Judge's bans grow ever wider

'Demeanour, tone' declared off limits

By Christie Blatchford

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ST. THOMAS, Ont. - It was what educators call a teachable moment.

I had just done the unthinkable — it is in terms of court etiquette approximately akin to farting in the presence of royalty — and dared to directly address a judge from my seat.

I spoke for no more than 10 seconds. I was polite.

Madam Justice Eleanor Schnall, looking right at me, then snapped: "I don't recognize anybody speaking from the body of the court!"

The lesson was crystal-clear and it is not for me alone: She has all the power in that room, and I, like other reporters and members of the public, must listen in silence, preferably adulatory and at least respectful.

The background goes like this.

I am one of a handful of reporters covering one of the most publicized and significant child-protection hearings in Canada.

At issue is not only the fate of seven lovely children who were wrenched last summer from their fundamentalist Christian home in the nearby town of Aylmer by a local children's aid society that now seeks here to have them declared "in need of protection," but also the society's reasons for doing so and whether or not its workers trampled over the family's Charter rights to security of the person and against unreasonable search and seizure.

In the balance hangs, as all the lawyers here have acknowledged, how social workers should do their jobs, what grounds they need to apprehend children from their homes, and what rights parents have to resist their efforts.

From the get-go last week, Judge Schnall was clearly displeased with the media: With the parents at the last hour seeking a sweeping publication ban, seven press organizations had quickly arranged for a lawyer to be present to argue that the hearing should be open. The judge was dismissive of our lawyer, Tony Wong, essentially announced her decision before she had heard him out, listened to his arguments with half an ear while paying occasional flowery lip service to the presumptive right to an open and transparent court system (this is a trick judges use to cover themselves at appeal), and repeatedly criticized him and his clients for "wasting valuable court time."

Then, having heard no evidence whatsoever, she declared the seven children would suffer "emotional harm" if the hearing was public, determined that virtually all the evidence would be heard in "voir dire," a mini-trial where reporting is not allowed, and imposed a publication ban so wide-ranging it prohibited virtually any coverage of evidence and even court artists from drawing any of the witnesses.

All this, it should be noted, was in addition to the kind of ban that is usual at child-protection hearings and that the press was never contesting — a statutory prohibition against identifying the children or their parents. The media have since appealed the broad ban and are slated to be heard in Superior Court later this month.

In the days that followed, two trends developed.

One was that those of us in the press who remained, deprived of the ability to tell an important story in the normal manner, began increasingly to use the children's parents, who are in court every day, and their reactions to the evidence to give our readers a flavour of what the forbidden evidence itself was.

This is called "demeanour" evidence — I

was guiltier than most of relying upon it — and not once did Judge Schnall object to it.

The second trend was that for a woman who had pronounced herself vitally concerned with the case progressing, Judge Schnall did little to effect its speedy movement. She was several times late arriving at court from her London, Ont., home; recesses purported to be 15 minutes long stretched to twice that; only once (before yesterday) did court sit late, and never did it start early — all these are options available, and often used, by judges who fear the clock.

Yet at the same time, she often rued the slow progress of the case.

What happened on Wednesday is that videotaped interviews with the seven children, conducted just three days after they had been literally dragged from their home by local police and social workers, were played in court.

The youngsters' parents clearly reacted to them as they were played, and yesterday, some vague reporting of their demeanour as they watched the tapes, and of the children's demeanour upon them, appeared.

Quite inadvertently, one reporter, Peter Cheney of the Globe and Mail, who had arrived only midday Wednesday and was thus catching up on the complexities of the enormous publication ban, made some mistakes in his story yesterday.

Fittingly, it was almost high noon when Judge Schnall belatedly stormed into her second-floor courtroom.

She proceeded in short order to harshly ream out Mr. Cheney and an unidentified radio reporter, pronounced herself once again the best guardian of the involved children, patted herself on the back for her generous treatment of the obviously undeserving press, and then broadened her already monstrous ban to preclude any reporting of "the demeanour and tone" of the parents and children — and, in fact, "any reporting of anything they see or hear in the court."

"How the parents are reacting in court," she sniffed, "is not evidence. It is not a breach of my order … it is not a breach of the letter of my order, but it is a breach of the spirit of the order." She prohibited it.

Over the lunch recess, I had consulted Mr. Wong, the media lawyer who last week tried to persuade the judge to keep the hearing open. My uninformed layman's view was that Judge Schnall's order was arguably equivalent to a new publication ban, and that the media should have the opportunity to at least be heard on its propriety. Mr. Wong agreed.

As a courtesy, Alfred Mamo, the lawyer representing the children's aid society in the case — he had also argued strenuously that the hearing should be conducted openly — told the judge when we resumed that a media lawyer wished to make submissions on the matter.

"I will not sacrifice any more court time on the media issue," Judge Schnall barked.

Reluctant to see perpetrated on the formal record the judge's mythical contention that it is the vile media and only the vile media who have been delaying these proceedings, I did the unthinkable thing and spoke from my seat in the front row.

"Our lawyer is willing to be here at 9 a.m., Madam Justice," I said, thus prompting the judicial equivalent of putting your fingers in your ears and loudly humming while saying, "I can't hear you!"

At one point, having deemed herself "speechless" by the purported breaches of her ban, Judge Schnall then delivered a rambling speech about the egregious nature of the Globe story in which, among other touchstones she invoked, she wondered aloud, "What will that do for the administration of justice?"

Two days ago, a man arrived in Judge Schnall's courtroom, and, poor fellow, actually tried to take a seat. He was tossed out, of course. The public is routinely barred from these hearings. The public's surrogate, the press, is muzzled in this one. What does that do, what do secret courts do, for the administration of justice?

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