

IV. ELECTRONIC AGE

When the Attorney General indicated that “[w]e have a legal system inherited from the 18th century operating in the media spotlight of the 21st century,” the Panel believes he was referring largely to the underutilization of technology to enable progress.

This chapter addresses a variety of opportunities to enhance the justice system using 21st century tools. The topics addressed are:

- notification of publication bans;*
- electronic access to court records;*
- online media guide;*
- public justice-media website.*

Notification of Publication Bans

RECOMMENDATION #10: NOTIFICATION OF PUBLICATION BANS

The Panel recommends that the Ministry of the Attorney General and the judiciary establish an electronic notification system for discretionary publication bans to provide basic information in a timely manner.

Issue:

The issues concerning publication bans focus on the frequency with which they are issued and the manner in which people are – or are not – notified.

What the Panel heard:

Problems expressed to the Panel regarding publication bans included:

- the perception by the media is that “[t]here are too many automatic and routine publication bans, implemented without any discussion of their necessity in the circumstances, breeding the belief that publication bans generally are normal and desirable, rather than exceptional and only to be used when proven justifiable.” (CBC)
- the sense that notification of bans can be last minute thus causing confusion for the media; or “[t]he content of notice to the media, when given, is often inadequate to permit the media and its counsel to make an informed decision as to whether to intervene.” (Ad IDEM)

Concern was especially expressed regarding s. 486 of the *Criminal Code* which allows for a ban if “there is a real and substantial risk that the victim, witness or justice system participant would suffer significant harm if their identity were disclosed.” This topic has become the subject of an interim policy on court files and documents under section 486 Publication Bans (Bill C-2 to amend s. 486 as of November 2005) from the Ministry’s Court Services Division, saying that:

Court files and documents subject to publication bans under sections 486.4 (1), (2), and (3) and 486.5 (1) or (2) of the *Criminal Code* are not accessible to the public without judicial direction. Before permitting members of the public to access court files or documents, court staff must ensure that a section 486 publication ban has not been noted on the information.

Members of the public who require access to court files or documents under section 486 publication bans must make an application to the court.

The Ontario Association of Chiefs of Police also weighed in on this subject:

...[I]ssues around how we [the police] manage information, for example, around a publication ban ordered by the courts, challenge us to balance the need of the public to “know” with the very real possibility that the demands of the public or media for details of a crime could impact the delivery of justice. It is an area which requires more discussion between police, the media and the courts to find the right balance, always keeping in mind that the delivery of justice should be paramount in such considerations.

A representative of the Ministry of the Attorney General pointed out that Crowns must approach such decisions through the lens of the best practices of the administration of justice, the fair trial interest of the accused and the fair trial interest of the public, in accordance with the *Charter*. While there are legitimate grounds for publication bans, the real issue is how the bans are written. In addition, the representative said, regimes such as those that exist in some jurisdictions to provide electronic notice of publica-

tion bans (see below) do not always suit the quick pace of a prosecutor’s life, where an Assistant Crown may receive a case the day before and realize a publication ban is needed.

In response to a question from the Panel as to whether Crown Attorneys should be more aggressive in fighting against publication bans and advocating openness, the Ontario Crown Attorneys’ Association made the point that this goes to the role of the Crown as a local minister of justice. The Crown has to determine what is in the best interest of justice, focusing on ensuring a fair trial.

A chart summarizing some pro’s and con’s may be helpful. It is adapted from Chief Justice Lamer’s ruling in *Dagenais v. Canadian Broadcasting Corporation* (please see Discussion below):

Ordering bans may:	Not ordering bans may:
<ul style="list-style-type: none"> • limit freedom of expression 	<ul style="list-style-type: none"> • maximize the chances of individuals with relevant information hearing about a case and coming forward with new information
<ul style="list-style-type: none"> • prevent the jury from being influenced by information other than that presented in evidence during the trial 	<ul style="list-style-type: none"> • prevent perjury by placing witnesses under public scrutiny
<ul style="list-style-type: none"> • maximize the chances that witnesses will testify because they will not be fearful of the consequences of publicity 	<ul style="list-style-type: none"> • prevent state and/or court wrongdoing by placing the criminal justice process under public scrutiny
<ul style="list-style-type: none"> • protect vulnerable witnesses (e.g., child witnesses, police informants, victims of sexual offences) 	<ul style="list-style-type: none"> • reduce crime through the public interest of disapproval of crime
<ul style="list-style-type: none"> • preserve the privacy of individuals involved in the criminal process 	<ul style="list-style-type: none"> • promote the public discussion of important issues
<ul style="list-style-type: none"> • maximize the chances of rehabilitation for young offenders 	
<ul style="list-style-type: none"> • encourage the reporting of sexual offences 	
<ul style="list-style-type: none"> • save the financial and/or emotional costs to the state, accused, victims and witnesses of the alternatives to publication bans (e.g., delaying trials, changing venues) 	
<ul style="list-style-type: none"> • protect national security 	

While it is clear that the trial or application judge retains the discretion to provide notice, some members of the media felt a sense of confusion or fear when trying to figure out publication bans. The more overriding concern, expressed by some members of the media, is that basic information about a case falls beyond the reach of the media, sometimes for no good reason.

Both the Canadian Bar Association and Ad IDEM have promoted principles for publication bans imposed at the discretion of the judge. These include: the importance of reasonable and timely notice to the media of applications for discretionary publication bans, opportunities for the media to make representations before such bans are issued and easy access to written records of such bans (as well as sealing orders, etc.).

Discussion:

There are two kinds of publication bans: those mandated in the *Criminal Code* and other legislation – for example, precluding the disclosure of the identity of a minor – and those imposed at the discretion of the judge. Much of the concerns relate to applications for discretionary publication bans.

From one perspective, while the media may be viewed as the public’s watchdog of the activities of the courts, their right of access and right to publish should not interfere with the administration of justice or an individual’s right to a fair trial.

The landmark ruling in *Dagenais* by the Supreme Court of Canada in 1994 establishes that members of the media have standing to be heard and to raise objections in open court when a party requests that a judge impose a discretionary ban. Representatives of the media should be given reasonable notice and the opportunity to make submissions on an application for a publication ban.

The *Dagenais* ruling articulates the tests that judges should apply when considering an application for a common law ban or discretionary statutory ban. As described in Alberta Justice’s Prosecution Pointer on Publication Bans, the test for a common law publication ban is that:

- the ban is necessary in order to prevent a real and substantial risk to the fairness of the trial because reasonably available alternative measures will not prevent the risk;
- the salutary effects of the publication ban outweigh the deleterious effects.

How have jurisdictions approached the notification issue? We find two examples in Nova Scotia and Alberta:

- Nova Scotia notifies the media of requests for, and the issuance of, publication bans. The Courts of Nova Scotia maintain a free email subscription service to advise media, members of the bar and the public of upcoming publication ban applications. Subscribers also receive daily copies of court decisions. Those wishing to apply for a publication ban complete an application form directly on the Courts website. Submitting the form sends an email message to subscribers notifying them of the application for a publication ban.

The screenshot shows the website for 'The Courts of NOVA SCOTIA'. At the top, there is a navigation menu with links to: Court of Appeal, Supreme Court, Provincial Court, Family Court, Small Claims Court, Bankruptcy Court, and Probate Court. Below this is a 'RESOURCES' section with a vertical list of links: About Judges, Civil Procedure Rules, Community Liaison, Court Costs & Fees, Court Locations/Maps, Courts & Classrooms, Decisions Database, Family Services, Frequent Questions, From the Bench, General Information, History of the Courts, Jury Duty Information, Legal Terms Defined, Media Information, News Archives, and Notices to the Bar.

The main content area features a subscription form titled 'Subscribe to receive publication ban advisories and daily decisions from the Courts of Nova Scotia.' The form includes two input fields: 'Email address:' and '(required) Your name:'. A 'subscribe >' button is positioned to the right of the email field. Below the form, a paragraph explains that members of the media, the bar, and the public can subscribe to receive copies of court decisions and publication ban advisories via email. It notes that subscribers receive daily copies of court decisions in Adobe Acrobat® format. A link is provided to 'unsubscribe to this service here >>'. To the right of the form, a text box contains a disclaimer: 'This page is for advising media outlets about applications for publication bans in Nova Scotia courts. It sends an e-mail message to news editors who subscribe to this service. It is maintained by the The Law Courts of Nova Scotia Please report technical difficulties to the Webmaster.' Below this, it says 'Address your comments about this service to: John Piccolo.'

Screenshot: Courts of Nova Scotia – Subscribe to Publication Ban Advisories

- Similarly, in Alberta’s Provincial Court, a media representative who wishes to receive electronic notice of any court applications that will be made for discretionary publication bans may register as an “interested party.” To do so, however, the media representative must name a member of the Law Society of Alberta to receive the notice on their behalf, and provide a current email address for that member. Electronic notification is mandatory.

Alberta Courts Search | Contact

Home Court of Appeal Court of Queen’s Bench Provincial Court Court Services Judgments Links

Location: Home > Provincial Court > Criminal Court > Publication Bans

Provincial Court

- ▶ Civil Court
- ▶ Criminal Court
 - ▶ Common Questions
 - ▶ Preliminary Inquiries
 - ▶ Judicial Assignments
 - ▶ **Publication Bans**
- ▶ Family Court
- ▶ Traffic Court
- ▶ Youth Court
- ▶ Judgments
- ▶ News, Notices & Practice Notes
- ▶ Publications

NOTICE OF APPLICATIONS FOR PUBLICATION BANS

This system has been put in place by the Provincial Court of Alberta in order to provide a means of giving notice of any application for a publication ban or an Order which would restrict the ability of the media to report on court proceedings.

At present, this form is for use by lawyers only. By submitting the form on the next page, the user sends an e-mail message to news media editors (or their legal counsel) who subscribe to this service. The e-mail message will advise the editor of any proposed application for a discretionary publication ban or Order restricting full reporting of court proceedings.

If you are a news outlet that wishes to receive electronic notice of any court applications that will be made for any discretionary publication bans, please submit a request to be added to the subscription list. Submit your request by email to brenda.haynes@gov.ab.ca. You must provide the name, address, phone number & email address of legal counsel designated by your organization to receive notice on your behalf.

Please note the following:

- This procedure is for use in the Criminal Division and the Family & Youth Division of the Provincial Court throughout Alberta.
- This form does not constitute or substitute for the application for any publication ban; it is simply the NOTICE THAT SUCH AN APPLICATION WILL BE MADE.
- Please read the [Practice Note Governing Notice of Application for Publication Ban](#) issued by the Chief Judge of the Provincial Court relative to mandatory use of this form, and, notice requirements (either by use of this electronic form, or, by email or fax). If notice is required for other parties, then that notice must also be given.
- Filing of this NOTICE does not mean any publication ban or Order will be granted; the application must be heard in court.
- If you have any questions, please contact Neil.Skinner@gov.ab.ca or phone 780/427-0459.

To file an application, enter your PIN number provided by the Courts. If you do not have a PIN, please contact brenda.haynes@gov.ab.ca; provide your name and telephone number within your request.

PIN:

Screenshot: Alberta Courts – Notice of Applications for Publication Bans

British Columbia has also launched a publication ban notification pilot project, including a subscription/notification process regarding discretionary bans.

The Supreme Court of Canada’s schedule of hearings, available on its website, includes a note where a publication ban is in effect. (It is also possible to subscribe to SCC emailed news releases.)

The Panel suggests that the appropriate officials in Nova Scotia, Alberta and British Columbia should be consulted for advice on how best to establish and operate such a system.

Electronic Access to Court Records

RECOMMENDATION # 1 1: ELECTRONIC ACCESS TO COURT RECORDS

The Panel recommends that the Ministry of the Attorney General and the judiciary ensure that, where practical, reasons for judgment and docket information of Ontario courts are available online.

Issue:

Electronic access to court records raises concerns such as the protection of privacy, accuracy and currency of information. It also calls into focus the principle of open courts.

What should Ontario's approach be?

Discussion:

The Panel notes practices in other jurisdictions. For example:

- In the U.S., Public Access to Court Electronic Records (PACER) is an electronic public access service that allows users to obtain case and docket information from U.S. Federal Appellate, District and Bankruptcy courts, and from the U.S. Party/Case Index. It is a fee-based service available over the Internet.
- The Supreme Court of Canada's website includes: case information, hearing schedules and notes re publication bans, news releases, bulletins, recent judgments and published judgments.
- British Columbia's Ministry of Attorney General and the B.C. judiciary have recently introduced Court Services Online. This service allows the media and the public online access to a variety of information.
- A partial sampling of other provincial courts indicates that most (though not all) provide judgments online. Nova Scotia and Alberta provide access through their courts; Saskatchewan through the Law Society of Saskatchewan. The Court of Appeal in Alberta also provides hearing lists and electronic filing.
- In Ontario, the Court of Justice and Superior Court provide access to their decisions via a link to CanLII. The Court of Appeal posts its judgments on its website.

In 2003, the Judges Technology Advisory Committee (JTAC) of the Canadian Judicial Council (CJC) prepared a discussion paper on issues arising from electronic access to court records and docket information.

The discussion paper certainly elicited lively debate, including responses from the

Canadian Newspaper Association, Ontario Bar Association and Law Society of Upper Canada. Some of this debate was highlighted to the Panel.

The JTAC discussion paper came to 33 conclusions, generally finding that, while privacy rights are certainly critical, the right to open courts usually outweighed the right to privacy.

The Panel is aware that the CJC will be issuing more specific guidance on access to court records, which will merit careful review and attention.

Online Media Guide

RECOMMENDATION #12: ONLINE MEDIA GUIDE

The Panel recommends that the Ministry of the Attorney General, in conjunction with justice and media representatives, develop an online Ontario justice system guidebook for the media.

Issue:

Information for the media about their rights, responsibilities and resources is fragmented and sometimes not available at all.

Discussion:

With respect to media guidebooks, there appear to be few comprehensive versions that are easily accessible, at least online.

The most highly developed media guide is in Nova Scotia. The draft Media Guidelines, which have been approved by judges in the Supreme Court and Court of Appeal, are posted on the Courts of Nova Scotia website and include information on policies in five major categories: access to courthouses and courtrooms; access to court documents; court records; media-related rules; and bans on publication.

Manitoba and B.C. courts also have media guides on their websites:

- Manitoba has a page on its website that gives some information about how to contact the media relations officer, Court policies affecting media coverage (cameras and audio recording equipment), access to court records and release of court judgments. The Manitoba Courts post an online dictionary of legal terms.
- B.C.'s Provincial Court has a "News and References" page that includes its media access policy with information about televising or broadcasting Court proceedings. Also listed are news releases, appointments and relevant articles.

A sampling of courts in U.S. states identified some media guides, including those in Tennessee, Wisconsin and Maryland.

Some courts in Australia and New Zealand also have media guides.

One of the recommendations of the Canadian Journalism Foundation's Bench-Bar-Media Communications Working Group (1996-1999) was for the development of introductory-level guidebooks on justice reporting for journalists, lawyers and judges. These guidebooks should include an introduction to each other's terminology and information on practices and procedures.

The Panel believes there is much value in an online media guide.

Public Justice-Media Website

RECOMMENDATION #13: PUBLIC JUSTICE-MEDIA WEBSITE

The Panel recommends that the Ministry of the Attorney General and the justice-media committee (as described in Recommendation 14) should establish a public website to provide information on:

- the roles of all participants in the justice system;
- the structure of the justice system;
- the media's role in relation to the justice system;
- hyperlinks to docket information and judgments of Ontario Courts;
- public access to the justice system;
- other learning tools as are already available on the Internet.

This would be an enduring demonstration of the culture shift that Ontario is embarking upon with the initiatives suggested above.

Technology offers the justice-media relationship many opportunities. There are always cautions to consider but the Panel believes the recommendations presented here offer a balanced approach.