chapter III of the *Australian Constitution*, which effects the separation of judicial power from legislative and executive power,<sup>104</sup> carries with it an implicit requirement that Chapter III courts ‘exhibit the essential attributes of a court and observe, in the exercise of that judicial power, the essential requirements of the curial process, including the obligation to act judicially.’<sup>105</sup> In other words, these judges have found that Chapter III contains implications about the manner in which federal judicial power must be exercised.

Although the essential features of judicial power that are implied in Chapter III ‘remain to be fathomed’,<sup>106</sup> some judges have suggested that they include an entrenched requirement of openness. For example, in *Grollo v Palmer*, McHugh J stated that ‘[o]pen justice is the hallmark of the common law system of justice and is an essential characteristic of the exercise of federal judicial power.’<sup>107</sup> Both Spigelman CJ of the NSW Court of Appeal<sup>108</sup> and Kirby J of the High Court<sup>109</sup> have expressed the view that the principle of open justice has constitutional attributes, although the precise nature of those attributes, and the extent to which it would be permissible to derogate from them, remains unclear and would have to be worked out on a case-by-case basis if the principle were accorded constitutional status. If this occurs, it will presumably operate as a fetter on common law and legislative power along the same lines as the implied freedom of political communication. Accordingly, Parliaments would be unable to enact legislation that infringes upon the requirement. Indeed, Kirby J has expressed the view that the *Australian Constitution* has significance for how legislative provisions that authorise courts to make non-publication orders are read.<sup>110</sup> However, with the exception of Kirby J, most of the impetus for this wide reading of Chapter III has come from judges who have now retired from the High Court.<sup>111</sup> If the recent decision of *APLA Ltd v Legal Services Commis-*

<sup>103</sup> *John Fairfax Publications Pty Ltd v A-G (NSW)* (2000) 181 ALR 694, 709–10 (Spigelman CJ), 721 (Priestley JA); *Conservation Council of South Australia Inc v Chapman* (2003) 87 SASR 62, 70 (Doyle CJ), 128 (Besanko J); *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1, 8–11 (Winneke ACJ), 103–5 (Warren AJA), *contra* 52 (Gillard AJA); *O’Shane v John Fairfax Publications Pty Ltd* [2004] Aust Torts Reports ¶81-733, [65 492] (Smart AJ); *John Fairfax Publications Pty Ltd v O’Shane [No 2]* [2005] NSWCA 164 (Unreported, Giles and Ipp JJA and Young CJ in Eq, 17 May 2005) [94] (Giles JA), [139] (Ipp JA), [250]–[307] (Young CJ in Eq). But see *Cunliffe v Commonwealth* (1993) 182 CLR 272, 298–9 (Mason CJ).

<sup>104</sup> *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1955) 94 CLR 254.

<sup>105</sup> *Leeth v Commonwealth* (1992) 174 CLR 455, 487 (Deane and Toohey JJ). The nature of the implied constitutional rights that might flow from ch III have been canvassed in a number of cases including: *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *Dietrich v The Queen* (1992) 177 CLR 292; *Lim v Minister for Immigration* (1992) 176 CLR 1; *Kable v DPP (NSW)* (1996) 189 CLR 51; *Kruger v Commonwealth* (1997) 190 CLR 1.

<sup>106</sup> *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 207 CLR 72, 89 (Kirby J) (citations omitted).

<sup>107</sup> (1995) 184 CLR 348, 379.

<sup>108</sup> *John Fairfax Publications Pty Ltd v A-G (NSW)* (2000) 181 ALR 694, 703; Spigelman, above n 2, 293.

<sup>109</sup> *Re Application 2005* (2005) 214 ALR 422, 448; *Re Application 2005* [2004] HCATrans 286 (Kirby J, 10 August 2004).

<sup>110</sup> *Re Application 2004* [2004] HCATrans 286 (Kirby J, 10 August 2004).

<sup>111</sup> These judges include Deane, Gaudron and McHugh JJ.

sioner (NSW)<sup>112</sup> is any indication, the current Court appears to be retreating from the notion that Chapter III contains constitutional implications.<sup>113</sup>

### C *The Impact of According Open Justice Constitutional Status*

The prevailing position is that Australian courts are not constitutionally bound to accord to open justice or freedom of expression the same degree of deference as Canadian courts. On one level, it could be argued that the absence of a constitutional imperative has had little impact on the emphasis placed on open justice by Australian courts. Indeed, it is evident from the case law that Australian courts attach considerable significance to the principle of open justice. In *Re Applications 2004*<sup>114</sup> discussed below,<sup>115</sup> the Victorian Court of Appeal was as careful to maintain an equilibrium between its statutory power to make non-publication orders and the demands of open justice, as the Supreme Court of Canada when the latter reconciled its power to impose publication bans with the constitutionally-protected freedoms that implicate open justice. Moreover, the presence of a *Canadian Charter* right did not produce a different outcome in Canada — both the Canadian and Australian courts ultimately concluded that the crime boss technique should not be suppressed.

Nevertheless, it is argued that the presence of constitutional imperatives does have significance. The introduction of a bill of rights, which would undoubtedly contain a clause protecting freedom of expression, may cause Australian courts to expand their concept of the purpose of open justice, so that it is regarded as a facet of freedom of expression, not just a means of securing greater accountability from those involved in the administration of justice.<sup>116</sup> A bill of rights would also place the process of balancing the power to make non-publication orders with the competing demands of open justice on a more formal footing, thereby introducing greater structure and transparency into the decision-making process. Finally, constitutional rights and freedoms that directly or indirectly operate to protect open justice would constrain the extent to which Parliaments could enact legislation that derogates from open justice.<sup>117</sup>

## IV OPEN JUSTICE AND SUPPRESSING EVIDENCE OF POLICE METHODS AND IDENTITIES: PROCEDURAL AND PRACTICAL ISSUES

Having outlined the nature and extent of the power of courts in Canada and Australia to make non-publication orders, it is necessary to consider the way in

<sup>112</sup> (2005) 224 CLR 322.

<sup>113</sup> In that case, the majority found that ch III did not contain an implied freedom of legal communication: *ibid* 351 (Gleeson CJ and Heydon J), 361–2 (McHugh J), 404 (Gummow J), 449 (Hayne J), 481 (Callinan J).

<sup>114</sup> (2004) 9 VR 275.

<sup>115</sup> See below Part IV(B).

<sup>116</sup> This may not follow if the High Court were to find an implication of open justice in ch III of the *Australian Constitution*.

<sup>117</sup> Ironically, as explained above, s 33 of the *Canadian Charter* permits legislatures to invoke an overriding clause, whereas an implied constitutional right effectively gives the courts the last say in determining the nature and extent of such rights, short of holding a referendum.

which these courts applied their respective tests in determining whether to make non-publication orders suppressing evidence of police methods and identities. While the primary focus of this article is on the outcome of the applications for such orders — and in particular, on the extent to which the principle of open justice has influenced the reasoning of the courts — a number of observations will first be made about the procedural and practical issues that have impacted on open justice as these cases have made their way through the courts.

A *Mentuck and ONE: The Initial Applications for Publication Bans and the Appeal Process*

In *Mentuck*, the accused was initially tried for second degree murder in the Court of Queen's Bench of Manitoba without the aid of the police methods described earlier in this article.<sup>118</sup> The trial was stayed, however, after crucial evidence was ruled inadmissible. It was at this point that the RCMP began their undercover operation, which culminated in a confession from the accused. The indictment was reinstated and a second trial began. During the early stages of the second trial, the Crown sought a publication ban from the trial judge, Menzies J, on the reporting of certain facts that were going to be tendered in evidence, namely, the nature of police operational methods that had been used in the case, and the identities of the undercover police involved in their implementation.<sup>119</sup> Much of this information had already been mentioned in open court in the opening address of counsel and reported in the media.<sup>120</sup> The Crown argued that if the targets of current undercover operations read or heard accounts of the *Mentuck* operation they may recognise that similar scenarios had been orchestrated in investigations in which they were the target.<sup>121</sup> If this occurred, the operations would be compromised, as suspects would be highly unlikely to confess once they realised that the criminal organisation was a construct of the

<sup>118</sup> See above Part II.

<sup>119</sup> The Crown sought to have concealed what it called the 10 'hallmarks' of the undercover operations. The hallmarks bear repeating as they indicate the level of detail claimed to constitute a danger to ongoing police operations:

that *Mentuck* was given the opportunity to join a criminal organization that would provide him with the potential to earn large sums of money so long as he showed his loyalty by confessing any past criminal activity; that he was told that the undercover operator was in trouble with the 'Crime Boss' because it was believed that he had recruited a liar; that he was asked to pick up a parcel from a bus depot locker and turn the key over to the operator; that he was asked to pick up and deliver a vehicle on the instructions of the operator; that he was asked to stand guard and report of any strange happenings while the undercover operator attended a meeting; that he was asked to help count large sums of money; that he was paid substantial sums of money for completing these tasks; that he met with the 'Crime Boss' in a hotel room; that he was told he needed to provide details of his involvement in the death of [the victim] so that arrangements could be made for a [terminally ill person] to confess to the crime; and that he was told he would be assisted in suing the government for wrongful imprisonment and would be allowed to keep a minimum of \$85 000 or 10% of the settlement whichever was the larger.

*Mentuck* [2001] 3 SCR 442, 467 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

<sup>120</sup> *Ibid* 448 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

<sup>121</sup> *Ibid* 468 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

police. Moreover, there may be danger to the officers involved if these suspects became aware that they had been duped. The same argument was advanced in respect of prospective operations. The motion was opposed by the accused and two intervening newspapers.<sup>122</sup>

Menzies J refused to impose a ban on the publication of operational methods, but granted a one-year ban on the publication of the identity of the undercover police.<sup>123</sup> A similar publication ban was sought by police at the outset of a *voir dire* in *R v ONE*.<sup>124</sup> A publication ban was issued by the judge that encompassed the ‘publication in print and the broadcasting on television, film, video, radio and the Internet’ of the undercover operation scenarios used in the investigation of the accused, and any information tending to identify the undercover officers.<sup>125</sup> At the time, although notice was given of the application, no media representatives appeared to contest it. Subsequently, the *Vancouver Sun* unsuccessfully applied to have the ban set aside in part.<sup>126</sup>

Appeals in both cases were lodged with the Supreme Court of Canada.<sup>127</sup> Before dealing with the substantive issue, the Court had to determine whether it had jurisdiction to hear appeals directly from the orders made by the respective superior court trial judges.<sup>128</sup> The Court ultimately decided that it did have jurisdiction and proceeded to hear both appeals at the same time.<sup>129</sup> However,

<sup>122</sup> The intervening newspapers were the *Winnipeg Free Press* and the *Brandon Sun*. The Canadian Newspaper Association also intervened.

<sup>123</sup> *R v Mentuck* (2000) 143 Man R (2d) 275, 279.

<sup>124</sup> *R v ONE* [2000] BCSC 1200 (Unreported, Edwards J, 8 August 2000). The *voir dire* was held to determine the admissibility of the confession that had been made as a result of the technique: at [3] (Edwards J). A similar ‘crime boss scenario’ had been used: *ONE* [2001] 3 SCR 478, 482 (Iacobucci J for McLachlin CJ, L’Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

<sup>125</sup> *ONE* [2001] 3 SCR 478, 482 (Iacobucci J for McLachlin CJ, L’Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

<sup>126</sup> *R v ONE* [2000] BCSC 1220 (Unreported, Edwards J, 11 August 2000).

<sup>127</sup> *Mentuck* [2001] 3 SCR 442; *ONE* [2001] 3 SCR 478.

<sup>128</sup> *Mentuck* [2001] 3 SCR 442, 452–7 (Iacobucci J for McLachlin CJ, L’Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

<sup>129</sup> *Ibid* 443 (Iacobucci J for McLachlin CJ, L’Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ). The jurisdictional issue turned on the meaning of s 40(1) of the *Supreme Court Act*, RSC 1985, c S-26, which states that an appeal lies to the Supreme Court ‘from any ... judgment ... of the highest court of final resort in a province, or a judge thereof’. The Court held that jurisdiction under s 40(1) was attracted only if two conditions were met. First, there had to be no other avenue of appeal from the orders and the appeal must not be explicitly barred by statute: at 456 (Iacobucci J for McLachlin CJ, L’Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ). It found that there was no other route of appeal, since the *Criminal Code*, RSC 1985, c C-46, s 676(1) only permits the Crown to appeal to an intermediate court of appeal in limited circumstances which do not include publication bans: at 453, 456 (Iacobucci J for McLachlin CJ, L’Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ). Accordingly, for the purpose of s 40(1), the decision of the trial judge was a decision of the highest court of final resort: at 452 (Iacobucci J for McLachlin CJ, L’Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ). Secondly, the Court had to be satisfied that an appeal was not barred by s 40(3), which effectively provides that the Court can hear appeals direct from a court of first instance only if the issues are ancillary, or not integrally related, to the guilt or innocence of the accused. The Court regarded the publication bans as fitting this description, since they were not being sought to preserve the fair trial rights of the accused or to secure evidence that might lose its value in the context of a trial if it became widely known, but rather, to maintain the secrecy of police operations in other investigations. Therefore, the appeal to the Supreme Court was not barred by s 40(3): *Mentuck* [2001] 3 SCR 442, 443, 446–7, 449–50, 452–7 (Iacobucci J for

Iacobucci J described the absence of legislative provision for an appeal to an intermediate court as an ‘unnecessary and troublesome gap in the law’, since it deprived the Court and the legal system in general of the benefit of the input of intermediate courts of appeal on the fundamental issue of publicity rights in trials.<sup>130</sup> His Honour invited Parliament to amend the *Criminal Code* to provide for clear and satisfactory avenues of appeal in publication bans for the Crown, the accused and interested third parties such as the media.<sup>131</sup> Although the Court lamented this ‘lacuna’ in the law,<sup>132</sup> it may have secured a final resolution of the issue more quickly than if the appeal had first been heard by an intermediate court and then gone on to the Supreme Court.<sup>133</sup>

Pending the resolution of the appeal by the Supreme Court in *Mentuck*, the orders of Menzies J were stayed and the publication ban was granted in full.<sup>134</sup> The application for leave to appeal was expedited.<sup>135</sup> In the meantime, Menzies J ordered a mistrial as a result of a hung jury.<sup>136</sup> A third trial resulted in the acquittal of the accused by MacInnes J sitting alone.<sup>137</sup> Having first found that the physical and scientific evidence had not established Mentuck’s guilt beyond reasonable doubt, MacInnes J proceeded to hold that the level of inducement offered to the accused to confess was ‘positively overwhelming’.<sup>138</sup> His Honour found that there was ‘nothing but upside’ for the accused if he confessed, and ‘nothing but downside’ if he did not.<sup>139</sup> If not false, the confession was, at the least, too unreliable to be accepted as an admission of guilt. It was not until some months after the conclusion of the third trial that the Supreme Court heard the appeal on the question of the publication ban. In a similar vein, in *ONE* the accused woman had been acquitted by a jury before the appeal on the publication orders was decided by the Supreme Court.<sup>140</sup> Thus, both trials had been completed before any final decision was made by the Supreme Court about whether the public could be informed about the methods employed by the police.

McLachlin CJ, L’Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ). This was reiterated by the Court in *ONE* [2001] 3 SCR 478, 483 (Iacobucci J for McLachlin CJ, L’Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

<sup>130</sup> [2001] 3 SCR 442, 454 (Iacobucci J for McLachlin CJ, L’Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

<sup>131</sup> *Ibid.* See also *R v Adams* [1995] 4 SCR 707.

<sup>132</sup> *Mentuck* [2001] 3 SCR 442, 454 (Iacobucci J for McLachlin CJ, L’Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ) referring to *Dagenais* [1994] 3 SCR 835, 874 (Lamer CJ for Lamer CJ, Sopinka, Cory, Iacobucci and Major JJ).

<sup>133</sup> Of course, the Supreme Court might not grant leave to appeal from a judgment of an intermediate court of appeal.

<sup>134</sup> [2001] 3 SCR 442, 449 (Iacobucci J for McLachlin CJ, L’Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

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

<sup>136</sup> *Ibid.*

<sup>137</sup> *R v Mentuck* [2000] MBQB 155 (Unreported, MacInnes J, 29 September 2000).

<sup>138</sup> *Ibid* [99] (MacInnes J).

<sup>139</sup> *Ibid.*

<sup>140</sup> *ONE* [2001] 3 SCR 478, 483 (Iacobucci J for McLachlin CJ, L’Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

B Re Applications 2004: *The Initial Applications for Publication Bans and the Appeal Process*1 *The Initial Applications for Non-Publication Orders*

In late 2003, two separate criminal proceedings were conducted in the Supreme Court of Victoria. Alipapa Tofilau was being tried for murder before Osborn J and a jury,<sup>141</sup> and, in an unrelated case, Lorenzo Favata was being tried for murder before Teague J and a jury.<sup>142</sup> In each trial, evidence of admissions alleged to have been made by each of the accused men was given by members of Victoria Police in open court. These police officers were part of the Covert Investigation Unit. They had been engaged as undercover operatives to employ certain investigative and interrogative techniques for the purpose of securing those admissions. These techniques were the same as those that had been developed in Canada and used in the *Mentuck* and *ONE* cases, with minor variations in the scenarios employed to accommodate the individual circumstances and the personality of the particular suspect.<sup>143</sup> It is interesting to speculate as to why the Victoria Police elected to use the crime boss scenario in these cases, given their contention that it is highly sensitive to spoiling by the media, and knowing that Canadian courts had refused to suppress details of the technique.

During the course of each of these two murder trials, an application was made by the Chief Commissioner of Victoria Police to the respective trial judges to suppress, for an unlimited time, publication of details of the techniques and the names and identities of the undercover police officers who employed them.<sup>144</sup> The order was sought under ss 18–19 of the *Supreme Court Act 1986* (Vic). Section 18(1)(c) empowers the Court, in any civil or criminal proceeding, to ‘make an order prohibiting the publication of a report of the whole or any part of a proceeding or of any information derived from a proceeding.’

Section 19 provides that the Court may make an order under s 18 if it is necessary to do so in any one of six circumstances. Only two of these circumstances were relevant to the application by the Chief Commissioner: (1) that the order was necessary so as not to prejudice the administration of justice; or (2) that the order was necessary in order not to endanger the physical safety of any person.<sup>145</sup> The existence of this statutory power made it unnecessary for the Court to determine whether a non-publication order could have been made pursuant to its inherent powers.

The accused in both cases objected to the making of the order.<sup>146</sup> *The Age* newspaper also lodged an objection in the *Favata* case.<sup>147</sup> In each case, the

<sup>141</sup> *R v Tofilau* (2003) 13 VR 1.

<sup>142</sup> *R v Favata* [2004] VSC 7 (Unreported, Teague J, 23 January 2004).

<sup>143</sup> *Re Applications 2004* (2004) 9 VR 275, 277–8 (Winneke P, Ormiston and Vincent JJA).

<sup>144</sup> The applications were made in the criminal trials, not as separate proceedings: see *Re Applications 2004* (2004) 9 VR 275, 275–7 (Winneke P, Ormiston and Vincent JJA).

<sup>145</sup> *Supreme Court Act 1986* (Vic) s 19(b)–(c).

<sup>146</sup> *Re Applications 2004* (2004) 9 VR 275, 276 (Winneke P, Ormiston and Vincent JJA).

<sup>147</sup> *Ibid.*

application for the non-publication order was heard in camera.<sup>148</sup> Each judge declined to make the orders in the unlimited form sought by the Chief Commissioner.<sup>149</sup> Instead, each judge granted the orders for a limited period — until 10 October 2003 — this being the anticipated duration of the trials.<sup>150</sup> Essentially, the orders were not made on the merits, but to preserve the subject matter of the litigation and to give the police officers involved in undercover work time to extricate themselves from any dangerous situation. The specific information that was the subject of the temporary orders was essentially fourfold: (1) visual images of the undercover operatives involved in the operations; (2) the names or other identifying information concerning the undercover operatives that would identify them as members of Victoria Police; (3) the evidence of specified witnesses; and (4) details of the scenarios and police methodologies used on the suspects.<sup>151</sup> It is important to note that the orders made by Osborn J were not confined to non-publication in the mass media, despite the fact that the Chief Commissioner appeared to be seeking suppression only in that forum.<sup>152</sup> By their terms, they restricted publication ‘by print or electronic means’.<sup>153</sup>

## 2 *The Appeal to the Victorian Court of Appeal*

Subsequently, counsel for the Chief Commissioner of Victoria Police notified each trial judge that the Chief Commissioner intended to appeal against the time limitation they had imposed on the life of the orders.<sup>154</sup> The Chief Commissioner took the view that, having found that the requirements of s 19 of the *Supreme Court Act 1986* (Vic) had been fulfilled, there was no proper basis for limiting the orders to 10 October 2003; therefore, they should be extended indefinitely.<sup>155</sup> The summonses in both cases were heard by the Court of Appeal the day before the orders were initially due to expire. In the meantime, each trial judge had extended the operation of the orders until 14 days after the hearing and determination of the appeals.<sup>156</sup> *The Age* was given leave to intervene before the Court of Appeal, as there would otherwise have been no contradictor to the application of the Chief Commissioner.<sup>157</sup>

Just as the Supreme Court of Canada needed to ascertain whether it had jurisdiction to hear an appeal, so the Court of Appeal had to determine whether it had jurisdiction to entertain the applications. The resolution of this issue turned on

<sup>148</sup> Ibid 277 (Winneke P, Ormiston and Vincent JJA).

<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid 278 (Winneke P, Ormiston and Vincent JJA).

<sup>152</sup> See *Re Application 2005* (2005) 214 ALR 422, 431–2, 451 (Kirby J). See also *Re Applications 2004* [2004] HCATrans 286 (D F R Beach SC, 10 August 2004).

<sup>153</sup> *Re Applications 2004* (2004) 9 VR 275, 278 (Winneke P, Ormiston and Vincent JJA). The orders made by Teague J were said to be in similar terms: at 279 (Winneke P, Ormiston and Vincent JJA).

<sup>154</sup> *Re Applications 2004* (2004) 9 VR 275, 277 (Winneke P, Ormiston and Vincent JJA).

<sup>155</sup> Ibid.

<sup>156</sup> The Court of Appeal sent the Chief Commissioner back to the trial judges to secure these extensions: *Applications by Chief Commissioner of Police (Vic)* [2004] HCATrans 286 (F X Costigan QC, 10 August 2004).

<sup>157</sup> *Re Applications 2004* (2004) 9 VR 275, 279 (Winneke P, Ormiston and Vincent JJA).



the correct interpretation of ss 17 and 17A(3) of the *Supreme Court Act 1986* (Vic), which deal with appeals to the Court of Appeal from determinations of a judge of the Trial Division. Even if the Court of Appeal did have jurisdiction to entertain the appeal, there was the further question of whether an appeal lay as of right or only by leave of the Court. Most of the hearing was taken up with argument on this jurisdictional issue. Judgment was reserved.

Two months after the hearing, but before judgment had been delivered, counsel for the Chief Commissioner forwarded to the Court of Appeal a memorandum that sought to convey to the Court the Chief Commissioner's understanding that the submissions made by her counsel at the hearing were limited to the separate and anterior question of jurisdiction.<sup>158</sup> The Chief Commissioner informed the Court that if it assumed jurisdiction or granted leave to appeal, she wished to be heard on the substantive issue, namely, whether the non-publication orders should be made in unlimited form.<sup>159</sup> *The Age* filed its own supplementary note in the Court of Appeal registry stating that, in the event that leave to appeal was granted, it too wished to make further submissions on the substantive issue.<sup>160</sup> It is not known whether these supplementary materials ever reached the judges of the Court of Appeal.<sup>161</sup>

The matter did not proceed as anticipated by the Chief Commissioner. On 12 February 2004, the Court of Appeal — constituted by Winneke P, Ormiston and Vincent JJA — unanimously ordered that the applications be dismissed. The greater portion of the judgment was devoted to dealing with the jurisdictional and procedural issues. Ultimately, the Court of Appeal did not determine the threshold question of whether it had jurisdiction to hear the appeal.<sup>162</sup> The Court was prepared to make this assumption for the purpose of enabling it to determine the substantive issue, because it had reached a 'firm and united view' on that issue.<sup>163</sup> Moreover, the Court of Appeal did not expressly resolve the question of whether an appeal lay as of right or only by leave,<sup>164</sup> although the fact that the Court dismissed the 'applications' for leave indicated that this is how it had treated the matter.<sup>165</sup> As far as the substantive issue was concerned, the Court of

<sup>158</sup> *Re Application 2005* (2005) 214 ALR 422, 433 (Kirby J).

<sup>159</sup> Further affidavits directed at the substantive issues were also filed by the solicitor for the Chief Commissioner and by a police witness. These supplementary submissions and evidence confirmed that similar undercover methods were being used in other states of Australia and that police in those states held similar concerns to those expressed by the Victoria Police should the media be permitted to publish details of the technique: see *Re Applications 2004* (2004) 9 VR 275, 289 (Winneke P, Ormiston and Vincent JJA).

<sup>160</sup> *Re Application 2005* (2005) 214 ALR 422, 434 (Kirby J).

<sup>161</sup> *Ibid.* In the High Court, Kirby J took a dim view of this incident, describing the attempt by the Chief Commissioner to enlarge the record by filing additional material with the Court of Appeal after the hearing and before judgment, without the publicly signified permission of the Court, as a derogation from the principle of open justice: at *ibid.*

<sup>162</sup> More specifically, the Court of Appeal did not make a finding as to whether its jurisdiction had been excluded by s 17A(3) of the *Supreme Court Act 1986* (Vic): *Re Applications 2004* (2004) 9 VR 275, 284 (Winneke P, Ormiston and Vincent JJA).

<sup>163</sup> *Re Applications 2004* (2004) 9 VR 275, 284 (Winneke P, Ormiston and Vincent JJA).

<sup>164</sup> *Re Application 2005* (2005) 214 ALR 422, 425 (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ), 435 (Kirby J).

<sup>165</sup> *Ibid* 423 (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ), 445 (Kirby J). This is further bolstered by the fact that the Court of Appeal made no order in relation to the Notices of Appeal,

Appeal held that there was no basis for imposing indefinite suppression orders, and ordered that the applications be dismissed.<sup>166</sup> The Chief Commissioner was not invited to return to the Court to make further submissions on the substantive issue as she had expected to be able to do.

### 3 *The Appeal to the High Court*

The Chief Commissioner of Victoria Police then filed two sets of applications for special leave to appeal to the High Court. The first set of applications sought special leave to appeal from the decision of the Court of Appeal.<sup>167</sup> The grounds of appeal were twofold: (1) that the Court of Appeal erred in failing to hold that the Chief Commissioner had an appeal as of right; and (2) that the Court of Appeal had not afforded the Chief Commissioner procedural fairness insofar as it had denied her an opportunity to present argument on whether the trial judges had erred in imposing time limits on the suppression orders. The second set of applications sought special leave to appeal directly from the orders of the trial judges, in the event that the High Court decided that the Court of Appeal lacked jurisdiction to entertain the appeals that were the subject of the first set of applications.<sup>168</sup> The initial orders were again extended by the trial judges pending an application by the Chief Commissioner for special leave to appeal to the High Court.<sup>169</sup> The special leave applications came before the High Court on 30 April 2004.<sup>170</sup> The Court granted special leave to appeal to the Full Court in respect of the decisions of the Court of Appeal and referred the two applications seeking special leave from decisions of the trial judges to the same Full Court hearing the appeals.<sup>171</sup>

The matter was argued before the High Court on 10 August 2004.<sup>172</sup> *The Age* appeared as an intervener. At the conclusion of argument, the High Court unanimously dismissed the appeals from the Court of Appeal, and dismissed each application for special leave to appeal from the orders of the trial judges on the ground that there were insufficient prospects of success to warrant a grant of

which, by inference, indicated that it must have decided that an appeal as of right was not available to the Chief Commissioner: at 445 (Kirby J).

<sup>166</sup> *Re Applications 2004* (2004) 9 VR 275, 294 (Winneke P, Ormiston and Vincent JJA).

<sup>167</sup> *Re Application 2005* (2005) 214 ALR 422, 429 (Kirby J).

<sup>168</sup> *Ibid* 430 (Kirby J).

<sup>169</sup> These extensions were not easily obtained. An application was made to the trial judges on 24 February 2004, but they were willing to grant extensions only until 1 March 2004. The matter came before Hayne J in the High Court on 27 February 2004 and again on 1 March 2004: *Re Application 2005* [2004] HCATrans 36 (Hayne J, 27 February 2004); *Re Application 2005* [2004] HCATrans 38 (Hayne J, 1 March 2004). However, rather than extend the orders himself, Hayne J thought it would be more appropriate for the Chief Commissioner to return to the trial judges to seek an extension. Comments made by Hayne J indicated that his Honour thought that the extensions should be granted to preserve the utility of the applications for special leave. At this point, the trial judges agreed to extend the orders pending the outcome of the applications before the High Court.

<sup>170</sup> *Re Application 2005* [2004] HCATrans 127 (Gleeson CJ, Gummow and Hayne JJ, 30 April 2004).

<sup>171</sup> *Ibid*.

<sup>172</sup> *Ibid* 286 (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ, 10 August 2004).

special leave.<sup>173</sup> The Court announced that it would deliver its reasons at a future date. It delayed the termination of the non-publication orders for a short interval to give the Chief Commissioner time to consider renewing her applications to the Trial Division of the Supreme Court ‘for *particular* extensions of the prohibition on the publication of evidence given in the respective trials identifying police operatives in a way that might endanger their safety.’<sup>174</sup> Orders were obtained from several trial judges in the Supreme Court of Victoria prohibiting the publication of the names of undercover operatives until 31 December 2005.<sup>175</sup> On 8 September 2004, the day after the orders pertaining to the methodology expired, *The Age* newspaper ran a prominent story which outlined in considerable detail the methods used by the police to convict Favata and Tofilau.<sup>176</sup> This was followed by an article which outlined the covert methods used to convict Malcolm Clarke of the murder of Bonnie Clarke, 20 years after it took place.<sup>177</sup> By contrast, the *Herald Sun* elected not to reveal details of the tactics to avoid compromising sensitive investigations.<sup>178</sup>

The High Court handed down its reasons for decision on 20 April 2005.<sup>179</sup> Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ delivered a joint judgment. Kirby J delivered a separate judgment. The greater part of the judgments was devoted to the jurisdictional aspects of the appeal. Ultimately, five of the six judges refused to determine the threshold question of whether an appeal to the Victorian Court of Appeal was barred by s 17A(3) of the *Supreme Court Act 1986* (Vic), thus leaving prospective appellants in a position of uncertainty regarding the correct avenues of appeal.<sup>180</sup> On the question of whether an appeal lay as of right or only by leave, the High Court held that despite the somewhat cryptic nature of its approach, the Court of Appeal must be taken to have found that leave to appeal was required,<sup>181</sup> and that this finding was correct.<sup>182</sup> As

<sup>173</sup> *Re Application 2005* (2005) 214 ALR 422, 423–4 (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

<sup>174</sup> *Ibid* 430 (Kirby J) (emphasis in original).

<sup>175</sup> On 8 September 2004 orders were also sought from the High Court that certain documents in the High Court Registry should be altered to protect the identity of the two undercover police operatives who gave evidence or who otherwise took part or were referred to in the proceedings the subject of the applications and appeals to the High Court. Kirby J ordered that the materials held by the Court be masked accordingly, but were otherwise open to inspection in the ordinary way: *Re Application 2005* [2004] HCATrans 331 (Kirby J, 8 September 2004).

<sup>176</sup> Ian Munro, ‘True Lies’, *The Age* (Melbourne), 8 September 2004, 16.

<sup>177</sup> Ian Munro, ‘True Lies: Part 2: A Killer Trapped’, *The Age* (Melbourne), 9 September 2004, 13.

<sup>178</sup> Geoff Wilkinson, ‘Undercover in the Open’, *Herald Sun* (Melbourne), 8 September 2004, 9.

<sup>179</sup> *Re Application 2005* (2005) 214 ALR 422.

<sup>180</sup> *Ibid* 428 (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ). In contrast, Kirby J held that s 17A(3) excluded an appeal as of right from the determinations made by the trial judges: at 444. However, Kirby J was prepared to proceed on the assumption that an appeal by leave might still be available under s 17A(4), which permits applications for leave to appeal against interlocutory orders: at 445. Whether the orders made under s 18 were interlocutory orders, and whether s 17A(4) permits applications for leave to appeal to be made in respect of such orders notwithstanding that they otherwise fell within the exclusionary provision of s 17A(3), had not been the subject of argument, which is why Kirby J did not finally decide the point: at 445.

<sup>181</sup> The fact that the authenticated orders of the Court of Appeal recorded that the applications that were dismissed were the applications for leave to appeal, the substantive reasoning and the title to the reasons and orders of the Court of Appeal, all sufficiently indicated that that was its conclusion: *ibid* 423 (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ), 445–6 (Kirby J). Moreover, the fact that the Court of Appeal made no order in relation to the purported appeals

explained above, the Chief Commissioner also argued that the Court of Appeal had denied her procedural fairness, insofar as it had disposed of the matter as an application for leave to appeal without affording her an opportunity to present full argument as on the return of an appeal, notwithstanding indications given in the hearing and in her subsequent written communications to the Court that she wished to file further material and make submissions on the substantive issue before the Court.<sup>183</sup> However, the High Court rejected this argument. Having found that the legal character of the proceedings before the Court of Appeal was an application for leave to appeal against the duration of the orders, the High Court held that it was proper and orthodox for that Court to consider the substantive merits of the case as part of the leave question.<sup>184</sup> Accordingly, the Chief Commissioner was not entitled to assume that the matter would return to the Court of Appeal after the 'jurisdictional stage' for further argument on the substantive issues.<sup>185</sup>

In light of its findings in respect of the jurisdiction of the Court of Appeal, the High Court did not need to adjudicate on the substantive question that was before the Court of Appeal, namely, whether indefinite non-publication orders should have been made.<sup>186</sup> Thus, the reasoning and decision of the Court of Appeal represents the current state of the law in relation to the suppression of police methods and the identities of the police who use them. However, there is every indication in the judgment of Kirby J that the decision of the Court of Appeal on the substantive issue was correct.<sup>187</sup>

### C Implications for Open Justice

A number of procedural aspects of these cases impact on open justice. First, the degree to which the merits of the principle are aired before a court is to some

meant that by inference it had decided that they were not available to the Chief Commissioner as of right: at 445 (Kirby J).

<sup>182</sup> Ibid 445, where Kirby J held that it would have been preferable for the Court of Appeal to have resolved the point about the nature of the appeal expressly rather than by inference.

<sup>183</sup> Ibid 426 (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

<sup>184</sup> Ibid 428–9 (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ), 446 (Kirby J).

<sup>185</sup> Ibid 446–50 (Kirby J) advanced numerous reasons as to why the Chief Commissioner was not justified in making such an assumption. For example, his Honour held that the fact that a jurisdictional issue was involved meant that the Chief Commissioner must have been aware of the possibility that the Court of Appeal would reject her asserted right to appeal and hold that leave to appeal was needed, and that she should have been prepared for that eventuality. Secondly, the Commissioner and *The Age* had made submissions to the Court on the substantive issue; thus the hearing had not, in fact, been confined to argument about jurisdiction. Thirdly, given that the outcome of the proceedings potentially affected the two accused and the public interest, the urgency of a speedy decision was agreed and the case had been expedited.

<sup>186</sup> Ibid 428–9 (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ). Since the High Court assumed that the Court of Appeal had jurisdiction to entertain an appeal from the trial judges, the only remaining question for the High Court to determine was whether the Chief Commissioner had been denied procedural fairness in the Court of Appeal. If she had, the matter would be remitted to that Court for determination. The substantive issue only arose in respect of the second set of applications seeking special leave to appeal directly from the orders of the trial judges. However, the High Court would only have needed to entertain an appeal directly from the trial judges if it had decided that the Court of Appeal had no right to hear the appeal: ibid 450 (Kirby J).

<sup>187</sup> Ibid 446 (Kirby J).

extent dependent on whether a media organisation is aware that a non-publication order is being sought and is prepared to appear before the court to oppose the order. While the Supreme Court of Canada has stated that even if there is no party or intervener to argue the rights of the press and the public to free expression, the trial judge is expected to take account of the demands of that fundamental right without the benefit of argument,<sup>188</sup> it is interesting that a ban on the undercover operation scenarios was refused by the trial judge in *Mentuck*, where the order was contested, but initially granted in *ONE*, where it was not opposed.

Secondly, the avenues of appeal against non-publication orders are either unsatisfactory or uncertain. In Canada, the problem is that there is no potential for appeal against non-publication orders to an intermediate appellate court, making the Supreme Court the only avenue for such appeals. In *Re Applications 2004*, many of the jurisdictional issues concerning the appeal process were left unresolved, thus leaving prospective appellants in a position of uncertainty regarding the correct avenues of appeal.<sup>189</sup> Indeed, Kirby J noted that the course taken by the Court of Appeal may have led the Chief Commissioner of Victoria Police to believe that it had accepted the existence of a right of appeal, which it would then need to determine after a further hearing.<sup>190</sup>

Thirdly, the appeal process itself seems to create an 'over-suppression' problem. In both Canada and Australia, the publication bans were either imposed or extended to preserve the utility of the appeal process, even though the bans were not ultimately upheld. This had the effect of suppressing information about the techniques for considerable periods of time. In Victoria, the police succeeded in suppressing the coverage by *The Age* of the crime boss scenario for many months despite the fact that they failed on the merits at every stage. Yet, at the same time it was necessary to impose or extend the bans in order to preserve the utility of the appeal process. It is difficult to predict whether this state of affairs will generate a practice of appealing against the refusal by a court to issue a non-publication order as a tactic to forestall the publication of details of police methods. However, if leave to appeal is required, which appears to be the case in Victoria, it is unlikely that it would be given if there were little prospect of success. The position might be otherwise if an appeal lay as of right.<sup>191</sup>

Finally, the temporal relationship between the progress of the trial of an accused and the resolution of the appeal on publication bans has concerning implications for open justice. In *Mentuck*, for example, the trial of an accused concluded before the resolution of the appeal without the benefit of public discussion of the methods. While the Supreme Court of Canada ultimately held that the police methods could be publicised, the extent to which they are in fact publicised and subjected to scrutiny is always going to be dependent on the judgement of the media as to their newsworthiness. Where the trial of the

<sup>188</sup> *Mentuck* [2001] 3 SCR 442, 465 (Iacobucci J for McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

<sup>189</sup> See also *Herald & Weekly Times Pty Ltd v A* (2005) 160 A Crim R 299.

<sup>190</sup> *Re Application 2005* (2005) 214 ALR 422, 445–6 (Kirby J).

<sup>191</sup> Frivolous applications might be met by a claim for summary judgment or a claim for abuse of process.

accused has concluded some months earlier, there is a risk that the interest of the media in disseminating the material at the heart of the publication issue will have diminished. Even if disseminated, the information might not spark as much public debate as it may have done if the information about the police methods had been disseminated whilst the trials were in progress.

#### V CONCLUSION TO PART ONE

Part Two of this article<sup>192</sup> is primarily devoted to considering how the Canadian and Australian courts have applied their respective tests for issuing non-publication orders in the context of these applications to conceal police methods and identities. It will also consider whether there is any scope for the police to employ the doctrine of public interest immunity — which operates to prevent evidence from having to be produced in a judicial proceeding because the public interest in its suppression outweighs the public interest in its admission — as a means of securing the suppression of their methods and identities.

<sup>192</sup> Sharon Rodrick, 'Open Justice and Suppressing Evidence of Police Methods: The Positions in Canada and Australia (Part Two)' (2007) 31 *Melbourne University Law Review* (forthcoming).