THE RIGHT TO A PUBLIC TRIAL IN CRIMINAL PROCEEDINGS

Peter G. Barton *

I. Introduction

The recently decided Ontario Court of Appeal case of *Grimba*[1] as well as such cases as *McIntyre*[2] and *Realty Renovations*[3] raise again the difficult question of the extent to which a criminal trial may be conducted in the absence of the accused and the more general question of the extent to which there exists in Canada a principle that judicial proceedings must be conducted in public and not "in camera". Since the writing of the short but seminal article on the topic in the Canadian Bar Review in 1947,[4] there has been little academic writing on these issues.

There appear to be two facets of the same problem involved here; the question of the extent to which members of the public or the accused is entitled to be present at judicial proceedings, and the extent to which members of the public other than those who attend judicial proceedings are entitled to be informed about the conduct and result of such proceedings. In other words, the question of the publicity that may be given to anticipated, on-going or concluded trials is as much a part of the question of whether a principle of open trials exists, as is the question of the right of attendance of parties or spectators.

It is proposed to review herein the extent to which Canadian law allows the public to attend judicial proceedings in criminal matters, the extent to which the accused-defendant is entitled or required to be present, the right of access to judicial records, the effect on the proceeding of failure to follow the dictates of the law, and limitations on pre-trial and post-trial publicity. Some conclusions may be drawn concerning the existing state of Canadian law in these topics, and some recommendations made about areas fruitful for additional research.

It is intended to restrict the article to federal criminal judicial proceedings; no further reference will be made to such topics as trials of provincial or municipal offences or appearances before statutory or consensual tribunals such as in immigration hearings, parole revocation hearings, prison disciplinary proceedings, disbarrment proceedings, etc. In addition I do not intend to deal with restrictions in the rules of evidence concerning such matters as state secrets, communications between spouses, communications between people and lawyers, etc.

II. Access to Judicial Proceedings

(1) By Members of the Public

A. Pre-Trial

To what extent are members of the public, including representatives of the media, entitled to access to pre-trial proceedings and to see or obtain copies of documents relevant to these?

---

* Faculty of Law, University of Western Ontario

1. *R.* v. *Grimba* (1980), 56 CCC (2d) 570 (Ont. C.A.). Discussed *infra* under s. 577.
2. *Re MacIntyre and The Queen* (1980), 52 CCC (2d) 161 (NSSC App. Div.); sub nom. *The Attorney General of Nova Scotia et al.* v. *Linden MacIntyre and The Attorney General of Canada et al.*, S.C.C. January 26, 1982.
3. *Realty Renovations Ltd.* v. *A.G. Alta.* (1978), 44 CCC (2d) 249 (Alta. S.C.T.D.).
4. P. Wright, "*The Open Court: The Hallmark of Judicial Proceedings*", 25 Can. Bar Rev. 721 (1947).

The first formal state of a criminal proceeding involving the court is, of course, the laying of an information before a justice. Under sections 455.3, 455.4, 723 of the Criminal Code the justice is said to be required to act "judicially". Despite this the justice is not required to hear from anyone other than the informant, nor is there any apparent necessity or indeed advisability of having such a proceeding conducted in a place to which members of the public have access.[5] Once the justice decides to issue process, be it by way of a summons or warrant, or decides to conform a release document such as an appearance notice, the information is normally filed in a court office from which it is taken to court at the first appearance. Although it might seem to a member of the public that such a document is a "public" document, there is some doubt about whether or not persons other than person "interested" in the proceeding are entitled to see it at this stage.

A similar problem exists with respect to informations laid to obtain search warrants under section 443 C.C. Before the warrants are executed, the existence of such informations is not likely to be known; once they are executed, who is entitled to see them? They are, presumably, court "records" or at least documents concerning a prosecution which are in the custody of the court. In *MacIntyre*[6] the issue was whether or not a person who was not a "party", in fact a television commentator, could see certain executed search warrants and informations upon which their issuance was based. Certain distinctions became significant in the course of the decision. One of these was between persons with a "special interest" and others and was based upon developments in English jurisprudence. It was suggested that there might be a difference between members of the public with no special interest, and ones with such an interest. A narrow definition of the latter class would restrict it to parties and those involved in the processes of the court. A wider one could include someone with a public interest such as a representative of the media. Hart, J.A. speaking for the court, did not see that the distinction was applicable to records of proceedings which had already been presented to the public in open court. Interestingly, he seems to have included informations sworn before a justice, presumably *in camera*, in this category. At this stage these would be filed in court office. The unexecuted warrants would be in the hands of police officers. He also suggested that the original application for the warrant should be conducted in open court!

Another distinction drawn in the case was between records which would normally be revealed during the conduct of proceedings in open court, and other court records. At one stage Hart, J.A. refers to "those parts of the record that are part of the public presentation of the judicial proceeding in Open Court".[7] Although he suggests that members of the public may see these, this discussion follows a reference in *R.* v. *Waterfield*[8] in which an exhibit (a film) was not required to be shown to members of the public in court. One would have thought that such an article would be part of the public presentation of the judicial proceeding, being evidence upon which a decision would be made!

5. The 'pre-enquête' proceeding, in Quebec, wherein this stage of the proceeding may be more formal, is not duplicated in common-law jurisdictions.

6. *Supra* n. 2.

7. 52 CCC (2d) at 182.

8. [1975] 2 All ER 40 (C.A. Crim. Div.).

Relying primarily on section 442, discussed *infra*, a declaration was granted that as a member of the general public the applicant was entitled to examine search warrants and informations relating thereto which had been executed upon and which were in the control of a justice of the peace or court official.

It is a bit unclear from the decision whether informations used to obtain search warrants are to be available before the warrants are executed. Despite a reference to such documents as being presented to the public in open court when laid, the declaration was limited to informations relevant to executed warrants. The practical reasons for this are obvious.

The Supreme Court of Canada, in a close five to four decision, restricted access to executed warrants and informations upon which they were based to situations in which objects were seized during execution and taken before a justice as required under s. 446. Persons interested and members of the public were stated to have access to these documents at this stage. Where nothing was seized under the warrant, access was stated to be unavailable to members of the public, but probably still available to 'persons interested'.

The court expressly disapproved of the suggestion of the Nova Scotia Supreme Court (Appellant Division) that the original application for the warrant should be conducted in open court. As stated by Dickson, J. for the majority,

> The effectiveness of any search made pursuant to the issuance of a search warrant will depend much upon timing, upon the degree of confidentiality which attends the issuance of the warrant, and upon the element of surprise which attends the search.

The dissenting justices led by Martland J. should have limited access to executed warrants and informations upon which they were based to persons with a 'direct and tangible interest' in the documents. This was suggested in order to protect the identity of informants (*Quaere*), and to avoid informing criminals about the pattern of police activities in connection with searches.

In *Realty Renovations Ltd.* v. *A.G. Alta*,[9] the Alberta Supreme Court was faced with a similar problem. The Attorney General had issued a directive to Provincial Judges and Chief Crown Prosecutors in which he indicated that once search warrants were executed the informations and executed warrants (a copy) were to be turned over to the Clerk of The Court and only made available with the approval of the prosecutor. A person who had sought these documents from the Provincial Court and had been refused access because of an absence of the approval brought an action for a declaratory judgment that the requiring of prior approval was without authority. Although in his judgment MacDonald J. talks of "interested parties" he did grant a declaration that the requirement of a crown prosecutor's approval was invalid and that upon execution, the information and warrant are matters of court record and available for inspection upon demand.

The extent to which informations charging offencee are available before the first court appearance by an accused person is clearly something which has

9. *Supra* n. 3.

not been the subject of much litigation. There should not be much doubt that the crown attorney or prosecutor and the accused or defendant can see these documents at any time, although the reasons for not allowing some of these persons to see search warrant informations before execution apply equally to informations upon which process has been issued but not executed. A person who is aware of an outstanding summons or warrant might very well make himself unavailable for service or execution if he were aware of the process. Perhaps a limitation on access by accused or by members of the public could be: no access to the information until process is served or executed. No such similar problems would arise in the case of an information laid to confirm process already issued unless a justice decided to issue a warrant under section 456.1.

Despite the fact that there seem to be few enactments or rules of court relevant to the question of access to informations, in most jurisdictions copies of informations charging offences are available from court offices to anyone who pays a prescribed fee.

The second major step involving the courts in many criminal proceedings, following the laying of the charge, is the interim release hearing held before a justice under s. 457 or a judge of a superior court of criminal jurisdiction in certain cases under s. 457.7. These proceedings are probably "proceedings against an accused" as contemplated in s. 442 and are presumably to be held in open court. This is normally the case where the accused appears before a regularly scheduled bail court. Indeed, s. 457.2 restricting publication of the evidence, the information given, or representations made or reasons given seems to contemplate that members of the public have a right to attend.

The situation is less clear if we consider cases where a justice of the peace attends at a hospital to remand a person injured in a police chase. What of cases where, on a Saturday, a justice of the peace goes to the jail to remand prisoners arrested Friday night to the bail court on Monday? These are somewhat less likely to be considered as proceedings held in "open court" to which members of the public have access. Questions have arisen concerning the position of lawyers retained by the accused as well. Are they entitled to be present? In Toronto recently, some justices of the peace were taking the position that such proceedings should be more formal than they had been, and were insisting upon holding such hearings in a place more suited to formality than a jail interview room or hall.

There seems little doubt about the practice in Canada concerning access of members of the public to various appearances in open court for the purpose of plea, election, etc. If an accused person elects for a trial in a higher court than the Magistrates or Provincial Court, there does exist a little used provision of s. 465 which regulates the conduct of the preliminary hearing, which allows the justice to exclude members of the public "where it appears to him that the ends of justice will be best served by so doing".[10] This provision finds its parallel in England where examining justices are not "obliged to sit in open court". No criteria such as those found in s. 442 exist, nor is there any jurisprudence which indicates that s. 465(1)(j) should be read with s. 442 and the criteria in the latter

10. S. 465(1); Orders for non-publicity and limitations on publication will be dealt with, *infra*.

section used. Certainly an order excluding the public would effectively curtail prejudicial pre-trial publicity.[11]

There are other pre-trial proceedings at which the issue of the right of the public, or indeed of the accused to be present may arise. One of these is a proceeding at which the sanity of the accused is an issue, such as a hearing to decide whether to remand for observation, or the trial of an issue of fitness. Unless the first-mentioned proceeding takes place during a preliminary hearing, s. 442 would seem to apply, as it would to the trial of an issue of fitness to stand trial. The time when a preliminary hearing begins is not one that can be identified with any precision, however. Unlike a trial, which seems to begin, as far as *seisin* is concerned, with the calling of evidence, some courts consider a s. 465 hearing to have begun once a person has appeared in court charged with an indictable offence. This enables the judges to utilize the publicity provisions of s. 467 in indictable cases prior to trial.

Another pre-trial proceeding is an application to a judge to consent to a direct indictment. Although the cases are far from uniform, it seems to be accepted that an accused has no right to be present at such a proceeding nor, presumably, have members of the public. It may not be long before this position is substantially weakened by courts, which are now eroding it gradually, particularly under the new Charter of Rights.

The final pre-trial proceeding at which the issue of the right of an accused or the public to be present might arise is the grand jury proceeding. Sections 523-5, 530 do not deal with the question, which can only arise in Nova Scotia, but it is clear from the nature of grand jury proceedings that they have traditionally been held in the absence of the accused or the public.

In the United States, under the sixth amendment; "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...".[13] The issue of the extent to which judges at pre-trial proceedings could, without statutory authorization, order partial or full closure to the public was recently litigated in the Supreme Court. In *Gannett Co.* v. *DePasquale*[14] the issue arose in the context of a pre-trial suppression hearing. Such a proceeding is not a common proceeding in Canada although many trial judges do conduct *voir dires* and hear argument concerning evidence at the start of a trial after the jury has been selected and released to a later date. In a four to one decision the court upheld the power of a judge to exclude the public from such hearings, primarily because of the exposure to prejudicial publicity that might ensue and affect the fairness of a subsequent trial. The Canadian judicial system protexts the accused from publicity in somewhat different ways.[15]

11. See A. Mewett, *Pre-Trial Publicity* 21 Cr. L.Q. 125 (1979). In *R.* v. *Sayegh* (No. 1) (1982), 66 CCC (2d) 430 an order was made under s. 465(1)(i) excluding certain reporters from a preliminary hearing.

12. See, e.g., *Re Stewart (No. 1)* (1977), 35 CCC (2d) 160 (Ont. H.Ct.); *re Welsh and Iannuzzi* (No. 2) (1976), 29 CCC (2d) 329 (Ont. H. Ct.); *re Johnson, Inglis et al.* (1980), 52 CCC (2d) 385 (Ont. H. Ct.).

13. U.S. Const. Amend VI, cl. 1. (This is applicable to state courts by virtue of the fourteenth amendment).

14. 99 S. Ct. 2898 (1979).

15. See, *infra*.

Gannett Co. in fact was a fairly ambiguous decision and led to a series of public comments from the judges themselves explaining what they felt they had decided. It is clear that although the court held that there was no "right" of public access to such proceedings, it was open to individual states to create such a right by statute.[16] It is probable that such "proceedings" in Canada would fall within s. 442(1) and normally be conducted in open court.

One of the major cases limiting *Gannett* was the Supreme Court decision in *Richmond Newspapers Inc.* v. *Virginia*.[17] In that decision a part of a Virginia statute authorizing closure of a trial (in this case a murder trial) at the unfettered discretion of the judge and parties, was struck down as violating the First and Fourteenth Amendments. It was agreed that, barring evidence of some overriding interest in closure, it was absolutely essential for freedom of speech, that trials be conducted in an open court to which all members of the public, including representatives of the press and media, had access. What would amount to grounds for closure was not specified although security and confidentiality were mentioned by Stevens, J.[18] In strongly supporting a principle similar to that enunciated in *Scott*[19] the court clearly indicated that *Gannett* was to be restricted to pre-trial proceedings.[20]

As can be seen from the summary of the law on the topic of public access to pre-trial procedures and documents, it is an area which has not received much attention from parliament or indeed courts. Only recently have members of the press tried to utilize official as opposed to unofficial processes to obtain documents or access to pre-trial proceedings. There are a number of unanswered questions left by the cases and criminal code provisions. These include:

1. Which documents, if any may an accused see?
2. Which documents, if any may a member of the public see?
3. Is the distinction between those that would normally be revealed in open court and those that would not, a workable one?
4. How "public" must various proceedings before justices be?
5. Why do so few justices utilize s. 465(i)j at preliminary hearings?
6. How does that section relate to s. 442 which deals with "proceedings"?

B. Trial

The basic rule with respect to summary conviction trials or trials of indictable offences is found in section 442 which provides as follows:

> "(1) Any proceedings against an accused that is a corporation or who is or appears to be sixteen years of age or more shall be held in open court, but where the presiding judge, magistrate 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

16. For a partial list of these as of 1979, see *Note, Public Access to pre-trial Criminal Hearings: The Use of Closure Orders after Gannett* v. *DePasquale* 44 Albany L. Rev. 455, 457-8 (1979-80).

17. 100 S.C. Rep. 2814 (1980).

18. *Id.*, at 2831. Trade secrets and young witnesses were mentioned by Stewart, J. at 2839.

19. *Infra.*

20. The United States position prior to these cases is discussed in Kruegger, *Public Trial in Criminal Cases*, 52 Mich. L. Rev. 128 (1953-4); and Mallender, *Right of Press to Protest Judge's Exclusion of the Public*, 53 Mich. L. Rev. 995 (1954-5).

members of the public from the court room for all or part of the proceedings, he may so order.

(2) Where an accused is charged with an offence mentioned in subsection 142(1) and the prosecutor or the accused makes an application for an order under subsection (1) of this section, the presiding judge, magistrate or justice, as the case may be, shall, if no such order is made, state, by reference to the circumstances of the case, the reason for not making an order.

(3) Where an accused is charged with an offence mentioned in subsection 142(1), the presiding judge, magistrate or justice shall, if application therefore is made by the prosecutor, make an order directing that identity of the complainant and her evidence taken in the proceedings shall not be published in any newspaper or broadcast.

(4) Every one who fails to comply with an order made pursuant to subsection (3) is guilty of an offence punishable on summary conviction.

(5) In this section, "newspaper" has the same meaning as it has in section 261. 1953-54, c. 51, s. 428; 1974-75-76, c. 93, s. 44."

This provision largely introduced in 1906,[21] originally allowed exclusion of the public in trials of certain offences, such as keeping a common bawdy house. No criteria were set down in the section which referred to common law and in 1915 a clause was added: "Such order may be made in any other case also in which the court or judge or justice may be of the opinion that the same will be in the interests of public morals".[22]

The present section has been interpreted largely with reference to the common law and in particular with reference to two cases, *Scott* v. *Scott*,[23] and *McPherson* v. *McPherson*.[24] It will be seen that the section (s. 442) provides for exclusion in the interest of public morals, the maintenance of order or the proper administration of justice, and provides for exclusion for all or part of the proceedings. These provisions leave a good deal of room for a judge who wishes to exclude members of the public. Despite this the overriding principle requiring the administration of justice to take place in open court has been applied consistently, and very few judges have used the wide powers granted under the section. As stated in *Scott*, ". . . If there is any exception to the broad principle which requires the administration of justice to take place in open court, that exception must be based on some other and overriding principle which defines the field of exception and does not leave its limits to the discretion of the judge."

Three relatively recent cases illustrate the commonly taken position in Canada.

In *R.* v. *Quesnel*[25] a sexual case involving four teenage girls, the trial judge ordered the crown case to be held *in camera* following a motion by crown counsel. The only suggested reason for the order was to prevent embarrassment to the girls and the possibility of "mass confusion". There seemed to be no concern about "public morals". In quashing the conviction the Ontario Court of Appeal did indicate that the *Scott* principle might have been modified

21. Parts relating to persons under sixteen appeared in the Code of 1892.

22. S. 645(2), R.S.C. 1927 c. 36.

23. [1913] A.C. 417 (H.L.). As will be seen, *infra*, a similar approach has been taken to s. 577 and the position of an accused person.

24. *McPherson*, [1936] A.C. 177 (H.L.).

25. (1979), 51 CCC (2d) 270. (Ont. C.A.).

by certain statutory changes such as the enactment of s. 142 but that in the instant case no public trial had been held. In so doing the court seems to have recognized the continued vitality of the *Scott* principle.

In *re F.P. Publications (Western) Limited and The Queen*[26] in a bawdy house trial, the crown asked the judge to exclude reporters of the Winnipeg Free Press while former customers of the massage parlours were testifying. The reason given was the reluctance these persons might have to testifying if their names and evidence were to be published in a newspaper. The application was originally granted by the Provincial Court Judge and upheld by the Court of Queen's Bench. The ground argued for exclusion was the third ground in s. 442(1), the "proper administration of justice". As Freedman J.A. stated,[27] "... Stronger grounds than here emerge are required to warrant a departure from the principle of trial in open Court". The Court of Appeal set aside the order for exclusion, relying on *Scott* and similar cases.

A third case in point in *R.* v. *Douglas*[28] in which a person raised as one ground of appeal, the refusal of the trial judge to allow her to testify *in camera* in her drug trial. It was alleged that her evidence would show that she had been a police informer in the past and was concerned about her safety if she were required to state publicly that she had been so acting in the instant transaction. The Court of Appeal, per Zuber, J.A. seemed to feel that she would have been in little additional danger since her counsel had already indicated her previous informer status to the court. He stated ... "Obviously, the law favours trials open to public view".[29]

The difficulty with most recent interpretations of s. 442(1) is that the *Scott* principle has been widely adopted but little attention has been paid to the possible exceptions to it. As pointed out in the Wright article,[30] the common law seemed to recognize that the court could hear matters *in camera* in exceptional cases of statutory authority, wards, lunacy, secret processes, keeping order, or matters properly brought in chambers. The primary statutory exceptions remain about as they were in 1945. These include a usual exclusion of the public in the trials of young persons,[31] and permissive exclusions in certain sex cases,[32] preliminary inquiries,[33] or trials under the Official Secrets Act.[34]

---

26. (1979), 51 CCC (2d) 110 (Man. C.A.).

27. *Id.*, at 119. A reverse case occurred in *R.* v. *Brown*, [1970] 3 CCC 30 (Que. Q.B.) in which the public were excluded from part of a trial but the representatives of the press were included! This was held to be beyond the jurisdiction of the judge.

28. (1977), 33 CCC (2d) 395 (Ont. C.A.).

29. *Id.*, at 405.

30. *Supra* n. 4.

31. Juvenile Delinquents Act R.S.C. 1970 c. j-3, s. 12, which includes a provision that the trial of children may take place in the private office of the judge. See also s. 441 CC which provides for a trial "with publicity" of a person who is or appears to be under sixteen. In the recent Supreme Court of Canada case of *C.B.* v. *Her Majesty The Queen* unreported (October 20, 1981), the phrase 'without publicity' was equated with '*in camera*' and it was stated that trials of juveniles in family courts must be closed to members of the public, in this case representatives of a radio station. This revised the position adopted in the Manitoba Court of Appeal in the same case. *Re B. and The Queen* (1980), 53 CCC (2d) 561.

32. S. 442(2). See also s. 142 and the *in camera* proceeding envisaged therein: *Forsythe* v. *The Queen* (1980), 53 CCC (2d) 225 (S.C.C.).

33. *Criminal Code*, R.R.C. 1970 c. C-34 s.s. 467(1).

34. R.S.C. 1970 c. 0-3, s. 14(2) which provides for exclusion if publication of the evidence would be "prejudicial to the interest of the State."

What seems to have occurred in Canada is that courts have focussed on the statutory exceptions and failed to adequately consider the common law ones referred to.

Suppose a person is charged with theft of certain chemical formulae or processes. Proof of these may be an integral part of the crown case and the victim may be quite reluctant to provide such evidence. Do Canadian courts exercise their undoubted power under section 442(1) to exclude the public from some parts of the taking of the evidence?[35] From discussions with some counsel involved in patent cases it appears that judges are reluctant to proceed *in camera* in those cases. In one recent Combines Act prosecution in Ontario involving formulae of chemical fertilizers, the judge did not exclude the public but did make an order prohibiting publication of parts of the evidence.[36] Such an approach would seem, at first glance, to involve a somewhat rigid adherence to the *Scott* principle.

A second example is that of informant evidence. The issue was not directly resolved in *Douglas*,[37] but it seems undoubted that courts have the power to allow evidence of informants to be given *in camera* in order to protect the persons involved. Should there not be some process to allow a preliminary ruling on the privilege of testifying "*in camera*" so that the crown or defence can promise protection to a potential witness? No such procedure seems to exist at present.

It should also be remembered that the exclusion of witnesses by a trial judge is a well recognized exception to the right of any member of the public to attend a trial. Not based on any statutory authority in Canada, this power is undoubted and the reason for it clear.[38]

It cannot be said that the judicial attitude toward preferring to proceed in open court has been supported in any way by the Canadian Bill of Rights. There are very few cases in which the question of the right to a public trial has been raised in the context of a Bill of Rights argument. In *re Spence*,[39a] a magistrate made an order excluding the public but allowing reporters in a preliminary hearing. An argument that this was contrary to the Bill of Rights was unsuccessful. It was held that the Bill protected against harm occurring otherwise then by due process of law but did not grant substantive rights (a traditional approach).

The "Canada Charter"[39b] purports to guarantee to a person charged a "public hearing". Section 11(d) reads: "Any person charged with an offence has the right ... to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal". This provision seems somewhat like the Sixth Amendment, referring to a speedy

35. See *Badische* v. *Levinstein* (1883), 24 Ch. D. 156 (secret processes involved); *ex parte Norman* (1915), 114 L.T. 232 (secret documents).

36. *Quaere* the legality of such an order. See, *infra*.

37. *Supra* n. 28. Because of the absence of evidence to support an argument for exclusion of the public.

38. See generally, W.H. Carleton, *Exclusion of Witnesses*, Jan. 1978 Crowns Newsletter (Ontario) 2 and P.G. Barton and N. Peel, *Criminal Procedure in Practice*, Butterworths (1978) at 206.

39a. (1961), 37 C.R. 244; 37 W.W.R. 431. (Man. Q.B.).

39b. Text of the Resolution respecting the Constitution of Canada adopted by the House of Commons on Dec. 2, 1981.

and public trial. As in the United States it seems likely that s. 11(d) in referring to a public hearing, refers only to trial proceedings and not to pre-trial ones, and the section is unnecessary because of s. 442.

The distinction between trial and pre-trial proceedings which exists in s. 577 and which has been created in the United States seems to have been carried into s. 11(d). Fortunately perhaps, s. 442 dealing with "proceedings" does not make this distinction. It can be argued that the publicity accorded to trials is a factor equally important at pre-trial proceedings. The dangers of adverse publicity are just as great at both stages, and since many pre-trial proceedings such as elections or *voir-dires* (if I may characterize these as pre-trial where they are conducted before evidence as presented to the jury) conclusively determine the outcome of the proceedings, the important principle of openness promoting a feeling of fairness,[40] seems equally applicable at pre-trial stages.

An interesting example of the problem of s. 442 occurred in Ontario in 1980. A man who had acted as chauffeur for the justices of the Supreme Court of Ontario was charged with possession of wiretap equipment. Judge Moore of the County Court allowed a reporter to see the indictment but apparently closed the court to spectators at the request of the accused. On the second day of the trial, following a second application by the accused to exclude the public, the judge reversed his earlier decision and refused to do so. The only apparent reason for the closure on the first day was the concern of the accused that he would lose his job if his charges were widely known.[41] What is interesting is the apparent haste with which His Honour bowed to requests not to continue the order.

The *Scott* case, as discussed by Wright[42] did seem to recognize the existence of a number of common law situations and some that were borrowed from equity, in which the general principle of proceedings being held in open court did not rigorously apply. A look at the above cases involving s. 442 suggests that Canadian judges tend to consider as valid grounds for proceeding *in camera*, only the situations covered by the specific statutory exceptions, i.e. public morals, protection of victims of sexual offences and maintenance of order. Little consideration seems to have been given to the other major exception in s. 442, the proper administration of justice as defined by common law or equity. Is it necessary to hear in open court that person charged with an offence such as public mischief, for example, had psychiatric problems in the past and tried to commit suicide ten years earlier? Does the right of the public to know what is going on within the judicial system take precedence over individual privacy or over a concern for what may happen to an individual once his or her brief current exposure to the judicial system is over?

In my experience some of the most compelling situations for proceeding *in camera* are at the pre-trial stages such as at interim release hearings and perhaps preliminary hearings. Given the relaxation of rules of evidence at interim release hearings in particular, it is sometimes quite embarrassing to hear the damaging hearsay recounted to a justice in the presence of avidly

40. Felix Frankfurter is reported to have said "Sunlight is the best disinfectant".

41. *See* Globe and Mail, November 5, 1980.

42. *Supra* n. 4.

listening spectators. Perhaps Mr. Justice Linden[43] or Judge Moore were not so far off the mark where they took into account the long term effect of publicity on an accused person. I suggest that perhaps judges should realize, or be persuaded by counsel, that the principle of an open court is not necessarily the most significant principle operating within the judicial system, and that requests for closure of a proceeding may themselves be based on significant interests which deserve consideration at least. Perhaps the long term interests of the defendant should receive greater attention, as one of these significant "interests".[44]

(2) By the Accused or Defendant

I have already dealt in some detail with the right of the public to attend pre-trial proceedings. In so doing I have commented upon the position of the accused-defendant. At the trial, the right of an accused to be present is clearly set out in section 577. Section 577 reads as follows:

> "(1) Subject to subsection (2), an accused other than a corporation shall be present in court during the whole of his trial.
>
> (2) The court may
> (a) cause the accused to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible,
> (b) permit the accused to be out of court during the whole or any part of his trial on such conditions as the court considers proper, or
> (c) cause the accused to be removed and to be kept out of court during the trial of an issue as to whether the accused is, on account of insanity, unfit to stand his trial where it is satisfied that failure to do so might have an adverse effect on the mental health of the accused. 1972, c. 13, s. 50.
>
> (3) An accused is entitled, after the close of the case for the prosecution, to make full answer and defence personally or by counsel. 1953-54, c. 51, s. 557."

In summary conviction cases a defendant need not be present unless the presiding judge wishes his/her attendance[45] and it seems that he has a right to be there to defend himself if he wishes.[46] It is probable that the limitations on this right found in s. 577(2), which apply to indictable offences, would also apply to the trials of summary conviction matters.[47]

The general rule in indictable trials is that the accused is required to be present in court during the trial. As seen earlier this rule is not necessarily extended to pre-trial proceedings. Despite this obvious gap in s. 577, if the accused fails to show up for a pre-trial proceeding, unless a court retains jurisdiction under an "absconding" section as is the case at a preliminary hearing,[48] problems of loss of jurisdiction arise.[49] Interestingly, while various

---

43. *Infra*, (*Regina* v. *P.*).

44. Obviously there are some dangers involved in accepting the primacy of these interests in a particular case. These dangers are discussed in some detail in A. Mewett, *Public Criminal Trials*, 21 Cr. L.Q. 199 (1978-9), which article is largely a discussion of ss. 441, 2.

45. S. 735 CC.

46. S. 737(1) "The prosecutor is entitled personally to conduct his case, and the defendant is entitled to make his full answer and defence."

47. The extent to which parts of the Code relevant to the trials of indictable offences can be used to supplement Part XXIV is unclear. Some provisions such as the "*autrefois*" provisions have expressly been found to apply.

48. S. 471.1 CC.

49. These will be explored further in P.G. Barton, *Loss of Jurisdiction*, Studies in Criminal Procedure, Butterworths (1981).

sections of the Evidence Act[50] have been held not to apply to pre-trial proceedings[51] because the sections refer to "trial", courts assume that the requirement that an accused be present at the trial, found in s. 577(1), applies to pre-trial proceedings and that unless excepted by statute, accused must be present in open court whenever the information, or indictment, is dealt with.

Assuming that the present Canadian law is that in indictable offences, an accused must be present in court[52] whenever the information or properly preferred indictment is dealt with, what are the exceptions to this and what are the consequences of failure to follow the general rule?

The first obvious exception is found in s. 577(2)a, which contemplates the accused being sufficiently disruptive that it is not feasible to carry on with the trial. The judge does have the power to handle the same situation by a citation for contempt and normally this would be the first avenue of recourse.[53] Fortunately this situation does not arise often; in fact there are likely more situations in which the accused, prior to verdict at least, refuses to say anything.[54]

The second major exception to the mandatory presence of the accused at a trial is if the accused has "absconded". By s. 431.1 trials in *absentia* are possible in indictable cases only if the accused absconds. This has caused problems where the accused has simply disappeared during the course of the trial and one proposed amendment[55a] created what could be called a "deemed absconded" provision.

A third exception may occur in a lengthy trial where the judge may, apparently, grant permission to certain accused to be absent for parts of the proceeding which do not concern them.[55b]

An interesting question has arisen concerning the power of a trial judge to order the accused to remove himself from the court. The power is expressly given in the case of a trial of an issue of fitness[56] but s. 579(2)b which "permits" the accused to be out of court would not seem to be wide enough to support a judicial order. There are often valid reasons why a trial judge might prefer that the accused not hear certain evidence. As far as defence evidence is concerned some judges have purported to require the accused, if he is going to testify, to testify first, although there is little authoritative judicial precedent for such an order. As far as crown evidence, or arguments on *voir dires*, etc., are concerned, does a judge have power to order the accused to leave the court

50. R.S.C. 1970, c. E-10.

51. See, e.g. the infamous *Patterson* case, [1970] S.C.R. 409.

52. "Presence" includes being able to comprehend the proceedings and take part in them. This requires interpreters in appropriate cases.

53. Superior and inferior courts such as Provincial Courts have the power to punish for contempt in the face of the court. Contempt other than in the face of the court is a power limited to courts other than inferior courts. See generally, *R.* v. *Dunning* (1979), 50 CCC (2d) 296 (Ont. C.A.).

54. It did arise in *R.* v. *Rose* (1973), 12 CCC (2d) 296 (Ont. C.A.).

55a. Bill C-51, s. 55, introduced by the pre-Clark liberal government. Counsel often find themselves in a difficult position when their clients disappear. Despite s. 431.1(4) continuing any authority counsel may have to act, it is not at all clear that counsel are obliged to continue. It is not within the province of the trial judge to inquire into the nature of the retainer or instructions of counsel.

55b. See, *R.* v. *Sampson et al.* (1982), 36 O.R. (2d) 665 (Co. Ct.).

56. S. 577(2)(c).

while this is being presented or argued? The earlier mentioned case of *Grimba*[57] suggests most emphatically that he does not. In that case the accused was co-charged with three counts of theft and three counts of fraud. He was being tried before a jury and had testified on his own behalf. On two occasions while the jury was excluded during his re-examination he was sent out of the court room. On the first occasion it was apparently with consent of counsel so that he might not hear argument and tailor his evidence accordingly. On the second occasion it was because he thrust some papers at the judge, who considered this to be offensive and disruptive. The Court of Appeal, speaking through Zuber, J.A. stated that the first exclusion was not supported by law. He stated:

> It is to be observed that [s. 577] is mandatory and provides that not only is an accused entitled to be present throughout the whole of his trial, he is obliged to be there. He may absent himself only with permission of the court under ss. 2(b) and may be excluded only in the circumstances set out in ss. 2(a) or (2).[58]

Insofar as the second exclusion was concerned there was no evidence that continuation of the trial was not feasible.

The decision followed two well known Supreme Court of Canada cases, *Genoux*[59] and *Meunier*[60] and held that the exclusion was more serious than an error of law and that the "no substantial wrong" provision s. 613(1)b(iii) did not apply. What occurred deprived the court of jurisdiction to continue. Clearly the right of an accused to be present at this trial is a strong one in Canada. It might be noted that exclusion of the public from trials, when held to violate s. 442, has led to the same result.[61]

The importance that is attached to the principles that the accused has a right to be present at his trial and that these trials must be held in the open, can be seen in other aspects of criminal procedure or evidence. The restrictions upon "judicial notice" or on the function of "taking a view" show the importance placed upon a case being decided only upon evidence presented in court. So also the reluctance of many judges or lawyers to acknowledge the existence or legitimacy of plea bargaining clearly may be caused in part by the feeling that something is being done which affects the accused, in his absence. Even the cases dealing with bias show that communications between a judge and counsel outside court during a trial may violate the principles. In *R.* v. *Luciow*[62] crown counsel was seen and heard to make remarks to the judge disparaging to the defence during a recess. This was held to have raised a reasonable apprehension of bias. Another view of the transaction could be that the judge was seen to be receiving information about the case other than in open court.

III. Access to Appeals

It is unlikely that s. 442 applies to appeals. By s. 440 it is recognized that superior court judges and magistrates have the power to preserve order in

57. *Supra* n. 1.
58. *Id.*, at 573.
59. (1971), 15 CRNS 117 (Que. C.A.).
60. (1965), 48 CR 14 (Que. Q.B. App.).
61. See, e.g., *R.* v. *Quesnel*, *supra* n. 23.
62. [1974] 6 W.W.R. 655 (Alta. S. Ct.).
63. *Supra* n. 16.

courts over which they are presiding. Presumably this power covers the situations in which they sit as appellate judges as well, and allows them to remove disruptive persons, including appellants and respondents and members of the public.

As far as parties for summary conviction appeal are concerned, nothing in the Criminal Code deals with those who are not in custody. There is no requirement that they be present at appeals other than on appeals "de novo" if the judge so requires, nor is there any specific provision dealing with their status. Presumably they are in the same position as members of the public.

A right to be present at an appeal is only conferred upon an appellant who is in custody and this is limited. By s. 615(1) such a person is, subject to s. 615(2), entitled to be present. This right is limited in that if appellant is represented by counsel he or she is not entitled to be present where the appeal is on questions of law alone, or where the matter being heard is an application for leave to appeal, or on matters preliminary or incidental to appeals such as s. 608 bail applications. This provision, applicable to appeals to the Court of Appeal is made applicable to appeals to the County Court under s. 748 by s. 755(1).

Section 748 appeals, being largely appeals on the record, are modelled after appeals to the Court of Appeal with the major exception that Appellant and Respondent Statements are not required unless ordered. Where an order is made under s. 755(4) for a trial *de novo*, the same rules about presence of the defendant at a summary conviction trial apply.

There is nothing in the Code extending the right to be present at any appeal to a respondent. By the same token there is nothing covering appeals by way of stated case. Presumably unless an appellant is presenting a case, whether in custody or otherwise, he or she is in the same position as any other member of the public.

Where an appeal is brought and a person is subject to continued imprisonment, s. 615(4) does authorize the appeal court to proceed in his or her absence. This section does not cover crown appeals where the respondent finds himself facing sentencing hearing in the presence of the respondent although no statutory provision requires it.

The problems of the right of the accused to be present at his own trial, and of the power of the judge to order the proceeding to be held in camera, found in ss. 577 and s. 442 respectively, seem to have been approached from the same perspective by Canadian courts. Insofar as it is possible to say that there is consistency in application of the two sections, courts seem to place great importance on the presence of an accused, in open court. Consequences of failure to follow s. 577 or s. 442 are seen as depriving a court of jurisdiction over the offence, and proceedings held in violation of these sections are held to be nullities.

Might I suggest that the reasons for having an accused present at his own trial are perhaps stronger than those requiring all proceedings to be held in open court? As long as the consequence of failing to follow s. 442 is that the

proceeding may be considered a nullity, trial courts will be reluctant to order any part of proceedings to be held 'in camera', and a restrictive approach to s. 442 will continue.

IV. Limitations on Publicity

As mentioned earlier, the principle that trials should be conducted in open court means that the public must have access to them. The size of court rooms is finite, however, and a corrollary of the principle is that members of the public who do not attend the trials should be able to find out what transpired there. In *Richmond Newspapers Inc.*,[63] the free speech amendment was found to be sufficiently strong that the court refused to distinguish between the press and other members of the public and saw publicity as essential.[64] The problem with both pre-trial and trial publicity is somewhat more complex than that of the right to an actual trial in open court, because of the added factor that publicity may be felt to influence potential jurors or jurors at trial who have been allowed to separate.[65]

There are a number of ways in which the extent to which publicity may be given to Canadian criminal proceedings is limited. This area of law is probably the most controversial of the entire problem of the "open court".

In the first place access to television, recording equipment, or cameras is very limited and during most trials an artist's sketch of the participants is all that appears in the media.[66]

At the interim release hearing stage, s. 457.2 in the case of most hearings, and s. 457.7(3) in the case of Supreme Court bail hearings, do place some restrictions on publicity. The presiding justice may of his own volition or shall if the accused requests, make an order prohibiting the publications in a newspaper or broadcast of the evidence, the information given,[67] the representations made and reasons given. This order remains in force until discharge at a preliminary hearing or the end of the trial.

The question of the extent to which a justice or judge may order non-publication of matters not covered by these sections or others is unclear. The issue arose recently in the context of publication of the names of persons charged. In *Regina* v. *P.*,[68] Linden J. of the Supreme Court of Ontario did prohibit publication of the name, address and place of employment of an accused charged with soliciting. Reviewing this decision, Steele J. did feel that there was power in the court to make such an order but that a stronger ground

64. See, e.g., Brennan J. "... a special solicitude for the public character of judicial proceedings is evident in the court's rulings upholding the right to report about the administration of justice. While these decisions are impelled by the classic protections afforded by the First Amendment to pure communication they are also bottomed upon a keen appreciation of the structural interest served in opening the judicial system to public inspection."

65. *Criminal Code*, R.S.C. 1970 c. C-34, s. 576 (hereinafter referred to as the *Code*) Of course the principle of an open trial, when applied to pre-trial proceedings raises many of the same problems as that of out of court publicity.

66. In Ontario, for example, s. 67(2)(a) of the *Judicature Act*, dealing with practice in the Supreme Court of Ontario severely restricts the taking of "visual representations" except where required for the presentation of evidence or authorized on ceremonial occasions or for educational purposes. A special committee of the Bench and Bar Committee on the Media has been set up to consider the problem, among others. In the United States the Supreme Court recently decided in *Chandler* v. *Florida* that nothing in the Constitution prohibited broadcast coverage of trials. The court also left it to individual state Supreme Courts. See A. Gold, "TV in the Courtroom," 4 Cr. L. Assoc. Newsletter 19 (1981).

67. Information is used here in the non-legal sense, I assume.

68. (1978), 43 CCC (2d) 197. The decision and reasons of Linden J. are reproduced at 41 CCC (2d) 377.

than the embarrassment of the accused would be required to support it. This, and a parallel case plus a widely publicized bath-house raid in Toronto have led to some suggestions that the Criminal Code be amended to prohibit the publications of names of persons accused of minor offences until the date of their trials.[69] Despite some private members bills in the Legislature of Ontario, there does not seem to be strong support for the proposal. The issue of the power to prohibit publication also arose in *re F.P. Publications (Western) Limited and the Queen*.[70] Although the case deals primarily with the exclusion of reporters, one of the justices, Huband J.A. discussed the issue as follows:

> What was objectionable, to the crown in any event was that the newspaper published the names of witnesses. There is no section of the Criminal Code which makes such publication unlawful. There is no law empowering a Judge to prevent such publication.[71]

The issue of the power to order non-publication of information not covered by Code provisions is, I suggest, very much an open one.

At the preliminary hearing stage, as mentioned earlier, the justice does have the power to proceed *in camera*. There are some things which are expressly forbidden to be published, and others which the judge may forbid in certain cases. In the former category are such items as admission or confessions[72] including both the fact of their having been given and the substance of them. In the latter category, if the accused requests the justice shall make an order prohibiting the publication of the evidence until discharge or the end of a trial.[73] There are certain problems with this section. In the first place the onus is on the accused to seek the order. As pointed out by A. Mewett,[74] in some other jurisdictions the rule is that there is no publicity unless the accused asks for it. He suggests that the potential prejudice to an accused from pre-trial publicity is sufficiently great that non-publication should be the rule rather than the exception.

In the second place only the evidence can be ordered not to be published. This is much narrower than the interim release provision which includes such things as representations made and reasons. Perhaps the protection is not wide enough.

The third problem is that the order must be sought prior to the commencement of the taking of the evidence. The section does not, on its face seem to allow an application during the hearing, when counsel realize that certain evidence is going to be presented. It is not uncommon to find justices refusing to make orders under s. 467 because counsel failed to seek them in time!

During the trial itself, publication is restricted more by the rules concerning contempt not in the face of the court, involving attempts to influence the course of justice. Publication during trials is really only a major problem in the case of jury trials and a provision of the Code applies to them. By s. 576.1

69. See London Free Press, May 28, 1981, p. A-3.
70. (1979), 51 CCC (2d) 110 (Man. C.A.).
71. *Ibid.*at 126.
72. S. 470(2).
73. S. 467.
74. *Supra* n. 11.

where the jury has not been sequestered, no information concerning any portion of the trial conducted in the absence of the jury, such as during a *voir dire*, can be published until the jury retires to consider its verdict or is sequestered. Orders made at the preliminary hearing stage continue, of course.

Both during and after a trial certain prohibitions can be found in the Code. By s. 162, for example the printing of indecent material in reports of judicial proceedings is prohibited. By ss. 269-76 printing of defamatory libel is prohibited. After the trial s. 576.2 makes it an offence for a member of the jury to disclose what went on outside court between members of the jury.[75] When an appeal is pending the major restriction on publication is the contempt power.

The problems of pre-trial publicity have been approached in the legislation from one perspective only: the effect of publicity on potential jurors. All of the above mentioned provisions are designed to make it more likely that a fair jury can be empannelled. Additional protections are found in the change of venue provisions,[76] the severance of count provisions,[77] the power to sever the trials of accused persons (a common law power), the procedures for challenging jurors, and on the belief that a jury can properly be instructed to disregard certain matters that come to its attention, and that it will follow these instructions.[78]

No attention, other than through the use of the contempt power, is focussed on publicity which may influence a judge. Indeed, the assumption is made that very little will influence a judge, who will remain impartial. Is it necessary to have such elaborate precautions to cover fewer than 5% of the criminal proceedings? Could the Code not be amended to provide that only where an election for a jury trial is made will the order of non-publication be available? This would, of course, involve a restriction upon the right to re-elect trial from judge alone to judge and jury,[79] upon the power of the Attorney General to require a jury trial,[80] and upon the magistrate changing a trial into a preliminary hearing.[81a] On the other hand, can it be argued that the restrictions are not severe enough; that publicity, particularly at a pre-trial stage is not a right but a privilege?

V. Conclusion

During the course of the above paper, a good many specific problems with the provisions at common law or statute governing the right to a "public" trial have been identified. A number of sections of the Criminal Code bear on the question of whether or not criminal proceedings should be "public" proceedings and the extent to which publicity may be given to such proceedings. Judicial interpretation of some of these sections seems to give excessive primacy to the principle that such proceedings should be "public". Juveniles

75. An exception as made to cover situations where there is an allegation of juror irregularity.

76. S. 527.8.

77. Ss. 520(3), 736(4).

78. See generally W.B. Affleck, *Free Press-Fair Trial*, 8 A.L.Q. 163; Freedman N.J. *Free Trial-Freedom of the Press*, 3 Osg. Hall L.J. 52.

79. It is suggested that there are many more re-elections from judge and jury than to judge and jury.

80. S. 498.

81a. S. 485.

are protected by elaborate provisions until they reach the relevant age of adulthood as are persons who are or appear to be under sixteen. At that stage the full light of publicity shines on their activities, including publicity concerning their juvenile activities, and they take their chances with other alleged criminals.[81b] Judges are sufficiently concerned about "private" proceedings that they have elevated the principle of an "open court" to a very high one indeed, finding that its violation can deprive a court of jurisdiction. The provisions dealing with restrictions upon publicity, and the law relating to judicial "gag" orders seem in some cases to be inadequate and in others in doubt. It is arguable that not enough attention has been given to other valid reasons why publicity should be restricted, other than the effect upon a jury, that is. In addition there may be many valid reasons why some or all of some proceedings, particularly at pre-trial states should not be held in public. These are found in the common law or in equity and, I suggest, not adequately considered when s. 442 is involved.

Other issues such as the question of voluntary restraint by the press, lengthy adjournments (postponements in the United States),[82] restraint upon public comment by lawyers through Codes of Professional Conduct,[83] restraint upon release of information by police officers or public officials, etc., are equally important and pressing but have not been addressed. There seem to be enough live issues, and there seems to be sufficient public interest and concern in these issues that perhaps they should be specifically addressed by those who change our laws.

81b. The issue of publicity and juvenile court proceedings is the subject of much litigation at present. Many of the problems are dealt with in the Young Offenders Act, Bill C-61, July 7, 1982 (to be proclaimed).

82. See *R.* v. *Comisso*, 10 CR (3d) 191 (B.C.S.Ct.) in which adverse publicity on the eve of a jury trial led to a 3-4 months adjournment.

83. See generally, *A.B.A. Standards for Fair Trial and Free Press* (1968); A. Friendly and R. Goldfarb, *Crime and Publicity. The Impact of News on the Administration of Justice* (1967).