Law Reform Commission of Canada
Commission de réforme du droit du Canada

CRIMINAL LAW

public and media access to the criminal process

Working Paper 56

Canada

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Law Reform Commission
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Working Paper 56

PUBLIC AND MEDIA ACCESS TO THE CRIMINAL PROCESS

1987

Notice

This Working Paper presents the views of the Commission at this time. The Commission's final views will form part of its new Code of Criminal Procedure to be presented in a Report to the Minister of Justice and Parliament after the Commission has taken into account comments received from the public.

The Commission seeks responses from members of the judiciary, legislative bodies, the legal and journalism professions, and the public at large.

The Commission would be grateful to receive written comments addressed to:

Secretary
Law Reform Commission of Canada
130 Albert Street
Ottawa, Canada
K1A 0L6

Commission

Mr. Justice Allen M. Linden, President
Mr. Gilles Létourneau, Vice-President
Mr. Joseph Maingot, Q.C., Commissioner
Mr. John Frecker, Commissioner

Secretary

François Handfield, B.A., LL.L.

Co-ordinator, Criminal Procedure

Stanley A. Cohen, B.A., LL.B., LL.M.

Principal Consultant

James W. O'Reilly, B.A. (Hons.), LL.B.

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Philip Anisman, Goodman and Carr, Toronto
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Bert Bruser, Blake, Cassels & Graydon, Toronto
Peter Calamai, Southam News, Ottawa
June Callwood, *The Globe & Mail*, Toronto
Tony Cox, News Director, CHEK-TV, Victoria
Murdoch Davis, Assistant Managing Editor, *The Citizen*, Ottawa
Mr. Justice Charles Dubin, Ontario Court of Appeal, Toronto
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Edward L. Greenspan, Q.C., Greenspan & Rosenberg, Toronto
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Jim Reed, CTV, "W5," Toronto
Stuart M. Robertson,* Blake, Cassels & Graydon, Toronto
Brian Rogers, Blake, Cassels & Graydon, Toronto
Clayton Ruby, Ruby & Edwardh, Toronto
Vicki Russell, CBC, "The National," Toronto
David W. Scott, Scott & Aylen, Ottawa
James K. Struthers, Executive Vice-President, *The Leader-Post*, Regina
Bodine Williams, CTV News, Toronto
Arthur E. Wood, Publisher and General Manager, *Cambridge Daily Reporter*, Cambridge

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Introduction

Freedom of expression is one of our most valued liberties. However, as will be seen throughout this paper, the present *Criminal Code*[1] is filled with restrictions on that freedom (see Appendix, *infra*, p. 101). In some cases, publication bans or limits on the public's entitlement to attend criminal proceedings seek to protect the right of an accused to a fair trial. In others, the limitations are for the benefit of "public morals." Some protect the interests of innocent participants in the criminal process, such as witnesses or victims of crime. Our approach in this Working Paper is to examine these limitations on the freedom to communicate information about the criminal process and determine whether they are desirable, consistent and effective.

While we recognize that freedom of expression is of extreme importance in a democratic society, we have not ignored the importance of other interests that limitations on expression have sought to protect. In other areas of the law, such as libel, hate propaganda and obscenity, we accept limits on expression out of a desire to promote certain social values. Given those kinds of limits, we believe that it may be justifiable to restrict freedom of expression occasionally in this area of the law to protect significant social values. We do, however, believe that its importance is sufficiently great as to require that limitations only be imposed when and to the extent necessary to protect those other substantial interests.

Our paper surveys the present law governing the extent to which the public and the media may attend criminal proceedings, examine documents relating to the criminal process and communicate what they have learned to others. We deal specifically with access to criminal matters. Although identical issues are often raised in civil cases and administrative proceedings, we feel that it is particularly important that we address ourselves to issues of openness in criminal proceedings so that our recommendations may form part of our proposed comprehensive Code of Criminal Procedure. Thus, the present Working Paper confines itself to questions of access and reporting in relation to the pretrial, trial, and appeal process in criminal cases.[2]

The Commission has long recognized the need for an in-depth treatment of the issues related to access and publicity in the criminal process. In our Report 10 on *Sexual Offences* we stated that the question of identifying victims and accused in sexual

1. *Criminal Code*, R.S.C. 1970, c. C-34 [hereinafter *Criminal Code*].
2. We do not, therefore, deal with questions of access to information about criminal matters which may be held in police files or government data banks. This is covered by the federal and provincial freedom of information statutes: *Access to Information Act*, S.C. 1980-81-82-83, c. 111, Schedule I; *Privacy Act*, S.C. 1980-81-82-83, c. 111, Schedule II; and, for example, *An Act respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, R.S.Q., c. A-2.1.

offences should be addressed within a larger work on public access and publicity.[3] In our Report 24 on *Search and Seizure*, we recommended the introduction of a means of restricting publication of the contents of search warrants in the interest of protecting the identities of innocent persons.[4] However, we then refrained from making any recommendations on public and media access in our Report 27 on *Disposition of Seized Property*[5] in light of the volume of cases interpreting the freedom of the media protected by the *Canadian Charter of Rights and Freedoms*[6] and the controversy surrounding the recent enactment of a ban on publication of certain information relating to searches under the *Criminal Code*.[7] This Working Paper re-examines these issues.[8]

It is not our intention to revisit the broad area of contempt of court in this work. The Commission recommended codification[9] of the common law offences in its Report 17 on *Contempt of Court*[10] and is presently reviewing this subject in an attempt to bring this area of the law into conformity with the *Charter*.[11] Neither do we address issues relating to the secrecy of jury deliberations or selection. The Commission dealt with these questions in its Report 16 on *The Jury*.[12]

3. Law Reform Commission of Canada [hereinafter LRCC], *Sexual Offences* (Report 10) (Ottawa: Supply and Services Canada, 1978) at 35-7.

4. LRCC, *Search and Seizure* (Report 24) (Ottawa: Supply and Services Canada, 1984) at 29-33.

5. LRCC, *Disposition of Seized Property* (Report 27) (Ottawa: LRCC, 1986) at 18-9.

6. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

7. *Criminal Law Amendment Act, 1985*, S.C. 1985, c. 19, s. 70, enacting section 443.2 of the *Criminal Code* [hereinafter *Criminal Law Amendment Act, 1985*].

8. Our recognition of the importance of public and media access to the legal process led us to co-sponsor a conference on that subject at Osgoode Hall Law School in March, 1985. A wide variety of legal and journalistic issues was canvassed and debated there by distinguished representatives of the legal and journalism professions. To a great extent, the inspiration to undertake this work on the criminal process derives from the interest demonstrated by participants and attendants at that conference in issues of public access generally. The essays and commentaries delivered at the conference have now been published: P. Anisman and A.M. Linden, eds, *The Media, the Courts and the Charter* (Toronto: Carswell, 1986).

9. Amendments responding to our concerns were tabled in Parliament in 1984, but died on the order paper. See Bill C-19, 2d Sess., 32d Parl., 1983-84 (First Reading, Feb. 7, 1984).

10. LRCC, *Contempt of Court* (Report 17) (Ottawa: Supply and Services Canada, 1982). For another recent discussion of contempt law with proposals for reform see Australia, Law Reform Commission, *Contempt and the Media* (Discussion Paper 26) (Sydney: GPO, 1986).

11. The Commission's recommendations will form part of Volume II of its Report 30, *Recodifying Criminal Law*, to be published soon.

12. LRCC, *The Jury* (Report 16) (Ottawa: Supply and Services Canada, 1982).

CHAPTER ONE

The Concept of Openness

I. Openness as a Virtue of Democracy

In addressing questions of public and media access to the criminal process, we must recognize the larger and more fundamental philosophical context into which our inquiry falls. The ability of the public to have access to information about its criminal courts and proceedings, either directly or through the media, is simply one facet of the openness of government generally. Knowledge about the criminal process, to a large extent, involves scrutiny of the actions of public officials and the operation of laws passed by public representatives. In determining the degree to which information about the criminal process should be publicly available, then, we must decide how open we wish our government to be. This, in turn, depends upon the importance of openness in a society founded upon democratic principles.

Openness as a characteristic of society connotes the ability of individuals to learn about the activities of their government, to communicate to others what they have learned, and to form opinions according to the information that is available. The greater the openness of government, the greater the participation of citizens in the democratic process. Individuals can only be informed about their government's behaviour if they have access to information about its functions. Also, a government will only be accountable to a citizenry that can scrutinize its actions. Thus, openness of government lies at the core of a democratic society. Only through access to government proceedings and information about government activities can citizens form educated opinions about the kind of government they desire, and only then can they make wise choices at the ballot box.

Public and media access to the criminal process is a necessary corollary to the overall principle of openness. The administration of criminal justice is a significant responsibility of government. Citizens will only be informed about the discharge of that responsibility if they have access to the process itself or to information about it. In order to know whether its criminal laws are good laws, the public must have access to criminal proceedings, either directly or through the free expression of information by the media. Further, the criminal process can sometimes be used as an instrument of tyranny. Openness in the process ensures the responsible exercise of the drastic but

necessary powers of the State. Our opinions about the quality of our laws and the performance of those who make, interpret and enforce them rest on the information we receive. The democratic process itself depends upon our ability to form these opinions.

Having recognized this larger context within which our study of public and media access to the criminal process falls, we must give due attention to the purposes served by access to the criminal process, its contribution to the openness of society generally, and the extent to which it furthers democratic aims. Emerson refers to this context as the "system of freedom of expression" and describes the integration of this system within a democratic society as follows:

> A system of freedom of expression, operating in a modern democratic society, is a complex mechanism. At its core is a group of rights assured to individual members of the society. This set of rights, which makes up our present-day concept of free expression, includes the right to form and hold beliefs and opinions on any subject, and to communicate ideas, opinions, and information through any medium — in speech, writing, music, art, or in other ways. To some extent it involves the right to remain silent. From the obverse side it includes the right to hear the views of others and to listen to their version of the facts. It encompasses the right to inquire and, to a degree, the right of access to information. As a necessary corollary, it embraces the right to assemble and to form associations, that is, to combine with others in joint expression.[13]

Alexander Meiklejohn, one of the foremost proponents of the view that freedom of the press and freedom of expression are essential to the democratic process, believed that the overriding purpose of the First Amendment of the American Bill of Rights, which protects freedom of speech and of the press,[14] was to safeguard the democratic system of government protected and created by the Constitution:

> The First Amendment is not, primarily, a device for the winning of new truth, though that is very important. It is a device for the sharing of whatever truth has been won. Its purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal. When a free man is voting, it is not enough that the truth is known by someone else, by some scholar or administrator or legislator. The voters must have it, all of them. The primary purpose of the First Amendment is, then, that all citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them. Under the compact upon which the Constitution rests, it is agreed that men shall not be governed by others, that they shall govern themselves.[15]

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13. Thomas I. Emerson, *The System of Freedom of Expression* (New York: Random House, 1970) at 3.
14. The First Amendment (USCS Constitution, Amend. I) states in full: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."
15. Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper & Bros., 1948) at 88.

The notion that free expression about public affairs is fundamental to democracy runs through the writings of liberal democratic theorists from the time of John Milton[16] to the present. It is important to recognize, however, notwithstanding the substantial benefits that openness provides to *society* through improvements to the democratic process, that liberal thought in this domain centres on the natural capacity and desire of *individuals* to pursue knowledge, reason and truth. Individuals become better informed and create better ideas when they are exposed to differing opinions and beliefs. Thus, the benefits of openness to society as a whole rest upon the triumph of individual thought and reason. In other words, society improves through the improvement of its members. Milton himself argued in the seventeenth century that when openness is circumscribed, so is the ability of individuals to discover truth and reason. These qualities can only be realized in a society in which opposing arguments and ideas can be heard and expressed.[17] Similarly, in the eighteenth century, Thomas Jefferson believed that when openness is curtailed, individuals are less able to educate and inform themselves. The majority may then be denied the opportunity of choosing the best of alternatives available to it.[18] Perhaps the most influential writer on this subject was John Stuart Mill. Mill departed from the prevailing nineteenth century utilitarian concept of democracy — the strict adherence to majority rule — by arguing that free expression was so crucial to democracy that it must prevail even over the contrary wishes of the majority. "In other words, the system could not be democratic if a democratic principle [majority rule] could be used to usurp the individual rights on which the system was dependent."[19] Again, this belief in the necessity of openness to democracy was founded upon a strong sense of individual sovereignty. In his famous essay *On Liberty* (1859), Mill recognized this relationship explicitly:

> But there is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest: comprehending all that portion of a person's life and conduct which affects only himself or, if it also affects others, only with their free, voluntary, and undeceived consent and participation. When I say only himself, I mean directly and in the first instance; for whatever affects himself may affect others through himself: ... This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness, demanding liberty of conscience in the most comprehensive sense, liberty of thought and feeling, absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people, but, being almost of as much importance as the liberty of thought itself and resting in great part on the same reasons, is practically inseparable from it. Secondly, the principle requires liberty of tastes and pursuits, of framing the plan of our life to suit our own character, of doing as we like, subject to such consequences as may follow, without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual follows the liberty,

16. See, for example, John Milton, "Areopagitica: A Speech for the Liberty of Unlicensed Printing, to the Parliament of England" (1644), in George Sabine, ed., *John Milton, Areopagitica and Of Education with Autobiographical Passages from Other Prose Works* (New York: Appleton-Century-Crofts, 1951) at 1.

17. See the discussion of Milton's ideas in G. Stuart Adam, "The Charter and the Role of the Media: A Journalist's Perspective," in Anisman and Linden, eds, *supra*, note 8, 39 at 42-6.

18. See the discussion of Jefferson's ideas in F.S. Siebert, T. Peterson and W. Schramm, *Four Theories of the Press*, reprint ed. (Urbana: Univ. of Illinois Press, 1969) at 46-7.

19. Adam, *supra*, note 17, in Anisman and Linden, eds, *supra*, note 8, 39 at 49.

within the same limits, of combination among individuals; freedom to unite for any purpose not involving harm to others: the persons combining being supposed to be of full age and not forced or deceived.

No society in which these liberties are not, on the whole, respected is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, *or* mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest.[20]

The degree of openness of a society, then, touches the ability of its members to engage in forms of conduct that are characteristically human: thinking, reasoning, creating, speaking. To confine these activities would be to constrict the growth of the human intellect. Society as a whole is the beneficiary of the exercise of these freedoms since new and often better ideas blossom from them. Further, according to Mill, no society could be called free or democratic were these freedoms not protected.

Although this vision of democratic society is by no means axiomatic or immutable, it appears to be the one to which constitutional recognition has been given in Canada in the *Charter*. Under the heading "Fundamental Freedoms," the *Charter* states in section 2:

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(*c*) freedom of peaceful assembly; and

(*d*) freedom of association.

These freedoms taken together, resemble a "system of freedom of expression," to use Emerson's terms, or a blueprint for an open society. It is noteworthy that paragraph 2(*b*) contains a set of related freedoms, and in particular, links the freedoms of opinion and expression. Arguably, this linkage indicates a dependency of the freedom to hold an opinion upon the freedom of others to express ideas and information that may form the basis of that opinion. For example, an opinion about the performance of government can only be cultivated if one has access, through the free expression of others, to a certain quantity of information about government behaviour. Further, the pairing of the freedoms of opinion and expression suggests a connection between the freedom to hold an opinion and the freedom to express it to others.

Having guaranteed these fundamental freedoms, the *Charter* limits them within the terms set out in section 1:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

20. John Stuart Mill, *On Liberty*, reprint ed. by Elizabeth Rapaport (Indianapolis: Hackett, 1985).

According to Mill, a "free and democratic society" is one which respects the ability of its citizens to hold opinions and express them to others. The *Charter*, according to section 1, permits intrusions on those freedoms only if they are consistent with the aims of a free and democratic Canadian society. Given the importance of the fundamental freedoms themselves to democratic purposes, the test for imposing legal restrictions on their exercise is a strict one. We do, however, tolerate some general limits on speech and opinion in our society. Libel, hate propaganda and obscenity are forms of expression that are subject to some legal limitations in order to foster certain social interests that democratic societies consider paramount: protection of reputations, promotion of racial and religious harmony, and recognition of human dignity.

On the whole, then, the *Charter* contains a constitutional structure that supports the individualistic, liberal conception of democratic society epitomized by theorists such as John Stuart Mill. It is to this framework that Canadians are now committed and to which we must adhere in developing standards governing public and media access to the criminal process. Throughout this paper, we are mindful of the importance of openness to the democratic process, and therefore, of the necessity of affording individuals an opportunity, through public and media access, to hold informed opinions about the criminal process and to express them to others. The administration of criminal justice can only benefit from a maximum amount of scrutiny and debate.

II. The Role of the Media

If we are to have an open, democratic society we must have not only the freedom to gather and to communicate knowledge, but also a means of distributing that knowledge beyond the sphere of private conversation. Otherwise, information of interest to the public as a whole would be held by small circles of informed citizens. Only through media of communication can the public become aware of matters that may affect it and be exposed to a diversity of opinion. Thus, the media's freedom to gather and distribute information, ideas and opinions is intimately connected with the overall openness of society.

To a large extent, the degree of a society's commitment to openness is attributable to the media's efforts to monitor and expose the activities of government. This is certainly true in the English tradition of open government. In the seventeenth century, the press rebelled against the government's system of licensing and censoring printers, which limited their ability to publish anything of which the government did not approve. As a result of these protests the statute imposing licensing of the press ceased to be in force as of 1694.[21] In the late eighteenth century, after years of official

21. See *An Act for preventing the frequent Abuses in printing seditious treasonable and unlicensed Books and Pamphlets and for regulating of Printing and Printing Presses, 1662* (U.K.), 14 Cha. 2, c. 33, not re-enacted according to *An Act for Continuing several Laws Therein Mentioned, 1694* (U.K.), 6 & 7 Wm. & M., c. 14. It was later repealed by *An Act for promoting the Revision of the Statute Law by repealing certain Enactments which have ceased to be in force or have become unnecessary, 1863* (U.K.), 26 & 27 Vict., c. 125. See Leonard W. Levy, *Emergence of a Free Press* (New York: Oxford Univ. Press, 1985) at 99-100.

exclusion, the press was permitted access to Parliament and was allowed to publish its proceedings.[22] The importance of reporters' presence to the proper functioning of Parliament was recognized by Edmund Burke, who is claimed to have stated that "... there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all."[23] Later, in the nineteenth century, the courts recognized accurate reports of parliamentary proceedings as "privileged," that is, immune from libel suits.[24] This resulted in greater public discussion of public affairs since it allowed the press to publish parliamentary debates without fear of civil liability for defamation. Throughout this entire period, the press continuously challenged the constraints imposed upon it by the law of seditious libel. At common law, this offence proscribed virtually all criticism of government and government representatives, whether true or false.[25] Changes in the law of seditious libel which occurred in the eighteenth and nineteenth centuries, were due largely to press agitation.[26]

Thus, the English press was successful in removing some of the major legal encumbrances on the open discussion of matters of public concern, and hence, on the cultivation of opinions which may have been adverse to the government of the day. These freedoms being vital to the health of a democratic society, it is therefore essential that the media enjoy maximum freedom and independence from government.

In societies committed to openness of discussion, the media's independence ensures that the government has no privileged access to the means of communicating with citizens. Similarly, the government should have no general power to prevent publication of what it considers to be bad or unsound ideas. It is the public who should be the arbiter of truth and reason, not the government.

This independence of the media from government is reinforced by their financial independence which, in our market economy, in turn requires that the media rely not only upon the income generated through sales of their product, but also upon advertising revenues. Thus, the media not only contribute to the social and political well-being of society, but, by necessity, promote economic activity. In some instances, the result has been the massive growth of commercially successful media corporations. This phenomenon is coupled with radical changes in the way the media operate in the

22. See Siebert *et al.*, *supra*, note 18 at 48-9; Sir William Holdsworth, *A History of English Law*, vol. 10 (London: Sweet and Maxwell, 1938) at 547-8; Sir David Lidderdale, ed., *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, [Spine Title: *Parliamentary Practice*], 19th ed. (London: Butterworths, 1976) at 221-3; J. Maingot, *Parliamentary Privilege in Canada* (Toronto: Butterworths, 1982) at 36-8.

23. Quoted in Thomas Carlyle, *On Heroes, Hero Worship and the Heroic in History*, reprint ed. (London: Oxford Univ. Press, 1968) at 215.

24. See *Wason* v. *Walter* (1868), 4 Q.B. 73.

25. See the discussion of the common law of seditious libel in Levy, *supra*, note 21 at 3-15.

26. For example, *An Act to Remove Doubts respecting the Functions of Juries in Cases of Libel*, (U.K.) [also known as "Fox's Libel Act" of 1792], 32 Geo. 3, c. 60, permitted juries to determine as a question of fact whether a publication was seditious. Truth was recognized as a defence to a charge of seditious libel by virtue of *An Act to amend the Law respecting Defamatory Words and Libel, 1843* (U.K.), 6 & 7 Vict., c. 96. In the United States, the *Sedition Act* of 1798 (ch. 73, Stat. 596) had already recognized truth as a defence. See Levy, *supra*, note 21 at 297.

twentieth century. We have seen the introduction of electronic technology and the development of journalism as a profession. Newspapers are now circulated on a global scale and satellites permit the instantaneous reproduction of visual images world-wide. This state of affairs often leads us to see the media as having interests that transcend the interests of members of the public, rather than simply serving as a means for permitting communication among them. It is sometimes difficult for us to conceive of the media's interests as being coextensive with the public interest.

Despite these features of the modern media, their *role* remains relatively unchanged. With the growth of journalism as a distinct profession, journalists operate increasingly as agents of the public in seeking out information and distributing it, whereas the press in past centuries was not so highly specialized. It was more closely connected to the opinion of ordinary citizens and relied more on information given to it than on knowledge it was able to acquire independently. Now, it is journalists, rather than other interested individuals, who are most likely to seek out information about government; it is to their opinions that we often resort in forming our conclusions about public affairs; and it is they who frequently challenge governmental restrictions on openness. The media act on our behalf in asserting the freedom to gather information and communicate it to us. In doing so, they protect the public's freedom to form opinions about matters of public concern, based on available knowledge. This role is essentially no different from that performed by the press in past centuries. The media still act as our "watch-dog" on the activities of government. They keep a constant vigil over matters affecting the public interest. They guarantee that the public learns about its government and has access to sufficient knowledge to make informed opinions about government performance.

Neither has the media's status changed in law. At common law, representatives of the media were never regarded as having any greater or lesser freedoms than those enjoyed by the general public. Their entitlement to access to information or governmental proceedings has, for example, always been equal to the right of access given to members of the public.[27] This equality appears now to be constitutionally entrenched in the *Charter*.[28] Section 2 states:

> **2.** Everyone has the following fundamental freedoms:
>
> ...
>
> (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; ...

According to the wording of this provision, freedom of the media is included within the freedom of expression that everyone enjoys. There is no apparent recognition that the media's constitutional freedom to express information and ideas is distinct from, or

27. *Journal Printing Co.* v. *McVeity* (1915), 7 O.W.N. 633, aff'd (1915), 21 D.L.R. 81 (Ont. C.A.).

28. See, for example, *R.* v. *Squires* (1986), 50 C.R. (3d) 320 (Ont. Prov. Ct.) at 342-3. This was also implicit in *Canadian Newspapers Co.* v. *A.G. Canada* (1985), 49 O.R. (2d) 557 (C.A.), *Re Southam Inc. and R. (No. 1)* (1983), 3 C.C.C. (3d) 515 (Ont. C.A.), and *Re Southam Inc. and R.* (1984), 48 O.R. (2d) 678 (H.C.), aff'd (1986), 53 O.R. (2d) 663 (C.A.), leave to appeal denied May 22, 1986.

superior to, the liberties of others.[29] It forms part of that cluster of fundamental freedoms which establish our "system of freedom of expression," or our design for an open, democratic society.

We should not overlook, however, the discontent that some feel toward the media for not performing their democratic responsibilities. Also, to a certain extent, the proliferation of large, commercial media enterprises, has in itself affected the role that the media play in modern society in a manner separate from their public watch-dog or surrogate function. The media have been criticized in recent years out of a perception that because of the magnitude of certain media corporations, they tend to present a monolithic version of news and prevent the birth of smaller media outlets.[30] Also, some have expressed concern about the influence of advertising on editorial considerations.[31] Others believe that the media (and the public as a whole) place disproportionate emphasis on sensational cases.[32] Because of the magnitude of some media outlets, the possibility for error has increased and the resulting harm that individuals can suffer is great. It is not for us to establish whether or not these perceptions are accurate. Yet we must take account of their influence on our ideal of the media's proper role in a democratic society.

According to a strictly libertarian theory of the media's functions, there should be no government involvement in the activities of newspapers or broadcasters. Only through rugged independence can they perform their assigned role as watch-dogs for the government and purveyors of free thought. But what happens when the public loses confidence in the media's ability to report news accurately and objectively, or to present a cross-section of opinion on public affairs? In other words, how can the public watch its watch-dog? These issues have resulted in calls for restrictions on the growth of media corporations in order to ensure that an adequate variety of news sources reaches the public.[33] To meet such criticisms, some media have organized themselves under press councils and professional associations with a view to dealing with public

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29. By contrast, the First Amendment of the American Bill of Rights refers to freedom of the press separately from the general protection of freedom of the press: "Congress shall make no law ... abridging the freedom of speech, or of the press ...." (*Supra*, note 14) Some argue that this entitles the press to special treatment in the United States: see, for example, Potter Stewart, "Or of the Press" (1974-75) 26 Hastings L.J. 631.

30. See, for example, *Report of the Royal Commission on Newspapers* [hereinafter the *Kent Commission Report*] (Ottawa: Supply and Services Canada, 1981) at 215-7.

31. *Ibid.* at 73. See also Tom Kent, "The Significance of Corporate Structure in the Media" (1985) 23 U.W.O. L. Rev. 151 at 154-5.

32. See, for example, Max Radin, "The Right to a Public Trial" (1931-32) 6 Temple L.Q. 381, who states at 397: "The state is under no duty to provide a small selection of curious seekers for excitement with a theatrical performance. There is in the last analysis no more reason for the public trial as it is currently conceived than there is for a public execution." However, in the recent case of *Canadian Newspapers Co.* v. *A.G. Canada* (1986), 55 O.R. (2d) 737 (C.A.), Osler J. points out at 748 that the press has an important function notwithstanding any tendency it may have to concentrate on sensational cases: "It is easy to become impatient with the press and to criticize it for what may at times appear to be sensationalism. It is not necessary that the motives of the press be altruistic for the importance of press freedom to be apparent."

33. *Kent Commission Report*, *supra*, note 30 at 238-41.

complaints and governing their own members.[34] Some profess to adhere to codes of ethics or statements of principles.[35] In certain jurisdictions, the media have been required to offer equal time or space to those whom they have criticized or those who advocate views different from those expounded by the particular media outlet so that the public may receive a balanced news diet.[36] To some extent, government has regulated the content of media broadcasts through its system of licensing.[37] Public broadcasting stations, with varying degrees of public sponsorship, have been created in order to provide non-commercial media to the public.[38]

All these phenomena point toward a public expectation that the media should perform their role in a socially responsible fashion, in a way that is fair both to consumers of news and to those who are the object of media attention. The media's freedom to gather and report information and opinions is, according to this view, coupled with an obligation to the public to be even-handed in its delivery of news. The public, through its government and its laws, should oversee the fulfilment of the media's democratic mandate and step in when necessary to protect overriding social values.

The *Charter* provides guidance on the scope of governmental limitations on media freedom that would be tolerable in our society. Section 1 sets out the test that must be met by any encroachment on the fundamental freedom of the media. Only limits that are "reasonable" and "demonstrably justified in a free and democratic society" are permitted. As with all the fundamental freedoms, the purpose of media freedom is to enhance the democratic character of our society. Yet any limit that would meet the standard of section 1 of the *Charter* would itself have to be justifed as a protector of "a free and democratic society." Thus, while reasonable intrusions on the absolute freedom of the media are foreseen in the present law, it would appear that only those constituting a greater contribution to democracy than is made by the media freedom that is consequently lost are constitutionally sound.

This is the standard that must guide us in analyzing the extent of public and media access to the criminal process. We recognize that the freedoms of opinion and expression lie at the foundation of our open democratic society. The freedom to attend

34. For a discussion of the history of press councils, see J. Allyn Taylor, "The Role of the Press Council," in Anisman and Linden, eds, *supra*, note 8, 159.

35. See, for example, the "Statement of Principles for Canadian daily newspapers," adopted by the Canadian Daily Newspapers Publishers Association, April, 1977, set out in the *Kent Commission Report*, *supra*, note 30, App. 7 at 286-7.

36. See Jerome A. Barron, "Public Access to the Media under the Charter: An American Appraisal," in Anisman and Linden, eds, *supra*, note 8, 177 at 191-7.

37. See, in Canada, the *Broadcasting Act*, R.S.C. 1970, c. B-11, s. 3, which sets out a broadcasting policy for Canada to be regulated by a public authority (the Canadian Radio-television and Telecommunications Commission). The Commission has the power to make regulations governing various aspects of the content of broadcasts, such as advertising, political announcements, sensitive subject-matter and "Canadian content"; see, for example, *Radio (A.M.) Broadcasting Regulations*, C.R.C. 1978, c. 379, s. 5-12; *Radio (F.M.) Broadcasting Regulations*, C.R.C. 1978, c. 380, s. 6-13; *Television Broadcasting Regulations*, C.R.C. 1978, c. 381, s. 6-20.

38. For example, the creation of the Canadian Broadcasting Corporation. *Broadcasting Act*, R.S.C. 1970, c. B-11, Part III, s. 33-47 and the *Ontario Educational Communications Authority Act*, R.S.O. 1980, c. 331.

and discuss matters relating to the administration of criminal justice is an important component of our "system of freedom of expression." Still, we must be aware of other values that compete with the contribution made by complete freedom of expression. Where those values represent serious and substantial social interests, they must be balanced against fundamental freedoms. Where superior, they justify restraining fundamental freedoms, but only to the extent necessary to give those interests due recognition.

III. Openness in the Administration of Criminal Justice

Openness has been a characteristic of the administration of justice generally,[39] and of the criminal process in particular, for many centuries. It has been regarded not only as a virtue, but as a necessary attribute of valid legal proceedings. The commitment to openness in the legal process has its origins in the concept of trial by jury. One historian describes the common law trial as follows:

> It was a public process, and it could hardly have been otherwise; the jury was traditionally the neighbours, and they were supposed to know about the facts. That slowly changed until juries were expected to decide on the evidence put before them, but the jury was still a man's 'country' to whose verdict he committed himself, and Assizes and Quarter Sessions were the periodical assemblies for the most important kinds of public business .... Open court was not derived from liberal thought but was an almost inevitable consequence of our system of courts and use of juries.[40]

Thus, the tradition of public access to, and freedom of communication about, criminal proceedings was not preceded by any conscious recognition of the benefits that openness might afford. Rather, openness was simply characteristic of the way justice was carried out. It has remained a contiguous element of criminal trial proceedings throughout the evolution of the common law. Justifications for the principle followed, rather than preceded, its genesis as an integral part of the early trial process. Those justifications are obviously compatible with the liberal theories of freedom of expression and freedom of the press originally expounded during the eighteenth and nineteenth centuries. According to a liberal view of the criminal justice system, the prosecution of an offence is essentially the exercise of government authority. In a democratic society, the public must have a full opportunity to scrutinize that authority and express an opinion about its propriety. This must include the freedom of the media to act as the vehicle for the exchange of information and ideas about the criminal process.

Openness in the criminal process is consistent with these tenets of liberal thought, in that the freedom to express oneself about any government behaviour advances democratic aims. Openness also contributes, however, to the fulfilment of the objectives

39. See, for example, *Scott* v. *Scott* (1913), [1913] A.C. 417 (H.L.).

40. R.M. Jackson, *The Machinery of Justice in England*, 6th ed. (London: Cambridge Univ. Press, 1972) at 21.

of the administration of justice. Scrutiny of the behaviour of those involved in the trial process contributes to the likelihood of justice being done. Jeremy Bentham wrote often of the importance of the common law's commitment to the openness of court proceedings. He stated:

> Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.[41]
>
> In the darkness of secrecy, sinister interest and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks, applicable to judicial injustice, operate. Where there is no publicity there is no justice.[42]
>
> Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial.[43]

It is often assumed that the defences of the principle of open justice offered by scholars such as Bentham are "no more than an instinctive reaction against Star Chamber proceedings."[44] However, it has been pointed out that whatever the excesses and evils of the Star Chamber might have been, "[t]here was apparently nothing secret about the action of this court, and the grievance the Parliament had against it was rather its power, than the method in which that power was exercised."[45]

Thus, the open quality of our legal system does not have its origins in any deliberate campaign to gain access to closed courtrooms. Rather, "[i]t was simply the English way of doing justice."[46] The concept of openness in the administration of justice, then, has more tradition in it than ideology, despite the compatibility of the idea with liberal democratic thought. Public access to trials even pre-dates by many centuries the right to attend parliamentary proceedings. In fact, in a landmark nineteenth-century decision[47] that recognized reports of parliamentary debates as being immune from libel actions, the Court expressly referred to the valuable contribution that public discussion of legal proceedings had made to society:

> The other and the broader principle on which this exception to the general law of libel [i.e., the concept of privilege] is founded is, that the advantage to the community from publicity being given to the proceedings of courts of justice is so great, that the occasional inconvenience to individuals arising from it must yield to the general good. It is true that with a view to distinguish the publication of proceedings in parliament from that of proceedings of courts of justice, it has been said that the immunity accorded to the reports of the proceedings of courts of justice is grounded on the fact of the courts being open to the public, while the houses of parliament are not; as also that by the publication of the proceedings of the courts the people obtain a knowledge of the law by which their dealings

41. Jeremy Bentham, *Rationale of Judicial Evidence*, vol. 1 (London: Hunt and Clarke, 1827) at 524.

42. *The Works of Jeremy Bentham, Published under the Superintendence of his Executor, John Bowring*, vol. 9 (New York: Russell & Russell, 1962) at 493.

43. *Ibid.*, vol. 4 at 316.

44. Alan W. Mewett, "Public Criminal Trials" (1978-79) 21 Crim. L.Q. 199 at 199.

45. Max Radin, *supra*, note 32 at 386-7.

46. Peter Wright, "The Open Court: The Hallmark of Judicial Proceedings" (1947) 25 Can. Bar Rev. 721 at 721.

47. *Wason* v. *Walter*, *supra*, note 24.

> and conduct are to be regulated. But in our opinion the true ground is that given by Lawrence, J. in *Rex* v. *Wright* [8 T.R. 293 at 298], namely, that "though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings." In *Davison* v. *Duncan* [7 E.&B. 229 at 231], Lord Campbell says, "A fair account of what takes place in a court of justice is privileged. The reason is, that the balance of public benefit from publicity is great. It is of great consequence that the public should know what takes place in court; ...[48]

The Court went on to conclude that public discussion of matters raised in Parliament was crucial to the proper functioning of a self-governing society. It stated: "To us it seems clear that the principles on which the publication of reports of the proceedings of courts of justice have been held to be privileged apply to the reports of parliamentary proceedings. The analogy between the two cases is in every respect complete."[49]

Clearly, then, openness in the administration of justice has long been regarded as a cornerstone of a society founded on democratic principles. The additional advantages to our system of criminal justice cannot, however, be ignored. Mewett describes the merits of public criminal trials as follows:

> An open trial provides some safeguard against unjust or unfair proceedings against an accused; it militates against the use by the executive of the courts to achieve its own ends; it reduces the possibility of any abuse of judicial power; it maximizes the chances of equal and impartial administration of justice to all accused persons; many aspects of the enforcement of criminal law, such as general abhorrence of certain acts or general deterrence, demand that the public be informed; witnesses who have to give their testimony in public will be more reluctant to give false evidence for fear of exposure. In general, of course, this merely means that it is in the interest not only of the accused and the prosecutor that a criminal trial be in public, but that it is in the interest of the public itself.[50]

An accused may also be protected by an open trial if witnesses come forward to give evidence on his behalf after hearing about the proceedings in the media. For example, in *Chartier* v. *A.G. of Québec*,[51] witnesses came forward with evidence exonerating the accused after learning through the media that he had been charged. Similarly, in a recent Ottawa case, witnesses came forward to contradict prosecution evidence after reading the perjured evidence of an "eyewitness" to a murder in the newspaper.[52]

Thus, the public benefits derived from openness are of two kinds: the improvements to society that result from the freedom to discuss and form opinions about both government generally and the legal system in particular; and, the improvements in the

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48. *Supra*, note 24 at 88.

49. *Ibid.* at 93.

50. *Supra*, note 44 at 199.

51. (1979), [1979] 2 S.C.R. 474, 48 C.C.C. (2d) 34 [hereinafter *Chartier* cited to S.C.R.].

52. See S. Bindman, "Perjury Charges Laid after Trial" *The [Ottawa] Citizen*, (5 October 1984) C-2.

administration of justice[53] that result from scrutiny of those involved in it and from increased public knowledge of the laws to which it is subject.[54] If these benefits are to be realized, public and media access to the criminal process must be maximized.

However, for two reasons, this does not mean that the freedom to acquire information about the criminal process or the media's freedom to communicate it must, in all circumstances, be unrestricted. First, there is a threshold question to be addressed. The common law's adherence to the principle of openness is clear in relation to the trial process. However, when we refer in this paper to the "criminal process" we mean the entire continuum of legal incidents that accompany the prosecution of a criminal charge, from the investigative procedures carried out by police to the exhaustion of appeal remedies, including the documents which are generated by, or are otherwise relevant to, these proceedings. An inquiry into the application of the openness principle to proceedings other than a criminal trial must, therefore, be undertaken and a determination made whether principles other than those which govern trials apply to the other incidents in the criminal process.

Second, there are compelling interests that may be of equal or greater magnitude than the value of openness in a society committed to democratic principles. As mentioned, the *Charter* itself recognizes this in section 1. Reasonable limits may be imposed on fundamental freedoms if they can be shown to be justified in a "free and democratic society." The challenge is to identify the competing interests and balance them against the enormous societal interest in maximum freedom of access and expression in the criminal process. This will be undertaken throughout this paper in the context of specific events in the criminal process. Nevertheless, there are certain general, competing interests that should be identified at this point. These are, effective law enforcement, individual privacy, and the guarantee of a fair trial.

IV. Competing Values

Certain information relating to the conduct of police investigations could, if revealed, frustrate the successful apprehension of those reasonably believed to have committed a criminal offence. Sometimes, even knowledge of the existence of a planned police operation could result in suspects absconding or in the destruction of evidence. Thus, in considering, for example, whether limits should be placed on public

53. See Jamie Cameron, The Rationales for Openness in Judicial Proceedings and the Rationales for Placing Limits on the Principle of Openness (Study Paper prepared for the LRCC, 1985) [unpublished]; also, Jamie Cameron, "Comment: The Constitutional Domestication of Our Courts — Openness and Publicity in Judicial Proceedings under the Charter," in Anisman and Linden, eds, *supra*, note 8 at 331.

54. The important educative function of publicity should not be overlooked, even where there may be a temptation to withhold sensitive information. The following is an example:

> The danger of interference with publicity in the sense of "open court" was illustrated by the Punishment of Incest Act, 1908. It was necessary to repeal the provision that proceedings under that Act should be held *in camera*, because it was found that such acts were often committed in ignorance that they were criminal. [Anonymous, "Pre-trial Publicity" (1938) 86 Law Journal 361.]

and media access to information about police searches, arrests or electronic surveillance, one must examine the likelihood and extent of the jeopardy to effective law enforcement that could result from disclosure of that information. The police, being that arm of government to which we have entrusted the greatest measure of discretionary authority to intrude into our daily lives, must be subject to public scrutiny in order for citizens to form opinions about the proper exercise of that authority. Yet that scrutiny should not prevent the police from carrying out their assigned duties. A free and democratic society must have an effective means of prosecuting crimes if its citizens are to have an opportunity to enjoy a substantial degree of liberty and security. However, any departure from the openness principle must be measured; it must only restrict freedom of access and communication to the extent necessary to allow public officials to perform their proper function, not to shield their actions from public examination.

By necessity, the free discussion of matters relating to the administration of criminal justice will often include commentary about the behaviour of various individuals. Some of these people will be public officials such as police officers, judges and Crown prosecutors. Quite properly, the discharge of their responsibilities will become public knowledge and the public will consequently develop and express opinions about the propriety of their actions in that capacity. Other people become involved in the criminal process in a purely private capacity. Victims of crime, witnesses, the accused and members of their families are likely to have details of their private lives, their habits, their personalities, even their feelings, exposed to public view. In some cases, these will be matters of relevance in the particular proceeding. In others, they will come to light only through media investigation. Totally innocent persons may find themselves under the glare of media attention if misfortune chooses to place them on the margins of a criminal investigation. For example, those who have their property searched for contraband may experience a violation of personal privacy if the press chooses to publish that information. The public may come to know matters that really have little to do with the need to scrutinize their government, the activities of its agents or the unfolding of the criminal process.

The protection of individuals' privacy is an important value in a democratic society. Neither the State nor the public should have an automatic right of access to intimate or embarrassing details about the lives of others. Some loss of privacy is, of course, inevitable in a criminal proceeding. What people did, said, heard and felt is the proper domain of inquiry in a trial if it is relevant to the criminal charge. Also, public curiosity and discussion about the individuals peripherally involved is natural. However, it would be proper for the State to protect the privacy of certain individuals involved in the criminal process when publicity would be particularly harmful. Again, any protection that is afforded to individuals in this respect should impose as little as possible on the public's right to know what transpires in its courtrooms and what its servants have done.

It is possible that the publication of information about an alleged crime or a person accused of an offence will limit the opportunity to hold a fair trial. By a "fair trial," we mean one in which the determination of the facts in the case depends solely on an evaluation of evidence lawfully tendered by the prosecution and the defence. No weight

should be given to any information about the case that is revealed outside of the courtroom and no deference should be paid to opinions expressed about the case by outside commentators, however venerable they may be. If information were published that would cause potential jurors to form fixed opinions about an accused's guilt or innocence, then the possibility of holding a fair trial would be reduced.

In a free and democratic society, there must be a guarantee that the way in which determinations of culpability are made will be equitable. One should neither be convicted nor acquitted of a criminal offence based on innuendo, suspect accusations or other specious reasons. This is why our laws of evidence only permit the introduction of evidence which is relevant. It would be justifiable, then, to impose reasonable, limited restrictions on what could be said or written about a criminal charge if there was a serious likelihood that potential jurors would be exposed to it and sufficiently influenced by it that a fair trial could not be held.

There may be a special obligation upon agents of the State to act in a manner that will protect the integrity of the criminal process. A criminal trial is a prosecution of an individual by the State. The State has a responsibility to act as the guardian of a fair trial. Police officers, Crown prosecutors and judges therefore have a duty to refrain from making remarks or revealing information that may reduce the likelihood of a fair trial taking place. Of course, State officials are bound by the law of contempt of court, which prohibits anyone from publishing information or opinions that could prejudice a fair trial. However, they may have an extra duty to preserve the integrity of the administration of justice, beyond the requirements of contempt law and the other legal limitations on expressing information about the criminal process.

These, then, are the principal interests that converge in an analysis of public and media access to the criminal process. They must be given due recognition and balanced on the scales of democracy and justice. It is a troubling endeavour which requires weighing the harm that results from limiting openness and freedom of expression against the harm that results from limiting any of the other significant interests at stake. For example, when we restrict an accused's opportunity to receive a fair trial, the resulting harm is measurable and concrete. There is a risk that a person will be placed in jeopardy and deprived of his liberty or denied his civil rights for a fixed period of time if he is wrongfully convicted. Similarly, if a police investigation is frustrated by the disclosure of its lawful clandestine activities, suspected criminals may evade prosecution. When innocent individuals are exposed to the glare of media attention, we can empathize with them for the psychological harm they may suffer. In each of these situations, it is relatively easy for us to appreciate the consequences of encroaching on the social interests involved.

By contrast, the harm done by restricting openness and freedom of expression about the criminal process is abstract and difficult, if not impossible, to measure. Information about a criminal proceeding may never reach the public. Some salient lesson about our legal system may go unlearned. The actions of a public official may go unobserved. The media may become more strident in the pursuit of their freedom or more complacent in the face of governmental barriers. These consequences are all

foreseeable. Yet, they are diffuse and intangible in comparison with the consequences of intruding on other social values. It is perhaps natural, then, that there be a tendency (one which we have been at pains to avoid) to recognize the relatively precise values which compete with the public interest in maximum openness more easily and, in some cases, give them precedence.

CHAPTER TWO

The Present Law

I. The Threshold Question

The common law has long recognized the importance of openness in the criminal trial process. However, adherence to the principle of free access to, and discussion about, criminal *trial* proceedings does not, in itself, give clear guidance as to the degree of openness in other kinds of criminal proceedings, such as *pretrial* proceedings.

The evolution of the law governing the preliminary inquiry is particularly instructive in this respect. Under early common law, the general rule of openness in legal proceedings did not apply to preliminary inquiries. The procedural character of these early proceedings ("preliminary examinations" as they were called) differed greatly from those of the late nineteenth and twentieth centuries. The preliminary hearing was originally an inquisitorial proceeding — the presiding justices did not perform a judicial function so much as an investigative one,[55] and thus the rule of maximum openness did not apply.[56] Published accounts of preliminary inquiries were not considered to be privileged, as were reports of trial proceedings.[57]

It was not until 1848 that the preliminary inquiry bore any resemblance to the present proceeding with the introduction of the *Indictable Offences Act, 1848*[58] which provided that it be conducted in a judicial fashion. The accused was entitled: to be present while witnesses were examined; to cross-examine the Crown's witnesses; to be informed of the allegations against him; to present witnesses of his own; and to speak on his own behalf if he so desired.[59] However, notwithstanding the major alteration in the character of the proceeding, the common law rule which restricted access to, and

55. See Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, vol. 1 (New York: Burt Franklin, 1883) at 216-29.

56. *Ibid.* at 227-8.

57. See *R.* v. *Fisher* (1811), 2 Camp. 563, 170 E.R. 1253 (K.B.) in which Lord Ellenborough stated at 1253: "The publication of proceedings in courts of justice, where both sides are heard, and matters are finally determined, is salutary, and therefore it is permitted. The publication of these preliminary examinations has a tendency to pervert the public mind, and to disturb the course of justice; and it is therefore illegal."

58. (U.K.), 11 & 12 Vict., c. 42 [also known as "Sir John Jervis's Act"]. See Stephen, *supra*, note 55 at 220.

59. *Indictable Offences Act, 1848*, *supra*, note 58, s. 17, 18 and 27.

publication of, preliminary inquiry proceedings was given statutory form in the same piece of legislation. The Act provided that "the room or building in which such justice or justices shall take such examinations and statement as aforesaid shall not be deemed an open court for that purpose." It went on to provide presiding justices with a power to exclude persons from the room or building if "the ends of justice" so required.[60] Thus, even though the preliminary inquiry was transformed into a judicial rather than an investigatory proceeding, the degree of openness which was considered appropriate for criminal trials was not applied to it. On the other hand, the proceeding was not completely closed. Notwithstanding the statutory presumption against openness and the absence of privilege attaching to reports of preliminary inquiries, it was apparently common for the public and press to be admitted and for accounts of the proceedings to be published.[61]

The original Canadian *Criminal Code* did not permit access to preliminary inquiries. Unlike the statutory provision in the United Kingdom which deemed the place where preliminary inquiries were held not to be an open court, the Canadian *Criminal Code* stated definitively that the place "shall not be an open court."[62] While English law negated the application of the common law presumption of openness, it also admitted of some possibility of public attendance. Canadian legislators foreclosed any such possibility.

It was not until 1980 that a presumption of openness was provided statutorily in England, in effect recognizing the completely judicial character of the preliminary inquiry.[63] By contrast, the Canadian 1892 *Code* was amended in 1906 by the removal of the express requirement that preliminary inquiries be held in closed court,[64] which in turn, gave rise to a presumption that the proceedings were open to the public, subject to the power to exclude persons other than those directly involved.[65] This, indeed, appears to have been and continues to be the Canadian practice,[66] our *Criminal Code* provision remaining essentially unchanged since the 1906 amendment.[67]

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60. *Ibid.*, s. 19.

61. See, for example, Anonymous, "Pre-Trial Publicity" (1938) 86 Law Journal 343, quoted in C.A. Wright, "Newspapers and Criminal Trials" (1939) 17 Can. Bar Rev. 191 at 192-4. Privilege was later extended to all fair and accurate reports of "proceedings publicly heard before any court exercising judicial authority ... if published contemporaneously with such proceedings ...." *Law of Libel Amendment Act, 1888* (U.K.), 51 & 52 Vict., c. 64, s. 3.

62. S.C. 1892, c. 29, s. 586(*d*) [hereinafter 1892 *Code*].

63. The English law remained unchanged from the 1848 statute until passage of the *Magistrates' Courts Act, 1952* (U.K.), 15 & 16 Geo. 6 and 1 Eliz. 2, c. 55, s. 4(2), which provided that justices presiding at a preliminary inquiry "shall not be obliged to sit in open court." The *Magistrates' Courts Act, 1980* (U.K.), 1980, c. 43, s. 4(2), now provides that justices "shall sit in open court" unless the ends of justice require otherwise, thus completely reversing the presumption in the *Indictable Offences Act, 1848*, *supra*, note 58, that preliminary inquiries were not to be held in open court.

64. R.S.C. 1906, c. 146, s. 679(*d*).

65. *Ibid.*

66. See Wright, *supra*, note 61 at 192; David Lepofsky, *Open Justice: The Constitutional Right to Attend and Speak about Criminal Proceedings* (Toronto: Butterworths, 1985) at 38-40. See also *infra* at 29-30.

67. See *Criminal Code*, s. 465(1)(*j*).

Recently the United States Supreme Court has ruled that preliminary inquiries in the State of California are governed by the general rule of openness of legal proceedings.[68] Historically, preliminary inquiries in both State and federal prosecutions have been accessible to the public. The Supreme Court found that openness was essential to the proper functioning of the proceeding: "Because of its extensive scope, the preliminary hearing is often the final and most important step in the criminal proceeding."[69] Therefore, the public's right of access is protected under the First Amendment.

From the foregoing discussion we see that the history of the preliminary inquiry offers some indication of the threshold at which the common law presumption of openness applies to legal proceedings. It was only when the preliminary inquiry took on a *judicial* rather than an investigatory character that it came to be regarded as an open proceeding, even though the governing statutory regime effectively limited openness for a significant period of time thereafter. This example, of course, does not lead inevitably to a conclusion that all adjudicative proceedings should be characterized by the same degree of openness as criminal trials.[70] Rather, it simply offers some indication that a presumption of openness normally attaches to "judicial proceedings," whether or not they occur prior to trial.

While the example of the preliminary inquiry is instructive on the question of where the common law presumption of openness applies, this question has been largely resolved in Canada by the Supreme Court's judgment in *A.G. of Nova Scotia* v. *MacIntyre*.[71] There, Dickson J. (as he then was) for the majority recognized that it governs all "judicial proceedings, whatever their nature, and in the exercise of judicial powers,"[72] not just trial proceedings. In particular, the Court ruled that the presumption of openness applies to the judicial act of issuing search warrants, and that therefore the public is entitled to have access to documents supporting the application for a warrant after the warrant has been executed and something found. It stated that "[a]t every stage the rule should be one of public accessibility and concomitant judicial accountability."[73]

Thus, the principle of openness and the threshold at which it applies are now clear in Canadian law. A presumption of public attendance and publicity attaches to proceedings which are judicial in nature. Further, a right of access and a freedom to publish documentary material related to those proceedings are included in that principle.

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68. *Press-Enterprise Co.* v. *Superior Court of California*, 478 U.S. [No. 84-1560], 92 L. Ed. 2d 1 (1986).

69. *Ibid.* at 12-3.

70. The United States Supreme Court previously held, for example, that pretrial suppression hearings may take place in the absence of the public because of the danger of exposing potential jurors to unreliable or illegally obtained evidence: *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 61 L. Ed. 2d 608, 99 S. Ct. 2898 (1979).

71. (1982), [1982] 1 S.C.R. 175 [hereinafter *MacIntyre*].

72. *Ibid.* at 185, citing in support the statement in *McPherson* v. *McPherson*, [1936] A.C. 177 at 200 (P.C.) *per* Lord Blanesburgh that "publicity is the authentic hall-mark of judicial as distinct from administrative procedure."

73. *Supra*, note 71 at 186.

Limitations on openness, however, according to the decision in *MacIntyre*, are justifiable where necessary to protect "social values of superordinate importance."[74] In essence, this Working Paper proposes to establish which values are in need of protection through limiting openness in the criminal process and the proper extent of that protection.

II. A Synopsis of the Canadian Law

There are numerous limitations on the principle of openness in the criminal process. Many are scattered throughout the *Criminal Code* and others derive solely from the common law. For ease of reference we have included an Appendix of all the applicable limitations discussed in this paper (see *infra*, p. 101).

A. Pretrial Proceedings

The earliest point at which there is judicial involvement in a criminal investigation is when the police seek an authorization to intercept a private communication under section 178.12 of the *Criminal Code*. This process, allowing for electronic surveillance as an investigatory tool, is by its very nature clandestine; secrecy is essential to it. A written application is made to a court for an authorization to intercept a private communication (section 178.12) and all documentation relating to the application is confidential (section 178.14). The affidavit, sworn by a peace officer, setting out the facts justifying issuance of the authorization and the particulars of the communications sought to be intercepted is put in a packet sealed by the judge which according to subsection 178.14(1) is "kept in the custody of the court in a place to which the public has no access."

There are various means for keeping the process secret. The packet may only be opened pursuant to a court order after a hearing has been conducted on that specific issue (subsection 178.14(2)). The Supreme Court of Canada has held that it may only be opened upon a direct challenge to the validity of the authorization, not in the course of collateral proceedings.[75] Generally, there has been a judicial reluctance to order these packets opened in the absence of evidence of fraud or misconduct in the application process.[76] Further, the contents of documents supporting an application for a wiretap authorization or the substance of an intercepted communication cannot be disclosed upon a request under the *Access to Information Act*.[77] Once an authorization has been

74. *Ibid.* at 186-7. See a fuller discussion of the *MacIntyre* decision *infra* at 26-7.

75. *Wilson* v. *R.* (1983), [1983] 2 S.C.R. 594, 9 C.C.C. (3d) 97.

76. See, for example, *Re Royal Commission Inquiry into the Activities of Royal American Shows Inc. (No. 3)* (1978), 40 C.C.C. (2d) 212 (Alta. S.C.). See also LRCC, *Electronic Surveillance* (Working Paper 47) (Ottawa: LRCC, 1986) at 59-61.

77. S.C. 1980-81-82-83, c. 111, s. 24(1), Schedule II.

issued and executed and an interception made, it is generally an offence to disclose the existence or contents of the intercepted communication, except in the course of a criminal investigation or prosecution.[78]

The primary interest served by the secrecy surrounding the authorization process is effective criminal law enforcement. Obviously, the effectiveness of a wiretap as an investigatory tool would be completely neutralized if the public were allowed either to attend during an application for an authorization or to publish information supporting the application while the investigation was ongoing. Possible suspects would be alerted to the investigation; their apprehension would be made difficult, if not impossible; and evidence could be concealed or destroyed.

The other interest served by the secrecy in the present electronic surveillance system is the protection of innocent persons. The safety of police informers and others who assist police in their investigations could be compromised if their identities were revealed through publication of the contents of supporting affidavits. Also, those who were wrongly suspected of criminal activity could suffer damage to their reputations if they were publicly identified as being associated with a criminal investigation.[79]

Although there are merits in the justifications for maintaining this level of secrecy in the process of authorizing electronic surveillance, courts have recognized that greater openness may be demanded by the right to be secure against unreasonable search and seizure in section 8 of the *Charter*. In *R.* v. *Ross*,[80] the Court held that the interest in secrecy is diminished after the execution of an interception at which time an accused has a right to gain access to the packet in order to make full answer and defence at his trial. To continue to protect innocent individuals, certain names were deleted from the contents of the documents in that case.[81] Similarly, in *R.* v. *Wood*,[82] Osborne J. held that section 7 of the *Charter* entitles an accused to full answer and defence and that restrictions on the accused's access to the sealed packet constitute an interference with that right. However, he also stated that measures must be taken to recognize the interests protected by the secrecy in the authorization process: "There must be and can be some protection afforded to the contents of the sealed packet. Those contents cannot be exposed to a public view as is the case with respect to evidence heard in our criminal courts on a day-to-day basis."[83]

In the Commission's recent Working Paper 47 on *Electronic Surveillance*, we recommended that there be greater openness introduced into the present law in order to

78. See *Criminal Code*, s. 178.2.

79. See *R.* v. *Finlay and Grellette* (1985), 52 O.R. (2d) 632 (C.A.) at 660-1.

80. *R. v. Ross* (1985), 26 C.C.C. (3d) 264 (Ont. Dist. Ct.).

81. See also *R.* v. *Finlay and Grellette*, *supra*, note 79 where Martin J.A. stated at 662 that "[i]t may be that the interests protected by the policy underlying the restriction of an accused's access to the sealed packet can in many cases be effectively protected in other ways, *e.g.*, by deleting in the copy supplied to the accused the names of informers and innocent persons who might be injured by the revelation of their names."

82. (1986), 26 C.C.C. (3d) 77 (Ont. H.C.).

83. *Ibid.* at 87.

permit greater monitoring of the process of issuing authorizations and to afford greater disclosure to an accused.[84]

As with the issuance of authorizations for electronic surveillance, there is a strong interest in effective law enforcement in the process of issuing search warrants. The question whether the public should have access to this process, and thereafter to documents relating to it, is one that has generated a good deal of controversy in recent years. There have been three recent approaches to this question.

The controversy really began with the case before the Supreme Court of Canada in *MacIntyre*.[85] There, a journalist had been denied access to a search warrant and supporting information after the warrant had been executed. The majority *per* Dickson J. (as he then was) began with the presumption that all judicial proceedings and documents relating to them are public, subject to competing "social values of superordinate importance." It found that one of those values was effective law enforcement and that another was protection of innocent persons. To safeguard the former value, the Court held that the process of issuing warrants should be closed to the public. If the public were permitted to attend, "the search for the instrumentalities of crime would, at best, be severely hampered and, at worst, rendered entirely fruitless."[86]

The second "superordinate value," the protection of the innocent, arises after a warrant has been issued. If public access to the warrant were permitted at this stage, innocent persons' names could be published or broadcast and their reputations damaged. The "innocent" whom Dickson J. (as he then was) wished to protect were those whose premises had been searched, but where nothing had been found. He asked whether these persons "[m]ust ... endure the stigmatization to name and reputation which would follow publication of the search?"[87] In order to protect the innocent, Dickson J. ruled that public access to the warrant and supporting information should be available only after the warrant has been executed and something found. The assumption was that if the search was fruitful, the occupant of the premises searched could no longer be regarded as "innocent" and his or her name could be published. The ability of interested parties to inspect warrants and supporting informations after execution of the warrant was upheld.[88] The restriction on access applied only to the general public, including representatives of the media.

Following the *MacIntyre* decision, the Commission examined the question of access to the process of issuing warrants and publication of their contents in its

84. LRCC, *supra*, note 76 at 59-65, 90-3.

85. *Supra*, note 71.

86. *Supra*, note 71 at 187. Note also that issuance of warrants under the *Canadian Security Intelligence Service Act*, S.C. 1984, c. 21, s. 27, must take place in secrecy.

87. *Supra*, note 71 at 187.

88. See, for example, *Realty Renovations Ltd.* v. *A.G. for Alta.* (1978), 44 C.C.C. (2d) 249 (Alta. S.C.); and *MacIntyre*, *supra*, note 71 at 181.

Report 24 on *Search and Seizure*. We agreed with the majority of the Supreme Court of Canada that the issuance of search warrants should normally take place *in camera*.[89]

We also recommended that the public's entitlement to have access to the warrant and supporting information be broadened so as to permit examination of those documents after the warrant was executed, whether or not anything was found in the course of the search.[90] On the other hand, in order to protect the reputations of innocent persons, we would have placed a ban on publication of the contents of warrants and informations without the consent of the person searched unless that person was charged with an offence. To illustrate, if the premises of an accounting firm were searched for evidence relating to suspected criminal activity of the firm's clients, it could be unfair to the firm and damaging to its reputation to identify it as being associated with the investigation, even if financial records were seized in the course of such a search. Yet, under the *MacIntyre* approach, it would not be protected as an "innocent" party, because material was seized in the course of a search of its premises.

The third approach to this issue is contained in an amendment to the *Criminal Code*, namely section 443.2, introduced in the *Criminal Law Amendment Act, 1985* and proclaimed in force on December 4, 1985. However, it has since been found to conflict with the *Charter*. Section 443.2 of the *Criminal Code* presently states:

> **443.2** (1) Where a search warrant is issued under section 443 or 443.1 or a search is made under such a warrant, every one who publishes in any newspaper or broadcasts any information with respect to
>
> (*a*) the location of the place searched or to be searched, or
>
> (*b*) the identity of any person who is or appears to occupy or be in possession or control of that place or who is suspected of being involved in any offence in relation to which the warrant was issued,
>
> without the consent of every person referred to in paragraph (*b*) is, unless a charge has been laid in respect of any offence in relation to which the warrant was issued, guilty of an offence punishable on summary conviction.
>
> (2) In this section, "newspaper" has the same meaning as in section 261.

This provision relates solely to the publication of information about a search. Thus, the rules in the *MacIntyre* case prohibiting attendance at search warrant application hearings and permitting public access to the warrant and supporting information after execution of the warrant still apply. Through this amendment, however, publication of the location of the search, and the identities of the occupants of searched premises and the suspects in the investigation is prohibited without their collective consent. The ban terminates when a charge is laid as a result of the investigation of which the search is a part.

Section 443.2 of the *Criminal Code*, therefore, seeks to protect the identities of suspects and occupants of searched premises until a charge is laid. Since public access to the warrant and supporting information is still available after the execution of a

89. *Supra*, note 4 at 22-3, s. 10(1)(*b*).

90. *Supra*, note 4 at 30.

fruitful search, there may be a considerable period during which the media are obliged to suppress information they have gleaned from these documents.

Recently, courts in Ontario and Manitoba[91] have held that this provision is unconstitutional for its intrusion on freedom of the press. The Minister of Justice has announced that he is treating *Criminal Code*, section 443.2 as inoperative and will reintroduce an amended version of it in the future. In Chapter Three, we discuss these cases, as well as some of the criticisms that have been made of this provision and suggest improvements to it.

There continues to be a sizeable public interest in openness after a charge has been laid. The public can be reassured that a possible offender has been identified and that the police have not abandoned their investigation. However, there is a risk at this stage that the accused will be stigmatized by adverse publicity, and that possibly his or her chances of a fair trial will diminish as a result. On the other hand, it may also happen that publicity, including publication of an accused's name, will alert and encourage potential witnesses to come forward, thus actually increasing the likelihood that an accused will receive a fair trial.[92]

Publicity surrounding a judicial interim release (bail) hearing poses particular problems. Evidence introduced by the Crown or the defence at a bail hearing is directed solely to establishing the appropriateness of an accused's detention pending his or her trial. Evidence that is relevant and admissible to this question may be irrelevant and inadmissible in a subsequent trial on the offence charged. For example, hearsay evidence may be tendered at a bail hearing if it is given under oath,[93] but may not be admitted later at trial. Clearly, if publicity is given to this type of evidence prior to a trial, there is some risk that potential jurors will be exposed to, and influenced by, it. This may intrude upon the principle inherent in the right to a fair trial, that is, that an accused should be judged solely on the evidence lawfully put before the trier of fact.[94]

The *Criminal Code* contains provisions designed to protect the integrity of trial proceedings by limiting the opportunities for publishing evidence tendered at a bail hearing. A justice may make an order banning publication or broadcast of evidence, information, or representations, and the reasons, if any, given or to be given by the justice at the hearing.[95] The order is discretionary if an application is made by the prosecutor, but mandatory if requested by an accused. It lasts until the accused is discharged at a preliminary inquiry, or if ordered to stand trial, until the trial is over. This power has been held to be a reasonable limit on the *Charter*'s guarantee of freedom of expression, including freedom of the press.[96]

91. *Canadian Newspapers Co.* v. *A.G. Canada* (1986), 53 C.R. (3d) 203 (Ont. H.C.). *Canadian Newspapers Co.* v. *A.G. Canada* (1986), 28 C.C.C. (3d) 379 (Man. Q.B.).

92. See, *supra*, p. 16 for examples.

93. *Re Powers and R.* (1972), 9 C.C.C. (2d) 533 (Ont. H.C.) at 538-9.

94. See Lepofsky, *supra*, note 66 at 11.

95. Subsection 457.2(1). It has been held that a court may ban publication of reasons for its decision, but it cannot ban publication of the decision itself: *Re Forget and R.* (1982), 65 C.C.C. (2d) 373 (Ont. C.A.).

96. *Re Global Communications Ltd. and A.G. Canada* (1984), 44 O.R. (2d) 609 (C.A.).

According to subsection 442(1), a justice may also exclude the public from a bail hearing if it is in "the interest of public morals, the maintenance of order or the proper administration of justice." Thus, if a justice has an apprehension that a fair trial cannot be guaranteed by imposing a publication ban on evidence tendered at the hearing, he may take the further step of clearing the courtroom to protect the "proper administration of justice." Since this provision applies to all "proceedings against an accused," it is discussed more fully below in relation to criminal trials.

Just as with judicial interim release hearings, there is a danger that publication of evidence led at preliminary inquiries may influence prospective jurors and jeopardize the possibility of holding a fair trial. The *Criminal Code* contains provisions permitting restrictions on access to these proceedings and limitations on publicity.

Paragraph 465(1)(*j*) of the *Criminal Code* empowers a justice presiding at a preliminary inquiry to exclude everyone from the courtroom other than the prosecutor, the accused and their counsel "where it appears to him that the ends of justice will be best served by so doing." In addition to this power, paragraph 465(1)(*k*) of the *Criminal Code* provides that a justice may regulate the inquiry "in any way that appears to him to be desirable." Thus, a justice has a broad discretion to exclude the public from the inquiry absolutely under paragraph 465(1)(*j*),[97] or to make any other suitable order under paragraph 465(1)(*k*). These provisions exist along with the general authority to exclude "all or any members of the public from the court room for all or part" of "any proceedings against an accused."[98] However, under the latter provision, the basis for exclusion must be related to "public morals, the maintenance of order or the proper administration of justice." The discretion to close a preliminary inquiry, then, is at least as broad if not broader than the power to close a criminal trial.[99] Although its main purpose is to guarantee a fair trial, it has also been invoked to protect the identities of witnesses at a preliminary inquiry.[100]

In conjunction with the power to close proceedings, a justice may also, or alternatively, impose a ban on the publication of evidence tendered at the preliminary inquiry. Like the corresponding publication bans relating to bail hearings, the ban placed on preliminary inquiry evidence may generally be imposed at the justice's discretion, unless it is the accused who makes the application. A justice must prohibit publication at the request of an accused.[101] The ban lasts until the accused is discharged,

97. This paragraph has been held to permit exclusion of *all* members of the public, but not selected persons: *R.* v. *Sayegh (No. 2)* (1982), 66 C.C.C. (2d) 432 (Ont. Prov. Ct.).

98. Subsection 442(1). See discussion *infra* under "Criminal Trials."

99. *Re R. and Grant* (1973), 13 C.C.C. (2d) 495 (Ont. H.C.) at 499. The Court also held that subsection 442(1) did not apply to preliminary inquiries given the particular powers in paragraphs 465(1)(*j*) and (*k*).

100. *Morgentaler* v. *Fauteux* (1971), [1972] C.A. 219 (Qué. C.A.).

101. *Criminal Code*, s. 467(1)(*b*) (as amended by the *Criminal Law Amendment Act, 1985*, s. 97). However, a justice may have a discretion not to impose a ban even on an accused's application if the request is made in the course of, rather than "prior to the commencement of the taking of evidence": *R.* v. *Harrison* (1984), 14 C.C.C. (3d) 549 (Ct. Sess. P.).

or, if ordered to stand trial, until the trial is over. This provision has been found to be a reasonable limit on freedom of the press as guaranteed by the *Charter*.[102]

Whether or not the presiding justice imposes a publication ban at a preliminary inquiry, there is an absolute prohibition in subsection 470(2) of the *Criminal Code* against publication of "any admission or confession ... tendered in evidence" at the inquiry. Again, it lasts until the accused has been discharged, or, if ordered to stand trial, until the trial is over. Clearly, this evidence is potentially the most prejudicial that could be published prior to a criminal trial. Although this is recognized statutorily in subsection 470(2) in relation to preliminary inquiry evidence, the publication of an admission or confession obtained from *other* sources could constitute an offence of contempt of court at common law if it tended to prejudice the likelihood of a fair trial taking place.[103]

B. Criminal Trials

The various means by which pretrial publicity in criminal cases can be limited serve to insulate the trial process from extraneous influences. Canadian law provides additional procedures that can be invoked where there is some apprehension that pretrial events may interfere with the integrity of the trial process. These procedures do not conflict with the principle of openness; rather, they serve to immunize criminal trials from any adverse effects that openness could have on the integrity of the criminal process.

For example, in any case that has gained local notoriety because of its sensational facts or the alleged participation of public figures, it may be difficult to find jurors who are objective, even if limits are placed on publicity prior to trial. In this situation, subsection 527(1) of the *Criminal Code* permits either a prosecutor or an accused to apply to a judge for a change of venue to another territorial division in the same province. The order may generally be made only where "it appears expedient to the ends of justice." This has been interpreted to mean that only where there is clear evidence that a fair trial cannot reasonably be expected, usually because of the degree or nature of pretrial publicity, will a change of venue be ordered.[104]

Another available technique is simply to delay proceedings until media attention has dissipated. The *Criminal Code* contains broad powers of adjournment that could be invoked in a situation where the fairness of a trial is thought to be in jeopardy because

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102. *R.* v. *Banville* (1983), 3 C.C.C. (3d) 312 (N.B.Q.B.).

103. *Steiner* v. *Toronto Star* (1955), 114 C.C.C. 117 (Ont. H.C.). Such a publication could also have offended the statutory codification of the common law offence that had been proposed in Bill C-19 (*supra*, note 9). See the offence of "interference with judicial proceedings" set out in the proposed section 131.11 of the *Criminal Code*, Bill C-19, s. 33. Bill C-19 died on the order paper in 1984. A superior court also has inherent jurisdiction to prohibit publication of an accused's guilty plea to prevent prejudice to the trial of a co-accused: *Re Church of Scientology of Toronto and R. (No. 6)* (1986), 27 C.C.C. (3d) 193 (Ont. H.C.).

104. See, for example, *R.* v. *Beaudry* (1965), [1966] 3 C.C.C. 51 (B.C.S.C.); *R.* v. *Turvey* (1970), 1 C.C.C. (2d) 90 (N.S.S.C.); *Re Trusz and R.* (1974), 20 C.C.C. (2d) 239 (Ont. H.C.).

of intense media attention. A justice presiding at a preliminary inquiry has the power to order an adjournment where there is "sufficient reason" to do so.[105] A summary conviction trial may be adjourned up to a maximum interval of eight days unless the parties agree to a longer period (subsection 738(1)). A trial before a magistrate or judge alone can be adjourned (section 501) as can a trial before a jury (subsection 574(2)). The power to delay proceedings is, however, limited by an accused's right to a trial within a reasonable time under paragraph 11(*b*) of the *Charter*.[106]

In a jury trial, it is possible to screen out those potential jurors who may not be objective because they have been influenced by pretrial publicity. Paragraph 567(1)(*b*) of the *Criminal Code* permits a prosecutor or an accused to challenge a juror's impartiality during the course of empanelling the jury. One who is felt not to be "indifferent between the Queen and the accused" may be questioned by counsel and is "tried" on the issue of his or her impartiality by the two jurors who were last sworn.[107] There must be a reason given for a challenge; it cannot be speculative. Thus, the questioning of potential jurors must be "relevant, succinct and fair."[108] The kind of wide-ranging questioning that is permitted in the United States[109] does not occur in Canada. However, in the recent trial of Dr. Morgentaler in Ontario, the defence was permitted to direct questions to potential jurors concerning their beliefs on abortion and their ability to decide the case solely on the evidence.[110]

Publicity which reaches the jurors *during* a trial can also interfere with its fairness. Where there is an apprehension that publicity may prejudice the proceedings, a judge may order that the jurors be sequestered. They are then prevented from communicating with anyone other than other members of the jury.[111]

These measures are alternate or coincident means of protecting the objectivity that is the essence of a fair trial. Their great advantage is that they do not prevent access to, or publication about, criminal proceedings. Their disadvantage is that they may cause inconvenience (for example, change of venue), delay (for example, adjournment of proceedings) and hardship to participants (for example, sequestering jurors). These factors must be weighed by those responsible in determining the proper course in individual cases.

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105. *Criminal Code*, s. 465(1)(*b*). Each delay may be for a maximum of eight days unless the parties agree to a longer period or the accused is remanded for observation.

106. See *R.* v. *Antoine* (1983), 5 C.C.C. (3d) 97 (Ont. C.A.); *Re R. and Beason* (1983), 7 C.C.C. (3d) 20 (Ont. C.A.).

107. *R.* v. *Hubbert* (1975), 29 C.C.C. (2d) 279 (Ont. C.A.) at 293.

108. *Ibid.* at 294.

109. See, for example, *Press-Enterprise Co.* v. *Superior Court of California*, 464 U.S. 501, 78 L. Ed. 629, 104 S. Ct. 819 (1983), in which the selection of jurors lasted more than six weeks.

110. Prospective jurors were asked: Do you have beliefs on abortion that might cause you to convict or acquit regardless of the evidence? Have you formed opinions as to the guilt or innocence of the accused? Would you be able to set aside beliefs to reach a verdict based on the evidence and the law? See Kirk Makin, "Potential jurors face morals quiz in Morgentaler's abortion trial," *The Globe and Mail* (16 October 1984) at 14, col. 1.

111. *Criminal Code*, s. 576(1) and (2).

In addition to the various limits that may be imposed on pretrial publicity and other ways in which the trial process can resist the potential influence of media coverage, there are restrictions on openness that can be imposed during criminal trials. Many of these serve interests ancillary to the fair administration of criminal justice, such as the protection of vulnerable individuals and broad social values.

There is a wide discretionary power in subsection 442(1) of the *Criminal Code* permitting a presiding judge to exclude all or any members of the public from all or part of any proceedings against an accused. Such an order may be made in the interests of public morals, the maintenance of order, or the proper administration of justice. Despite the breadth of this power, it has been exercised with restraint.[112] With respect to the protection of public morals, courts have held that it is not the nature of the offence that should be considered in determining whether to close a criminal proceeding, but rather the kind of evidence that will be tendered.[113] Neither can the power be used to save witnesses from any embarrassment they might suffer from having to testify in a public trial of a sexual offence.[114] However, in the interests of the proper administration of justice, a trial may be closed in order to encourage a reluctant witness to testify.[115] A closure order should only be of sufficient duration to satisfy the particular public interest at stake in the case.[116] Further, an appeal court may order a new trial where proceedings have been unjustifiably closed to the public.[117]

Although there is no specific statutory authority to close a courtroom while submissions are being made on sentencing, an Alberta court has ruled that such submissions may be heard *in camera* in appropriate circumstances.[118] Where public access would discourage a person from making representations on his own behalf, a court may order closure of the courtroom. Fairness to the accused was held to be a "social value of superordinate importance"[119] justifying an intrusion on the general principle of the maximum openness of judicial proceedings.

The media have occasionally sought to examine exhibits tendered in judicial proceedings on the reasoning that full public access must apply to both their oral and physical aspects. Some courts have been unwilling, however, to recognize the latter dimension of the openness issue. In *R.* v. *Thomson Newspapers*,[120] it was held that under the *Charter* the media have no right of access to documentary evidence in a criminal proceeding for purposes of copying or filming it for publication. The Court defined the right of access to trial proceedings by the public and the media to be no

112. See *R.* v. *Brint* (1979), 45 C.C.C. (2d) 560 (Alta. C.A.); *Re Vaudrin and R.* (1982), 2 C.C.C. (3d) 214 (B.C.S.C.).

113. *R.* v. *Warawuk* (1978), 42 C.C.C. (2d) 121 (Alta. C.A.).; *Re Cullen and R.* (1981), 62 C.C.C. (2d) 523 (Alta. Q.B.).

114. *R.* v. *Quesnel and Quesnel* (1979), 51 C.C.C. (2d) 270 (Ont. C.A.).

115. *R.* v. *Warawuk*, *supra*, note 113.

116. *R.* v. *Brint*, *supra*, note 112.

117. *Ibid.*

118. *R.* v. *Parisian* (1985), 63 A.R. 153 (Alta. Q.B.).

119. *MacIntyre*, *supra*, note 71 at 187.

120. 11 W.C.B. 436 (December 8, 1983), (Ont. H.C.) [unreported].

more than the entitlement to attend proceedings as spectators. This is not unlike the English situation which permits, for example, the exclusion of the public from a courtroom while an exhibit is being viewed by the jury.[121] However, in a contrary ruling, the Ontario High Court held that the media were entitled to broadcast the videotaped confession tendered in evidence in a murder trial.[122] O'Driscoll J. made the decision based on considerations of equal treatment of the electronic media and other forms of news reporting:

> Newspapers, radio and television all have their own particular media. Up to this point in time, I suppose it can be said that in view of the way that trials are conducted, the television media [*sic*] has been limited; television does not have the right to televise trials while the newspapers and radio have been able to broadcast in their medium what has been said in open court. Television should have comparable rights in its own particular medium in the realm of court exhibits.[123]

Courts also have the power to control dissemination of information contained in exhibits even after the media have been granted permission to copy them. In *Lortie* v. *R.*,[124] videotapes showing the accused engaged in a shooting incident in the Québec National Assembly were introduced in evidence at the accused's trial. The media were given permission to make copies of the tapes while the accused's appeal was pending, but the Speaker of the National Assembly and the Crown moved to enjoin the media from broadcasting them. Despite the accused's support of the media's position, the Québec Court of Appeal nonetheless held that it had the power to restrict the media's ability to show the public the contents of exhibits pending the accused's appeal. It derived these powers from its wide discretion to control the appeal process set out in the Rules of Practice[125] and subsection 610(3) of the *Criminal Code*. Even though the accused himself sought the broadcast of the tapes, the Court ruled that a limitation on the media's activities was necessary to protect his right to a fair trial, in the event that his appeal resulted in a new trial being ordered.

There are limitations that may be imposed on the publication of certain facts and matters that arise in the course of criminal proceedings. For example, a court may order that no publication be made of the fact that a change of trial venue was sought. Such an order usually lasts until the trial is over or the change of venue is in fact ordered.[126] The danger in the publication of this information is that prospective jurors may infer from it that an accused believes the community to be biased against him or her. This, in itself, may provoke an adverse attitude toward the accused in the community.

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121. *R.* v. *Waterfield* (1975), [1975] 2 All E.R. 40 (C.A.).

122. *R.* v. *Priemski* (March 11, 1986), (Ont. H.C.) [unreported].

123. *Ibid.* at 4. No reference was made to the *R.* v. *Thomson Newspapers* case, *supra*, note 120.

124. (1985), 46 C.R. (3d) 322 (Qué. C.A.) [hereinafter *Lortie*].

125. *Rules of Practice in Criminal Matters in the Court of Appeal of Quebec*, SI/83-107, s. 58.

126. *Re Southam Inc. and R. (No. 2)* (1982), 70 C.C.C. (2d) 264 (Ont. H.C.) at 266.

In order to ensure that jurors are not exposed to inadmissible evidence, there is in section 576.1 of the *Criminal Code* an absolute ban on the publication of information relating to trial proceedings that take place in the jury's absence. Of course, this only applies where a jury has not been sequestered and thus insulated from media reports. A breach of this provision, however, does not automatically entitle an accused to a new trial. An accused must first show that publication resulted in a miscarriage of justice.[127] Further, to protect the identities of innocent persons, a permanent publication ban may be placed on names revealed in the course of a *voir dire*[128] in circumstances analogous to proceedings against persons accused of blackmail, given that victims of blackmail are protected at common law.[129]

Limitations on publication of trial proceedings are usually aimed, as are certain pretrial restrictions, at preventing certain prejudicial information from reaching and influencing jurors. There are other provisions whose purpose is to protect different social interests. There is an absolute ban, for example, on publishing "in relation to any judicial proceedings any indecent matter or indecent medical, surgical or physiological details ... calculated to injure public morals."[130] Law reports and other professional publications are exempted from the ban under subparagraphs 162(4)(*c*)(i) and (ii). Obviously, the interest served by this provision is not the protection of a fair trial, but protection of public morality.

Subsection 442(3) of the *Criminal Code* presently permits the identity of complainants in sexual offences to be kept secret. There are two purposes served by this provision. First, it protects innocent individuals from public exposure out of a recognition that this can be very painful for them and can hinder them from resuming their life-style away from the glare of public exposure. Second, protection from publicity encourages victims both to report crimes and to come forward to give necessary evidence at trial. Thus, the withholding of sexual complainants' identities helps ensure that they are treated with dignity in the criminal justice system and that sexual offences are prosecuted. However, while recognizing the merit of the purposes underlying subsection 442(3), the Ontario Court of Appeal has ruled that the mandatory aspect of that provision constitutes a breach of the *Charter*'s guarantee of freedom of the press.[131] An order banning publication *must* be made under subsection 442(3) if the complainant or prosecutor so requests. The Court ruled that the social value protected by this provision was of superordinate importance; yet, it went on to state that publication of a complainant's name may, in a small number of cases, be desirable, such as where a complainant has been known to have made false accusations in the past. In those cases, publication of the complainant's name may encourage witnesses

127. *R.* v. *Demeter* (1975), 25 C.C.C. (2d) 417 (Ont. C.A.).

128. *Toronto Sun Publishing Corp.* v. *A.G. Alta.* (1985), [1985] 6 W.W.R. 36 (Alta. C.A.) [hereinafter *Toronto Sun Publishing Corp.*].

129. See, for example, *R.* v. *Socialist Worker Printers and Publishers Ltd.* (1974), [1975] Q.B. 637.

130. *Criminal Code*, s. 162(1)(*a*). Bill C-114, *An Act to Amend the Criminal Code and the Customs Tariff*, 1st Sess., 33d Parl., 1984-85-86 (First Reading, June 10, 1986) would have repealed section 162. The Bill died on the order paper.

131. *Canadian Newspapers Co.* v. *A.G. Canada* (1985), 49 O.R. (2d) 557 (C.A.), leave to appeal granted April 24, 1985.

with helpful information to come forward. For that reason, a presiding judge ought to have a discretion to make such an order but he should not be required to do so in every case in which a complainant or prosecutor requests it.[132]

There are other provisions in the *Criminal Code* whose purposes are similar to those underlying subsection 442(3). The public must be excluded from a *voir dire* to determine the admissibility of a complainant's sexual history (subsection 246.6(3)); also a ban is placed on publication of information relating to that proceeding (subsection 246.6(4)). These provisions prevent a complainant from having to testify in public concerning extremely personal information; they restrict the publication of that information until there has been a judicial finding that this testimony is relevant and admissible in the proceedings. Even with these protections, complainants may be reluctant to testify, either out of fear or embarrassment. However, a court does not have the authority to extend further protections to a complainant, such as excluding the public from a courtroom, unless there is some clear evidence that persons in the courtroom are intimidating the witness.[133] Nor will a complainant be excused from testifying because of fear of retribution.[134]

In some circumstances, courts have protected the identity of certain persons other than sexual complainants where an overriding public interest could be shown to justify protection. For example, there is a long-standing common law privilege protecting the identity of confidential police informers. Courts have recognized that the public interest in effective law enforcement justifies this privilege.[135] An analogous protection extends to the identity of inmates who testify against their fellow prisoners.[136] The common law also protects complainants in blackmail cases in order to further the public interest in prosecuting blackmailers.[137] Thus, courts have been willing to extend protection to witnesses other than sexual complainants where there is a strong public interest in hearing their evidence, particularly if their physical safety may be endangered. On the other hand, courts have been reluctant to give any protection to witnesses who may simply suffer public embarrassment by being named in the press.[138]

The question whether the name of an accused person may be kept secret has arisen in numerous recent cases. There is no statutory authority providing for an order banning publication of an accused's name, but some courts have recognized that this extraordinary power may lie within the inherent jurisdiction of a superior court.[139] However, courts have recently invoked the *Charter*'s guarantee of equality to protect

132. *Ibid.* at 581.

133. *Re Vaudrin and R.*, *supra*, note 112.

134. *R.* v. *X.* (1983), 8 C.C.C. (3d) 87 (Ont. H.C.).

135. For a discussion of the history and legal basis of the privilege, see *Bisaillon* v. *Keable* (1983), [1983] 2 S.C.R. 60 at 84-100, 7 C.C.C. (3d) 385 (S.C.C.) [hereinafter *Bisaillon* cited to S.C.R.].

136. *R.* v. *McArthur* (1984), 13 C.C.C (3d) 152 (Ont. H.C.).

137. See *Toronto Sun Publishing Corp.*, *supra*, note 128; *R.* v. *Socialist Worker Printers and Publishers Ltd.*, *supra*, note 129.

138. *F.P. Publications (Western) Ltd.* v. *Conner* (1979), [1980] 1 W.W.R. 504 (Man. C.A.).

139. *R.* v. *P.* (1978), 41 C.C.C. (2d) 377 (Ont. H.C.); *R.* v. *P.*; *R.* v. *Di Paola* (1978), 43 C.C.C. (2d) 197 (Ont. H.C.); *Re R. and Several Unnamed Persons* (1983), 8 C.C.C. (3d) 528 (Ont. H.C.).

the identity of persons accused of sexual assault. In *R.* v. *R.*,[140] Potts J. reasoned that since a complainant's name is kept secret under subsection 442(3) of the *Criminal Code*, so should the name of an accused, at least until a conviction is registered against him. In that case, since the accused was acquitted, the publication ban on his identity was permanent.[141]

The Ontario Court of Appeal has cast doubt on the inherent jurisdiction of superior courts to protect the identities of accused persons. It held that this jurisdiction extends only so far as to lend "assistance to inferior courts to enable them to administer justice fully and effectively."[142] According to this reasoning, courts could protect the identities of vulnerable witnesses, such as penitentiary inmates,[143] where the trial could not proceed without their evidence. However, they should not protect accused persons since the adverse consequences of publicity are usually limited to strictly personal effects, such as embarrassment or loss of employment for them or their families.[144]

At present, there is no formal regime in the *Criminal Code* governing the manner in which the media choose to convey information about the criminal process to the public. However, at the provincial level, there are rules specifying the types of media activity that are permitted to be carried out in and around courtrooms. In Ontario, the *Courts of Justice Act, 1984* provides in section 146 that:

> **146.** (1) Subject to subsections (2) and (3), no person shall,
> (a) take or attempt to take a photograph, motion picture, audio recording or other record capable of producing visual or aural representations by electronic means or otherwise,
> (i) at a court hearing,
> (ii) of any person entering or leaving the room in which a court hearing is to be or has been convened, or
> (iii) of any person in the building in which a court hearing is to be or has been convened where there is reasonable ground for believing that the person is there for the purpose of attending or leaving the hearing; or
> (b) publish, broadcast, reproduce or otherwise disseminate a photograph, motion picture, audio recording or record taken in contravention of clause (a).
>
> (2) Nothing in subsection (1),
> (a) prohibits a person from unobtrusively making handwritten notes or sketches at a court hearing; or
> (b) prohibits a solicitor or party acting in person from unobtrusively making an audio recording at a court hearing that is used only for the purposes of the litigation as a substitute for notes.

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140. *R.* v. *R.* (1986), 28 C.C.C. (3d) 188 (Ont. H.C.). See also *R.* v. *C.E.H. (No. 2)*, 14 W.C.B. 473 (August 19, 1985) (Ont. Prov. Ct.) [unreported].

141. In the United Kingdom, persons accused of rape may not be identified in the media until conviction, unless the accused obtains leave of a court to have the prohibition lifted: *Sexual Offences (Amendment) Act, 1976* (U.K.), 1976, c. 82, s. 6.

142. *Re R. and Unnamed Person* (1985), 22 C.C.C. (3d) 284 (Ont. C.A.) at 287.

143. See *R.* v. *McArthur*, *supra*, note 136.

144. *Re R. and Unnamed Person*, *supra*, note 142 at 285.

(3) Subsection (1) does not apply to a photograph, motion picture, audio recording or record made with authorization of the judge,

(a) where required for the presentation of evidence or the making of a record or for any other purpose of the court hearing;

(b) in connection with any investitive, naturalization, ceremonial or other similar proceeding; or

(c) with the consent of the parties and witnesses, for such educational or instructional purposes as the judge approves.

(4) Every person who contravenes this section is guilty of an offence and on conviction is liable to a fine of not more than $10,000 or to imprisonment for a term of not more than six months, or to both.[145]

While this provision in theory allows electronic broadcast of criminal trial proceedings in certain circumstances, in reality, very few broadcasts have been made in Ontario[146] because they require the consent of the judge and of all the parties and witnesses involved in the trial. Recently, a reporter charged under the forerunner of this provision[147] with filming in a courthouse argued that its limitation on the activities of the electronic media was an unconstitutional infringement on freedom of the press. The Court ruled that the *Charter* does not protect the electronic media's ability to film court proceedings, or other matters within a courthouse. Even if the *Charter* did extend this protection, the Court held that the limitations contained in the Ontario statute were justifiable according to the standards of section 1 of the *Charter*.[148]

In the province of Québec, this issue is dealt with in the Rules of Practice of the Superior Court and the Court of Sessions of the Peace. Section 30 of the Sessions Court Rules states:

30. The reading of newspapers, the taking of photographs, sketching, cinematography and radio and television broadcasting are prohibited in Court.[149]

The Superior Court Rule[150] is similar, but does not explicitly prohibit sketching.

145. S.O. 1984, c. 11.

146. Only two broadcasts have been made under the forerunner of section 146; see *R.* v. *Squires*, *supra*, note 28 at 332-3.

147. *Judicature Act*, R.S.O. 1980, c. 223, s. 67(2)(*a*).

148. *R.* v. *Squires*, *supra*, note 28 at 344-52 and 353-69. See James W. O'Reilly, "Annotation to *R.* v. *Squires*" (1986) 50 C.R. (3d) 321, for a discussion of the *Charter* issues in the case.

149. *Rules of Practice of the Court of the Sessions of the Peace of Quebec, Penal and Criminal Jurisdiction*, SI/81-32.

150. *Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division*, SI/74-53, s. 5.

C. Young Persons

While this paper does not focus directly on the trials of young persons, it is necessary for comparative purposes to discuss some of the features of those proceedings. Under subsection 12(1) of the now-repealed *Juvenile Delinquents Act*,[151] the trials of young persons took place *in camera*.[152] This situation was altered both by the passage of the *Charter* and later, by the enactment of the *Young Offenders Act*. The blanket exclusion of the public required by subsection 12(1) of the *Juvenile Delinquents Act* was challenged as being contrary to the *Charter*'s guarantee of freedom of the press, in that it prevented media from attending, and hence from publishing information about, juveniles' trials. The Ontario Court of Appeal held that the restriction was overly broad and could not be justified in a free and democratic society.[153] It found that there was a rational basis for the restriction in the *Juvenile Delinquents Act*, but that absolute exclusion of the public could not be justified in all cases.

The corresponding provision of the *Young Offenders Act* (subsection 39(1)) permits a youth court to exclude any person whose presence is unnecessary to the proceedings where evidence is being presented that would seriously injure the young person before the court or young witnesses or victims. An exclusionary order may also be made in the interest of public morals, the maintenance of order or the proper administration of justice, just as under subsection 442(1) of the *Criminal Code*. Thus, unlike under the *Juvenile Delinquents Act*, the exclusion of the public from proceedings under the *Young Offenders Act* is discretionary, rather than mandatory. MacKinnon A.C.J.O. in *Re Southam Inc. and R. (No. 1)* approved of this approach in preference to the blanket exclusion of the public. In striking down subsection 12(1) of the *Juvenile Delinquents Act*, he stated:

> An amendment giving jurisdiction to the court to exclude the public from juvenile court proceedings where it concludes, under the circumstances, that it is in the best interests of the child or others concerned or in the best interests of the administration of justice to do so would meet any residual concern arising from the striking down of the section .... Parliament can give the necessary discretion to the court to be exercised on a case-to-case basis which, in my view, would be a prospective reasonable limit on the guaranteed right and demonstrably justifiable.[154]

After proclamation of the *Young Offenders Act*, the discretionary power to exclude the public was itself challenged as being contrary to the *Charter*'s guarantee of freedom of the press. In *Re Southam Inc. and R.*,[155] the Ontario High Court considered the impact that completely open proceedings might have on young accused, witnesses and victims and concluded that the discretionary provision in the *Young Offenders Act* was a reasonable limit on the *Charter* protection of freedom of the press.

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151. R.S.C. 1970, c. J-3, repealed by the *Young Offenders Act*, S.C. 1980-81-82-83, c. 110, s. 80 [hereinafter *Young Offenders Act*].

152. See *C.B.* v. *R.* (1981), [1981] 2 S.C.R. 480, 62 C.C.C (2d) 107.

153. *Re Southam Inc. and R. (No. 1)*, *supra*, note 28.

154. *Supra*, note 28 at 536.

155. *Supra*, note 28.

Also at issue in *Re Southam Inc. and R.* was the question whether the absolute ban in the *Young Offenders Act* on identifying young accused, witnesses and victims offended the *Charter*. Subsection 38(1) of the Act makes it an offence to identify any of these persons in a report of an offence or of proceedings under the Act. Even though this constitutes an absolute ban, it was held to be a reasonable limit on freedom of the press as it does not restrict the activities of the press, other than to prevent publication of a single piece of information, the name of a young accused. The corresponding provision (subsection 12(3)) of the *Juvenile Delinquents Act* had previously been found to be a reasonable limit under the *Charter*.[156]

Recent amendments to the *Young Offenders Act*[157] provide exceptions to the general rule of non-identification of young accused, witnesses and victims. First, disclosure of the identity of a young accused is permissible if its main purpose is not to identify that young person in the community but rather to assist in the administration of justice, for example, by disclosing that a crime has taken place. Second, a youth court may make an order permitting a young person to be identified if he or she is at large and is considered to be dangerous. Finally, a youth court may permit a young person's identity to be published if the young person has applied for such an order and the court is satisfied that it would not be contrary to the young person's best interests.[158]

In all of the *Charter* cases dealing with young persons, the courts have considered the special situation of young accused in interpreting the reasonableness of statutory limits on access to proceedings or information concerning such young persons. Expert evidence of psychologists and social workers has been received[159] to determine what restrictions on access, if any, are necessary in order to pursue the objects of the applicable legislation. Special treatment of young offenders, and hence special rules of access, have been justified in these cases by the broad social interest in their rehabilitation through a minimization of the impact and stigma that can result from their association with the criminal process.

156. *R.* v. *T.R. (No. 1)* (1984), 10 C.C.C. (3d) 481 (Alta. Q.B.).

157. S.C. 1986, c. 32, proclaimed in force Sept. 1, 1986.

158. S.C. 1986, c. 32, s. 29(3), enacting s. 38(1.1), 38(1.2) and 38(1.4) respectively.

159. See, for example, *Re Southam Inc. and R.*, *supra*, note 28 at 687-92.

CHAPTER THREE

Reforming the Present Law

I. The Need for Reform

Derogations from the principle of openness have largely been accomplished in a piecemeal fashion in response to dangers or hardships perceived in unqualified access to, and reporting of, criminal proceedings. In general, these limitations have been introduced in order to protect three broad categories of interests; these are: (1) protecting vulnerable individuals, such as victims of crime, witnesses or accused; (2) ensuring that the criminal process is carried out without interference from elements within the court or extraneous influences; and (3) serving other social interests, such as public morals or effective law enforcement. These categories are by no means mutually exclusive. Often what has been done to protect the integrity of the trial process, for example, has also been in the interests of an accused individual and of society as a whole.

Owing both to its history and the incremental intrusions upon the concept of openness discussed in Chapter One, the state of the present law in Canada is difficult to ascertain and not as consistent as it should be. On no occasion has a comprehensive, principled assessment of the importance of public access to criminal proceedings been undertaken.

If the evolution of the present law were not enough reason to cause us to engage in an examination of its merits and demerits, the *Charter* alone would demand such an assessment. As was seen in the previous chapter, case-law under the *Charter* to date indicates that many blanket limitations on public access and press freedom are no longer tolerable. A more measured response to the interests that are deserving of protection is required. The *Charter* forces us both to identify those interests and formulate protections that interfere with *Charter* rights only to the extent that they are reasonable and demonstrably justified in a free and democratic society.

A basic guiding principle in our recommendations is the need for consistency and clarity in this area of the law, particularly because of the constitutional implications of interfering with the right of public access. In making our proposals for reform, we are mindful of jurisprudence under the *Charter* dealing with infringements on freedom of expression. In *Re Ontario Film and Video Appreciation Society and Ontario Board of*

Censors, the Ontario Divisional Court, affirmed by the Court of Appeal, held that limits on constitutional rights must meet the following test in order to comply with the requirement in section 1 of the *Charter* that they be "prescribed by law":

> It is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law.[160]

Some statutory provisions dealing with openness of criminal proceedings may, because of the absence of clarity and the degree of unstructured discretion in them, be violative of this section 1 requirement. Recently, the Supreme Court of Canada has given guidance as to the other provisions of section 1. In *R.* v. *Oakes*,[161] Dickson C.J.C. articulated criteria for determining whether limitations on *Charter* rights could be considered reasonable and justifiable in a free and democratic society. He stated that those seeking to limit constitutional rights must bear a very heavy onus. It must be demonstrated with "cogent and persuasive" evidence that there is "a very high degree of probability" of compliance with section 1. A limit will be upheld under section 1 only if its objective "relate[s] to concerns which are pressing and substantial in a free and democratic society" and the "means chosen are reasonable and demonstrably justified." Within the latter criterion, the limit must be shown to be "rationally connected to the objective," to intrude "as little as possible"[162] upon a right or freedom, and to be proportional to its object.

We accept, as have many *Charter* cases to date, that restrictions upon public attendance or communication about criminal proceedings represent limits on freedom of expression or freedom of the press. This is, then, one of the first occasions on which the Commission must rely, not just on substantive rights in the *Charter*, but on the scope of permissible limitations on those rights in setting out its recommendations. By necessity, we must be guided by judicial interpretations of the meaning and content of *Charter* section 1. The test set out in the *Oakes* case, being the most recent and most authoritative pronouncement on section 1 to date, must govern our assessment of the necessity and the reasonableness of limitations on access to criminal proceedings.

We have not provided specifically for rights of appeal from the publication bans and exclusion orders we propose. Judicial review through the prerogative writs will be available in some cases according to the present law.[163] We defer the question of the adequacy of the present judicial review powers to our forthcoming work on extraordinary remedies. Apart from the prerogative writs, there will also be recourse to the remedial provisions of the *Charter* in this area as a means of reviewing the

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160. (1983), 41 O.R. (2d) 583 (Div. Ct.) at 592, aff'd (1984), 45 O.R. (2d) 80 (C.A.).

161. (1986), [1986] 1 S.C.R. 103, 65 N.R. 87 [hereinafter *Oakes* cited to S.C.R.].

162. *Ibid.* at 138-9, citing *R.* v. *Big M Drug Mart Ltd.* (1985), [1985] 1 S.C.R. 295 at 352.

163. For example, the *Re Southam Inc. and R.* case originally began as an application for *mandamus*; *supra*, note 28.

constitutionality of a publication ban or an order excluding the public from a courtroom. According to the evolving case-law under the *Charter*, the media have standing to seek a *Charter* remedy where such an order is made in the course of a criminal proceeding.[164]

II. Recommendations and Commentary

A. General

RECOMMENDATION

Arrangement of Statutory Provisions

1. Provisions relating to public access to the criminal process should be set out in a separate chapter of the *Criminal Code*.

Commentary

There is presently no logical basis for the arrangement of provisions relating to the openness of criminal proceedings in the *Criminal Code* (see *infra* Appendix). This situation contributes to the difficulty that the public, and journalists in particular, must have in determining whether they have a right to attend, or to communicate certain information about, criminal proceedings. By "access to the criminal process," we mean the ability of the public and representatives of the media to gather and communicate information about the criminal process through access to the court file or attendance at the proceedings themselves.

In this and other recommendations to follow, we refer simply to the "public," without specifically setting out the entitlements of the media, for it is our belief that they should have no greater ability than other members of the public to attend, or to communicate information and opinions about, criminal proceedings. This is based on our view of the media's role — they act as surrogates of the public. While they have a special function to perform in a democratic society, that role does not, and should not in our view, translate into any kind of special legal status.

There would also be a practical difficulty with granting special status to the media. It would be necessary to define who the "media" are. Obviously, any definition should include those who are professional journalists. But should it also include authors of books, legal editors or students writing for their school newspapers? The difficulty

164. See, for example, *Canadian Newspapers Co.* v. *A.G. Canada*, *supra*, note 131 in which the media were not given leave to intervene in an ongoing criminal case, but were entitled to bring an application under the civil rules of practice for a declaration that subsection 442(3) of the *Criminal Code* was unconstitutional before the trial judge and to appeal the ruling on the application to the Court of Appeal on *Charter* grounds.

encountered in drawing a line here is perhaps an indication that the line should not be drawn at all. Everyone ought to have the same freedom to express ideas and opinions about the criminal process. Therefore the Commission considers all members of the public as being on the same footing in this area of the law.

Presently, the relevant provisions are scattered throughout the *Criminal Code* in six different Parts.[165] Those that should logically be placed together, because they apply to the same type of proceeding or protect the same interest, are separated. Although there are probably no constitutional implications arising from these formal irregularities, a more coherent presentation would, in itself, go some way toward rendering the law more "ascertainable and understandable."[166]

RECOMMENDATION

Presumption in Favour of Openness

2. The *Criminal Code* should provide, subject only to specific limitations set out in these recommendations: that all criminal proceedings involving the exercise of judicial powers be conducted in public; that public access to court documents relating to those proceedings be allowed; and that all communication about those proceedings and documents be permitted.

Commentary

There is presently a declaration in subsection 442(1) of the *Criminal Code* that "[a]ny proceedings against an accused shall be held in open court ...." We would extend the presumption in favour of openness to apply to *all* judicial proceedings in the criminal process, not just "proceedings against an accused." Included within the presumption, then, would be pretrial proceedings, as well as criminal trials and appeals, subject, of course, to specifically recognized exceptions. Further, we would make it clear that access to information relating to these judicial proceedings should generally be allowed in order for the public to be aware of the activities of public officials involved in the criminal process. Thus, this presumption would operate in favour of maximum scrutiny, of both judicial powers and powers executed by others when judicially authorized, by allowing public access to court files (for example, the issuance and execution of process). Finally, we would specify that the reporting of information about the criminal process should also be presumptively open.

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165. See *Criminal Code*, Part IV (Sexual Offences, Public Morals and Disorderly Conduct), s. 162(1)(*a*); Part VI (Offences against the Person and Reputation), ss. 246.6(3), (4); Part XIII (Special Procedure and Powers), ss. 442(1), (3), 443.2; Part XIV (Compelling Appearance of Accused before a Justice and Interim Release), s. 457.2; Part XV (Procedure on Preliminary Inquiry), ss. 467(1), 470(1); Part XVII (Procedure in Jury Trials and General Provisions), s. 576.1.

166. See *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors*, *supra*, note 160 at 592.

This recommendation generated much discussion during our consultations, yet it embodies no more than the common law presumption of openness as stated by the Supreme Court of Canada in the *MacIntyre* case.[167] The discussion centred mainly on the application of such a presumption to specific proceedings and instances, however, rather than on the meaning of the presumption itself. The application of the presumption to specific proceedings is largely the subject of the recommendations that follow.

It is our view that this presumption should be enacted as part of the *Criminal Code* for two reasons. First, it would explicitly state that only those limitations specifically set out (that is, "prescribed by law" in the language of section 1 of the *Charter*) would be given legal recognition. In other words, common law powers to impose publication bans or otherwise limit openness would no longer exist. Second, our recommendation would serve as a directive to the judiciary that openness is a significant social value that can only be departed from where there is clear statutory authority to do so.

RECOMMENDATION

Automatic Publication Bans

3. No automatic publication bans should remain in the *Criminal Code*.

Commentary

By "automatic publication bans" we mean those that are imposed automatically upon the application of one party. Such bans, we believe, should be removed from the *Criminal Code*. One such ban has already been held to be contrary to the *Charter*, namely, the mandatory prohibition on publication of the name of a complainant in a sexual offence.[168] There are two others in the *Criminal Code*: section 457.2 requires a justice to impose a ban on publication of judicial interim release proceedings where the accused requests it; section 467 requires a justice to impose a ban on evidence at a preliminary inquiry upon the accused's application. It is our view that there should always be room for a judge or justice to refuse to make an order limiting openness where there is no demonstrable need for it. This is reflected in our recommendations with respect to judicial interim release hearings (Recommendation 14) and preliminary inquiries (Recommendation 15).

167. *Supra*, note 71.

168. *Criminal Code*, s. 442(3). See *Canadian Newspapers Co.* v. *A.G. Canada*, *supra*, note 131.

RECOMMENDATION

Public Morals

4. No person should be excluded from criminal proceedings and no publication bans should be imposed on the grounds of protecting public morals.

Commentary

We would not include a power either to exclude the public or to ban publication based on the protection of "public morals." Presently, under subsection 442(1) of the *Criminal Code* the public may be excluded from criminal proceedings on these grounds and the media are prohibited from publishing indecent matter in relation to judicial proceedings if "calculated to injure public morals" under paragraph 162(1)(*a*). We concur with the view that in relation to sexual offences "it cannot be but in the interest of public morals to have it known publicly that such offences are prosecuted and brought to trial."[169] The public should have access to proceedings and to information about them even when the subject-matter is sensitive. As one writer stated:

> The courts have one surpassing purpose: to do justice and to do it publicly. For that they are responsible. The responsibility for public morality rests on the public, which cannot discharge that responsibility unless it is informed. If death be its portion, it is better that it should be shocked dead by the truth, than slowly poisoned by ignorance and evasion.[170]

RECOMMENDATION

Discretionary Powers

5. (1) Any provision in the *Criminal Code* which allows a court to limit public access in its discretion should be drafted as narrowly as possible to give recognition to the specific superordinate interests that it seeks to protect, while intruding as little as possible on the openness of the criminal process.

(2) A court should exercise its discretionary powers to limit access only where necessary to protect the specific superordinate interests at stake, and in doing so, should confine its order to the duration and scope required by the circumstances.

(3) An order excluding the public or imposing a publication ban should be based on clear evidence of harm or potential harm and should ordinarily be accompanied by reasons.

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169. *R.* v. *Warawuk*, *supra*, note 113 at 126.

170. Wright, *supra*, note 46 at 729 .

Commentary

This recommendation seeks to narrow the scope of judicial discretion in this area of the law. Recommendation 5(1) constitutes, along with the general presumption of openness, the Commission's basic orientation toward issues of public and media access to the criminal process. Presently, the provisions in the *Criminal Code* governing access and publication are cast very broadly and contain language that invites litigation. We seek, therefore, to clarify the law by stating the general principles that should underlie it and by drafting exceptions carefully.

Recommendation 5(2) refers to the exercise of the discretion we would leave to judges to limit openness where necessary. Wherever possible, limitations should be confined both in duration and scope so that openness will be minimally restricted in the protection of competing interests. Where a time-limited publication ban would be effective, its use is to be preferred over a permanent one. Similarly, where a ban on publication of certain evidence, for example, at a preliminary inquiry is necessary to protect a fair trial, only the prejudicial material should be subjected to the order, not all of the evidence. Where it is necessary to exclude members of the public from a courtroom to maintain order, only those who are the source of the disorder should be ejected, not all of the attendants. Once again, we make no specific provisions for members of the media. They should have the same rights of attendance and be subject to the same kinds of orders as other members of the public.

Recommendation 5(3) embodies the principle that orders limiting public and media access should not be made lightly. Some concrete justification for such an order is essential and, therefore, the judge making it should generally refer to that justification in order to assure the public that its interests are being duly recognized by the court. However, we qualify the obligation to give reasons by the word "ordinarily." In some extraordinary situations, the judicial discretion to make an exclusionary order or a publication ban will, by necessity, be rather broad. In such circumstances, it would be unrealistic to require the court to deliberate over its reasons for the order (for example, the decision to exclude the public from a hearing to determine the admissibility of evidence concerning the sexual activity of a complainant in a sexual offence — see Recommendation 6). Yet, in many other situations, the decision whether or not to exclude the public or to impose a publication ban will be a matter of real controversy attended by oral argument and written submissions on matters of law and evidence. Our recommendation would encourage serious attention to the significant legal and factual issues at stake in those cases where judicial discretion depends on the balancing of many competing interests.

RECOMMENDATION

General Power to Exclude the Public

6. (1) A court may exclude all or any members of the public from all or part of a criminal proceeding where:

(a) it is necessary to obtain the testimony of a child or young person who is a witness in the proceeding;

(b) it is necessary to maintain order;

(c) it is necessary to prevent disclosure of matters obscured or sealed from public view or to which the public does not have access; or

(d) a hearing is held to determine the admissibility of evidence concerning the sexual activity of a complainant in a sexual offence.

(2) A court may exclude young persons in attendance at a criminal proceeding when any information is being presented to the court, the knowledge of which may be seriously injurious or seriously prejudicial to them.

(3) Where a court proceeds in the absence of the public, it should communicate the nature and result of the closed proceedings in open court at the earliest reasonable opportunity; where the closed proceedings take place in the absence of the jury, it should do so before empanelling or recalling the jury.

(4) A court should proceed in the absence of the public only where an available publication ban would not be adequate in the circumstances.

Commentary

This recommendation would apply to all of the criminal proceedings dealt with in the specific recommendations to follow. While in some cases there may be a need for additional powers to exclude the public from particular kinds of proceedings on other grounds, this proposal identifies certain powers that we believe courts should always possess. The language is modelled in part on the wording presently contained in subsection 442(1) of the *Criminal Code*. It would allow courts great flexibility in that they could exclude certain persons who may, for example, be intimidating young witnesses or causing disorder in the courtroom, while maintaining the general openness of the proceeding.

The grounds for exclusion that we identify in this recommendation are obviously much narrower than those in the present *Criminal Code*. Subsection 442(1) permits courts to exclude the public "in the interest of public morals, the maintenance of order or the proper administration of justice ...." As mentioned, we believe that openness of the criminal process should not be curtailed in the interest of "public morals." Therefore, we would not include this as a ground for exclusion. However, we do advocate a limited power to exclude young persons from criminal proceedings in extraordinary circumstances, such as where evidence of extreme brutality or degradation is being presented or the proceedings concern allegedly obscene materials. In Recommendation 6(2), we use words similar to those presently found in subsection 39(3) of the *Young Offenders Act* to achieve this.

We would keep that portion of section 442 which permits exclusion of the public for the "maintenance of order." While this power should rarely need to be exercised, it requires specific recognition so that judges may control the proceedings before them.

Our proposal does not contain a broad power to exclude the public to protect the "proper administration of justice." In certain kinds of proceedings it may be necessary to afford courts the power to exclude the public in order for justice to be done, for example, where a *voir dire* is held into a complainant's sexual history under *Criminal Code* section 246.6. Where these special powers are necessary they should, we believe, be set out expressly. Therefore, we include this power in Recommendation 6(1)(d).

We have added a ground for exclusion not contained in the present law which would empower courts to exclude the public from a criminal proceeding where the witness is a child or young person who would be intimidated by the public's presence. In accordance with our Recommendation 5(2) regarding the limited exercise of judicial discretion, such an order should normally last only for the duration of the witness's testimony. We include protection for young witnesses here to allow courts to make orders similar to those presently available under paragraph 39(1)(*a*) of the *Young Offenders Act*, since it is our belief that young witnesses deserve protection where necessary, whether they are testifying in trials under the *Young Offenders Act* or in trials of accused adults.[171]

Recommendation 6(3) directs courts generally to attempt to apprise the public of their activities even where it is necessary to proceed in its absence. If, for example, a court excludes the public during *voir dire* proceedings respecting the admission of wiretap evidence, it would be a simple matter for the presiding judge to state on the record the nature and result of the *voir dire*. This should be done at the earliest reasonable opportunity which, in a jury trial, would be prior to recalling or empanelling the jury to ensure that no prejudice results, for example, from the jury's knowledge that certain prosecution evidence has been ruled inadmissible. By the words "nature and result," we simply mean that the character of the proceedings, but not necessarily the contents of the evidence that was heard, should be disclosed. A court could state that a certain young witness gave evidence with respect to identity, for example, without relating the entirety of that evidence. The public would have access to the testimony through examination of a transcript. Where the closed proceedings involved sealed documents, however, it would be appropriate for the court to state that a motion was made concerning the admissibility of certain evidence. If the evidence was ruled inadmissible, the court could state that fact without disclosing the contents of the documents. The public would not have access to a transcript of the closed proceedings in this situation (see Recommendation 8).

Recommendation 6(4) indicates our preference for publication bans over exclusion of the public if some intrusion on openness is necessary to satisfy competing interests. To our minds, a publication ban is less of an intrusion on openness than exclusion of the public since, in the latter case, no one can witness the propriety of the court's actions. Where there is a publication ban available that adequately addresses the

171. At various points in this Working Paper we make recommendations regarding the treatment of young persons in the criminal process. In general, our approach has been to achieve some consistency between the *Young Offenders Act* and trials of adults. This, however, should not be interpreted to be an endorsement of all of the provisions of that Act. In the absence of a complete study of the *Young Offenders Act*, we make no general recommendations or comments on its contents.

particular need to limit the openness of a criminal proceeding, it should be imposed. Only where a publication ban is not available or would not be effective should the public be excluded.

RECOMMENDATION

General Publication Bans

7. (1) After a charge has been laid in relation to a crime mentioned in section 246.4 of the *Criminal Code*, no one may publish or broadcast the name of, or other information, including the name of the accused, which serves to identify:

(a) a complainant or victim of the crime, unless the person consents; or

(b) a child or young person who is a victim of, or a witness in respect of, the crime.

(2) After a charge has been laid, no one may publish or broadcast the name of, or other information serving to identify, a confidential informant in the proceedings, unless the person consents.

(3) A court may, upon application, make an order prohibiting publication or broadcast of the name of, or other information serving to identify, a victim or witness where identification would pose a risk to that person's safety.

(4) A court may terminate a publication ban under (1), (2) or (3) upon application by the accused where the ban would jeopardize the accused's right to full answer and defence.

Commentary

This recommendation sets out the situations in which a publication ban on the identities of complainants, victims, witnesses and confidential informants would apply. Our approach with respect to complainants in sexual offences is consistent with the *Canadian Newspapers Co.* v. *A.G. Canada* case[172] in which the Ontario Court of Appeal ruled that the present prohibition in subsection 442(3) of the *Criminal Code* is overly restrictive and offends the *Charter*. In particular, the Court found the present rule to be offensive because of its mandatory character — the name of a complainant in a sexual offence *must* be withheld upon the person's or the prosecutor's application. Our recommendation would prohibit publication of a complainant's name so long as the ability of the accused to make full answer and defence is not impaired. According to our Recommendation 7(4), if a court is of the view that disclosure of the complainant's name would, for example, assist the defence in locating an eyewitness it has the discretion to release that information.

In making this particular recommendation, we have considered at length its justification. In general, this paper attempts to impose on openness only when necessary

172. *Supra*, note 131.

to satisfy objectives consistent with the proper administration of justice. We have not sought to protect, *per se*, the reputations or sensibilities of participants in the criminal process. Here, our recommendation is aimed at encouraging victims of sexual offences to come forward to report crimes. Sexual assaults are at present "significantly underreported."[173] In the United States, rape is said to be "the most underreported crime in the country" — between "50 and 90 percent of rape victims never report to the police."[174] In Canada, "[o]nly about one in three female victims of sexual assault report their victimization to the police."[175] There are, of course, various reasons for this: fear of retribution, shame, intimidation, trauma, and the desire not to have one's privacy invaded in the course of subsequent judicial proceedings.[176] It is very difficult to ascertain the influence of the last factor on rates of reporting sexual assaults. We could uncover no empirical evidence that privacy concerns alone are substantial enough to dissuade victims from reporting a sexual assault who otherwise would have done so. Nor could we be sure that victims of other kinds of crime do not feel the same reluctance. We concur with a recommendation contained in a study prepared for Status of Women Canada that empirical research is needed to determine the "reasons for [a] complainant's reluctance to testify in sexual assault matters."[177]

It is possible that the protection of complainants' identities does increase the likelihood that sexual offences are reported and successfully prosecuted. On the other hand, keeping the names of complainants confidential may also have disadvantages from a criminal justice perspective. It may perpetuate the stigmatization of victims of sexual assaults by contributing an aura of mystery and unreality to the proceedings. In a study done for the Commission in the 1970s, Lorenne Clark recommended that trials of sexual offences should not take place *in camera* for this very reason, even though victims would prefer to give their testimony in the absence of the public:

> Although increased use of this discretionary power [to close proceedings] could function to reduce somewhat the victims' apprehension and embarrassment, in the long-run, it would not constitute a profitable reform. A change of this nature would concomitantly reinforce the societal stigmatization of rape victims, thereby undermining the original purpose of the reform.[178]

We believe that in this case, doubt should be resolved in favour of protecting the identities of sexual complainants given the serious problem of underreporting. However, we concur with the approach of the Ontario Court of Appeal in the *Canadian*

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173. Christine L.M. Boyle, *Sexual Assault* (Toronto: Carswell, 1984) at 28.

174. *Fischer* v. *Department of Public Welfare*, No. 283 C.D. 1981 (Commonwealth Court of Pa., Mar. 9, 1984), *per* MacPhail J. at 9, 11.

175. *Report of the Canadian Federal-Provincial Task Force on Justice for Victims of Crime* (Ottawa: Supply and Services Canada, 1983) at 65.

176. See, for example, the testimony reproduced in the *Canadian Newspapers Co.* v. *A.G. Canada* case, *supra*, note 131 at 563-5.

177. Christine L.M. Boyle *et al.*, *A Feminist Review of Criminal Law* (Ottawa: Supply and Services Canada, 1985) at 92-3.

178. Lorenne M.G. Clark, A Study of Rape in Canada (1975) [unpublished Study Paper prepared for the LRCC].

Newspapers Co. v. *A.G. Canada*[179] case that the protection should not be mandatory, leaving to the judge the discretion to reveal the identity of the complainant where the accused's ability to mount a proper defence is curtailed by secrecy. We include this discretion in our Recommendation 7(4).

We would also provide protection to children and young persons who are victims or witnesses of a sexual offence. Section 38 of the *Young Offenders Act* presently offers broad protection to all young victims and witnesses. In our view, some measure of protection should also be available in proceedings against accused adults.[180] However, since proceedings under the *Criminal Code* are generally much more open than those under the *Young Offenders Act*, we confine this protection to cases where the embarrassment and prejudice are likely to be greatest, namely, sexual offences.

In Recommendation 7(2) we protect the identities of confidential police informants in accordance with the common law protection they are now given. This is desirable, in our view, to ensure that those who assist in the detection and enforcement of criminal law are not placed in personal jeopardy. However, there is some risk that others, such as victims and witnesses of crimes, could also be put at risk in the criminal process through publication of their identities.[181] Recommendation 7(3) would permit a court to make an order banning publication of the identities of victims or witnesses where there is a danger that the person's safety would otherwise be put at risk.

All these bans would be subject to the discretion contained in Recommendation 7(4). A court seized with an application to terminate a publication ban would have to weigh the harm of publicity against its benefits. As the Court recognized in the *Canadian Newspapers Co.* v. *A.G. Canada* case,[182] publication and broadcast of witnesses' names can protect the accused's right to a fair trial in that persons who may have information which contradicts that of a witness or who are able to refute a complainant's allegations may come forward.

With respect to the identification of complainants, victims and young witnesses in sexual offences we would prohibit in Recommendation 7(1) publication not only of their names, but of other information which would serve equally to identify them. We specifically include within the prohibition publication of the accused's identity in cases where disclosure of his or her name would lead to revelation of the name of the complainant, the victim, or a young witness. This prohibition, then, would generally be confined to cases where the accused is charged with a sexual offence involving a person with whom the accused shares a family name or to whom the accused stands *in loco parentis*. We believe this is necessary in order to make the prohibition against identifying complainants, victims and young witnesses in sexual offences effective.

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179. *Supra*, note 131.

180. But see *supra*, note 171.

181. For example, prisoners (*R.* v. *McArthur*, *supra*, note 136) and complainants in blackmail cases (*Toronto Sun Publishing Corp.*, *supra*, note 128).

182. *Supra*, note 131.

The inclusion of this limited prohibition on identifying an accused is a departure from the present law. There is presently no statutory authority in the *Criminal Code* for courts to restrict publication of an accused's identity. The Ontario Court of Appeal has now ruled that no such power lies within the inherent jurisdiction of superior courts.[183] In our view, the public has a genuine interest in knowing the identity of an accused. It can be assured that the police have conscientiously and perhaps successfully pursued a criminal investigation. In a community in which there is concern about a rash of crimes, or that a particularly dangerous suspect is at large, publication of the fact that an individual has been charged may put the community at ease. The name of the individual is important since it may be the only means of verifying the accuracy of such a report. Publication of the accused's name can also prevent speculation and damaging rumours from circulating in the community about persons other than those charged. For example, if the media were only able to report that a retired auto worker, or a prominent lawyer, or a secondary school teacher had been charged with a crime, all persons within those respective categories would come under suspicion and possibly be the object of community censure. Further, publication of the accused's identity can indeed protect the accused's fair trial. Just as an open trial can bring matters to light to the accused's benefit, so also can pretrial publicity. Witnesses who were previously unaware of the crime but who have information about the matter may come forward.[184]

Therefore, we do not recommend that an accused's name be routinely kept secret. In doing so, we do not discount the importance of the presumption of innocence. Nor do we deny that publicity can sometimes amount to a form of punishment for an offence not proved. As was stated by the Supreme Court in *Oakes*:

> An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial.[185]

We should not, however, erect a barrier to publication of an accused's name based on unfair or conclusory inferences drawn from the fact that a criminal charge has been laid. This simply means that someone, usually a peace officer, has acquired reasonable grounds to believe that the person committed the offence. While the test is objective and the standard significant, an inference that the person is guilty beyond a reasonable doubt would obviously be entirely inappropriate. The harm that comes from publication of the charges against an individual often results from that kind of inference. We believe that if the public were more aware of the criminal process,[186] there would be less of an inclination to draw an adverse conclusion from mere knowledge that a person has been charged with an offence. Of course, greater public awareness will not be

183. *Re R. and Unnamed Person*, *supra*, note 142.

184. See, for example, *Chartier*, *supra*, note 51, in which publicity about a criminal case resulted in witnesses coming forward to exonerate the accused; see especially at 492-3, 502.

185. *Supra*, note 161 at 119-20.

186. For example, in an unpublished study prepared for the Department of Justice, it was discovered that the more information members of the public were given about a criminal case, the more likely they were to agree with the actual sentence imposed by the court upon conviction. See Anthony N. Doob and Julien V. Roberts, An Analysis of the Public's View of Sentencing, (1983) [unpublished].

achieved through limitations on publication. Further, our concern for the accused's reputation in many cases is perhaps traceable to an uneasiness about certain conduct being classified as criminal. In other words, we may be concerned about the consequences that befall a person who is charged with a relatively minor crime, because of a belief that the conduct really is not "criminal." The Commission holds that the criminal law should be used with restraint and that only conduct which constitutes a serious interference with fundamental values should be placed in the *Criminal Code*. Thus, it may be a partial answer to misgivings about the harm which results from publicity to say that a new *Criminal Code* based on the Commission's principles would contain only "real crimes."[187]

There is an argument under the equality guarantees of section 15 of the *Charter* that persons accused of sexual offences should be entitled to keep their identity secret since complainants are entitled to this protection.[188] However, the protection offered to complainants serves a criminal justice purpose, that is, that sexual offences be reported and prosecuted. On the other hand, protecting the identity of accused persons would not serve such a purpose. In fact, it would defeat the proper administration of justice if accused persons could be held in custody without anyone's knowledge.

It is our belief that section 15 of the *Charter* does not require that all participants in the criminal process be given equal treatment, but rather that each participant receive treatment which is appropriate to his or her respective situation. We have recommended that the identities of complainants be withheld in order to deal with the serious problem of underreporting. Similarly, we have recommended a discretionary power to exclude the public from *voir dires* into a complainant's sexual history in order to prevent dissemination of evidence which is extremely sensitive and, until a determination of relevancy has been made at the *voir dire*, is irrelevant to the process. These measures are, we believe, appropriate means of furthering criminal justice aims in the prosecution of sexual offences and are particular to complainants in those offences. On the other hand, we have made numerous recommendations relating to accused persons. We would allow courts to impose publication bans on pretrial evidence in order to protect an accused's right to a fair trial. The prohibition on publishing the name of a complainant would also be subject to the accused's ability to make full answer and defence. As well, the accused should be permitted access to sealed documents for that same purpose. We have suggested, therefore, that certain rules of public and media access be tailored to take account of the respective situations of complainants and accused. Admittedly, in not recommending that the names of accused persons be kept secret, we do not provide complainants and accused "equal treatment." Rather, we afford them "treatment as equals."[189] In other words, we have given them equal consideration and respect, and have attempted to formulate our recommendations accordingly.

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187. See LRCC, *Our Criminal Law* (Report 3) (Ottawa: Information Canada, 1976) at 36.

188. See, for example, *R.* v. *R.*, *supra*, note 140.

189. For a discussion of the distinction between "equal treatment" and "treatment as an equal" see Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) at 227-9.

Recommendation 7, then, provides for one narrow exception from the general rule that accused persons' identities are publishable. We would prohibit publication of an accused's identity where that would result in the identification of a complainant, victim, or young witness in a sexual offence. Here we are in part giving effect to proposals put forward in the *Report of the Committee on Sexual Offences against Children and Youths* (the Badgley Committee):

> On the basis of its review, the Committee considers that, where the publication of an accused's identity will serve to identify his or her alleged sexual victim (for example, in prosecutions for incest), the young *victim's* identity can only effectively be protected by prohibiting the identification of the *accused* in the media and in the law reports.[190]

Some members of the Commission are of the view that additional protection should be available on a discretionary basis for innocent persons such as victims and witnesses, as well as those who are presumed to be innocent, that is, accused persons. Their interests, according to this view, should be balanced against the sometimes harmful consequences of media attention. Those members would include provisions to the following effect as part of our Recommendation 7 to achieve this balance:

[*Optional Recommendation — Protection of Identities*

(5) A court may, upon application by an accused, a victim or a witness, make an order prohibiting publication or broadcast of the name of, or other information serving to identify, the applicant in exceptional circumstances where identification would result in substantial and extraordinary harm to the applicant or others and the public interest in the applicant's identity is minimal.

(6) In making an order under (5) in relation to an accused person, the court should consider:

(a) the nature and severity of the crime, including whether the crime involves violence, loss of property or breach of public trust;

(b) whether the effect of identification would be disproportionate to the crime itself, or impair the possibility of treatment or rehabilitation;

(c) evidence of good character, including the absence of a prior criminal record with respect to related crimes;

(d) the need for effective law enforcement in the community;

(e) whether publication of the person's identity would promote deterrence of similar criminal activity.

(7) A publication ban on an applicant's identity should expire:

(a) upon a court order, or

(b) in addition, in relation to an accused, upon conviction.]

190. *Report of the Committee on Sexual Offences against Children and Youths*, vol. 1 (Ottawa: Supply and Services Canada, 1984) (Chair: Robin F. Badgley) at 438.

The aim of these alternative provisions would not be to protect individuals from the embarrassment often inherent in being identified in association with a criminal prosecution. Rather, they would prevent serious psychological repercussions or possible physical harm[191] to participants and their families.[192] This is conveyed in the words "substantial and extraordinary harm." Resort to this power would be left to those exceptional cases where publicity and harm go beyond that which is normally part of the criminal process. Further, the purpose of the proposed discretion to impose a publication ban in these circumstances would not be to prevent identification of important figures who have public reputations to protect, but rather to assist those ordinary citizens who would be likely to suffer grave consequences in their own communities. A court seized with such an application would have to measure the possible harm to the applicant against the public interest in openness. Included in the latter concept is the accused's right to a fair trial. It may be necessary, even where great harm would come to a witness who is publicly identified, to publish the person's name in order to ensure a fair trial.

Optional Recommendation 7(6) sets out the considerations a court would make in determining whether to make an order with respect to an accused. These criteria demonstrate that only in the exceptional case would the accused's identity be shielded prior to trial. Many of the factors are similar to those considered by courts in making a determination about a convicted person's entitlement to an absolute discharge.[193] The withholding of an accused's identity would, like the absolute discharge, be an extraordinary procedure. Courts would simply be given the jurisdiction to impose the kind of publication ban they presently have no jurisdiction to order.[194] It would not be an absolute ban, such as that recommended by the New Zealand Criminal Law Reform Committee,[195] but a discretionary one, informed by all the relevant circumstances, including the public interest in openness and the particular situation of each applicant. It is intended to apply in circumstances analogous to those in the case of *R.* v. *P.*[196] There, the accused male was charged with soliciting and wished to plead guilty. The trial judge convinced him to plead not guilty, believing that a customer for sexual services could not be charged with soliciting. The accused found himself in the midst of a test case which would have attracted a great deal of publicity because of the legal issue at stake. Yet the offence itself was a relatively minor one. Further, there was evidence that publicity would harm the accused's ailing wife and his three daughters. On an application to have his identity kept secret, the Ontario High Court imposed a

191. Such as in the case of *R.* v. *P.*, *supra*, note 139.

192. The merits of such a proposal were discussed in Allen M. Linden, "Limitations on Media Coverage of Legal Proceedings: A Critique and Some Proposals for Reform," in Anisman and Linden, eds, *supra*, note 8, 301 at 303-4.

193. See subsection 662.1(1) of the *Criminal Code*.

194. According to *Re R. and Unnamed Person*, *supra*, note 142.

195. New Zealand Criminal Law Reform Committee, *The Suppression of Publication of Name of Accused* (Wellington, 1972).

196. *Supra*, note 139.

publication ban on the accused's name and other identifying features.[197] It is in these kinds of extraordinary circumstances that the provisions in optional Recommendations 7(5) and 7(6) would apply.

Optional Recommendation 7(7) provides rules for the expiry of a publication ban of the type envisaged in Recommendation 7(5). In general, the proposed ban on the publication of an accused's identity would expire upon conviction, unless terminated by order of another court before which the accused appeared. If the accused were acquitted, the publication ban would continue in force. This recognizes that the public has a genuine interest in knowing the identities of those convicted of criminal offences. The publication ban on the identities of witnesses and victims would terminate only upon court order.

RECOMMENDATION

Special Provisions for Closed Proceedings

8. Where a criminal proceeding takes place in the absence of the public, the court may:

(a) admit members of the public who are engaged in *bona fide* research into the operation of the criminal process on appropriate terms and conditions; or

(b) limit public access to any transcript of the proceeding the disclosure of which would frustrate the purpose for which the proceeding was closed.

Commentary

This recommendation proposes special judicial powers in situations where criminal proceedings take place in the absence of the public. Thus, they would apply to the situations contemplated in Recommendation 6 if no members of the public were permitted to remain in the courtroom. They would also apply to other proceedings which, according to our recommendations, could take place in the absence of the public (for example, the issuance of search warrants — Recommendation 10; pre-hearing conferences — Recommendation 17).

Where proceedings are closed to the public, we believe that the presiding judge or justice should have some residual discretion to admit members of the public who are engaged in *bona fide* research into the operation of the criminal process. In the Commission's Working Paper 47 on *Electronic Surveillance*, we remarked on the difficulty of making informed recommendations about the process of obtaining authorizations to intercept private conversations owing to the restrictions on access to authorization hearings and documents relating to them.[198] Because of the secrecy of this process, it is presently impossible to observe it in operation. The same could be said of the issuance of search warrants. Our proposal in Recommendation 8(a) is designed to permit research and observation of these types of proceedings. While it is necessary for

197. The order was later discontinued: *R.* v. *P.*; *R.* v. *DiPaola*, *supra*, note 139.

198. LRCC, *supra*, note 76 at 59-61.

these proceedings to take place in the absence of the public, they must also be subjected to scrutiny to ensure protection of the public interest. The researcher could, according to our proposal, be required to accept certain terms and conditions of attendance, such as obtaining the consent of the applicant or parties, or agreeing to give copies of the research to the court, applicant or parties prior to publication.

Where criminal proceedings are closed to the public, it is necessary to allow the court to make an order regarding access to the transcript of those proceedings if one exists. This is provided in Recommendation 8(b). Access could be denied to a transcript if disclosure of its contents would be at odds with the reason for closing the proceedings in the first place. To illustrate, if the public were excluded from a hearing to determine the admissibility of a complainant's sexual history, it would frustrate the purpose for closing the hearing if the public were given access to a transcript of it. The point of closing the proceeding is to prevent disclosure of what may be embarrassing and irrelevant evidence. On the other hand, excluding the public during the testimony of a young witness, would not necessitate restricting access to the transcript. Closure in that case would serve to encourage a young person to give evidence, not to prevent disclosure of the evidence itself. Public access to the transcript would, in that situation, be desirable so that exclusion of the public would not in itself prevent dissemination of information about a criminal proceeding.

B. Pretrial Matters

There are some general principles that apply to certain types of pretrial investigatory proceedings such as applications for authorizations for electronic surveillance and applications for search warrants. In these situations, there are concerns that compete with the public interest in maximum openness. Completely open proceedings could expose the existence of, and techniques used in, police investigations and thereby frustrate the enforcement of criminal law. Scrutiny of the process of authorizing searches and wiretaps may also inhibit a candid exchange between the police and the presiding justice. If public access were permitted to the documentary foundation for these proceedings, it would be possible for police informers or others assisting the police in an investigation to be identified, jeopardizing their personal safety and the success of the investigation. Similarly, persons whose association with an investigation is completely innocent, including those who may have been wrongly suspected of criminal activity, may be publicly named and suffer injury to their reputations.

Against these interests, the value of openness must be weighed. In these kinds of proceedings it would permit the public to assess the propriety of police and judicial action in the authorization of intrusive powers. It would also allow affected parties to challenge the legality of intrusions they have suffered. Further, openness would permit researchers to study the frequency and result of police activities with a view to making informed recommendations for law reform. In general, the knowledge that their actions may be scrutinized by the public may encourage public officials to exercise greater care

and caution in discharging their responsibilities and may foster greater public accountability.

Other types of pretrial proceedings raise different issues. For example, in those relating to the prosecution of a criminal offence, there is often a concern that publicity may jeopardize a fair trial. While this may be a concern prior to laying a charge it becomes paramount once a charge is laid. Our general approach is to permit greater freedom to attend and report pretrial proceedings while advocating greater consideration of alternatives to measures that restrict these important activites. As has been pointed out,[199] the interests in maximum openness and trial fairness are perhaps not as mutually exclusive as has been thought. There are means, we believe, for giving greater recognition to both.

An empirical question arises in any discussion of pretrial proceedings such as judicial interim release (bail) hearings and preliminary inquiries. To what extent will adverse publicity about an accused irreparably interfere with the objectivity of potential jurors? In a Study Paper prepared for the Commission, the attempts in the literature to analyze this issue have been canvassed.[200] There is a definite need, however, to study further the impact of the media on trial proceedings. Since many of the available studies have been conducted in the United States, we need more work done in the Canadian context.

Existing studies show that there are various elements in the pretrial reporting of crime that can affect the attitudes of potential jurors. Simply reporting that a person has been arrested can arouse adverse feelings against the accused.[201] Similarly, reporting information about an accused's previous criminal record can have a damning effect not only on potential jurors,[202] but perhaps on judges as well.[203] It appears that the most prejudicial information that can be published about an accused is that a confession was made.[204] Studies show that potential jurors are likely to prejudge guilt upon learning of a confession.[205]

As discussed in Chapter Two, there are various means for minimizing or at least reducing the impact of this kind of prejudice on the trial process. A change of venue, delaying a trial, and challenging jurors for cause can all be invoked where necessary to a fair trial. However, studies demonstrate that stern instructions to jurors to disregard

199. See Lepofsky, *supra*, note 66 at 11-5.

200. L. Luski and T. McCormack, "Mass Media Effects upon Pretrial and Trial Proceedings: An Examination of the Empirical Literature," (1985) [unpublished Study Paper prepared for the LRCC].

201. M. Tans and S. Chaffee, "Pretrial Publicity and Juror Prejudice" (1966) 43 Joumalism Quarterly 647; Thomas E. Dow, "The Role of Identification in Conditioning Public Attitude toward the Offender" (1967) 58 Joumal of Criminal Law, Criminology and Police Science 75.

202. Alice M. Padawer-Singer and Allen H. Barton, "The Impact of Pretrial Publicity on Jurors' Verdicts," in Rita James Simon, ed., *The Jury System in America* (London: Sage Publications, 1975) at 135.

203. H. Kalven and H. Zeisel, *The American Jury* (Boston: Little, Brown, 1966).

204. Donald M. Gillmor, *Free Press and Fair Trial* (Washington: Public Affairs Press, 1966) at 91.

205. Tans and Chaffee, *supra*, note 201; W. Wilcox, "The Press, the Jury and the Behavioral Sciences," in F.S. Siebert *et al.*, *Free Press and Fair Trial: Some Dimensions of the Problem* (Athens: Univ. of Georgia Press, 1970) 49 at 53; Padawer-Singer and Barton, *supra*, note 202.

what they have heard outside the courtroom are the most effective means of preventing publicity from influencing jurors.[206] Such instructions have been found to be capable of completely neutralizing the effects of pretrial publicity.[207] Although we must be cautious about relying too heavily on this research, we should neither overestimate the fragility of our system of justice nor underestimate the intelligence of jurors. The following recommendations reflect our confidence in the Canadian system of justice and the ability of jurors to execute their assigned duty conscientiously.

RECOMMENDATION

Electronic Surveillance

9. (1) A judge should receive an application for an authorization to intercept a private conversation or a renewal of an authorization in the absence of the public.

(2) The packet containing all documents relating to an application should be sealed and should not be opened except by court order or as authorized by rules of disclosure to accused persons and others who have been the objects of interceptions.

(3) Everyone may examine an authorization, a renewal or a certificate of notice after:

(a) the accused has received notice of the prosecution's intention to introduce an intercepted private conversation into evidence and has consented to disclosure;

(b) the object of an interception has received notice of the interception and has consented to disclosure; or

(c) it has been introduced as evidence in a legal proceeding.

(4) The entire contents of an authorization, a renewal or a certificate of notice may be published or broadcast and accordingly the current provisions of the *Criminal Code* prohibiting disclosure of the existence of an intercepted private conversation should be amended.

(5) A judge who receives an application for, or who previously granted, an authorization or renewal may, if requested, obscure with a cypher matters contained in the authorization, renewal, or documents relating to the application which, if disclosed, would

(a) frustrate an ongoing police investigation, or

(b) pose a risk to the safety of any person.

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206. R. Simon, "Murder, Juries and the Press" Trans-action (May/June, 1966) 40.

207. *Ibid.* See also F. Kline and P. Jess, "Prejudicial Publicity: Its Effect on Law School Mock Juries" (1966) 43 Journalism Quarterly 113; and R. Simon, "Does the Court's Decision in Nebraska Press Association Fit the Research Evidence on the Impact on Jurors of News Coverage?" (1977) 29 Stan. L. Rev. 515.

(6) Any obscured matters may be revealed in order for the accused to make full answer and defence by a judge who:

(a) reviews the validity of an authorization, a renewal or a decision to obscure matters contained in the authorization, renewal or documents relating to an application for an authorization or renewal; or

(b) hears an application to exclude evidence obtained by means of the interception of a private conversation on the basis of a substantive defect in the application for the authorization or renewal.

Commentary

In our recent work on *Electronic Surveillance*,[208] we analyzed the need for secrecy in the process of authorizing the interception of private communications and the concurrent need for public accountability in the exercise of this power. We determined that there must be a power to limit public access to the process in order to reinforce the effectiveness of electronic surveillance as an investigative device. At the same time, we found that greater openness after the execution of an interception would better serve the public interests in monitoring the activities of public officials and would introduce an element of greater fairness for accused persons against whom evidence obtained by means of an interception may be tendered.

The hearing at which an authorization for electronic surveillance is sought should continue to be *in camera*.[209] If the interception of private communications is to be an effective means of investigating crime, it must be carried out secretly. We affirm that position in Recommendation 9(1). The need for secrecy was recognized with respect to search warrants in the *MacIntyre*[210] case and is even more true of electronic surveillance. To the extent that this constitutes an intrusion upon the principle of openness, and hence, a violation of freedom of expression and freedom of the press under paragraph 2(*b*) of the *Charter*, it can be justified as the only possible means of protecting the substantial public interest in criminal law enforcement. Our proposal is subject to Recommendation 8(a) that a judge have a discretion to admit members of the public who are conducting *bona fide* research into the process.

However, once the authorization has been obtained and an interception has occurred, there are other considerations to which the interest in absolute secrecy must yield. We recommended in Working Paper 47 that public access to documents on which an authorization is based not be permitted, as electronic surveillance is an ongoing investigative device that is subject to renewal. Public access to these documents would frequently result in interference with a continuing investigation. However, we recommended that documentary disclosure be accorded to accused persons in order for them to prepare their defence and, where appropriate, to challenge the basis for the

208. LRCC, *supra*, note 76.

209. LRCC, *supra*, note 76, Recommendation 18 at 31.

210. *Supra*, note 71.

authorization.[211] Similarly, those who are the objects of an interception should be given disclosure so that they may initiate civil proceedings or challenge the authorization.[212] Thus, we propose in Recommendation 9(2) that the packet continue to be sealed, but that both accused persons and objects of interceptions be given access after they have received notice of the interception or of the prosecution's intention to introduce an intercepted private conversation into evidence pursuant to subsections 178.23(1) and 178.16(4) of the *Criminal Code*. The packet could also be opened by court order.[213]

While documents relating to an application for an authorization remain sealed, the authorization and renewals do not. They do, however, form part of the court file. Recommendation 9(3) contains a proposal for public access to those documents and to the certificate of notice.[214] We would permit public access to authorizations, renewals and certificates of notice only after the accused or the object of an interception has received notice of the interception or of the prosecution's intention of introducing an intercepted private conversation into evidence, and has consented to its disclosure. Once notice has been given, there is no longer a danger that disclosure of the existence of an interception would frustrate an ongoing police investigation, since the objects of the wiretap will have been made aware of it. However, we would only allow access if the object consents to disclosure because of the extremely intrusive nature of electronic surveillance. The stigma associated with public disclosure of the fact that a person has been the object of an interception prevents us from recommending complete access and publication of wiretap authorizations. By way of our consent rule, however, an object of an interception can bring attention to the matter if he or she so desires. This may result in the publication of the names of other objects of interceptions included in the same authorization. While this has the potential of embarrassing some of those named, it is our view that the public interest in monitoring the use of intrusive investigative devices such as wiretaps is significant and should not be subject to the collective consent of the objects of interceptions. We would not, therefore, require the consent of all those named in authorizations prior to their publication, nor the consent of each named individual before that person's identity could be revealed. In our view, if objects of an authorization choose to bring attention to the investigation, all matters contained in the relevant authorizations, renewals and certificates of notice should become public.

The consent rule would, however, be subject to the provision in Recommendation 9(3)(c). Once the document in question becomes an exhibit in a legal proceeding, public access would no longer be tied to the object's consent. Thus, if an intercepted private conversation were introduced into evidence, or if a challenge were made to the validity of an authorization, the public would be entitled to examine the relevant documents. Recommendation 9(4) makes it clear that once an authorization, renewal or certificate of notice has been examined, all of the contents are publishable. Section 178.2 of the *Criminal Code* would require amendment to implement this

211. LRCC, *supra*, note 76, Recommendations 49 and 51 (at 65) respectively.

212. LRCC, *supra*, note 76, Recommendation 69 at 93 and text at 59-61.

213. That is, by a judge of a superior court of criminal jurisdiction or a judge as defined in section 482. See paragraph 178.14(1)(*a*) of the *Criminal Code*.

214. See subsection 178.23(1) of the *Criminal Code* and *Protection of Privacy Regulations*, C.R.C. 1978, c. 440, s. 2.

recommendation. It should not be an offence to disclose the existence of wiretap activities once the public is entitled to gain access to documents that contain that information.

There remains the question whether the contents of the intercepted communications themselves can be disclosed. In Working Paper 47, we endorsed the current prohibition on their disclosure in the interests of individual privacy.[215] Such a rule operates to prevent the dissemination of private communications in the media, thus protecting the privacy interests of individuals whose words have been intercepted. It may also protect innocent individuals and police informers whose names arise in the intercepted conversations. Of course, disclosure is permitted in the course of criminal proceedings pursuant to paragraph 178.2(2)(*a*) of the *Criminal Code*.

In Working Paper 47, we suggested that judges be given a power to prevent disclosure of matters contained in authorizations or other documents relating to an application to intercept a private conversation, where disclosure would tend to reveal the identities of police informers or others who assisted the police in their investigation.[216] The appropriate means for doing so, in our opinion, is to obscure the sensitive information with a cypher. In Recommendation 9(5), we recognize this power and include an additional ground for preventing disclosure of information contained in the documentation. We believe that, where necessary, a judge who issues an authorization should also have the power to obscure matters that, if disclosed, would frustrate an ongoing police investigation. Use of electronic surveillance techniques can be part of a continuing police operation involving several suspects which often does not terminate after an interception has occurred. Yet because the object of the interception is entitled to notice, there is a risk that the purpose and extent of the ongoing investigation may be rendered fruitless by its being revealed to other suspects. We do not, however, believe it is necessary to include a power to limit access to the packet itself to protect a police investigation or police informers, since access to the packet is already extremely limited. This distinguishes documents relating to an interception from search warrant documents, which the public is generally entitled to examine.[217]

Finally, once matters in wiretap documents have been obscured, there ought to be some mechanism for revealing those matters at a later stage. We believe that a court which reviews the validity of the authorization or which determines the admissibility of intercepted conversations should be empowered to reveal the obscured matters if necessary for the accused to make full answer and defence. In Working Paper 47 we

215. LRCC, *supra*, note 76 at 93-4. We also recommended that two additional exceptions to the prohibition be added (Recommendation 74 at 94-5).

216. LRCC, *supra*, note 76, Recommendation 50 at 65.

217. See Recommendation 10, *infra*, and commentary. See also S.A. Cohen, *Invasion of Privacy: Police and Electronic Surveillance in Canada* (Toronto: Carswell, 1983) at 134 where such a distinction is made between wiretap documents and search warrant documents.

suggested that questions of admissibility could be determined at a preliminary inquiry or at trial, instead of seeking an independent review of the authorization in the superior court.[218]

RECOMMENDATION

Search Warrants

10. (1) A justice should receive an application for a search warrant in the absence of the public.

(2) Everyone may examine a search warrant and its supporting information after the warrant has been executed.

(3) The entire contents of a search warrant and its supporting information may be published or broadcast.

(4) A justice who receives an application for, or who previously issued, a search warrant may, if requested by the applicant, obscure with a cypher:

(a) any telephone number appearing on a search warrant or its supporting information if disclosure of the telephone number would be likely to reveal the existence of electronic surveillance activities; or

(b) the name of, or other information serving to identify, an informant appearing on a search warrant or its supporting information if that person's safety would otherwise be jeopardized.

(5) A justice who receives an application for, or who previously issued, a search warrant may if requested deny public access to the warrant or its supporting information until introduced as evidence in a legal proceeding where disclosure of their contents would:

(a) frustrate an ongoing police investigation, or

(b) pose a risk to the safety of any person

and an order obscuring matters contained in the warrant or supporting information would not be adequate in the circumstances.

(6) A judge who reviews the validity of a search warrant or a decision to obscure matters contained in the warrant or its supporting information may reveal any obscured matters if necessary for the accused to make full answer and defence.

Commentary

Publication of information relating to police conducted searches has recently become controversial. With respect to access to hearings at which applications for search warrants are made, the considerations are the same as those surrounding

218. As presently required. See *Wilson* v. *R.*, *supra*, note 75 and LRCC, *supra*, note 76 at 52-65 and Recommendation 51 at 65.

applications for wiretap authorizations. In *MacIntyre*,[219] the Supreme Court of Canada held that search warrant application hearings may be held *in camera* in order to ensure the efficacy of the warrant as an instrument of criminal law enforcement. We concur with this position in Recommendation 10(1).

The question of access to the hearing, however, is only the first issue that must be confronted in determining the breadth of the guarantee of freedom of expression and freedom of the media in relation to search warrants. Access to documents and publication or broadcast of their contents are subsequent and more problematic issues. In *MacIntyre*, the Court was guided by the principle that judicial acts and information relating to those acts should, presumptively, be accessible and publishable.[220] To give effect to the applicable *Charter* guarantees, we must be guided by these same presumptions.

Precisely what kinds of information are contained in warrants and supporting informations and the interests that ought to be protected should be made clear before we define the limitations themselves. A warrant will usually, but not always, state the names of the officers who are authorized to conduct a search. For example, although not required in warrants issued under sections 443 or 443.1 of the *Criminal Code*, it is mandatory for warrants issued pursuant to section 10 of *Narcotic Control Act*.[221] A warrant and supporting information will identify other persons, such as the issuer, informants, persons from whom information has been obtained, including victims of crime, the occupants of premises to be searched and perhaps suspects or accused persons. Other information, such as the reasons for the search, the suspected offence and the property to be sought and seized, will also be contained in these documents.

In our study of search warrants conducted for our Working Paper on search and seizure, we discovered that over fifty per cent of the warrants examined were invalid for failure to set out properly the necessary information.[222] For this reason, among others, we strongly recommended that warrants and supporting informations generally be examinable in order to encourage greater adherence to legal standards in the authorization of an intrusive power. It may be that the prospect of public access will actually cause some peace officers to omit information from a warrant application. However, we are of the view that it would be better to raise the overall level of compliance with warrant authorizing procedures than preserve inclusion of what may be unnecessary detail in a small number of cases.

Having recognized the public interests in maximum openness in this process, we must consider the potential impact on other interests. In the *MacIntyre* case,[223] protection of the innocent was held to justify limiting public access to the warrant and

219. *Supra*, note 71.

220. See *supra*, pp. 23-4.

221. R.S.C. 1970, c. N-1.

222. LRCC, *Police Powers — Search and Seizure in Criminal Law Enforcement* (Working Paper 30) (Ottawa: Supply and Services Canada, 1983) at 244.

223. *Supra*, note 71.

supporting information until the warrant had been executed and something found. This prevents the public identification of persons named in a warrant or supporting information until some concrete basis for a peace officer's suspicion has been established. Such a mechanism, however, only protects one group of "innocent" persons — those suspected of criminal activity but for whom that suspicion is negated by a subsequent fruitless search. There are other innocent persons who may be equally harmed by being identified after public inspection of search warrant documents. For example, occupants of searched premises may have no association whatsoever with the crime under investigation; yet, the rule in *MacIntyre* would permit them to be identified if evidence of an offence were found on their property. Similarly, even those originally suspected of criminal activity may be innocent, notwithstanding that something was seized in the course of a search. A person suspected of possessing stolen property may have property seized from his possession but may never be charged if, for example, it is later discovered that indeed the property was not stolen or that the suspect had a reasonable explanation.

Thus, the *MacIntyre* case stands for the proposition that the innocent must be protected from the harms flowing from public identification. However, its solution did not reach all innocent persons, nor did it deal with effects of the revelation of other matter contained in a warrant or supporting information. For this reason, in our work on search and seizure, we recommended that restrictions other than those foreseen by *MacIntyre* be enacted.[224] However, since we formulated that position there has been a number of cases interpreting the extent of the freedom of expression and the freedom of the press in relation to criminal proceedings. Further, a statutory provision restricting publication of the contents of warrants and supporting informations was introduced into the *Criminal Code*.[225] This provision generated some heated responses from the media, and in some cases, deliberate flouting of the restriction. Some newspapers printed the location of a search without the occupant's consent[226] in spite of the publication ban on this information and have been successful in obtaining judicial declarations that such a ban offends paragraph 2(*b*) of the *Charter*.[227] The Minister of Justice has stated that he is treating the provision as inoperative. Because of these developments, we revisit the issue in this Working Paper.

Recommendation 10(2) allows public access to a warrant and supporting information after the warrant has been executed even if nothing was found in the course of the search. The interests in effective law enforcement clearly diminish after the execution of the warrant, at which point, as was recognized in *MacIntyre*,[228] the public interest in openness ascends. However, there is no reason, in our view, to make any ready association between the "success" of a search and the disclosure of the identities of persons who may be named in warrant documents.

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224. See *supra*, note 4, section 17 and comments at 29-33.

225. *Criminal Code*, section 443.2, set out *supra* at 27.

226. See, for example, Peter Moon, "Law amendment gags media, MPs say," *The [Toronto] Globe and Mail* (14 February 1986) A1.

227. See *Canadian Newspapers Co.* v. *A.G. Canada*, *supra*, note 91.

228. *Supra*, note 71.

Recommendation 10(3) permits publication of the contents of a warrant and supporting information. We would not limit the publication of matters contained in warrant documents except where it is necessary, according to Recommendation 10(4) or 10(5) to obscure matters contained in them or to deny access to them. This is a marked departure from the present law, but one which we believe is necessary to bring the law into conformity with the *Charter*.

Most significantly, our approach would permit publication of the identities of persons who are named in search warrant documents. During our deliberations we presented consultants with a revised version of section 443.2 of the *Criminal Code* which would have protected the identities of all innocent persons (including those presumed innocent, that is, suspects) and prevented publication of the location of a search. Our proposed rule was subject to a consent provision and the publication ban would have terminated upon disclosure of the secreted information in judicial proceedings, upon the laying of charges arising from the search or upon a court order.

Criticism of our proposal, which was itself much more permissive than section 443.2 of the *Criminal Code*, was largely of two types. Some consultants believed that such a provision would still constitute an intrusion upon freedom of expression. It would have allowed access to certain information in warrant documents, but prohibited communication of some of that information. The preferred approach, according to their reasoning, would be to deny access where necessary to protect a superordinate interest.

The other response to our proposed revision of *Criminal Code* section 443.2 was that the protection we would have given innocent persons was so limited as to be illusory, since that protection would terminate on the laying of charges, disclosure in judicial proceedings or by court order. Further, our rule would not have prevented publication of information about searches obtained from sources other than the warrant documents so that ultimately, innocent persons were likely to be named. Therefore, our approach would have merely postponed the inevitable.

After considerable deliberation, the Commission has decided not to recommend that the contents of warrants and supporting informations be subjected to a publication ban. However, we are still of the view that there are matters contained in those documents which, in exceptional cases, should not be disclosed. In preference to a publication ban, however, we recommend that when necessary sensitive matters should be obscured with a cypher. Where such a measure would not be effective, access to the documents could be denied. These proposals are set out in Recommendations 10(4) and 10(5).

Recommendation 10(4) would permit the court issuing a warrant to obscure certain matters set out in warrant documents in narrowly defined circumstances. This was originally proposed by the Commission in its Report 24 on *Search and Seizure*.[229] The

229. See *supra*, note 4, subsection 9(1) at 20-1. The Commission also recommended that police not be required to reveal the identity of informers in applying for a search warrant. *Ibid.*, section 8 at 19. However, see *Aikenhead Door and Hardware Ltd.* v. *Wagschal*, 13 W.C.B. 280 (January 23, 1985), (Ont. H.C.) [unreported] in which a search warrant failing to identify an informer was quashed.

power to make orders limiting access to information in court documents was foreseen by the Supreme Court in the *MacIntyre* case where the majority stated:

> Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.[230]

This discretion was interpreted in the case of *Re A.G. of Ontario and Yanover* as giving the issuing court a power to seal warrant documents, at a minimum, where there would be a risk of disclosure of information concerning police use of electronic surveillance, the identities of confidential informants or police investigative techniques, and where disclosure would otherwise obstruct a continuing police investigation.[231]

Our approach differs, however, from that in *Yanover*. We would give the issuing court the power to delete certain particularly sensitive information, rather than deny access to all documents and have isolated two kinds of information that should be subject to this kind of order. In Recommendation 10(4)(a) we refer to telephone numbers contained in warrant documents which, if disclosed, would reveal the existence of wiretapping activities. In situations where a warrant is sought to search telephone company premises for records, disclosure of the existence of electronic surveillance activities would be inevitable if there were no restriction on disclosure of the telephone numbers in relation to which records were sought. Therefore, there is a need to empower a justice to obscure that information with a cypher.

Consistent with the common law protection offered to police informers, Recommendation 10(4)(b) would permit the name or characteristics of an informer to be obscured where the person's safety would otherwise be threatened.[232]

Recommendation 10(5) would allow an issuing justice to deny public access to warrant documents in narrow circumstances. This is a power analogous to that recognized in the *Yanover* case. However, we would limit its exercise to situations where disclosure would result in the frustration of an ongoing police investigation[233] or a threat to the life or safety of any person. Further, this power could only be used if the obscuring of matters contained in the document would not be effective in the circumstances. This would permit a justice, for example, to deny public access where disclosure of information in the warrant documents would pose a risk to the safety of a person other than a police informer, such as an innocent party. Similarly, if there were information other than a telephone number in the warrant documents relating to an ongoing police investigation, a justice could deny public access to them. In accordance

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230. *Supra*, note 71 at 189.

231. (1982), 68 C.C.C. (2d) 151 (Ont. Prov. Ct.) at 163 [hereinafter *Yanover*].

232. See, for example, *Bisaillon*, *supra*, note 135.

233. It appears that in the United States, public access to warrant documents can also be denied where a police investigation is continuing: *Seattle Times Co.* v. *Eberharter* (1985-86) 38 Crim. L. Rptr. 2353 (Wash. Sup. Ct.).

with the existing law, interested parties could still obtain access any time after the warrant was executed.[234] Recently, the Supreme Court of Newfoundland ruled that persons whose property has been searched, as interested persons, may also have access to sealed warrant documents even where there is a risk of disclosure of the identity of an informant.[235] They must have access, the Court stated, in order to be able to challenge the validity of the warrant.

Recommendation 10(6) would permit a court reviewing the validity of a warrant or a decision to obscure matters in the warrant documents to reveal matters that had previously been obscured if the information would be needed by the accused to make full answer and defence. This is analogous to the power we provided earlier in relation to electronic surveillance (Recommendation 9). There is no need for an express power to give an accused access to warrant documents that have been kept from public view since the accused, as an interested party, already has the right to obtain access any time after execution of the warrant.[236]

We believe that our approach to this issue constitutes an improvement over section 443.2 of the *Criminal Code*. There are various problems with the present law that we have attempted to avoid in our recommendation.

First, the prohibition on publication and broadcast in section 443.2 of the *Criminal Code* is too broad. It applies whether or not the information is discovered through inspection of the warrant or from other sources. The prohibition applies whenever a warrant has been issued or a search conducted under a warrant. Thus, if a reporter is present on the scene when a search is conducted pursuant to a warrant, he would be prevented from publishing the location of the search and the occupant's name, even though no access to the warrant documents was ever sought. We have avoided such a general prohibition by allowing publication of information about searches whether obtained from warrant documents or through other sources. In other words, we would not restrict the publication of knowledge that a person has acquired about searches. To do otherwise would create too great an imposition on freedom of expression and freedom of the media, as it could serve to restrict communication about what could have been observed phenomena. Both of the courts which struck down section 443.2 on *Charter* grounds criticized this aspect of the present law.[237]

The second problem with *Criminal Code* section 443.2 is that it protects the occupants of premises and suspects in the investigation, but not confidential informants. We have done this through our Recommendations 10(4) and 10(5), which would permit a court to obscure with a cypher an informant's identity, or deny public access to warrant documents if disclosure of their contents would pose a risk to a person's safety.

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234. See, for example, *Realty Renovations Ltd.* v. *A.G. for Alta.*, *supra*, note 88; and *MacIntyre*, *supra*, note 71.

235. *Rideout and Rideout and Associates Ltd.* v. *R.* (1987), 61 Nfld & P.E.I.R. 160 (Nfld. S.C.).

236. *Ibid.*

237. *Supra*, note 91 at 215 (Ont. H.C.) and 382 (Man. Q.B.).

Thirdly, section 443.2 of the *Criminal Code* requires that the consent of all occupants and all suspects be obtained prior to publication of the location of a search or the names of any of the occupants or suspects, whether or not those names appear in the warrant or supporting information. This is the most serious problem with the provision.[238] In a complex case, there may be many occupants of searched premises (for example, an office building) and dozens of suspects (for example, the officers of several corporations) making it nearly impossible to obtain their consent to publication. Further, this requirement may itself constitute an infringement upon the individuals' privacy and the protection of the innocent. In order to comply with the provision, the media would have to be given access to the names and addresses of innocent persons, who may not have even been named in warrant documents, so that the necessary consent could be obtained prior to publication. This could in fact result in harassment of innocent individuals although the purpose of the provision is presumably to protect them. We acknowledge that our approach would result in the names of innocent persons being released to the public. Where this is done in a manner that defames innocent persons by unjustifiably associating them with criminal behaviour, such persons would have access to a civil remedy in libel. If it is simply reported that a search took place at the home of a certain individual, there is little harm done to that person. Any harm at all would be the result of hasty or ill-founded conclusions about the person's connection to the police investigation. In our view, the *Criminal Code* is not the appropriate device for dealing with what may be an inclination to jump to conclusions, nor can sound rules of criminal procedure be founded on that inclination.

Fourthly, the prohibition in section 443.2 terminates only when a charge has been laid "in respect of any offence in relation to which the warrant was issued." On the one hand, this means that whenever a charge results from an investigation, the names of innocent persons would be publishable. On the other hand, if no charge is laid as a result of the investigation preceding the search, (and even if a different charge arises out of the search) media activity could be restricted indefinitely, unless compliance with the consent requirements was effected.[239] This has the effect of creating two categories of "innocent" persons — those whose premises are searched and charges subsequently laid as a result, and those whose premises are searched and no charges or different charges laid as a result. In our view, there is no reason to distinguish between these categories.

Finally, section 443.2 of the *Criminal Code* adopts a definition of "newspaper" which results in the application of the publication ban to daily and monthly publications, but creation of an exemption for quarterly or annual journals.[240] There appears to be no sound basis for this distinction which, needless to say, our approach avoids since we do not advocate the use of a publication ban.

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238. The Ontario High Court in the *Canadian Newspapers Co.* v. *A.G. Canada* case also criticized this aspect of section 443.2; *supra*, note 91 at 214.

239. *Supra*, note 91 at 214 (Ont. H.C.).

240. *Supra*, note 91.

RECOMMENDATION

Disposition of Seized Property

11. (1) Any hearings at which determinations are made governing the disposition of seized property should be open to the public, subject only to subsection 444.1(10) of the *Criminal Code*, which requires that hearings to determine the disposition of documents seized from a lawyer be held in private if a claim of solicitor–client privilege has been made.

(2) Everyone has the right to examine inventories of seized property and post-search and post-seizure reports.

(3) The entire contents of inventories of seized property and post-search and post-seizure reports may be published or broadcast.

Commentary

The *Criminal Law Amendment Act, 1985* introduced numerous changes as to how seized property is disposed of. Questions of access to, and reporting of, disposition proceedings,[241] as judicial acts, should be governed by the general presumption in favour of openness. They can be distinguished to some extent from pretrial investigatory proceedings such as wiretap and search warrant applications in that the disposition proceedings usually occur at the completion of an investigation, rather than at the beginning. There is less risk that public access to this process will jeopardize a criminal investigation or interfere with effective law enforcement. Thus, in Recommendation 11(1) we state that the public should be entitled to attend disposition hearings, subject only to subsection 444.1(10) of the *Criminal Code* which requires that hearings involving a determination of whether seized documents should be protected by solicitor–client privilege be closed. Public access in other cases may even assist police in an investigation in that attendants may help to identify seized property or offer other important information.

Recommendation 11(2) deals with access to documents associated with the disposition of seized property. The reference to "inventories of seized property" arises from our recommendation in Report 27 on *Disposition of Seized Property* that inventories be prepared by peace officers and given to those parties with an apparent interest in the property.[242] We refer to both "post-search" and "post-seizure" reports to make it clear that there should be public access to reports prepared after a search whether or not anything was seized. For example, subsection 443.1(9) of the *Criminal Code* presently requires a peace officer to make a written report consequent on the execution of a telewarrant, whether or not a seizure of property occurred in the course

241. See, for example, s. 445.1(1)(*b*)(i), 445.1(2)(*a*) (bringing seized property before a justice); s. 446(2)(*a*), 446(3)(*a*) (applications for extension of custody order); s. 446(5), (6), (7), (10) (applications for disposition orders); s. 446(15) (application for access to examine seized property); s. 446(17) (appeal from disposition orders); s. 446.2(2) (disposition of property obtained by commission of an offence).

242. *Supra*, note 5, Recommendation 2(1) at 10.

of the search.[243] On the other hand, section 445.1 allows a peace officer either to bring seized property before a justice or make a post-seizure report[244] after execution of a warrant. Our recommendations in this area protect the public interest in being informed of police activity and encourage accountability by permitting access to an executed warrant, even when nothing is seized, access to post-seizure proceedings and access to post-search and post-seizure reports.

The issue of publication of the contents of inventories and post-search and post-seizure documents differs from publication of the contents of search warrant documents. The former documents are unlikely to contain information that, if disclosed, would frustrate a police investigation. Nor is a confidential police informant likely to be named in them. There is no need, then, to limit publication of their contents.

RECOMMENDATION

Charge Documents

12. (1) A justice who receives an information may do so in the absence of the public.

(2) Everyone has the right to examine:

(a) an information, once laid, and

(b) an indictment, once preferred.

(3) The entire contents of informations and indictments may be published or broadcast.

Commentary

As we have mentioned in other contexts, the laying of a criminal charge sets in motion various elements of the criminal process. It represents the point at which a peace officer or private citizen has acquired sufficient reasonable grounds to believe that a criminal offence has been committed by a specific individual to justify commencement of a criminal prosecution.

We believe that this step is a significant one in the criminal process and Recommendation 12 is consistent with this belief. It would allow unfettered access to an information, the document which commences a prosecution, and complete freedom to publish its contents. This recommendation, however, would be subject to the prohibition on publishing the identities of victims and complainants in sexual offences set out in Recommendation 7 should that information be contained in a charge document.

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243. The required contents of this report are set out in paragraphs 443.1(9)(*a*), (*b*) and (*c*).

244. The report is provided in Form 5.2 of the *Criminal Code* (subsection 445.1(3)).

We would, however, permit a justice to receive an information *in camera*. There are two reasons for this. First, the justice is not acting judicially when he receives an information, but rather, he is acting "ministerially."[245] There is no exercise of judicial powers or discretion involved; thus, there is no presumption of openness attaching to it. Second, at the point when an information is laid, there may be a judicial decision to be made simultaneously as to what form of process should issue, that is, in order to compel the accused's appearance to answer the charge or to secure custody of the accused in the public interest. We deal with the issuance of process separately in Recommendation 13. However, there may be a need for the justice to proceed in the absence of the public to ensure the efficacy of the process.

While almost all criminal prosecutions are initiated by the laying of an information, another document (the indictment) is used to set out a description of the allegations against an accused charged with an indictable offence. It comes into existence after the accused is ordered to stand trial following the preliminary inquiry or, if the accused is discharged, or no preliminary inquiry has been held, after the Attorney General indicts the accused directly. In all of these situations, the indictment is said to have been "preferred." Although the indictment is usually drawn up at a later stage in the proceedings than the information, the same rules of publication should apply to both. For this reason, we include it here along with the information. This uniform approach is consistent with our Working Paper 55 on *The Charge Document in Criminal Cases*, in which we recommend that the distinction between informations and indictments be eradicated in favour of a single form of "charge document."[246]

It should be noted that at present no hearing occurs when an indictment is preferred. We have, therefore, made no recommendations regarding public attendance when an indictment is preferred by the Attorney General. In our forthcoming work on powers of the Attorney General, we examine this process in greater detail.

RECOMMENDATION

Issuance of Process

13. (1) A justice should receive an application for the issuance of process to compel the appearance or secure the arrest of an accused or a witness in the absence of the public.

(2) Everyone has the right to examine:

(a) a subpoena,

(b) an appearance notice,

(c) a promise to appear,

(d) a recognizance, whether entered before a peace officer or a justice,

(e) a summons,

245. *R.* v. *Jean Talon Fashion Center Inc.* (1975), 22 C.C.C. (2d) 223 (Qué. Q.B.).

246. LRCC, *The Charge Document in Criminal Cases* (Working Paper 55) (Ottawa: LRCC, 1987) at 15.

(f) an undertaking entered before a justice, or

(g) a warrant for arrest once executed.

(3) Documents set out in Recommendation 13(2) may be published or broadcast in their entirety.

Commentary

At the time of the laying of an information[247] or, in special circumstances, at a later time,[248] a justice may issue process to compel an accused to attend court to answer the charge against him or her or to secure the custody of an accused or a witness by way of arrest.[249] In order for an arrest to be effective, it is often essential that the person to be arrested not have any forewarning. For this reason, at the point where an application is made for the issuance of process, our Recommendation 13(1) would allow a justice to proceed in the absence of the public.

Recommendation 13(2) would give everyone the right to examine the documentary foundation for an accused's or a witness's obligation to attend court or submit to custody prior to trial. In all cases, except for an arrest warrant, we would allow complete access to the documents. The appearance notice, promise to appear and recognizance entered before a peace officer all come into existence prior to the formal commencement of proceedings by the laying of an information.[250] Nevertheless, it is our belief that these documents should be examinable by the public to enable it to follow the unfolding of a prosecution. Through examination of these documents, the public may know when an accused is required to attend court to answer the charges. They may also know the nature of the allegations and the identities of the police officers who have responsibility for the matter.

The same is true for the other forms of process that issue after an information has been laid. We believe that there is no justification for denying access to these documents in the court file at any time. The only exception is with respect to arrest warrants. If an arrest is to be an effective means of compulsion to attend court or a practicable means of taking an accused into custody, the person to be arrested must not be given advance warning. In the interests of effective law enforcement and public safety, therefore, the warrant should not be examinable until after it has been executed. Recommendation 13(2)(g) provides for this restriction which is similar to the limitation on the rule of access we propose in relation to search warrants in Recommendation 10.

In Recommendation 13(3), we provide that the contents of the documents identified in Recommendation 13(2) may be published or broadcast in their entirety. This recommendation, however, would be subject to the ban in Recommendation 7 on

247. See sections 455.3 and 455.4 of the *Criminal Code*.

248. See, for example, section 456.1 of the *Criminal Code*.

249. In our Report 29 on *Arrest* (Ottawa: LRCC, 1986), we identified the grounds on which an arrest is justifiable: see Recommendations 2 and 4 at 21 and 28 respectively.

250. See sections 451, 452, 453 and 453.1 of the *Criminal Code*.

publication of the identities of complainants in sexual offences, should that information appear in any of the documents governed by the present recommendation.

RECOMMENDATION

Judicial Interim Release Hearings

14. (1) Judicial interim release hearings should be held in public.

(2) A justice may prohibit the publication or broadcast of:

(a) evidence tendered, representations made or reasons given at a judicial interim release hearing if, having given consideration to other procedures for protecting the fairness of a subsequent trial, such as an adjournment of trial proceedings, the process of selecting and instructing jurors, or a change of trial venue, the justice is satisfied that these other procedures would not be adequate in the circumstances;

(b) any notice given, evidence taken, information given or representations made at a hearing to determine the admissibility of evidence concerning the sexual activity of a complainant in a sexual offence.

(3) A publication ban imposed under Recommendation 14(2)(a) should expire:

(a) upon discharge of the accused at a preliminary inquiry,

(b) upon conviction or acquittal of the accused at trial, or

(c) upon the entering of a stay of proceedings.

(4) This recommendation should apply to reviews of decisions or orders made at judicial interim release hearings.

RECOMMENDATION

Preliminary Inquiries

15. Recommendation 14 should apply, with the necessary modifications, to preliminary inquiries.

Commentary

As discussed in Chapter Two, there are various means of protecting a fair trial by the imposition of limitations on the openness of pretrial events. In our view, the concerns about publication of evidence tendered at bail hearings and preliminary inquiries are sufficiently similar as to warrant equal treatment in this area. Thus, we have essentially combined Recommendations 14 and 15 and the following commentary applies to both bail hearings and preliminary inquiries.

We begin in Recommendation 14(1) by stating that judicial interim release hearings (and preliminary inquiries) should be conducted in public. There is presently no specific statutory basis for excluding the public from a bail hearing, although the general exclusionary powers in subsection 442(1) of the *Criminal Code* presumably apply as it refers to "any proceedings against an accused." There is a statutory provision (paragraph 465(1)(*j*)) applicable to preliminary inquiries which allows a justice to exclude persons other than the prosecutor, the accused and their counsel from a preliminary inquiry "where it appears to him that the ends of justice will be best served by so doing." Recommendation 14(1) would make it clear that these proceedings should usually be open, subject only to the general power to exclude the public under Recommendation 6 on specific grounds. In our consultations, we were assured that no jeopardy to a fair trial occurs if the public is allowed access to bail hearings and preliminary inquiries. The fairness of a trial can be adequately protected when necessary by imposing publication bans on prejudicial matters disclosed in those proceedings.

The general power to exclude the public in Recommendation 6 would allow a justice to exclude "all or any members of the public from all or part of a criminal proceeding" if necessary to protect one of the identified interests. This language is taken from subsection 442(1) of the *Criminal Code*. It would permit a certain amount of flexibility in the making of closure orders that presently does not exist. Under paragraph 465(1)(*j*), a justice presiding at a preliminary inquiry may only exclude *all* members of the public from the *entire* proceedings.[251] This kind of blanket order should, in our view, be avoided. It permits significant encroachments on the public interest in openness where an order which is much narrower in scope and duration would completely satisfy the competing interests at stake.

Presently, a justice *must* impose a publication ban on evidence tendered at judicial interim release hearings (subsection 457.2(1)) and preliminary inquiries (subsection 467(1)) if the accused so requests. Otherwise the matter is within the justice's discretion.[252] Both these powers are absolute in the sense that they apply to all evidence tendered at the proceeding and, in the case of bail hearings, the prohibition also applies to "information given or the representations made and the reasons, if any, given or to be given" according to subsection 457.2(1). These provisions, in our view, are overly restrictive of freedom of expression, notwithstanding that they have both been found to be constitutionally valid.[253] The mandatory nature of the prohibitions and their breadth constitute an unjustifiable intrusion on the principle of maximum openness. Other similar mandatory orders have, in fact, been found to offend the *Charter*.[254] Our

251. *R.* v. *Sayegh (No. 1)* (1982), 66 C.C.C. (2d) 430 (Ont. Prov. Ct.); *R.* v. *Sayegh (No. 2)* (1982), 66 C.C.C. (2d) 432 (Ont. Prov. Ct.).

252. Section 467 was recently amended by section 97 of the *Criminal Law Amendment Act, 1985*, to make this clear. However this appears to have been true even under the unamended section 467: see Stuart M. Robertson, *Courts and the Media* (Toronto: Butterworths, 1981) at 201.

253. Section 457.2 of the *Criminal Code*: see *Re Global Communications Ltd. and A.G. Canada*, *supra*, note 96; section 467: see *R.* v. *Banville*, *supra*, note 102.

254. *Re Southam Inc. and R. (No. 1)*, *supra*, note 28 (striking down mandatory *in camera* trials of juveniles); *Canadian Newspapers Co.* v. *A.G. Canada*, *supra*, note 131 (striking down mandatory prohibition on publication of the identity of a complainant in a sexual offence).

approach here is consistent with our earlier Recommendation 3 that no automatic bans should remain in the *Criminal Code*.

We would replace the present limitations with our Recommendation 14(2) which makes it clear that an order should only be made when necessary to satisfy a substantial competing interest. Recommendation 14(2)(a) identifies the interest in a fair trial. It would require that a justice presiding at a bail hearing or preliminary inquiry consider whether other means of guaranteeing a fair trial would be effective before deciding to impose a publication ban. In many ways, this test is similar to, but less strict than, that now required by American courts before publication bans or exclusionary orders will be considered constitutional. In *Nebraska Press Association* v. *Stuart*,[255] the United States Supreme Court held that while adverse pretrial publicity posed a risk that potential jurors would be prejudiced against the accused, this risk did not justify a limitation on freedom of the press to publish information about a sensational murder case prior to trial. The Court stated that alternatives to a publication ban, such as a change of venue, an adjournment, or the careful selection of jurors, had not been demonstrated to be insufficient in the circumstances to protect the accused's right to a fair trial. It set a standard of persuasion that must be met by those seeking a publication ban: "Reasonable minds can have few doubts about the gravity of the evil pretrial publicity can work, but the probability that it would do so here was not demonstrated with the degree of certainty our cases on prior restraint require."[256]

This test has also been applied by the United States Supreme Court to the issue of whether exclusion of the public from a criminal trial is constitutional.[257]

We would simply impose a duty on the presiding justice to apply his mind to the various means of protecting a fair trial which are also available in Canada, before imposing a publication ban. He would not be required to make a definitive ruling with the "degree of certainty" or "probability" that is required in the American context. Our recommendation, then, effects a compromise. We would remove the accused's entitlement to an automatic publication ban on all evidence tendered at bail hearings and preliminary inquiries but require simply a demonstration of the need for a publication ban in the circumstances. As Dickson J. (as he then was) stated in *MacIntyre*: "The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right."[258] We believe that this should be the rule with respect to publication bans as well. Thus, if either the defence or the prosecution seeks a limit on the presumption of openness, it must discharge the corresponding onus of proof. However, we would not erect such a heavy onus of proof as required by American courts. We believe, for example, that an accused should not be put to an exacting standard in the assertion of his or her right to a fair trial. The accused should, however, at least direct the court to the possible inadequacies of other available procedural measures.

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255. 427 U.S. 539, 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976).

256. *Ibid.*, *per* Burger C.J. at 569.

257. *Richmond Newspapers Inc.* v. *Virginia*, 448 U.S. 555, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980).

258. *Supra*, note 71 at 189.

Recommendation 14(2)(b) restates the present law set out in section 246.6 of the *Criminal Code*. The power to impose a publication ban where a *voir dire* is held into a complainant's sexual history should exist whether it takes place at a bail hearing, preliminary inquiry or criminal trial.

We have made proposals relating to access to documents associated with judicial interim release (that is, recognizances, undertakings, and so forth) in Recommendation 13 on Issuance of Process.

Some forms of evidence may be so inherently prejudicial that their publication would almost always be prohibited prior to trial. Confessions, criminal records and the results of certain forensic tests are obvious examples. Still, the prohibition on publication of these matters would, in our scheme, remain discretionary so as to take account of other means of protecting a fair trial, such as a change of venue. It must also be recognized that presently the law of *sub judice* contempt operates to suppress publication of some of the most damaging evidence about pending criminal proceedings even in the absence of publication bans. Our approach assumes the existence of some form of offence of contempt by publication.[259] We have not made any proposals which would limit expression about criminal matters prior to the commencement of the criminal process (for example, by police before a charge is laid). We have confined ourselves here to communication of information about procedural incidents within the criminal process, not discussion about criminal matters at large. That issue has traditionally fallen within the domain of the law of contempt of court, a subject the Commission is addressing elsewhere as part of its comprehensive revision of substantive criminal offences.

Our recommendations present a measured response to the problems of openness of pretrial proceedings. Although we have perhaps extended the range of recognized interests that come into play in pretrial events, we have carefully structured the discretion that should be given to justices in making orders that are intrusive upon openness and have defined the scope of such orders.

We have also provided rules which we think should govern the termination of a publication ban. Recommendation 14(3) sets out the events that should trigger termination of a publication ban on evidence and representations made at bail hearings and preliminary inquiries. Our rule is similar to that now contained in sections 457.2 and 467 of the *Criminal Code*. However, it was suggested during our consultations that the present provisions contain ambiguities. For example, they state that a publication ban terminates when "the trial is ended." It is unclear whether this means after conviction, acquittal, the rendering of a verdict, or after sentencing. There is no reason, in our view, for a publication ban to extend beyond the conviction or acquittal of the accused and our proposal in Recommendation 14(3)(b) so provides.

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259. See LRCC, *supra*, note 10 and Bill C-19, *supra*, note 9, s. 33.

Another ambiguity relates to the termination of a publication ban in the event of a stay of proceedings. For sake of clarity and completeness, we provide in Recommendation 14(3)(c) that bans should terminate upon the entering of a stay, whether the stay is entered judicially or by the prosecution.

This proposal, however, will not always insulate trial proceedings from matters that have been the subject of a publication ban at a bail hearing or preliminary inquiry. For example, we suggest that a publication ban should terminate upon the discharge of the accused at a preliminary inquiry. Yet, if the prosecution then indicts the accused directly, the trial will take place after the matters which were the subject of the publication ban have been published. Similarly, if the prosecution enters a stay of proceedings, it may later recommence them. In the interim, any information that was previously subject to a publication ban may have been published. Even if the ban lasts until a trial has ended, an accused may subsequently face a new trial if so ordered by an appeal court. In these situations, the publication ban will not prevent prejudicial pretrial evidence from reaching potential jurors. However, protection could only be guaranteed in *all* cases if publication bans lasted until the exhaustion of all trial and appeal proceedings against an accused. We believe that this alternative would constitute an unacceptable limit on freedom of the media to report pretrial evidence. Thus, while there are imperfections in our approach, they are both necessary and reasonable.

Finally, Recommendation 14(4) provides that the same rules should apply upon review of bail hearings and preliminary inquiries as at first instance. The reviewing court would have the power to continue or discontinue a publication ban or exclusion order.

RECOMMENDATION

Pretrial Motions and Applications

16. (1) Pretrial motions and applications should be held in public.

(2) The publication bans available at a judicial interim release hearing or preliminary inquiry should apply, with the necessary modifications, to pretrial motions and applications.

Commentary

There is a wide variety of proceedings which may occur prior to trial that fall under the general rubric of pretrial motions and applications, for example, an application for an extraordinary remedy, an application for a change of venue, motions by counsel to withdraw, motions to quash an information or search warrant, and so forth. We have already provided recommendations relating to the review of determinations made at bail hearings and preliminary inquiries (see Recommendations 14(4) and 15). We must, however, make provision for these other types of pretrial proceedings, many of which will be unexceptional and guided by the general

presumption in favour of complete openness. However, in some cases, these motions may deal with matters that could prejudice a fair trial, such as the reasons for a defence counsel's withdrawal from a case. Some mechanism is needed, therefore, to prevent their publication. We believe that the power to impose a publication ban at a bail hearing or preliminary inquiry should be available to courts hearing pretrial motions and applications. This would permit the presiding judge to ban publication of evidence tendered or representations made, if alternatives such as an adjournment, a change of venue, and so forth, would be inadequate in the circumstances to protect the accused's right to a fair trial.

This recommendation would also apply to the application for a change of venue itself. Courts presently have a common law power to prohibit publication of the mere fact that a change of venue was sought if the application is turned down. This is based on the reasoning that public hostility could be aroused toward the accused by the mere suggestion that the accused believed it was necessary to go elsewhere to receive a fair trial.[260] To our minds, publication of the fact that a change of venue was sought would not cause sufficient prejudice to justify a publication ban. A change of venue may be ordered under paragraph 527(1)(*a*) of the *Criminal Code* where "it appears expedient to the ends of justice." There are many reasons for seeking a change of venue which are unrelated to the possibility of receiving a fair trial, such as the convenience of the witnesses or the parties. Thus, we would not prevent publication of the mere fact that a motion or application was made. Where necessary, a publication ban could be imposed, according to our recommendation, on the allegations made during the motion. For example, if the accused alleged that the community was prejudiced against him, it may be necessary, if the court rules against the motion, to prohibit publication of that information to protect a fair trial. However, any prejudice created by publishing the fact that the accused sought a change of venue and was unsuccessful could be corrected by an adjournment to allow publicity to subside, by the careful selection of jurors or, where it is indeed impossible to assemble a panel of objective jurors, by the ultimate granting of the change of venue application.

Other pretrial motions may deal directly or indirectly with matters that are the subject of an order obscuring them with a cypher or an order prohibiting public access, including applications to terminate these kinds of orders. With respect to an order prohibiting public access to a search warrant, for example, it would be appropriate for a court seized with an application for judicial review to exclude the public pending a determination on the application. This situation is contemplated by our general proposal for excluding the public from criminal proceedings in Recommendation 6.

RECOMMENDATION

Pre-hearing Conferences

17. Pre-hearing conferences should take place in the absence of the public.

260. The power to impose a publication ban on the fact that a change of venue application was sought is presently available. See *Re Southam Inc. and R. (No. 2)*, *supra*, note 126.

Commentary

A recent amendment to the *Criminal Code* introduced the concept of regular pretrial meetings taking place between counsel "to consider such matters as will promote a fair and expeditious hearing."[261] They would be mandatory in a case to be tried before a jury. These meetings are to be held with a view to resolving contentious matters that may arise during a trial, in a more expeditious manner than is possible during the trial itself. There may be discussions about the admissions or concessions that the defence and prosecution are prepared to make in order to narrow the issues at trial. There may even be discussions about the possibility of an accused pleading guilty to a lesser or included charge and the corresponding range of sentence he may expect. These are sensitive matters. The role of the pre-hearing conference would be compromised if there were public attendance at, or disclosure of, the discussion.

Most provinces have now promulgated rules of practice to accommodate pre-hearing conferences. Ontario is a typical example. Its rules state:

> Unless otherwise ordered by the pre-hearing conference judge, a pre-hearing conference shall be an informal meeting conducted in chambers at which a full and free discussion of the issues raised may occur without prejudice to the rights of the parties in any proceedings thereafter taking place.[262]

On the other hand, the Québec rules state that the pre-hearing conference is to be held "in court."[263] In our view, if these proceedings were to take place in open court in the presence of the public, their purpose would be defeated.

Further, as the *Criminal Code* states in subsection 553.1(1), a court seized with a criminal case may "order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by the court, judge, provincial court judge or justice, be held prior to the proceedings ...." In other words, the hearing is not a judicial proceeding as such. It is generally a meeting between counsel "presided over" by a judge or justice. It would not, then, fall within the general presumption of openness as we define it in Recommendation 2, namely, that "all criminal proceedings involving the exercise of judicial powers [should] be conducted in public." Therefore, we recommend that pre-hearing conferences be held in the absence of the public.

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261. Section 553.1 to come into force on proclamation.

262. *Ontario Supreme Court Rules respecting Pre-hearing Conferences in Criminal Matters*, SI/86-145, s. 4.

263. *Quebec Superior Court Rules of Practice respecting Criminal Matters*, SI/86-81, s. 2. There is a discrepancy between the English and French versions of section 553.1 which may account for the Québec rule. In the English version, the conference takes place between "the prosecutor and the accused or counsel for the accused." In the French version, the conference takes place "entre les parties," i.e., the accused's counsel is not present. Openness of the proceeding is, therefore, a guarantor of faimess to the accused.

C. Criminal Trials and Appeals

Fewer measures ought to be available to limit the openness of actual trial proceedings than are available prior to trial. Once a trial has commenced, there should be much less concern with the impact of publicity on the fairness of the trial. The jurors will already have been selected. Where necessary, they can be isolated from media reports of the proceedings in order to ensure that they base their verdict solely on the evidence before them (see subsection 576(2) of the *Criminal Code*). Still, there are occasions when exclusion of all or part of the public would, to our minds, be justifiable. These are articulated in Recommendation 6 which contains a general power to exclude the public.

RECOMMENDATION

Criminal Trials

18. (1) Criminal trials should be open to the public.

(2) A court may prohibit publication or broadcast of any notice given, evidence taken, information given or representations made:

(a) at a hearing to determine the admissibility of evidence concerning the sexual activity of a complainant in a sexual offence; or

(b) during a portion of the trial at which the jury is not present, if the jury has not been sequestered, until the jury retires to consider its verdict.

Commentary

Recommendation 18 would eliminate much of the vague language presently in *Criminal Code* provisions limiting access to, and publication of, criminal proceedings. Trial proceedings should take place in public, subject only to the general powers of exclusion contained in Recommendation 6. Essentially, we would do away with the broad power in subsection 442(1) of the *Criminal Code* to exclude members of the public "in the interest of public morals." Although this power has been used sparingly in Canadian law, we believe its breadth should be curtailed. We must not, particularly in the post-*Charter* era, base whatever limits on freedom of expression we may tolerate on a paternalistic notion that the public should be spared the details of courtroom happenings "in the interest of public morals." We believe that with respect to sexual offences "[i]t cannot but be in the interest of public morals to have it known publicly that such offences are prosecuted and brought to trial."[264] In this area we must be particularly cautious not to intrude on the concept of openness simply because the information that might be publicly disclosed is shocking.

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264. *R.* v. *Warawuk*, *supra*, note 113 at 126.

We have also removed the power to exclude the public when it is in the interest of "the proper administration of justice." Generally, the proper administration of justice is enhanced by maximum openness rather than closed proceedings. The fairness of trial proceedings can best be protected, where necessary, by measures limiting publication of pretrial proceedings or by other procedures, such as changes of venue or the careful selection of jurors. The fairness of a jury trial can be safeguarded by the publication ban we propose in Recommendation 18(2)(b), which is modelled on the present section 576.1 of the *Criminal Code*. Our proposal is of a discretionary nature, however, while section 576.1 is an absolute ban.

Recommendation 18(2) contains the publication bans we believe should be available during the trial process. Again, we would not continue limitations based on the interest in public morals presently contained in paragraph 162(1)(*a*) of the *Criminal Code*. The protection of public morals is, to our minds, too vague and too broad a basis for banning publication or broadcast of information about criminal trials.

We would allow prohibitions on the publication of information about *voir dires* concerning the sexual history of complainants in sexual offences or where necessary to keep certain matters from jurors. These protections are already contained in subsections 246.6(3) and 576.1(1) of the *Criminal Code*.

RECOMMENDATION

Trials of Young Persons

19. In place of the power in paragraph 39(1)(*b*) of the *Young Offenders Act* to exclude members of the public, the relevant provisions of Recommendation 6 should be inserted.

Commentary

Our recommendation with respect to the treatment of young offenders is obviously very narrow.[265] The protections presently available for young persons accused of offences and young witnesses and victims, constitute a greater intrusion on freedom of expression than would be permitted in adult proceedings. However, in *Re Southam Inc. and R.*,[266] these protections were found to be justifiable in the interest of the rehabilitation and protection of young persons.

The *Southam* case did not, however, deal with the restriction contained in paragraph 39(1)(*b*) of the *Young Offenders Act*. That provision is identical to subsection 442(1) of the *Criminal Code* which permits exclusion of the public from criminal proceedings "in the interest of public morals, the maintenance of order or the proper administration of justice." In Recommendation 6 and the accompanying commentary,

265. See *supra*, note 171.

266. *Supra*, note 28.

we expressed our view that this provision is vague and overbroad and should be replaced. The effect of this recommendation would be to allow closure of proceedings under the *Young Offenders Act* only where justified by the circumstances presently set out in paragraph 39(1)(*a*) of that Act and where necessary to protect the relevant interests identified in Recommendation 6. Recommendation 6(1)(a) deals with young witnesses who are already protected in paragraph 39(1)(*a*) of the *Young Offenders Act*. The remaining provisions of our Recommendation 6 should replace the broad power to exclude the public in paragraph 39(1)(*b*) of the *Young Offenders Act* for sake of consistency and clarity.

RECOMMENDATION

Access to Exhibits

20. (1) Everyone may examine, photograph or make copies of exhibits admitted into evidence at a criminal proceeding, subject only to Recommendation 20(2).

(2) A court may, on the application of any person with an interest in an exhibit, make an order restricting access to the exhibit or limiting the ability of the public to photograph or make copies of the exhibit where necessary:

(a) to preserve the exhibit,

(b) to protect a proprietary interest in the exhibit, or

(c) to prevent disclosure of the private or confidential contents of the exhibit, unless

(i) the private or confidential contents of the exhibit are relevant to the proceeding in which it was introduced, or

(ii) the public interest requires disclosure.

(3) A publication ban imposed by a court applies to the related exhibits and their contents.

Commentary

As mentioned, the Commission has previously made recommendations governing the disposition of seized property.[267] Also, since passage of the *Criminal Law Amendment Act, 1985*, the *Criminal Code* now contains a regime dealing with seized property. However, the issues here differ from those addressed in our earlier work. In this paper we are dealing with a special kind of property: that which has been tendered as proof of a fact in issue at a criminal trial and ruled to be relevant, whether or not it was seized in the course of a criminal investigation. At this stage, while the private interest in the property continues to exist, the public interest in the property ascends. In effect, it becomes as much a part of a trial as the oral testimony. The rules of access

267. See *supra*, pp. 71-2.

to it and publication of information obtained thereby must be determined by resort to the same principles that govern the trial itself.

As discussed above (at 32-3), the case-law in this area is contradictory. There are no provisions in the *Criminal Code* that deal with public access to, or publication of, the contents of exhibits. Thus, our recommendation would fill a gap in the present law.

In effect, Recommendation 20(1) would allow complete access to exhibits and allow them to be copied, subject to Recommendation 20(2). An exhibit which has been entered into evidence will have been shown to the court and the jury, as well as to the spectators at the trial. In the absence of a publication ban, what has been seen and heard in the trial is reportable to the public at large. To ensure accurate reporting of the evidence, the entitlement to copy the exhibit directly would obviously be preferable to paraphrasing it or relying on recall. If the subject-matter of the evidence can be published, why not the evidence itself?

However, we recognize, as did the Québec Court of Appeal in the *Lortie* case,[268] that other interests converge with the public interest in the exhibit. Recommendation 20(2) attempts to identify those other interests and provide a mechanism for courts to deal with exhibits in a manner consistent with their dual aspect, that is, both private and public. A court should have the power to limit access to exhibits, or the public's entitlement to photograph or copy them, where necessary to preserve the object or to protect a proprietary interest in it, such as a copyright. Further, there should exist a residual judicial discretion to deny disclosure of confidential matters unless they are relevant to the proceeding, or the public interest otherwise requires it. Thus, where sensitive matters are contained in exhibits, but their confidential character is irrelevant to the legal proceeding, the privacy of the owner of the exhibit should be protected. Our approach is to some extent consistent with that of the United States Supreme Court in *Nixon* v. *Warner Communications*.[269] There, the Court held that a trial judge may deny permission to copy exhibits where the copies could be used for an improper purpose.

Recommendation 20(3) would ensure that any matters prohibited from publication at the trial (for example, the name of an informant) would not be disclosed through access to exhibits containing that information.

RECOMMENDATION

Motions and Applications during and after Trial

21. (1) Motions and applications made during or after a criminal trial should be held in public.

268. *Supra*, note 124.

269. 435 U.S. 589, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978). Elsewhere the Court has affirmed that there is generally complete freedom to publish information contained in public court records: *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975).

(2) The publication bans available at a criminal trial should apply with the necessary modifications to motions and applications made during or after a trial.

Commentary

Just as with pretrial motions, there is a variety of motions and applications that may be made during or after a criminal trial. Our approach is to allow public access to all motions and applications, subject to the general power to proceed *in camera* contained in Recommendation 6.

The power to impose a publication ban at a trial or post-trial motion should be the same as the power available at trial. Set out in Recommendation 18, these powers relate to *voir dire* proceedings regarding evidence of a complainant's sexual history or other matters heard in the absence of a jury.

Motions after a trial, such as an application for leave to appeal, a motion to vary a probation order (see subsection 664(3) of the *Criminal Code*), a motion for judicial review of parole ineligibility (see section 672 of the *Code*) or an application for an extraordinary remedy, should always be held in public. Even in the rarest case where the subject-matter could prejudice a fair trial (if a new trial is ordered), there are other means for protecting that trial, that is, adjournment, selection of jurors, change of venue, and so on. Often the passage of time before a new trial will itself be sufficient in assuring that prospective jurors will not be biased by publicity surrounding these kinds of motions.

RECOMMENDATION

Appeals

22. (1) Appeals in criminal cases should be held in public.

(2) Everyone has the right to examine the file on appeal.

(3) Where a prohibition on publication is in force with respect to matters raised on the appeal, the appeal court should determine whether the public interest justifies continuation of the prohibition.

Commentary

In general, the appeal process in criminal cases should be completely open. We recommend that the public be entitled to attend appeals, and in the interest of furthering understanding of criminal law and procedures, the proceedings of appeal courts be entirely publishable. Further, access to the file on appeal in individual cases should be open to scrutiny by the public. The appeal file will usually contain a notice of appeal setting out the grounds for appeal, written arguments, if any, submitted by the parties,

and transcripts of proceedings in the courts below. We see no reason not to permit complete access to these documents.

Our only limitation on complete openness of appeal proceedings relates to matters subject to publication bans. Where these have been ordered by the court below, they should be reviewable by the appeal court, and where the public interest no longer justifies them, they should be terminated. Thus, if a trial court rules that the identity of an informant or a complainant should be kept secret, the appeal court should have a discretion to release the person's name, for example, if it is of the opinion that the accused's right to a fair trial would be limited by the order.

In many cases, publication bans will be uncontentious and no issue will arise on appeal as to whether they should be set aside. For example, prohibitions on publishing the identities of young victims or witnesses, whether in connection with trials of adults or of young persons, will effectively be permanent bans because of the general public consensus that they are justifiable in the interests of rehabilitation. Appeal courts will rarely, we believe, be confronted with controversies surrounding these types of prohibitions.

D. Electronic Media Coverage

Thus far, our recommendations have not applied differentially to various kinds of media access or reporting. The presumption of openness, in our view, should generally apply no matter what kind of access is sought, or what manner of communication about criminal proceedings is to be conducted. However, because of the controversy surrounding the question whether electronic media should be entitled to broadcast criminal proceedings, we include a special recommendation on the subject.

In the Province of Ontario, electronic media access to courts and courthouses is governed by the provincial *Courts of Justice Act, 1984*.[270] It allows broadcast of court proceedings for an educational purpose if the consent of all parties and the presiding judge is obtained (section 146). Most other provinces do not have such specific statutory rules and practices appear to vary among them.[271] Generally, however, no electronic coverage of trials occurs regularly anywhere in Canada.[272]

270. *Supra*, note 145 and accompanying text at 36-7.

271. See the discussion in *R.* v. *Squires*, *supra*, note 28 at 334. But see the Québec rules of practice on this subject, *supra*, notes 149 and 150.

272. The Canadian Broadcasting Corporation has broadcast one criminal proceeding in Ontario from the accused's arrest until the end of trial. The broadcast, entitled "Lawyers — 'And You Shall be Heard'", was one of the first recipients of the Scales of Justice Award in 1986, sponsored jointly by the Canadian Bar Association and the Law Reform Commission of Canada.

Television broadcast of criminal proceedings is permitted now in over forty of the United States.[273] There is a variety of practices in those States. Some permit coverage of appellate courts only, some permit coverage only with the accused's consent, and some have express exceptions for trials of juveniles or sexual offences.[274] The United States Supreme Court ruled in 1981 in the case of *Chandler* v. *Florida*[275] that experimentation by individual States with non-consensual electronic coverage did not, in itself, deprive accused persons of a fair trial provided that adequate safeguards were in place. That ruling opened the way for other States to begin experiments. However, electronic coverage of American federal court proceedings is not permitted.[276] In essence, the law in the United States is that electronic broadcast of criminal proceedings does not offend the accused's right to a fair trial under the Sixth Amendment, but a prohibition on such coverage does not breach the First Amendment's protection of freedom of the press.

In Canada, there has only been one case which has ruled definitively on the media's freedom to broadcast court proceedings. In *R.* v. *Squires*, Vanek Prov.J. held that the limitations on electronic access to Ontario courts do not infringe the *Charter*'s protection of "freedom of the press and other media of communication."[277] He held, further, that even if the Ontario rule did offend that *Charter* freedom, it constituted a reasonable limit that was demonstrably justified in a free and democratic society.[278] In making the latter determination, the Court surveyed the voluminous evidence given by numerous witnesses as to the effects of electronic media coverage on participants in the criminal process. In sum, the Court's findings were that the televising of judicial proceedings has a tendency "to produce an adverse effect on court participants." This effect, in turn, "has a strong tendency to impact adversely on the fact-finding process and hence effect the results of the proceedings."[279] The Court considered the oral evidence of experienced defence counsel, prosecutors, judges and social scientists. In addition, Judge Vanek was referred to social science studies conducted in the United States on the impact of electronic media coverage on participants.[280] However, he found that these studies "were not carried out in accordance with any approved scientific methodology and are quite unreliable."[281] In other words, while certain experts in the United States are of the opinion that television coverage has an adverse impact on

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273. For a well-documented survey of the law of electronic media coverage of legal proceedings in Canada and the United States see: Daniel J. Henry, "Electronic Public Access to Court: A Proposal for Its Implementation Today," in Anisman and Linden, eds, *supra*, note 8, 441 at 441; see also the discussion of the comparative law in *R.* v. *Squires*, *supra*, note 28 at 328-44. Our brief discussion is taken largely from these sources.

274. Henry, *ibid.*, Appendix 1 at 475, 479, 484 and 485 respectively.

275. 449 U.S. 560, 66 L. Ed. 2d 740, 101 S. Ct. 802 (1981). The ruling represented a departure from the Court's judgment in *Estes* v. *Texas*, 381 U.S. 532, (1965) in which television coverage of the accused's trial was held to have infringed his right to a fair trial.

276. See, for example, *U.S.* v. *Hastings*, 695 F. 2d 1278 (11th Cir. 1983).

277. *Supra*, note 28 at 345.

278. *Ibid.* at 369.

279. *Ibid.* at 360-2.

280. *Ibid.* at 358-9, 361.

281. *Ibid.* at 361.

witnesses, counsel, the judge or the jurors, it appears that no concrete social scientific evidence is available to confirm or refute those opinions.

This state of affairs and the great division of opinion on this issue[282] make it extremely difficult for the Commission to set forth a definitive recommendation. However, we believe that given the importance of the general presumption of openness, there is presently no basis for foreclosing the possibility of allowing electronic media access to criminal proceedings.[283] On the other hand, the risk of upsetting the fact-finding process by allowing total access prevents us from recommending that the present barriers be lifted completely.

RECOMMENDATION

Electronic Media Coverage

23. (1) Electronic media coverage should be permitted in relation to appeals in criminal cases.

(2) Use of audio recorders should be permitted in criminal proceedings as a substitute for, or in addition to, handwritten notes.

(3) A national experiment with electronic media coverage of criminal trials should be conducted with a view to studying comprehensively the impact of the presence of video and still cameras and audio recorders on witnesses, counsel, judges and jurors.

Commentary

There is much speculation about whether the presence of television cameras affects the fact-finding process. There is no reason to suspect, in our opinion, that electronic media coverage of appeals would in any way interfere with those proceedings, so long as the court was able to maintain an atmosphere of decorum conducive to a proper hearing on the matters before it. Technology that is presently available would, we believe, allow appellate courts to proceed in a dignified fashion. Thus, in Recommendation 23(1), we suggest that there be no limit placed on electronic media coverage of criminal appeals. Where a publication ban is in force, the electronic media would, of course, be bound by it along with the other media.

Recommendation 23(2) suggests that use of audio recorders be permitted in criminal proceedings. Audio recorders constitute a means for ensuring the accuracy of

282. See, for example, Michel Proulx, "Comment: No Cameras Please," in Anisman and Linden, eds, *supra*, note 8, 491; Edward L. Greenspan, "Comment: Another Argument against Television in the Courtroom," *ibid.*, 497; P.S.A. Lamek, "Comment: A Middle Way," *ibid.*, 499; S.G. McD. Grange, "Justice and the System" (1985) 19 Law Society of Upper Canada Gazette 125.

283. Recently, the Canadian Bar Association–Ontario has recommended that greater public access to courts through electronic media coverage should be allowed: *Submission to Ontario Courts Inquiry* (1986), Recommendation 6.15, c. 6 at 28.

statements and testimony made in legal proceedings. A recent study revealed "a high level of serious error" was discovered in an analysis of quotations published by the print media in relation to the trial of Colin Thatcher.[284] Use of audio recorders was recommended by the study's author to improve this situation. Use of audio recorders in court by the media was also recommended by the New South Wales Law Reform Commission. It found that use of recorders did not constitute a nuisance or interfere with proceedings. That Commission recommended, however, that recordings be broadcast to the public only with leave of the court.[285] Audio recordings may be made of legal proceedings in the United Kingdom again only with leave of the court.[286] Recordings may not be broadcast. Our proposal would merely permit recorders to be used to obtain statements and testimony made in a criminal proceeding with complete accuracy. We do not recommend at this time that recordings be broadcast. Any recommendation regarding the broadcast of recorded proceedings should await the results of the experiment we propose in Recommendation 23(3). While it may seem incongruous to permit audio recorders to be used in criminal proceedings, but not to allow recordings to be broadcast, it is our view that any impact that the introduction of recorders would be likely to have on the process would relate to the participants' knowledge that their comments could ultimately be broadcast. This may result in nervousness or self-consciousness on their part which should be studied along with the impact of video recording and broadcasts.

Recommendation 23(3) reflects our hesitancy to make a definitive recommendation supporting or opposing blanket electronic media coverage. We believe that a meaningful decision on this issue can only follow a comprehensive study for a significant period of time in various parts of the country. The guidelines for the experiment would have to be generated in consultation with many groups, such as the Canadian Judicial Council,[287] the Canadian Bar Association, provincial law societies, Crown attorneys, law professors, the police and social scientists. Guidelines for the media have already been proposed by the Radio Television News Directors Association[288] and could form the basis for media activity during the experiment. Comparative studies of the effects of audio, as opposed to video, recording ought to form part of the experiment, as should a comparison of electronic with conventional media coverage. The data should be carefully analyzed by social science experts and the conclusions widely circulated.

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284. Peter Calamai, "Discrepancies in News Quotes from the Colin Thatcher Trial," in N. Russell, ed., *Trials and Tribulations* [Monograph No. 1 in a series sponsored by the School of Journalism and Communications, University of Regina] (Regina: Univ. of Regina, 1986).

285. *Sound Recording of Proceedings of Courts and Commissions: The Media, Authors and Parties* [Community Law Reform Program — Fourth Report] (Sydney: NSWLRC, 1983), Recommendations 5.16 and 5.17 at 76-7. Our proposal in Recommendation 23(2) is similar to the New South Wales Recommendation 5.16.

286. *Contempt of Court Act, 1981* (U.K.), 1981, c. 49, s. 9(1).

287. The Council, it should be noted, previously resolved that "television should not be allowed in court proceedings." See Henry, in Anisman and Linden, eds, *supra*, note 8 at 461-2.

288. *Ibid.*, Appendix 2 at 487. Guidelines have also been proposed by the Canadian Bar Association–Ontario in its submission to the Ontario Courts Inquiry. See also *supra*, note 283, Chapter 6, Appendix B, App. 1.

In the absence of clear evidence that electronic media coverage has a significantly greater impact on participants than present media activity, electronic media should be given access to criminal trials on the same footing as other media.

Technology now permits unobtrusive audio or video recording. No special lighting is required; sound can be transmitted through the courts' own sound recording system; only one video camera is necessary to serve all media outlets. The effectiveness of the present technology has been borne out in electronic media coverage of the Royal Commission of Inquiry into Certain Deaths at Hospital for Sick Children and Related Matters (the Grange Commission). Both the Commission's counsel[289] and its Commissioner[290] have been persuaded, after months of experience with intensive electronic media activity, that the media's presence had no adverse impact. Rather, according to Justice Grange, the introduction of televison into courtrooms would perform a valuable public benefit:

> I do not want [television] in all courts at all times. I do, however, think it should be tried in some courts at some times under controlled conditions. The reason is simple. The public must know what goes on in our courts and the only way they can get a proper conception is the way they get their conception of all our institutions, i.e. through television. And the ignorance of the public of our system and the way it runs (as opposed to some other system or some totally imaginary systems) is appalling.[291]

We concur with this opinion in principle. However, doubts about the impact of electronic media coverage on the trial process will always linger in the absence of a satisfactory empirical study. This study should, therefore, precede the introduction of electronic media on a scale beyond what is now permitted.

289. Lamek, in Anisman and Linden, eds, *supra*, note 8 states at 499 that "the unobtrusive presence of cameras did not disrupt the proceedings in any way — indeed, we had more disruption from press photographers with still cameras — and did not to any discernible degree influence the behaviour of any of the participants in the hearings."

290. Mr. Justice Grange states, *supra*, note 282 at 128: "Counsel, while still I'm afraid a little on the long-winded side, have generally been better behaved and the witnesses don't seem to be affected at all. And on the very good side, the judge is much less likely to pontificate or to fall asleep."

291. *Supra* at 127.

CHAPTER FOUR

Summary of Recommendations

Arrangement of Statutory Provisions

1. Provisions relating to public access to the criminal process should be set out in a separate chapter of the *Criminal Code*.

Presumption in Favour of Openness

2. The *Criminal Code* should provide, subject only to specific limitations set out in these recommendations: that all criminal proceedings involving the exercise of judicial powers be conducted in public; that public access to court documents relating to those proceedings be allowed; and that all communication about those proceedings and documents be permitted.

Automatic Publication Bans

3. No automatic publication bans should remain in the *Criminal Code*.

Public Morals

4. No person should be excluded from criminal proceedings and no publication bans should be imposed on the grounds of protecting public morals.

Discretionary Powers

5. (1) Any provision in the *Criminal Code* which allows a court to limit public access in its discretion should be drafted as narrowly as possible to give recognition to the specific superordinate interests that it seeks to protect, while intruding as little as possible on the openness of the criminal process.

(2) A court should exercise its discretionary powers to limit access only where necessary to protect the specific superordinate interests at stake, and in doing so, should confine its order to the duration and scope required by the circumstances.

(3) An order excluding the public or imposing a publication ban should be based on clear evidence of harm or potential harm and should ordinarily be accompanied by reasons.

General Power to Exclude the Public

6. (1) A court may exclude all or any members of the public from all or part of a criminal proceeding where:

(a) it is necessary to obtain the testimony of a child or young person who is a witness in the proceeding;

(b) it is necessary to maintain order;

(c) it is necessary to prevent disclosure of matters obscured or sealed from public view or to which the public does not have access; or

(d) a hearing is held to determine the admissibility of evidence concerning the sexual activity of a complainant in a sexual offence.

(2) A court may exclude young persons in attendance at a criminal proceeding when any information is being presented to the court, the knowledge of which may be seriously injurious or seriously prejudicial to them.

(3) Where a court proceeds in the absence of the public, it should communicate the nature and result of the closed proceedings in open court at the earliest reasonable opportunity; where the closed proceedings take place in the absence of the jury, it should do so before empanelling or recalling the jury.

(4) A court should proceed in the absence of the public only where an available publication ban would not be adequate in the circumstances.

General Publication Bans

7. (1) After a charge has been laid in relation to a crime mentioned in section 246.4 of the *Criminal Code*, no one may publish or broadcast the name of, or other information, including the name of the accused, which serves to identify:

(a) a complainant or victim of the crime, unless the person consents; or

(b) a child or young person who is a victim of, or a witness in respect of, the crime.

(2) After a charge has been laid, no one may publish or broadcast the name of, or other information serving to identify, a confidential informant in the proceedings, unless the person consents.

(3) A court may, upon application, make an order prohibiting publication or broadcast of the name of, or other information serving to identify, a victim or witness where identification would pose a risk to that person's safety.

(4) A court may terminate a publication ban under (1), (2) or (3) upon application by the accused where the ban would jeopardize the accused's right to full answer and defence.

[*Optional Recommendation — Protection of Identities*

(5) A court may, upon application by an accused, a victim or a witness, make an order prohibiting publication or broadcast of the name of, or other information serving to identify, the applicant in exceptional circumstances where identification would result in substantial and extraordinary harm to the applicant or others and the public interest in the applicant's identity is minimal.

(6) In making an order under (5) in relation to an accused person, the court should consider:

(a) the nature and severity of the crime, including whether the crime involves violence, loss of property or breach of public trust;

(b) whether the effect of identification would be disproportionate to the crime itself, or impair the possibility of treatment or rehabilitation;

(c) evidence of good character, including the absence of a prior criminal record with respect to related crimes;

(d) the need for effective law enforcement in the community;

(e) whether publication of the person's identity would promote deterrence of similar criminal activity.

(7) A publication ban on an applicant's identity should expire:

(a) upon a court order, or

(b) in addition, in relation to an accused, upon conviction.]

Special Provisions for Closed Proceedings

8. Where a criminal proceeding takes place in the absence of the public, the court may:

(a) admit members of the public who are engaged in *bona fide* research into the operation of the criminal process on appropriate terms and conditions; or

(b) limit public access to any transcript of the proceeding the disclosure of which would frustrate the purpose for which the proceeding was closed.

Electronic Surveillance

9. (1) A judge should receive an application for an authorization to intercept a private conversation or a renewal of an authorization in the absence of the public.

(2) The packet containing all documents relating to an application should be sealed and should not be opened except by court order or as authorized by rules of disclosure to accused persons and others who have been the objects of interceptions.

(3) Everyone may examine an authorization, a renewal or a certificate of notice after:

(a) the accused has received notice of the prosecution's intention to introduce an intercepted private conversation into evidence and has consented to disclosure;

(b) the object of an interception has received notice of the interception and has consented to disclosure; or

(c) it has been introduced as evidence in a legal proceeding.

(4) The entire contents of an authorization, a renewal or a certificate of notice may be published or broadcast and accordingly the current provisions of the *Criminal Code* prohibiting disclosure of the existence of an intercepted private conversation should be amended.

(5) A judge who receives an application for, or who previously granted, an authorization or renewal may, if requested, obscure with a cypher matters contained in the authorization, renewal, or documents relating to the application which, if disclosed, would

(a) frustrate an ongoing police investigation, or

(b) pose a risk to the safety of any person.

(6) Any obscured matters may be revealed in order for the accused to make full answer and defence by a judge who:

(a) reviews the validity of an authorization, a renewal or a decision to obscure matters contained in the authorization, renewal or documents relating to an application for an authorization or renewal; or

(b) hears an application to exclude evidence obtained by means of the interception of a private conversation on the basis of a substantive defect in the application for the authorization or renewal.

Search Warrants

10. (1) A justice should receive an application for a search warrant in the absence of the public.

(2) Everyone may examine a search warrant and its supporting information after the warrant has been executed.

(3) The entire contents of a search warrant and its supporting information may be published or broadcast.

(4) A justice who receives an application for, or who previously issued, a search warrant may, if requested by the applicant, obscure with a cypher:

(a) any telephone number appearing on a search warrant or its supporting information if disclosure of the telephone number would be likely to reveal the existence of electronic surveillance activities; or

(b) the name of, or other information serving to identify, an informant appearing on a search warrant or its supporting information if that person's safety would otherwise be jeopardized.

(5) A justice who receives an application for, or who previously issued, a search warrant may if requested deny public access to the warrant or its supporting information until introduced as evidence in a legal proceeding where disclosure of their contents would:

(a) frustrate an ongoing police investigation, or

(b) pose a risk to the safety of any person

and an order obscuring matters contained in the warrant or supporting information would not be adequate in the circumstances.

(6) A judge who reviews the validity of a search warrant or a decision to obscure matters contained in the warrant or its supporting information may reveal any obscured matters if necessary for the accused to make full answer and defence.

Disposition of Seized Property

11. (1) Any hearings at which determinations are made governing the disposition of seized property should be open to the public, subject only to subsection 444.1(10) of the *Criminal Code*, which requires that hearings to determine the disposition of documents seized from a lawyer be held in private if a claim of solicitor–client privilege has been made.

(2) Everyone has the right to examine inventories of seized property and post-search and post-seizure reports.

(3) The entire contents of inventories of seized property and post-search and post-seizure reports may be published or broadcast.

Charge Documents

12. (1) A justice who receives an information may do so in the absence of the public.

(2) Everyone has the right to examine:

(a) an information, once laid, and

(b) an indictment, once preferred.

(3) The entire contents of informations and indictments may be published or broadcast.

Issuance of Process

13. (1) A justice should receive an application for the issuance of process to compel the appearance or secure the arrest of an accused or a witness in the absence of the public.

(2) Everyone has the right to examine:

(a) a subpoena,

(b) an appearance notice,

(c) a promise to appear,

(d) a recognizance, whether entered before a peace officer or a justice,

(e) a summons,

(f) an undertaking entered before a justice, or

(g) a warrant for arrest once executed.

(3) Documents set out in Recommendation 13(2) may be published or broadcast in their entirety.

Judicial Interim Release Hearings

14. (1) Judicial interim release hearings should be held in public.

(2) A justice may prohibit the publication or broadcast of:

(a) evidence tendered, representations made or reasons given at a judicial interim release hearing if, having given consideration to other procedures for protecting the fairness of a subsequent trial, such as an adjournment of trial proceedings, the process of selecting and instructing jurors, or a change of trial venue, the justice is satisfied that these other procedures would not be adequate in the circumstances;

(b) any notice given, evidence taken, information given or representations made at a hearing to determine the admissibility of evidence concerning the sexual activity of a complainant in a sexual offence.

(3) A publication ban imposed under Recommendation 14(2)(a) should expire:

(a) upon discharge of the accused at a preliminary inquiry,

(b) upon conviction or acquittal of the accused at trial, or

(c) upon the entering of a stay of proceedings.

(4) This recommendation should apply to reviews of decisions or orders made at judicial interim release hearings.

Preliminary Inquiries

15. Recommendation 14 should apply, with the necessary modifications, to preliminary inquiries.

Pretrial Motions and Applications

16. (1) Pretrial motions and applications should be held in public.

(2) The publication bans available at a judicial interim release hearing or preliminary inquiry should apply, with the necessary modifications, to pretrial motions and applications.

Pre-hearing Conferences

17. Pre-hearing conferences should take place in the absence of the public.

Criminal Trials

18. (1) Criminal trials should be open to the public.

(2) A court may prohibit publication or broadcast of any notice given, evidence taken, information given or representations made:

(a) at a hearing to determine the admissibility of evidence concerning the sexual activity of a complainant in a sexual offence; or

(b) during a portion of the trial at which the jury is not present, if the jury has not been sequestered, until the jury retires to consider its verdict.

Trials of Young Persons

19. In place of the power in paragraph 39(1)(*b*) of the *Young Offenders Act* to exclude members of the public, the relevant provisions of Recommendation 6 should be inserted.

Access to Exhibits

20. (1) Everyone may examine, photograph or make copies of exhibits admitted into evidence at a criminal proceeding, subject only to Recommendation 20(2).

(2) A court may, on the application of any person with an interest in an exhibit, make an order restricting access to the exhibit or limiting the ability of the public to photograph or make copies of the exhibit where necessary:

(a) to preserve the exhibit,

(b) to protect a proprietary interest in the exhibit, or

(c) to prevent disclosure of the private or confidential contents of the exhibit, unless

(i) the private or confidential contents of the exhibit are relevant to the proceeding in which it was introduced, or

(ii) the public interest requires disclosure.

(3) A publication ban imposed by a court applies to the related exhibits and their contents.

Motions and Applications during and after Trial

21. (1) Motions and applications made during or after a criminal trial should be held in public.

(2) The publication bans available at a criminal trial should apply with the necessary modifications to motions and applications made during or after a trial.

Appeals

22. (1) Appeals in criminal cases should be held in public.

(2) Everyone has the right to examine the file on appeal.

(3) Where a prohibition on publication is in force with respect to matters raised on the appeal, the appeal court should determine whether the public interest justifies continuation of the prohibition.

Electronic Media Coverage

23. (1) Electronic media coverage should be permitted in relation to appeals in criminal cases.

(2) Use of audio recorders should be permitted in criminal proceedings as a substitute for, or in addition to, handwritten notes.

(3) A national experiment with electronic media coverage of criminal trials should be conducted with a view to studying comprehensively the impact of the presence of video and still cameras and audio recorders on witnesses, counsel, judges and jurors.

APPENDIX

Restrictions on Public and Media Access

This Appendix is a comprehensive description of the restrictions referred to in this paper. It is not necessarily an exhaustive inventory of restrictions in the present criminal law.

Nature	*Source*
Application for wiretap authorization heard in absence of the public	*Criminal Code*, s. 178.12(1): An application for an authorization shall be made *ex parte* and in writing to a judge of a superior court of criminal jurisdiction, or a judge as defined in section 482 and shall be signed by the Attorney General of the province in which the application is made or the Solicitor General of Canada or an agent specially designated in writing for the purposes of this section ....
Documents relating to wiretap authorization sealed	*Criminal Code*, s. 178.14(1): All documents relating to an application made pursuant to section 178.12 or subsection 178.13(3) or 178.23(3) are confidential and, with the exception of the authorization, shall be placed in a packet and sealed by the judge to whom the application is made immediately upon determination of such application, and such packet shall be kept in the custody of the court in a place to which the public has no access or in such other place as the judge may authorize and shall not be (*a*) opened or the contents thereof removed except (i) for the purpose of dealing with an application for renewal of the authorization, or (ii) pursuant to an order of a judge of a superior court of criminal jurisdiction or a judge as defined in section 482; and (*b*) destroyed except pursuant to an order of a judge referred to in subparagraph (*a*)(ii).
Prohibition on disclosing existence or contents of an intercepted conversation	*Criminal Code*, s. 178.2(1): Where a private communication has been intercepted by means of an electromagnetic, acoustic, mechanical or other device without the consent, express or implied, of the

originator thereof or of the person intended by the originator thereof to receive it, every one who, without the express consent of the originator thereof or of the person intended by the originator thereof to receive it, wilfully

(*a*) uses or discloses such private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof, or

(*b*) discloses the existence thereof,

is guilty of an indictable offence and liable to imprisonment for two years.

Application for search warrant heard in absence of the public

A.G. of Nova Scotia v. *MacIntyre* (see *supra*, note 71).

Access to warrant documents only after search executed and something found

A.G. of Nova Scotia v. *MacIntyre* (see *supra*, note 71).

Prohibition on publishing location of search and identity of occupants and suspects

Criminal Code, s. 443.2(1):

Where a search warrant is issued under section 443 or 443.1 or a search is made under such a warrant, every one who publishes in any newspaper or broadcasts any information with respect to

(*a*) the location of the place searched or to be searched, or

(*b*) the identity of any person who is or appears to occupy or be in possession or control of that place or who is suspected of being involved in any offence in relation to which the warrant was issued,

without the consent of every person referred to in paragraph (*b*) is, unless a charge has been laid in respect of any offence in relation to which the warrant was issued, guilty of an offence punishable on summary conviction.

Hearings to determine the disposition of documents seized from a lawyer held in private

Criminal Code, s. 444.1(10):

An application under paragraph (3)(*c*) shall be heard in private.

Prohibition on publishing evidence, representations, reasons, etc. at a bail hearing

Criminal Code, s. 457.2(1):

Where the prosecutor or the accused intends to show cause under section 457, he shall so state to the justice and the justice may, and shall upon application by the accused, before or at any time during the course of the proceedings under that section, make an order directing that the evidence taken, the information given or the representations made and the reasons, if any, given or to be given by the justice shall not be published in any newspaper or broadcast before such time as

(*a*) if a preliminary inquiry is held, the accused in respect of whom the proceedings are held is discharged, or

(*b*) if the accused in respect of whom the proceedings are held is tried or ordered to stand trial, the trial is ended.

Exclusion of public from a preliminary inquiry

Criminal Code, s. 465(1)(*j*):

A justice acting under this Part may

...

(*j*) order that no person other than the prosecutor, the accused and their counsel shall have access to or remain in the room in which the inquiry is held, where it appears to him that the ends of justice will be best served by so doing ....

Prohibition on publishing evidence tendered at a preliminary inquiry

Criminal Code, s. 467(1):

Prior to the commencement of the taking of evidence at a preliminary inquiry, the justice holding the inquiry

(*a*) may, if application therefor is made by the prosecutor, and

(*b*) shall, if application therefor is made by any of the accused,

make an order directing that the evidence taken at the inquiry shall not be published in any newspaper or broadcast before such time as, in respect of each of the accused,

(*c*) he is discharged; or

(*d*) if he is ordered to stand trial, the trial is ended.

Prohibition on publishing confession tendered in evidence at a preliminary inquiry

Criminal Code, s. 470(2):

Every one who publishes in any newspaper, or broadcasts, a report that any admission or confession was tendered in evidence at a preliminary inquiry or a report of the nature of such admission or confession so tendered in evidence unless

(*a*) the accused has been discharged, or

(*b*) if the accused has been ordered to stand trial, the trial has ended,

is guilty of an offence punishable on summary conviction.

Exclusion of the public from any proceedings against an accused

Criminal Code, s. 442(1):

Any proceedings against an accused shall be held in open court, but where the presiding judge, provincial court judge or justice, as the case may be, is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice to exclude all or any members of the public from the court room for all or part of the proceedings, he may so order.

Prohibition on publishing exhibits tendered in a criminal proceeding

R. v. *Thomson Newspapers* (See *supra*, note 120).

Lortie v. *R.* (see *supra*, note 124).

Prohibition on disclosing application for a change of venue	*Re Southam Inc. and R. (No. 2)* (see *supra*, note 126).
Prohibition on publishing *voir dire* proceedings in a jury trial	*Criminal Code*, s. 576.1(1): Where permission to separate is given to members of a jury under subsection 576(1), no information regarding any portion of the trial at which the jury is not present shall be published, after the permission is granted, in any newspaper or broadcast before the jury retires to consider its verdict.
Prohibition on publishing identities of blackmail victims	*Toronto Sun Publishing Corp.* v. *A.G. Alta.* (see *supra*, note 128). *R.* v. *Socialist Worker Printers and Publishers Ltd.* (see *supra*, note 129).
Prohibition on identifying prisoners who give evidence in a criminal proceeding	*R.* v. *McArthur* (see *supra*, note 136).
Prohibition on identifying accused in a sexual offence	*R.* v. *R.* (see *supra*, note 140).
Prohibition on identifying police informers	*Bisaillon* v. *Keable* (see *supra*, note 135).
Prohibition on publishing identity of complainant in a sexual offence	*Criminal Code*, s. 442(3): Where an accused is charged with an offence mentioned in section 246.4, the presiding judge, provincial court judge or justice may, or if application is made by the complainant or prosecutor, shall, make an order directing that the identity of the complainant and any information that could disclose the identity of the complainant shall not be published in any newspaper or broadcast.
Exclusion of public from *voir dire* into admissibility of complainant's sexual history	*Criminal Code*, s. 246.6(3): No evidence is admissible under subsection (1) unless the judge, provincial court judge or justice, after holding a hearing in which the jury and the members of the public are excluded and in which the complainant is not a compellable witness, is satisfied that the requirements of this section are met.
Prohibition on publication of *voir dire* proceedings into admissibility of complainant's sexual history	*Criminal Code*, s. 246.6(4): The notice given under subsection (2) and the evidence taken, the information given or the representations made at a hearing referred to in subsection (3) shall not be published in any newspaper or broadcast.

Prohibition on publishing indecent matter in judicial proceedings

Criminal Code, s. 162(1)(*a*):

A proprietor, editor, master printer or publisher commits an offence who prints or publishes

(*a*) in relation to any judicial proceedings any indecent matter or indecent medical, surgical or physiological details, being matter or details that, if published, are calculated to injure public morals ....

Prohibition on electronic media coverage of criminal proceedings

Courts of Justice Act, 1984, S.O. 1984, c. 11, s. 146(1):

Subject to subsections (2) and (3), no person shall,

(a) take or attempt to take a photograph, motion picture, audio recording or other record capable of producing visual or aural representations by electronic means or otherwise,

(i) at a court hearing,

(ii) of any person entering or leaving the room in which a court hearing is to be or has been convened, or

(iii) of any person in the building in which a court hearing is to be or has been convened where there is reasonable ground for believing that the person is there for the purpose of attending or leaving the hearing; or

(b) publish, broadcast, reproduce or otherwise disseminate a photograph, motion picture, audio recording or record taken in contravention of clause (*a*).

Sessions Court Rules, s. 30 (see *supra*, note 149):

The reading of newspapers, the taking of photographs, sketching, cinematography and radio and television broadcasting are prohibited in Court.

Superior Court Rules, s. 5 (see *supra*, note 150):

Anything that interferes with the decorum and good order of the court is forbidden.

The reading of newspapers, the practice of photography, cinematography, broadcasting or television are equally prohibited during the sittings of the Court.

Exclusion of public from trial of a young person

Young Offenders Act, S.C. 1980-81-82-83, c. 110, s. 39(1):

Subject to subsection (2), where a court or justice before whom proceedings are carried out under this Act is of the opinion

(a) that any evidence or information presented to the court or justice would be seriously injurious or seriously prejudicial to

(i) the young person who is being dealt with in the proceedings,

(ii) a child or young person who is a witness in the proceedings,

(iii) a child or young person who is aggrieved by or the victim of the offence charged in the proceedings, or

(b) that it would be in the interest of public morals, the maintenance of order or the proper administration of justice to exclude any or all members of the public from the court room,

the court or justice may exclude any person from all or part of the proceedings if the court or justice deems that person's presence to be unnecessary to the conduct of the proceedings.

Prohibition on identification of young accused, victims or witnesses

Young Offenders Act, S.C. 1980-81-82-83, c. 110, s. 38(1):

Subject to this section, no person shall publish by any means any report

(*a*) of an offence committed or alleged to have been committed by a young person, unless an order has been made under section 16 with respect thereto, or

(*b*) of a hearing, adjudication, disposition or appeal concerning a young person who committed or is alleged to have committed an offence

in which the name of the young person, a child or a young person who is a victim of the offence or a child or a young person who appeared as a witness in connection with the offence, or in which any information serving to identify such young person or child, is disclosed.