Dalhousie Law Journal

Volume 36 | Issue 2 Article 10

10-1-2013

A Comment on "No Comment": The Sub Judice Rule and the Accountability of Public Officials inthe 21st Century

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The sub judice *rule is a rule of court, a statutory rule, a Parliamentary convention and a practice that has developed in the interaction between media and public officials. At its most basic, the* sub judice *rule prohibits the publication of statements which may prejudice court proceedings. This study examines the nature, rationale and scope of the* sub judice *rule. The authors provide an account of the current state of the rule, and highlight areas where more clarity would be desirable. The authors propose a more coherent approach to the* sub judice *rule, more clearly rooted in the concern over prejudice to proceedings, and suggest it be embedded in an ethical rather than purely legal framework.*

La règle du sub judice est une règle de procédure, une règle législative, une convention parlementaire et une pratique qui s'est développée dans l'interaction entre médias et fonctionnaires. Dans sa forme la plus élémentaire, la règle du sub judice interdit la publication de déclarations qui peuvent être préjudiciables à des procédures judiciaires. Les auteurs étudient la nature, la justification et la portée de la règle sub judice. Les auteurs font un bilan de l'état actuel de la règle et mettent en évidence certaines situations où une plus grande clarté est souhaitable. Les auteurs proposent une approche plus uniforme de la règle du sub judice, approche qui serait plus clairement ancrée dans les préoccupations face au processus judiciaire, et ils suggèrent qu'elle soit enchâssée dans un cadre éthique plutôt que dans un cadre strictement législatif.

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Introduction

In the autumn of 2012, when the Federal Budget Officer (PBO), Kevin Page, announced he would be taking the federal government to Court because of a lack of disclosure of relevant information from government ministries and agencies to his office he issued the following statement:

> I can confirm to you that the PBO will be filing and serving legal notice on all non-compliant deputy heads [of departments] early this week... As it is now clear that this matter will constitute the subject of a legal action, it would be inappropriate for me to comment further.[1]

"No comment—the matter is before the courts." How often does this statement accompany the media report of a dispute involving a public authority? How often is this response heard to a journalist's question to a public official about a matter of public concern? Why should the existence of litigation excuse representatives of government from accounting for their and the government's actions? Why should journalists be content

1. G Galloway, "Budget Watchdog Takes Feds to Court," *Globe and Mail* (21 October 2012), online: <http://www.theglobeandmail.com/news/politics/budget-watchdog-will-go-to-court-to-get-information-on-ottawas-cuts/article4626742/>.

with this (non) answer? Is the decision not to comment in these settings based on a legal rule or duty, or political convenience? To the extent there is a rule governing commenting on matters before the courts, what are the origins and purpose of this rule—and what are its limits? Finally, can this rule be modernized to adapt to an era of digital media where citizen journalists and social media discuss matters at issue in litigation largely outside the scope of the court's control?

In response to the PBO's lawsuit, the federal Minister of Finance Jim Flaherty, appeared unconstrained in his comments on the matter. On one television appearance in January of 2013, Mr. Flaherty accused Mr. Page of "wandering off" from his mandate of reporting to Parliament on "how the government is doing" in its budgeting.[2] He went on to indicate that what the government wanted in creating the PBO was "a sounding board, a testing board" and that in light of Mr. Page's conduct, the PBO's mandate should be "better defined." The scope of the PBO mandate was precisely the matter before the Court, so why was it permissible for the minister of finance to comment on the issue?

With these questions in mind, the purpose of this study is twofold. First, we endeavour to examine the nature, rationale, and scope of the *sub judice* rule in order to provide a coherent account of the current state of the rule, and highlight areas where more clarity would be desirable. Second, we argue not only that we lack a clear understanding of this rule, but also that because of this, it is used selectively, incoherently, and instrumentally. As a result, the accountability of government, the integrity of adjudicative processes, and the effectiveness of the media all may be jeopardized.

We suggest that the rule is invoked too broadly in some contexts and too narrowly in others. It is invoked too broadly where the mere existence of litigation—or even an intent to litigate or the possibility of litigation—is used as a justification by government officials for refusing to address an issue in the media. Taken to its logical conclusion, this would preclude government responses to almost every question. Litigation can often be wide-ranging. Class actions challenge the federal government's immigration landing fees, and the provincial government's treatment of foster children. Does this mean those governments cannot be asked to explain their policies in relation to these topics? Indigenous land claims cover broad swaths of the country—in a very real sense, all decisions about uses of that land and the resources on it could be the subject of litigation.

2. B McKenna, "Flaherty Delivers Harshest Criticism Yet of Federal Budget Watchdog," *Globe and Mail* (27 January 2013), online: <http://www.theglobeandmail.com/news/national/flaherty-delivers-harshest-criticism-yet-of-federal-budget-watchdog/article7896566/>.

Does this prevent municipal, provincial, and federal governments from speaking about how those lands are used? Litigation followed almost immediately in the wake of the Walkerton tainted water incident in the 1990s, the Mad Cow and SARS crises in the early 2000s, and can be expected to follow nearly every major crisis which adversely affects some people in a significant way. In our view, to say that the act of a party filing a statement of claim against the Crown somehow precludes government from communicating to the public about matters of public importance has no basis in law and would seriously undermine the accountability of government.

On the other hand, the *sub judice* rule is applied too narrowly where government attempts to undermine the integrity of an impartial proceeding by attempting to influence a court or tribunal through its public pronouncements. Our project, therefore, is to ensure the rule is both narrowed when governments are tempted to invoke it too broadly to avoid accountability, and strengthened when governments are tempted to ignore it altogether in order to achieve a desired result from a court or regulatory proceeding.

This analysis will be divided into four sections. In the first section, we explore the history and application of the *sub judice* rule in current Canadian statutory law, common law, and as a Parliamentary convention. We also examine the rule from a comparative perspective. In the second section, we examine the *sub judice* rule from a critical perspective, surveying academic criticism of the rule as well as attempts to reform the rule. In the third section, through a discussion of two recent case studies, we demonstrate the selectivity and incoherence of how the rule has been used in Canada. Finally, in the fourth section, we suggest a proposed formulation of the principle which we think would enhance accountability while at the same time strengthening the integrity of the adjudicative process.

I. *What is the* sub judice *rule?*

The *sub judice* rule is a rule of court, a statutory rule, a parliamentary convention, and a practice that has developed in the interaction between media and public officials. As a result of its multiple forms, it has meant different things to different people at different times. Our goal below is to canvass the development of the rule in these various guises and present, to the extent possible, a coherent foundation for the rule as a point of departure for the rest of our analysis.

The term *sub judice* literally means "under judicial consideration"[3] or "before the court or judge for determination."[4] At its most basic, the *sub judice* rule prohibits the publication of statements which may prejudice court proceedings. The *sub judice* rule is part of the law of contempt of court, specifically *ex facie* contempt, which refers to contemptuous acts committed outside the courtroom.[5] This is often referred to as the common law rule of *sub judice.* Occasionally, aspects of the rule have been codified, and this may now be referred to as statutory *sub judice.*[6] The *sub judice* parliamentary convention, a separate but related restriction, prohibits members of parliament from commenting in the House of Commons on matters that are before the courts. This convention has been codified in Ontario in the Standing Orders. Each will be discussed in turn.

1. *Statutory* sub judice

Statutory *sub judice* consists of the restrictions imposed by statute on the publication of certain details relating to court proceedings. For example, section 486(3) of the *Criminal Code* prohibits the publication of information which may reveal the identity of a sexual assault complainant if the complainant requests that her identity be concealed.[7] Another example concerns the publication of the identity of youth involved in the criminal justice system. The *Youth Criminal Justice Act* expressly prohibits any publicity in relation to the identity of a young person subject to the Act (including an accused, a witness or a victim of a crime).[8]

There have been two cases in which Ontario ministers have resigned for publicly mentioning the names of young offenders. In April of 1998, then Solicitor General of Ontario Robert Runciman resigned after naming the mother of a young offender in a throne speech.[9] Criminal charges were not, however, laid.[10] He was reinstated shortly after to "thunderous applause."[11] Then, in December 2000, Corrections Minister Rob Sampson and parliamentary assistant Doug Galt resigned "after Galt mentioned the names of several young offenders from a privatized detention centre in

3. Ontario Ministry of the Attorney General, *Sub Judice Rule*, online: <http://www.attorneygeneral.jus.gov.on.ca/english/legis/subjudicerule.asp>.
4. *Black's Law Dictionary*, 9th ed, *sub verbo* "sub judice."
5. Robert Martin, *Media Law*, 2d ed (Toronto: Irwin Law, 2003) at 95.
6. *Ibid* at 103.
7. RSC 1985, c C-46, s 486(3).
8. SC 2002, c 1.
9. Richard Brennan & John Ibbitson, "Emotional Day for Runciman: Experts Believe Speech may Violate Young Offenders Act," *Kingston Whig—Standard* (28 April 1998).
10. Kellie Hudson, "RCMP clears Runciman of any wrongdoing," *Toronto Star* (25 July 1998).
11. Richard Brennan, "Runciman back as top cop," *The Windsor Star* (28 July 1998).

Cobourg. He was quoting from a program from the graduation ceremony."[12] In both cases, the slip was unintentional, no charges were laid, and the Ontario politicians were reinstated to their positions shortly after their resignation. That being said, the immediate resignations demonstrate that breaches of the statutory *sub judice* rule tend to be clear and well-understood.

Other statutes provide authority for adjudicators themselves to issue publication bans on the subject matter of criminal or civil litigation, such as section 517 of the *Criminal Code,* which allows a Justice of the Peace to issue a publication ban at a bail hearing.[13] In *Toronto Star Newspapers Ltd v Canada,*[14] the Supreme Court upheld a publication ban issued under section 517 of the *Criminal Code* in the context of bail proceedings which had been challenged as an infringement on the freedom of expression of the media. Absent such an order, the "open courts" principle dictates that matters relating to litigation or adjudicative proceedings before administrative tribunals and regulators may be freely published as a matter of public record.

The statutory rule is simply a bright line test. There is no need to show that the breach of the rule was intentional, or motivated by a desire to influence or prejudice a criminal prosecution. Nor is it necessary to show that the published information may prejudice a matter before the courts. By contrast, the common law *sub judice* rule is complex, subtle, and subject to misunderstanding and manipulation.

2. *The common law rule*

As the following discussion of the common law rule shows, in contrast to the statutory rule, the concern over publicizing information about a case is related directly to potential prejudice to the parties and to the possibility of inappropriate influence over the judge or decision maker. There are two possible consequences for breach of the common law *sub judice* rule. First, the publisher of the prejudicial comments may be convicted for contempt of court. Second, the party who has been prejudiced by the offending publication can, theoretically, obtain a stay of proceedings. The case law has diverged somewhat based on which remedy is sought.

12. "Ontario Corrections Minister Resigns," *CBC News* (5 December 2000), online: <http://www.cbc.ca/news/story/2000/12/05/ott_minister001205.html>.
13. *Supra* note 7.
14. 2010 SCC 21.

Contempt sub judice

The common law *sub judice* rule dates back at least to 1742, when Lord Hardwicke described three types of contempt of court, the third of which consists of "prejudicing mankind against persons before the cause is heard."[15] In his "classic statement"[16] on the *sub judice* rule, Lord Hardwick justified the rule as follows:

> Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented, nor is there any thing of more pernicious consequence, than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard.[17]

A test for breach of the common law *sub judice* rule was articulated further in 1896, in which Lord Russell stated that the rule is breached when a publication is "intended or at least is calculated to prejudice a trial which is pending."[18] In 1900, Lord Russell stated the test as a publication "calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts,"[19] which was the test adopted by the Supreme Court of Canada in the 1950s.[20]

The rule began to take its modern shape in the 1970s with the "Sunday Times case" in England. At the centre of the case were two newspaper articles commenting on litigation against the pharmaceutical company Distillers, which marketed a sedative containing thalidomide to pregnant women. Tragically, hundreds of children whose mothers had taken the drug while pregnant were born with serious birth defects. At the time the first article was published, three hundred eighty-nine claims were pending against Distillers, and settlement negotiations were underway. The first *Sunday Times* article described Distillers' settlement offers as "grotesquely out of proportion to the injuries suffered," and urged Distillers to make a more generous offer.[21] The second article, which was not published due to an injunction, described the incomplete steps Distillers had taken to test the drug before putting it on the market. The Court of Appeal found that the articles did not breach the *sub judice* rule, reasoning that the litigation

15. *Roach v Garvan*, (1742) 2 Atkyns 469 at 471, 26 ER 683 (Ct of Chancery). Also known as *St. James's Evening Post Case*.
16. J Miller, *The Law of Contempt in Canada* (Toronto: Carswell, 1997) at 101.
17. *Roach v Garvan*, *supra* note 15 at 470-471.
18. *Reg v Payne*, [1896] 1 QB 577, 65 LJQB 426 at 580. Cited in *Sommers v Sturdy* (1956), 116 CCC 160, 6 DLR (2d) 642 (BCSC) at para 24.
19. Lord Russell in *R v Gray* (1900), 2 QB 36 at 40.
20. *Poje v British Columbia (Attorney General)*, [1953] 1 SCR 516; and *Re Duncan*, [1958] SCR 41.
21. *Case of the Sunday Times v The United Kingdom* (1979), E Ct HR, Application No 6538/74, online: HUDOC <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57584> at 5 [*Sunday Times*].

was "dormant," as settlement was expected, not a trial. As Lord Scarman stated, "the issue of a writ cannot stifle all comment."[22] The House of Lords, however, unanimously held that the second article did breach the *sub judice* rule, finding that the rule applies equally to interference with settlement negotiations as with trials. The House of Lords settled on a "prejudgment" test, making it impermissible to "prejudge issues in pending cases" if it presents a real risk of prejudice to the administration of justice.[23] The final word on this case was issued by the European Court of Human Rights, which held by a close majority that the House of Lords decision against Times Newspapers violated article 10 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, which protects the right to freedom of expression.[24]

The "prejudgment test" has not prevailed in Canadian law, which has placed greater emphasis on the risk of prejudice caused by publications to a fair trial. While the Supreme Court of Canada has not provided guidance on the precise application of the test for *sub judice* contempt since freedom of expression was constitutionally protected by the *Canadian Charter of Rights and Freedoms* in 1982,[25] provincial trial courts and courts of appeal have recently discussed the rule and articulated the test for its breach.

For example, in *R v Robinson-Blackmore Printing & Publishing Co*,[26] a reporter brought a constitutional challenge to a charge against him of contempt *sub judice*. He had published an article which mentioned that an individual accused of murder had threatened to spread AIDS in prison, as well as other details which may not have been admissible at the trial. The Newfoundland trial court rejected the reporter's claim that the *sub judice* rule violated his freedom of expression. The judge found that a breach of the *sub judice* rule occurs in either of two situations: where an article is published with the "clear intent to influence the fair trial of an accused" or where there is a "real risk" that it will do so.[27]

In *R v Edmonton Sun*,[28] the Alberta trial court and Court of Appeal considered whether three newspaper articles violated the *sub judice* rule. In a critique of the role of social services in protecting children, the articles

22. *Attorney-General v Times Newspapers Ltd*, [1973] 1 All ER 815 (UKCA).
23. *Attorney-General v Times Newspapers Ltd*, [1973] 3 All ER 54 (HL) at 63 and 65.
24. 4 November 1950, 213 UNTS 221 at 223; *Sunday Times*, *supra* note 21 at 38.
25. *Canadian Charter of Rights and Freedoms*, s 2(b), Part 1 of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11.
26. *R v Robinson-Blackmore Printing & Publishing Co* (1989), 73 Nfld & PEIR 46, 1989 CarswellNfld 159.
27. *Ibid* at para 35.
28. *R v Edmonton Sun*, 2000 ABQB 283, [2000] AJ No 1600 (QL) [*Edmonton Sun* trial]; 2003 ABCA 3, [2003] AJ No 5 (QL) [*Edmonton Sun* appeal].

stated that social services had returned a young boy to his mother's home, which she shared with a man who had previously been convicted of assaulting the boy. The boy was killed shortly after returning home and the article reported that the same man was accused of his murder. Linking the previous assault conviction to the current murder trial had the potential to prejudice the right of the accused to a fair trial. At trial, Justice Binder found the publisher guilty of contempt, stating that a jury member who read the articles would find it "extremely difficult, if not impossible to disabuse himself/herself of the idea...that the accused killed the child."[29] This verdict, however, was reversed on appeal because of the time lapse between publication and trial, the fact that the Sun newspapers were not delivered to the town from which the jury would be drawn, and the likelihood that the accused's past conviction would be admissible at trial. Despite the reversal of the initial decision, the Court of Appeal confirmed the test for *sub judice* contempt, as stated by the trial judge:

> The Court must be satisfied beyond a reasonable doubt that the publication of the alleged contemptuous material constituted a real and substantial risk of prejudice to the integrity of the administration of justice.[30]

A concurring opinion of the Alberta Court of Appeal decision indicated a "public interest" exception to the rule. Based largely on the defence to *sub judice* contempt available in the Australian case law,[31] Justice Berger framed the public interest exception as follows:

> No finding of publication contempt shall be made if the alleged contemnor establishes on a balance of probabilities that the decision to publish was taken in good faith in order to inform the public of a legitimate, compelling and pressing issue of public importance and if, objectively assessed, the issue is properly so characterized.[32]

In the opinion of Justice Berger, the newspaper articles were not contemptuous due to the fact that they "raised legitimate and pressing issues of public importance," namely the protection of children and the role of social services.[33]

Notwithstanding the search for clarity in the case law, it would appear that there is little consensus among mainstream journalists and publishers as

29. *Edmonton Sun* trial, *ibid* at para 54.
30. *Ibid.*
31. The leading case is *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* (1937) 37 SR (NSW) 242, discussed below in Section D.
32. *Edmonton Sun* appeal, *supra* note 28 at para 119.
33. *Ibid* at para 124.

to the implications of this legal standard.[34] In other words, news journalists sometimes identify parties and issues in pending litigation where there is no publication ban and, in the eyes of the journalist/publisher, an issue of public importance.

Because the *sub judice* rule necessarily implies a limitation on the freedom of expression of the media and individual journalists or both, the rule should theoretically reflect a balance between the constitutional rights to freedom of expression and the protection of a fair trial (and, by extension, the open courts principle).

This balance was addressed directly by the Supreme Court of Canada in the case of *Dagenais v Canadian Broadcasting Corp* in the context of publication bans and freedom of expression in the *Charter of Rights and Freedoms*. Chief Justice Lamer held that one set of rights cannot be superior to another, and consequently, a balance must be achieved that "fully respects the importance of both sets of rights."[35] The Court held that:

> A publication ban should be ordered only when:
>
> (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.[36]

Subsequent decisions have refined the test and clarified that the standard for issuing a publication ban requires convincing evidence that a ban is necessary.[37] As Justice Lamer notes in *Dagenais*, courts should believe in the ability of jurors to obey their oath and not be influenced by pre-trial publicity. Accused persons have a right to an impartial jury, but not an uninformed jury. The trend in *Charter* jurisprudence is clearly toward permitting more publicity and greater coverage of the criminal justice system.[38]

In the context of the *sub judice* rule, however, there is currently no requirement to prove necessity. Justice Binder stated in *Edmonton Sun* that "the right of an accused to a fair and public hearing by an independent and impartial tribunal" will take precedence over freedom of expression,

34. Correspondence with Star Media executive and former Editor-in-Chief of the *Globe and Mail*, Ed Greenspon, August 2012, on file with the authors.
35. *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 877; 1994 CarswellOnt 112.
36. *Ibid* at 878 [emphasis original].
37. See, for example, *Toronto Star v Ontario*, 2005 SCC 41.
38. See, for example, *R v Kossyrine*, 2011 ONSC 6081.

as long as the court is satisfied beyond a reasonable doubt that there is a "real and substantial risk of prejudice," thus finding the *Dagenais* test inapplicable to *sub judice* contempt.[39]

The intention to prejudice the outcome of a court proceeding is not a required element of *sub judice* contempt. The *mens rea* requirement is merely the intent to publish the information and not the intention to prejudice the trial. In *R v CHEK TV Ltd* an assistant news director put together a television broadcast which linked a man accused of murder with a previous event in which he took three prison guards hostage.[40] Although the assistant news director only wished to increase the newsworthiness of his story and not influence the trial, he was found guilty of contempt.[41]

It does not appear to be settled whether or not the prior public availability of the published information is a defence to contempt *sub judice*. In a 1956 British Columbia case, it was decided that a publication was not prejudicial, as the information had already been "widely disseminated."[42] This is, however, contrasted by the case of *Editions Maclean v Fulford*, 1965, in which an article revealing the criminal record of an accused was found to be in breach of the *sub judice* rule, despite the fact that much of the information published in the article could be accessed elsewhere.[43] More recently, in *R v Lindsay*, the Ontario Superior Court found that no prejudice was caused when Attorney General of Ontario Michael Bryant and a police officer publicly characterized the Hells Angels as a criminal organization at a time when some of its members were facing criminal charges. The Court reasoned that no harm was done because such a characterization was already in the public domain.[44]

Importantly, the fact that prejudicial information is true does not detract from liability for contempt *sub judice*. In 1974, the Quebec Court of Appeal ruled on the case of *R v Carocchia,* in which the Court held that "the truth of the published fact is not a defence against an accusation of contempt of Court."[45]

Although the truth of a prejudicial statement will not save it, the press has the right to report fairly and accurately on both criminal and civil

39. *Edmonton Sun* trial, *supra* note 28 at para 38.
40. *R v CHEK TV Ltd*, 23 CCC (3d) 395, 1985 CarswellBC 713 at paras 15 & 25 (BCSC).
41. *Ibid.* See also *Manitoba (Attorney General) v Groupe Quebecor*, 1987 CarswellMan 203 at para 43, 45 DLR (4th) 80 (Man CA) [*Quebecor*].
42. *Sommers v Sturdy* (1956), 1956 CarswellBC 104 at para 33 (BCSC). See also *R v Southam Inc*, [1995] 8 WWR 279 (Atla CA).
43. 1965 CarswellQue 8 at para 8, [1965] 4 CCC 318.
44. *R v Lindsay*, [2004] OJ No 3952 (QL) at para 31.
45. *Regina v Carocchia*, 1973 CarswellQue 212 (WL Can) at para 27, 15 CCC (2d) 175.

matters.[46] The ability of the press to report factually on court proceedings was reaffirmed in 1973 in the case of *Bellitti v Canadian Broadcasting Corp*,[47] which states:

> [O]nly when publication or broadcast departs from factual reporting and expresses comments or opinions and those comments or opinions interfere with the administration of justice or prejudice a fair trial that the broadcast or publication will constitute contempt of court.[48]

Subsequently, in *Ontario (Residential Tenancy Commission) v Toronto Apartment Buildings Co,* in which a lawyer had provided clarification to the press about a case, the judge found that the lawyer was not in contempt, as he had disclosed "nothing that was not in the court proceedings."[49]

The "type and tenor" of an article has also been found to be a factor in whether the *sub judice* rule has been breached. In *Zehr v McIsaac*, an article which mentioned a previous conviction of a man facing a dangerous offender hearing was found not to be contemptuous in part due to the "absence of any sensationalism in connection with the article."[50]

Thus, while Canadian courts have opined in various contexts on the principles and rationale for the *sub judice* rule, it remains difficult to predict how it will be applied in any given setting. Additionally, as discussed below, how and when the rule is to be applied has given rise to uncertainty as well.

Application of the sub judice *rule*

The case law described above provides guidance as to the test for breach of the *sub judice* rule. There is still significant ambiguity, however, regarding the following questions: to whom does the rule apply, when does it apply, and to what types of proceedings does it apply?

There is no stated or inherent limit on the parties or people to whom the rule may have application. Most frequently, contempt charges are laid against journalists and media outlets such as newspapers and radio stations. The Ontario Ministry of the Attorney General states, however, that the rule applies to parties, lawyers, public officials, and statements in

46. See *R v Thomas*, [1952] OR 22 at para 6, [1952] 3 DLR 622; *Brown v Murphy*, [1972] 6 WWR 331 at para 14, 30 DLR (3d) 355. See also Law Reform Commission of Canada, *Working Paper 20: Criminal Law Contempt of Court Offences* (Ottawa: Minister of Supply and Services Canada, 1977) at 41: "Under existing law, publication in good faith of an accurate report of the facts of a trial does not constitute contempt of court."

47. (1973) 2 OR (2d) 232 (HC).

48. *Ibid* at 233-234.

49. (1983), 42 CPC 314 at 316.

50. 1982 CarswellOnt 943 at para 39, 39 OR (2d) 237.

the legislatures.[51] Statements by public officials are more likely to result in a motion for a stay of proceedings rather than a contempt charge; however, this is simply our observation, rather than a rule.[52]

There is a clear temporal aspect to the rule—that is, it does not limit publication of information prior to the commencement of proceedings or after the proceedings are terminated.[53] According to the Law Reform Commission of Canada, "it is very important that the beginning and end of the *sub judice* period be clearly determinable and not open to uncertainty."[54] While the *sub judice* rule certainly applies when proceedings are "pending," according to the decision in *Alberta v Interwest*, it may also apply at an earlier stage when proceedings are "imminent."[55] In *Manitoba v Groupe Quebecor*, a breach of the *sub judice* rule was found for news stories which were published "immediately after the arrest" and long before trial.[56]

According to the website of the Ontario Ministry of the Attorney General, the rule applies "where court proceedings are ongoing, and through all stages of appeal until the matter is completed." While the *sub judice* rule may technically apply during appeals, we have not come across a single example in which someone faced contempt charges for publications made regarding an appeal.

Further, prosecutions of any kind in relation to media reports of criminal proceedings are increasingly rare. It is now common for the police to hold a press conference after a significant arrest. Media report on various aspects of the crime, the victim, and the accused, including past criminal records where this is known. Columnists specialize in covering trials, including the background, context, and investigative details, while the less traditional media tend to expose even more with even less concern for any legal consequences. While some aspects of the statutory *sub judice* rules remain enforced (such as section 517 of the *Criminal Code* which precludes reporting on bail hearings), the rule is more notable in the criminal context for the lack of consistent enforcement.[57] Given how much information about criminal proceedings is openly publicized through traditional and social media, it is an open question whether there is real benefit to protecting the disclosure of what is left.

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51. Ontario Ministry of the Attorney General, *supra* note 5.
52. See *R v Vermette*, *R v Kormos*, *R v Chenier*, and *R v Lindsay*, discussed below.
53. Martin, *supra* note 5 at 100.
54. Law Reform Commission of Canada, *supra* note 46 at 44.
55. *Alberta (Attorney General) v Interwest Publications Ltd*, 1990 CarswellAlta 112 at para 32; 73 DLR (4th) 83 (ACQB) at para 25.
56. *Quebecor, supra* note 41.
57. See P Schabas, "What Happens at a Bail Hearing Anyway" (2011) 54 SCLR (2d) 197.

Most of what few cases come to court in which the *sub judice* contempt rule is considered emerge from criminal proceedings. *Sub judice* cases in civil proceedings are rarer. The rule appears, however, to have equal application to publications which prejudice civil trials as well. The most notable example is the *Sunday Times Case*, discussed above, which dealt with civil claims against a pharmaceutical company. The Law Reform Commission of Canada recommended in its 1982 report on contempt of court that although "the risks are obviously smaller," the *sub judice* rule should continue to apply in civil cases.[58] Indeed, when it comes to the practice of public officials declining to comment on matters before the courts, this is more likely to occur in civil proceedings, whether class actions for damages or administrative, regulatory, or constitutional challenges.

Beyond civil justice, the application of the *sub judice* rule has yet to be clarified. The *sub judice* rule was developed at a time before the rise of administrative justice through tribunals, boards, agencies and regulatory bodies. Now that so much adjudication in Canada has shifted to administrative settings, it would appear that the logic underlying the rule would apply with equal force in those settings where impartial adjudication by an arm's length or quasi-independent body is part of the process, even though the technical mechanism for enforcing the common law rule is not present, since administrative adjudicators (like Provincial Court judges) have no inherent contempt powers.

Stay of proceedings

A finding of contempt of court is not the only potential consequence for breach of the common law *sub judice* rule. An accused may be granted a stay of proceedings in "extreme cases" in which a publication compromises a fair trial. This remedy was considered by the Supreme Court of Canada in the Quebec case of *R v Vermette*.[59] In that case, an RCMP officer was accused of stealing computer tapes containing the names of *Parti Quebecois* members.[60] While the trial was ongoing, the premier of Quebec, René Lévesque, denounced one of the defence witnesses in the National Assembly, despite warnings by the Speaker that such comments would be prejudicial to the accused. Justice La Forest described the Premier's comments as follows:

58. *Ibid.*
59. [1988] 1 SCR 985, 50 DLR (4th) 385 at para 21.
60. *Ibid* at para 34.

> [T]he Premier denounced not only the actions of the witness, whose credibility he attacked in colourful and abusive language, but also those of the defence lawyers, the federal government and the R.C.M.P. He even accused members of the R.C.M.P. of having committed several crimes. This diatribe lasted some 20 minutes.[61]

There was extensive coverage of these comments in the media and the trial judge discontinued the trial, finding that a fair trial was impossible in the circumstances. When a new trial was ordered, the defence sought a stay of proceedings, which was denied by the Supreme Court of Canada. In his reasons, Justice La Forest stated that "[j]udicial abdication is not the remedy for an infringement of the *sub judice* rule.... I cannot accept that the reckless remarks of politicians can thus frustrate the whole judicial process."[62] The continued administration of justice was especially crucial due to the "serious allegations" against the RCMP and the federal and provincial governments.[63]

The availability of a stay of proceedings was at issue as well in the Ontario case *R v Kormos*,[64] which involved allegedly inappropriate comments in the legislature by the Attorney General of Ontario Charles Harnick. Peter Kormos and Shelley Martel, two NDP MPPs entered the Office of Family Support Services, run by the Ministry of the Attorney General, in order to prove that the office was not actually up and running as claimed. Police were then called to investigate a "break-in" at the office. Later that afternoon, in the legislature, the Attorney General announced the criminal investigation, and stated that the Mr. Kormos and Ms. Martel had broken into the office.[65] When Mr. Kormos was charged with assaulting a security guard during the incident, he moved for a stay of proceedings, claiming that the integrity of the administration of justice was called into question when the Attorney General publicly announced the criminal investigation of the two MPPs and then pronounced on their guilt. While Justice Vaillancourt did not find that the integrity of the administration of justice was compromised to such an extent as to require a stay of proceedings, he warned that the Attorney General:

61. *Ibid* at para 36.
62. *Ibid* at para 23.
63. *Ibid.*
64. (1997) 154 DLR (4th) 551, 36 OR (3d) 667 (Ont Ct J, Prov Div).
65. Harnick's statement, while not recorded in the Hansard due to the volume of interjections and commotion, was deemed to have been made as a finding of fact by the court.

> would have been well advised to heed the practice of not commenting on the potential guilt of anyone with respect to any offence that is under investigation by the authorities or before the courts. This caution applies to all elected officials but particularly to those persons occupying the sensitive and important position of Attorney General.[66]

A stay of proceedings was also sought in *R v Chenier*,[67] a case in which police made some inappropriate public comments about a murder suspect, including that "the right person is going to be sitting in the prisoner's dock," and that "[Chenier] is an A-level bad guy." The police admitted that the wording of these comments should have been chosen more carefully, but that they were necessary as part of a police strategy to warn the public of potential danger and to solicit help from the public in capturing the suspect. The Ontario Superior Court refused to grant a stay of proceedings to Chenier, relying on the assumption that the amount of intervening media coverage on other incidents would make it difficult for potential jurors to recall the prejudicial comments. While declining to grant a remedy, Justice Rutherford urged police to rely routinely on the *sub judice* rule when asked to comment on anything beyond "factual information as to the charges and the necessary immediate facts." He stated that "[t]he rule is not a tool that can be pulled out of the box for use on occasion when it suits one's interest in a particular case" and that "[i]ts invocation is all too rare."[68]

It is interesting that the decision focused almost exclusively on the prejudicial comments issued by the police, while much of the negative characterization of Chenier was the result of journalistic initiative. Given that the police were not themselves facing sanction, it is puzzling that the Court did not consider the prejudicial content of the media coverage as a whole in order to determine whether a stay of proceedings was necessary. It seems that comments by police are assumed to have a greater prejudicial potential than comments by journalists, whether this is in fact true or not.

A stay of proceedings remains a remedy invoked rarely. Rather, such cases more commonly serve as occasions for a restatement of general principles. In *R v Lindsay*, discussed above,[69] for example, the Ontario Superior Court declined to grant a stay of proceedings for the Hells Angels. Justice Fuerst cautioned public officials about speaking to the media when a matter is under adjudication:

66. Kormos was subsequently acquitted of the assault charge.
67. [2001] OTC 1033, 2001 CarswellOnt 5577 (WL Can) (Ont Sup Ct).
68. *Ibid* at para 18.
69. *Supra* note 44.

> I agree that members of government, including provincial Attorneys General, and members of the law enforcement community, including senior police officers, must always exercise caution in their comments to the media, because of the danger that their remarks will reflect or appear to reflect authoritative opinions about specific cases before the courts.[70]

The common law *sub judice* rule as a whole appears well accepted as a general statement of principle but enforced by different judges in different settings in different ways. This lack of coherent application is exacerbated by the tendency to blur the *sub judice* rule dealing with prejudice to a hearing with a general caution that public officials should avoid comment on matters before adjudication. This latter concern arises not from the common law rule per se but may be traced instead to the *sub judice* Parliamentary convention, to which we now turn.

3. *The* sub judice *parliamentary convention*

Unlike the common law *sub judice* doctrine which is enforced through the court's contempt power, the *sub judice* convention as a Parliamentary rule is governed through the Speaker's office. Typically, Parliament is governed by rules which are enforceable by the Speaker and by conventions which guide practice but are not enforceable. Conventions are rules of behaviour that are not enforced by either the courts or the speakers of our legislatures.[71] As Andrew Heard has explained:

> Most conventions are unwritten, coming from years of practice – either in doing a certain thing (such as answering questions in the House) or in not doing something (such as Governors General not refusing Bills presented to them for royal assent). However, some conventions have been written down or even have their genesis in a written agreement among political actors.[72]

The *sub judice* doctrine is unusual in that it appears to be both a rule *and* a convention, which is to say it has been occasionally enforced and occasionally invoked as a binding rule giving rise to no sanction if violated.[73] The *sub judice* convention, as defined in the Beauchesne's *Parliamentary Rules & Forms*, states that:

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70. *Ibid* at para 49.

71. See Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press Canada, 1991).

72. See Andrew Heard, "Constitutional Conventions and Parliament," online: Canadian Parliamentary Review <http://www.revparl.ca/english/issue.asp?param=168&art=1143>.

73. See generally Robert Marleau & Camille Monpetit, *House of Commons Procedure and Practice* (Ottawa: House of Commons, 2000) at 534-536.

> Members [of Parliament] are expected to refrain from discussing matters that are before the courts or tribunals which are courts of record. The purpose of this *sub judice* convention is to protect the parties in a case awaiting or undergoing trial and persons who stand to be affected by the outcome of a judicial inquiry. It is a voluntary restraint imposed by the House upon itself in the interest of justice and fair play.[74]

In Ontario, the *sub judice* convention has been codified in Standing Order 23(g), which states:

> In a debate, a member shall be called to order by the Speaker if he or she refers to any matter that is the subject of a proceeding
>
> (i) that is pending in a court or before a judge for judicial determination; or
>
> (ii) that is before any quasi-judicial body constituted by the House or by or under the authority of an Act of the Legislature,
>
> where it is shown to the satisfaction of the Speaker that further reference would create a real and substantial danger of prejudice to the proceeding.[75]

Speaker Steve Peters elaborated on the *sub judice* convention in the Ontario legislature on 27 October 2008, in his ruling that a motion which called for a public inquiry on the release of an individual on bail offended the convention. He stated that at the core of the convention is "the principle that the separation between legislative and judicial bodies is to be respected." He went on to compare the parliamentary convention with the restriction on the media:

> Restrictions on media comment are limited to not prejudicing the trial, but Parliament needs to be especially careful: it is important constitutionally, and essential for public confidence, that the judiciary should be seen to be independent of political pressures. Thus, restrictions on parliamentary debate should sometimes exceed those on media comment.[76]

While this approach may be sound when considering a criminal trial, there are additional factors to consider when it is the government that is on trial for alleged wrongdoing. Where legal proceedings relate to government

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74. Beauchesne et al, *Beauchesne's Rules and Terms of House of Commons of Canada*, 6th ed (Toronto: Carswell, 1989).

75. Legislative Assembly of Ontario, "Standing Orders of the Legislative Assembly of Ontario" (January 2009), online: <http://www.ontla.on.ca/web/go2.jsp?Page=/house-proceedings/supporting-content/files/standing_orders&menuitem=dandp_ proceedings&locale=en>.

76. Legislative Assembly of Ontario, "No. 80: Votes and Proceedings" (27 October 2008, Sessional Day 88), online: <http://www.ontla.on.ca/web/house-proceedings/house_detail.do?locale=fr&Date=2008-10-27&detailPage=/house-proceedings/votes-and-proceedings/files_html/080_October_27_2008.htm>.

actions, there is harm in the government *not* providing an account to the public of its activities. In this situation, the potential for a public comment to be viewed as an attempt to interfere with the judiciary should be weighed against the importance of accountability to the public.

4. *The* sub judice *rule from a comparative perspective*

As demonstrated above, references to the *sub judice* rule in courts and Parliaments in Canada have not been sparse. There remains, however, no definitive Supreme Court guidance on the nature and scope of the rule. The *sub judice* rule has been subject to extensive consideration in other common law jurisdictions and for this reason, it is helpful to see the rule through a comparative lens. Our purpose in so doing is not to provide an exhaustive review of the rule across peer jurisdictions but rather to better understand how it has been approached in Canada, and what alternative approaches may be available or desirable. In this brief review, we examine the status of the *sub judice* rule in the U.K., South Africa, Australia, and the U.S.

United Kingdom

In the U.K., the *sub judice* rule is codified in the *Contempt of Court Act*, 1981.[77] This move toward the codification of contempt was motivated in part by the decision of the European Court of Human Rights that the House of Lords decision in the *Sunday Times* case violated freedom of expression.[78] According to subsection 2(1) of the *Act*, publications which create "a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced" are subject to strict liability. The publisher of such material will be guilty of contempt of court regardless of intent to interfere with the course of justice.[79] The strict liability rule only applies, however, while proceedings are active.[80]

There are several defences and exceptions to this rule. For example, it is a defence to a charge of contempt if the publisher is unaware—and has no reason to suspect—either that proceedings are active or that the publication contains the prejudicial material.[81]

There is also a defence for "discussion of public affairs." Section 5 of the *Act* provides:

77. 1981, c 49, online: <http://www.legislation.gov.uk/ukpga/1981/49>.

78. *Sunday Times*, *supra* note 21; see Sally Walker, "Freedom of Speech and Contempt of Court: The English and Australian Approaches Compared" (1991) 40 Int'l & Comp LQ 583 at 584.

79. *Contempt of Court Act*, *supra* note 76, s 1.

80. *Ibid*, s 2(4). The statute provides extensive elaboration on when criminal, civil, and appellate proceedings are active.

81. *Ibid*, s 3(1)–(2).

> A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion.[82]

It is important to note that this defence only serves to exempt a publication from the strict liability rule. It therefore would not exempt a publication which intentionally aims to interfere with the administration of justice. It does address, however, the concern that public debate on matters of public interest should not be suppressed merely because of the existence of litigation, reflecting Lord Scarman's insistence in the *Sunday Times* case that "the issue of a writ cannot stifle all comment."[83]

South Africa

In South Africa, the *sub judice* rule is not codified and, like in Canada, can be found in the common law cases on contempt of court. The South African *sub judice* contempt law has, however, evolved to its present state more recently than in Canada. The leading case, *Midi Television (Pty) Ltd v Director of Public Prosecutions*,[84] was decided in 2007. The Supreme Court of Appeal of South Africa relied on a review of the American, British, Canadian, and Australian case law and arrived at a test requiring a "real risk" of "demonstrable and substantial" prejudice to the administration of justice.[85] This was a departure from the previous authorities which held that a publication which merely "tends" to prejudice the administration of justice is subject to a charge of contempt.[86] Here, too, the emphasis on prejudice rather than the mere existence of litigation is instructive.

Australia

In Australia the *sub judice* rule is also defined by the common law. Publications which mention a case *sub judice* are subject to contempt sanctions in Australia if there is a "real and definite tendency" of interfering with the administration of justice.[87] The intention to prejudice a trial is

82. *Ibid*, s 5.
83. *Sunday Times*, *supra* note 21 at para 27.
84. [2007] SCA 56 (RSA), online: <http://www.saflii.org/za/cases/ZASCA/2007/56.html>.
85. *Ibid* at para 19.
86. *S v Van Niekerk* 1972 (3) SA 711 (A); *S v Harber* 1988 (3) SA 396 (A).
87. *Hinch & Macquarie Broadcasting Holdings Ltd v Attorney-General* (Vic), [1987] HCA 56, 164 CLR 15 (available on Austlii) [*Hinch*] at para 7 (Wilson J), and para 37 (Toohey J). Justice Deane used similar language at para 2: "the clear tendency of the publication is to preclude or prejudice the fair and effective administration of justice." Chief Justice Mason preferred: "a real risk of serious prejudice to a fair trial" (para 26).

not a requirement for breach of the rule, and thus full *mens rea* is not required.[88]

Unlike in Canada the Australian common law provides a clear public interest exception to *sub judice* contempt. The authority for the public interest defence is a frequently cited passage from *Ex parte Bread Manufacturers*:

> The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion or the denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant....It is well settled that a person cannot be prevented by process of contempt from continuing to discuss publicly a matter which may fairly be regarded as one of public interest, by reason merely of the fact that the matter in question has become the subject of litigation....If, however, under colour of discussing, or continuing to discuss, a matter of public interest statements are published the real purpose of which is to prejudice a party to litigation, the contempt is none the less serious that an attempt has been made to cloak it.[89]

Like the British "discussion of public affairs" defence, the Australian public interest exception does not apply when a publisher actually intends to prejudice a party to litigation. The application of the public interest principle involves balancing the public interest in freedom of expression with the public interest in administration of justice,[90] which means that even if a publication contributes to a discussion of public interest, there is no guaranteed exemption from a finding of contempt.

Additionally, comments made by higher level members of government, such as Ministers, may be seen to have more impact. This was illustrated in the case of *Director of Public Prosecutions v Wran*,[91] in which the Premier of New South Wales stood in front of a court house and publicly stated that an accused was innocent. The Court of Appeal found him guilty of contempt, giving weight to his position as Premier, which would increase the newsworthiness of his prejudicial comments.[92]

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88. *Ibid* at para 6 (Deane J).

89. *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd*, (1937) 37 SR (NSW) 242 at 249-250, cited in *Hinch, ibid* at paras 18, 23.

90. *Hinch, ibid.*

91. (1986) 7 NSWLR 616. Both the Premier and the publisher of the information were found guilty of contempt and fined.

92. The Honourable Justice Whealy, "Contempt, Some Contemporary Thoughts" (27 August 2007), online: <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_whealy180807>.

United States

In the American law on *sub judice*, the balance is tipped the farthest toward free speech of any of the other common law jurisdictions. This is a result of the strong constitutional protections on freedom of expression found in the First Amendment, as well as the willingness of American courts to protect fair trial rights by other means, such as sequestering juries[93] and reversing convictions that were influenced by pretrial publicity.[94] The prevailing test for contempt *sub judice*, which was first set out in the 1941 case *Bridges v California*, requires that there be a "clear and present danger" of improper judicial influence before courts will impose sanctions for contempt. Additionally "the substantive evil must be extremely serious and the degree of imminence extremely high" before sanctions can be imposed.[95]

The 1962 case *Wood v Georgia* is illustrative of the U.S. Supreme Court's restraint in finding contempt for prejudicial public statements.[96] Amidst a political campaign, a judge, who was running for re-election, had instructed a grand jury to investigate rumours that voters in the black community were being bribed to vote in a particular way. A sheriff, also seeking re-election, issued a press release which called the investigation "a crude attempt at judicial intimidation of negro voters and leaders, or, at best, as agitation for a 'negro vote' issue in local politics." The press release also compared the actions of the judge to those of the Ku Klux Klan. The sheriff was cited for contempt, but his conviction was overturned by the Supreme Court, which stated that "in the absence of any showing of an actual interference with the undertakings of the grand jury, this record lacks persuasion in illustrating the serious degree of harm to the administration of law necessary to justify exercise of the contempt power."[97]

The U.S. experience highlights the risks of a subjective standard to the *sub judice* doctrine in a highly politicized environment. Considering the treatment of the rule in other common law jurisdictions generally, it is fair to conclude that the consensus has focused on the nature and extent of prejudice to an adjudicative process. Between the open courts principle

93. James E Jefferson, "Loosening the Gag: Free Press and Fair Trial" (1985) 43 UT Fac L Rev 100 at 109.

94. See *Marshall v United States* (1959) 360 US 310; *Irvin v Dowd* (1961) 366 US 717; *Rideau v Louisiana* (1963) 373 US 723; *Estes v Texas* (1965) 381 US 532; *Sheppard v Maxwell* (1966) 384 US 333.

95. *Bridges v California*, (1941) 314 US 252, 261-263.

96. (1962) 370 US 375.

97. *Ibid.* The case is also described in Jefferson, *supra* note 93 at 108-109.

on the one hand, and robust free expression rights on the other, the *sub judice* rule has evolved as an exceptional sphere where comment in the media likely to undermine the integrity of a proceeding is subject to the prohibition. This approach is a far cry from the broad and unquestioned "no comment" which so often surrounds Government litigation in Canada.

II. *The search for coherence*

In this second section, we consider critical commentary on the *sub judice* rule in Canada, and the search for coherence in light of the varied legal, factual, and political circumstances in which the rule has been applied at different times. Specifically, we consider (1) the clarity in the rule, (2) the limits on the rule, (3) the merits of codifying the rule, and (4) the mischief to which the rule is directed.

There is a surprising dearth of literature analyzing the *sub judice* rule in Canada, which is what in part inspired this study. The modest Canadian literature here again may be supplemented with a broader view of observations and critiques from other common law jurisdictions. In each setting, this commentary has searched for the appropriate balance between free speech and free press on the one hand, and respect for the integrity and impartiality of the adjudicative process on the other. In Canada and in other common law jurisdictions, academic commentators have argued for reform, but generally not abolition, of the *sub judice* rule.

1. *Lack of clarity*

As illustrated by the above discussion on the law surrounding the *sub judice* rule, the boundaries between the different aspects of the rule are not well defined, with the exception of the statutory forms of the rule. Because the *sub judice* rule is not only part of the law of contempt of court but also the basis on which a party may apply for a stay of proceedings, as well as a parliamentary convention governing the behaviour of members of parliament and the provincial legislatures, it remains uncertain as to which rule a government official is relying on when he or she refuses to comment on a matter because it is before the courts. If it is impossible to indicate with precision the legal basis for the refusal to comment, then it is difficult to demand that the rule be invoked neither too broadly nor too narrowly.

The case law does not define where contempt of court ends, where the parliamentary convention begins, and where a stay of proceedings will be considered. Public officials stand at the cross-section of all three aspects of

the rule. In *R v Carocchia*,[98] referred to above, a police officer was found to be in contempt of court for issuing a prejudicial press release, but that sanction was not at issue in either *R v Lindsay*[99] or *R v Chenier*,[100] both of which involved comments by the police. Neither can it be said that the boundary between judicial enforcement of the *sub judice* rule and the parliamentary convention lies at the steps of the legislature. In the cases of *R v Vermette*[101] and *R v Kormos*,[102] a stay of proceedings was sought for comments made inside the provincial legislatures. And in 2006, an Ontario MPP was found to be in breach of the *sub judice* parliamentary convention, codified in the Ontario Standing Orders, for public comments made outside the legislature.[103]

While the Supreme Court has yet to weigh in on the substantive scope of the *sub judice* rule, it has addressed the relationship between the various incarnations of the rule in *Canada (Minister of Citizenship and Immigration) v Tobiass*. The Court commented that although the *sub judice* rule "is a matter of Parliamentary convention and not statutory law, it is desirable that the convention of Parliament as to matters *sub judice* should, so far as possible, be the same as the law administered in courts."[104]

Similarly, Graham Steele argues in his article "The *Sub Judice* Convention: What to do when a Matter is Before the Courts?" that the parliamentary convention should reflect the judicially enforceable contempt of court doctrine. He notes, however, the difficulty that there are very few cases which have dealt with contempt proceedings against parliamentarians.[105] He attributes this to the fact that journalists are publicly reporting on court proceedings on a daily basis, providing a much larger base from which contempt proceedings may emerge.[106] In contrast, the words of parliamentarians are not widely read, and are in fact filtered by journalists, who tend to avoid reporting anything that could clearly give rise to contempt proceedings.[107] Given that the *sub judice* contempt rule is found exclusively in the common law, a lack of precedent for its application to publicly elected government officials creates a void, whereby

98. *R v Carocchia*, *supra* note 45.
99. *R v Lindsay*, *supra* note 44.
100. *R v Chenier*, *supra* note 67.
101. *R v Vermette*, *supra* note 59.
102. *R v Kormos*, *supra* note 64.
103. Graham Steele, "The Sub Judice Convention: What to Do When a Matter is 'Before the Courts'" (Winter 2007) 30:4 Can Parl Rev 5 at 12.
104. [1997] 3 SCR 391 at para 114.
105. Steele, *supra* note 103 at 8.
106. *Ibid* at 8.
107. *Ibid* at 9.

government officials do not necessarily know which public statements might violate the rule. As stated by Steele, "[t]he more precedents we have, the more guidance we have."[108] More clarity is required if public officials are to refuse to comment when bound by the rule, and provide a statement on issues of public importance when there is no legal restriction on doing so.

2. *The limits on the* sub judice *rule*

In addition to the importance of providing a clear definition of the rule and its application so that it can be invoked in a precise manner, it is important to approach the rule as an exceptional sphere, as noted above. Most of the criticisms of the *sub judice* rule address the scope of the rule, and its overly broad interpretation.

As discussed above, Canadian courts have provided little guidance on the interaction between the *sub judice* rule and the *Charter* guarantee of freedom of expression. In the early years of the *Charter*, it was argued that the balance between free press and a fair trial should tilt toward freedom of the press, but not to the extent of the American "clear and present danger" test. [109] Under this approach, the *sub judice* rule would be applied only where necessary, and more focus would be given to alternative methods of ensuring a fair trial.[110] Further, a penalty for breach of the *sub judice* rule would be imposed only in cases where actual interference with the trial can be shown.[111]

It is also argued that an appropriate way to balance free expression with the fair administration of justice would be if a publisher were liable for contempt "only if the publisher can be shown to have acted recklessly."[112] This would provide some clarity for publishers, who otherwise are forced by uncertainty to either ignore the law or engage in "over-cautious self-censorship."[113]

While the Supreme Court of Canada has restricted the ability of courts to impose publication bans due to the importance of freedom of expression,[114] this has not been extended to *sub judice* contempt. As discussed above, the *Dagenais* approach has been specifically rejected in the *sub judice* context, at least in Alberta.[115]

108. *Ibid* at 8
109. Jefferson, *supra* note 93.
110. *Ibid* at 127.
111. *Ibid* at 129.
112. Walker, *supra* note 78 at 606.
113. *Ibid.*
114. *Dagenais*, *supra* note 35.
115. See *Edmonton Sun* appeal, *supra* note 28 at para 56.

Much of the commentary and review of the scope of the *sub judice* rule has been done by law reform commissions in the common law countries. In general, the commissions have recommended retaining the *sub judice* rule in some form, but usually with a more coherent set of distinctions as to the circumstances in which the rule should apply.

The Canadian Law Reform Commission reviewed the *sub judice* rule in its 1982 report on contempt of court, in which it advocated for the codification of criminal contempt, including the *sub judice* rule. The Commission recommended that the *sub judice* rule be retained for both criminal and civil cases, with some modifications. It was of the view that only "serious interferences" should be contemptuous in order to promote freedom of expression. It found that, however, "[i]t is impossible to formulate a general rule. The matter must therefore be left to judicial interpretation."[116]

The Law Reform Commission of New South Wales, Australia, "tentative[ly]" recommended that the *sub judice* rule be retained,[117] despite the lack of empirical evidence supporting the premise that jurors and judges would be influenced by media publications.[118] It concluded that the abolition of the rule could "seriously impede"[119] the administration of justice, particularly if evidence not admissible in court were available through the media. The Commission concluded that the value of open justice is maintained through the Australian "public interest" and "fair and accurate reporting" defences.[120] It recommended, however, that there should be "an element of fault" to the offence.[121]

Insight may also be gained from commentary on the scope of the *sub judice* parliamentary convention. Graham Steele advocates for a narrower scope of the convention, arguing that an overly broad interpretation of the *sub judice* convention tends to suppress parliamentary debate, "even when there is not the remotest possibility that the fairness of a trial will be impaired."[122] Steele gives a number of possible reasons why parliamentarians would prefer not to speak about a particular matter, such as legal strategy, the parliamentary "right to remain silent" with respect to any matter, or a desire to wait for the outcome of a public inquiry or

116. Law Reform Commission of Canada, *supra* note 46 at 28.
117. Law Commission of New South Wales, "Discussion Paper 43 (2000)—Contempt by publication" at para 2.110, available for purchase online: <http://www.lawreform.lawlink.nsw.gov.au/lrc/lrc_orderingdiscussionpapers.html>.
118. *Ibid* at para 2.67.
119. *Ibid* at para 2.110.
120. *Ibid* at para 2.112.
121. *Ibid* at para 2.116.
122. Steele, *supra* note 103.

other fact-finding process on the issue.[123] He argues, however, that these should not be confused with the *sub judice* convention. He discourages Speakers from "playing it safe"—that is disallowing a comment in case it might offend the convention—because to do so unfairly tilts the balance between free speech and fair trials in one direction.[124] Although Steele's argument is based on the rule governing comments in Parliament and the legislatures, his arguments can be extended to apply to the invocation of the *sub judice* rule by government officials outside the House.

While Steele generally advocates for a narrower application of the *sub judice* convention, he believes that there is a greater need for parliamentarians to respect the convention when commenting on matters in the administrative justice system, as administrative tribunals may be more vulnerable to prejudice than courts. He states:

> Tribunal members, in contrast [to judges] typically have much shorter terms of office, much lower pay, and no power to punish or even reprimand anyone who is not a party before them. They are appointed by the government, and may be beholden to the government for their re-appointment, funding, and working conditions. If anyone is going to be influenced by the captious comments in parliament, it is more likely to be at the tribunal level than in the courts.
>
> On the other hand, there is a vast number of administrative proceedings at any given time, and over-broad application of the *sub judice* convention would render whole areas of public policy beyond parliamentary debate.[125]

There is no question that the *sub judice* parliamentary convention applies to at least some regulatory and adjudicative proceedings. Impartiality and public confidence in the objectivity of adjudicative and regulatory decision makers is just as important as in the judicial context. In some cases, *sub judice* may be even more significant in these contexts as adjudicative and regulatory decision makers are, arguably, more susceptible to pressure from the executive branch because they lack constitutionally entrenched judicial independence. As tribunals are not competent to punish for contempt of court, however, the common law *sub judice* rule does not appear to be enforceable against government officials who make comments in public settings which cause prejudice to adjudicative or regulatory proceedings. This apparent gap in the scope of the existing law should be addressed, especially in light of the Supreme Court of Canada statement

123. *Ibid* at 6.
124. *Ibid* at 7.
125. *Ibid* at 12.

in *Tobiass* that the parliamentary convention should "be the same as the law administered in courts."[126] To the extent the rule applies to protect the integrity of adjudicative proceedings, there is no principled reason why this should not be extended to settings of adjudication outside the judicial context.

3. *Codifying* sub judice*?*

The lack of certainty and consistency in the common law applications of the rule, highlighted by law reform reports and academic commentary, has in some jurisdictions led to attempts at codification. The *sub judice* rule was successfully codified in the U.K. by the *Contempt of Court Act* of 1981, as discussed above. The *Contempt of Court Act* did not, however, entirely replace common law contempt, but merely "amend[ed] parts of it."[127] Sally Walker, a senior law professor at the University of Melbourne, argues that even in the U.K., a publisher can rely on developments in the common law for protection from liability for contempt *sub judice.* This led her to question whether the British approach to codification provides any more certainty about the *sub judice* rule than the common law alone.[128]

In contrast to the U.K. approach, the Law Reform Commission of Canada recommended complete codification of criminal contempt, with an amendment to section 8 of the *Criminal Code* which would have eliminated the residual power of the courts to punish for contempt of court at common law.[129] The legislative text proposed by the Commission read: "Every one commits an offence who, while judicial proceedings are pending...publishes or causes to be published anything he knows or ought to know may interfere with such proceedings."[130] The text recommended by the Commission provided for precise start and end points of the *sub judice* rule, and specified that "accurate and impartial reports of judicial proceedings published in good faith" would be permitted.[131]

Two years later, in 1984, an attempt was made by the Trudeau government to codify the *sub judice* rule as part of Bill C-19, the *Criminal Law Reform Act.*[132] Bill C-19 would have codified most of the law of contempt of court, leaving for the common law only the power of judges

126. Tobiass, *supra* note 104.
127. Walker, *supra* note 78 at 584.
128. *Ibid* at 585.
129. Law Reform Commission of Canada, *supra* note 46 at 47.
130. *Ibid* at 43.
131. *Ibid* at 44.
132. Bill C-19, *Criminal Law Reform Act*, 2d sess, 32nd Parl, 1983-84 [Bill C-19].

to punish for non-compliance with a judicial order.[133] The Bill would have codified the *sub judice* rule as follows:

> Everyone who knowingly makes or causes to be made any publication that creates a substantial risk that the course of justice in any particular civil or criminal judicial proceeding pending at the time of the publication will be seriously impeded or prejudiced is guilty of [an offence].[134]

This would have narrowed the application of the *sub judice* rule, as it would only apply if the risk to a judicial proceeding is "serious." According to one review of the Bill C-19 at the time, the inclusion of the word "knowingly" also represented a departure from the common law, as it would have excluded from its ambit cases in which the publisher was unaware of the judicial proceedings or of the risk of prejudice.[135]

Drawing on the recommendations of the Law Reform Commission, Bill C-19 specified start and end points of the application of the *sub judice* rule.[136] It also provided for two defences. The *sub judice* rule would not have applied to "a fair and accurate report of a legal proceeding" that was "published contemporaneously and in good faith" or to a publication that "was made as or as part of a discussion in good faith of public affairs or other matters."[137] Strangely absent from this second defence is the specification that there is no exception for comments which are intended to prejudice judicial proceedings, as is present in the analogous British and Australian exceptions. Rather than viewing these as "defences," in our view, it is preferable to view the *sub judice* analysis as one of balancing the interests of a fair trial against other interests such as the open courts principle, freedom of the press, and government accountability. An exception for public discussion is well-justified, but may go too far if it is not counterbalanced by an absolute prohibition on intentional interference with the administration of justice.

Bill C-19 was never enacted, as it died when an election was called in the summer of 1984. In our view, codifying the *sub judice* rule is unlikely to achieve the contextual balancing exercise suggested above. We argue that coherence is a goal not always best accomplished by imposing bright lines. As we discuss below, treating the rule as an ethical principle, subject to elaboration in ethical guidelines and commentaries may provide both

133. *Ibid*, cl 6.
134. *Ibid*, cl 33.
135. Linda Fuerst, "Bill C-19: Reforming the Criminal Law" (1984) 16 Ottawa LR 316 at 318.
136. Bill C-19, *supra* note 132, cl 33.
137. *Ibid.*

the flexibility and clarity which those who may be subject to the rule need most.

4. *Identifying the mischief in the* sub judice *rule*

Having raised a variety of concerns with the current legal underpinnings of the *sub judice* rule, the question remains as to what mischief the rule is addressing, and how to tailor the application of the rule to be effective in this regard. The review of the jurisprudence provided above reveals a concern not with publicity about a case or the underlying dispute but with *prejudicial* publicity—that is, publicity which could reasonably undermine the impartiality or integrity of the judicial process. Avoiding prejudice to a judicial process lies at the heart of the *sub judice* rule. Therefore, to the extent that the *sub judice* rule does not in fact protect the integrity of the administration of justice, the justification for the existence of the rule may be undermined.

In *R v Edmonton Sun*, Justice Binder lists four underlying purposes of the *sub judice* rule. The first is "to avoid prejudicing the fair trial of an issue." He states that the focus is usually on the publication's influence on jurors, but not exclusively. The second rationale is "to preserve the impartiality of the judicial system, protecting it from undue influence which might affect its operation, or at least might appear to do so". The third is to protect the system of evidence, which would be compromised if inadmissible evidence were available publicly. The final rationale is "generally to uphold the public interest in the due administration of justice."[138]

In *R v Chenier*, the rationale was stated as follows:

> The *sub judice* rule is designed to enable to courts to fulfill their purpose without improper influence over either their judicial determination or public opinion as to the issue for determination.[139]

This rationale of the rule was not restricted to influence on juries, and the *sub judice* rule is often justified when a matter is being decided by a judge alone. According to a former Chief Justice of Ontario:

> No judge or juror should be embarrassed in arriving at his decision by an expression of opinion on the case by anyone. He should not be put in a position where, if he decides in accordance with the opinion expressed or the popular sentiment existing, it can be said he has been influenced; nor should he be put in the position where it could be said he was antagonistic to any opinion or popular sentiment. Everyone who has a matter before

138. *Edmonton Sun* trial, *supra* note 28 at para 17.
139. *R v Chenier*, *supra* note 67 at para 17.

> a court of justice for decision has the right to have the decision of the court founded on the law as the court conceives it to be and the evidence properly submitted.[140]

Other courts have, however, questioned whether, in reality, the impartiality of judges or juries will necessary be compromised by media publications. In the Manitoba appeal of *R v Sophonow*, there had been extensive media coverage of the facts of a murder trial. Chief Justice Monnin, dissenting, expressed the opinion that exposure to media coverage alone does not impair the ability of jurors to come to an impartial verdict:

> It is most unfair to prospective jurors and contrary to the jury system to assume that since these prospective jurors may have some prior knowledge of the case by virtue of the media that they are probably biased or prejudiced.[141]

In *R v Vermette*, Justice La Forest of the Supreme Court of Canada also emphasized "the ability of a jury to disabuse itself of information that it is not entitled to consider."[142]

The rationale for the *sub judice* rule has also been criticized by observers of the judicial system for lack of empirical foundations, incompatibility with the context of judicial decision-making, and faulty foundational assumptions.

It has been argued in the South African context that the justifications for the *sub judice* rule are "often without foundation."[143] This is due to the fact that jury trials no longer exist in South Africa, and judges—although not "superhuman"—have by their training "no difficulty in putting out of [their] mind matters which are not evidence in the case."[144] The argument that the *sub judice* rule protects public confidence in the court system is also rejected as "miss[ing] the point," since statements that would tend to cause public disrespect for the administration of justice are not in fact prohibited by the rule.[145]

The assumptions that underlie the rule—that people believe and are influenced by everything they hear in the media—are also questionable.[146] In a twenty-first century context, all parties to adjudicative proceedings may

140. JC McRuer, "Criminal Contempt of Court Procedure. A Protection to the Rights of the Individual" (1952) 30:3 Can Bar Rev 225 at 227-228, cited in *Zehr v McIsaac*, *supra* note 50.
141. (1984) 29 Man R (2d) 1 at para 187, 12 CCC (3d) 272 (Man CA).
142. *R v Vermette*, *supra* note 59 at para 53.
143. Craig Cleaver, "Ruling without Reasons: Contempt of Court and the Sub Judice Rule" (1993) 110 S African LJ 530 at 541.
144. *Ibid* at 534, quoting Lord Parker CJ in *R v Duffy & others, exparte Nash* [1960] 2 QB 188 at 189.
145. *Ibid* at 538.
146. Martin, *supra* note 5 at 101.

be affected by a diverse array of informational sources, from conventional print media, radio and television, to websites, digital portals, Facebook and Twitter posts, as well as blogs, and "wiki" posts of varying authority and reliability. The *sub judice* rule appears to have been formulated for a time when the regulation of information was a knowable and controllable process. Not only are the sources of information now diffuse and largely unable to be regulated, but the impact of this information, because of the multiplicity of its sources, also is evolving. Readers of an obscure blog by a citizen journalist attending a court or tribunal proceedings may be influenced by this information differently than those who used to tune in to an authoritative nightly newscast.

The Law Commission of New South Wales, Australia, conducted a review of empirical studies which test the assumptions "that jurors will have come in contact with media publicity surrounding a case, that they will retain the information and that they will be influenced by what they read and hear in the media."[147] The Commission was unable, however, to draw conclusions from the empirical review, as the studies produced divergent results. For example, the Commission reported that:

> some studies have found that "the media, especially television broadcasts, exert a strong and continuing influence on what people think and feel"; while others have found that "the degree to which the specific contents of media publications are recollected is generally very low."[148]

The Commission further reports that even within each camp, the studies are equivocal in their results, finding, for example, that "some jurors" are affected by media coverage in their deliberations, or that there is "some evidence" that news coverage influences jurors.[149] One point of clarity is that jurors tend to be influenced by information regarding previous criminal convictions of the accused, especially when the past conviction was for a similar offence, no matter how this information is received.[150]

147. Law Commission of New South Wales, *supra* note 117 at para 2.55.

148. *Ibid* at para 2.56, citing M Chesterman, "OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America" (1997) 45 Am J Comp L 109 at 140.

149. *Ibid* at para 2.59, citing T Grisham & S Lawless, "Jurors Judge Justice: A Survey of Criminal Jurors" (1973) 3 New Mexico Law Review 252, quoted in JM Shipman Jr & D Spencer, "Courts Recognise Multiple Factors in Free Press/Fair Trial Cases" at 90 (1990) 12 Comm & L 87; Reed, "Jury Deliberation. Voting and Verdict Trends" (1965) 45 South Western Social Science Quarterly 361, quoted in Shipman & Spencer, *ibid.*

150. See M Chesterman, "OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America" (1997) 45 Am J Comp L 109 at 140; and Law Commission of New South Wales, "Report 100 (2003)—Contempt by publication" at para 2.45, online: <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r100toc>.

The criticisms discussed here centre around the factual question of whether exposure to public statements will in reality affect decision-makers, be they judges or jury members. These concerns go to the question not of whether prejudicial statements should be prohibited, but rather of which statements are truly prejudicial.

Ultimately, our concern with the *sub judice* rule is not only as a matter of common law jurisprudence, or Parliamentary convention, but rather political practice. This concern cuts in two different directions. First, there is a concern where public officials seek to avoid accountability for public actions on the basis that the matter is "before the courts." Second, there is a concern where public officials comment in ways that may prejudice the impartiality and integrity of an adjudicative proceeding.

Below, we consider an example of each concern. First, we examine the "Northern Gateway Pipeline" controversy, which highlights the dangers of unconstrained comment by public officials about a matter being adjudicated. Second, we examine the "Mad Cow" controversy, which highlights the dangers of unduly constrained comment by public officials about a matter of public accountability.

III. *Case studies on the* sub judice *rule*

The following section explores the *sub judice* rule in action. We consider an example of the principle in two disparate contexts in order to demonstrate the twin hazards of sidestepping accountability on the one hand, and undermining the integrity of adjudication on the other.

1. *Northern Gateway pipeline*

Arguably, if the root mischief of the *sub judice* rule is to deter attempts at improper influence over adjudicative proceedings, the relevance of the *sub judice* rule in the context of criminal trials with juries is well established and relatively uncontroversial. Whether the rule ought to extend to civil trials before a judge, or to regulatory hearings before appointed tribunal or board members, as we have noted, has received less attention. The implications of this shift toward a greater focus on regulatory and administrative adjudication became apparent in the Spring of 2012, when the Canadian Federal Government began to comment publicly about a regulatory process involving a $5.5 billion pipeline to be built by Enbridge from the Alberta oil sands to a port on the West Coast.

Comments by Prime Minister Stephen Harper and Natural Resources Minister Joe Oliver indicated that the federal government was in favour

of the Enbridge pipeline; however, in an interview, Prime Minister Harper was careful to state that he does not "endorse specific projects." At different junctures during this period, he stated:

> It is vitally important to the national interests of this country that we are able to export our energy products to Asia and, obviously, that is something the government hopes will happen in the future,[151]

and,

> I believe selling our energy products to Asia is in the country's national interest....Now I don't endorse specific projects. Obviously there's a regulatory process. We want that process to happen on a timely basis but that process has to be thorough and has to judge on their own merit.

Natural Resources Minister Joe Oliver was more direct about preventing the regulatory process from being "hijacked," stating:

> Unfortunately, there are environmental and other radical groups that would seek to block this opportunity to diversify our trade. Their goal is to stop any major project, no matter what the cost to Canadian families in lost jobs and economic growth. No forestry. No mining. No oil. No gas. No more hydroelectric dams,[152]

and,

> These groups threaten to hijack our regulatory system to achieve their radical ideological agenda. They seek to exploit any loophole they can find, stacking public hearings with bodies to ensure that delays kill good projects.[153]

While the Prime Minister appeared to be careful not to appear interested in the outcome of a particular proceeding about a particular project, the Minister of Natural Resources' comments appeared to be less careful. While his comments could be construed as offered in support of the legislative changes being proposed by the Government to the regulatory process, a reasonable observer could also conclude that the comments were calculated at undermining those who opposed this particular pipeline in this particular regulatory process.

Where Government wishes to influence a judicial or regulatory proceeding, it certainly has ample tools to do so. It can, for example, simply change the law to compel a particular decision (as it did several

151. Peter O'Neil, "PM headed for conflict with First Nations over pipeline, Rae warns; Court spells out need to consult," *The Ottawa Citizen* (31 Jan 2012) A.3.
152. *Ibid.*
153. *Ibid.*

years ago in relation to nuclear safety where it was determined to be in the public interest to keep the Chalk River Nuclear facility open even though the Canadian Nuclear Safety Commission had ordered it closed for repairs).[154] Or, alternatively, it can change the decision-making process to ensure passage or at least a more timely hearing. This is the path it chose in relation to the pipeline.[155] The puzzle is whether the comments of the Prime Minister and Natural Resources Minister were an attempt to influence the Energy Board's consideration of the Northern Gateway Pipeline, or whether they were comments intended to justify the legislative changes to be introduced—or, as is more likely the case, a little bit of both.

Unlike the Prime Minister and the Natural Resources Minister, comments by BC Premier Christy Clark show a clear intention not to interfere with the administrative proceeding which will decide on the Pipeline project. In an opinion piece published in the Globe and Mail, she listed five "bottom lines" which must be met in order for British Columbia to "consider support" of the pipeline. The first of these is an insistence on "[s]uccessful completion of an environmental review process. In Enbridge's case, this means a recommendation by the Joint Review Panel that the project proceed."[156] She makes no comment on which way she believes the Review Panel should rule, and reserves her comment on the project itself to established facts and BC's interests.

Premier Clark also states that "[l]egal requirements regarding aboriginal and treaty rights must be addressed and First Nations must be provided with opportunities to benefit from these projects."[157] Such public comment regarding First Nations rights could theoretically be challenged by the *sub judice* rule, as the proposed pipeline will cross the territories of

154. For a discussion of this incident, see L Sossin, "The Puzzle of Independence for Administrative Bodies in the Common Law World: A Canadian Perspective" in Susan Rose Ackerman & Peter Lindseth, eds, *Comparative Administrative Law* (Northampton, MA: Edward Elgar Publishing, 2010) at 205-224.

155. See *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, SC 2012, c 19. The changes to the environmental assessment process introduced through the 2012 federal budget bill create strict timelines for the completion of environmental assessments, limit participation in the process, and allow the federal government to override the result of an environmental assessment. This means that the federal government now has the power to go ahead with the Northern Gateway Pipeline regardless of the outcome of the environmental assessment.

156. Christy Clark, "National energy strategy must address B.C. pipeline worries," *The Globe and Mail* (28 July 2012), online: <http://www.theglobeandmail.com/commentary/national-energy-strategy-must-address-bc-pipeline-worries/article4446502/>.

157. *Ibid.*

more than fifty First Nations groups,[158] several of which have outstanding land claims and ongoing litigation with the Federal Government over the ownership and use of those lands. Premier Clark's statement, however, while addressing the issue of the rights of First Nations, does not suggest that she intends to cause prejudice to any proceedings relating to First Nations land affected by the pipeline project. This distinction strikes us as a crucial one. It is possible both to address important matters that are before the courts and to do so in a way which contributes to rather than undermines the integrity of the process.

The challenge in considering the proper application of the *sub judice* rule to these types of circumstances is to disentangle the legitimate need for government to explain why it is acting in a particular way (in this case, streamlining environmental assessments so as to limit delay in approving infrastructure projects) from the illegitimate attempt to get a favourable decision from an impartial and independent expert board.

2. *Mad cow*

Just as the main risk of undermining the integrity of adjudication is apparent in contexts of administrative justice, the main risk of impairing accountability through the overly broad invocation of the *sub judice* rule is in civil litigation against the Crown. This dynamic is particularly apposite in the context of class actions, as an incidence of alleged government mismanagement or mishandling of a significant issue is now more than ever followed by a class action against the Crown.

When a group of farmers filed a class action law suit against the federal government in 2005 for failing to protect against mad cow disease, the CBC reported on the $7 billion law suit.[159] The article included comments from one of the plaintiffs' lawyers as well as from Steve Van Roekel,

158. Pipe up against Enbridge, online: <http://pipeupagainstenbridge.ca/learn/pipeline>. To provide an example, the 140 km of the pipeline would cross Wet'suwet'en territory. Currently, the Wet'suwet'en is fighting an appeal of an injunction to prevent logging on a portion of their territory. They hope to seek aboriginal title on that territory. The Nadleh Whuten First Nation, whose territory would also be affected by the pipeline, is also in the planning stages of commencing a judicial review of the Crown's conduct surrounding the regulatory review and environmental assessment of the process. See Nathan Vanderklippe, "Native group calls for pipeline boycott," *The Globe and Mail* (16 January 2010), online: <http://www.theglobeandmail.com/report-on-business/native-group-calls-for-pipeline-boycott/article1207494/>; and West Coast Environmental Law, "Highlights from the EDRF —April 2012" (10 April 2012), online: <http://www.wcel.org/resources/new-at-westcoast/highlights-edrf-april-2012>; West Coast Environmental Law, "Map of EDRF Recipients," online: <http://www.wcel.org/environmental-legal-aid/map-edrf-recipients> and West Coast Environmental Law, "Nadleh Whuten/Headwaters Initiative," online: <http://www.wcel.org/grantee/nadleh-whutenheadwaters-initiative>.

159. "Farmers file $7B mad cow lawsuit," *CBC News* (11 April 2005), online: CBC <http://www.cbc.ca/news/canada/story/2005/04/11/madcow-lawsuit050411.html>.

President and CEO of Ridley Corp, an Australian-based animal feed producer that was also named in the law suit. Plaintiff lawyer Cameron Pallet defended the class action, stating: "Canadian cattle producers have lost $7 billion and counting as a result of the BSE crisis and they deserve to be fully compensated." Van Roekel also defended his legal position: "We are confident that the allegations will prove meritless and we intend to vigorously defend this suit." Agriculture Canada, on the other hand, stated that it was not commenting on the suits.

Five years later, another CBC article provided an update on the class action in which the farmers' lawyer gave statements which can only be interpreted as intending to persuade the public that the federal government is liable in the class action:

> What kind of monitoring program is that? They kept graphs, they had charts, knew where they were and all this stuff....All they had to do was make sure [infected animals] don't get rendered, turned into calf starter, [and] fed to Canadian calves. How hard is that?[160]

That article then mentioned that "[t]he Canadian Food Inspection Agency (CFIA) is not commenting on the matter as it's currently before the courts." This refusal to comment combined with the willingness of other parties to the class action law suit to publicly state their opinions on the case causes one to wonder how the Canadian Food Inspection Agency (CFIA's) silence can be justified by the *sub judice* rule. As discussed earlier in this paper, the *sub judice* rule only prohibits publications which present "a real and substantial risk" of prejudicing a fair trial or the administration of justice. Ironically, if the CFIA had provided a statement to the press, then the article may have been even less likely to prejudice the determination of the class action suit, as it would have been balanced by the perspectives of both sides of the dispute. While a statement from a public official may create greater potential for prejudice than a statement by a private party, this does not create a justification for refusing all comment. Rather, it necessitates statements which explain the government's actions without intending to influence the outcome of the legal action.

As with many large class actions, matters such as the Mad Cow litigation may be tied up in the courts for years. Indeed, it took five years for the Mad Cow litigation to be certified and the statement of claim finalized. If public officials take the view that comments to the media are inappropriate while a matter is "before the courts," this effectively may

160. "Beef producers slam Ottawa over BSE cases," *CBC News* (31 March 2001), online: <http://www.cbc.ca/news/canada/calgary/story/2010/03/31/alberta-red-deer-bse-lawsuit-rally-calgary.html>.

insulate those officials from accountability for years. In our view, the *sub judice* principle has limited application in such contexts. While a public official casting aspersion on the judge hearing the matter, the court, or the other parties would give rise to the appearance of trying to influence the litigation improperly, there is no basis for the view that public officials cannot comment on the litigation or the government conduct giving rise to the litigation. Indeed, given the public importance of the litigation and the contingent liability to which it gives rise, arguably, there is an obligation on public officials to provide a public account of what transpired and why.

These brief case studies show the two different sides of the *sub judice* principle—the Northern Gateway experience reveals the dangers of public officials intervening in ongoing adjudication where they have the real potential to influence an impartial proceeding; by contrast, the Mad Cow experience shows the way in which the *sub judice* principle may hinder accountability, as the existence of a class action can be used to deflect difficult but legitimate questions about government action. We believe with these case studies in mind, and in light of the elusive search for coherence detailed in the earlier sections, a new approach to the *sub judice* rule is warranted.

IV. *Toward a new approach*

In short, our argument is that public officials should not refuse to comment based on the mere fact that a lawsuit is ongoing or anticipated, but should also not let their comments stray into territory that causes or could be reasonably foreseen to cause prejudice to an adjudicative proceeding. This simple, clear test would obviate the need for a public interest exception—as there is never a public interest in prejudicing adjudicative proceedings. On the other hand, a test focused on prejudice can be more clearly rooted to the lived experience both of parties to litigation and other parties (judges, jurors, etc.). In other words, prejudice relates not only to what is said, but where and in what context it is said, and just as importantly, how it is heard and by whom. Rather than a bright line approach, the prejudicial approach allows for contextual and purposive judgments to ensure the actual mischief underlying the *sub judice* rule informs its application.

We suggest that the focus on prejudice allows for a more precise balance between the need for public accountability and the protection of the integrity and the impartiality of the adjudicative process. While there is clear support for the focus on prejudice in the jurisprudence and literature of the *sub judice* rule, the case studies described above illustrate that the same cannot be said about the manner in which the *sub judice* rule is

invoked by government officials speaking to the press about matters of public importance.

Arguably, while the *sub judice* rule is becoming less relevant in the criminal law context in light of s 2(b) of the Charter and the "open courts" principle, it is becoming more relevant to the question of governmental accountability.

Whereas commentary on the courts was once the preserve of the mainstream media, the media is now a far more varied and egalitarian sphere. Academics and other experts routinely comment on litigation in blogs and other social media settings. Trials are live-tweeted with commentary both by professional and "citizen" journalists. NGOs, court-watchers, and advocates of all stripes often seek to influence the result of litigation by sharing their prognostications or their view of the "right" outcome. There is no suggestion by the Courts that such public discussion and debate is improper or harmful. Indeed, it would not make very much difference at this point if a court did attempt to invoke the *sub judice* rule in such circumstances. It would simply be unenforceable. Public officials, however, remain a separate category. The question is—should they be treated differently than others when it comes to commenting on litigation.

We argue that the *sub judice* rule should be invoked narrowly and only when justified in the circumstances. There is nothing in and of itself pernicious in commentary and discussion of litigation whether before, during, or after its conclusion. Indeed, it is healthy in a democracy for public officials to comment on matters of public concern, which must necessarily include litigation of public concern. There is a meaningful and crucial difference, however, between commenting on litigation and improperly influencing that litigation—or the integrity and impartiality of the courts generally.

To address this, it is necessary also to distinguish between the different ways in which the government or the Crown is either directly or indirectly a party to litigation. In one sense, the Crown has an interest in all litigation, since the judges are public servants, the courthouses public spaces, and court staff public employees. If a public official makes a statement casting aspersion on the court or which could be interpreted as a veiled threat or potential *quid pro quo*, the integrity of the system is always in play. In this sense, when an editorial appears or an academic journal or an NGO blog, the same cannot be said.

Further, in every criminal justice matter, the Crown is a direct party. It is a vital distinction in our criminal justice system that after a crime, it is not a victim that seeks vindication in the court, but the Crown, and by extension, the public. Thus, any time a public official (whether minister,

prosecutor, coroner, or police officer) speaks about a criminal matter in public, it creates an impression that such statements reflect the position of a party to the proceeding offered outside the context of a trial and therefore not subject to the rules of evidence and governance of the court. That makes all such statements presumptively problematic. While public officials may legitimately be asked and expected to answer questions about criminal investigations and prosecutions, all of these can be addressed without undermining the presumption of innocence or the need to preserve the integrity of particular evidence or matters in dispute. Therefore, if asked about the outcome she hopes for in a criminal case, it is important that all public officials embrace the principle of "innocent until proven guilty" and that the proper place for government positions to be taken or evidence to be proffered is a court and not the media.

Where the government or Crown is a party to civil proceedings or in the administrative justice context of regulatory and tribunal adjudication, the optimal application of the *sub judice* rule has been more elusive. In this context, the Northern Gateway Pipeline and Mad Cow examples may be instructive.

In the Northern Gateway Pipeline matter, the government had come to the conclusion that approving more infrastructure which would allow resources from the Alberta oil sands to reach Asian markets was in the public interest. Saying so in the media should not be seen as a violation of the *sub judice* rule, especially where legislation revamping the regulatory process is part of how the Government wishes to achieve this goal. Suggesting that those who oppose a particular project such as the Northern Gateway Pipeline are motivated by improper outside interference, or that the National Energy Board would be acting contrary to the public interest if they did not approve this pipeline, by contrast, could be interpreted as attempting to influence a particular result of a particular regulatory adjudication. This, in our view, engages the very mischief the *sub judice* rule was developed to counter, and its interpretation should be sufficiently broad so as to extend to these settings.

By contrast, in the Mad Cow scenario, to invoke the *sub judice* rule so as to avoid commenting on the crisis and the role of government officials in that crisis for a period of seven years (and counting) has little to do with the integrity and impartiality of the courts and more to do with political expediency and using the existence of litigation as a screen against accountability. In such circumstances, it is possible (and, we would suggest, necessary) that public officials indicate both respect for the judicial process and respect for the public's right to know how and why the government or a public agency acted as it did. This balance may be struck

as easily as the official stating: "While it is not the government/agency's intent to influence the court, it is important that the public understand why the government took the steps it did."

Of course, the *sub judice* rule is not the only reason why public officials may refuse to comment on a matter which is before the courts. The CFIA did not specifically refer to the *sub judice* rule in its refusal to comment on the mad cow situation, but rather indicated that it could not comment because the matter was "before the courts." While the CFIA may have had another valid reason for refusing to comment, we argue that public officials should make that reason explicit so that the public can evaluate its validity. Importantly, the mere fact that a matter is "before the courts" should not be accepted as a valid reason for refusing to comment on a matter of public importance without further explanation or real potential for prejudice to the proceedings.

While public officials often invoke the *sub judice* rule as a legal constraint, it is more properly seen, in our view, as a matter both of public service ethics and journalistic ethics. While it began as a rule (of court, and of Parliament), we believe it should now be seen more as a principle—not to be enforced through an order from a Court or Speaker, but through appropriate oversight bodies (a provincial Integrity Commissioner if the comments are made by a provincial Minister, for example). In this way, it is not necessary to distinguish between parliamentary conventions and judicial rules, and the inability of administrative tribunals to punish for contempt of court would no longer save comments which prejudice administrative proceedings from penalty.

While we believe that a *sub judice* principle should replace contempt *sub judice* and the parliamentary convention, it is important to specify that we do not believe it should eliminate the possibility for litigants or accused persons to seek a stay of proceedings where their right to a fair trial has been irreparably infringed. In other words, the ethical principle would fulfill the deterrent and punitive aspects of the rule, but courts and tribunals should still be responsible for granting an appropriate remedy, in appropriate circumstances.

There is already precedent for this approach. In 2006, the Ontario Integrity Commissioner investigated a complaint about the conduct of then Opposition Critic Robert Runciman for comments outside the legislature criticizing restitution payments to the mother of a murder victim as part

of a proposed plea bargain.[161] The complaint alleged that Mr. Runciman violated the *sub judice* parliamentary convention (under the Ontario Members Integrity Act, the Integrity Commissioner has jurisdiction over violations of Parliamentary conventions). Mr. Runciman referred to the restitutionary payment variously as "dirty money" and a "deal with the devil." The Integrity Commissioner sustained the complaint and found that Mr. Runciman's comments violated the *sub judice* convention. In the circumstances, no penalty was imposed since the comments did not appear to undermine the criminal proceedings. Then Integrity Commissioner Coulter Osborne went on to caution all members of the legislature, observing: "Once the court process (including any right of appeal) is complete, there is no bar to reasonable discussion about issues that were before a court. Before the process is complete, public discussion of matters then before a court is off-limits from the standpoint of Members of the Legislative Assembly."[162]

While we would disagree with the "bright line" all-encompassing characterization of the *sub judice* rule, and would view public comments as problematic only where those comments give rise to actual or perceived prejudice, we think it is appropriate that the question of whether the convention was violated was considered by the Integrity Commissioner. The true issue in a *sub judice* context is the appropriateness of a public official's conduct. The most effective "penalty," in this sense, as with other ethical breaches, is the political damage to which a finding of improper conduct may give rise.

Similarly, we would disagree with the "bright line" approach to the temporal aspect of the *sub judice* rule. While establishing firm start and end points to the application of the *sub judice* rule would provide some clarity and predictability, it would also increase the potential for the *sub judice* rule to be applied both too broadly and too narrowly. For example, if the principle were to apply during proceedings only, statements made before proceedings begin would not be caught by the rule, even if there is a strong probability that they would prejudice the outcome. On the other hand, if the principle applies when proceedings are "pending" or merely "imminent," as well as through all appeals, then there is a greater risk that the rule will be invoked when there is no potential for prejudice. For this

161. See Office of the Integrity Commissioner, *Report of the Honourable Coulter A. Osborne Integrity Commissioner Re: Robert Runciman, MPP, Member for Leeds-Grenville* (25 October 2006), online: OICO <http://oico.on.ca/oic/oicweb2.nsf/(CommReports)/34/$FILE/report.pdf?OpenElement>.
162. *Ibid* at 11.

reason, the risk of prejudice should be the principle concern, of which the temporal aspect is one consideration.

For this approach to succeed, it is important not only that public officials view the *sub judice* rule as an ethical framework, but also that journalists view the rule through an ethical lens as well. The Radio-Television Digital News Association of Canada's Code of Ethics, for example, includes the following injunction:

> Article Nine—Fair Trial
>
> In reporting matters that are or may be before the courts, electronic journalists will ensure that their reporting does not interfere with the rights of an individual to a fair trial.[163]

This overarching principle is elaborated in greater detail in the ethical codes of particular broadcasters or newspapers. For example, the *Toronto Star* ethical guidelines include the following section:

> THE STAR AND THE LAW
> THE RIGHT TO A FAIR TRIAL
>
> The Star seeks not to publish anything that would jeopardize the right to a fair trial of a person accused of a crime. The Star also believes in freedom of expression and the public's right to know what is happening in the courts. These principles sometimes collide.
>
> The Star should always guard against stories that suggest an accused is guilty. But in general, the media have more leeway to publish information around the time of an accused's arrest than immediately before or during a trial.
>
> For example, an accused's criminal record can be reported around the time of arrest if the editor deems it to be in the public interest and the Star is confident the information is accurate and complete. But it must not publish such information just before or during a trial. Doing so could cause a mistrial and result in the Star being cited for contempt of court.
>
> Likewise, the Star generally does not report during a trial, or the months leading up to a trial, statements by police that tend to incriminate the accused or evidence of the bad character of the accused until it is presented in court. Such information may be published at the time of arrest or shortly afterward only with the permission of the editor and only when there is a compelling public interest in doing so.
>
> The Star does not report that an accused has confessed until the confession has been ruled admissible and entered into evidence in court.
>
> The names of people charged with criminal offences are reported in Star

163. Canadian Broadcast Standards Council, *Radio Television Digital News Association of Canada (RTDNA Canada) Code of Ethics*, online: CBSC <http://www.cbsc.ca/english/codes/rtnda.php>.

> stories unless there is a legal or ethical reason not to do so. Wherever possible, the Star also tries to distinguish the accused from others who share the same name by specifying their age, occupation and general place of residence.

The canons of journalistic ethics tend not to focus on the proper responses by journalists to public officials invoking the *sub judice* rule. We believe they should. While we have focused on the twin hazards of the *sub judice* rule (avoiding accountability on the one hand and undermining the integrity of an adjudicative process on the other), both the potential and the danger of the rule depend on the conduct of the media, and the values they express. The importance of such an ethical framework cannot be overstated. As indicated above, the trend in how people obtain information suggest this will become even less prone to regulation or standardized conduct. Integrating the *sub judice* principles as discussed in this study into the ethical framework for journalists is necessary but not sufficient to address the concerns we have noted above. When combined with more rigorous oversight of the ethical conduct of public officials grounded in the prejudice-focused approach, a judicial approach to granting a stay of proceedings, and the extension of these principles to a broader array of adjudicative and regulatory settings, we believe the reforms suggested above would lead to greater accountability and more predictable and effective safeguards over the adjudicative process through the *sub judice* principle.

Conclusion

This paper has sought to convey a portrait of the *sub judice* doctrine as a common law rule, statutory law, and a convention of Parliament. We have argued both that the *sub judice* doctrine has been ignored where it should be invoked and invoked where it should be ignored. It has been invoked where it should be ignored where public officials have sought to avoid public comment employing the rule as an explanation. It has been ignored where it should be invoked where public officials have sought to influence adjudicative proceedings.

We highlight the core of the *sub judice* principle as the attempt by a public official to influence an adjudicative proceeding and prejudice its outcome. If the media seeks an account by government for its actions, as in the Mad Cow context, the existence of litigation should not act as a shield against such accountability. Further, we suggest while this once applied only to judicial proceedings, it has taken on increasing significance in regulatory settings such as the Northern Gateway approval proceeding. Beyond clarifying the proper scope of the *sub judice* principle, we argue

that it is more properly understood as an ethical principle operating both on public officials and journalists than a judicially enforced rule. In this way, the contextual balancing which necessarily underlies the relationship between political, legal and journalistic judgment, can be given full expression. The point of this comment is to ensure that the term "no comment" becomes the point of departure for a meaningful conversation about our legal and political values rather than the end of the discussion.